



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we have another in our “Listen and Learn” series – this one on hearsay, specifically present sense impression and state of mind. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Law School Toolbox podcast! I was reviewing a student’s Evidence essay the other day and I realized there are some common misconceptions out there about some hearsay exceptions. Hearsay is a topic we’ve covered before on this podcast, and as you know, there are lots of exceptions to the general rule.

Lee Burgess: One skill that will help you score higher on both Evidence essays and multiple choice exams is knowing how to quickly distinguish between each hearsay exception (or exemption) and see which ones are being triggered by the facts. Along those lines, today, I want to look at two highly tested hearsay exceptions: present sense impression and state of mind. The reason we’re going to cover these two together is because, like I said, they can be easy to confuse. So, let’s get started!

Lee Burgess: First things first, let’s quickly re-cap on what hearsay exceptions are. So, when a party is trying to get spoken or written words into court as evidence, deeming them “hearsay” is a way to make sure they’re kept out. The whole “he said/she said” is not something we can really trust to be true. An exception to hearsay, on the other hand, means that these are times when the written or spoken evidence will come in, even though it is technically hearsay.

Lee Burgess: The reason hearsay is generally not allowed is because it’s not reliable. These exceptions to hearsay are situations in which courts have said, “Yeah, okay, if these elements are met, then the evidence IS reliable and CAN come in.”

Lee Burgess: On an essay, each hearsay exception that is triggered should always get its own header and a one-to-two sentence rule. Keep these IRACs pretty short because Evidence essays are often race-horse exams and you have lots of questions and issues to cover.

Lee Burgess: Okay, now onto our rules. What is a present sense impression? Here’s a rule you could write on an essay under the header: “A statement describing an event or



condition made while the declarant perceived it or immediately after is admissible.”

Lee Burgess: Okay, so we have a s statement describing an event or a condition, and that describing needs to happen while the event or condition is being perceived, or right afterwards. Students sometimes get thrown off by the “immediately after” idea. That’s why I like to explain this exception as “while the events are unfolding.”

Lee Burgess: The policy reason for allowing what is technically hearsay to have an exception in this situation is because the declarant has no time to fabricate. You can actually include that in your rule if you have time. Think of it this way: If I’m saying what’s happening as it’s happening, I’m probably telling the truth because I don’t have time to lie. That’s why the evidence is considered reliable in this situation. For present sense impression, what you’re looking for in a fact pattern is the declarant – that’s the person doing the talking – saying something about what’s happening as those events are taking place.

Lee Burgess: So, if I’m walking down the street with a friend and I tell her, “I think that guy is following us” – that could be a present sense impression because I’m talking about a thing that is occurring. If we got back to her apartment and then I said, “That guy outside was totally following us” – that would not fit the exception because the moment was already gone. Make sense?

Lee Burgess: So, while it is also possible to fit the exception if the events unfolded immediately before the declarant makes their statement, the touchstone I want you to remember for this is the person talking as the events are unfolding. That will make it easier to spot when this exception is being triggered by the facts. And of course, if you’re not sure whether it’s immediate enough, you could use those ambiguous facts and argue both ways.

Lee Burgess: Alright, let’s compare this with state of mind. Here’s a rule that you can write under your header on an essay: “A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition is admissible.”

Lee Burgess: So here, we are talking about a declarant saying what’s going on in their head or how they feel emotionally or physically. This one is less about events unfolding and more about the declarant describing their own inner world in that exact moment, as the words are coming out of their mouth. So, if I said, “Hey, that’s cold!” or, “I’m thinking of throwing a surprise party for my cat” – those could be state of mind exception declarations.

Lee Burgess: What you’ll notice is that both of these exceptions deal with something happening right now. Either the declarant is saying the events or conditions of the moment in the moment – that’s present sense impression, or the declarant



is saying what's going on in their head, body, or feelings in that exact moment – that's state of mind. The names of the exceptions can help you out here. Present sense impression is about what the outside world is impressing upon me in the moment. And state of mind is literally the state my mind is in. Sounds pretty easy, right?

Lee Burgess: So, let's get into some hypos and make sure you've got it. Here's the first one:

Lee Burgess: "Thief stole \$100,000 from Boss. Thief was found murdered in his apartment with no signs of forced entry. Thief's ex is the prime suspect since he is the only other person who had keys to Thief's apartment. Friend testifies in Ex's defense that he was talking on the phone to Thief on the night of the killing. Thief had said, 'Hold on, someone's at the door.' According to Friend, Thief then looked through the peephole and said, 'Hmm, I've never seen this guy before, but he looks pretty angry. I think Boss found out I'm the one who took the 100 grand.' Do any hearsay exceptions apply?"

Lee Burgess: As you know, the first step is always to qualify the statement as hearsay. Was this out-of-court? Is it being offered for the truth of the matter asserted? If you're not sure how to do this, we've covered that in [another podcast episode about hearsay](#). For today, we will just assume that this is hearsay without going through the full analysis, so we can use the time to discuss the exceptions.

Lee Burgess: Okay, so here there are a few different statements. On an exam question, it's helpful to mark how many things the declarant is actually saying. Here, Thief was saying "There's someone at the door" – one thing; then "I've never seen this guy" – two things; then "He looks angry" – three things; and finally the last part about Boss finding out he stole the money. That's four different messages in this statement. You can see how there can be more than one important kernel of information in each sentence, so practice parsing out the quoted language carefully.

Lee Burgess: Okay, so we have the victim telling his friend "Hold on." That's some nice present sense language, which is a good clue, but it's not dispositive. Thief then described the guy outside his door looking angry. He's telling his friend how the guy looks right in the moment. Does this fit state of mind? Is Thief saying what he's thinking about or how he feels? No. So, that exception won't work here.

Lee Burgess: What about present sense impression? Well, this one works. This would fit the present sense impression framework because Thief is talking about the guy on the other side of the door right as he's looking at him. He's describing the scene as it unfolds.

Lee Burgess: Let's move on to the part about Thief saying he thinks Boss found out about the money he stole. Is this a present sense impression? Let's see. Is Thief describing



an event or condition? Not really. He's saying what he thinks. Sounds more like a state of mind kind of statement, right? Yep. Since Thief is saying something that's going on in his head in that moment, the state of mind exception would apply.

Lee Burgess: So, let's look at another example. This one is loosely based on the [February 2012 Evidence essay from the California bar exam](#):

Lee Burgess: "Paul sued David in federal court for damages arising from an automobile accident. Paul testified that he was driving below the speed limit when his passenger, Vera, calmly told him there was a black SUV weaving recklessly through traffic behind them. He also testified that 30 seconds later, he saw David driving a black SUV which then swerved in front of them, causing the accident. Are there any hearsay exceptions at play?"

Lee Burgess: Well, what do you think? The first step, what is our declarant statement? There aren't any quotation marks in the fact pattern, so it's a bit harder to pull out, but we're looking at what passenger Vera said. Vera told Paul that there was a black SUV approaching behind them. To figure out which exceptions might work here, we have to look at the declarant and what they were doing, thinking, and feeling in that moment.

Lee Burgess: Vera is sitting shotgun and says, "Okay, that black SUV looks dangerous. It's speeding up behind us and it's weaving through cars." Is Vera afraid? The facts said she "calmly" said this, so probably not. Do we know anything else about her mental state? Not really. Her statement is probably not going to fall under state of mind.

Lee Burgess: But what about present sense impression? Does Vera have any time to fabricate? No. She saw the black SUV rolling up, she spoke, and then David crashed into them. The facts say "30 seconds later", which is another good clue that we're dealing with something happening almost at the same moment the declarant is speaking. So, did Vera describe the events as they were unfolding? Yes. Her statement would qualify as present sense impression.

Lee Burgess: So, let's walk through another example. This one is based on the [July 2009 Evidence essay from the California bar exam](#). That question asked for California law, though, and here, we are using the federal rules. So if you happen to look this one up, just know that some of the rules and analysis will be different:

Lee Burgess: "While driving their cars, Paula and Dan collided and each suffered personal injuries. Paula testified that three hours after the accident, when a physician at the hospital to which she was taken asked her how she was feeling, she said, 'My right leg hurts the most, all because that idiot Dan failed to yield the right-of-way.' Which hearsay exceptions apply?"



- Lee Burgess: Alright, so who is our declarant? Paula. Why? Because she is the one doing the talking. She is testifying at trial about something she herself told the doctor. How many messages does Paula get across in her statement? She said two things, right? She said her leg hurts, and she called Dan an idiot because he didn't stop his car in time.
- Lee Burgess: Are we dealing with a state of mind kind of statement? Let's remember back to the rule for that one: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition is admissible." Paula said that her left leg hurts the most. That lines up with our rule, right? That's a physical condition or a sensation because she's talking about pain.
- Lee Burgess: How's our timing? Well, the facts say she talked to her doctor three hours after the accident. Does that make a difference? For state of mind, the declarant needs to be thinking or feeling the thing as they are talking about it. She was feeling that her leg hurt and she said her leg hurt. That's good enough. For this one, it doesn't matter that the accident was three hours prior because her leg still hurts. Paula's statement about her leg would fit the state of mind exception.
- Lee Burgess: But what about Paula saying Dan was an idiot because he didn't stop his car? She didn't flat out say, "I think Dan is an idiot", but it does seem like that's what's on her mind. You could argue the state of mind for this one as well, at least under the federal rules.
- Lee Burgess: What about present sense impression? Again, let's refresh on the rule: "A statement describing an event or condition made while the declarant perceived it or immediately after is admissible." Okay, so is Paula describing an event or condition? Yes, she's talking about the condition of her leg. Her leg hurts. A present sensation of pain in the body can come in under this exception.
- Lee Burgess: So, are the events of the car accident unfolding as she's speaking? No, the accident happened three hours ago. Does that matter? No, because Paula's leg still hurts, and that's the event she's talking about, not the crash. She is describing the condition of pain as she's feeling that pain. Her statement would also come in under this exception.
- Lee Burgess: Let's do one more example to get another illustration of these exceptions:
- Lee Burgess: "Surf Shop is being sued by Beach Club for not finishing its rental contract at Sandy Beach. It is Surf Shop's contention that Beach Club did not uphold its end of the agreement to offer a secure beach with a lifeguard, where patrons could enjoy a clean, safe, fun surf lesson. As evidence, Surf Shop would like to introduce at trial the written surveys from 300 beachgoers, 99% of whom said they did not feel that Sandy Beach was clean or safe since the lifeguard and the



garbage patrol crew leader had run away together two months prior. Discuss any hearsay exceptions that apply.”

Lee Burgess: So, what’s our first step? Locate the declarant’s statement. No one is saying anything here, so that’s a little more tricky. The evidence in question is a stack of 300 surveys. Remember, hearsay can also be in writing; it’s not always verbal.

Lee Burgess: So, on an exam, you would first discuss why this was hearsay. Again, we’re going to save time by skipping this step here. Can you do that on an essay? No way! Don’t even think about it. But on my podcast – sure, why not?

Lee Burgess: Next, think through your mental checklist of exceptions and see if any apply. Today, we’re just dealing with present sense impression and state of mind, so let’s get into these.

Lee Burgess: So, what’s our statement? It’s the beachgoers saying they don’t feel safe or clean on the beach. Are they describing an event or condition as its unfolding? Not really. Is there time to fabricate? Sure, they could write anything they want. This doesn’t really look like a present sense impression. Maybe if the survey said, “Hey, look at the beach where you’re standing right now and mark down the level of safety or cleanliness you feel in this moment” – that might get us closer to the exception, but we don’t have any facts about that. So, present sense impression probably won’t work.

Lee Burgess: What about state of mind? Is the survey about what’s on the beachgoers’ minds? Sure. The survey asked them about whether the beach feels clean and safe, and most of them said “No”. That is giving us a window into their thoughts and feelings. What about timing? Does it really matter that we are in court right now and the survey happened some time before? Not really. The reason is that when the beachgoers took the survey, they were noting their current thoughts. Maybe their thoughts have changed now; we don’t know. What matters is that when they made the declaration, they were showing their state of mind at the time. So, this exception would work here.

Lee Burgess: Alright, that’s the end of our hypos. Hopefully these examples helped you understand the difference between present sense impression and state of mind. One other caveat to remember is that if your Evidence professor asks you to learn local rules of evidence rather than federal rules of evidence, check out any distinctions in your hearsay exception rules and make sure you understand what you’re responsible for knowing on exam day.

Lee Burgess: And finally, like I said in the previous podcast about hearsay, you definitely need to have a quick way to shuffle through all possible hearsay exceptions and pick out the ones that are being triggered by the facts. If you haven’t already, listen to that podcast and come up with your own mnemonic for all the exceptions.



Each exception is distinct and unique, but some pieces overlap here and there, which can get confusing. So, it's crucial to know these inside and out because – let me tell you – there is no extra time to figure out stuff like this on an Evidence essay in real life.

Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via our website [contact form](#) at LawSchoolToolbox.com. Thanks for listening, and we'll talk soon!

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[California Bar Examination – Essay Questions and Selected Answers, July 2009](#)

[Examples & Explanations for Evidence, by Arthur Best](#)

[Podcast Episode 215: Listen and Learn – The Commerce Clause](#)

[Podcast Episode 218: Listen and Learn – Supplemental Jurisdiction \(Civ Pro\)](#)

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