



Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we are doing another in our “Listen and Learn” series – this one is covering hearsay exceptions for statement against interest, statements made for medical diagnosis and treatment, and statements of personal or family history. 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 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. Today we’re going to talk about three hearsay exceptions: statement against interest, statement made for medical diagnosis or treatment, and statement of personal or family history. The common thread with these exceptions is you have someone speaking or writing about him or herself.

Lee Burgess: But before we dive into what exactly these exceptions cover, let’s do a quick refresher on exactly what hearsay is, since this can be a confusing topic, and it’s heavily-tested. The rule is: Hearsay is an out-of-court statement that is offered for the truth of the matter asserted. Hearsay is inadmissible unless it falls under an exception.

Lee Burgess: I’ll briefly break down the general hearsay rule, so that we are all on the same page. The person who made the statement is referred to as the “declarant”. “Out of court” means that the statement was made when the declarant was not on the witness stand at trial or in a hearing. “Offered for the truth of the matter asserted” just means to prove the statement’s content, as opposed to some other purpose, such as showing that the declarant was on notice of a hazardous condition, or to prove a statement was made where that’s an essential element of a claim, as in a defamation case. We have an [entire podcast devoted to hearsay](#), so I’m not going to spend a ton of time generally defining it today. If you have additional questions or need more of a refresher, definitely revisit that podcast, as we’ve included a link to it in our show notes.

Lee Burgess: Now that we’ve got that out of the way, let’s dig into today’s exceptions. Remember, if one of these exceptions is established, a statement that would otherwise be considered inadmissible hearsay, becomes admissible – unless, of course, it’s excluded for some other, non-hearsay-related evidentiary reason, but that’s not our concern today.



- Lee Burgess: Our first exception today is statement against interest. This exception is heavily-tested, so it's really important to know it well. The good news is that it's a pretty simple, straightforward rule (not like some of the other hearsay exceptions, which have multiple elements that must be satisfied and remembered). The rule to write down is: A statement made by an unavailable declarant against his or her own penal, proprietary, or pecuniary interest is an exception to the hearsay rule. Note that the declarant must be aware that the statement is against his or her interest, and must not have had any motive to misrepresent that.
- Lee Burgess: It can be helpful for remembering this and the many other hearsay exceptions if you understand why the exceptions exist in the first place. Remember that the reason why hearsay statements are generally inadmissible is because they're presumed to be unreliable or untrustworthy, unlike a witness's statements under oath in a courtroom. Hearsay exceptions are designed to capture circumstances where a statement, even though it's been made out-of-court, without the safeguard of an oath to tell the truth, can be presumed to be trustworthy. With the statement against interest exception, this extra boost of reliability exists because it seems pretty unlikely that a person would lie about something that goes against his or her own interests. For example, if I admit to my friend weeks before my trial for larceny that I stole my brother's car, I'm probably telling the truth, because it would be weird to lie about something that makes me guilty of a crime.
- Lee Burgess: Also, as we have discussed in other hearsay-related podcasts, we again have a rule that distinguishes between a declarant who is available and one that is unavailable. Let's quickly revisit what it means to be unavailable for purposes of the hearsay exceptions. It's important to know the test well, because there are other common hearsay exceptions triggered by an unavailable declarant, besides statement against interest – such as testimony under oath (which we will get to next) and dying declaration. And professors love to test multiple exceptions in the same essay or multiple choice question. It can also be helpful when you're working on your attack plan for evidence to divide the hearsay exceptions into two categories—those requiring unavailability of the declarant and those that apply regardless of availability.
- Lee Burgess: So, here's the rule for what it means to be unavailable to write down on your essay: A declarant is deemed unavailable as a witness if he or she, (a) is exempt from testifying due to a privilege; (b) refuses to testify despite a court order; (c) cannot be present due to death or illness; (d) testifies that he or she cannot remember the subject matter; or (e) is beyond the reach of the court's subpoena power and his or her attendance cannot be procured by reasonable means. Note also that the unavailability of a declarant cannot have been caused by either party.



Lee Burgess: Now we'll tackle a hypo featuring this exception, which is the best way to get a handle on the rule and to make sure you understand how and when to apply it. Remember that Evidence questions usually have a lot of issues to cover quickly, so many that they're sometimes referred to as "racehorse essays". So, it's super important to be able to identify the many issues easily and promptly. This hypo is loosely adapted from the Evidence question on the [July 2010 California bar exam](#). That question asked exam takers to apply California law, but today we're applying federal law. So keep that in mind if you go back to do this essay for practice:

Lee Burgess: "Denise and Vera are farmers on neighboring pieces of land. For years, they've been arguing about water rights. One afternoon in June, Vera and her husband Walter were sitting in their living room when Vera's cell phone rang, and Vera answered. Walter could see that Vera was becoming angry as she listened to the caller. As soon as she hung up, she said to Walter, 'That rat, Denise, just called and told me she was going to make me sorry!'

Lee Burgess: A month later, Denise drove by Vera on the road by their farms and gave her the finger. Vera immediately stopped the car and yelled, 'You want a fight? Because that's what you're going to get!' Both women jumped out of their trucks. After an exchange of blows, Denise began strangling Vera. Vera collapsed and died from a massive heart attack. Denise was charged with manslaughter. At the trial, the prosecutor called Walter, who testified about Vera's description of the June phone call. Did the court properly admit Walter's testimony about what Vera told him Denise said?"

Lee Burgess: Well, we can immediately see that we are dealing with a statement made outside of the courtroom, and which is being offered to prove the truth of its contents, namely that Denise threatened to harm Vera. So, we know we're dealing with a hearsay issue. Therefore, you'll want to state the general hearsay rule – an out-of-court statement offered for the truth of the matter asserted, which is inadmissible unless an exception applies – and apply it to Vera's statement to Walter about what Denise said on the phone that day in June.

Lee Burgess: Next, we need to figure out if there was a hearsay exception that applied to make the statement admissible. Since we are talking about the statement against interest exception today, we'll try that. But before we do, you may have noticed that Walter's testimony is actually double hearsay, or hearsay within hearsay. This is because Walter is describing what Vera told him (hearsay layer number one) that someone else told her (hearsay layer number two). For our purposes today, however, which is just to learn about how to apply the statement against interest exception, we're just going to focus on layer two, which is Denise's threatening statement to Vera.



- Lee Burgess: In your essay, begin by stating the rule: A statement made by an unavailable declarant against his or her own penal, proprietary, or pecuniary interest is an exception to the hearsay rule.
- Lee Burgess: Next, let's start the analysis applying the rule to our facts. Here, Denise told Vera that she was going to make her sorry, which certainly sounds like a threat of physical harm. The statement doesn't sound like it impacts a pecuniary or financial interest of Denise's, nor does there appear to be any proprietary impact. But a threat like this could certainly subject Denise to punishment under the legal system for assault and other offenses, like manslaughter. Therefore, Denise's alleged statement does appear to go against her penal interest.
- Lee Burgess: Now, do we have an unavailable declarant? We'll need to state the rule for unavailability too as part of our IRAC for this sub-issue. A declarant is deemed unavailable as a witness if he or she, (a) is exempt from testifying due to a privilege; (b) refuses to testify despite a court order; (c) cannot be present due to death or illness; (d) testifies that he or she cannot remember the subject matter; or (e) is beyond the reach of the court's subpoena power and his or her attendance cannot be procured by reasonable means. Note that you only need to write out this rule once; if one of the other hearsay exceptions requiring unavailability also potentially applies – as will often be the case – you can just write "See above for the rule" on your IRAC for that exception.
- Lee Burgess: Here, we know that at the time Walter is testifying, Denise has been charged with manslaughter. That means she could invoke her Fifth Amendment privilege against self-incrimination and refuse to testify at trial. One of the bases for unavailability, as you know, is if the declarant is exempt from testifying due to a privilege. Thus, Denise qualifies as unavailable. The court properly admitted Walter's testimony about her statement to Vera under the statement against interest exception to the hearsay rule.
- Lee Burgess: Okay, nice work! Let's move on to our second exception for today, which is for statements made for medical diagnosis or treatment. Here's the rule to commit to memory: A statement is not excluded by the hearsay rule when it is, one, made for and reasonably pertinent to medical diagnosis or treatment; and two, describes medical history or symptoms. The symptoms can be past or present. As you can see, whether the declarant is available or not does not matter for this exception.
- Lee Burgess: Before we do another hypo, I'll also give you the rule for statements of personal or family history. This is another exception that, like the statement against interest exception, only applies if you have an unavailable declarant. The rule is: A statement about, one, the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history; or two, another person concerning



these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage, or was so intimately associated with the person's family that the declarant's information is likely to be adequate.

Lee Burgess: Basically, this rule is a long-winded way of saying that there is an exception for a declarant's statement about either her family-related history or about a relative's family history. The relationship doesn't have to be by blood; adoptive relatives or relatives by marriage qualify. What you're looking for is not medical history with this exception, but rather major family milestones like birth, marriage, divorce, etcetera.

Lee Burgess: Okay, so let's make sure we've got it with another hypo. This hypo is loosely adapted from an essay on the [February 2017 California bar exam](#):

Lee Burgess: "Paul was driving his car one day when it collided with a furniture delivery driver's car. Paul sustained serious injuries in the accident and was hospitalized. Paul later sued the furniture company, Dana's Homegoods, in federal court. At trial, Paul testified that he had entered the intersection on a green light when his car was hit by the Dana's Homegoods driver, Erin, who ran a red light. He also called as a witness Ned the nurse, who testified that he treated Paul in the hospital. Ned testified that Paul told him that his head struck the windshield in the accident, and he was still in a lot of pain. He also stated that Paul shared with him during the same conversation that he had recently divorced his wife. Did the court properly admit Ned's testimony?"

Lee Burgess: Again, we can quickly tell that we have a hearsay issue, because Ned's testimony is about a statement Paul made to him in the hospital, not in court. It appears Paul is offering it for the truth of its contents, namely that he was injured as a result of the accident with the furniture delivery driver. So, we may need to scroll through our mental rolodex of hearsay exceptions and IRAC any that apply. For purposes of this podcast, we'll just focus on statements made for medical diagnosis or treatment and statements of personal or family history.

Lee Burgess: First, do we have a statement made for medical diagnosis or treatment? Remember, for this exception we are looking for a statement that is, one, made for and reasonably pertinent to medical diagnosis or treatment; and two, describes medical history or symptoms. Let's put aside the statement about the divorce for now. We know that Ned is a nurse who was treating Paul in the hospital. According to Ned, Paul told him that he hit his head on the windshield in the accident, and he was still in a lot of pain. Paul is clearly describing a symptom – pain, and what he believes to be the cause of that pain – hitting his head on the windshield. This information will help Ned to treat Paul, whether with pain medication or a head CT or something else, and to diagnose his injury, so it seems to have been made for and reasonably pertinent to medical diagnoses or treatment. This is not one of the exceptions where availability



matters. It looks like the court properly admitted Ned’s testimony about Paul telling him about his pain and injury under the statement made for medical diagnosis or treatment exception.

Lee Burgess: Now, what about Paul’s comment about his divorce? Again, we must always start by stating the rule for the exception. Here, that would be the statement of personal or family history. It’s a long one so I’ll just paraphrase: A statement concerning births, deaths, or other family history where the declarant is unavailable, and a member of the family or intimately associated with the family and has personal knowledge of the facts. While on first glance it looks like this exception would apply, because it’s about Paul’s own divorce, is Paul unavailable? The facts tell us that he testified at trial, so we know he is available. Accordingly, this exception won’t apply. I know, you have to constantly make sure that you’ve asked yourself all the appropriate questions on your attack plan.

Lee Burgess: Okay, that wraps up our podcast for today. Thanks for joining us! 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 or 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 2010](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2017](#)

[Podcast Episode 261: Listen and Learn – The Basics of Hearsay](#)

[Podcast Episode 271: Listen and Learn – Hearsay Exceptions: Present Sense Impression and State of Mind](#)

[Podcast Episode 296: Listen and Learn – Hearsay Exceptions: Government and Business Records](#)