Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are doing another in our "Listen and Learn" series – this episode will cover non-hearsay. 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. Today we are going to talk about a quirky category of evidence called "non-hearsay". Non-hearsay is either, one, evidence that meets part of the hearsay definition – usually the "out-of-court statement" part – but not all of it; or, two, evidence that does meet the definition but has been specifically deemed "non-hearsay" by statute. Non-hearsay is tested often on both the MBE and on Evidence essays.

Lee Burgess: When you see a question that seems to trigger the hearsay rule, it's easy to fall into the trap of immediately looking for a hearsay exception. This is a mistake, because you're skipping right over non-hearsay. Always focus first on whether the statement at issue is in fact hearsay. That means starting with the definition of hearsay. We've addressed this in another podcast focused exclusively on the general rule for hearsay, but we'll go over it again today with a goal of using it to illustrate what is not hearsay. Then we'll dig into statements that are specifically defined in the FRE as non-hearsay.

Lee Burgess: Okay, so what is hearsay? Hearsay is an out-of-court statement offered for the truth of the matter asserted. You'll know you're dealing with hearsay when the question asks whether a statement made outside the courtroom should be admitted. The person who made the statement is referred to as the "declarant". The declarant's statement can be verbal – meaning spoken words, written, or non-verbal conduct, provided the declarant intended the conduct as an assertion. This means that if the non-verbal act doesn't assert or communicate anything, it's not a "statement" for purposes of the hearsay rule. An example of non-verbal conduct that does not qualify is the act of pointing to identify a suspect in a lineup. "Out-of-court" means the statement was made when the declarant was not on the witness stand at trial or in a hearing.

Lee Burgess: The last piece of the hearsay rule – "offered for the truth of the matter asserted" – is where you'll find the most "non-hearsay", outside of the categories of "non-hearsay" provided by statute, which we'll talk about in just a little bit. First off, what does it even mean to offer a statement "for the truth of

the matter asserted"? Basically, it just means that the party seeking to admit the statement is trying to prove its content. Say, for example, that a witness – we'll call her Wanda – is called to testify at trial that Roger told her that Mary is a thief. If Mary is accused of stealing, Wanda's statement is likely to be offered for its truth – specifically, to prove that Mary is, in fact, a thief. But what if Wanda is testifying in a defamation case brought by Mary against Roger? In that scenario, Mary is likely offering Roger's statement not to prove that its contents are true, but rather as evidence of slander, and it's admissible as non-hearsay.

Lee Burgess: Roger's statement in the defamation case is an example of a commonly-tested type of non-hearsay referred to as verbal acts of legal significance or legally operative facts. In such cases, the statement itself, regardless of the truth or falsity of its content, affects the legal rights of the parties. In our defamation example, the fact that Roger said, "Mary is a thief" is legally significant, independent of whether the statement is true, since publication – meaning speaking or writing of the allegedly defamatory statement to another person – is itself an element of a defamation claim.

Lee Burgess: Another type of statement that is non-hearsay, because it is offered for some other purpose than the truth of the matter asserted, is a statement offered to show its effect on the hearer, such as to prove the hearer's knowledge or that the hearer had notice. To illustrate this type of non-hearsay, let's return to our friends Wanda, Roger, and Mary. Say that Mary instructed Roger to clean up a spill in the aisle of the grocery store where they work. Wanda, who overheard the conversation between Mary and Roger while shopping, can be called to testify to it in a negligence lawsuit by another customer who slipped and fell as a result of the spill Roger failed to mop up. Did you figure out why? Because Mary's statement is admissible to prove that Roger was on notice of the hazardous situation.

Lee Burgess: Lastly, a statement offered as circumstantial evidence of a defendant's state of mind is also non-hearsay, because the statement is not offered for its truth. For example, imagine if, when Mary found out that Roger told Wanda she was a thief, Mary, in a rage, threatened to kill Roger. Roger, fearing for his life, pushed Mary down a flight of stairs. In a subsequent prosecution of Roger, Mary's threat to kill Roger would be admissible to support Roger's self-defense claim, specifically to prove that Roger believed he would be attacked and was reasonable in defending himself.

Lee Burgess: Hopefully you're seeing the common thread here. The key question is why a statement has been offered. If it's not offered for the purpose of establishing the truth of the matter asserted in the statement, then it's non-hearsay. So, let's look at a hypo now, which is adapted from the Evidence essay on the July 2007 bar exam from California. When we're done, we'll move on to the two types of

statements that are specifically defined in the FRE as non-hearsay. Okay, so now for our hypo:

Lee Burgess: "Dave brought his corvette to the local gas station for an oil change. While servicing the car, the mechanic, Melanie, checked the brakes and noticed they needed repair. When Dave picked up the corvette later, Melanie's assistant, Will, overheard Melanie tell Dave, "I think your brakes are bad. You'd better get them fixed." That evening, Dave, driving his corvette, ran a red light and crashed into Polly's truck. Polly sued Dave on the theory that Dave hit her truck because his brakes failed, and that Dave knew or should have known that his brakes were bad, and that driving the corvette under those circumstances was negligent. Polly called Will to testify to Melanie's statement to Dave that the brakes were bad. Should the court admit Will's testimony?"

Lee Burgess: Okay, so we can pretty quickly see here that our question asks whether an out-of-court statement can be admitted. We know that Will's proposed testimony would describe a statement made by Melanie prior to the trial where Will is testifying. And we've discussed our next question should always be, why is the statement being offered? What is it being used to prove? Is it to prove the truth of the matter asserted in the statement, or is there some other reason? So, let's review the common reasons that statements that would otherwise qualify as hearsay might be offered, other than to prove the truth of their contents.

Lee Burgess: We've got the verbal act statements (also known as operative facts), statements offered to show their effect on the listener or reader, such as to show notice or knowledge, and statements offered as circumstantial evidence of a defendant's state of mind. We also know what Polly's theory of liability is, because the facts spell it out. Her theory is that Dave knew or should have known his brakes were bad, so he was negligent in continuing to drive the car without repairing them. That's a huge clue as to why she's offering Will's testimony. It seems likely, then, that Polly wants Will to testify that he heard Melanie tell Dave his brakes were bad to prove that Dave was on notice of the problem. If that's why Polly seeks to introduce Will's testimony, the court should admit it as non-hearsay offered to prove its effect on Dave.

Lee Burgess: Okay, let's move on to the two categories of statements that are statutorily deemed non-hearsay: one are prior statements by a witness; and two, statements of a party opponent. We'll start with prior statements by a witness. Here's the rule to write down under your header: A prior statement by a witness is not hearsay if the declarant testifies and is subject to cross-examination and the statement is, one, inconsistent with the declarant's testimony and was given under oath at another proceeding; two, consistent with the declarant's testimony and offered to rebut a charge that the witness is lying; or three, a prior statement of identification.

Lee Burgess: To help keep these prior witness statement scenarios straight, I find it helps to make up a quick hypo for each one. So let's bring back Roger, Mary, and Wanda. You'll recall that Wanda is our witness in Mary's lawsuit against Roger for defamation. Say Wanda previously testified at her deposition in this matter that she did not actually hear Roger call Mary a thief. Wanda's statement at the deposition would be hearsay because she didn't make it at the trial, but it's non-hearsay under the statute because it was made while she was under oath, and it's inconsistent with her subsequent testimony that Roger said Mary was a thief. If the court admitted this evidence of Wanda's inconsistent statement as part of Roger's attempt to discredit Wanda, Mary could offer evidence that Wanda told her that Roger said she was a thief. This would be a prior consistent statement by Wanda being offered to rebut Roger's charge that Wanda was lying. Lastly, a prior statement by Wanda identifying Roger would also be admissible non-hearsay.

Lee Burgess: For the second category of statutory non-hearsay, statements of an opposing party, the rule to write down is this: Any statement offered against an opposing party is not hearsay if it, (a) was made by the party in an individual or representative capacity; (b) is adopted or believed to be true by the party; (c) was made by a person authorized by the party to make a statement on the subject; (d) was made by the party's agent or employee on a matter within the scope of that relationship; or (e) was made by the party's co-conspirator during and in furtherance of the conspiracy.

Lee Burgess: So essentially, a statement offered by a plaintiff against a defendant or vice versa. If the party against whom the statement is offered isn't the declarant (categories (b) through (e) in the rule), the statement can be adoptive, vicarious, or part of a conspiracy. There are a couple of important things to be aware of here. First, the statement need not have been against the declarant's interest when it was made. What matters is that it's offered against him at the time of the trial or hearing. The statement can also be an opinion or even a legal conclusion; the declarant doesn't need to have personal knowledge. Lastly, for an adoptive admission, remaining silent is enough to establish acquiescence if a reasonable person would have denied the statement after hearing it.

Lee Burgess: Got it? Let's make sure by doing another hypo that incorporates both statutory non-hearsay and seeming hearsay that's not actually hearsay because it's not offered for the truth of the matter asserted. This one is adapted from the Evidence essay on the July 2005 California bar exam:

Lee Burgess: "Dan is charged with arson. The prosecution attempts to prove that he burned down his failing business to get the insurance proceeds. It is uncontested that the fire was started with gasoline. At Dan's trial, the prosecution called Steve,

the bookkeeper for Dan's business. Steve testified that two months before the fire, Dan told him to record some phony accounts receivable to increase his chances of receiving a loan from the bank. Steve further testified that he created and recorded an account receivable from a fictitious entity, but the bank still denied the loan. He then testified that two days before the fire, Dan again told him to create some phony accounts, but Steve refused to do so. Should the court have admitted Steve's testimony?"

Lee Burgess: Let's get to it. Immediately we see that we have two conversations between Dan and Steve, made outside the courtroom. So we know we are in the hearsay realm. Always start with a header for hearsay and state the general rule. Then, focus on whether the statement at issue meets the definition of hearsay (an out-of-court statement offered for the truth of the matter asserted), with an eye toward why the evidence is being offered. Usually, if non-hearsay is in play, the facts will tell you why the evidence is being offered in pretty plain language. Remember that first hypo? The question explicitly stated the plaintiff's theory of liability. Here, we are told in no uncertain terms what the prosecution is attempting to prove that Dan burned down the business to get the insurance money because the business was failing. Given that information, it seems pretty clear that Steve's statement to Dan refusing to set up more phony accounts is being offered not for its truth, but rather for their effect on Dan, for the non-hearsay purpose of proving that Dan was motivated to burn down his business to get money.

Lee Burgess: Now, what about statutory non-hearsay? We've got an out-of-court statement by a party (Dan) that the prosecution is offering to prove he intentionally burned down his business. This is clearly against Dan's interest in proving he is innocent of arson. Therefore, Steve's testimony about what Dan told him to do is a statement of an opposing party, which is non-hearsay under the FRE.

Lee Burgess: But wait, there's more! Steve is Dan's employee. Remember that opposing party statement non-hearsay can also be vicarious when you have a statement by an employee of the party concerning a matter within the scope of employment that is against the party's interest. This is another basis for admitting Steve's side of the conversation as non-hearsay, in addition to the effect on the listener type of non-hearsay.

Lee Burgess: Hopefully through these examples, you've learned the importance of following an approach to hearsay questions that doesn't skip over the commonly-tested non-hearsay. As I said, start with whether hearsay is an issue by looking out for an out-of-court statement that a party seeks to admit. State the rule for hearsay, apply it to your facts, and make a conclusion. If you have an out-of-court statement that is offered for one of the purposes we discussed – verbal act, effect on the listener, or circumstantial evidence of state of mind – you

have non-hearsay. If both pieces of the hearsay definition are met, before you move on to hearsay exceptions, consider whether either type of statutory non-hearsay applies. Then, you can address whether any of the many exceptions to the hearsay rule apply. If you need a refresher on those, check out our previous podcasts, which cover several often-tested exceptions.

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 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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