Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we have another episode in our "Law Every 1L Should Know" series, and this one is on evidence. 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.

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Lee Burgess: Welcome back! If you're new to this series – "Law Every 1L Should Know" – it is designed for incoming 1Ls – students who are getting ready for law school and want a head start on the law they're about to spend the next year learning. Each episode gives you a simplified overview of one of the core 1L subjects. We're not trying to cover every doctrine or every exception. We want to give you the framework so that when you walk into class on day one, you already have mental shelves to put the new material on. And if you want to go deeper on any of the specific topics we mention today, our podcast also has a series called "Listen and Learn". These episodes take one specific legal concept, review the rules in more detail, and apply the law to a fact pattern. We'll link to relevant "Listen and Learn" episodes in the show notes.

Lee Burgess: Today, we're talking about evidence. One quick note before we start: At many law schools, Evidence is actually a second or third-year course rather than a first-year one. We're including it in this series because it's a core, heavily tested subject. It's tested on the bar in nearly every state, and because getting an early feel for it pays off. So if you're a true first-semester 1L, think of this as a preview of coming attractions. One more orienting point: Evidence is governed in most law school courses and on the bar by a specific written code called the Federal Rules of Evidence, or the FRE. So unlike some subjects where the rules come from old cases, here you're largely learning a rule book. We'll keep the rule

numbers light, but I'll point out a few so the names are familiar when you see them.

Lee Burgess: Here's the plan for today: First, we'll orient to what evidence law is actually doing, and the one concept that everything else is built around – relevance. Then we'll spend most of our time on the single most important, most heavily tested, and most feared topic in all of evidence – hearsay. We'll learn what hearsay is, why the law distrusts it, and the major ways it still gets admitted. And we'll finish with a fact pattern. A quick reminder, especially if you're listening before law school starts: Don't try to memorize everything. Just let it wash over you. The goal is recognition. When your professor says "hearsay" or "excited utterance", those words should already have a shape to them. And with that, let's dive in.

Lee Burgess: So, what is evidence law? When a case goes to trial, the parties want to put proof in front of the jury – testimony from witnesses, documents, photographs, physical objects. Evidence law is the body of rules that decides what the jury is allowed to see and hear, and what it isn't. A trial is not a free-for-all, where any information comes in. Evidence law acts as a filter. Some proof is reliable and helpful, and comes in. Other proof is unreliable, unfair, or distracting, and gets kept out. The judge is the gatekeeper who applies these rules, usually in response to a lawyer's objection.

Lee Burgess: The foundational concept, the thing every other rule builds on, is relevance. To be admissible, evidence must first be relevant. Evidence is relevant if it has any tendency to make a fact that matters to the case more or less probable than it would be without the evidence. That's a low bar on purpose. Evidence just has to move the needle, even a little, on some fact that's of consequence to the case. If evidence isn't relevant, it's out, full stop. If it is relevant, it's admissible unless some other rule excludes it. And that's the basic structure of all of evidence law. Relevant evidence comes in unless a specific rule keeps it out. So most of the subject is really a catalog of the rules that keep relevant evidence out, and why. Even relevant evidence can be excluded if its value is substantially outweighed by the danger of unfair prejudice, confusing the jury, or wasting time. That's the famous balancing rule – Rule 403. Relevant evidence about a person's character is sharply restricted, because we don't want juries deciding that someone did something just because they seem like a bad person. Certain communications are protected by privileges: attorney-client, spousal, and psychotherapist-patient, and stay out for policy reasons, even when they'd be helpful. Many states also recognize a broader doctor-patient privilege, but under the federal rules, there's no general one. And then there's the giant among the exclusionary rules, the one that takes up more of your Evidence

course than anything else – the rule against hearsay. That's where we're going to spend the rest of our time.

Lee Burgess: So, let's talk about hearsay. The reason hearsay terrifies law students is that the definition is deceptively simple, but applying it is tricky, and there's a long list of exceptions on top. So, let's build it up carefully. Here's the definition: Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. To figure out whether something is hearsay, you ask three questions, and it's only hearsay if the answer to all three is "yes".

Lee Burgess: Question 1: Is it a statement? A statement is an assertion – someone asserting that something is true. It can be spoken, written, or even conduct that's meant as an assertion, like nodding your head "yes". If there's no assertion, there's no hearsay.

Lee Burgess: Question 2: Was the statement made out of court? That is, was it made somewhere other than on this witness stand in this trial? A statement someone made last year, or said at the scene of an accident, or wrote in a letter – those are all out-of-court statements. The whole concern is about statements made outside the courtroom, where they couldn't be tested by cross-examination the way live testimony can.

Lee Burgess: Question 3 – and this is the one students miss most: Is the statement being offered to prove the truth of the matter it asserts? In other words, is the party offering the statement trying to get the jury to believe that what the statement says is actually true? This is the crux of hearsay, so sit with it. If someone said, "The light was red" and you're offering that statement to prove the light was in fact red – then yes, you are offering it for its truth.

Lee Burgess: If the answer to all three is "yes" – it's a statement, made out of court, offered for its truth – then it's hearsay. And the basic rule – Rule 802 – is that hearsay is not admissible. It gets excluded unless an exception applies. Why does the law distrust hearsay so much? Because of what we lose. When a witness testifies in court, three safeguards protect reliability: the witness is under oath, the witness can be cross-examined by the other side, and the jury can watch the witness's demeanor to judge credibility. With an out-of-court statement, we lose all three. The person who originally said it – the declarant – isn't under oath, can't be cross-examined about what they really meant or whether they were lying or mistaken, and isn't in front of the jury. We're being asked to trust a secondhand report. That's the core anxiety, and it explains everything else about the doctrine.

Lee Burgess: Now, here's the first big escape hatch, and it flows directly from Question 3: If a statement is offered for some purpose other than proving the truth of what it asserts, it is not hearsay at all, no exception needed. This trips up everyone, so let me give you the main examples. Sometimes a statement matters simply because it was said and heard, regardless of whether it was true. Take a statement offered to show its effect on the listener. Suppose the issue is whether a store owner knew about a dangerous spill. A witness testifies that an employee told the owner, "There's oil all over aisle five." That statement isn't being offered to prove there was actually oil in aisle five. It's offered to prove that the owner was put on notice. Offered for that purpose, it is not hearsay. Or take verbal acts, words that have legal significance just by being spoken, like the words forming a contract, or the words of a threat or a defamatory statement. We're not proving those words are true; the words themselves are the event. And sometimes a statement is offered as circumstantial evidence of the speaker's own state of mind. The lesson: Before you ever reach for an exception, always ask what the statement is being offered to prove. If it's not the truth of the matter asserted – well, you're done, and it's not hearsay.

Lee Burgess: Next, there are some statements that meet the technical definition, but the rules simply define as "not hearsay". The most important by far is the opposing party statement. Older books call it an "admission". The rule is that anything a party to the case said can be offered against them by the other side. It is treated as not hearsay. So if you're suing someone and they once said, "Yeah, I ran the red light", the other side can bring that statement in against them. The theory is, you can hardly complain about not being able to cross-examine yourself. You said it, you can explain it on the stand. Prior statements by a witness who's testifying, like certain prior inconsistent statements and prior identifications, also fall into this "not hearsay" category. For now, just lock in the big one – a party's own statement offered against them comes in.

Lee Burgess: Then we get to the true exceptions – statements that are hearsay but come in anyway. Here's the key idea that ties every exception together, and it's worth holding onto: Remember that we distrust hearsay because the speaker wasn't under oath and couldn't be cross-examined. Each hearsay exception is, in effect, the law saying, "This particular kind of statement tends to be made under circumstances that make it trustworthy enough to admit it without cross-examination." The circumstances supply a substitute guarantee of reliability. So as you learn each exception, don't just memorize the label. Ask what it is about that situation that makes the statement trustworthy. That single question is the policy logic running underneath the entire list. There are a lot of exceptions, and you'll learn them in detail. Let me give you the most common ones, organized into two groups.

Lee Burgess: The first group applies whether or not the original speaker is available to testify. Two of these are worth slowing down on, because students mix them up consistently: the present sense impression and the excited utterance. They overlap a lot, but the reason we trust each one is different. A present sense impression is a statement describing or explaining an event, made while the speaker is perceiving it or immediately afterward. What makes it trustworthy is timing. It's said in the moment, so there's no time to sit and invent a lie. Notice that it does not require any excitement at all. Picture someone calmly narrating over the phone to a friend, "A silver pickup is pulling into the neighbor's driveway right now." Nothing startling, no emotion, but because it's happening contemporaneously, it's a present sense impression. An excited utterance is a statement relating to a startling event, made while the speaker is still under the stress of excitement the event caused. Here, what makes it trustworthy isn't the timing; it's the stress. The theory is that when you're in the grip of shock or panic, you're reacting, not calculating, so you don't have the presence of mind to fabricate. Picture a witness to a violent mugging who, still shaking and out of breath several minutes later, blurts out, "He pointed the gun right at her head." That might be too delayed to count as a present sense impression. The event is over, and some time has lapsed. But because the speaker is still under the stress of the startling event, it qualifies as an excited utterance.

Lee Burgess: So, here's the quick way to keep them straight. Present sense impression is about timing: Was it said in the moment? Excited utterance is about stress: Was the speaker still rattled by something startling? Plenty of statements qualify as both at once. If a bystander screams, "That car just ran a red light" at the very instant of a crash – it's contemporaneous, so it's a present sense impression; and it's a stressed reaction to a startling event, so it's also an excited utterance.

Lee Burgess: The rest of the common exceptions in this first group follow the same logic. Each has a built-in reason to be trusted. A statement of a then existing state of mind or physical condition, like "My chest hurts right now" comes in, because you're the best and most contemporaneous source on your own present sensations. Statements made for the purpose of medical diagnosis or treatment come in, because people have a strong incentive to be truthful with a doctor who's about to treat them. And business records – records kept routinely in the regular course of business – come in, because the routine, systematic nature of record-keeping itself is a reason to trust them.

Lee Burgess: The second group only applies when the original speaker is unavailable to testify – for example, because they've died or can't be found, or refuse to testify. Former testimony the person gave in an earlier proceeding can come in if the other side had a chance to cross-examine it before. A dying declaration – a statement about the cause or circumstances of what the speaker believed was

their imminent death – can come in, but only in a homicide prosecution or a civil case, on the old theory that people don't lie when they think they're about to die. And a statement against interest – a statement so contrary to the speaker's own interest that they wouldn't have made it unless it were true – can come in.

Lee Burgess: There are more exceptions than these, but if you know the difference between not hearsay and hearsay but an exception, and you know the handful of common exceptions, you have the spine of the whole topic. One more thing to flag for criminal cases specifically: Even when a statement fits a hearsay exception, the Constitution's Confrontation Clause can still keep it out if it's testimonial and offered against a criminal defendant who never had a chance to cross-examine the speaker. That's a wrinkle you'll meet later. Just file that name away.

Lee Burgess: Hopefully you're still with me. Let's bring it together with a fact pattern. As I read it, run the three-part hearsay test in your head, and then ask whether an exception applies. So, here's the hypo:

Lee Burgess: There's a civil trial arising out of a car crash at an intersection. The plaintiff calls a witness named Tina. Tina wasn't driving; she was standing on the corner. She wants to testify to the following: "Right after the two cars collided, a pedestrian standing next to me threw up his hands and shouted, 'The red truck just blew through the stop sign!'" The defendant, who was driving the red truck, objects that this is inadmissible hearsay. How should the judge rule?

Lee Burgess: Well, let's walk through it. First, run the three-part test. Is the pedestrian's shout a statement? Yes. "The red truck just blew through the stop sign" is an assertion that something is true. Was it made out of court? Yes. The pedestrian said it at the scene, not on the witness stand in this trial. And is it being offered to prove the truth of what it asserts? Yes. The plaintiff is offering it precisely to prove that the red truck did, in fact, run the stop sign. All three answers are "yes", so the pedestrian's shout is hearsay. Under the basic rule, it's inadmissible unless an exception applies.

Lee Burgess: Second, does an exception apply? Well, let's look at the circumstances. A car crash is a startling event. The pedestrian shouted the statement immediately after the collision with his hands thrown up, clearly still under the stress and excitement of what he just witnessed. That fits the excited utterance exception almost perfectly – a statement relating to a startling event made while the speaker was still under the stress of excitement that it caused. The statement also likely qualifies as a present sense impression, since he described the event right as it happened. Either way, an exception applies, so the hearsay bar is

overcome. The judge should overrule the objection and let Tina testify to what the pedestrian shouted.

Lee Burgess: Now, here's a twist that shows the power of Question 3: Imagine a different witness in the same case wants to testify that a split second before the crash, a passenger in the truck screamed at the driver, "Stop! You're running the stop sign!" If that statement is offered to prove the truck actually ran the stop sign, it's hearsay – an out-of-court statement offered for its truth. But if it's offered only to prove that the driver was warned and had a chance to react – his notice of the danger, not the truth of whether he was running the sign – then it's not offered for its truth, and it isn't hearsay at all. No exception needed. Same words, different purpose, opposite answer. That's the move to master.

Lee Burgess: Before we wrap up, a quick recap. Evidence law is the filter that decides what a jury gets to see and hear. Everything starts with relevance. Relevant evidence comes in unless a specific rule keeps it out, and most of the subject is the catalog of rules that keep relevant evidence out. The biggest of those is the rule against hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Run the three-part test every time. If a statement is offered for some purpose other than its truth, it isn't hearsay at all. A party's own statement, offered against them, is defined as "not hearsay". A genuine hearsay can still come in under an exception, like excited utterances, present sense impressions, statements for medical treatment, business records, dying declarations, and statements against interest.

Lee Burgess: If you want to go deeper on any of these topics, check out the show notes. We've linked to "Listen and Learn" episodes on relevance, the basics of hearsay, and character evidence. These go into more depth than we did here.

Lee Burgess: Well, that's all that we have today for evidence. Until next time, take a breath. Evidence feels like a maze of rules at first, but it's one of the most logical subjects once you see the structure. Relevant in, exclusions out, and hearsay with its escape hatches and exceptions sitting at the center. You've got this.

Lee Burgess: Thanks again to Juno for supporting this podcast. If you're thinking about student loans for law school, head to JoinJuno.com to explore your options and see how Juno can help you find a better rate.

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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 281: Listen and Learn – Character Evidence
Podcast Episode 296: Listen and Learn – Hearsay Exceptions: Government and Business Records
Podcast Episode 301: Listen and Learn – The Confrontation Clause
Podcast Episode 308: Listen and Learn – More Hearsay Exceptions
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