



# Evidence Outline Sample

<p>Number of MBE Questions:  25</p>	<ul style="list-style-type: none"> <li>• Relevancy and reasons for excluding relevant evidence: 8–9 questions</li> <li>• Hearsay and circumstances of its admissibility: 6–7 questions</li> <li>• Presentation of evidence: 6–7 questions</li> <li>• Privileges and other policy exclusions: approx. 2 questions</li> <li>• Writings, recordings, and photographs: approx. 2 questions</li> </ul>	<h2>Note</h2> <p>Dates in <b>green</b> font indicate when a concept was tested on a Multistate Essay Exam (MEE) essay and all examples in <b>green</b> font come from past MEEs.</p>
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In this chart at the top of each MBE outline, we tell you how often a subject is tested on the MBE, i.e., you can expect 8-9 questions on relevancy and only about 2 questions on privileges. This helps you focus your study.



## I. Hearsay and Circumstances of its Admissibility

**Tested: July 2018, July 2016, Feb 2016, July 2013, Feb 2013, Feb 2011, Feb 2008**

### 1) Hearsay definition:

- a) Out of court
- b) Statement
  - i) There needs to be an **intent** to make an assertion—that is, an intent to **communicate**.  
(1) *Ex.: If you ask me where something is and I point, there is an intent to communicate.*
- c) Offered to prove
- d) The truth of the matter asserted
  - i) If a statement is offered for **credibility** or to prove that something was spoken/written, it is not hearsay.
  - ii) See the first three hearsay exclusions for examples.

We list all the dates each topic was tested at the top in green, and throughout the outline next to each item.

### 2) Hearsay rule

- a) Hearsay is inadmissible unless an exception or exclusion applies.
- b) Rationale for the hearsay rule: hearsay is unreliable because
  - i) the declarant may **misperceive** an event;
  - ii) the declarant may **misremember** an event;
  - iii) the declarant may **be lying**; or
  - iv) the person testifying in court may **misremember the statement, may have misheard it, or may be lying about it**
- c) Thus, the law makes it necessary for the declarant herself to testify in court so that the jury can evaluate sincerity and whether the declarant has misperceived or misremembered the situation (likely through questions on cross-examination).

### 3) Non-hearsay: **Bar Exam Tip: The first three categories of non-hearsay are not used to prove the truth of the matter asserted. The next two categories (prior statements of a trial witness**

Bar Exam Tips can be found throughout the outline!





and an opposing party’s statement (“party admission”)) are used to prove the truth of the matter asserted.

Statements that are non-hearsay and not used to prove the truth of the matter

a) **Verbal act: legally operative words**

- i) *Rationale: The statement is not being offered for the truth of the matter asserted—only that the statement was said. The plaintiff is basically trying to prove an element of the claim, so therefore it is not hearsay.*
- ii) *Definition: These are words that have a legal effect. They are being offered into court solely to prove that they were said, as merely saying the words gives rise to a claim.*
- iii) *Examples include: defamation, contract formation, solicitation of crime, bribery, or to show something like sexual harassment, that a gift was made, perjury, or fraud.*
  - (1) *Ex.: A coworker says to a woman, “you would look better without a shirt on.” The woman offers the statement into evidence in her sexual harassment claim against the coworker. She is not offering it to prove it is true, but to prove that the statement was said and that it constitutes sexual harassment.*

b) **Effect on person who heard or read statement—“state of mind” (Feb 2013)**

- i) This is a statement that is not offered for the truth of the matter asserted—rather, it is generally offered to show that a person (1) **had notice** of a fact, or (2) to dispute  **motive or intent**.

(1) **Notice**

(a) *Ex.: A woman slips in a grocery store and sues the store. An hour before the woman slipped, a witness overheard a different customer mention to the manager that the floor was very slippery. Is the statement of the customer admissible in court? For what purpose?*

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(b) *Ex.: Bob Bystander says to Dan Driver, “Dan, it looks like your tire is flat.” Dan drives his car anyway, but because the tire was flat, he strikes Patty Pedestrian. Patty sues Dan for negligence and wants to offer Bob’s statement into evidence. May she? For what purpose—as substantive evidence, for proof he had notice of the flat tire, for both purposes, or neither?*

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**Bar Exam Tip: on the MBE, this hearsay exclusion often comes up with fact patterns involving cars and a negligence claim.**

(2) **Motive or intent**

(a) *Ex.: A woman is charged with elder abuse because she did not give her mother the proper medications after her mother had surgery. As a result, her mother died. If the woman introduces a doctor’s note that said not to give her mother the medications in question after surgery, then that note would be offered not for truth of matter but to show the*

\_\_\_\_\_ 3 *(and that the woman was not trying to abuse her mother).*

(b) *Ex.: Bob claims his manager, Linda, who was newly appointed to the manager position, discharged him from his sales job because she was biased against older people like him. Linda states he had been evaluated as “below average” based on past performance reviews written by his prior manager. Are the performance reviews admissible? For what purpose?*

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c) **Circumstantial evidence of speaker’s state of mind**

- i) These are statements being offered to prove someone’s state of mind—not truth.
- ii) *Rationale: it is not being offered for the truth of the matter asserted so it is not hearsay.*

We include practice problems with answer explanations in the back of the outline.



- (1) *Ex.: A defense attorney introduces the fact that his client said, “God told me to kill [the victim]” to show the defendant was insane (not the truth of the matter).*

Statements that are non-hearsay but are used to prove the truth of the matter

Examples in green font are from past Multistate Essay Exam answers.

a) **Prior statements of a trial witness—three kinds (Feb 2016)**

i) **Witness’s prior *statement of identification of a person* (Feb 2016)**

- (1) *Rationale: in-court identifications are not as reliable as identifications made under less suggestive circumstances.*
- (a) *Ex.: A victim was robbed after leaving a jewelry store. She went into the police station to give a statement and when she walked in, she overheard the defendant in the adjoining room. As soon as she heard the defendant’s voice, she said, “that is the voice of the guy who robbed me.” If the victim testifies, this statement could be admitted as nonhearsay. (Feb 2016)*

ii) **Witness’s prior *inconsistent statement***

- (1) *Rationale: to eliminate perjury.*
- (2) Elements:
- (a) the statement is made **under oath** at a formal trial, hearing, or deposition;
  - (b) it is **inconsistent** with the statement at trial; and
  - (c) the declarant is **testifying** at a trial or hearing and is subject to cross-examination concerning the statement.



(i) **Bar Exam Tip: prior inconsistent statements that fall within this exception can be used for substantive evidence and impeachment!**

(ii) Note: if used for impeachment too, the witness must have some opportunity to explain or deny the statement on the stand (unless the witness is the opposing party, because then the statement would be admissible as an opposing party’s statement (“party admission”) and their lawyer can simply call them to the stand).

iii) **Witness’s prior *consistent statement***

- (1) *Rationale: it is used to rehabilitate the witness but also to prove that the statement is true since if the same statement was made pre-motive, the witness is less likely to be lying.*
- (2) Elements:
- (a) the statement is **consistent** with testimony at trial, and
  - (b) is used to rebut charge of **recent** fabrication of improper motive/influence.

b) **Opposing party’s statement (“party admission”) (July 2018, July 2016)**

i) *Rationale: the witness can simply take the stand and explain why he said what he said!*

ii) There are four kinds of opposing party statements:

- (1) **Opposing party statement:** any statement made by the opposing party if offered against that party.
- (2) **Adoptive admissions:** A party remains silent under circumstances in which a reasonable person would protest if the statement were false. The proponent must show that the person:
- (a) heard and understood the statement,
  - (b) was physically and mentally capable of responding, and
  - (c) a reasonable person would have denied the statement.
- (i) *Ex.: If a woman came up to someone at a coffee shop and said, “I just saw you hit that old lady crossing the street then flee the scene!” a reasonable person would deny it if the*



*incident did not occur. Thus, if the accused person is silent, heard and understood the statement, and was capable of responding, this would be an adoptive admission.*

- (3) **Agent or employee statements:** These are admissible if:
  - (a) they are made by the agent/employee,
  - (b) they are offered against the principal/employer,
  - (c) they are made during the existence of the agency/employment relationship, and
  - (d) the statement concerns a matter within the scope of the agency or employment.
    - (i) **Bar Exam Tip: The person does not need to be at work when the statement is made. The statement could be said after work but they must still be an agent or employee while the statement is made.**
- (4) **Statement by co-conspirator:** these are admissible if made *during the course of* and *in furtherance* of the conspiracy.
  - (a) Note: \_\_\_\_\_



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Here, which has been removed, the outline lists all the hearsay exceptions and more information on each. Next, we tell you how to approach hearsay on a Multistate Essay Exam (MEE) question!

### Hearsay on the Multistate Essay Exam

#### **I. Hearsay: how to approach a hearsay issue on the Multistate Essay Exam (mnemonic = DIA) (July 2018, Feb 2016, July 2013, Feb 2013, Feb 2011, Feb 2008)**

**D: Define hearsay:** hearsay is “an out of court statement offered to prove the truth of the matter asserted.”

**I: State why it is important to determine if a statement is hearsay:** hearsay is not admissible unless it comes within an exception.

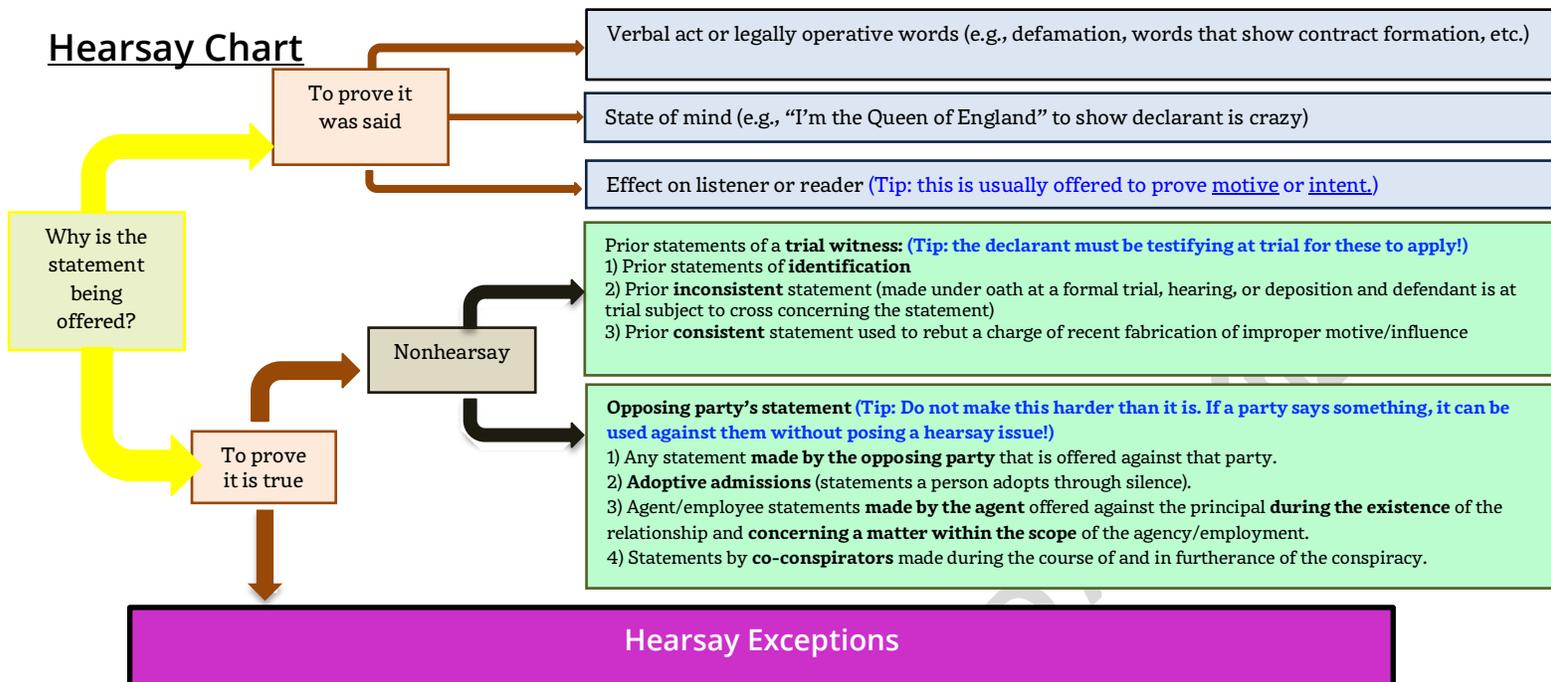
**A: Analyze exceptions or exclusions:** Some of the tested hearsay exceptions are as follows:

- **Excited utterance:** an excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress or excitement that it caused.” (Feb 2016, July 2013)
- **Present sense impression:** a present sense impression is “a statement describing or explaining an event or condition made while or immediately after the declarant perceived it.” (Feb 2016, July 2013, Feb 2013)
- **Statement made for medical diagnosis or treatment:** these statements must be made for and reasonably pertinent to medical diagnosis or treatment and describe medical history, past or present symptoms or sensations, their inception, or their general cause. (July 2013)
- **Business records:** A record of “acts, events, conditions, opinions, or diagnoses” is admissible if it is made “at or near the time” of the event recorded by a “person with knowledge” of the event. Further, the making of the record must occur in the course of a regularly conducted business activity, and it must be the regular practice of the business to make the record. (Feb 2013, Feb 2008)
- **State of mind nonhearsay exclusion:** If offered to show state of mind and not truth, it is not hearsay. (Feb 2013)
- **Prior statement of identification:** a prior statement of identification by a witness who testifies at trial is considered nonhearsay. (Feb 2016)



- **Opposing party's statement** ("party admission"): a statement made by an opposing party offered against them is not hearsay. **(July 2016)**
- **Past recollection recorded:** A record that is on a matter that the witness once knew about but now cannot recall well enough to testify fully and accurately and was made while the matter was fresh in the witness's memory. The witness can read the record; it should not be offered as an exhibit. **(July 2016)**

Evidence Outline Sample JD Advising



Declarant must be unavailable (invokes a privilege, is absent from the jurisdiction, ill or dead, lack of memory, or refuses to testify)

**1. Forfeiture by wrongdoing** (witness tampering): party engages in wrongdoing for the purpose of making a witness unavailable for trial.

**2. Former testimony**: declarant is unavailable and had given testimony at a former proceeding or deposition and it is admitted against a party or someone in privity who had the motive and opportunity to develop the statement.

**3. Statement against interest**: declarant is unavailable and made a statement he knew was against his interest at the time the statement was made.

**4. Dying declaration**: Declarant is unavailable, the statement was made while he believed death was impending, it concerns the cause or circumstances of death and it is used in a homicide or civil case. **Tip: memorize these elements!**

**5. Statement of personal or family history** (e.g., birthdate, marriage date)

Is it a **CRIMINAL CASE**? If so, if the statement is testimonial, the declarant is unavailable, and the defendant had no opportunity to cross-examine the declarant, the statement will **NOT** be admitted (pursuant to the **Sixth Amendment**). **Tip: it will not be admitted even if there is a hearsay exception!**

Declarant can be available or unavailable

**1. Present sense impression**: declarant describes or explains event as it is happening or immediately thereafter.

**2. Excited utterance**: there is a startling event and declarant makes statement while under the stress of excitement and statement relates to startling event.

**3. Then-existing mental, emotional, or physical condition**: declarant states his then existing feelings, physical conditions, or intent.

**4. Statement made for medical diagnosis or treatment**: declarant makes statement about past or present symptoms or cause for purpose of diagnosis or treatment.

**5. Past recollection recorded**: a witness has insufficient recollection of event, but made or adopted a statement when he had personal knowledge while it was fresh in his memory and can vouch for the accuracy of the statement.

**6. Business records**: a record made in the regular course of business at or about the time the event occurred and that contains information observed by employees of the business (or an independent hearsay exception exists).

**7. Public records** (made by an agency, but not police reports in criminal cases)

**8. Learned treatises** (read into evidence if an expert is on the stand)

**9. "Catch all"** exception (for trustworthy statements)

**10. Others** (reputation about character, familial relations, etc.)



## Evidence Tested Issues

Feb 2020: awaiting final answers

At the end of each outline, we show you when and how issues were tested on the essay portion of the bar exam through a color-coded list.

July 2019:

Feb 2019:

July 2018: hearsay: nonhearsay, opposing party's statement, business records, statement made for medical diagnosis or treatment; relevancy; lay witnesses and expert witnesses; privileges: doctor-patient; habit evidence

Feb 2018:

July 2017:

Feb 2017:

July 2016: [combined with Criminal Procedure] hearsay: nonhearsay, opposing party's statement, past recollection recorded

Feb 2016: hearsay: present sense impression, excited utterance, prior statement of identification is not hearsay; Sixth Amendment Confrontation Clause; character evidence: may not be used in prosecution's case-in-chief

July 2015:

Feb 2015:

July 2014: impeachment: felony convictions admitted to impeach (one felony where witness was released nine years ago admitted, one for sexual assault not admitted, a misdemeanor of dishonesty which he plead guilty to admitted); prior bad acts: one can cross-examine regarding past bad acts but cannot offer extrinsic evidence

Feb 2014:

July 2013: hearsay: present sense impression, excited utterance, statement made for medical diagnosis or treatment; Sixth Amendment Confrontation Clause (does not apply in "ongoing emergency")

Feb 2013: hearsay: state of mind exclusion, present sense impression, business records, relevancy

July 2012:

Feb 2012: policy exclusions: subsequent remedial measures (inadmissible to prove negligence or culpable conduct), offers to settle are inadmissible if there is a disputed claim, offers to pay medical expenses inadmissible, sexual assault victim's past sexual behavior may be admitted if the probative value substantially outweighs the danger of unfair prejudice, relevancy

The remainder of the list is deleted.



## Answers

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<sup>1</sup> Yes, it can be offered to prove that the store had notice that the floor was slippery (but not that the floor was actually slippery).

<sup>2</sup> Yes, it can be offered to prove notice (but not that the tire was actually flat).

<sup>3</sup> Effect on the woman.

<sup>4</sup> Yes, this is admissible to show that Linda did not have discriminatory intent. This is not being admitted for the truth of matter asserted (but rather, to show her mindset).

<sup>5</sup> Note: This would not generally apply after the coconspirators are caught because it is not made in the course of or in furtherance of the conspiracy. (It would still apply if, for example, it was part of the conspiracy to get caught.)

Evidence Outline Sample JD Advising