

515756

515756

Institution **Harvard Law School**
Exam Mode **TAKEHOME**
Extegrity Exam4 > 15.8.22.0

Course / Session **F15 Murray - Takehome - Evidence**
NA
Section **All** Page 1 of 5

Institution **Harvard Law School**
Course **F15 Murray - Takehome - Evidence**

Event **NA**

Exam Mode **TAKEHOME**

Exam ID **515756**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	899	4709	5598
Total	899	4709	5598

Answer-to-Question-_1_

The jury is the inescapable conundrum of the common law system. It provides some protection against arbitrary governmental decisions and thus contributes to the government's legitimacy and the average citizen's general peace of mind. Yet, it is also problematic; a black box with inputs and outputs without any way of knowing whether there was any rational connection between the two. The Federal Rules of Evidence are an attempt to control jury inputs to legitimize the jury process. See *U.S. v. Tanner*. Such control would be much less important if there was some way to get inside of that black box and see how the sausage was made, so to speak.

The use of judges, who are required to explain their reasoning, accomplishes just that goal. Yet, civil bench trials do not obviate the need for admissibility rules as a category. The rules of evidence also address policy concerns and provide judges the structure and guidance necessary to use their informed discretion to decide cases in accordance with the law. The Federal Advisory Committee should retain only those rules that offer such guidance and structure or protect extrinsic policy concerns. Any rule that categorically denies the admittance of evidence should either be abolished or amended.

Rules to Retain

Rules 104, 401-402, 601-602, and 701 merely offer guidance; threshold criteria that all evidence or witnesses must meet for courts to seriously consider them. Excluding irrelevant evidence is not a matter of not trusting the decision-maker to properly evaluate the evidence (see 403), but rather a matter of judicial expediency. Likewise, excluding the testimony of a witness who is incompetent, lacks personal knowledge, etc. simply

preserves judicial resources and serves the parties' interest in a speedy trial.

Rules 901-902, and 1001-1007 offer similar guidance. Authenticating evidence is good policy but such a requirement is not there to protect against judicial biases but to assist the Judge in making her determination. The best evidence rules are purely preferential and because they increase the likelihood of an informed decision, they too should be retained.

Rules 607 and 611 offer structure to court proceedings. These rules establish our adversarial system and, 611 in particular, gives the Judge considerable discretion within that adversarial process. Because they do not unduly restrict judicial discretion and because cross-examination is such a powerful tool for discerning the truth of a matter, these rules should also be retained.

Rules 406, 415, 501 and 706 are an assortment of rules that should be retained for policy reasons. 406 and 415 are clear expressions of legislative intent to allow certain evidence to be considered at trial. To remove them would imply that such evidence may now be excluded. To avoid such an implication they should be retained. Rule 501 should be retained because of the importance of privileges, not just in court but to the functioning of society at large. 706 should be retained because it is good policy. Court-appointed experts complicate the adversarial process but I believe the benefits outweigh the costs.

Rules to Amend

Rules 403-405, and 412 offer problems even in bench trials. Judges are still human and thus are susceptible to personal biases. Yet, insofar as prejudicial evidence has any probative value, it should be admitted for consideration. These rules should be amended

so that instead of objecting to the admission of such prejudicial evidence, counsel asks that the evidence simply be “tagged” for discussion in the court’s opinion. The Judge must explain how she used the probative value of tagged evidence and how she dealt with its prejudicial effect. By clarifying how such evidence was used in the decision making process, all of the evidence’s probative value can be rung out, as it were, and properly utilized and the specter of judicial bias avoided. Also, instead of limiting what crimes may be used to impeach a witness’ character, Rule 609 should also be susceptible to “tagging.”

Rules 407-409 should be amended because they implicate important policy concerns. The incentives to settle, decrease risks, and adjust losses voluntarily should be retained but to exclude this evidence even when offered for “impermissible” inferences seems excessive. Because there is also probative value here, these rules should be altered to address sufficiency. By noting that such evidence, by itself is not sufficient, the new rules would preserve the policy goals while reducing the danger of impermissible inferences.

Rules 801-807 should be dramatically altered. Hearsay should be handled much as the Romans handled it. If a court determines that either the out-of-court statement is not offered for the truth of the matter or is non-hearsay (FRE 801(d)) it should be given full evidentiary weight. If not, such statements should receive reduced weight; I would recommend 1/4 (Romans did 1/8).

Rules 702-705 should be amended to allow the judge to question expert witnesses because, at a bench trial, there is no risk of such questions prejudicing a jury. This should be apart and after the lawyers have examined the expert witness to avoid interfering with their trial tactics.

Rules to Abolish

Rule 411 is the only rule that I would recommend be completely abolished.

The risk that a judge would be more or less likely to find a defendant liable simply because she does or does not have insurance, seems de minimis. If the committee disagrees with this rule's removal, I would recommend that it at least be amended for sufficiency (407-409) or "tagging".

515756

515756

Institution **Harvard Law School**
Exam Mode **OPEN LAPTOP + NETWORK**
Extegrity Exam4 > 15.8.22.0

Course / Session **F15 Murray - In Class - Evidence**
NA
Section **All** Page 1 of 8

Institution **Harvard Law School**
Course **F15 Murray - In Class - Evidence**

Event **NA**

Exam Mode **OPEN LAPTOP + NETWORK**

Exam ID **515756**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	1313	6914	8146
Total	1313	6914	8146

Answer-to-Question-_1_

1

Reason: 401 - irrelevant to the proceedings; 611 - leading question on direct;
403/608 - prejudicial because it strengthens the witness' credibility before it was
attacked; 404 - past experience could lead jury to think that he is expert in this situation

Response: Further questions will establish relevance; leading questions are
permitted to develop testimony; probative of the witness' experience, does not put the
witness' trustworthiness at issue so no violation of 608, not prejudicial

Ruling: Overruled, counsel has leeway to develop the testimony of his witness, not
prejudicial nor does it address trustworthiness

2

Reason: 901 - authentication, insufficient foundation for recognition; 1002 - best
evidence, should use original

Response: 1003, veracity of original not at issue so duplicate may be used, the
newspaper is sufficiently unique to satisfy recognition

Ruling: Sustained lack of authentication, please lay further foundation counsel;
overruled as to best evidence due to 1003 exception.

3

Reason: 801-02 - hearsay out of court statement offered for the truth of matter; 602
- no evidence that employee had personal knowledge

Response: Not offer for the truth of matter, only to indicate that plaintiff spoke with

the bank; 801(d) opposing party statement, employee of the bank

Further Reason: 401 - relevance, if not offered for the truth what does that fact that you spoke offer in evidence?

Ruling: Overruled, 801(d) party opponent statement; employees reasonably have knowledge about their work, but personal knowledge is not required for party-opponent statements (*Mahlandt*)

4

Reason: 701 - lay opinion, no reason to believe that he has the capacity to “characterize” the property; also vague question, could call for narrative; 401 - relevance of type of property

Response: 702, plaintiff while not an expert has more than lay knowledge of land as he works in real estate, this is the kind of question he has special knowledge to answer, relevant to damages your honor

Ruling: Sustained as to lay opinion, please rephrase so that we know what kind of characterization he is making, so to know if he must be an expert; Overruled as relevance.

5

Reason: 802 - hearsay, offered for the truth and was a statement made out of court, it is non-verbal but intended as an assertion of what the lot is like; 403 - prejudicial because it indicates that it was going to put more than one house on the lot, the jury could improperly inflate the value of the house

Response: 801(d), previous statement by the witness made in a deposition which

was under oath, non-hearsay; no prejudicial because it reflects real potential value

Ruling: Sustained, 801(d) is for consistent or inconsistent statements, there is no such comparison here

6

Reason: 901 - authentication lack of foundation, witness doesn't even know if it accurately represents the house

Response: It is being used to indicate the plans for the house, not the actual lot

Ruling: Sustained, please lay further foundation counsel

7

Reason: 802 - hearsay; 501 - privileged conversation between the lawyer and client

Response: Client may divulge privileged information; not offered for the truth, basis for further action (of lawyer)

Ruling: Overruled - basis for further action and client need not respect privilege.

8

Reason: 611 - overbroad; calls for narrative, too vague to answer; 401 - relevance

Response: Broad questions are permissible in developing the chain of events; relevance will be determined by the answer to the question

Ruling: Sustained, rephrase the question counsel

9

Reason: 802 - hearsay, not within the scope of her employment; 1002 - best

evidence, the message speaks for itself

Response: 801(d) - Party opponent statement, offered by employee of the bank; working that bank give presumption of personal knowledge of the banks business

Further reasons: Still no evidence that this is within the scope of her employment

Ruling: Overruled - 801(d) non-hearsay, statement by party-opponent, free to impeach on cross; sustained as to best evidence (1002)

10

Reason: 401 - relevance, his testimony is sufficient, non-responsive, beyond the scope of the question, could have answered

Response: The witness made a reasonable attempt to answer the question, my client should be given leeway to establish the role of my witnesses

Ruling: Sustained and stricken - counsel please make sure your client answers the question

11

Reason: 802 - hearsay; 403 - prejudicial, tries to get in the evidence from objection 9 in a round about way, waste of time, this evidence is already in the case.

Response: 801(d) - party-opponent statement, employee of the bank, in the scope of her employment; probative that the bank did not make a mistake leaving the message

Further reason: 403 - prejudicial because it is trying double down and make the evidence look even more damning

Ruling: Overruled, party-opponent statement, 801(d)

12

Reason: 802 - hearsay, offered for the truth, 403 - prejudicial because it is unclear who the speaker is in the case, implies that it was an employee but that has not been established

Response: 801(d) party-opponent statement, "secretary" is sufficiently illustrative to identify the speaker and conversation is probative of the potential wrong doing by the bank, not all evidence that is bad for the defense is prejudicial

Ruling: Overruled - opponent-party statement (801(d))

13

Reason: 1002 - best evidence of the deed is the deed; 802 - hearsay, quoting the deed which is an out of court statement; non-responsive, asked what the sales price said, not what the deed says

Response: My client was referring to his recollection of the deed, his recollection is the best evidence, witness made a reasonable attempt to answer the question; deed is a business document kept in the regular course of business

Further Reasons: 803(6) lack of foundation for a business document

Ruling: Sustained and sticken, as hearsay, no exception, non-responsive and lacks best evidence

14

Reason: 701 - lay opinion, asking for conclusion, not expert as to worth of land, 403, answer would be unduly prejudicial, jury could get implication that he is expert here

Response: Plaintiffs experience in real estate (per objection 1) makes him

sufficiently expert in this case (702)

Ruling: Sustained, no sufficient basis for expertise

15

Reason: 802 - hearsay, previous out of court statement; 611 - leading question on direct

Response: 801(d) inconsistent with witness' current testimony and was given under oath at a deposition, non-hearsay; 611 - may ask leading questions to a hostile witness and to develop testimony

Ruling: Overruled, non-hearsay 801(d); and as to leading question, hostile witness

16

Reason: 611 - leading question on direct; 802 - hearsay

Response: Hostile witness; inconsistent previous statement

Ruling: Overruled as to leading question; sustained as to hearsay, not statement to be inconsistent with yet

17

Reason: 404(b) - specific instance character evidence, impermissible inference of untrustworthiness because of this past act; 403 - prejudicial for such inferences, 401 relevance

Response: 607 - offered to impeach the witness, probative of trustworthiness

Ruling: Overruled, damning evidence is not more prejudicial than probative *per se*

18

Reason: 802 - hearsay, out of court statement

Response: 801(d) consistent statement used to rebut a recent attack on witness

credibility

Ruling: Overruled, 801(d)

19

Reason: 802 - hearsay; 701 - lay opinion, no basis except for witness' word that she is an expert appraiser; 901 - lack of foundation for authentication

Response: Her employment with the bank is basis enough; business record

Further reason: If business record must show four legs (803(6)).

Ruling: Sustained as hearsay and lay opinion, you must give further evidence of expertise

20

Reason: 802, 803(6) - hearsay, no exception for business record when the witness says "I suppose so"; 902 - lack of foundation for authentication

Response: Four legs of business record exception met, sufficient foundation has been laid

Ruling: Sustained, it is unclear whether this kind of records is maintained in the regular course of business at the bank, can you offer further support for this assertion counsel?