EVIDENCE
Spring 2016
Professor Ben Trachtenberg

Comments on the Final Examination

Having read all the answers to the final examination, I have written a few comments about them. The text below is not intended to serve as a "model answer." I spent more than six hours preparing this document, and I consulted whatever sources I pleased. Accordingly, there is no way that any exam taker could have addressed all of the issues that I discuss below.[1] Instead, this document exists to list some of the main points that students could have raised in response to the questions calling for narrative answers, and it also identifies a few common mistakes. The purpose is to enhance the exam's utility as a teaching tool.

While not everything I discuss below applies to each student's answer, I have focused on issues of broad relevance. Before I turn to the questions, a quick note on proofreading: Proofreading is worth doing. Errors like "Confrontational Clause" are distracting, as are odd abbreviations (such as "HS" for "hearsay"). I did not consciously deduct points for such imperfections, but they cannot have helped students create an impression of mastery of evidence law.

Question 1 [Chess Tournament]

The simplest way to answer this question was to discuss each of the twelve pieces of evidence, one at a time, in the order they appear in the question. That said, it was occasionally sensible (albeit not necessary) as a matter of organization to jump around so that similar pieces of evidence could be discussed together. As long as all the items were covered, one's organizational strategy did not affect grades.

For each piece of evidence presented by the exam question, I provide brief analysis:

1. ***Chess notation sheet.*** This evidence is admissible. It has immense relevance in that it documents the moves made by both players in the game, allowing analysis of whether Morphy's moves involved cheating. The document is almost certainly hearsay: an out-of-court statement offered for its truth (we care if the notation is accurate).[2] Assuming it is hearsay, it is nonetheless admissible against Morphy as his own statement. *See* FRE

---

[1] That said, these comments are by no means exhaustive; my failure to address an issue in this document does not necessarily mean that a student was erroneous in discussing it on the exam. These comments are too brief to acknowledge every good point I read while grading.

[2] The only good argument for "not hearsay" is that perhaps Morphy did not write for an audience, intending the notes only for himself. In actual chess tournaments, competitors know that their notation sheets may be consulted by others in the event of disputes. Students were not penalized for not knowing this; however, students who decided the document was not hearsay and failed to consider hearsay exceptions missed a chance to earn points.

801(d)(2)(A).[3] Also, it is likely a present sense impression and accordingly admissible against anyone. *See* FRE 803(1). Other hearsay exceptions were not worth the effort to examine.

2. ***Earpiece.*** This piece of real evidence is admissible assuming Capablanca can provide reasonable evidence of authenticity. Its relevance is high. The most straightforward way to establish authenticity is with testimony by Mrs. Capablanca about how she found it (along with information about chain-of-custody). Note that contrary to the belief of many students, the relevance of the earpiece is not dependent on whether Morphy cheated. Instead, the earpiece helps Capablanca to prove that Morphy cheated. Further, even if Rule 104(b) applies, the standard is easily met in that a reasonable jury could conclude that Morphy received improper help.[4] *See Huddleston*.

3. ***Earpiece manual.*** This evidence is admissible, despite being hearsay, as long as Capablanca can prove that it is what it purports to be, that is, a manual for the same sort of earpiece just introduced. It is hearsay because it was written out of court and Capablanca wants the jury to believe what it says about how the device works. It is likely admissible as a business record. *See* FRE 803(6). Testimony by the investigator can establish that the manual corresponds to the same make and model as the earpiece presented by Mrs. Capablanca.

4. ***Testimony by Capablanca.*** This evidence is admissible. It is straightforward eyewitness testimony about how the defendant behaved during the match giving rise to the suit. Testimony that Morphy "acted in a very strange way" is not the sort of opinion for which an expert is required. *See* FRE 701.

5. ***Testimony by Carlson.*** This evidence is admissible only if Carlson qualifies as an expert on youth chess. The proposed testimony is based on "specialized knowledge" within the scope of Rule 702. A lay witness may not opine about whether a kindergartener is capable of certain chess moves.

   For expert testimony to be admissible, it must (a) be offered by someone qualified, (b) help the trier of fact, (c) be based on sufficient facts or data, (d) be the product of reliable principles, *see Daubert*, reliably applied to the facts of the case, and (e) get past Rule 403. Here, the complicated questions are (a) and (d).

---

[3] And perhaps against his father as a coconspirator's statement. *See* FRE 801(d)(2)(E).

[4] Why is the relevance not conditional? The Advisory Committee Note to Rule 104 states: "In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled 'conditional relevancy.' Morgan, *Basic Problems of Evidence* 45–46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, *e.g.*, evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401." If the concept remains confusing, read the discussion of Items 8 and 9, *infra*. If it is still confusing, don't worry about it. In the end, the difference between Rule 401 and Rule 104(b) has little practical importance.

a) Carlson is surely an excellent chess player and an expert on the game. But is he an expert on how well young players can play? We don't know. More information is needed to decide if he is qualified to give the suggested opinion.

b) If he is qualified, the testimony would greatly help the jurors, who cannot possibly evaluate Morphy's moves.

c) It seems likely that the notation sheet provides sufficient facts or data, on which "experts in the particular field would reasonably rely." *See* FRE 703. Even if the notation sheet is somehow inadmissible (hard to see how), an expert probably may use it.

d) We have no information about how Carlson will get from the notation sheet to his opinion on whether a kindergartener could independently make the indicated moves. While a robust *Daubert* analysis was not necessary here (or even really possible given the information provided in the exam question), students were wise to flag the issue. Various "*Daubert* factors" discussed in class (testable, peer reviewed, error rate, standards, general acceptance, litigation-based, etc.) could sensibly have been raised. See the Advisory Committee Note on the 2000 amendment to Rule 702.

e) If the requirements above are all satisfied, Rule 403 should be no problem.

6. ***U.S. Chess Association print-out.*** This evidence is hearsay yet admissible, assuming Capablanca can deal with straightforward problems concerning authenticity and the best evidence rule. The document is offered for its truth (to show that Parker Morphy is a top-ranked adult player) and is likely admissible as a business record. Capablanca must show that the print-out is an accurate reflection of the information on the USCA website, in which case the document is authentic, *see* FRE 901, and an "original" as defined by Rule 1001(d). (The best evidence rule applies because the writing is offered to prove its content. *See* FRE 1002.) Testimony by whoever viewed the website and printed the document should suffice. Morphy's rank is relevant because it makes it more likely that he assisted his son during the tournament.[5]

7. ***Testimony by Fisher.*** This is likely inadmissible character evidence. It is hard to see what relevance Fisher's testimony has other than to show that young Morphy is a cheater, meaning that he likely acted in conformity with his dishonest nature at the tournament. FRE 404 prohibits such evidence. While theoretically the evidence could be offered to show "knowledge" of how to cheat (or some other such "around-the-box"

[5] Note that there is no problem presented by Rule 404. Parker Morphy's chess skills are not being offered to show that he acted in conformity with his character trait (once a good chess player, always a good chess player) but instead to show that he possessed sufficient knowledge to help his son cheat.

use), the non-propensity relevance is nearly zero, meaning that Rule 403 should bar the evidence even if Rule 404 does not.

Note that because this is a civil case, Rule 404(a)(2)(A) and (a)(2)(B) do not apply. There is no possibility that Morphy can "open the door" by presenting evidence of his own honest character.

Further, even if somehow Fisher were allowed to give evidence of Morphy's character, Capablanca's lawyer could ask only about reputation and opinion during direct examination (after laying proper foundation), meaning that "specific acts" evidence would remain inadmissible. *See* FRE 405. Clever students who noted that after Morphy testifies (*see* Item 12, *infra*), he can be attacked under Rule 608 should not have suggested that Fisher could then testify about specific acts. *See* FRE 608(b) (limiting specific acts evidence to cross-examination). Specific instances of Morphy's prior cheating could, however, be raised during cross-examination of Morphy himself.

8. ***Radio Shack employee.*** This evidence is likely admissible, if the evidence about Parker Morphy's accent is admissible. Evidence that the purchaser had "a Louisiana accent" is relevant only if someone connected with the defendants has such an accent. Accordingly, the relevance is conditional, and Rule 104(b) applies. If Parker Morphy can testify about his background, then Rule 104(b) is satisfied (a reasonable jury can conclude that someone "born and raised in New Orleans, Louisiana" spoke with "a Louisiana accent").

   However, just what is "a Louisiana accent," and does a Radio Shack employee in New York know? Although one probably need not be an expert to opine that someone sounds like he comes from Louisiana, some foundation must be laid before a witness can offer such testimony. If the employee will testify that she had heard Louisiana accents before,[6] that may well suffice. Then again, perhaps the judge will reject the evidence as having so little probative value that it is a waste of time. *See* FRE 403.

9. ***Testimony by Parker Morphy.*** This evidence also poses a conditional relevance issue. If the Radio Shack employee testifies, then the relevance of Parker Morphy's background is obvious. If the Radio Shack employee's testimony is excluded, then Parker Morphy's background is not relevant, and the proposed testimony will be inadmissible. If one combines the Radio Shack testimony with evidence of Parker's background, one obtains fairly probative evidence. Depending on how many earpieces like this are sold and how many Louisiana accents are normally heard in New York, the evidence may strongly connect Morphy to the disputed earpiece and thereby undermine any suggestion by the defendants that Mrs. Capablanca is lying about how she found it.

---

[6] I realize that Louisiana is a diverse place, and folks from New Orleans often speak differently than Cajuns from Acadiana. In New York, however, the phrase "Louisiana accent" may assist the trier of fact.

Yes, it is possible that some other person with a Louisiana accent coincidentally bought an earpiece of the same make and model as the one found by Mrs. Capablanca—that is, that Parker Morphy had nothing to do with it. Indeed, in New York City, a store "located a few miles" from the tournament site is actually a good distance away. But this objection likely goes to weight rather than admissibility.

10. ***Testimony by Spassky.*** This evidence is similar to the proposed testimony by Carlson analyzed above at Item 5. The only real difference concerns the qualifications of the witness. Spassky is "a well-regarded coach of young chess players who is not himself an especially highly-ranked adult player." Perhaps that makes him more qualified than Carlson, who may not have much expertise on youth play. Then again, perhaps Spassky lacks the raw chess ability to evaluate play at the youth championship level. We don't have enough information to know. For the other factors that determine admissibility (*e.g.*, reliable methods under *Daubert*), students could save effort by referring to analysis already presented for Carlson.

11. ***Peter's teacher.*** This evidence is probably inadmissible "other acts" evidence. *See* Rule 404. The purpose of the evidence is to convince the jury that because Peter has written about kids using Morse code to communicate chess moves, he is more likely to have used some sort of electronic communication during the tournament to receive moves from his father. The problem for Capablanca is that propensity reasoning is not permitted here, meaning that the plaintiff must offer some sort of "around-the-box" theory for admissibility. The best would be that the story proves knowledge of how to send chess moves electronically. But this theory is pretty weak. First, writing about someone using Morse code is not the same as knowing Morse code. (I can tell my kids a story about astronauts flying to the Moon without knowing much about rockets.) Second, receiving moves through an earpiece is not exactly rocket science. The probative value of the "knowledge" theory is very low, and the danger of unfair prejudice seems high. (Note that there is no hearsay issue here. The story is not being offered for its truth. Indeed, it's "fictional.")

12. ***Testimony by Peter Morphy.*** This evidence is admissible. (*See* Item 4, *supra*.) Morphy is free to testify that he did not cheat, and the jury can decide whether to believe him. For an analysis of how his choice to testify could allow Capablanca to offer evidence of Morphy's dishonesty, *see* Item 7, *supra*.

13. ***General Notes on this Essay.*** Because this is not a criminal case, there are no Confrontation Clause or Compulsory Process Clause issues presented. Words spent addressing those constitutional provisions were wasted. Also, undue attention to authentication issues wasted time for many students. In general, there is no need to discuss authentication at length for an item whose authenticity cannot likely be challenged in a plausible way (*e.g.*, the notation sheet). Similarly, there is no need to

describe at length why a certain piece of evidence does not present a hearsay issue (*e.g.*, Capablanca's testimony about Morphy's behavior during the match).

14. ***Note on the names used in the fact pattern.*** The names are based on real people from the chess world: Paul Morphy (of New Orleans), José Capablanca (Cuba), Magnus Carlsen (Norway, current world champion), Bobby Fischer (of Brooklyn, won the world championship from Spassky), and Boris Spassky (Russia).

Question 2 [Colorado's Rule 606]

This question concerned *Peña-Rodriguez v. Colorado*, Case No. 15-606, in which the U.S. Supreme Court will consider a constitutional challenge to Colorado's equivalent of FRE 606(b). Many students answered something other than the question asked. To review, the question ended as follows:

> Colorado has a rule similar to FRE 606 that would render testimony about the events described above [involving racist statements by jurors] inadmissible if offered to challenge the verdict. Peña-Rodriguez says the rule violates his constitutional rights. Colorado says states may generally enact rules of evidence as they see fit and that the rule at issue in this case is perfectly legitimate.
>
> What do you think we should do? Why? Please address strong potential counterarguments.

Several students discussed how the Colorado rule should be interpreted, addressing in particular whether racist statements by jurors should fall within one the of the exceptions listed in Rule 606(b)(2), such as "an outside influence" or "extraneous prejudicial information." The problem with such analysis is that Mr. Peña-Rodriguez has already lost in state court, and the Supreme Court of Colorado has decided that the state's rule "would render testimony about the events described above inadmissible if offered to challenge the verdict." In other words, the top state court, which has final authority to interpret state law, has foreclosed all such arguments.

The sole issue presented is whether, as Mr. Peña-Rodriguez now argues, "the rule violates his constitutional rights" or instead, as Colorado argues, "the rule at issue in this case is perfectly legitimate." Good answers could support either side, so long as they took time to "address strong potential counterarguments."

Conveniently, the assigned casebook[7]—which students were permitted to consult during the exam—contains material directly relevant to this question. It appears on pages 17-19, after *Tanner v. United States* (1987). The book discusses cases in which some courts have held that a strict application of Rule 606(b) (similar to the decision in Colorado) violates the rights of defendants to

[7] GEORGE FISHER, EVIDENCE (3d ed. 2013).

due process and an impartial jury. It then discusses cases in which such constitutional arguments have been rejected. The arguments summarized on those pages were worth considering when deciding how to answer this exam question.

Plausible arguments in favor of Mr. Peña-Rodriguez include:

- The protections listed by Justice O'Connor in *Tanner* (*e.g.*, voir dire, observing jurors during the trial) do not prevent racism from infecting the jury room. Members of the venire panel will not admit racial bias during voir dire. Further, while one can in theory keep an eye out for drunk jurors, racist jurors are not as easy to spot. [Note potential counterargument: The arguments in *Tanner* don't really hold much water even for intoxication, but they were good enough to get a majority. Maybe jury secrecy is so important that the Court will accept bad arguments to protect it.]

- Racist statements in the jury room are especially pernicious and merit a stronger response than does the problem of juror intoxication. *See* U.S. CONST., amend XIV.

- Some states, such as Missouri, already allow evidence such as Mr. Peña-Rodriguez wishes to present, and it seems to work fine. None of the parade of horribles listed below (in favor Colorado's arguments) have come to pass. For example, there is no evidence of widespread harassment of Missouri jurors.

- What happened to Mr. Peña-Rodriguez is disgusting, and a decent justice system won't tolerate it. Affirming the conviction undermines respect for the court system and the rule of law more generally.

- Speaking of the rule of law, there is widespread discontent concerning the treatment of racial minorities by the justice system, and affirming the conviction here (a) sends a bad message and (b) is bad on the merits.

Plausible arguments in favor of Colorado include:

- *See Tanner*.

- Watch out for the slippery slope. Once we open the door to post-verdict evidence of racial bias, defendants will come with evidence of other forms of bigotry (*e.g.*, based on religion, gender, sexual orientation). [Note potential counterargument: If this slope is indeed slippery, is the bottom of the slope a bad place do be?]

- Allowing evidence such as Mr. Peña-Rodriguez wishes to present will create an incentive to harass jurors after they return guilty verdicts. This could make it difficult to convince citizens to serve on juries, which is already a problem.

- Allowing such evidence will deter jurors from speaking freely during deliberations. [Note potential counterargument: If it deters racist nonsense, is that so terrible?]

- Allowing such evidence will waste judicial resources because lots of defendants will demand hearings about alleged racist statements. It may also encourage perjury.

- Allowing such evidence will undermine "finality" by allowing cases to drag on and on.

- Jurors are smart enough not to be swayed by racist idiots.

- The jury system cannot survive an effort to perfect it. Jurors are randomly selected from the citizenry, and some citizens are racists. But we already tolerate lots of other biases in jurors (or at least don't allow post-verdict evidence about such biases). We need to trust jurors to follow instructions from judges to apply the law.

In addition to the recitation of arguments for and against a conclusion, grades for this question depended on the overall quality of argument (*e.g.*, organization, persuasiveness, grammar/usage).

Final comment: This document contains 3,497 words, including footnotes[8] (as well as comments about common mistakes and other items not appropriate for a real exam answer).[9] Students who budgeted words carefully should not have had too much trouble answering the questions in the allowable 3,000 words.

[8] It's 3,063 without footnotes.
[9] It becomes 2,824 words (including footnotes) if one excludes my introductory comments on page 1 and my "final comment" on this page.