



Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we're doing another in our "Listen and Learn" series. This one is on relevance – specifically, multiple uses for the same evidence, conditional relevance, and stipulations. 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: Hi, and welcome back to the "Listen and Learn" series! Today we are going to be talking about logical relevance, which is an often-tested issue on the MBE, the UBE, the California bar, and in law school Evidence essays. This is a somewhat unusual episode, in that we won't actually be discussing any new rules today. Instead, the goal of today's episode is to address some of the pitfalls that come up in Evidence questions involving relevance.

Lee Burgess: Because of the tricky nature of these issues, this episode will assume that you are already familiar with [the rules governing relevance](#), [character evidence](#), [hearsay](#), and impeachment. We also have prior episodes on all of these topics, and I recommend that you listen to those first to get the most out of our discussion today. We will link to those in the show notes.

Lee Burgess: So, let's get to it. As a brief reminder, evidence is logically relevant if it tends to make a fact of consequence more or less likely than it would be without the evidence. Relevance is a low bar, but it's an important first-step hurdle to get over when introducing any kind of evidence, whether that be a document, witness testimony, or a piece of physical evidence.

Lee Burgess: Pretty straight forward, right? Well, not necessarily. There are a number of issues that can make things more complicated. First, there can be multiple uses for the same evidence. While relevance is a hurdle that needs to be cleared, it's a bad idea to think about relevance only in those terms – in other words, as merely relevant or not relevant. Evidence can be relevant to one issue in the case, but not relevant to other issues in the case. More importantly, the same piece of evidence can be relevant to more than one issue in the same case. We'll see how that comes into play in today's first hypo.



- Lee Burgess: Second, the relevance of a particular piece of evidence can depend on the introduction of further evidence that has not yet been admitted. This is known as “conditional relevance” or evidence offered “subject to a connection”.
- Lee Burgess: Third, the relevance of a particular piece of evidence can depend on stipulations between the parties.
- Lee Burgess: There are no particular federal rules that govern these concepts. Rather, these concepts flow directly from the basic rule of logical relevance contained in Rule 403. As a result, the best way to go about understanding these concepts is to see how they apply in practice. So, let’s do that now with our first hypo:
- Lee Burgess: “A woman hired a contractor to refurnish her deck. As part of the refinishing service, the contractor inspected the framing under the deck. As soon as the contractor finished inspecting the deck, he sent the woman an email that read, ‘Just finished checking out your deck. We should schedule a time to fix your railing.’ The woman read the contractor’s email and came to inspect his work the following week. As the woman was looking over the deck, she saw the contractor working nearby and asked, ‘Is it safe to use my deck for a while?’ The contractor responded with a thumbs up.
- Lee Burgess: One month later, the woman invited several guests over for a barbecue on the deck. About an hour into the barbecue, part of the railing collapsed causing one of her guests to fall off the deck. The guest has sued the woman for damages for his injuries resulting from the fall.
- Lee Burgess: The guest has alleged that, (1) the woman knew that the railing needed repair; (2) it was negligent for the woman to have guests on the deck knowing that its railing needed to be repaired; and (3) the deck collapsed due to the defective railing.
- Lee Burgess: The guest has proffered an authenticated copy of the contractor’s email to the woman. The woman plans to testify that she asked the contractor, ‘Is it safe to use my deck for a while?’, and that he gave her a thumbs up in response.
- Lee Burgess: Analyze whether each of these items of evidence is relevant and admissible at trial:
1. The authenticated copy of the contractor’s email;
  2. The woman’s testimony that she asked the contractor, ‘Is it safe to use my deck for a while?’; and
  3. The woman’s testimony describing the contractor’s thumbs up.”



Lee Burgess: Alright, this question specifically asks us to address the relevance of these pieces of evidence. That makes issue-spotting this question somewhat easier. But it's important to remember that even if this question didn't specifically ask us to analyze relevance, you would still need to do so in order to determine what other evidentiary issues exist.

Lee Burgess: Let's start with the first piece of evidence – the contractor's email. The key to analyzing a relevance issue is to think about the evidence from the perspective of the party proffering the evidence. Ask yourself, "What do I need to prove in this case, and how does this evidence help me do that?" And remember, if this evidence is helpful to your case, you want to get this evidence in front of the jury any way you can. That means you need to think about every possible way you can introduce this evidence.

Lee Burgess: So, let's work through this together. If we're the guest's lawyers, what do we need to prove? Well, let's think carefully about what the guest is alleging. First, the guest is alleging that, (1) the woman knew that the railing needed repair; and (2) it was negligent for the woman to have guests on the deck knowing that its railing needed to be repaired. This is essentially the breach element of the guest's negligence claim.

Lee Burgess: Now that we've established what the guest is alleging, let's look at the evidence. Does the contractor's email make it either more or less likely that the woman knew that the railing needed repair? Yes. The contractor's email says, "We should schedule a time to fix your railing." That means that the woman received an email from the contractor that suggested that there was something wrong with the railing. That makes it more likely that the woman knew that the railing needed repair, and therefore was negligent when she invited guests onto her deck. Accordingly, the evidence is relevant.

Lee Burgess: Great, we've cleared our initial relevance hurdle, so now we can move on to other evidentiary issues, right? Not so fast! Just because we've technically cleared the hurdle, doesn't mean we're done with our relevance analysis. Before we move on to other issues, we need to think about whether there is any other use for this evidence. In other words, is there another fact of consequence that is made more or less likely by this evidence?

Lee Burgess: To figure that out, we need to go back to the guest's allegations. We know that the guest is also alleging that the deck collapsed due to the defective railing. This is the causation element of the guest's negligence claim. Clearly, for the defective railing to have caused the man's fall, the railing must have actually been defective. So that's what the guest needs to prove.



- Lee Burgess: Now let's look at the evidence. Does the contractor's email make it either more or less likely that the railing was defective? Yes. As we know, the contractor's email says, "We should schedule a time to fix your railing." That makes it more likely that the railing was in fact defective, and therefore was the cause of the man's fall. Accordingly, the evidence is relevant.
- Lee Burgess: Okay, at this point you might be thinking, "What's the big deal? The evidence is relevant either way, so let's just pick one of the relevant uses for the evidence and move on with our analysis." But that would be a huge mistake. To understand why, let's see how our analysis of the admissibility of the contractor's email unfolds.
- Lee Burgess: We established that the email is relevant to show that the woman knew the deck railing needed repair. But given that the email is an out-of-court statement, we would also need to determine whether the email is hearsay. Here, the email is not hearsay, because the contractor's statement is not being used for its truth. The statement "We should schedule a time to fix your railing" does not need to be true for the woman to be on notice that the railing needs repair. The woman knew the railing needed repair merely because she received the email.
- Lee Burgess: Therefore, if you analyzed the hearsay issue based only on the use of this statement to show the woman's knowledge, you would conclude that the statement is not hearsay. You would be right. Unfortunately, you would also miss more than half of the available points for this question. That's because the other use of this statement has completely different hearsay implications. If used to show that the railing was in fact defective, the contractor's statement actually needs to be true. In other words, he and the woman really did need to schedule a time to fix the railing. That means that the statement is hearsay if used for that purpose.
- Lee Burgess: As a result, we would need to examine whether any hearsay exceptions apply. We won't go too far into that right now, but it's likely that the contractor's email was a present sense impression, because it was sent "as soon as the contractor finished inspecting the deck." It's also arguably a business record. The point is that you would miss out on all of those hearsay issues if you didn't consider all the uses for this piece of evidence.
- Lee Burgess: Let's move on to the second and third pieces of evidence – the woman's testimony that she asked the contractor, "Is it safe to use my deck for a while?", and the woman's description of the contractor's thumbs up in response. Standing alone, neither piece of evidence seems to make any fact of consequence more or less likely. In other words, the evidence neither supports



nor undermines any of the guest's allegations. But what about if we consider both pieces of evidence together? Now the woman's question provides the context for the contractor's thumbs up, and vice versa. That's an example of conditional relevance. Neither piece of evidence is relevant on its own, but each piece of evidence is relevant if combined with a further piece of evidence. Specifically, taken together, these pieces of evidence will make it less likely that the woman knew that the railing needed repair. If the woman was told that her deck was safe to use, she had no reason to believe that it was defective. The evidence also makes it less likely that the railing was actually defective. If the deck was in fact safe to use for a while, then it wasn't defective, and therefore was likely not the cause of the guest's fall.

Lee Burgess: Now, we still need to consider the hearsay implications of both uses of this evidence. The woman's question doesn't present a hearsay problem because questions typically are not statements. The contractor's thumbs up, however, is an out-of-court statement because it was meant as an assertion. But is it being used for its truth? As with our first piece of evidence, the answer depends on why it is being introduced. If the statement is used to show that the woman believed the deck was safe, then it's not being used for its truth. It's the fact that the contractor gave her the thumbs up – not the truth of the thumbs up – that would cause the woman to believe her deck was safe. Accordingly, if used for that purpose, the evidence would be admissible non-hearsay. In contrast, if the statement is used to show that the deck was in fact safe, then the contractor's statement would need to be true. So if used for that purpose, the evidence would be inadmissible hearsay.

Lee Burgess: Okay, let's do one more that deals with some different evidentiary issues:

Lee Burgess: "Last year, the FBI raided an apartment shared by Defendant and two other roommates. After the FBI found several guns stashed in a closet, Defendant was arrested and charged with the federal crime of felony possession of a firearm by a convicted felon. To meet its burden, the prosecution must prove three elements: (1) the defendant knowingly possessed a firearm or ammunition; (2) the defendant had a previous felony conviction; and (3) the firearm traveled in or affected interstate commerce.

Lee Burgess: Before trial, the prosecution and defense stipulated that the defendant had a previous felony conviction. At trial, Defendant took the stand and admitted that the guns were found in the closet of his apartment, but denied that the guns belonged to him. Defendant further testified that the guns belonged to one of his roommates.



- Lee Burgess: On cross examination, the prosecution seeks to introduce evidence that the defendant was convicted of felony robbery five years ago after stealing two firearms from a sporting goods store. Both of the stolen firearms were recovered during the FBI raid of Defendant’s apartment.
- Lee Burgess: Defendant’s counsel objects to the admission of this evidence. Should the court admit this evidence?”
- Lee Burgess: Alright, as with our first hypo, let’s think about why the prosecutor might want to introduce this evidence. First, the prosecutor might want to introduce evidence of the defendant’s prior conviction to show that the defendant has committed crimes in the past, which makes it more likely that the defendant committed the crime for which he is currently being prosecuted. If you’re familiar with Rule 404, you know that that’s not going to work, because Rule 404 generally prohibits the admission of propensity evidence. In other words, evidence is not admissible to prove the defendant’s character in order to show that on a particular occasion the defendant acted in accordance with that character.
- Lee Burgess: So let’s keep going. Why else might our prosecutor want to introduce this evidence? Well, we know that our prosecutor has to prove that the defendant knowingly possessed a firearm. We also know that the defendant testified that the guns belonged to one of his roommates. That means that the defendant is disputing the identity of the perpetrator of the crime. To rebut that contention, the prosecutor would likely use the defendant’s prior conviction to show that the defendant previously stole the very firearms he is now accused of possessing. If used for that purpose, the evidence would likely be admissible under Rule 404(b)(2), which lists a number of permitted uses for evidence of other crimes, wrongs, or acts, including to prove identity. Moreover, Rule 405(b) permits the introduction of specific instances of conduct where a “person’s character or character trait is an essential element of a charge, claim, or defense.” Here, the prosecutor could arguably use this evidence to show that the defendant knowingly possessed the firearms, which is the first element of the crime.
- Lee Burgess: Now, even though we’ve established that the evidence is likely admissible under Rules 404(b)(2) and/or 405(b), we still need to consider any other potential uses for the evidence. One of the things our prosecutor has to prove is that the defendant had a prior felony conviction. Could the prosecutor introduce the evidence of Defendant’s prior conviction to satisfy that element as well? Normally, yes, under Rule 405(b). But the evidence still needs to be relevant, and it isn’t under the facts of this hypo. That’s because the parties already stipulated that the defendant had a previous felony conviction. Any time you



see a stipulation in a fact pattern, you should consider how it impacts the relevance of every piece of evidence. Remember, for evidence to be relevant, it needs to make a fact of consequence more or less likely. The result of the stipulation in this case is that the fact of the felony conviction is no longer of consequence. Therefore, it's not relevant if used for that purpose.

Lee Burgess: Okay, we're almost done. We just need to consider whether the evidence is relevant for impeachment purposes. If you listened to our episode on character evidence, you might recall that character evidence and impeachment often go hand in hand. A good way to think about it is that impeachment is a type of character evidence. Every witness that testifies places their character for truthfulness or untruthfulness at issue. Because the defendant testified in this case, his character for truthfulness is relevant. If used to attack the defendant's character for truthfulness, the prior conviction is admissible under Rule 609, because it is a felony conviction that's less than 10 years old, and its probative value is not substantially outweighed by a danger of unfair prejudice.

Lee Burgess: And with that, we're done for today. I hope these hypos have helped you appreciate the importance of fully thinking through the relevance of every piece of evidence in a given hypo. 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](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via our website [contact form](https://www.lawschooltoolbox.com/contact-form) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

#### **RESOURCES:**

[Podcast Episode 259: Listen and Learn – Relevance in Evidence](#)

[Podcast Episode 261: Listen and Learn – The Basics of Hearsay](#)

[Podcast Episode 281: Listen and Learn – Character Evidence](#)