

EVIDENCE

Fall 2022

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This course will examine the rules governing the admission, exclusion, and presentation of evidence in judicial proceedings. The focus of the course readings and discussion will be on the Federal Rules of Evidence.

Course Learning Outcomes

By the end of the semester, you should be able to:

1. Use and apply the Federal Rules of Evidence.

You will learn the substance and application of the Federal Rules of Evidence. You will refine skills identifying legally significant facts and applying relevant rules, including synthesizing multiple relevant rules in a single problem.

2. Recognize and become familiar with lawyering roles and relationships.

The lawyering role and important lawyering relationships are important to resolving evidentiary issues. Thus, you will learn to apply the rules of evidence in conjunction with how lawyers deal with clients, witnesses, judges, and jurors in a trial setting.

3. Bar exam preparedness and skills.

You will practice strategies to answer Bar-style multiple-choice questions, including managing time effectively.

Required Reading:

1. Learning Evidence: From the Federal Rules to the Courtroom, 5th Edition, 2022, Deborah Jones Merritt & Ric Simmons (“M&S”).

This textbook comes with an online eBook and digital resources (see inside the front cover of the textbook for registration instructions on West Academic). If you have a used textbook, you should purchase the digital resources by following [this link](#). It is important that you sign up for the digital resources right away, as I assign some of these materials to supplement your textbook reading.

2. Federal Rules of Evidence (“FRE”). Although the textbook contains an appendix with the Rules for quick reference, **you will need the latest version of the FRE that includes the Advisory Committee’s Notes**. Please make sure you bring to class an annotated copy of the rules assigned for that class.
3. Evidence Lab Packet (posted on Canvas).

Recommended Reading:

1. Goode, S & O. Willborn, *Courtroom Evidence Handbook, Student Edition 2021-2022*, West Academic 2021.
2. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 Minn. L. Rev. 2243 (2017). (Available on Canvas)

Lab:

This course has a mandatory lab component, which accounts for 20% of your grade. Please make sure you leave room in your schedule to register for one of the available lab sessions. If you have questions about enrollment in the lab, please contact the Registrar, Maureen Moriarty.

Class Meeting Time:

- Monday , Wednesday, Friday at 9:55-11:10 in Oakes 110
- **After the Midterm on Friday, October 7, we will drop Monday classes and meet only on Wednesdays and Fridays.**
- Labs meet separately.

Teaching Assistants:

This is a large class and we want to answer all of your questions. We are fortunate to have an excellent teaching assistant for this course. **While I am always happy to speak with you, I recommend that you start by seeking the help of a TA in order to get to everyone efficiently.** Do not feel shy about reaching out to the TAs for help. TAs will hold regular office hours as well as conduct review sessions throughout the semester (dates TBA) to help you master sets of topics and prepare for the midterm, hearsay test, and final exam. You are strongly encouraged to attend the review sessions and to send questions to the TAs in advance. Our TAs are:

James Brien

TA Office Hours: TBA.

Prof. Donnelly Office Hours: Mondays 2-3pm; Thursdays 11:30-12:30; by appointment

Course expectations:

Students must be prepared for class, be prompt in attendance, and be professional in all interactions. (See below under grading policy for additional information.) This is a four-credit course covering a topic that is on the Bar Exam. There is thus a significant amount of material to cover, and you should expect to dedicate significant time to reading and assignments.

Participation:

Class attendance is required, and I will maintain detailed attendance records. Absences will affect your grade. Unexcused absences from three classes will result in a written warning and a significant deduction from your final grade. Unexcused absence from seven classes will result in an automatic grade of FwD. (See Academic Regulations II.A.1.b.). Make-up classes that are scheduled outside of our regular class meeting time will not be counted for purposes of calculating your attendance history.

Absences resulting from religious observance, serious illness, and personal emergency are excused if notice is given to the Professor within a reasonable time (the same day if possible) of the absence.

However, informing the Professor of anticipated absences does not automatically convert those absences into “excused” absences unless the aforementioned criteria are met and approved by the Professor. Excused absences may affect your grade if they are excessive because you are not present and cannot contribute to class discussion.

Unexcused absences may affect your grade even if they do not exceed three regularly scheduled classes. Unexcused absences are to be used for job interviews, attendance at conferences, and similar activities. If you inform the Professor of the reason for your absence by email either before or shortly after your absence and the Professor deems your reason sufficient, that unexcused absence will not affect your Professionalism grade. Again, informing the Professor of the reason for your absence does not convert your absence into an excused absence.

Being late for class may be treated as an unexcused absence if you are significantly or frequently late. Leaving in the middle of class will also negatively affect your grade. Class begins promptly at 9:55 A.M. If an emergency or other valid reason causes you to be late, let the Professor know.

You are expected to be prepared and to participate in class when called on. I will cold call frequently. If you are not prepared, please pass. However, passing can have a detrimental effect on your grade, so preparation for class is essential. Class participation is measured primarily by its meaningfulness and utility to the classroom discussion. While frequency of participation matters, it is the substance of your contribution that matters more.

You are not expected to fully understand the material completely before class. If you have prepared, you should participate. I will not embarrass you if you are confused or get an answer wrong. If you are uncertain, you are expected to ask questions when you do not understand. You can ask questions during class, after class, during office hours or appointments with the TAs or with me, and by email.

Respect, Civility, and Understanding:

You are expected to show respect for me, your lab instructors, and your classmates. Please raise your hand to be called on and do not engage in side conversations or make comments about the contributions of your classmates. Please respect the differing contributions of other students. If you are a frequent contributor to class discussion, you might not always be called on to speak.

A Note on Difficult Topics:

By necessity, the topics covered in this course will be uncomfortable at times. For instance, we will read about and discuss cases and hypotheticals involving murder, sexual crimes, child abuse, and other violent acts that may disturb you or your classmates. The criminal justice system in the United States disproportionately impacts BIPOC communities, and we will discuss that and how race intersects with Evidence law.

Please maintain an awareness of the possibility that any of the topics covered in our discussions could potentially be sensitive for your classmates, even if they may not be challenging for you specifically, and you should thus be mindful of your classmates’ experiences and perspectives. We are all responsible for working at maintaining an environment that facilitates learning.

If you are incapacitated by discomfort over a topic, you are welcome to let me or Dean Brennan know so that we can try to find a workable solution. Keep in mind, however, that Evidence is covered on the Bar, and so a full understanding of the issues covered in this class is critical.

Electronics:

Computers, cell phones, and electronic devices are an enormous help in our daily lives but also an enormous distraction. Please refrain from engaging in other activities on your computers, phones, and other electronic devices while in class. It is fairly obvious whether you are taking notes and engaged in class or are absorbed by some other distraction like email, social media, etc. The latter is a discourtesy to me and your classmates, and I will address it in your participation score.

Grading:

20% of the course grade will be based on a midterm exam, 10% on a hearsay test, and 40% on a final exam (testing all topics covered in the course). Lab performance will account for 20% of the grade. Professionalism counts for 10% of your grade and will be based on attendance, class preparation and participation, assignment and quiz completion, civility, respect, and meeting all course obligations.

Assignments:

The reading assignments must be completed before attending class. The assignments listed as “M&S” reference chapters from the Merritt & Simmons text (“M&S”). The Rules listed as FRE [#] refer to the Federal Evidence Rule. In addition to the text reading, reading the rules and associated committee notes is required (and essential). Reading the committee notes is required because they provide important context and explanation of the rules. From time to time, I will assign additional readings or exercises and post them on the Canvas course site.

I will frequently assign quizzes to help you integrate your learning after doing the reading. The quizzes are to be done *after* class to assess your comprehension of the topic. Your quiz *scores* will not count toward your final grade, but your *completion* of the quizzes will count toward the participation portion of your final grade. The quizzes will be available through the eBook and digital resources that come with the M&S textbook (see information in the above Required Reading section). In general, the M&S digital resources are incredibly useful and include: multiple-choice quizzes, simulations, additional video mini-classes, study aids, and practice exam questions.

Some assignments may also be paired with problems that will be available on the Canvas course site. Other assignments are group assignments that we will solve in class.

The syllabus may be updated periodically. You will always be able to find the most up-to-date syllabus on the Canvas course site.

There is a course code for the online quizzes that accompany Learning Evidence: From the Federal Rules to the Courtroom. To redeem the course code and connect your quizzes so that I can see them (and give you credit), follow these steps:

1. Go to eproducts.westacademic.com
2. Sign in or create an account.
3. Click to open Learning Evidence: From the Federal Rules to the Courtroom from your bookshelf.
4. Click the Enroll in a Course button and enter this course code:

CRSE-KSEW-CDR1-7DYD-MHWF

5. If you don't see a picture of Learning Evidence: From the Federal Rules to the Courtroom on your bookshelf when you log on to eproducts.westacademic.com, perform either of the following:
 - o Click the Redeem Code button on the My Bookshelf page and enter the code that came with the casebook. Next, redeem your code.
 - o If you did not purchase a new book with a code, you can go to store.westacademic.com and purchase either the eBook/Learning Library or the Learning Library option for your casebook.

For help you can contact us at 1-877-888-1330 (option 4) or support@westacademic.com.

The schedule of assignments is as follows:

	TOPICS	READING
	Rules of Evidence in Context; Relevance	
1	<u>Monday, August 29</u> Types of Evidence; Raising and Resolving Objections. Intro to Relevance.	M&S Chapters 1-5 M&S c.5 quiz FRE 101, 103, 105 Sign up for the Evidence Canvas page before the first day of class. If you have difficulty accessing the Canvas page, please email Molly Russell (MRussell@vermontlaw.edu).
2	<u>Wednesday, August 31</u> Relevance - Balancing probative value against prejudicial effect.	M&S 6 M&S c.6 quiz FRE 401, 402 David M. Tanovich, <i>Safeguarding trials from racial bias</i> , Policy Options, Institute for Research on Public Policy, October 2, 2018. (Available on Canvas)
3	<u>Friday, September 2</u> Relevance - Balancing probative value against prejudicial effect. (cont.)	M&S 7, 8 M&S c.7 quiz FRE 403
	<u>Monday, September 5</u> <u>Labor Day. No Class</u>	

4	<u>Wednesday, September 7</u> Subsequent Remedial Measures; Liability Insurance	M&S 9,13 M&S c.9, 13 quizzes FRE 407, 411
5	<u>Friday, September 9</u> Medical Expenses; Settlements and Offers to Compromise	M&S 10, 11, 12 M&S c. 10, 11, 12 quizzes FRE 408, 409, 410
Reliability of Documentary and Physical Evidence		
6	<u>Monday, September 12</u> Authentication; Best Evidence	M&S 69, 70 M&S 69, 70 quizzes FRE 901, 902, Article X (1001-1008) Read: Flint Water Crisis Pre-Class Materials Bring to class (but don't need to read before class): Flint Water Crisis Exercise
Witnesses		
7	<u>Wednesday, September 14</u> Witness Examination; Refreshing Recollection	M&S 14,15 (pages 183-195, 200-204 only), 16 M&S c.15, 16 quizzes FRE 601, 602, 603, 605, 606(a), 611, 612
8	<u>Friday, September 16</u> Impeachment; Prior Statements	M&S 17, 18 M&S c.18 quiz FRE 607, 613
9	<u>Monday, September 19</u> Examining the witness' character for truthfulness or untruthfulness	M&S 19 FRE 608
10	<u>Wednesday, September 21</u> Impeachment with Criminal Convictions	M&S 20 M&S c.20 quiz FRE 609 <i>Sampsell-Jones, Implicit Stereotyping as Unfair Prejudice in Evidence Law, 83:1 University of Chicago Law Review Online Art. 15 (2016). (Available on Canvas)</i>

11	<u>Friday, September 23</u> Character witness: Reputation, and Opinion Evidence of Untruthful character.	M&S 21, 22 M&S c.22 quiz FRE 608
	Character Evidence	
LAB 1	Week 9/26-9/30 Authentication <i>Buyer v. Seller</i>	
12	<u>Monday, September 26</u> Character Evidence / Propensity in Criminal Cases	M&S 27-29 FRE 404(a); 405(a) Mikah K. Thompson, <i>Blackness as Character Evidence</i> , 20 Mich. J. Race & L. 321 (2015). (Available on Canvas)
13	<u>Wednesday, September 28</u> Crimes, Wrongs, or Other cts.	M&S 30 M&S c.30 quiz FRE 404(b), 403 Child Abuse Motion and DV Motion (Available on Canvas) Jasmine B. Gonzales Rose, <i>Racial Character Evidence in Police Killing Cases</i> , 2018 Wisc. L. Rev. 369 (2018). (Available on Canvas)
	<u>Midterm Review: Wednesday September 28: 6-730pm. Oakes 110</u>	
14	<u>Friday, September 30</u> Crimes, Wrongs, or Other Acts (cont.); Habit	M&S 31 M&S c.31 quiz FRE 406
15	<u>Monday, October 3</u> Rape Shield; Sexual Assault Propensity	M&S 32-33 M&S c.32, 33 quizzes FRE 412-15
16	<u>Wednesday, October 5</u> Midterm Review	FRE 101, 103, 105, 401, 402, 403, 404, 405, 407, 408, 409, 410, 411, , , 601, 602, 603, 605, 606(a), 611, 612, 607, 613, 608, 901, 902, 1001-1008

16	<u>Friday, October 7</u> Midterm (in person)	
	FALL RECESS, Monday, OCTOBER 10 – NO CLASS	
	Hearsay	
17	<u>Wednesday, October 12</u> Hearsay (intro) Truth of the Matter Asserted; Hearsay Statements	M&S 35, 36 M&S c.36 quiz FRE 801 (a)-(c)
19	<u>Friday, October 14</u> Hearsay intro (cont.) Truth of the Matter. What is “out of court.” What is a Statement.	M&S 36, 37 M&S c.37 quiz
LAB 2	Week 10/17-10/21 Relevance, Personal Knowledge <i>Johnson v. Grand Union</i>	
20	<u>Wednesday Oct 19</u> Admissible Hearsay: Prior Statements by Witnesses	M&S 38-39 M&S c.39 quiz FRE 801, 801(d)(1)
21	<u>Friday, October 21</u> Statements by Opposing Party; Multiple parties	M&S 53, 54 M&S c.53 quiz FRE 801(d)(2)
LAB 3	Week 10/24-10/28 Impeachment <i>State v. Dixon</i>	
22	<u>Wednesday, October 26</u> Co-conspirators	M&S 55 M&S c.55 quiz FRE 801 (d)(2)
22	<u>Friday, October 28</u> Hearsay Exceptions: Present Sense Impressions; Excited Utterances; State of Mind	M&S 40, 41 M&S c.40, 41 quizzes FRE 803(1), (2), (3)

LAB 4	Week 10/31-11/4 Character Evidence <i>State v. Day</i>	
24	<u>Wednesday, November 2</u> – Will be Held even though School is following Monday schedule Medical Treatment; Recorded Recollection	M&S 42, 43 M&S c.42, 43 quizzes FRE 803(4), (5)
25	<u>Friday, November 4</u> Multiple Levels of Hearsay; Business Records	M&S 44, 45 M&S c.45 quiz FRE 803 (6), 805
LAB 5	Week 11/7-11/11 Hearsay & Non-Hearsay <i>State v. Crowe</i>	
26	<u>Wednesday, November 9</u> Unavailability; Former Testimony	M&S 48, 49 M&S c. 49 quiz FRE 804(b)(1)
27	<u>Friday, November 11</u> Dying Declarations; Statements Against Interest; Forfeiture	M&S 50-51, 52 (p.659-661 only) M&S c.50, 51 quizzes FRE 804(b)(2-3) and (6)
LAB 6	Week 11/14-11/18 Refreshing Recollection & Recorded Recollection <i>Adam v. Schrackle</i>	
28	<u>Wednesday, November 16</u> Hearsay Review	M&S 36 (re-read) Go over prior M&S hearsay quizzes
29	<u>Friday, November 18</u> Confrontation Clause	M&S 58 M&S c.58 quiz
	Take Home Hearsay Test. Must be completed in a one-hour window between 12 AM on 11/18 and 11:59 PM on 11/21.	
	Expert Opinions and Lay Opinions	

30	<u>Wednesday, November 23</u> Expert Opinions; Expert Qualifications	M&S 60-61 M&S c.60, 61 quizzes FRE 201, 701, 702
THANKSGIVING BREAK – Friday NOVEMBER 25, NO CLASS		
LAB 7	Week 11/28-12/2 Business Records; Multiple Levels of Hearsay <i>Student v. Hulk</i>	
31	<u>Wednesday, November 30</u> Bases of Opinions; Confrontation Clause and Expert Testimony	M&S 62-63 M&S c.62, 63 quizzes FRE 702-705 Read: Koniov Expert Opinion, posted on Canvas
32	<u>Friday, December 2</u> Limitations on Opinion and Expert Testimony	M&S 64 M&S c.64 quiz FRE 701, 702, 704, 403
Privileges		
LAB 8	Week 12/6-12/10 Expert testimony and Character Evidence in Sex Crimes Cases <i>State v. Victor</i>	
33	<u>Wednesday, December 7</u> Attorney-Client Privilege	M&S 66-67 M&S c.67 quiz FRE 501
34	<u>Friday, December 9</u> Other Privileges	M&S 68 M&S c.68 quiz
Reading Period: Monday December 13-Tuesday December 14		
Final Exam (in person)		December 21, 9:30 AM - 12:30 PM, Oakes 07 and 012 (admins will help you be seated before exam starts). See Registrar for accommodations.

