



TEXAS SOUTHERN UNIVERSITY
THURGOOD MARSHALL SCHOOL *of* LAW

EVIDENCE
LAW 600 / SECTION 2
FALL 2017
PROFESSOR ANA M. OTERO

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THE PROFESSOR

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LOCATION: Room 236A

OFFICE HOURS: Monday, Wednesday, and Friday: 12:00 pm to 4:00 pm.

If you require a special appointment, please call or email to make proper arrangements.

MY TEACHING PHILOSOPHY:

My teaching philosophy has evolved during my thirty years of teaching in the legal profession. It is partly grounded on the words of the Lebanese poet, Khalil Gibran: *“The teacher who is indeed wise does not bid you to enter the house of his wisdom but rather leads you to the threshold of your mind.”*

I am thoughtful and passionate about my teaching. I teach by example, so I strive to be diligently prepared and to challenge students to excel. I am mindful that each student learns differently, so my teaching style evolves to meet the needs of my students. I believe that repetition and reinforcement of the legal concepts are pivotal in learning the law, so I provide different teaching tools to accomplish this goal. Above all, I strive to ensure that students fully understand the foundational principles so that their learning is meaningful and effective.

As I reflect on my years of teaching, I find that my mission is rooted on three principles: to spark enthusiasm for learning, to create a positive learning environment, and to infuse professionalism and compassion in my students.

Through the years, I have learned much from my students. I am humbled by their determination to succeed and their dedication to the task. I care about my students, and I believe that each of them can become a successful lawyer. But being a lawyer is a huge responsibility and I strive to ensure that my students will be ethical and competent practitioners.

COURSE BOOKS & MATERIAL

1. Best, Arthur. *Evidence. Practice, Problems, and Rules*. Wolters Kluwer Law & Business, 2017.
2. Federal Rules of Evidence. (Any source, but it must contain the Committee's Advisory Notes. Latest edition).

Suggested Supplements:

1. Steven Goode, Olin Guy Wellborn III, *Courtroom Evidence Handbook, 2013-2014* Student Edition (West).
2. *McCormick on Evidence*, 6th ed. (Thomson West).
3. Weinstein, Berger. *Weinstein's Evidence Manual* Student Edition, 8th ed. (LexisNexis).

Please note that failure to have your books and be prepared will count against your grade.

COURSE DESCRIPTION & OBJECTIVE

DESCRIPTION:

Evidence is a three-credit course which covers the Federal Rules of Evidence and their application in both civil and criminal litigation. The Federal Rules of Evidence will be tested on the Multistate Bar Exam as offered in all jurisdictions. In Texas, however, the rules of evidence are also tested in a state-specific exam that tests Texas civil, criminal procedure, and evidence. Accordingly, I will point out the distinctions as we move through the materials, and will also provide a workshop on the differences between the Federal and Texas rules.

Evidence law may be divided into three categories: 1) rules governing the substantive content of evidence, 2) rules governing witnesses, and 3) substitutes for evidence. (Paul C. Gianelli, *Understanding Evidence*, Third Edition, LexisNexis)

I. Rules Governing the Content of Evidence

- A. Relevance Rules
 - 1. Character Evidence
 - 2. Other-acts evidence
 - 3. Habit evidence
 - 4. Insurance evidence

- B. Competence Rules
 - 1. Rules Based on Reliability Concerns
 - a. Hearsay rule
 - b. “Best Evidence” rule

 - 2. Rules Based on External Policies
 - a. Privileges (e.g. attorney-client)
 - b. Quasi privileges
 - (1) Subsequent remedial measures
 - (2) Offers of compromise
 - (3) Payment of medical expenses

II. Rules Governing Witnesses

- A. Competence of Witnesses

- B. Examination of Witnesses

1. Order of examination (direct, cross, redirect, recross)
2. Leading questions
3. Refreshing recollections

C. Types of Witnesses

1. Lay Witnesses
 - a. Firsthand knowledge rule
 - b. Opinion rule
2. Expert Witnesses
 - a. Subject matter requirement
 - b. Qualifications requirement
 - c. Bases of expert opinions

D. Credibility of witnesses

1. Bolstering
2. Impeachment
 - a. Bias
 - b. Untruthful character
 - c. Sensory or mental defect
 - d. Prior inconsistent statements
 - e. Specific contradiction
3. Rehabilitation

III. Substitutes for evidence

- A. Judicial notice of fact
- B. Stipulations

OBJECTIVE:

This class will cover these three categories of evidence by carefully examining the Federal Rules of Evidence, reading case law interpreting the rules, and practicing specific problems testing the application of the rules in the context of complex factual scenarios. As you will progress through the course, you will quickly notice that reading the evidence rules is not a difficult task, applying the rules to the process of litigation and, particularly, the trial stage, is a more challenging and oftentimes daunting process. But it is precisely during the “difficult” tasks of studying evidence law that you will find the most intellectual challenge.

STUDENT LEARNING OUTCOMES

The evidence class involves aspects of theory and practice. The evidence rules are designed to be used, not studied in the abstract. Most of the class time will be spent providing students with the opportunity to practice using the rules to accomplish an adversarial goal. These exercises will provide students with a solid background in the basic trial rules and their complex application.

As a result of taking this course, students will be able to do the following:

1. Demonstrate an understanding of the litigation process, and the role the evidence rules play in that process.
2. Demonstrate a working knowledge of the rules of evidence and the underlying rationale for each rule.
3. Analyze and apply the rules on the admissibility of evidence at trial and the role of the judiciary in both civil and criminal trials.
4. Compare and contrast the historical development of the rules of evidence and their effect on the modern rules of evidence.
5. Compare and contrast the Federal Rules of Evidence with the Texas Rules of Evidence.
6. Develop critical thinking and improve verbal and written communication skills through the identification, interpretation, discussion and briefing (written summary) of a variety of evidentiary issues from actual criminal and civil court cases.

In addition, please see the student learning outcomes at the end of each topic.

GRADING

There will be a number of in-class, closed-book quizzes (only rule book allowed) throughout the term, a midterm, and a cumulative comprehensive final examination including the Federal Rules of Evidence. The final letter grade is based on the following:

Quizzes (In-Class. Will drop lowest grade)	20%
Midterm	30%
Final (Cumulative)	40%
Class participation (Includes TWEN quizzes)	10%

TWEN Quizzes: There will be a number of quizzes posted on TWEN during the semester. **These will be announced in class and posted on the TWEN calendar. Quizzes are mandatory.** Please check the calendar regularly. Points earned count towards the 10% class participation portion of the grade.

Open-Rules: For in-class quizzes, open rules may apply. "Open rules" means that you may only have with you during the examinations your own Federal Rules of Evidence supplement. No substitutions will be allowed. Your supplement may be annotated with *handwritten* notes, but shall not have any attachments other than tabs to mark the location of specific material (the tabs may have on them numbers and the short titles of the referenced material and nothing more). Only handwriting may cover the blank spaces and the original printing on the supplement. The use of stick-on labels or paper, white-out or any other method to eliminate any of the original printing is prohibited. Other than the addition of handwritten notes and tabs, the supplement shall be in its original condition, no material may be added nor may any material be removed in any way.

Violations of the Thurgood Marshall School of Law Honor Code or of the exam rules should be reported to me before or during the examination. Violation of these rules shall result in a failing grade and in my referring the matter to the pertinent university or law school authorities.

Open rules policy does not apply to either the midterm or the final. These two exams will be closed-book.

TWEN

I use TWEN extensively to post course materials, handouts, class announcements, e-mail, and the mandatory quizzes. **Please sign up accordingly.**

To use TWEN, you need a WESTLAW password and access to the WEB. Whenever you access TWEN, make sure to have the technical support number available so you can contact them with any problems you may have. That number is 1.800.486.4876.

I will send reminders, class follow-ups and notifications by email through TWEN. Please check your email regularly.

ACCOMMODATIONS

Accommodations/Excused from Graded Quizzes or Tests, etc.

An “accommodation” is defined for these purposes as any student request for deviation from the time, date, or circumstances under which scheduled graded assignments are administered. Students must apply to and be granted WRITTEN accommodation by the DEAN’S OFFICE if he/she will not be in attendance for any graded assignment or test (e.g., graded quiz and midterm/final exams). Once granted, the professor must receive official confirmation from the DEAN’S OFFICE of any ALTERNATIVE DATES or accommodated changes that have been granted to the student. All requests for ACCOMMODATIONS must be handled by the Dean’s office rather than by the professor. ORAL CONVERSATIONS made with EITHER the professor or the DEAN’S OFFICE, ARE NOT BINDING.

Students requesting accommodations may do so through the Office of Student Affairs.

ATTENDANCE, PARTICIPATION, AND PROFESSIONALISM

ATTENDANCE

Class attendance is mandatory. (See Students Rules of Matriculation for details on absences and grade reductions.) You should be at your seat when class begins at 1:00 pm.

NO PERMISSION TO LEAVE THE CLASSROOM AFTER LECTURE BEGINS

Certainly, extenuating circumstances and emergencies occur that warrant leaving the classroom during a 50 minute time period. When such circumstances occur, feel free to notify me in advance, or provide justification for leaving if an emergency occurs.

TARDINESS NOT PERMITTED –NO CLASS ADMISSION

Tardiness will **not** be permitted. Tardiness is determined based on the classroom clock, or if none is present, then Professor's watch. Unless you have received permission from me to be late, you will not be allowed to enter the classroom after I have completed calling the roll. If you come into the classroom while the roll is being taken but your name has already been called, you will be marked absent.

CLASS PARTICIPATION

Class participation is mandatory. Cases will be specifically assigned before class.

PROFESSIONALISM

Naturally, you are bound by the Thurgood Marshall School of Law Student Rules and Regulations of Texas Southern University (available at <http://www.tsulaw.edu/life/rr0910.pdf>), Thurgood Marshall School of Law's Honor Code, and my rules. But more important than adhering to the rules, professionalism implies a respect and courtesy for others in the classroom. In keeping with the professional school environment, students should remember to respect their fellow classmates and the Professor at all times. Please refrain from side conversations or other distracting conduct. Also, please refrain from coming to class late or departing during class instruction. It can be very disruptive. Unless there is an emergency, I do not expect anyone to leave the classroom during class. I expect all students to maintain the highest standards of professionalism in the classroom, in the university community, and in related public settings. All that you do and say, and the way you present yourself visually either elevates or diminishes your professional image in the eyes of others. In addition, what each of us does effects the way all of us are viewed.

ACADEMIC CALENDAR



THURGOOD MARSHALL SCHOOL OF LAW

TEXAS SOUTHERN UNIVERSITY
ACADEMIC CALENDAR 2017 – 2018

FALL SEMESTER 2017 (SEVENTY DAYS OF CLASSES)

Orientation	Monday-Friday	August 14-18, 2017
First Day of Class	Monday	August 21, 2017
Last Day to ADD/DROP	Friday	August 25, 2017
Labor Day (NO CLASSES)	Monday	September 4, 2017
<i>Purge of all unpaid course selections</i>	Thursday	September 20, 2017
Mid Term Examinations	Mon – Fri	October 16-20, 2017
VETERANS DAY (NO CLASSES)	Friday	November 10, 2017 (tentative)
Thanksgiving Holiday	Thurs – Fri	November 23-24, 2017
Last Day of Classes	Thursday	November 30, 2017
Last Day to Drop a Class	Thursday	November 30, 2017
First Year Professors' Grades due	Thursday	November 30, 2017
Reading Period (NO CLASS)	Friday - Sunday	December 1-3, 2017
Final Examinations	Mon – Fri	December 4 - Dec. 15, 2017
Commencement	Saturday	December 16, 2017

SPRING SEMESTER 2018 (SEVENTY DAYS OF CLASSES)

School Opens	Tuesday	January 2, 2018
First Day of Class	Monday	January 8, 2018
Last Day to ADD/DROP	Friday	January 12, 2018
M L K Holiday (No Classes)	Monday	January 15, 2018
<i>Purge of all unpaid course selections</i>	Wednesday	February 7, 2018
President's Day Holiday (No Classes)	Monday	February 19, 2018
Mid Term Examinations	Mon – Fri	March 5– 9, 2018
Spring Break	Mon – Fri	March 12 – 16, 2018
Good Friday (No Classes)	Friday	March 30, 2018
Last Day of Classes	Wednesday	April 25, 2018
Last Day to Drop a Class	Wednesday	April 25, 2018
First Year Professors' Grades due	Wednesday	April 25, 2018
Reading Period (No Classes)	Thur. – Sun	April 26 - 29, 2018
Final Examinations	Mon- Fri	April 30 – May 11, 2018
Hooding Ceremony	Friday	May 11, 2018
Commencement	Saturday	May 12, 2018

Please note that the calendar events and /or dates are subject to change.

TMSLAW REGISTRAR
Approved 5/31/2017

POLICIES & PROCEDURES

NO LAPTOPS IN THE CLASSROOM

A 2006 study conducted by Winona State University found a negative relationship between laptop use and student learning. “Recently, a debate has begun over whether in-class laptops aid or hinder learning. While some research demonstrates that laptops can be an important learning tool, anecdotal evidence suggests more and more faculty are banning laptops from their classrooms because of perceptions that they distract students and detract from learning. The current research examines the nature of in-class laptop use in a large lecture course and how that use is related to student learning. Students completed weekly surveys of attendance, laptop use, and aspects of the classroom environment. Results showed that students who used laptops in class spent considerable time multitasking and that the laptop use posed a significant distraction to users and fellow students. Most importantly, the level of laptop use was negatively related to several measures of student learning, including self-reported understanding of course material and overall course performance.”

NO CELL PHONES IN THE CLASSROOM

The use of cell phones in the classroom during class is strictly prohibited.

NO MAKE-UP FOR IN-CLASS QUIZZES

There will be a number of in-class quizzes. I will drop the lowest grade. Unless you have a family or medical emergency, or a justifiable excuse, I will not allow making up a missed quiz. Please let me know about any emergencies immediately. However, since I will drop the lowest grade from these quizzes, the missed quiz will be the grade I will drop.

CAMPUS CARRY POLICY

As you know, the State of Texas has recently passed legislation permitting you to carry a *concealed* firearm on campus if you have a concealed license permit recognized by the State of Texas, subject to the rules and regulations of Texas Southern University's ("TSU's) Campus Carry Policy.

Under TSU's Campus Carry Policy, ***I have the right to designate my office as a gun-free zone. I have elected to make my office a firearm-free space.***

Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun. (Conforme a la seccìon 30.06 Del Còdigo Penal (traspasar portando armas de fuego con licencia), personas con licencia bajo del sub-capitulo 411, Còdigo Del Gobierno (ley de portar armas), no deben entrar a esta propiedad portando un arma de fuego ocultada.).

For a complete list of the gun-free zones on this campus and the rules governing campus carry at our institution, please visit Texas Southern University's website at <http://www.tsu.edu/police/campus-carry.php>. Please note that entering a gun-free zone on campus with a firearm, including inside my office, could not only lead to not only criminal prosecution, but also suspension or expulsion from school.

READING ASSIGNMENTS

Text-book problems:

Please note that there are a number of problems from the text book that have been assigned for class discussion. Read these carefully.

Date

Assignment

Week 1

8-21

- ▶ **Introduction to Evidence.**
Overview and review of Article I: FRE 101-106. Power Point presentation, and walkthrough covering preliminary concepts of evidence law.
- ▶ **Chapter 1 – Relevance: A. Introduction to Evidence Law, pp. 1-2**

▶ **After Chapter 1, you will be able to:**

- 1) Understand the several well-established meanings of the term “evidence,” and the various types of evidence used during the litigation process.
- 2) Understand pretrial practice and procedure including the seven stages of litigation: investigative, pleading, discovery, pre-trial, trial, post-trial, and appeal.
- 3) Understand the role played by evidence law in each of these stages.
- 4) Understand the different responsibilities of the judge, the attorneys, and the jury during a trial, and how the evidence rules play a significant role in the division of these duties.
- 5) **You will be able to answer the following questions:**
 - a. How do the rules of evidence affect the conduct of a lawsuit?
 - b. What role does evidence play at trial?
 - c. How is the judge the “gatekeeper” of the evidence admitted at trial?
 - d. How can attorneys satisfy their dual roles of representing their clients zealously and serving as officers of the court?
 - e. How do attorneys preserve error for appeal?
 - f. Why is the jury described as the “judge of the facts?”
 - g. Is it important for jurors to evaluate the credibility of evidence?

Week 2

8-28

- ▶ **Continue Chapter 1 – B. Introduction to Relevance, pp. 2-45.**
Review FRE 104, 401, 402.
- ▶ **Review Articles 2 and sections of Article 4.**

Cases

- Supreme Pork, Inc. p. 6
- Kaechele v. Kenyon Oil, p. 12
- United States v. Dillon, p. 17
- Lovick v. Wil-Rich, p. 21
- Spino v. John S. Tilley Ladder, p. 24
- Aloï v. Union Pacific Railroad, p. 28
- Old Chief v. United States, p. 38

► **After Chapter 1, you will be able to compare prejudicial evidence and unfairly prejudicial evidence, and answer the following questions:**

1. Why is it important to ask, “To what is the evidence relevant?” and not just, “Is the evidence relevant?”
2. What do inferences have to do with relevance?
3. What do relationships have to do with relevance?
4. What does probative mean in the definition of relevance?
5. What does fact or consequence mean in the definition of relevance?
6. How does the probative prong of the relevance test relate to the fact of consequence prong?
7. How difficult is it for evidence to meet the threshold test of relevance?
8. Why is some evidence conditionally relevant? At what point in time during a party’s case can proof of a conditionally relevant fact be offered during trial?
9. What is the test to determine unfair prejudice exists?
10. How many steps are there in the test of unfairly prejudicial evidence?
11. What do certain types of probability evidence, excessively violent evidence, similar acts or occurrences, and scientific tests have in common?
12. What is the significance of a limiting instruction?

Chapter 2 – Social Policy Relevancy Rules, pp. 47-75.

Review FRE 407, 408, 409, 410, 411.

Cases

- Cyr v. J.J. Case, p. 49
- Bethel v. Peters, p. 54
- Flaminio v. Honda, P. 58
- Kenny v. Southeastern Pennsylvania, p. 60



After Chapter 2, you will be able to answer the following questions:

- 1a. Is evidence of “subsequent remedial measures”- that is, of measures taken after an injury or harm occurs that would have made the injury or harm less likely - being offered to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction? See Rule 407.
- 1b. Is it instead being offered for some other purpose, such as proving ownership, control, or feasibility or precautionary measures? If so, is it admissible? See Rule 407.
- 2a. Is evidence being offered of 1) furnishing or offering or promising to furnish, or 2) accepting or offering, or promising to accept a valuable consideration to compromise or attempt to compromise a claim that is disputed as to either validity or amount, or 3) conduct or statements made in compromise negotiations? See Rule 408.
- 2b. If yes, is the evidence offered to prove liability for or invalidity of a claim or its amount, in which case it is – with one exception – inadmissible, or is it instead offered for some other purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation, in which case it may be admissible. See Rule 408.
- 2c. Even if the evidence is offered to prove liability for or invalidity of a claim or its amount, which would ordinarily make it inadmissible, does the evidence consist of conduct or statements made in compromise negotiations in a criminal case in which the negotiations related to the claim of a public office or agency in the exercise of regulatory, investigative, or enforcement authority? If yes, contrary to the usual rule, the evidence is admissible.
- 3a. Is evidence being offered of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury? See Rule 409.
- 3b. If yes, is it offered to prove liability for injury, in which case it is inadmissible? See Rule 409.
- 4a. Is evidence being offered in any civil or criminal proceeding of (See Rule 410):
 1. a plea of guilty later withdrawn?
 2. a plea of nolo contendere (that is, “no contest,” meaning that the defendant agrees to be sentenced for it)?
 3. any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas?
 4. any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn?

- 4b. If yes, is the statement offered in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel? See Rule 410.
- 4c. If yes to 4b, the evidence may be admissible, but if no, is the evidence offered against the defendant who made the plea or was a participant in the plea discussions, in which case it is inadmissible? See Rule 410.
- 5a. Is evidence offered that a person was or was not insured against liability? See Rule 411.
- 5b. If yes, is it offered on the issue whether the person acted negligently or otherwise wrongfully, in which case it is not admissible, or is it instead offered for another purpose, such as proof of agency, ownership, or control, bias or prejudice of a witness in which case it may be admissible. See Rule 411.
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Week 3:

- 9-4** ► **Monday, Labor Day – No Class**
- **Review and Discuss Handout “Key Principles of Hearsay.”**
 Begin Chapter 5 – Hearsay: Foundations of the Doctrine, pp.163-202.
- **Brief review of FRE 801 -807.**

Cases

- Vincellette v. Metropolitan, p.167
 - State v. Patterson, p. 172
 - Schaffer v. State, p. 174
 - Biegas v. Quickway Carriers, p. 176
 - United States v. Tenerelli, p.179
 - Moen v. Thomas, p. 182
 - Kenyon v. State, p. 185
 - Field v. Trigg County Hospital, p. 192
 - Hickey v. Settlemeir, p. 195
 - State v. Dullard, p. 200
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Week 4

9-11 ► Chapter 5 – Hearsay: Foundations of the Doctrine continued.

► After Chapter 5, you will be able to answer the following questions:

- 1) What are the two types of arguments supporting the admissibility of out-of-court statements?
- 2) What are the steps to determine whether a statement constitutes hearsay?
- 3) How does the hearsay rule protect the right to cross-examination?
- 4) What are the four hearsay dangers?
- 5) Can animals and machines be declarants?
- 6) What is a statement for the purpose of the hearsay rule?
 - a. What are implied assertions?
 - b. What are sub assertions?
 - c. What are invisible assertions?
 - d. What are attributed assertions?
- 7) Can I avoid the hearsay rule by asking witnesses to paraphrase out-of-court statements?
- 8) Can witnesses' own out-of-court statements constitute hearsay?
- 9) What is the status of hearsay statements prior to trial?
- 10) What are testimonial hearsay assertions?
- 11) Who determines what a statement is offered to prove?
- 12) What is an "assertion first" approach to case planning?
- 13) How is admissibility determined when a statement is offered for a non-hearsay rule?
- 14). What is the meaning of the following common law non-hearsay uses?
 - a. Assertion offered as evidence of the speaker's state of mind.
 - b. Assertion offered as evidence of the state of mind of person who heard the assertion.
 - c. Assertion offered as a "verbal act" or "words of independent legal significance."
 - d. Assertion offered to contradict (impeach) in-court testimony.
 - e. Assertion offered to provide context and meaning.

► **Begin Chapter 6, Opponents' Statements, pp. 203-230. FRE 801(d)(2).**

Cases

- United States v. Sprick, p. 205
- Shields v. Reddo, 207
- State v. Lambert, p. 213
- Barnett v. Hidalgo, p. 220
- B& K Rentals, p. 221
- State v. Cornell, p. 228

Week 5

9-18 ► Complete Chapter 6, Opponents' Statements.

► After Chapter 6, you will be able to answer the following questions:

1. Is a party admission an out-of-court statement that admits to wrongdoing?
2. Can parties offer their own out-of-court statements into evidence as party admissions?
3. Can a non-party's out-of-court statement qualify as a party's admission?
4. What are the foundational requirements for showing that out-of-court statements constitute the following kinds of party admissions?
 - a. Straight admissions.
 - b. Adoptive admissions.
 - c. Authorized admissions.
 - d. Employee admissions.
 - e. Co-conspirator admissions.
5. Can a hearsay assertion itself support a statement's admissibility as a vicarious admission?
6. By what standard does a judge decide whether the foundational requirements for a party admission have been satisfied?

► Begin Chapter 7- Witnesses' Out-Of-Court Statements, pp. 231-262. FRE 801(d)(1).

Cases

- United States v. Neadeau, p. 234
- United States v. Gajo, p. 234
- United States v. Day, p. 241
- Tome v. United States, p. 242
- United States v. Lewis, p. 249
- State v. Shaw, p. 252
- Goforth v. State, p. 256

► After Chapter 7, you will be able to answer the following questions:

1. What does it mean that a statement may be used substantively? When can statements be used in this manner?
2. What are the three kinds of declarant-witness's prior statements presented in FRE 801(d)(1)?
3. What foundational requirements are necessary for the following types of out-of-court statements to be admissible for the truth of their contents?
 - a. The out-of-court statement conflicts with a witness' courtroom testimony.
 - b. The out-of-court statement is consistent with a witness' courtroom testimony.

- c. The out-of-court statement constitutes an identification made by a testifying witness.
4. Are the statements covered under FRE 801(d)(1) admissible if the declarant does not testify at trial.
-

Week 6

- 9-25 ► **Chapter 8, Hearsay Exceptions: Spontaneous and Personal Statements, pp. 263-313.
FRE 803 (1-4).**

Cases

- Fischer v. State, p. 265
- Pressey v. State, p. 270
- State v. Flores, p. 274
- Graure v. United States, p. 278
- Stoll v. State, p. 280
- Schering Corp. v Pfizer, p. 284
- State v. James, p. 289
- Hansen v. Heath, p. 297
- Colvard v. Commonwealth, p. 310

- **After Chapter 8, you will be able to answer the following questions:**

1. Does admissibility of hearsay under Rule 803 depend on a declarant's ability to testify?
2. Are the trustworthiness considerations underlying each Rule 803 hearsay exception the same?
3. How does the permitted gap between event and statement differ among the exceptions for present sense impressions, excited utterances and past recollection recorded?
4. For an excited utterance to be admissible, does it have to be made spontaneously?
5. If a hearsay statement satisfies any one of the Rule 803 foundational requirements, is it admissible as a matter of law?
6. Does the admissibility of an excited utterance require that an event be both objectively and subjectively startling?
7. For a statement to qualify under the medical hearsay exception, must it be made to a treating physician? Can it qualify for admission if it is made to non-physicians?
8. When might a statement be admissible under the medical hearsay exception, but not under the "state of mind" exception?

9. How does the “state of mind” hearsay exception compare to non-hearsay uses of statements as circumstantial evidence of state of mind?
 10. Does the “state of mind” exception make admissible an assertion of the fact giving rise to the state of mind?
-

Week 7

- 10-2** ► **Chapter 9, Hearsay Exceptions: Recorded Statements, pp. 315-366. FRE 803(5-9).**

Cases

United States v. Jones, p. 318
State v. Taylor, p. 320
United States v. Dazey, p. 324
Germain v. State, p. 329
Rush v. Illinois, p. 333
Lust v. Sealy, p. 343
United States v. Blechman, p. 349
United States v. Dowdell, p. 361

- **After Chapter 9, you will be able to answer the following questions:**

1. What types of statements are covered by the hearsay exception for recorded recollection?
2. What is the difference between recorded recollection and present recollection recorded?
3. What are three common ways of obtaining evidence from a forgetful witness? Which of these depend on use of a document prepared or adopted by the forgetful witness?
4. Does the business records exception apply only to the records of for-profit entities?
5. What is the role of a “sponsoring witness” when a party seeks to offer a business or official record into evidence?
6. Do the business record and public record exceptions both require that a document be prepared in the regular course of operations?
7. Are police reports admissible against criminal defendants under the public records exception?
8. What predicate must be laid for the business records exception to apply?
9. What predicate must be laid for the public records exception to apply?

- ▶ **Begin Chapter 10, Hearsay: Unavailability Required Exceptions, pp. 367-389. FRE- 804.**

Cases

O'Banion v. Owens, p. 369
Grant v. State, p, 373
State v. Paredes, p. 376
United States v. Gray, p. 387

Week 8:

10-9 Complete Chapter 10.

- ▶ **After Chapter 10, you will be able to answer the following questions:**

1. Why did the drafters of the Federal Rules of Evidence consider the Rule 804 hearsay exceptions to be “second tier” exceptions?
2. Can a person be physically present in court, yet be considered unavailable under Rule 804?
3. Can a witness who improperly refuses to testify be considered unavailable under Rule 804?
4. Can failure of recollection render a witness unavailable under Rule 804?
5. Is a person who breaks a promise to show up for trial unavailable under Rule 804?
6. Does deposition testimony qualify as former testimony? What if the deposition testimony is given in one case and offered into evidence in another?
7. Can testimony that a witness has previously given be admissible against a party who neither offered the testimony initially nor had an opportunity to cross-examine the witness who provided it?
8. In what types of cases are dying declarations admissible?
9. Can a dying declaration be admissible even if the declarant is alive?
10. Can a statement qualify as against interest if it was initially self-serving but later turns out to be against the declarant’s interest?
11. Does a self-serving statement qualify as against a declarant’s interest if it is part of a larger set of statements that taken as a whole are against the declarant’s interest?
12. In what way do the foundational requirements for statements against a declarant’s penal interest differ from the requirements for statements against other interests?

MIDTERM, FRIDAY, MARCH 9, 2017

Week 9:

- 10-16 ► **Practice Exercises on the Hearsay Rule.**
- **Chapter 11, Modifications of the Basic Hearsay Rules. Residual Exception, Due Process, and Confrontation Clause. This chapter will be covered through a PPT presentation. Do not read cases.**
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Week 10:

- 10-23 ► **Chapter 3, Proof of Character, pp. 77-129
FRE 404, 405.**

Cases

Boyd v. United States, 80
John A. Russell Corp. v. Bohlig, p.83
City of Kennewick v. Day, p.88
State v. Gowan, 92
Commonwealth v. Adjutant, 97
State v. Foxhaven, 106
United States v. Queen, p. 112
State v. Winebarger, p. 120
Leyva v. State, p. 123
State v. Willett, p. 124

- **After Chapter 3, you will be able to answer the following questions:**
1. Is the testimony being offered “character” evidence?
 2. If yes, what is the purpose for which evidence of a person’s character is being offered?
 - a. Is the person’s character itself a material fact?
 - b. Is the person’s character offered to prove “action in conformity therewith,” that is, how the person behaved on a specified occasion (“act propensity”)?
 - c. Is the person’s character offered to prove that person’s mental state (“mental propensity”)?

- d. Is the person's character offered to prove or disprove the person's credibility as a witness? If so, is "intrinsic" or "extrinsic" evidence of character being offered, and what is the difference?
 3. Do any of the exceptions to the general bar on act propensity evidence apply?
 4. Is this a homicide or sexual assault case, to which special character rules apply?
 5. What type of evidence of a person's character is being offered?
 - a. The person's reputation?
 - b. The opinion of a witness who knows the person?
 - c. Specific acts in which the person has previously engaged?
 6. Is evidence that looks like character evidence but is not – such as some uses of prior bad acts – being offered and, if so, for what purposes?
 7. What distinguishes "character" evidence from "habit" evidence?
 8. What distinguishes "character evidence" from motive evidence?
 9. Why does the Case Library to this chapter present *Michelson v. United States*?
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Week 11:

10-30 ► **Chapter 4, Habit and Sexual Conduct in the Context of Character, pp. 131-162. FRE 406.**

Cases

Do not read cases in Sections C, and D, pp. 143-162.

► **After Chapter 3, you will be able to answer the following questions:**

1. What is habit evidence?
2. Under what circumstances is habit evidence admissible?

**Days 2-3, Chapter 12, Impeachment, pp. 453-520.
Read all cases. FRE 607-611.**

► **After Chapter 12, you will be able to answer the following questions:**

1. Is there a witness testifying at a hearing or proceeding before, during, or after the trial?
2. Is the witness under oath and subject to cross-examination?

3. Is the witness offering evidence going to the background of the case, an element of the claim, defense, or cause of action, or the impeachment of another witness?
 4. Is the witness on direct, cross, redirect, or re-cross examination?
 5. If this is the proponent's witness, what objections to the witness' testimony can be anticipated?
 6. If the witness is being impeached, is the impeachment intrinsic (from the witness' mouth) or extrinsic (by offering other evidence or another witness)?
 7. If the impeachment is intrinsic, is it in a permissible form?
 8. If the impeachment is extrinsic, does it satisfy the collateral issue?
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Week 12

**10-31 Days 1-2, Chapter 13, Witnesses, pp. 521-562.
Read all cases in Chapter 13. FRE 602.**

- **After Chapter 13, you will be able to answer the following questions:**
1. When is a witness competent to testify?
 2. Why does Rule 602 prohibit testimony by a witness who lacks personal knowledge?

**Day 3, Chapter 14, Opinions, pp. 563-618.
Read all cases in Chapter 14. FRE 701-705.**

Week 13

11-7

Day 1 - Finish Chapter 14.

- **After Chapter 14, you will be able to answer the following questions:**
1. What is the difference between expert and lay opinion?
 2. To what relevant issues does any proffered expert testimony relate?
 3. If the opinion testimony is "expert," is the expert "qualified" by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise?
 4. If the expert is so qualified, does the expert's testimony involve: a) scientific knowledge; b) technical knowledge; c) other specialized knowledge? Does this matter?

5. Is the expert opinion based on:
 - a. a hypothetical question?
 - b. observations personally made by the expert in the courtroom?
 - c. observations personally made by the expert outside the courtroom?
 - d. information provided to the expert prior to trial?
6. Does the expert offer his or her opinion to a “reasonable degree of professional certainty”? Does this matter?
7. What is the likely impact of the expert’s opinion on the jury? For example will the testimony “overawe” the jury or otherwise lead it to be unfairly prejudiced, misled, or likely to give the testimony undue weight?
8. Has the expert testified to an “ultimate issue” by stating an opinion or inference as to whether a criminal defendant did or did not have a mental state or condition constituting an element of a charged crime or offense?
9. As to the major premise of the expert syllogism, have the principles and methods (techniques) used by the expert shown to be both relevant and “reliable,” with reliability shown by weighing a wide range of pertinent factors including:
 - a. Whether the principles and techniques are testable and have been tested (that is, has a hypothesis been generated, and have adequate efforts been made to falsify the hypothesis, with no such falsification yet having been achieved)?
 - b. Have the theory and technique been subjected to:
 1. peer review?
 2. publication?
 - c. What is the technique’s known or potential error rate?
 - d. Has the principle or technique attained “widespread acceptance”?
 - e. Are there standards controlling the technique’s operation?
10. Has cross-examination of the expert inquired into such matters as:
 - a. The non-existence of any particular basis on which the expert relied that might, if shown, alter the opinion?
 - b. The existence of contrary or additional bases that would alter the expert’s opinion.
 - c. The materials the expert reviewed or failed to review?
 - d. The tests or other investigations the expert conducted or failed to conduct?
 - e. Any financial compensation the witness received for giving advice and testimony?
 - f. The contradiction between his assertions and those by others in “learned treatises”? exception to the hearsay rule?

Lay or expert opinion?

11. Is the testimony being sought “lay” or “expert”?

12. If the testimony involves “lay opinion” is the opinion:
 - a. “rationally based” on the perception of the witness and
 - b. helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue?
 - c. Does it express a “collective fact” or a “skilled lay observer’s opinion”?

Day 2 & 3 – Chapter 15, Privileges pp. 619-675.
Do not read any cases in this chapter. FRE 501.

Week 14:

11-14 Chapters 16, Authentication and the Original Writing Rule, pp. 677-705.
Do not read any cases in this chapter. FRE 901, 902, 903, 1001-1008

► **After Chapter 16, you will be able to answer the following questions:**

1. Is the thing to be admitted into evidence what it purports to be?
 2. Have all of the “magic” foundation questions for authentication been asked of the witness in a recognizable form?
 3. Does the so-called best evidence rule apply to the case?
 4. To determine the applicability of the best evidence rule, is a party proving the contents of a writing that is important to the case?
 5. If the best evidence rule applies, is there an adequate alternative to the original writing that can serve as a substitute?
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Week 15:

Chapter 17, Presumptions and Judicial Notice, pp. 707-728.
Do not read any cases in this chapter. FRE 201, 301, 302.

11-21

► **After Chapter 17, you will be able to answer the following questions:**

1. Do the Federal Rules of Evidence allocate burdens of proof or determine their content?
2. What is the difference between “burden of producing evidence” and the “burden of persuasion”?
3. What is a “prima facie case”?
4. If a plaintiff makes out a prima facie case, does either the burden of producing evidence or the burden of persuasion then shift to the defendant?
5. How is a “presumption” different from a “permissive inference”?
6. How does a “social policy presumption” differ from a “common practice presumption”?

(Last day of class, Thursday, November 2017)

Mark your calendars!

I plan to hold a tutorial on Sunday, November 11, 2017 from 5:00 pm to 8:00 pm. I also plan to hold a tutorial on Saturday, November 19, 2016 from 1:00 pm – 5:00 pm.

PLEASE MARK YOUR CALENDARS ACCORDINGLY.