ASSIGNMENTS FOR THE FIRST TWO CLASSES:
Judicial Notice & Witness Examination up to and including Past Recollection Recorded.

Judicial Notice:
FRE 201; 1238-1247; 237-246; 333-339; 316-333

Witness Examination

Direct (Rule 611(c)-- 333-339
    Straub v. Reading Co.;
    - 335-339 (important pages)
Preparation of Witnesses -- 316-333; 237- 246
    Resolution Trust Corp. v. Bright
    Opinion NO. 79, Legal Ethics Committee
Refreshing (Rule 612) -- 340-352
    US v. Riccardi
Past Recollection Recorded (Rule 803(5) -- 539-540
    US v. Porter

NOTES:
1) Office Hours: From 2 - 3: 30 - M-Thur. Office: room 235 by appointment: speak2kess@yahoo.com
2) **Class Participation:** Class participation is critical to learning. Preparation to answer questions requires more than simply reading the assignment. To be prepared students must both have read and spend time trying to understand the cases before class. In this class, hypotheticals will be used extensively. The purpose of a hypothetical is to give students an opportunity to assess their knowledge of the materials. Students who do not try to answer hypotheticals will deprive themselves of critical feedback. If you are not called on, think of what your answer would be and compare it to the students who are responding.

This feedback mechanism is solely designed to assist students in evaluating their knowledge of the materials. Each class is an informal examination. Each class is designed to provide a measure of how much you have learned. If you are not called on, think of what your own answer would be and compare it to the students who are responding. To ease the burden of preparation for class participation, students will have advance notice when they will or may be called on. Further, to enable preparation for class, the specific cases and rules that will be the topic of each class are noted in the assignments.

3) **Laptops** are permitted. Those using laptops will be expected to be able to look back through their class notes to explain what has been said in prior classes (For example: Where there 5 or 7 separate categories of rules that are being covered in the classes on the admissibility of Prior Similar Acts and what are they?) and also may be asked to do quick legal research during the class.

4) **Attendance:** Good and regular attendance is mandatory. Attendance will be taken and an excessive number of absences may lead to involuntary withdrawal from the class.

4) **Final Examination:** Closed book.

5) **Assignments:** The schedule identifies specific Federal Rules of Evidence that are to be read in conjunction with the assignments.

   1) Students will be expected to have carefully read the assigned Federal rule prior to class and to be able to explain each such rule during the class session. If the rule contains elements, students must be able to identify those elements. **In other words, students are expected to have memorized the rules that are assigned for each class!**

   2) The major cases that will be discussed in class are specifically noted in the assignment to facilitate class preparation.
ASSIGNMENTS

Cross -- (Rule 607,611(a)(b)(c)) -- 362-381
   Finch v. Weiner
   People v. Sallis
Redirect -- 381-385
   Commonwealth v. O’Brien

Real Proof/Relevance
   Factual Relevance (Rule 401,901) -- 97-122

      McAndrews v. Leonard
      Almeida v. Corriea
      Bruce’s Juices v. US
      Miller v. Pate - Add the following facts:
         The “blood” was Type A
         The decedent had Type A blood
         40% of the population has Type A blood
         The shorts were found 3 days after the crime
      Anderson v. Berg

Preliminary Issues of Fact (Rule 104 (a) & (b)) - 169-172
      Sliker v. US

Logical Relevance (Rule 401) -- 1-15
      People v. Adamson
Prejudice -- (Rule 403) -- 15-35
      State v. Poe
      US v. Zimeri-Safie
      State v. Bray
      Robbins v. Whelan
      Old Chief v. US

Reproductions/Photographs -- (Rule 901) -- 150-176
      Knihal v. State
      Loftin v. Howard
      Bannister v. Town of Noble
      US v. Carbone

Diagrams -- 176-181
Views -- 136-139
People v. Crimmins
Demonstrations -- 139-150
Larramendy v. Myres
Hall v. GM

Writings
Foundation -- (Rule 901-902) -- 181-211
Keegan v. Green Giant Co.
US v. Labovitz
Zenith Radio Corp. v. Matsushita Electric Industries
University of Illinois. v. Spalding
Best Evidence (Rule 1002, 1004, 1006, 1007)-- 211-237
Myers v. US
Davenport v. Ourisman-Mandell Chevrolet, Inc.
Amoco v. US Relevance and Sufficiency
Circumstantial Proof -- 35-51
Regina v. Onufrejczyck

Statistical Proof -- 51-79
People v. Collins
Smith v. Rapid Transit, Inc.
State v. Rolls

Review of Relevance
State v. Oswalt
Stephens v. People
People v. Pargo
People v. Terczak
People v. Wilson

Competency
Common Law – (Rule 601) – 255-277
Rock v. Arkansas
Zeigler v. Moore
Truthfulness -- 285-291
US v. Ward
Ability to Perceive – (Rule 602) -- 291-297
State v. Raniere
Infancy -- 297-305; 563;
Mental Disease – 305-316

Opinion Evidence
Lay Opinion -- (Rule 701) --352-362
    Wilson v. Pennsylvania RR Co.
    US v. Stamps
Expert Opinion -- (Rule 702-5) -- 954-1067
    Een v. Consolidated Freightways
    People v. Taylor
    Meier v. Ross General Hospital
    Daubert v. Merrell Dow Pharm.

    US v. Chischilly
    US v. Scop
    US v. West (Rule 704)
    Rabata v. Dohner
    Pelster v. Ray (Rule 703)

    People v. Anderson

Learned Treatises -- (Rule 803(18)) -- 766-771
Lie Detectors -- 467-471

Cross Examination

Anticipating Cross -- 385-390
    US v. Cosentino
Impeaching Own Witness --( Rule 607) - 390-401
Impeachment Subject Matter
    Bias -- 406-416
        Gordon v. US
        US v. Campbell
        Henning v. Thomas
        Grudt v. City of LA
Crimes -- (Rule 609) -- 416-429
    People v. Sandoval, 34NY2d 371 (1974)
    US v. Valencia
    Cree v. Hatcher
Bad Acts -- (Rule 608) -- 429-438
   People v. Sorge
   People v. Duffy, 36NY2d258 (1975)
Statements
   Prior Inconsistent -- (Rule 613; 801(d)( 1)(A) -- 453-462; 522-530
   Denver City Tramway Co. V. Lomovt
   Rowe v. Farmers Insurance Company, Inc
   Nucci v. Proper, 95NY2d 597 (201)
   Letendre v. Hartford Ins Acc & Indemntiy Co,
      21 NY2d 518 (1968)
   Prior Consistent -- (Rule 801 (d)(1) (B)) -- 540-549; 552-554
   Tome v. US
   Beech Aircraft Corp. V. Rainey (Rule 106)
Circumstantial
   Proof
Character
   Other Crimes -- (Rule 404, 405)
      -- 808-815; 819-853; 861-875
   People v. Molineux, 168NY264 (1901)
   People v. Zackowitz
   State v. Spraggin
   State v. Abercrombie
   People v. Steele
   Gaddis v. State
   People v. Cole
   US v. Montalvo
   People v. Santarelli (Review 703 & 702 on these facts
   State v. Bock
US v. Figueroa
Lyles v. State
Huddleston v.US
Reputation -- (Rule 803(21); 404 (a); 608(a)) -- 875-887; 438-447; 464-467
Michelson v. US
US v. Dotson
Civil Cases -- 914-921
Dallas Railway & Terminal CO. v. Farnsworth
Habit & Custom -- (Rule 406) -- 921-926
Frase v. Henry
Settlement Offers -- (Rule 408) -- 938-947

Hearsay
Rule 801
Definition (Rule 801 (a)-- 475-522
Leake v. Haggert
People v. Eady
Brown v. Coca Cola
Kingdon v. Sybant
Safeway Stores Inc. v. Combs
Hanson v. Johnson
Koury v. Follo
US v. Jackson
Betts v. Betts
Bridges v. State
State v. Galvan
Rex v. Wysochan
Wright v. Doe D. Tatham
Kinder v. Commonwealth
Admissions (Rule 801(d)(2)(A-E)-- 563-605
Bill v. Farm Bureau Life Insurance Co.
Schrffius v. Orr
East Kentucky Rural Electric Co-op. v. Phelps
US v. McKeon
Mahlandt v. Wild Canid Survival & Research Center, Inc.
Brookover v. Mary Hitchcock Memorial Hospital
Wilkerson v. Carnival Cruise Lines, Inc.
Bourjaily v. US
US v. Urbanik

Rule 804
Unavailability - Rule 804(a)(1-5)
Dying Declaration - Rule 804(b)(2) -- 753-760
   People v. Callahan
   People v. Nieves
Declaraton Against Interest- (Rule 804(b)(3) -- 605-634
   Potter v. Finan
   Carpenter v. Davis
   People v. Brown
   Williamson v. US
Former Testimony - Rule 804 (b)(1) -- 723-737; 747-752
   Fleury v. Edwards
   State v. Ayers
   Commonwealth v. Canon --- US. v. Napoli

Rule 803
Business Records – R.803(6) & 803(8)– 679-723
   Palmer v. Hoffman
   US v. Jacoby
   Johnson v. Lutz
   Beech Aircraft Corp. v. Rainey
   Baker v. Elcona Homes Corp.
   Commonwealth v. DiGiacomo
Physical or Mental Condition -- R.803(4) – 645-654; 718-723
   Wadena v. Bush
   US v. Tome
State of Mind -- R.803(3) – 654-679
   US v. Brown
   Mutual Life Ins. v. Hillmon
   US v. Annunziato
   Smith v. Slifer
   In re Anderson’s Estate
Spontaneous or Excited Utterances -- R.801-2) --634-645
   Commonwealth v. Coleman
   US v. Obayagbona
Catchall -- (Rule 807) – 774-796
Robinson v. Shapiro
Constitutional Limitations -- Confrontation
Handout:
Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)

EVIDENCE LAW LEARNING OBJECTIVES
Professor Lawrence Kessler

COURSE DESCRIPTION AND LEARNING OBJECTIVES

Course Description:

This course introduces students to a field of law in which the fundamental policy decisions are based on disdain for the jurors who are not believed to be rational enough to free themselves from their individual and cultural biases. It is based on distrust of lawyers who are not trusted to avoid intentionally deceiving jurors about both the existence and importance of facts. These perceptions have led to the development of a system that seeks to protect the fairness of trial proceedings by systematically concealing information from juries. The system of seeking fairness by concealment is effectuated by the Rules of Evidence. These rules exist solely to keep information away from jurors.

Students will learn the rules and, more importantly, how to use the rules to benefit the client by applying them to exclude information that is bad for the client and evading them when it is good. In this pursuit, students will learn how to develop a Theory of the Case (litigation strategic planning) without which they would not be able to tell what is good and what is bad for their client. The students will acquire a detailed knowledge of the rules of evidence and a basic set of skills in applying those rules. The primary focus of the course will be on the Federal Rules of Evidence. When New York evidence practice is significantly different, the New York rules will be taught as well.

Learning Objectives:

By the end of this course, students should know the:

Category 1- Substantive rules of law and policies.
Each ... student must have demonstrated a thorough knowledge of the basic rules of law and policies that were covered in this course, both the Federal Rules of Evidence and New York State evidence law;

And
Category 5, **Basic Legal Analysis, fact development and law-finding.**

• Have advanced their proficiency in extracting rules and policies from cases and statutes and in analyzing, interpreting and arguing differing interpretations of how those rules would apply in specific factual settings = fact analysis.

And

Develop an appreciation of the ways in which trial lawyers properly use the rules to circumvent the rules in witness preparation, witness and client interviewing, misrepresentation of purpose in asking questions, and the like. Both legal ethics standards and moral standards will be used in this analysis.

• Develop an appreciation of the role and work of the trial lawyer.
INTRODUCTORY HYPOTHETICAL

John Smith lives about ½ mile West of the Hanson Street park. The park is on Hanson Street, the major north/south street in the city of Hanson. Hanson Street is the demarcation between the residential and commercial areas of Hanson. The park is on the East side of the street. Immediately to the west of the street is a large industrial area that is filled with heavy industry factories, such as steel mills and the like. Immediately across the street from the park is the Hanson Meat Rendering factory. HMR is a large factory extracting fluids from meats. The byproduct of the extraction is the release of an extremely noxious odor. Although HMR has filtering equipment designed to retain the noxious gases, odors are released.

When the wind blows from west to east these odors can be detected in the park. John Smith is the plaintiff in an action to close the plant for violation of Hanson Ordinance #111,

“It is prohibited to impair, pollute or destroy the air or other natural resource. It is an affirmative defense that an industrial release has been caused despite the use of the best available equipment to abate such release.”

The Hanson Street park was developed at about the same time as HMR was built. The parkland had been a farm. The park covers about 12 acres. Fill from the construction of many of the industries and single family homes in Hanson was used to create a sizeable hill. The entire park was planted with as large a variety of local flora as could be assembled. 40 years later, the park has a towering forest area and fields of native plants. Walking tours describe the flora and the fauna that have been attracted to the fields, forest and pond. A large pond was dug and now is a stopping place for migratory birds. Of course, the park also contains a baseball field, a basketball area and assorted playgrounds.

John Smith claims that the smell from the plant literally sickens him and his children and that they have to leave the park. He has four witnesses who support his testimony about the nature of the smell.

HMR will call four witnesses, none of whom can be in any way connected to the company, who will testify that the smell does not bother them and that the park is constantly filled with children and adults, with or without regard to any smells. HMR also will call an expert witness to testify that it is using the best abatement equipment available for a plant of their size. She will also testify that “better” equipment would be far too expensive and would necessitate a closing of the plant.
Judicial Notice

1 - Will the court take judicial notice that the meat rendering process produces an offensive smell.

2 - Will the court take judicial notice of the fact that a climate condition known as a heat inversion causes emissions from factories to stay closer to the ground where they can be detected for longer periods.

3 - Will the court take judicial notice of the fact that a climate condition known as a heat inversion only occurs during the warmer summer weather?

4 - Will the court take judicial notice that the Hanson Street factory is in an “industrial district.”

Direct Examination

1 - Q: Mr Smith, you live at 121 Jones Street with your wife and two children, Amy who is 6 and John who is 10?
   A: Yes

2 - Q: Mr Smith, the smell in the Hanson Street park has made you sick?
   A: Yes

3 - Q: Mr Smith, where is the Hanson Street park?
   A: Across the street from the Hanson Meat Rendering Factory.

4 - Smith calls Mr Hanson, the factory owner.
   Q: Your factory emits a God awful smell, doesn’t it?
   Objection
Witness Preparation

5 - Mr. Jones comes to Smith’s attorney’s office to talk about his testimony. The attorney knows that Jones told Smith that the park is a horror show. When Jones is asked about the park, he says, “It is really a nice place. My kids play there all the time.”

The attorney then says, “Smith is suing Hanson Meat Processing because the smell from the plant makes him and his kids sick. He told me that you were a witness who would help him prove how bad the smell is by testifying that it makes you feel horrible. He needs your testimony. Is that what you will say?”

Witness says, “I guess so.”

Attorney: Smith and all the others say it stinks. Do you disagree with them? After several hours of such, witness has told the attorney that the smell is so awful that he rarely is willing to let his kids use the park, when the factory is operating. Further, he will say, if asked, that the park is a nice place in which his kids play all the time when the factory is not operating.

Assuming that the local prosecutor hears this conversation, can you imagine a conversation that led the witness to say above without the attorney violating any ethical or legal mandate?

Further, Direct Examination

6 - On Direct Examination in a personal injury case, Witness doesn’t remember which car ran the red light. The attorney has an office memo that he wrote after talking to witness that contains an outline of all of the facts in the case. It is marked as Exhibit 1 for Identification.

Q: I show you what has been marked Exhibit 1 for identification. Read it.
A: It says that the red car went through the red light. — Objection
- What is the attorney trying to do? If this is not the right way to do it, what is? Could he do it if the witness had not already said that he did not remember?

7 - The witness never remembers. The attorney has an office memo that he wrote after talking to the witness that contains an outline of all of the facts in the case.
A) Is there a viable way for the attorney to introduce the memo into evidence as a substitute for the testimony that is not remembered? If so, what has to be said by the witness for this to happen?
Cross Examination

1 - Jones has testified for the Hanson Meat Processing plant that he uses the park all the time and that the smell does not bother him.

What single fact would be the most important to emphasize on cross examination? This fact is one that cannot be denied by Hanson and will help plaintiff prevail.