EVIDENCE
Fall, 2016
Professor Stefan H. Krieger
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Rm. 234
Assistant: Marcela Fernandez, Rm. 216

SYLLABUS (Revised)

Required Texts

Broun, Mosteller, & Giannelli, *Problems in Evidence* (West 5th ed. 2011)
Broun, *McCormick on Evidence* (Thomson/West 7th ed. 2014) (Student Edition)
Mueller and Kirkpatrick, *Federal Rules of Evidence with Advisory Notes and Legislative History* (Wolters Kluwer 2016)

Course Description

This course covers the theory and rules of presenting evidence to a judicial tribunal. While at times, I will address New York decisions on specific issues, I will focus on the Federal Rules of Evidence because they were developed and codified during an extensive process of judicial, legislative, and academic review.

Unlike many of your other courses, this class will concentrate primarily on rule, rather than case, analysis. Your texts are the rules themselves, the advisory notes on the rules and legislative history, and a hornbook. Using these sources, you will be required to argue evidentiary issues as if you were an attorney in a courtroom. I am using this approach because it is the one most trial lawyers take in handling evidentiary problems. Evidence is an area in which instantaneous decisions of trial judges are often the end of the matter. Appellate cases play a less important role in this area than perhaps any other in the law. Whether or not you plan on a career as a litigator, this approach will help you understand how the rules of evidence are actually applied in practice.

Because of the nature of evidence law, it is an ideal vehicle for learning oral advocacy. In practice, mastery of the rules is not enough. Lawyers need to craft persuasive arguments, applying the rules to the facts of the case. In class, I will critique your performance, and we will discuss methods for developing such arguments.

Learning Objectives

At the end of the course, students should have the level of proficiency required for an entry-level lawyer in the following areas:

1. Analyzing and arguing differing interpretations of evidentiary rules;

2. Identifying legal issues in factual problems and applying evidentiary rules and policies to those facts;

3. Weighing evidence to reach factual inferences;

4. Constructing evidentiary arguments and identifying flaws in your adversary's arguments;

5. Presenting analysis orally in evidentiary arguments; and

6. Performing the basic trial tasks of arguing evidentiary objections and motions.

Class Format

I will teach this class primarily using a problem-based method. In each class, I will call on eight or more students to argue objections and motions based on problems in the *Problems in Evidence* book. You will play the role of the attorney for one of the parties, and I will act as judge, asking you questions about your arguments and making a ruling. I will then critique the argument and discuss the relevant substantive issues.

For each class, I have assigned two to five problems in the *Problems in Evidence* book and have asked one of the two class groups to prepare the argument on the objection or motion for a particular party (Plaintiff/People or Defendant). If your last name begins with the letters A through K, you are in Group A, and if your last name begins with the letters L through Z, you are in Group B. To prepare, you should read the applicable federal rules (along with the Advisory Notes and Legislative History), sections in McCormick noted in the book for that problem, and any additional assigned readings. Then, draft an outline for the argument, anticipating possible counterarguments or questions from the bench. No further research of the issues is required. As the semester progresses, I may ask students from either group to assist me as "law clerks" to assess the merits of the arguments.

Many of the problems in the book ask specific questions about the applicable rules or ask you how you would rule as a judge. While those questions might be helpful in developing your arguments, you should prepare only to argue the objection or motion described in the problem for the party whom you represent. We will approach each of these problems as an argument in court. If the problems ask you to draft a witness examination, do not worry about the form of the question but focus on the answers you wish to elicit.

Grading

Class Performance (25%)

Each of you should have at least three opportunities to argue an objection or motion during the semester or to advise me as a law clerk. I will grade you on each performance: 5 for a superior performance; 4 for a proficient performance; 2 for inadequate preparation; and 0 for no preparation or default (unexcused absence) when called upon to argue. These grades will be averaged and will constitute 25% of the grade for the course. While in class I may critique your skills in presenting arguments, my grades will primarily be based on your knowledge of the applicable rules and doctrines. My decision as judge on whether you win or lose the motion or objection will not affect your grade.

Final Examination (75%)

The final examination will be a four-hour closed book exam with short-answer questions.

Class Preparation

Three times during the semester you are entitled to request to be excused from being called upon in a class. To make such a request, you must send me an email <lawshk@hofstra.edu> by 10:00 a.m. of the day of the class. If you do not send me such a request by that time, I will expect you to be attending class that day and to be prepared to argue or address the assigned problems. If for some reason, you want to be excused from more than three classes, please email me BEFORE THE ADDITIONAL CLASS explaining the reason for your request, and I will consider it.

The American Bar Association requires that you spend ***at least eight hours per week***, on average, ***outside of class*** studying for this four-credit course. This requirement is ***in addition to*** the four hours a week we spend in class. (The ABA has a formula for determining the requirement. In other courses, the required number of out-of-class hours may be different.)

Class Attendance

The rules of the New York State Court of Appeals, the American Bar Association, and the law school require law students to be in good and regular class attendance. To comply with these rules, you must attend at least 85% of the regularly-scheduled classes in this course. **Thus, you may miss no more than FOUR individual classes.** I will provide sign-in sheets for each regularly-scheduled class, which shall be the dispositive evidence regarding your absence from a given class. Each student is responsible for signing in. Falsification of sign-in sheets is a violation of the Code of Academic Conduct.

If you exceed the permitted absences by failing to sign in, you will be administratively withdrawn from the course. No prior notice may be given, and you will receive notification from the Office of Academic Records indicating the withdrawal. Any such withdrawal may have serious ramifications for your financial aid, academic standing, and date of graduation. If you believe you must be absent from class for more than the permitted number of hours, you should contact the Office of Student Affairs as soon as possible. Accommodations may be made for

students who must be absent for religious reasons and in cases of truly compelling hardship. Any request for an exception must be accompanied with appropriate documentation.

An absence, by itself, does not excuse you from being called upon in class. To be excused from being called upon, please notify me in accordance with the "Class Preparation" section above.

Office Hours

My office hours are Tuesdays, 4:10-5:00 p.m. If you need to schedule an appointment for another time, please email me.

Coverage*

Following is the predicted coverage for the course. Adjustments may be made in the course during the course of the semester. The coverage for each class is only approximate. I will try to remember to tell you how far we are going to get in the next class.

Class	**Problems and Additional Readings**	**Group Assignments**
1 Objections	Problems 1-3, 1-5, 1-6, and 1-8 Explanation of the restyling project set forth in the Committee Note after Rule 101	Demonstration of oral advocacy on evidentiary issues (No groups will need to argue.)
2 Burdens and Presumptions	Problems 3-1, 4-1, 4-8, and 5-2	Group A: Plaintiff/Prosecutor Group B: Defendant
3 Relevancy–Generally	Problems 7-2, 7-3, 7-7, and 7-8	Group A; Defendant Group B: Plaintiff/Prosecutor
4 Relevancy–Other Happenings	Problems 1-2, 8-1, 8-3, and 8-6	Group A: Plaintiff/Prosecutor Group B: Defendant
5	Problems 8-7, 8-8, 8-9, and 8-12	Group A; Defendant

* Because of the Presidential Debate and Jewish holidays, I am cancelling the classes on Mondays, September 26, October 17 and October 24. I have scheduled make-up classes in Rm. 230 on Tuesday, September 27, Tuesday, November 1, and Tuesday, November 15 from 12:10-2:00 p.m.

Relevancy-- Character in Civil Case		Group B: Plaintiff
6 Relevancy– Character, Accused (Offered by Prosecutor)	Problems 8-14, 8-16, and 8-19	Group A: Prosecutor Group B: Defendant
7 Relevancy– Character of Victim	Problems 8-27 and 8-29	Group A: Defendant Group B: Prosecutor
8 Relevancy– Character, Accused (Offered by Accused)	Problems 8-23 and 25	Group A: Prosecutor Group B: Defendant
9 Relevancy–Intersection of relevancy and other policies	Problems 8-31, 8-32, 8-37 and 8-41	Group A: Defendant Group B: Plaintiff/Prosecutor
10 Real and Demonstrative Evidence #1	Problems 10-3, 10-5, 10-6, and 10-7	Group A: Plaintiff/Prosecutor Group B: Defendant
11 Real and Demonstrative Evidence #2	Problems 10-9, 10-12, 10-14, and 10-16	Group A: Defendant Group B: Plaintiff/Prosecutor
12 Authentication	Problems, 10-17, 11-8, 11-9, and 11-11	Group A: Plaintiff/Prosecutor Group B: Defendant
13 Best Evidence	Problems 11-13, 11-14, 11-15 (Plaintiff--Joan; Defendant-Barry), and 11-25	Group A; Defendant Group B: Plaintiff/Prosecutor
14 Competency/Direct Evidence	Problems 12-1, 12-2, 12-13, and 12-15 (Argue Parts (A) and (B)) Additional section in McCormick, 6th ed., § 25	Group A: Plaintiff/Prosecutor Group B: Defendant
15 Personal knowledge/ Lay Opinion	Problems 12-18, 12-19, 12-20, and 12-22	Group A: Defendant Group B: Plaintiff/Prosecutor
16	Problems 12-24, 12-25 (Parts A	Group A: Plaintiff/Prosecutor

Expert Testimony – Subject Matter	and D), 12-26 (Parts A, B, and C), and 12-30	Group B: Defendant
17 Expert Testimony – Qualifications/Form	Problems 12-38, 12-42, 12-43, and 12-44 *Ake v. Oklahoma*, 470 U.S. 68 (1985)	Group A: Defendant Group B: Plaintiff/Prosecutor
18 Credibility/Impeachment (bolstering, impeaching own witness, bias, specific contradiction)	Problems 12-46, 12-47, 12-49, and 12-61	Group A: Plaintiff/Prosecutor Group B: Defendant
19 Impeachment (prior convictions, misconduct, prior inconsistent statements, rehabilitation)	Problems 12-56, 12-62, 12-63, and 12-66	Group A: Defendant Group B: Plaintiff/Prosecutor
20 Hearsay – Generally #1	Problems 13-1, 13-5, 13-9, and 13-12 (Plaintiff represents those seeking to establish incompetency; Defendant represents Smith)	Group A: Plaintiff/Prosecutor Group B: Defendant
21 Hearsay – Generally #2/Prior Statements	Problems 13-15, 13-31, 13-32, and 13-33	Group A: Defendant Group B: Plaintiff/Prosecutor
22 Opposing Party's Statements	Problems 13-40, 13-41, 13-46, 13-48, and 13-49	Group A: Plaintiff/Prosecutor Group B: Defendant
23 Present Sense Impression/Excited Utterances/ State of Mind	Problems 14-2, 14-7, 14-11, 14-12, and 14-20	Group A: Defendant Group B: Plaintiff/Prosecutor
24 Medical Diagnosis/Business Records	Problems 14-22, 14-32, 14-33, and 14-35	Group A: Plaintiff/Prosecutor Group B: Defendant

26 Wrongdoing/Residual Exceptions	Problems 14-66 and 14-69	Group A: Plaintiff/Prosecutor Group B: Defendant
27 Confrontation	Problems 13-51, 13-55, 13-57, and 13-72 *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) *Williams v. Illinois*, 132 S. Ct. 2221 (2012)	Group A: Defendant Group B: Plaintiff/Prosecutor
28 Review/Catch-up		