

**Law 536: Evidence**  
**Course Memorandum**  
**Spring 2017**

Clinical Assistant Professor Mark Brittingham  
T & Th, 1:30-3:15, Courtroom (Room 108)  
First Class: Tuesday, January 15, 2019

NOTE: Dean Behan graciously provided his syllabus and permission for me to use it as a basis for this syllabus (since I am using his book this year). My thanks to Dean Behan.

1. **Course Overview.**

The law of evidence certainly forms the core of the adversarial trial system. No cause of action, however just, can prevail at trial unless an advocate presents admissible evidence to and persuades a finder of fact that her side should win. The rules of evidence used in American courtrooms have evolved over centuries to provide a workable framework for the introduction of testimony and exhibits at trial.

Understanding evidence is the first step in mastering the courtroom. The purpose of this course is to teach you evidence within the context of the trial process. To that end, we will learn the background and theory behind each rule of evidence, then apply the rule in a trial setting.

Please understand, however, that this is NOT a trial preparation class. While I am hopeful you will learn how to use the rules of evidence in a trial, I am equally hopeful that you will learn to use the rules in other settings as well. For example, I believe a successful transactional lawyer must understand the rules of evidence in order to negotiate an enforceable contract and the estate planning lawyer must understand the rules in order to draft a valid will. Why? Because in the end, whether the contract is *enforceable* and whether the will is *valid* are determined in a courtroom, and that determination will be guided, if not dictated, by the rules of evidence. Therefore, EVERY lawyer must understand the rules of evidence, not merely to pass the bar exam, but to practice law successfully.

2. **Learning Objectives.** At the end of this course, students will be able to:

- Understand the common law and statutory bases for the Federal Rules of Evidence and use that knowledge to frame arguments for the application, interpretation, extension, and modification of the Rules.
- Correctly identify evidentiary issues, in the context both of problems and of courtroom trial and appellate exercises.
- Demonstrate competence in solving evidentiary issues in the context both of problems and of courtroom trial and appellate exercises.
- Draft an evidentiary *motion in limine* in a civil, personal injury case, combining rule interpretation, case application and analysis, and policy arguments.

3. **Class Meetings.**

This class meets Tuesday and Thursday from 1:30 PM-3:15 PM., starting Tuesday,

January 15, 2019 and ending Thursday, April 25, 2019.

From time to time, I may cancel class to attend conferences, moot court tournaments or other professional obligations. I will do my best to provide advance notice to assist in your planning. To make up for these missed classes, I may use a combination of out-of-class assignments, podcasts and physical make-up classes.

We will have a seating chart. On Tuesday, January 15, sit in the seat that you intend to occupy the entire semester. Otherwise, I may never learn your names.

#### 4. **Course Materials.**

As I indicated above, I will use Dean Behan's textbook (with Professor Kolenc) for this course, entitled EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE, **SECOND EDITION**.

If you prefer e-books, electronic versions of the book for Kindle, iPad and other electronic readers are available at either Amazon.com or Lexis's website at:  
<http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?prodId=prod16080469#>

However, *keep in mind the rule in paragraph 8 below that computers are banned from the classroom.*

There are two optional supplementary resource materials that I recommend. The first is the advisory committee notes for each rule. Both Lexis and Westlaw publish the advisory committee notes, but they are also available online for free on Westlaw and Lexis and at many websites, including <http://federalevidence.com/node/1335>. *The advisory committee notes are extremely useful in understanding the rules of evidence and **I EXPECT YOU TO READ THEM.***

The second is Goode & Wellborn's COURTROOM EVIDENCE (2015-2016 Student Edition). Professor Behan recommends this one. It contains sample scripts for objections and evidentiary foundations. It is an excellent resource for preparing application exercises. It also contains digests of leading evidence cases to help illustrate the rules of evidence in practice. This is the kind of reference book you will take into the courtroom with you when you go into practice.

#### 5. **Contact Information.**

a. *General.* My office is Room 256. Telephone number is 453-8744. E-mail address is mabritt@siu.edu.

b. *Office Hours.* My office is Room 0256, on the second floor near the far end of the hall. My formal office hours are Tuesday & Thursday, 10:00 a.m. to 1:00 p.m. and Wednesday 10:00 a.m. to Noon. I am also here routinely at most other times, so feel free to drop in if you find me in my office.

c. *Electronic Communication.* TWEN. I will use the TWEN page to post reading materials and assignments. I will also use it to communicate with you. You **MUST** sign up for the TWEN page. School of Law has adopted a rule requiring students to use their assigned siu.edu email address for law school-related business. Thus, excuses such as “well, I use my gmail account and that’s why I never got your email” are not acceptable.

d. *Problems and Issues.* Despite the best efforts of professors and students, class is not always perfect. Sometimes a lecture or concept is unclear. Sometimes a fellow student will do or say something insensitive or inappropriate that is not fully resolved by the professor in the classroom. You may experience personal frustration with something I do or say in the classroom. If you experience a problem or identify an issue in the class, please see me so we can discuss it and resolve it. Some of my best growth and development as a teacher have come from students taking the time to alert me to issues or problems I had not previously been aware of.

## 6. **Class Structure**

We will follow a predictable class structure as follows:

### (1) *Before Class*

(a) Reading Assignment. There is a reading assignment for each class session. You are expected to read the assignment, understand the cases, and work out the problems on your own prior to class.

(b) Assigned Problems. Every chapter in the book contains problems. Everyone must prepare written answers to and be prepared to discuss these problems in class (although I may choose not to discuss some of them). **ALSO, SEE THE NOTE BELOW.** I may also assign additional problems.

(c) Occasional Quizzes. From time to time, I may give quizzes, either in class or on the TWEN page or some other electronic system such as D2L. These quizzes are based on the reading assignments and must be completed as assigned. If you fail to take the quiz due to absence or for any other reason, you will not be permitted to make it up. I will give you more information on how this works

### (2) *During Class*

(a) Application Exercises. Every chapter in the book contains an application exercise. You should at least review each such exercise and formulate a proposed answer. We will discuss them in class when time allows.

(b) In-Class Problems. In addition to the problems in the book, I will distribute additional problems for discussion in class. I will usually distribute these problems via the TWEN page. Everyone in the class is on call to participate in class discussions of these problems as well. Additionally, as indicated above, I

will sometimes require you to prepare written answers to some of them and submit them to me.

NOTE: The American Bar Association standards for accrediting law schools contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310(b)(1), “a “credit hour” is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.” This is a 4-credit hour class, meaning that we will spend four 50-minute blocks of time together each week (a 100-minute block each Tuesday and Thursday). The amount of assigned reading and out of class preparation should take you about 4 hours for each class session and 8 hours for the week. All told, applying the ABA standard to the number of credits offered for this class, **you should plan on spending a total of 12 hours per week (4 in class and 8 preparing for class) on course-related work.**

You cannot meet this ABA requirement simply by reading Professor Behan’s book because it is too short. Therefore, **YOU MUST PREPARE WRITTEN ANSWERS TO THE PROBLEMS AT THE END OF EACH CHAPTER AND SUBMIT THEM TO ME PRIOR TO THE FIRST CLASS IN WHICH WE DISCUSS THE PROBLEMS.** I will not grade them. I will only look at them to see that you have done the work. For each assignment that you fail to turn in timely I will deduct one-tenth (1/10) of a point from your final grade. Each of you get two (2) free passes from this requirement during the semester. Please use them wisely. Also, **YOU MUST DO YOUR OWN WORK.**

### **7. Class Participation.**

Class participation is not only a key to successful learning, it is an integral part of this course. I intend for you to learn evidence thoroughly, and the best way to accomplish that is through frequent class participation. I prefer not to cold call on people because I do not like to humiliate anyone. However, I do expect everyone to participate in class discuss. Successful lawyers do not sit quietly and let others do the talking. Everyone must learn to speak up.

### **8. Listening, Note-Taking, Computers and the Internet.**

I expect you to listen and be mentally engaged in class. Active, sustained listening is an absolutely critical skill for lawyers. This is especially true in evidence and trial work. In order to make and respond to objections, you must listen closely to everything that is being said in the courtroom. Therefore, to prepare you adequately for life after graduation, I demand that you turn off your cell phones. **ANY STUDENT WHO I FIND IS USING A CELL PHONE WILL BE ASKED TO LEAVE CLASS AND WILL BE CONSIDERED ABSENT ON THAT DAY.**

In addition, **DO NOT BRING COMPUTERS TO CLASS.** (If this presents a unique problem for you personally, please let me know.) Plenty of research now shows that computers in the classroom impede student learning. (*See, e.g.,*

<http://mobile.nytimes.com/2017/01/02/opinion/leave-your-laptops-at-the-door-to-my-classroom.html>) Whether you agree or not, research shows that students learn better by

handwriting class notes than by typing them. In light of the difficulty today's students are having passing the bar exam, I have decided to ban computers from my class in order to promote better listening and learning. Also, you cannot bang on a computer at the counsel table during a trial. You are expected to WATCH AND LISTEN, which you cannot do if you are typing or looking at Facebook. So in my class I will expect you to act as though you are in a courtroom.

This also means you must be courteous to the others in the classroom by keeping distractions to a minimum and giving the class your full attention. If it is absolutely necessary for you to leave the classroom while class is in session, please minimize the disruption when entering or exiting the room. This is what judges will expect of you after you graduate.

#### 9. **Policy on Recording Class.**

The School of Law will not be making either audio or video recordings of this class. You are NOT authorized to make your own audio or video recordings of my classes.

#### 10. **Attendance Policy.**

Attendance is required. You may miss no more than four (4) class sessions during the semester (this is LESS than the number of possible absences under the Law School rules) without having to withdraw from the class or face the grade penalty. You are responsible to manage your own absences and, as an adult and a professional, should realize that if you take all absences early in the semester and run into a problem later in the semester, you will have created a problem for yourself from which no one else is obligated to rescue you. Regardless of your reason for doing so, if you miss class on a day when your team is assigned a presentation or application exercise, you will receive a zero for that assignment.

I will pass around an attendance sheet every day at the beginning of class. Your original, genuine signature on the attendance sheet certifies that you are physically present. If you fail to sign the attendance sheet, you are deemed absent even if you actually attend class on that day. In other words, it is your responsibility to ensure that you sign the attendance sheet if you are present for class.

If you cannot be prepared for a class, let me know in advance and I will not call on you. It is not my intent to humiliate you. However, do not abuse this privilege. I reserve the right to withdraw it to a student who I believe (in my unfettered discretion) is not preparing adequately for class. (THIS DOES NOT ABSOLVE YOU OF YOUR RESPONSIBILITY TO SUBMIT TIMELY ANSWERS TO PROBLEMS OR EXCUSE YOU FROM THE PENALTY WHEN YOU FAIL TO SUBMIT THEM TIMELY ANSWERS TO PROBLEMS.)

Also, please make a habit of coming to class on time. It is a tremendous distraction to everyone when someone strolls in after class has begun. I reserve the right to find a tardy student absent if that student has arrived late more than a couple of times.

#### 11. **Grading and Evaluation:**

I will evaluate your work in several ways:

- a. Classroom preparation and participation.
- b. Quizzes & writing assignment. These may be timed multiple choice quizzes and a writing assignments.
- c. Mid-term exam. This will be an essay exam. (Same rule as with the final below.)
- d. Final examination. The exam will consist of both multiple choice questions and an essay question, both parts of which are modeled on the bar exam. You will take the multiple choice portion of the exam first. That will be closed book. When you turn in the multiple choice answers you will receive the essay portion. To answer the essay, you may use a copy of the federal rules of evidence and anything you can write in or upon them. You may use nothing else.

### **OTHER IMPORTANT STUFF:**

**PLAGIRISM:** Plagiarizing another's work, in whole or in part, is a violation of the Honor Code and can lead to serious penalties, including expulsion. An Honor Code investigation must also be reported to the Bar Examiners, even if you are cleared of any violation. The Honor Code defines plagiarism as: *passing off another's ideas, words, or work as one's own, including written, oral, multimedia, or other work, either word for word or in substance, unless the student author credits the original author and identifies the original author's work with quotation marks, footnotes, or other appropriate designation in such a way as to make clear the true author of the work.*

**EMERGENCY PROCEDURES:** *Southern Illinois University Carbondale is committed to providing a safe and healthy environment for study and work. Because some health and safety circumstances are beyond our control, we ask that you become familiar with the SIUC emergency Response Plan and Building Emergency Response Team (BERT) program. Emergency response information is available on posters in buildings on campus, available on BERT's website at [www.bert.siu.edu](http://www.bert.siu.edu), Department of Safety's website [www.dps.siu.edu](http://www.dps.siu.edu) (disaster drop down) and in Emergency Response Guideline pamphlet. Know how to respond to each type of emergency.*

*Instructors will provide guidance and direction to students in the classroom in the event of an emergency affecting your location. **It is important that you follow these instructions and stay with your instructor during an evacuation or sheltering emergency.** The Building Emergency Response Team will provide assistance to your instructor in evacuating the building or sheltering within the facility.*

**DISABILITY ACCOMMODATION POLICY:** *Disability Support Services provides the required academic and programmatic support services to students with permanent and temporary disabilities. DSS provides centralized coordination and referral services. To utilize*

*DSS services, students must come to the DSS to open cases. The process involves interviews, reviews of student-supplied documentation, and completion of Disability Accommodation Agreements. <http://disabilityservices.siu.edu/>. Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreement to the School of Law Registrar's Office to ensure the School of Law provides the proper classroom and examination accommodations.*

**SALUKI CARES:** *The purpose of Saluki Cares is to develop, facilitate and coordinate a university-wide program of care and support for students in any type of distress—physical, emotional, financial, or personal. By working closely with faculty, staff, students and their families, SIU will continue to display a culture of care and demonstrate to our students and their families that they are an important part of the community. For Information on Saluki Cares: (618) 453-5714, or [siucares@siu.edu](mailto:siucares@siu.edu), <http://salukicare.siu.edu/index.html>. At the School of Law, Assistant Dean Judi Ray is also available to help students access university resources. Her email is [judiray@siu.edu](mailto:judiray@siu.edu), and her phone number is 618-453-3135.*