

Law 536: Evidence
Course Memorandum
Fall 2020

Clinical Assistant Professor Mark Brittingham

T & Th, 2:45-4:25 p.m.

VIA ZOOM

First Class: Tuesday, August 18, 2020

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 should 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 2:45 PM-4:25 PM., starting Tuesday, August 18, 2020 and ending Thursday, November 19, 2020.

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 Zoom make-up classes.

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**. You should feel free to use e-books, electronic versions of the book for Kindle, iPad and other electronic readers if you prefer.

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 **LEXP**ECT YOU TO READ **THEM**.*

The second is Goode & Wellborn's COURTROOM EVIDENCE (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.* As indicated above, I will not maintain regular office hours during COVID 19. Please email me if you wish to meet.

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**

I have never before taught EVIDENCE remotely (although I have taught EVIDENCE many times). Using Zoom will undoubtedly make it more difficult for me to demonstrate how the Rules of Evidence are used in an actual courtroom. Nevertheless, I intend to do my best, and I ask that you be patient with me. To prepare for class, do the following:

(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.

(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 may 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 BY EMAIL 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 and pay attention.

9. Policy on Recording Class.

I will try to record each class. **YOU NEED TO REMIND ME AT THE BEGINNING OF EACH CLASS TO HIT THE "RECORD" BUTTON.!** 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) unless some special circumstance requires otherwise. If you violate this rule, you will be withdrawn 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 you are assigned a presentation or application exercise, you will receive a zero for that assignment.

To take attendance, I will call roll at the beginning of each class. It is your responsibility to ensure that I know you are present in 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 TIMELY ANSWERS TO PROBLEMS.)

11. **Grading and Evaluation:**

I will evaluate your work in several ways:

- a. Classroom preparation and participation, quizzes & writing assignments may be used to adjust final grades.
- b. Mid-term exam. This will be an essay exam. (Same rule as with the final below.) It is worth 1/3 of your final grade (subject to a above).
- d. Final examination. The exam may consist of both multiple choice questions and essay question(s), both parts of which are modeled on the bar exam. Each part will be worth 1/3 of your final grade (subject to a above).

OTHER IMPORTANT STUFF

PLAGIARISM: 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: We ask that you become familiar with **Emergency Preparedness @ SIU**. Emergency response information is available on posters in buildings on campus, on the Emergency Preparedness @ SIU website, and through text and email alerts. To register for alerts, visit: <http://emergency.siu.edu/>.

DISABILITY POLICY. SIU Carbondale is committed to providing an inclusive and accessible experience for all students with disabilities. Disability Support Services coordinates the implementation of accommodations. If you think you may be eligible for accommodations but have not yet obtained approval please contact DSS immediately at 618-453-5738 or disabilityservices.siu.edu. You may request accommodations at any time, but timely requests help to insure accommodations are in place when needed. Accommodations and services are

determined through an interactive process with students and may involve consideration of specific course design and learning objectives in consultation with faculty. Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreements for each course to the School of Law Registrar's Office to ensure the School of Law provides the proper classroom and examination accommodations. Accommodation [request](#) and [renewal](#) forms can be found here: <https://law.siu.edu/academics/>.

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) 453-2461, or 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, and her phone number is 618- 453-3135.

COVID-19. As a condition of on-campus enrollment, all SIUC students are required to engage in safe behaviors to avoid the spread of COVID-19, including the requirement that all students wear a mask in campus buildings, including classrooms, laboratories, and studios when others are present, regardless of social distancing. Students are expected to follow physical or social distancing guidelines by keeping at least 6 feet from others, and practicing good hand hygiene. Failure to comply with this policy may result in dismissal from the current class session. If the student refuses to leave the classroom after being dismissed, the student may be referred to the Office of Student Rights and Responsibilities. SIUC will follow federal, state and county public health recommendations and mandates in all decisions relating to university operation. Students should regularly review the link for the [SIUC COVID-19 response](#).