

Law 536: Evidence, Section 1
Course Memorandum
Spring 2020

Professor Chris Behan
W-F, 10:30-12:15, Room 108

1. Course Overview.

The law of evidence 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.

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.

3. Class Meetings.

This class meets Wednesday and Friday from 10:30 PM-12:15 PM, starting Wednesday, January 15, 2020 and ending Friday, April 24, 2020. We will take a 5-minute break in the middle of each class, thus extending the end time of the class from 12:10 to 12:15. I have found that a 5-minute break in the middle of a 100-minute class is absolutely necessary for most students.

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

We will have a seating chart. On Friday, January 17, sit with your litigation team in the courtroom. This will be your assigned seating area during the semester.

4. Course Materials.

Along with my co-author, Professor Tony Kolenc, I wrote the textbook for this course, entitled EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE (2d Edition, Carolina Academic Press, 2018). Do not use the first edition. The second edition is a complete rewrite and re-organization of the first, with different chapters, cases, problems, exercises, and so forth.

The text is also available electronically on RedShelf and can be purchased or rented at this link:

<https://redshelf.com/book/916730/evidence-and-the-advocate-916730-9781531008055-christopher-behan-and-antony-b-kolenc>. Many students have used the electronic version of the text and found it worked well for them.

There are two optional supplementary resource materials you might consider, although they are not required purchases and we will not directly use them in class. The first is Goode & Wellborn's COURTROOM EVIDENCE (any edition after 2015 will do). This book contains sample scripts for objections and evidentiary foundations. It is an excellent resource for preparing for 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.

The second is the Advisory Committee Notes for the Federal Rules of Evidence. As you will see, the textbook contains excerpts from these notes, but if you would like to read the complete Notes for each rule, they are 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 highly recommend that you read them.

5. Contact Information and TA Information.

- a. *General.* My office is in Room 254. Telephone number is 453-8722. E-mail address is cbehan@siu.edu. If you need to reach me and I am not in the building, leave a text at 618-521-1849. I prefer text messages to calls. If you text, identify yourself in the text (you'd be surprised at how many students don't do that).
- b. *Office Hours.* My office hours are whenever I am in the office and my door is open. Also Tuesdays from 3:00-4:30. If those times don't work for you, we can set up an appointment to meet at a different time of mutual convenience. Just email me to set up an appointment.
- c. *Teaching Assistants.* My teaching assistant is Holly Belmonte. She will post her contact information and office hours on the TWEN page. She will grade the case

problems described later in the syllabus and will be available to answer questions and provide assistance in all matters pertaining to the course.

- d. *Electronic Communication.* Check your e-mail regularly. I will use TWEN to send messages pertaining to class. Make sure you are actually checking the email address you used to register for TWEN. The 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 unacceptable.
- e. *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 come see me so we can discuss it and resolve it. Some of my best growth and development as a professor has come from students taking the time to alert me to issues or problems I had not previously been aware of.

6. Workload, Class Structure and Rhythm

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 Monday and Wednesday). 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.**

We will cover the entire book. I expect you to be prepared for class, turn in all assigned materials, and keep up with class.

We will not leave issues of workload compliance to chance. The class follows a predictable structure and rhythm:

(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) Problems. Every chapter contains several problems. Prior to class, you must work through the problems and prepare written solutions to them. You can do this individually or in your litigation groups. If you work as a group, each person in the group must submit the problems individually and include a statement that the assignment was (1) prepared by the group, and (2) that the student fully participated in the preparation of the assignment. To get credit for the problems, you must post the solutions to the course TWEN page prior to class. You'll have to certify Honor Code compliance to be able to submit the problems. The TAs will review the problems weekly.

(c) In-Class Activities. Each chapter has an assigned in-class activity. Some require advance preparation before class, although this is typically relatively minimal preparation. You must be prepared to participate in these activities in class.

(d) Application Exercises. Each unit has at least one application exercise, a more in-depth project that requires advance preparation, including written materials and in-class performances. After you have formed your litigation teams, I will post sign-up sheets on the TWEN page.

(2) *During Class*. We will discuss the cases in class. I will call on litigation teams at random for case discussions and also to work through problems. I will also call on litigation teams and/or individuals for participation in the in-class activities. You can sign up for application exercises on the TWEN sign-up sheet, which will be available the week of January 20.

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 thoroughly learn evidence, and the best way to accomplish that is through frequent class participation.

Students must form 3-person litigation teams by class time on Friday, January 17. Each litigation team must select a name and turn in a 3x5 index card at the beginning of class with the following information: (1) team name; (2) individuals on the team; (3) for each individual on the team, your hometown, undergraduate school and degree, and an interesting (must actually be interesting; nothing dull) fact about you.

In most of our class sessions, students will participate in one of three primary roles: problem/case counsel, in-class activity counsel, application exercise advocate and/or role player. Each of those roles is explained below:

Problem Discussants. Each chapter in the text contains a number of problems. I will cold-call on teams randomly to participate in class. You will not know in advance whether you'll be called on in class. If you are unprepared to

participate, or if your performance indicates substandard preparation, you will be assessed a penalty of 5 raw points from the class preparation portion of your grade (see below).

In-Class Activity Counsel. For the in-class activities, I will call on litigation teams and/or individuals to participate. If there is additional guidance for an In-Class Activity (such as advance preparation), the syllabus provides the information. You must be prepared to participate.

Application Exercise Advocate Role Player. Each unit in the text contains one or more application exercises. Most application exercises take place in a courtroom environment and include counsel, witness and judge roles. Assigned teams must prepare for every single role in the application exercise. If you need additional people to serve as witnesses, it is your responsibility to recruit them from the class and ensure they are ready to participate. Thorough preparation is paramount.

Application exercises are graded on a team basis. Each team must prepare a written version of the application exercise. In addition, the team will be graded on its preparation and performance as role players in the courtroom. If the team needs additional role players for its exercise, it may recruit them from the class, or, in the alternative, team members can play multiple roles.

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.

Be courteous to the others in the classroom by keeping distractions to a minimum and giving the class your full attention. Do not text, send instant messages, or hold conversations with others during class. 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.

You may use computers in class to take notes and access the electronic version of the text during class. Those are the authorized uses and there are no others. If individuals abuse the privilege, I reserve the right to ban such individuals from using laptops from the classroom.

9. Policy on Recording Class.

You are not authorized to make your own audio or video recordings of my classes. Moreover, the class will not be recorded at all.

10. Attendance Policy.

Attendance is required. In accordance with law school rules, you may miss no more than six (6) class sessions during the semester (for a 4-credit hour class meeting twice a week, this is the maximum number of possible absences under our rules) without having to withdraw from the class or face the grade penalty under the School of Law rules. 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 two things: (1) you are physically present; and (2) you are prepared for class. If you come in a minute or two late, you can still sign the attendance sheet.

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 do not permit noting out in my classes. At student request, I recently experimented with it in a class and remembered why I have prohibited it in the past.

11. Grading and Evaluation:

I will evaluate and assess your work in several ways:

- a. Written Problem Solutions. (10% of final grade.) As explained above, you are expected to turn in your written problem solutions for the assigned reading prior to each class. You may work in litigation groups on the problems but must submit solutions individually. In cases involving group work, you must certify that you contributed equally to the problem solutions, and you must list the other members of the group who participated with you. (To clarify, if your litigation team works out a common set of problems, you can all turn in the same problem set on your individual TWEN dropboxes, but you cannot turn in a set of problems to which you did not contribute— that’s called “cheating” and is a form of plagiarism.) There are two grade possibilities for each set of problem solutions: 5 points (full credit for making a good-faith, thorough effort that indicates understanding of the principles involved in the problem); 0 points (substandard, indicating a lack of understanding or effort). These points will be totaled at the end of the semester and scaled to be worth 10% of the final grade. Note: if you work in a group but do not certify equal participation and list the other members of the group, you automatically get a 0 on the assignment no matter how good it is, and this is non-appealable.

- b. Classroom preparation and participation. **(10% of your final grade)**. I will assign 100 raw points for classroom preparation and participation. These will be scaled to be worth 10% of the final grade. Everyone starts out with 80 points. You can earn up to an additional 20 points through consistent superior preparation and performance in classroom discussions throughout the semester; this determination is in my sole discretion and is not appealable. At the end of the semester, I will ask each of you to turn in a self-evaluation explaining what grade you believe you should earn from classroom preparation and participation, supported by a sound narrative explanation and evidence. I will then compare your notes and mine and assign total points for this area of assessment.

Although it has never happened, you could also lose all 80 of the points you start with for deficient performances. If I call on you and you are unprepared, inadequately prepared, or not paying attention, you will lose 10 raw points for that day. Also—if you attempt to excessively dominate classroom discussions by blurting out answers without being called on, talking over your classmates, treating classmates or the process disrespectfully, sighing or acting put out if I don't call on you, or engaging in other unprofessional classroom behavior, you will lose 10 points on the day.

- c. Quizzes. **(10% of final grade)**. Throughout the semester, at the end of each of the first six units, I will administer a timed, multiple-choice MBE-style quiz via TWEN. The quizzes will be open for a 24-hour period. Each quiz contains explanations for both correct and incorrect answers. These quizzes satisfy the bar preparation assignment for the course. The quizzes contain an honor code certification that you did the quiz on your own and did not obtain information about quiz questions or possible answers in advance from other members of the class. The quiz scores will be scaled to constitute 10% of your final grade.
- d. Application Exercise. **(10% of final grade)**. Each litigation group must sign up for an application exercise on the TWEN page. Each exercise requires significant out-of-class preparation, including the submission of written materials. The written materials count as your WAC requirement for this course.
- e. Final examination (60%). Exam will be closed-book, closed note. The examination will be a combination of multiple choice questions and essay questions. The examination is scheduled for Thursday, April 30, at 1:15 pm.

12. 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 the BERT's website at www.bert.siu.edu, Department of Public Safety's website www.dps.siu.edu (disaster drop down) and in the Emergency Response Guidelines 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 BERT will provide assistance to your instructor in evacuating the building or sheltering within the facility.

13. Students with Disabilities.

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.

14. Students with Physical, Emotional, Mental, or Financial Needs.

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, <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 618453-3135.

15. Reading & Assignment Schedule.

The reading schedule for the semester is below. The schedule is subject to change if I feel we need more time to cover a topic in class. There may be times when reading, discussions, and/or In-Class Activities or Application Exercises spill over to the next class. This does not change your obligation to be prepared for the material that is listed for a particular class and day. Think of the reading schedule as similar to an airline schedule. You have to be at the airport on time, even if the flight might be delayed a bit. As you will see in the reading schedule, I have built a

few “flex days” into the schedule to ensure we catch up and cover all material before moving on to a new topic.

Week	Class	Date	In-Class Topics	Reading Assignment (includes all problems)	In-Class Activity & Application Exercise Assignments
Unit One: Introduction to the Adversary Trial System					
1	1	15 Jan	Introduction to the Rules of Evidence	Chapter One	CA (classroom activity). Option One. Bring hard copy to class
	2	17 Jan	Basic Evidentiary Procedural Framework	Chapter Two	CA. Offer of Proof Exercise. Either individually or in a group, prepare for this exercise in advance.
2	3	22 Jan	Establishing Facts at Trial	Chapter Three	<ul style="list-style-type: none"> • CA. Classroom court #1. Review and be prepared. • Unit 1 Application Exercise. Each group must do the exercise. Use option “b” in the factual scenario on page 90.
	End of Unit One. Quiz on TWEN.				
	Unit Two. Relevance.				
	4	24 Jan	Introduction to Relevance	Chapter 4	CA. Classroom court #2. Read and be generally prepared.
3	5	29 Jan	Excluding Relevant Evidence under Rule 403	Chapter 5	CA. Review and be generally prepared.
	6	31 Jan	Extrinsic Social Policies and Exclusion of Relevant Evidence	Chapter Six	CA. As assigned in class.
4	7	5 Feb	Rape Shield Rule: Rule 412	Chapter 7	CA. As assigned in class.
	8	7 Feb	Privileges	Chapter 8	CA. Litigation groups prepare for privilege in advance and bring information to class.
5	9	12	Finish Unit Two	No new reading	Unit Two application

Week	Class	Date	In-Class Topics	Reading Assignment (includes all problems)	In-Class Activity & Application Exercise Assignments	
		Feb			exercise. Assigned groups from sign-up sheet.	
End of Unit Two. Quiz on TWEN.						
Unit Three. Character.						
	10	14 Feb	Introduction to Character Evidence	Chapter 9	CA. As assigned in class.	
6	11	19 Feb	Evidence of Other Crimes, Wrongs, or Acts	Chapter 10	CA. Classroom Court #3. Review and be prepared. Unit 3 Application Exercise. Groups on TWEN sign-up page. All students in class should review factual scenario prior to class.	
End of Unit Three. Quiz on TWEN.						
Unit Four: The Law of Witnesses and Impeachment.						
	12	21 Feb	Witness Competency	Chapter 11	CA. Prepare before class. Will call on groups in class.	
7	13	26 Feb	Refreshing Recollection & Past Recollection Recorded	Chapter 12	CA. Litigation groups should discuss prior to class and be prepared to demonstrate in class.	
	14	28 Feb	Introduction to Impeachment	Chapter 13	CA. Make sure you really know the cases and problems in the .	
8	15	4 Mar	Impeachment by Prior Inconsistent Statements	Chapter 14	CA. Review and be familiar. Unit Four Application Exercise. Groups from sign-up sheet on TWEN.	
	End of Unit Four. Quiz on TWEN.					
	Unit Five: Exhibits: Authentication and the Best Evidence Rule.					
		16	6 March	Authentication	Chapter 15	CA. As assigned in class. Review facts and be generally prepared.
Spring Break 7-15 March. Be Safe and Have a Great Time.						

Week	Class	Date	In-Class Topics	Reading Assignment (includes all problems)	In-Class Activity & Application Exercise Assignments
9	17	18 March	Best Evidence (Original Documents) Rule	Chapter 16	CA. Classroom Court #4. Review before class. Unit Five Application Exercise. Groups from TWEN sign-up sheet
	End of Unit Five. Quiz on TWEN.				
	Unit Six. Hearsay.				
	18	20 March	Introduction to hearsay.	Chapter 17	CA. As assigned in class. Please ensure you have read the transcript and identified potential objections.
10	19	25 March	Hearsay within Hearsay and <i>Res Gestae</i> exceptions	Chapter 18	CA. As assigned in class. Please ensure you have read the transcript and identified potential objections.
	20	27 March	Business & Public Records and Other Rule 803 Exceptions	Chapter 19	CA. Prepare for this in your litigation groups in advance. Create your own scenario and records to support it. □
11	21	1 April	Complete Unit Six Mid-Unit Materials	No new reading	Unit Six, Mid-Unit Application Exercise. Groups as per TWEN sign-up sheet.
	22	3 April	Rule 804 and Unavailability Exceptions	Chapter 20	CA. Classroom Court #5. As assigned in class. Read transcript and be prepared.
12	23	8 April	Hearsay Finale: Rules 806 and 807	Chapter 21	CA. As assigned in class.
	24	10 April	Confrontation Clause	Chapter 22	CA. As assigned in class. Be familiar with the transcript and fact pattern.
13	25	15 April	Finish Unit Six	No New Reading	Unit Six Final Application Exercise. Groups as per TWEN sign-up sheet.
	End of Unit Six. Quiz on TWEN.				

Week	Class	Date	In-Class Topics	Reading Assignment (includes all problems)	In-Class Activity & Application Exercise Assignments
Unit Seven. Opinion Testimony.					
	26	17 April	Introduction to Lay and Expert Opinion Testimony	Chapter 23	CA. As assigned in class. Come prepared as per instructions in the exercise.
14	27	22 April	Expert Opinion Testimony and Its Limits	Chapter 24	CA. Review and be familiar. Unit Seven Application Exercise. Groups as per TWEN sign-up sheet.
	28	24 April	Final Class	Capstone Application Exercise	As assigned

Instructions

Prior to signing up for an application exercise, it is a good idea to skim all the application exercises to see what most interests your team. The sign-ups are, however, all first-come, first-served. This means if you don't get the exercise or the date you wanted, you are still responsible for the exercise on the date you signed up for one.

1. For most application exercises, there are two sign-up slots, meaning that two teams can sign up for the exercise. The exception is the Capstone Application Exercise. Only one team--a 4-person team--can sign up for that exercise.
2. Only one team member from each litigation team should sign up for an application exercise. When you do sign up for an exercise, please put your team name in the text box. In the text box next to your name, write the name of your team and the names of your other team members.
3. On the scheduled day for an application exercise, the teams that have signed up must show up prepared to perform the exercise. Each team turns in a written version of their performance. Teams must coordinate with each other and me to ensure all roles in the exercise are covered. If the exercise states that the professor will assign a jurisdiction, cause of action, or anything similar--the teams must contact me in advance to get this assignment.
4. For courtroom exercises that are adversarial in nature (e.g., Prosecution v. Defense), teams must coordinate with each other, in advance, to decide on roles. Teams must inform the professor, in advance, of which role each team will be playing.

The exercises will be evaluated as follows:

1. Preparation. Evident preparation, not only of a written version of the exercise, but also the in-class performance.
2. Thoroughness. Students have done more than a surface analysis of the issues, but rather have thoroughly researched the issues and are able to present, perform, and teach to others at a professional level.

3. Learning value for other students.

4. Fidelity to time limits. No exercise, unless with prior approval of the instructor, can last more than 15 minutes.

All team members must equally participate and must sign a certificate of joint and equal participation. The team may define equal participation as it wishes, provided that the effort and contribution of all members is roughly equal. No free riders are permitted for these application exercises.