

**Law 536: Evidence
Course Memorandum
Spring 2021**

Professor Chris Behan
W-F, 10:30-12:15, via Zoom
Zoom link and password available on course TWEN page

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 20, 2021 and ending Friday, April 23, 2021. 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.

All class meetings this semester will be via Zoom. The Zoom link is on the course TWEN page. If you move your mouse over the link, you'll see the meeting ID and password, if you need them.

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.

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 2016 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. I have included a link to the Rules with Advisory Committee Notes on the course TWEN page.

5. Contact 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.* I have tried set office hours with Zoom, and the experiment has been unsuccessful. If you are in the building, my office hours are whenever I am in the office and my door is open. You can also text or email to set up a time for a telephone or Zoom consultation.
- c. *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.
- 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 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 individually 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. **Also, you should know that any of these problems are fair game for the final examination; there will be a short-answer section that includes at least two or three of the problems from class.**
- (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 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 after our second class on January 22.

7. Attendance, Preparation and Class Participation.

Attendance is required. In accordance with law school rules, you may miss no more than four (4) class sessions during the semester without having to withdraw from the class or face a grade penalty under the School of Law rules. You are responsible to manage your own absences. As an adult and a professional, should realize that if you take all absences early in the semester and need more later in the semester, you will have created a problem for yourself from which no one else is obligated to rescue you. Also, if you are assessed an absence for inadequate preparation or not paying attention when off-camera, that absence counts towards your total absences.

Zoom will keep track of your attendance. When you log on to class, your log-in certifies three things: **(1) you are present via Zoom for class; (2) you are prepared for class; and (3) you are participating in class by listening, taking notes, and responding appropriately when called on.**

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 4-person litigation teams by class time on Friday, January 22. Each litigation team must select a name and turn in a completed information sheet using the template provided on TWEN.

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 several 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. When I cold

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. Zoom Protocol, Listening, and Note-Taking.

I expect you to listen and be mentally engaged in class. Active, sustained listening is a critical skill for lawyers. I use a minimal number of slides in the class; they do not substitute for good note-taking practices by students.

I expect the following from anyone attending class via Zoom:

- Make sure you have a good, high-speed internet connection. If you are attending from home, ensure that no one else is using Zoom or streaming movies or video at that time. If you can plug your computer directly into a router with an ethernet cable or USB connection, you'll find your Zoom connection will be much better than simply using wifi.
- Attempting to attend class while driving somewhere else does not count as class attendance. Should it become apparent that is what you're doing, I'll assess an absence for the day.
- Turn off all programs on your computer except Zoom and a word-processing program if you are using one to take notes. Do not use chat services or instant-messaging services on your computer during class.
- Do not use your cellphone during this class, or any class, unless it is to participate in an online survey or quiz as directed by me.
- If you are speaking, your video camera must be on. When your camera is on please ensure the area around you is free from distractions, including pets and people. Remember, your Zoom presence is intended to substitute for your personal presence in the classroom as much as possible.
- To help with bandwidth issues, you are permitted to turn your camera off when you are not speaking.

- When your camera is off, you are still part of the class. This means you are required to listen and to participate when called on, without me having to repeat the question or summarize the classroom discussion up to that point because you were not listening. If I call on you and you are not available to respond, ask me to repeat the question, or indicate in any way that you were checked out of class with your camera off, you'll be assessed an absence for the day.
- A few things to consider when your camera is on.
 - You are free to use a virtual background if you'd like, provided it is not overly distracting.
 - If you're attending class from a bedroom or other room in your home, take the time to make your bed, pick up any dirty clothes or dishes that might be lying around, and, in general, straighten the area up to look as uncluttered and professional as possible.
 - The camera should be focused on your face and not on other parts of your body such as up your nostrils, your forehead, your neck, your chest, your midsection, any other non-face part of your body, or the wall behind you.
 - The light source in the room should be in front of you, not behind you.
 - Wear acceptable clothing, such as you would wear to class. Ensure that other people in your home who might pass through camera range are also wearing acceptable clothing. Acceptable clothing does not include pajamas and/or underwear.
 - (This section is derived entirely from experience; my other students and I have, unfortunately, seen far more than we would like to see in classes or meetings in which the participants haven't complied with these recommendations.)
- Unless you are being called on, keep your microphone muted. If you would like to participate, use the Raise Hand function on Zoom to indicate this.
- If something happens to your internet connection during class, turn Zoom off and on and log back on as soon as you can. There is no need to apologize for this; it happens to everyone. It may happen to me while I'm teaching (has happened before).
- I likely will not activate the Zoom chat feature for our classes. I've found it to be more distracting than helpful during class.

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.

9. Policy on Recording Class.

You are not authorized to make your own audio or video recordings of my classes. The class will be recorded by the School of Law IT department. Generally, I do not make recordings available unless necessary to accommodate a disability or unless you request and receive my approval.

10. 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 (all problems turned in before class starts, good faith effort to answer correctly); 0 points (problems turned in late or not at all; 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. 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 quizz 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.
- c. 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.
- d. Final examination (70%). The examination consists of a combination of multiple-choice questions, short answers, and essays. I will provide more information about it later.

11. Other Important Information on Support and Resources. Please see the Law School and Provost Syllabus attachments, available at [https://pvcaa.siu.edu/ common/documents/provost-memos/syllabus-](https://pvcaa.siu.edu/common/documents/provost-memos/syllabus-)

[attachment-spring-2021-vs2.pdf](#) and <https://law.siu.edu/common/documents/courses/sp-21-syllabi/syl-attachment-spr-21.pdf>.

12. 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 class and day. Think of the reading schedule as akin to an airline schedule. You must show up to 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	20 Jan	Introduction to the Rules of Evidence	Chapter One	CA (classroom activity). Option One. Bring hard copy to class
	2	22 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	27 Jan	Establishing Facts at Trial	Chapter Three	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	29 Jan	Introduction to Relevance	Chapter 4	CA. Classroom court #2. Read and be generally prepared.
3	5	3 Feb	Excluding Relevant Evidence under Rule 403	Chapter 5	CA. Review and be generally prepared.
	6	5 Feb	Extrinsic Social Policies and Exclusion of Relevant Evidence	Chapter Six	CA. As assigned in class.
4	7	10 Feb	Rape Shield Rule: Rule 412	Chapter 7	CA. As assigned in class.
	8	12 Feb	Privileges	Chapter 8	CA. Litigation groups prepare for privilege in advance and bring information to class.

Week	Class	Date	In-Class Topics	Reading Assignment (includes all problems)	In-Class Activity & Application Exercise Assignments
5	9	17 Feb	Finish Unit Two	No new reading	Unit Two application exercise. Assigned groups from sign-up sheet.
	End of Unit Two. Quiz on TWEN.				
	Unit Three. Character.				
	10	19 Feb	Introduction to Character Evidence	Chapter 9	CA. As assigned in class.
6	11	24 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	26 Feb	Witness Competency	Chapter 11	CA. Prepare before class. Will call on groups in class.
7	13	3 March	Refreshing Recollection & Past Recollection Recorded	Chapter 12	CA. Litigation groups should discuss prior to class and be prepared to demonstrate in class.
	14	5 March	Introduction to Impeachment	Chapter 13	CA. Make sure you really know the cases and problems in the .
8	15	10 March	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	12 March	Authentication	Chapter 15	CA. As assigned in class. Review facts and be generally prepared.
9	17	17 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.				

Week	Class	Date	In-Class Topics	Reading Assignment (includes all problems)	In-Class Activity & Application Exercise Assignments
	18	19 March	Introduction to hearsay.	Chapter 17	CA. As assigned in class. Please ensure you have read the transcript and identified potential objections.
10	19	24 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	26 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	31 March	Complete Unit Six Mid-Unit Materials	No new reading	Unit Six, Mid-Unit Application Exercise. Groups as per TWEN signup sheet.
	22	2 April	Rule 804 and Unavailability Exceptions	Chapter 20	CA. Classroom Court #5. As assigned in class. Read transcript and be prepared.
12	23	7 April	Hearsay Finale: Rules 806 and 807	Chapter 21	CA. As assigned in class.
	24	9 April	Confrontation Clause	Chapter 22	CA. As assigned in class. Be familiar with the transcript and fact pattern.
13	25	14 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.				
	Unit Seven. Opinion Testimony.				
	26	16 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	21 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	23 April	Final Class	Capstone Application Exercise	As assigned