

**Law 536: Evidence
Course Memorandum
Spring 2023**

Professor Chris Behan
M-W-F, 9:00-10:10
Room 102

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.

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.
- Engage and consider non-dominant perspectives on the law of evidence with respect and empathy.
- Develop ability to critique the adversarial system and Federal Rules of Evidence for their ability to provide equitable access to justice.
- Identify and critically reflect upon the various aspects of their courtroom persona and identity.
- Demonstrate competence in solving evidentiary issues in the context both of problems and of courtroom trial and appellate exercises.

Class Meetings

This class meets Monday, Wednesday, and Friday from 9:00 AM-10:10 AM, starting Wednesday, January 18, 2023 and ending Friday, April 28, 2023. Each class session is 70 minutes, a total of 210 minutes each week. Because of the extra 10 minutes per week, we will not need to make up the class missed from the Martin Luther King, Jr., holiday.

Class meetings this semester will be held live in the classroom. This is not a hybrid class; there will be no separate “Zoom section.” Class meetings will be recorded and made available to students with genuine emergencies, such as documented illnesses, quarantines, and the like.

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 Zoom classes, out-of-class assignments, podcasts and physical make-up classes.

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 (2022-2023). 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 D2L page.

Contact Information & Office Hours

- 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.* Office hours are M-W from 3:00-4:30. I also have an open-door policy, under which you are welcome to drop by anytime 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. *Teaching Assistant.* My teaching assistant is Alexis Barnes. She will post her contact information and availability on the D2L page.
- d. *Electronic Communication.* Check your e-mail regularly. I will use D2L to send messages pertaining to class. Make sure you are actually checking the email address you used to register for D2L. 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 of which I had not previously been aware.

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. 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) Pre-Class Preparation (critical to your success in this class)

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.

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 D2L 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.**

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, as per the reading schedule below.

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. Each litigation group will participate in two application exercises. After you have formed your litigation teams, I will post sign-up sheets on the D2L page.

(2) *During Class.*

Reading and Problem Days. On these days (usually, but not always, Mondays and Wednesdays), we cover the assigned reading for each day, including cases and problems. I cold-call students at random to discuss cases and work through problems.

Synthesis Days. On synthesis days (usually, but not always, Fridays), we work through the classroom activities at the end of each chapter. We also conduct the unit application exercises. These activities and exercises are important in synthesizing your understanding of evidentiary doctrines and principles. I will distribute a weekly note-taking guide for our synthesis days to help you better understand and contextualize them. Take note: the principles we discuss related to these exercises are testable and will be tested.

Finally, I will administer unannounced in-class multiple choice synthesis quizzes throughout the semester on synthesis days. These are ungraded and can be repeated as many times as necessary to get them right. These MC questions satisfy the bar preparation requirement for the course.

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. If you exceed the number of absences

(including absences assessed for inadequate preparation), you are subject to penalties in School of Law Rule 5(g). These include involuntary withdrawal from the course, a grade reduction, or failing the class.

I will pass an attendance sheet at the beginning of the class. Your initials certify three things: **(1) you were on time 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, but also 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 20. Each litigation team must select a name and turn in a completed information sheet using the template provided on D2L.

I cold-call on litigation teams, using a spreadsheet that randomly generates an order for cold-calling. It is possible to be called on multiple sessions in a row. I expect you to be prepared for class. **I will assign a grade on a scale of 0 to 10 for every time I cold-call on you in class.** If it becomes evident during our discussion that you are not prepared or have not been paying attention to class, I will announce that you have been assessed an absence for the day. You will also be assigned a grade of 0 for class participation for the day. I call on teams, but I expect every member of the team to participate in the discussion. Team members are graded individually. You cannot coast by on the work of other team members.

In addition to participating in class when called on, I expect you to listen respectfully to others. Attempts to dominate classroom discussions, interruptions of myself or others, eye-rolling or disruptive body language and behavior, or other unprofessional classroom behaviors will result in class participation grade reductions and/or assessed absences.

When I call on a team in class, I am focused on that team and the dialogue we are having. I will entertain questions from other class members after those discussions but not during them. Furthermore, I do not call on every student who raises their hands, every time. Frequently, you may hear me say something such as, "We are moving on. I am not calling on you at this time." This is not personal, but rather a reflection of my judgment that it is time to move to another topic. If questions remain about a subject after I have moved on, you may approach me after class or during office hours to discuss.

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. All slides used in class will be posted to D2L prior to class.

Zoom Protocol

We may hold one or more class sessions via Zoom this semester.

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.

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.

Grading and Evaluation.

I will evaluate and assess your work in several ways:

- a. **Written Problem Solutions and Written In-Class Activity Prep Materials (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 D2L 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.

The same policies as listed above apply to the in-class activities listed at the end of each Chapter. We will work through these activities on synthesis days, so the written solutions will be due on synthesis days before class on the D2L dropbox, just as problem solutions normally would be. **I will indicate on the reading and assignment schedule whether a written solution is required for an in-class activity; not all of them require an advance written solution.**

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. Class Participation (10% of final grade). When I cold-call on your group in class, I assess your individual performance on a scale of 0-10. You will have multiple opportunities to participate in class via cold-calling during the semester. I call on you as a group but assess you individually. What that means is people in the same group may get different grades. You are not allowed to dominate a group discussion at the expense of other members of the group or “carry” the group because they aren’t prepared. Likewise, you can’t coast on the good preparation of your fellow group members. Here are the performance standards for classroom participation that I will use to assess you:

- **8-10 points.** (I am willing to give this grade to everyone, every time, but it must be earned; experience tells me relatively few students typically achieve this level.) Highest level of preparation. Student understands not only the basic facts and holding of the cases. Student has done an exceptional job of solving the written problem and anticipating follow-up questions. **Student’s performance enhances the understanding of the overall class and demonstrates the highest standards of preparation, engagement, and performance.**

- **5-7 points.** (The typical classroom participation grade will likely be in the 5-7 point range but see comment in parentheses above.) Acceptable level of preparation. Student understands the basic facts and holding of the cases. Understands the Court’s reasoning in the case, including treatment of precedent, but may require extra direction from the professor in class to get there. Student is adequately prepared for problems and follow-up questions but may require extra guidance and direction from professor to meaningfully contribute to the class discussion. Student demonstrates some difficulty answering questions accurately or concisely. **Student’s preparation and performance makes a positive contribution to overall class discussion and the understanding of classmates.**

- **2-4 points.** Some preparation, but no real contribution to overall classroom discussion. Student may have read case but did not adequately understand it and did not spend the

extra time required to do so. May be able to state the holding of the case but shows inadequate understanding of the Court’s reasoning in the case. Evident struggle to connect notes cases and discussion materials with the primary case. Student’s problem solution is flawed and student is unable to follow in-class direction from professor to salvage performance. **Professor may need to call on another student in the group to complete the discussion or assist the cold-called student. Student demonstrates effort and some preparation, but falls short of making a positive contribution to the classroom discussion.**

- **0.** Manifestly inadequate preparation. Student cannot answer basic questions about the case. Student wastes classroom time searching for information that a prepared student would have readily at hand. Student is unfamiliar with notes cases, discussion materials, and problems. **Student’s lack of performance and preparation detracts from the classroom experience for others and falls short of minimum standards of classroom professionalism.**

c. Application Exercises (20% of final grade)

Each litigation group will be assigned two application exercises on the D2L page. Each exercise requires significant out-of-class preparation, including the submission of written materials. The rubric for evaluating these application materials will be posted to D2L. The written component of the application exercises counts as your WAC requirement for this course.

d. Final examination (60%). The final examination consists of a combination of multiple-choice questions, short answers, and essays. I will provide more information about it later.

Other Important Information on Support and Resources. Please see the Law School and Provost Syllabus attachments, available on the D2L page in the Syllabus folder.

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	Topic	Assignments
Unit One: Introduction to Adversary Trial System				

Week	Class	Date	Topic	Assignments
1	1	16 Jan	No class this day. MLK Holiday. Make-up for this class is built into the rest of the semester.	
	2	18 Jan	Chapter 1: Adversary Trial Intro	EA, pages 3-29 Problems 1-1 to 1-4
	3	20 Jan	Chapter 2: Basic Evidentiary Procedures	EA, 33-61 Problems 2-1 to 2-6
2				
	4	23 Jan	Synthesis	Chapter One In-Class Activity, page 30 <ul style="list-style-type: none"> Option One (turn in prep materials on D2L) Chapter Two In-Class Activity, page 62 (turn in prep materials)
	5	25 Jan (no live session; podcast)	Chapter 3: Establishing Facts at Trial	EA, 63-84 Problems 3-1 to 3-3 Note: you must turn problems in by 9 am on the 25th to access podcast. Podcast will be available only on 25 January.
	6	27 Jan	Synthesis	Classroom Court #1 (no materials turned in for any classroom court) Unit One Application Exercise. Page 89. All Groups turn in.
Unit Two: Relevance				
3	7	30 Jan	Chapter 4: Intro to Relevance	EA, 93-106 Problems 4-1 to 4-6
	8	1 Feb	Chapter 5: Rule 403	EA 111-126 Problems 5-1 to 5-4
	9	3 Feb	Synthesis	Classroom Court #2, pages 106-111 Chapter 5 In-Class Activity, pages 128-131. Turn in prep materials. <ul style="list-style-type: none"> Groups 1-3. Criminal Case Groups 4-6. Civil Case
4	10	6 Feb	Chapter 6: Rules 407-411	EA, 131-158 Problems 6-1 to 6-6

Week	Class	Date	Topic	Assignments
	11	8 Feb	Chapter 7: Rule 412 (Rape Shield)	EA, 161-179 Problems 7-1 to 7-3
	12	10 Feb	Synthesis	Chapter 6 In-Class Activity (no turn-in prior to class) Chapter 7 In-Class Activity (no turn-in prior to class)
5	13	13 Feb	Chapter 8: Privileges	EA 183-207 Problems 8-1 to 8-2
	14	15 Feb	Synthesis	Chapter 8 In-Class Activity (each litigation group identifies a privilege from any state jurisdiction and turns in prep materials) Unit Two Application Exercise (Groups 1 and 6)
	Unit Three: Character Evidence			
	15	17 Feb	Chapter 9: Intro to Character Evidence	EA, 215-240 Problems 9-1 to 9-4
6	16	20 Feb	Chapter 10: Evidence of Other Crimes, Wrongs, Acts	EA 243-270 Problems 10-1 to 10-6
	17	22 Feb	Synthesis	Chapter 9 In-Class Activity (no advance preparation required) Classroom Court #3 Unit Three Application Exercise (Groups 2 and 5)
	Unit Four: Law of Witnesses and Impeachment			
	18	24 Feb (Podcast)	Chapter 11: Witness Competency	EA 279-301 Problems 11-1 to 11-3 Note: you must turn in problems to access podcast. Podcast will be available only until 26 Feb.
7	19	27 Feb	Chapter 12: Refreshing Recollection & Past Recollection Recorded	EA 305-323 Problems 12-1 to 12-3

Week	Class	Date	Topic	Assignments
		1 March	Chapter 13: Intro to Impeachment	EA 325-351 Problems 13-1 to 13-4
	20	3 Mar	Chapter 14: Impeachment by Prior Inconsistent Statements	EA 353-370 Problems 14-1 to 14-3
8	21	6 March	Synthesis	Do NOT prepare Chapter 11 or Chapter 13 In-Class Activity Chapter 12 In-Class Activity (plan in advance with litigation group; bring materials to class) Chapter 14 In-Class Activity (no advance planning needed) Unit Four Application Exercise (Groups 3 and 4)
	Unit Five: Exhibits: Authentication & Best Evidence			
	22	8 March	Chapter 15— Authentication	EA, 377-402 Problems 15-1 to 15-8
	23	10 March	Chapter 16— The Best Evidence Rule	EA 405-424
Spring Break March 11-19				
9	24	20 March	Synthesis	Chapter 15 In-Class Activity (be generally prepared; volunteers in class; no written assignment) Classroom Court #4 (Unit Five Application Exercise— covered in class; more info to come)
	Unit Six: Hearsay			
	25	22 March	Chapter 17: Intro to Hearsay	EA 433-445 Problems 17-1 to 17-5
	26	24 March	Chapter 17, finish Chapter 18, Rule 805	EA 445-470 Problems 17-6 to 17-9 Problem 18-1

Week	Class	Date	Topic	Assignments
10	27	27 March	Chapter 18: Res Gestae Exceptions	EA 470-490 Problems 18-1 to 18-5
	28	29 March	Synthesis	Chapter 17 In-Class Activity (identify objections and responses on transcript, which will be provided on D2L; turn in) Chapter 18 In-Class Activity (identify objections and responses on transcript, which will be provided on D2L; turn in)
	29	31 March	Chapter 19, Business and Public Records	EA 495-521 Problems 19-1 to 19-6
11	30	3 April	Chapter 19, Concluded	EA 521-526 New problems to be distributed on D2L and discussed in class.
	31	5 April	Synthesis	Chapter 19 In-Class Activity Unit Six Mid-Unit Application Exercise (Groups 1 and 4)
	32	7 April	Chapter 20: Rule 804 Exceptions	EA 533-561 Problems 20-1 to 20-4
12	33	10 April	Chapter 20 concluded Chapter 21, Hearsay Finale	Problems 20-5 and 20-6 EA 567-584 Problems 21-1 to 21-4
	34	12 April	Synthesis	Classroom Court #5 Chapter 21 In-Class Activity (submit written prep materials)
	35	14 April	Chapter 22, Confrontation Clause, Part One	EA, 587-607 Problems 22-1 to 22-4
13	36	17 April	Chapter 22, Confrontation Clause, Part Two	EA, 607-219 Problem 22-5 to 22-6
	37	19 April	Synthesis	Chapter 22 In-Class Activity (identify objections and responses on transcript, which will be posted on D2L; turn in) Unit Six End-of-Unit Application Exercise (Groups 2 and 6)

Week	Class	Date	Topic	Assignments
	Unit Seven: Opinion Testimony			
	39	21 April	Chapter 23, Intro to Lay and Expert Opinion Testimony	EA 633-653 Problems 23-1 to 23-4
14	40	24 April	Chapter 24, Expert Opinion Testimony	EA 655-685 Problems 24-1 to 24-4
	41	26 April	Synthesis	Chapter 23 In-Class Activity (turn in prep materials) Chapter 24 In-Class Activity (turn in prep materials) Unit Seven Application Exercise (Groups 3 and 5)
	42	28 April	Final Class	Read Pages 695-696 No advance preparation required Winning litigation group gets Quatro's Pizza!