MASSACHUSETTS SCHOOL OF LAW at ANDOVER
SYLLABUS FOR EVIDENCE -- Fall 2015
Professor Michael L. Coyne

Instructor:  Professor Coyne  Email: coyne@mslaw.edu
Web:  www.mslaw.edu/coyne
Phone:  978.681.0800
Text:  Weinstein on Evidence

Class Time:  Monday 2:00 p.m.-4:20 p.m.

Course Objectives:  The objective of this course is to have students master the rules of evidence and trial tactics so they will be skilled courtroom advocates, effective litigators and highly successful on the evidence section of the MBE and state essay questions.

Grading Criteria:  Your midterm examination, lack of class participation and final examination all contribute to your final grade in this class.

ASSIGNMENTS DUE FOR EACH CLASS

READ AND BRIEF 15 CASES FOR EACH AND EVERY CLASS.

August 17:  Overview/Reliability/The Five Part Test
Your first assignment is to EMAIL me an example of relevant evidence. Please also tell me what you thought was the single most powerful piece of evidence in either a civil or criminal trial that you thought was particularly interesting. Briefly explain your choice.


August 31:  Demonstrations, experiments, reproductions and chalks. Writings and Testimonial Proof.
Competency - the ability to PURC - perceive, understand, remember and communicate.
September 7: Labor Day -- No School.
September 14: Examination of witnesses, including discrediting the witness, and the Ten Commandments of Cross.
September 21: Rehabilitation of a witness and introduction to Hearsay.
September 28: Prior statements of witnesses, Admissions and Hearsay exceptions.
October 5: Finish Hearsay, including the exceptions detailed in Rules 803 and 804.
October 12: Columbus Day -- No School.
October 19: Review handouts, Hearsay and Examination.
October 26: Hearsay, and hand-outs on spousal privilege, character, habit and Impeachment.
November 2: Hearsay continued.
November 9: Confrontation clause issues and expert testimony.
November 14 8:00 a.m. Saturday Review Class
November 16 Judicial Notice and privileges.
November 23: Watch Frontline O.J. presentation, review powerpoint presentations, handouts and complete questions.
November 30: Discuss examination issues and Jeopardy.

Review and be thoroughly familiar with the Federal Rules of Evidence.

There will be a Saturday class on November 14, 2015. It will also be recorded.

There are audio CD’s on the major handouts for this course available in the Media Center and for purchase in the Bookstore.
Evidence by Irving Younger is a great resource on Evidence. It is available at the Reserve Desk.

There is a mid-term examination that counts for 25% of your grade.

Some interesting links to checkout at your leisure.

www.ncjrs.org/txtfiles/dnaevid.txt - Convicted by juries exonerated by science.

www.lawbuzz.com -- Famous Trials and other interesting legal information.

### EVIDENCE
Professor Michael L. Coyne

<table>
<thead>
<tr>
<th>RELEVANCE</th>
<th>Any fact that is of consequence -- does it make the proposition more probable with it than it would without the information.</th>
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<td>Rules 401 and 402</td>
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<tr>
<th>COMPETENCY</th>
<th>Does the witness have the ability to perceive, understand, remember and communicate the event? Does the witness have any special problems, i.e., infancy or insanity, that would impair their understanding of the event? Although not truly a competency issue, are there any privileges that exist which should preclude the testimony. Attorney/client, Priest/Penitent, Doctor/Patient, Marital Privilege and the like.</th>
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<td>Rules 601 and 602</td>
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<tr>
<th>FOUNDATION</th>
<th>A proper basis for admission of the testimony. The evidence must be authenticated and a basis established that shows it is reliable. Expert testimony needs a foundation showing the expert has sufficient education, training, background and experience. Photographs must depict what they purport to depict. Also keep in mind chain of custody concerns, the Best Evidence rule regarding proving the contents of a writing, recording or other document and the accuracy of electronic records.</th>
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<tbody>
<tr>
<td>Rules 901, 902, 903</td>
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<tr>
<th>HEARSAY</th>
<th>Any, any, any out of court statement offered to prove the truth of the matter asserted therein except a party’s own statement offered against that party.</th>
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<tr>
<td>Rules 801, 803, 804</td>
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<tr>
<th>RULE 403 PROBLEMS</th>
<th>Authorizes the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion and delay.</th>
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CHARACTER - HABIT - IMPEACHMENT OUTLINE

Character Evidence

*General rule,* character evidence may *NOT* be introduced:

1. To prove the defendant acted in conformity with a specified character trait.
2. To show that someone has a propensity to act in a certain way.

*Character is an issue in a criminal case ONLY:*

1. After the defendant first offers character evidence (by general reputation only), or
2. By testifying, the defendant places his or her character for truthfulness in issue.

The evidence that may be offered is limited to *relevant* character traits -- relevant to the crime charged, i.e., teetotaler for DUI, peaceful person for violent crimes.

Prosecution may *impeach character witnesses through specific instances of bad character* (misconduct which is at odds with the general reputation testimony -- “I realize you said he was a teetotaler, but did you know that he was so drunk at the company picnic, that he fell asleep in his own vomit?”) The prosecution may also *rebut the defendant’s good character evidence by offering evidence again through general reputation witnesses of the defendant’s bad character.*

Character evidence is *never admissible in a civil case except* in cases of malicious prosecution, libel and slander since reputation is relevant to the cause of action.

While one is not permitted to introduce specific instances of conduct to prove character, *specific instances of conduct may be used* to prove motive, opportunity, intent, common plan, scheme, design, identity or absence of mistake or accident (mimic rule, signature crimes, serial killers, “brides in the bathtub,” etc.).

**Habit**

Habit is defined as a regular and systematic routine and is proved by showing specific instances of conduct.
**Impeachment**

The *scope of cross examination* under the F.R.E. is *bias, credibility* and matters covered on *direct testimony*: BCD. You may impeach any witness by showing that his general reputation for truthfulness is bad, by his prior criminal convictions and his prior bad acts that bear on truthfulness under the F.R.E.

**Bias**

As of right one can inquire into matters pertaining to bias. This includes family relationships, compensation of a witness, pending criminal charges and anything which would provide the witness with a motive to lie or allow the jury to find that the witness is under an influence to prevaricate.

**Credibility/Prior Convictions**

The Court has no discretion to exclude a conviction for a crime involving a false statement or dishonest act that is less than 10 years old. This includes felonies and misdemeanors.

All other felonies are subject to a 403 analysis unless it is a prior conviction of the criminal defendant and then it is excluded if it is more prejudicial than probative (as opposed to the substantially more prejudicial than probative analysis required to exclude convictions of all other witnesses under 403.

To be admissible, all crimes over 10 years old (as measured from the date of the last incarceration or conviction whichever is later) require:

A. Prior notice of the intention to use the crime for impeachment.
B. A ruling, supported by specific facts and circumstances, that the probative value of the conviction substantially outweighs its prejudicial effect.

**Accused**

Conviction can be excluded if the prejudicial effect is greater than the probative value.

**Others**

Only if the prejudice is substantially greater than the probative value can the conviction be excluded.

**Direct -- Matters Covered on Direct Testimony**

Cross examination concerning matters covered on direct testimony not only includes matters testified to on direct but any sensory deficiencies applicable to that witness.
Spousal Testimony

There are two different privileges involved in deciding if husbands or wives can testify concerning their partner.

The *common law rule* barred a spouse from testifying if their partner was a party to the action. This rule is absolute disqualification has now been abandoned and replaced with rules which require you to first decide if the proposed testimony either involves a private marital communication between husband and wife or involves an observation made by a spouse.

Private Communication

Either spouse has the right to prevent the other from testifying about *confidential communications* between them *while they were married* -- this is true even if the testimony would occur subsequent to a divorce.

- *“Confidential”* means just that. The communication is not confidential if it is placed on a billboard in Times Square, or if there are people present who could be expected to hear the conversation. *An eavesdropper*, however, *would not destroy* the *confidential nature of the communication* and the privilege may still be claimed.

- *“While they were husband and wife”* excludes conversations which took place prior to the marriage or conversations which occur subsequent to a divorce.

Observations or Transactions of a Spouse

Generally this relates to things other than confidential communications between husband and wife.

Where the husband or wife is the criminal defendant, during the term of a legitimate marriage, his or her spouse:

**State Court Rule Generally:** May not testify about anything if either the witness or party spouse opposes such testimony.

**Federal Court Rule:** May testify if he or she voluntarily elects to, even over the party spouse’s objection, with respect to observations and transactions only.

- These rules can apply to cover testimony which includes observations or transactions and even communications which preceded the marriage.
- There is no similar privilege concerning transactions and observations for civil cases.

Myfiles/Evidence/SpousalTestimony

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# EVIDENCE

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## HEARSAY

Any out-of-court statement that is offered to prove the truth of the matter asserted therein except a party’s own statement offered against that party.

## HEARSAY EXCEPTIONS

There are a total of 27 exceptions of which the following 16 are utilized fairly often.

<table>
<thead>
<tr>
<th>Main Groups</th>
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<th>R-6</th>
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<td></td>
<td>Unavailability Exceptions</td>
<td>Spontaneous Exceptions</td>
<td>Records Exception</td>
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### Unavailability Exceptions F.R.E. 804 (2 D’s and 3 F’s)

<table>
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<tr>
<th>Rule 804 Declarant Must Be Unavailable</th>
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<tbody>
<tr>
<td>1. Former Testimony</td>
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<td>2. Declaration Against Interest (penal or pecuniary)</td>
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<td>3. Dying Declaration</td>
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<td>4. Statement of Family History</td>
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<td>5. Forfeiture by Flight of a Witness</td>
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### Spontaneous Exceptions F.R.E. 803

<table>
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<tr>
<th>Rule 803 Declarant’s Availability Does Not Matter</th>
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<tbody>
<tr>
<td>1. Present Physical Condition</td>
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<td>2. Present Mental State</td>
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<td>3. Statement For Treatment or Diagnosis</td>
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<tr>
<td>4. Excited Utterance</td>
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<td>5. Present Sense Impression</td>
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### Records Exceptions F.R.E. 803

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<th>Rule 803</th>
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<tr>
<td>1. Past Recollection Recorded</td>
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<td>2. Business Records</td>
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<td>3. Public Records</td>
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<td>4. Records of Vital Statistics</td>
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<td>5. Documents Concerning Land</td>
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<td>6. Judgments of Criminal Convictions</td>
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## F.R.E. 801 Defines The Following as non-hearsay:

“A party’s own statement offered against that party.” This covers a broad array of material including:

- **(A)** His own statement or one which he believes to be true.
- **(B)** Agent’s statement including someone authorized to speak, a servant’s statement concerning something within scope of employment made while so employed and a co-conspirator’s statement made in course of furtherance of the conspiracy.

**OR**

Prior statement of a witness who testifies at the present trial and the statement is:

- **(A)** inconsistent with present testimony and prior statement was under oath in some judicial proceeding;
- **(B)** consistent with present testimony and is offered to rebut charge of recent fabrication, improper influence or motive;
- **(C)** one of identification made after perceiving him.