



MASSACHUSETTS SCHOOL OF LAW at ANDOVER
SYLLABUS FOR EVIDENCE -- Fall 2021
Professor Michael L. Coyne
Professor Amy Dimitriadis

Instructor: Professor Coyne Email: coyne@msslaw.edu
Professor Dimitriadis Email: amyd@msslaw.edu
Web: www.msslaw.edu/mcoyne
Phone: 978.681.0800
Text: Sklansky, Evidence—Cases, Commentary and Problems, Fifth Edition
Wolters Kluwer.

Class Time: Classes are in person on Mondays at 2:30-3:50 and also asynchronous which means you must review all class materials before each Monday, come to class prepared to apply that knowledge both practically and through testing, and take that week’s retention exercise. Much of evidence law is revealed by its application to the facts. Even though you are now second year law students and thus know everything, you must read the cases to understand the nuances of the rules and become adept at applying the rules on the Multistate Bar Examination. Read them because you are only shortchanging yourself but just to make sure we will have regular quizzes on the cases and the rules of law that the cases address.

- Read the cases and pertinent rules before each class.
- Watch Zoom discussion of cases and section’s rules before each class.
- Attend class where you use that material and take the quiz.
- Take Socratic retention exercise after class is completed.

We conduct this class remotely and in person. It requires active and regular preparation and participation from each student. While you can choose to participate in the remote class any time before the scheduled in class use of that material, you must participate each week by reading your cases, focusing on key concepts, the application of those concepts, and doing that week’s exercises.

Course Objectives: The objective of this course is to have students master the rules of evidence and trial strategies so they will be skilled courtroom advocates, effective litigators, and highly successful on the evidence questions in the MBE, the MPT and the UBE Essays.

Grading

Criteria: The course outline you prepare, your quizzes, participation in exercises, midterm examination, lack of class participation, and final examination all contribute to your final grade in this class.

Audio Reviews: There are audios lectures for the major handouts in this course. Review the handouts and listen to audios early and often. In addition, a Power Point presentation and course review is available with an extensive questionnaire that you must submit to me by 10.11.2021.

ASSIGNMENTS DUE FOR EACH CLASS

We will read 60-75 pages of our textbook for each class. There will be weekly quizzes on the material and the week's subject matter.

Class 1 :
8.23.21 Read the handouts attached to this syllabus. What questions do these handouts bring to mind? If we quizzed you on the 5 part test, could you tell us what 5 parts the test requires?
Overview/Reliability/The Five Part Test—The Big Picture
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.

Class 2:
8.30.21: Role of the Judge and Introduction of Relevant Evidence. Begin with Walton and end with Montana. Conduct direct and cross examinations using relevant evidence.
(Do parts one and two of class 2.)

9.6.21: Labor Day – No School.

Class 3:
9.13.21: Hearsay Zenni through Bruton problems. Confrontation issues and Hearsay exercises.

Class 4:
9.20.21: Hearsay—the spontaneous exceptions through public records and reports problems as described in Beech Aircraft.

- Class 5:
9.27.21: Melendez-Diaz, unavailability exceptions, and confrontation issues.
- Class 6:
10.4.21: Introduction to character evidence, mimic, prior bad acts, and prior conviction problems. Zackowitz to Cunningham (333).
- Class 7: Review and FAQ. Submit answers to PPT questions.
- Class 8:
10.18.21: Midterm Exercises and Examination.
- Class 9: (Week 7, Part 2) Settlements, subsequent remedial measures, and questioning by jurors. (335-385)
- Class 10: Impeachment through dead man's statutes. (387-471)
- Class 11: Jurors, experts, and scientific evidence under Daubert. Skip pages 534-617.
- Class 12: Privileges and Introducing Physical Evidence. (619-697)
- Class 13: Prerequisites and proper foundation for lay witnesses, experts and scientific evidence. Foundation examinations. (699-718)
- Class 14: Best evidence, burdens, presumptions, and judicial notice questions. (718 to end)
- Class 15: Final exam review and issues.

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

There are audio reviews on the major handouts for this course with a questionnaire that you must complete after listening to the related recordings.

EVIDENCE

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<u>RELEVANCE</u> Rules 401 and 402	Any fact that is of consequence -- does it make the proposition more probable with it than it would without the information.
<u>COMPETENCY</u> Rules 601 and 602	Does the witness have the ability to <i>perceive, understand, remember</i> and <i>communicate</i> 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.
<u>FOUNDATION</u> Rules 901, 902, 903	A proper basis for admission of the testimony. The evidence must be authenticated and a basis established that shows it is reliable. <i>Expert</i> testimony needs a foundation showing the expert has sufficient <i>education, training, background</i> and <i>experience</i> . 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.
<u>HEARSAY</u> Rules 801, 803, 804	<i>Any, any, any</i> out of court statement offered to prove the truth of the matter asserted therein except a party's own statement offered against that party.
<u>RULE 403 PROBLEMS</u>	Authorizes the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. Is the <i>probative value</i> of the evidence substantially <i>outweighed</i> by the danger of <i>unfair prejudice, confusion</i> and <i>delay</i> .

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CHARACTER - HABIT - IMPEACHMENT OUTLINE

Character Evidence

Character evidence is a pattern of any type of personal behavior whether it involves an issue of morality or not.

General rule, character evidence may **NOT be introduced** to prove the defendant acted in conformity with a specified character trait or to show that someone has a propensity to act in a certain way. It is almost exclusively found in criminal cases as there are few civil cases where character is relevant e.g. defamation, negligent entrustment or parenting activities.

Character is an issue in a criminal case ONLY:

1. After the defendant first offers character evidence (by calling witnesses to testify to their general reputation), or
2. By testifying, the defendant places his or her character for truthfulness in issue, just as every witness who testifies in every case places his or her character for truthfulness in issue.

The evidence that defendant may offer is limited to **relevant** character traits -- relevant to the crime charged, i.e., teatotaler 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 teatotaler, 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 rare cases such as libel and slander or negligent entrustment cases since a person's reputation is relevant to those causes 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," rule).

The Rape Shield Rule prevents a victim's prior sexual activity from being admitted unless it goes to source of rape trauma or signs of rape or prior sexual activity with the defendant.

In sex offense cases, with prior notice, the prosecution or plaintiff may introduce evidence that the defendant previously committed other sexual assaults or child molestation offenses.

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.

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Spousal Testimony

There are two different privileges involved in deciding if partners to a valid marriage can testify concerning their spouse or if any witness can testify concerning communications between spouses.

The *common law rule* barred a spouse from testifying if their partner was a party to the action. This rule of absolute disqualification has now been abandoned and replaced with rules which require you to first decide if the proposed testimony either involves a confidential marital communication between partners to the marriage or involves testimony concerning anything else—what we call the observation rule.

Confidential Marital Communication

Either spouse has the right to prevent the other and anyone else who surreptitiously heard it 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 unknown eavesdropper*, however, *would not destroy the confidential nature of the communication* and the privilege may still be claimed.
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- “*While they were married*” excludes conversations which took place prior to the marriage or conversations which occur subsequent to a divorce.

Anything other than a confidential marital communication is treated as an observation, transaction or any other information one spouse may have about the other.

For all matters other than confidential communications between partners to a valid marriage there are two preconditions to any claim of privilege:

- The spouse must be the criminal defendant.
- The proposed testimony will occur during a legitimate marriage.

If both preconditions are met then use--

SEFW

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

Federal Court Rule: Witness spouse may testify if he or she voluntarily elects to, even over the party spouse’s objection, with respect to observations and transactions but not confidential marital communications.

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

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myfiles/Evidence/HearsayExceptions

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.

3 Main Groups U-5 **U**navailability Exceptions
 S-5 **S**pontaneous Exceptions
 R-6 **R**ecords Exception

Unavailability Exceptions F.R.E. 804 (2 D's and 3 F's)

U	Rule 804 Declarant Must Be Unavailable	<ol style="list-style-type: none">1. Former Testimony2. Declaration Against Interest (penal or pecuniary)3. Dying Declaration4. Statement of Family History5. Forfeiture by Flight of a Witness (Forfeiture by wrongdoing)
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Spontaneous Exceptions F.R.E. 803

S	Rule 803 Declarant's Availability Does Not Matter	<ol style="list-style-type: none">1. Present Physical Condition2. Present Mental State3. Statement For Treatment or Diagnosis4. Excited Utterance5. Present Sense Impression
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Records Exceptions F.R.E. 803

R	Rule 803	<ol style="list-style-type: none">1. Past Recollection Recorded2. Business Records3. Public Records4. Records of Vital Statistics5. Documents Concerning Land6. Judgments of Criminal Convictions
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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 and in 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 someone.