

EVIDENCE
Summer 2020

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This course will examine the rules governing the admission, exclusion, and presentation of evidence in judicial proceedings. The focus of the course readings and discussion will be on the Federal Rules of Evidence.

Course Learning Outcomes

By the end of the semester, you should be able to:

1. *Use and apply the federal rules of evidence.*

Students will learn the substance and application of the federal rules of evidence. Students should refine skills identifying legally significant facts and applying relevant rules, including synthesizing multiple relevant rules in a single problem. Further, students should learn how to formulate solutions around factual and legal uncertainty.

2. *Recognize and become familiar with lawyering roles and relationships.*

The lawyering role and important lawyering relationships are important to resolving evidentiary issues. Thus, students should be able to apply the rules of evidence in conjunction with how lawyers deal with clients, witnesses, judges and jurors in a trial setting.

3. *Bar exam preparedness and skills*

Practice strategies to answer bar style multiple-choice questions, including managing time effectively.

Required Reading:

1. Learning Evidence: From the Federal Rules to the Courtroom, 4th Edition, 2018, Deborah Jones Merritt & Ric Simmons (“M&S”).

This textbook comes with an online eBook and digital resources (see inside the front cover of the textbook for registration instructions on West Academic). If you have a used textbook, you should purchase the digital resources by following [this link](#).

- a. It is important that you follow the instructions in your textbook to sign up for the digital resources right away, as I will assign some of these materials to supplement your textbook reading.
2. Federal Rules of Evidence (“FRE”). Although the textbook contains an appendix with the Rules for quick reference, **you will need the latest version of the FRE that includes the Advisory Committee’s Notes**. Please make sure you bring to class an annotated copy of the rules assigned for that class.

Recommended Reading:

1. Goode, S & O. Willborn, Courtroom Evidence Handbook, Student Edition 2018-2019, West Academic 2018.

Class Meeting Time:

MWF 1:00-2:50, Microsoft Teams

Teaching Assistant:

Office Hours TBA.

Dean Rushlow Office Hours:

Scheduled upon request. Contact Christine Saul (csaul@vermontlaw.edu) for scheduling.

Course expectations:

Students must be prepared for class, be prompt in attendance, and be professional in all interactions. (See below under grading policy for additional information.) This is a four-credit course covering a topic that is on the Bar Exam. There is thus a significant amount of material in this course, and you should expect to dedicate significant time to reading and assignments.

We will be holding all classes via Teams. My baseline expectation is that you will be physically present for the entirety of every single synchronous session held at our usual time, and that you will have your webcam on. Our being remote is not a reason to check out or put less effort into this course; my expectations for you will remain high.

Before our first class, you should access Teams. You may want to open the program and familiarize yourself with it. To use Teams, you need a computer with a webcam, speakers and a microphone. In the event you do not have either, or if you are experiencing temporary internet difficulties, you can join the session via telephone and you should email me. To join our Teams meetings, go to the class calendar invitation.

Participation:

Class attendance is required. Attendance will be taken at the beginning of each class and absences will affect your grade. Given the condensed nature of the summer course, unexcused absences from more than two classes will result in a significant deduction from your final grade. Make-up classes that are scheduled outside of our regular class meeting time will not be counted for purposes of calculating your attendance history. Please consult the VLS Academic Regulations for guidance on the school's attendance policies.

Absences resulting from religious observance, serious illness, and personal emergency are excused if notice is given to me within a reasonable time (the same day if possible) of the absence. However, informing me of anticipated absences does not automatically convert those absences into "excused" absences unless the aforementioned criteria are met and approved by me. Excused absences may affect your grade if they are excessive because you are not present and cannot contribute to class discussion.

Unexcused absences may affect your grade even if they do not exceed two regularly scheduled classes. Unexcused absences are to be used for job interviews, attendance at conferences, and similar activities. If you inform me of the reason for your absence by email either before or shortly after your absence and I deem your reason sufficient, that unexcused absence will not affect your Professionalism grade.

Being late for class or leaving in the middle of class will also affect your Professionalism grade. Class begins promptly at 1:00 P.M. If an emergency or other valid reason causes you to be late, let me know.

You are expected to be prepared and to participate in class when called on. I will cold call frequently. If you are not prepared, please pass. However, passing can have a detrimental effect on your grade, so preparation for class is essential. Class participation is measured primarily by its meaningfulness and utility to the classroom discussion. While frequency of participation matters, it is the substance of your contribution that matters more.

You are not expected to fully understand the material completely before class. If you have prepared, you should participate. If you are uncertain, you are expected to ask questions when you do not understand. You can ask questions during class, after class, during office hours or appointments with the TAs or with me, and by email.

Respect, Civility, and Understanding:

You are expected to show respect for me and your classmates. Please do not engage in side conversations or make comments about the contributions of your classmates. Please respect the differing contributions of other students. If you are a frequent contributor to class discussion, you might not always be called on to speak.

A Note on Difficult Topics:

By necessity, the topics covered in this course may be uncomfortable at times. For instance, we will read about and discuss cases involving violent acts, sexual acts, and other topics that may disturb you or your classmates. These issues are likely to be more disturbing for some than others based on personal life experiences.

Please maintain an awareness of the possibility that any of the topics covered in our discussions could potentially be sensitive for your classmates, and you should thus be mindful of your classmates' experiences and perspectives. We are all responsible for working at maintaining an environment that facilitates learning.

If you are incapacitated by discomfort over a particular topic due to personal experiences, you are welcome to let me or Dean McCormack know so that we can try to find a workable solution. Keep in mind, however, that Evidence is covered on the Bar Exam, so a full understanding of the issues covered in this class is critical.

Electronics:

Computers, cell phones, and electronic devices are an enormous help in our daily lives but also an enormous distraction. Given that the class is virtual this summer, you will need to be in front of your computer. Please refrain from engaging in other activities on your computers, phones, and other electronic devices while in class. It is fairly obvious whether you are taking notes and engaged in class or are absorbed by some other distraction like email, social media, etc. The latter is a discourtesy to me and your classmates, and I will address it in your participation score.

Grading:

25% of the course grade will be based on a midterm exam, 20% on a hearsay test, and 40% on a final exam (testing all topics covered in the course). Professionalism counts for 15% of your grade and will be

based on attendance, class preparation and participation, civility, respect, and meeting all course obligations.

Assignments:

The reading assignments must be completed before attending class. The assignments listed as “M&S” reference chapters from the Merritt & Simmons text (“M&S”). The Rules listed as FRE [#] refer to the Federal Evidence Rule. In addition to the text reading, reading the rules and associated committee notes is required (and essential). Reading the committee notes is required because they provide important context and explanation of the rules. From time to time, I will assign additional readings or exercises and post them on the Teams course site.

I will frequently assign quizzes to help you integrate your learning after doing the reading. The quizzes are to be done *after* class to assess your comprehension of the topic. Your quiz *scores* will not count toward your final grade, but your *completion* of the quizzes will count toward the participation portion of your final grade. The quizzes will either be available through the eBook and digital resources that come with the M&S textbook (see information in the above Required Reading section) or through Microsoft Forms. In general, the M&S digital resources are incredibly useful and include: multiple-choice quizzes, simulations, additional video mini-classes, study aids, and practice exam questions.

Some assignments may also be paired with problems that will be available on the Teams course site. Other assignments are group assignments that we will solve in class.

The syllabus may be updated periodically. You will always be able to find the most up-to-date syllabus on the Teams course site.

The schedule of assignments is as follows:

	TOPICS	READING
	Rules of Evidence in Context. Relevance	
1	<u>Wednesday, May 27</u> Types of Evidence; Raising and Resolving Objections. Intro to Relevance.	M&S Chapters 1-5 M&S c.5 quiz FRE 101, 103, 105
2	<u>Friday, May 29</u> Relevance - Balancing probative value against prejudicial effect.	M&S 6, 7, 8 M&S c. 6, 7 quizzes FRE 401, 402, 403
3	<u>Monday, June 1</u> Subsequent Remedial Measures; Liability Insurance; Medical Expenses; Settlements and Offers to Compromise	M&S 9-11, 13 M&S c. 9, 10, 11, 13 quizzes FRE 407, 408, 409, 411
	Reliability of Documentary and Physical Evidence	

4	<u>Wednesday, June 3</u> Authentication; Best Evidence	M&S 69, 70 M&S 69, 70 quizzes FRE 901, 902, Article X (1001-1008) Read: Flint Water Crisis Pre-Class Materials Bring to class (but don't need to read before class): Flint Water Crisis Exercise
Witnesses		
5	<u>Friday, June 5</u> Witness Examination; Refreshing Recollection	M&S 14,15 (pages 183-195, 200-204 only), 16 M&S c.15, 16 quizzes FRE 601, 602, 603, 605, 606(a), 611, 612
6	<u>Monday, June 8</u> Impeachment; Prior Statements	M&S 17, 18 M&S c.18 quiz FRE 607, 613
7	<u>Wednesday, June 10</u> Examining the witness' character for truthfulness or untruthfulness	M&S 19 FRE 608
8	<u>Friday, June 12</u> Impeachment with Criminal Convictions	M&S 20 M&S c.20 quiz FRE 609
9	<u>Monday, June 15</u> Character witness: Reputation, and Opinion Evidence of Untruthful character.	M&S 21, 22 M&S c.22 quiz FRE 608
Character Evidence		
10	<u>Wednesday, June 17</u> Character Evidence / Propensity in Criminal Cases	M&S 27-29 FRE 404(a); 405(a)
11	<u>Friday, June 19</u> Crimes, Wrongs, or Other Acts.	M&S 30, 31 M&S c.30, 31 quizzes FRE 404(b), 403, 406 DV Motion and Child Abuse Motion
12	<i>Monday, June 22</i> <i>Midterm Exam</i>	
13	<u>Wednesday, June 24</u> Rape Shield; Sexual Assault Propensity	M&S 32-33 M&S c.32, 33 quizzes FRE 412-15

	Hearsay	
14	<u>Friday, June 26</u> Hearsay (intro) Truth of the Matter Asserted; Hearsay Statements	M&S 35, 36, 37 M&S c.36, 37 quizzes FRE 801 (a)-(c)
15	<u>Monday, July 6</u> Admissible Hearsay: Prior Statements by Witnesses	M&S 38-39 M&S c.39 quiz FRE 801, 801(d)(1)
16	<u>Wednesday, July 8</u> Statements by Opposing Party; Multiple parties and co-conspirators	M&S 53, 54, 55 M&S c.53, 55 quizzes FRE 801(d)(2)
17	<u>Friday, July 10</u> Hearsay Exceptions: Present Sense Impressions; Excited Utterances; State of Mind	M&S 40, 41 M&S c.40, 41 quizzes FRE 803(1), (2), (3)
18	<u>Monday, July 13</u> Medical Treatment; Recorded Recollection	M&S 42, 43 M&S c.42, 43 quizzes FRE 803(4), (5)
19	<u>Wednesday, July 15</u> Multiple Levels of Hearsay; Business Records	M&S 44, 45 M&S c.45 quiz FRE 803 (6), 805
20	<u>Friday, July 17</u> Unavailability; Former Testimony	M&S 48, 49 M&S c.49 quiz FRE 804(b)(1)
21	<u>Monday, July 20</u> Dying Declarations; Statements Against Interest; Forfeiture	M&S 50-51, 52 (p.659-661 only) M&S c.50, 51 quizzes
22	<u>Wednesday, July 22</u> Confrontation Clause, Hearsay Review	M&S 58 M&S c.58 quiz <u>Take Home Hearsay Test</u>

	Expert Opinions and Lay Opinions	
23	<u>Friday, July 24</u> Expert Opinions; Expert Qualifications	M&S 60, 61 M&S c.60, 61 quizzes FRE 201, 701, 702
24	<u>Monday, July 27</u> Bases of Opinions; Confrontation Clause and Expert Testimony	M&S 62, 63 M&S c.62, 63 quizzes FRE 702-705
25	<u>Wednesday, July 29</u> Limitations on Opinion and Expert Testimony	M&S 64 M&S c.64 quiz FRE 701, 702, 704, 403
	Privileges	
26	<u>Friday, July 31</u> Attorney-Client Privilege, Other Privileges	M&S 66, 67, 68 M&S c.67, 68 quizzes FRE 501
TBD	<u>Final Exam</u>	