

Evidence and Trial Procedure
SPRING 2022

Professor David Bernstein

The text for this class is Mueller and Kirkpatrick, *Evidence under the Rules*, **9th edition** (MK).

You do not need to *purchase* a Federal Rules of Evidence Supplement, but you do need to get one. A free version is available online at <https://www.cali.org/books/federal-rules-evidence>. It comes in IPAD, PDF, and Kindle editions.

This course is largely based on the Federal Rules of Evidence. Please read each rule and the accompanying Advisory Committee Notes as each Rule is mentioned in the casebook.

I recommend Best, *Evidence, Examples and Explanations*, as a basic review text. However, with the proliferation of review books over the years, I'm sure there are other good options.

If you would like to meet with me, you can email me at dbernste@gmu.edu, I am happy to meet with you any time my schedule permits.

For those of you who like to review while driving or jogging or are just good at learning from audio, there are two good series available from West that review the evidence rules. One is Goode, Sum & Substance. The other is Rossi's Law School Legends Audio On Evidence. I believe that both are available for free via your student West study aids subscription;

With regard to the assigned problems, if I haven't specified which problems are being covered or skipped for any given class session, assume that we will be covering all the problems that arise within the readings for that session.

The syllabus below is subject to modification as the semester progresses. Due to conflicts with Rosh Hashanah and Yom Kippur, there will be no class on September 26 or October 6. Due to a scheduling conflict because I needed to make a travel commitment before my teaching schedule was announced, there will be no class on September 14. I will discuss with students the best way to make up these classes when the semester commences. The syllabus below assumes that each class will be made up at a different time, but another option would be to extend class on certain days, in which case the syllabus will be adjusted accordingly.

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Syllabus

Class 1 MK 1-51 (Prob 1A)

Class 2 Logical Relevance MK 55-70 (Probs 2-A, 2D)

Class 3 Pragmatic Relevance MK 70-86, 88-90 (Probs 2E, 2-F, 2G)

Class 4 MK 111-127 (Probs 3-A, 3-B)

Class 5 MK 133-42, 156-61 (skip problem 3-G, pp 138-40)

Class 6 Hearsay: Test Your Understanding
MK 161-64 (skip quiz questions 6, 7, 11, 16, 25, 26, 30) (we will get to as many of these as we can)

Class 7 Hearsay Exceptions--Declarant Testifying MK 165-182 (Prob 4A, 4B); if time, begin Statements by Party Opponents MK183-95

Class 8 Hearsay Exceptions--Declarant Testifying, Statements by Party Opponents MK183-95, 197-214

Class 9 Statements by Party Opponents, MK 214-31; Unrestricted Exceptions MK 235-44

Class 10 Unrestricted Exceptions MK 254-58 (skip Prob. 4-K); 261-73 (Prob. 4-L); review FRE 803(4); MK 285-91

Class 11 Unrestricted Exceptions MK 289-98; 304-05; 311-20; 321-23 (skip Prob. 4N)

Class 12 ExceptionsCDeclarant Unavailable MK 328-31, 337-39, 347-58, 373-74

Class 13 Character Evidence MK 421-39 (Probs 5-A thru 5-F)

Class 14 MK 442-60 (Probs 5-G, I, J, K, M skip the rest)

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Class 15 Habit and Routine Practice MK 460-61
Remedial Measures MK 467-75
Settlement Negotiations MK 475-78
Proof of Payment of Medical Expenses MK 485-86
Proof of Insurance Coverage MK 486-87

Class 16 MK 625-30, 633-39, 643-52, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

Class 17 MK 625-30, 633-39, 643-52, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

Class 18 MK 652-667; NY Times Article, Wall Street Journal article on TWEN, course materials; *Gen. Electric Co. v. Joiner*,
<https://supreme.justia.com/cases/federal/us/522/136/case.pdf>

Class 19 *United States v. Johnson*,
<https://web.archive.org/web/20010308162210/http://www.law.harvard.edu/publications/evidencciii/cases/us-v-joh.htm>.
MK 668-81; Bernstein, The Unfinished Daubert Revolution,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354733; comparison of Rule 702 as amended with *Daubert* and *Joiner*; Proposed amendment to Rule 702

Class 20 Competency of Witnesses MK 489-94, *Rock* Case to be distributed; MK 504-10

Class 21 Impeachment of Witnesses MK 535-59

Class 22 MK 559-86

Class 23 MK 596-600, 610-20

Class 24 MK 703-25 (burdens of proof and presumptions in civil cases)

Class 25 MK 779-814 (attorney-client privilege)

Class 26 MK 815-23, 847-66 or TBA

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Course Overview

The purpose of this class is to learn the Federal Rules of Evidence, mostly via reading and discussing cases and problems.

Learning outcomes

Students who complete this course should be conversant in the substance and application of the rules of evidence, including relevance, hearsay and its exceptions, character evidence, expert evidence, and privileges.

Office hours

I am happy to meet with you via Zoom at any mutually convenient time. Please email me for an appointment.

Basis of Evaluation & Assessments

Students' grades will be based on a final exam, consisting of multiple choice questions and/or essays. There are no pluses or minuses for class participation in this class.

Instructor Expectations

This class deals with many controversial and sometimes sensitive issues. Students are expected to participate and listen respectfully, and express disagreement in a civil manner. Students (and even the professor) sometimes express their views awkwardly, which can happen when one is speaking extemporaneously rather than from a script. We should all be generous in assuming that other participants in the class are well-meaning and do not intend to express animus toward any individual or group.

Course rules

Students are expected to participate in class. The professor will announce class participation rules before the first day of class.

Email Communication

Students must use their MasonLive email account to receive important University information, including communications related to this class.

Attendance

Regular and punctual attendance are required to earn academic credit. Attendance requirements for academic credit will follow the policies set forth in Academic Regulation 4-1. Should circumstances occur where you anticipate the possibility of missing a substantial

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number of class sessions (e.g. a serious illness), you should immediately contact the Assistant Dean, Student Academic Affairs.

Class Recordings Prohibited

Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by me, or arranged via the dean's office in case of a Covid-related exception.

Covid Health & Safety Requirements

To the extent I meet with individual students in person, students must follow all university policies. Please follow to the most up-to-date University policies.

Exam Conflicts

In accordance with AR 4-4.1, excuses and requests for permission not to sit for an examination when scheduled must be presented, with appropriate documentation, to the Assistant Dean, Student Academic Affairs. Except in emergencies, such requests should be presented no later than two weeks before the date of the examination.

Academic Integrity

It is expected that students adhere to the Antonin Scalia Law School Honor Code. The Honor Code prohibits lying, cheating, or stealing. This includes a student obligation to never represent the work of another as their own, and to never provide or accept unauthorized assistance on any school related assignment. The Honor Code is available here: <https://sls.gmu.edu/honor/>.

Classroom Accommodations: Disability Services at George Mason University is committed to providing equitable access to learning opportunities for all students by upholding laws that ensure equal treatment of people with disabilities. If you are seeking accommodations for this class, please visit <http://ds.gmu.edu/> for detailed information about the Disabilities Registration Process. Faculty may not receive or respond to requests for an accommodation. All requests must be handled by the office of Disability Services. You may contact Disability Services directly via email at ods@gmu.edu or phone at (703) 993-2474. If you have any questions about how in-class or testing accommodations are implemented at the law school, please contact the Assistant Dean, Student Academic Affairs for more information.

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University Life

University Life provides student support resources such as **Counseling and Psychological Services (<https://caps.gmu.edu/>)**, **Student Health Services (<https://shs.gmu.edu/>)**, and the **Student Support and Advocacy Center (<https://ssac.gmu.edu/>)**. For more information about University Life on the Arlington Campus, please visit: <https://ularlington.gmu.edu/>