Law 222-R03 | Evidence | Spring 2025 | 3 credits

Professor(s): Irwin R. Kramer

Mon. & Wed. 6:05 – 7:30 pm EST | **Final Exam:** Friday, May 9, 6:00 pm EST

Reading(s): [REQUIRED]

1. Capra & Saltzburg, Principles of Evidence, 9th Edition (West Academic Publishing 2022); ISBN: 9781636594606;
2. Kramer, Federal Rules of Evidence. **After downloading this rules supplement from the course Canvas page, you must print a copy for use during class**.

Communication(s): ikramer@gmu.edu

Office Hours: Taking questions after class. Otherwise, by appointment via Zoom.

COURSE DESCRIPTION

Examines legal rules governing the proof of disputed issues of fact in adversary proceedings. The emphasis is on rules determining the admissibility of various types of evidence, including testimonial evidence, hearsay rules and impeachment of witnesses, documentary evidence, and scientific and expert evidence. The course also considers judicial notice as a substitute for evidence, burdens of proof, and the effect of jury trials on rules of evidence.

COURSE OBJECTIVES

Unlike many fields of law, Evidence Law requires fast application without the luxury of prior research or the opportunity to consult a rule book in the heat of battle. Like a seasoned athlete, we must train every day to develop the "muscle memory" to employ these rules at the speed of trial. So while this course may entail less traditional reading than courses centered on the meticulous analysis of judicial opinions, we will flex our evidentiary muscle in exercises which test our knowledge in a multitude of scenarios. With proper class preparation and active participation, you will leave this class:

- Appreciating the strategic chess match confronting all trial lawyers in a battle of wits over the admissibility of various types of evidence.
- Learning how to overcome problems of proof to carry your evidentiary burden at trial.
- Able to spot evidentiary issues in the time it takes to yell, “Objection!”

You may not plan to go into litigation. Neither do many clients. But to protect them effectively *outside* of court, you must do so in a manner that will ultimately hold up *inside* the courtroom. Unlike trial lawyers, who cannot fabricate favorable evidence to prove their clients’ cases, lawyers representing them long before disputes arise play a vital role in documenting the evidence needed to win at trial. That’s why lawyers at all stages must learn the Law of Evidence.

GRADING & PARTICIPATION

Class Attendance & Participation

This is an interactive course. Your active and consistent participation is critical to the quality of our learning experience. Having eliminated the need to travel for class, I expect everyone to log into every single class with cameras on by the time we start. While there may still be occasions where this is not possible, students with more than four unexcused absences (or more than six regardless of the reason), will not be permitted to complete the course. Just as trial lawyers must show up to court prepared, on time and ready to participate, I expect the same from you. If you do not believe you can meet this expectation, please do not register for this class.

Problem-Oriented Assignments

Beyond reading assignments, we will apply the rules through several exercises in class and at home. This course emphasizes exercises in class and in applying the rules to a range of challenging situations. Having tried several cases via Zoom, I will use this platform to simulate the courtroom and expect you to unmute and object as necessary. Where CALI exercises or other problems are assigned as homework, you are expected to complete each prior to the class for which they are assigned to be marked present for that class.

Grading

Grading Component	Percentage
Midterm Assignment	Preparation of a 5-6 page outline of evidentiary issues raised in the prosecution of a high-profile criminal case. While graded on a pass/fail basis, excellent submissions will be factored into class participation adjustments as set forth below.
Final Examination	100%* [3-hour closed book; multiple choice questions in format of the Multistate Bar Examination]
*Class Preparation & Participation	Much depends upon exam performance. But those who contribute to the quality of our class may merit an increase in the quality of their grades. For students whose point totals border the next highest grade, the instructor has the discretion to increase a grade by one half-step based on strong preparation, class performance and timely/thorough completion of all assignments.

Class Recording Policy

Classes will be recorded on Zoom and posted to Canvas. Any materials projected in class will likewise be available on the video. In return, students agree not to post this material on other platforms where the instructor's embarrassing antics may go viral. The instructor reserves the right to use these videos in future instruction.

Canvas & CALI Sites

This course has a Canvas page with links to this syllabus, announcements, class assignments, and other important materials. You are responsible checking Canvas regularly for course information. To complete the CALI exercises assigned, you must register a CALI account using the school's case-sensitive authorization code of GEOGMAstu79.

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Course Outline: Using this outline, I have posted assignments on Canvas. When referring to portions of the textbook, this outline shows page numbers on which a specified topic *starts*. Unless instructed to stop at a given page or line, your reading assignment will include all pages corresponding with that topic. Where applicable, line numbers are placed in [brackets] following the page number. In addition to the textbook and any materials posted on Canvas, you must read the rules cited. Beyond this reading, we have a group discussion board for Evidence questions, which I consider to be required reading and which you should subscribe to at the start of the semester.

Evidence and The Trial Process

Introduction: Why Do We Need Rules of Evidence? 1-4
The Adversary System 5
Phases of a Trial 6
Preserving Evidentiary Issues for Appeal 7
- ❖ Offers of Proof & Objections [FRE 103] ..... 7-11[14]

Role of Judge and Jury: An Overview [FRE 104(a)] ..... 25[3]
Shortcuts to Proof: Judicial Notice and Other Devices 29
- ❖ Judicial Notice 29
- ❖ When Judicial Notice Is Conclusive 30
- ❖ Legislative Facts 31-32

Burdens and Presumptions 413-423

Relevance

What's "Relevant"? [FRE 401] ..... 33-40[21]
- ❖ *Harlot v. Harlot*: Did the King Err?

Excluding Relevant Evidence: A Balancing Test [FRE 403] ..... 40[22]-48[14]
Conditional Relevancy [FRE 104(b)] 61
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- ❖ Character Evidence 69
  - ○ Directly at Issue [FRE 405(b)] 72
  - ○ As Circumstantial Evidence [FRE 404(a)] 75
- ❖ Habit Evidence [FRE 406] 89
- ❖ Prior Bad Acts [FRE 404(b)] 92
  - ○ Prejudicial Effect Concerns 103
  - ○ Victim's Reputation, Threats and Past Misconduct in Self-Defense Cases 108
  - ○ Sexual Misconduct [FRE 412-FRE415] 109

Special Applications Driven by Social Policy....121
- ❖ Subsequent Remedial Measures [FRE 407]....122
- ❖ Compromise and Offers to Compromise [FRE 408] 130
- ❖ Payment of Medical Expenses [FRE409] 136
- ❖ Pleas and Related Statements [FRE 410]....136
- ❖ Liability Insurance [FRE 411]....143-145

Real and Demonstrative Evidence

Authentication [FRE 901, 902] ....51[14]
Demonstrative Evidence to Illustrate Points....61[13-29]
The Best Evidence Rule [FRE 1001-1008]....441-447
CALI EXERCISE: Best Evidence Rule Under the Federal Rules

Testimonial Evidence

Examining Witnesses [FRE 611]....11[15]
- ❖ Scope of Cross-Examination [FRE 611(b)] ....16-18[7]
- ❖ Refreshing Recollection [FRE 612]....20[36]-25[2]

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- ❖ Personal Knowledge [FRE 602]....48-51[13]
  - ○ The Lay Opinion Rule [FRE 701]....18[8]-20[35]
- ❖ Competency [FRE 601] 301
  - ○ Limits on Juror Testimony About Deliberations ....303-304[37]

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In General....304[38]
- ❖ Types of Impeachment....305
- ❖ Impeaching One's Own Witness [FRE 607] 306

Methods....307
- ❖ Criminal Convictions [FRE 609]....307
- ❖ Prior Bad Acts [FRE 608(b)] 318
- ❖ Character Testimony [FRE 608(a)]....322[38]
- ❖ Bias [FRE 608(b)] ....324[31]
- ❖ Prior Inconsistent Statements [FRE 613]....327[11]
- ❖ Contradiction....331[11]
  - ○ *Johnson v. Mitchell*, Transcript of Proceedings
- ❖ Sensory Impairments....333[21]
- ❖ Psychiatric Condition....334[3-21]

Rehabilitating Witnesses [FRE 608(a)] ....336[9]-339
CALI EXERCISE: Character Evidence Under Federal Rules [Negligence & Lizzy Borden Only]

REVIEW: Understanding Character Evidence [on the merits and for impeachment purposes]
ASSIGNMENT: Outline of Analysis in *People of Bedrock v. Scott Skater* [5-6 Page PDF]

Expert Testimony

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- The *Frye* Test 388
- The *Daubert* Test of Reliable Methodology 389
- The Trial Judge's Role as Gatekeeper ....390-393[27]

The Expert Witness: Sources of Knowledge and Direct Examination [FRE 703, 705] ..... 393[28]
- Hypothetical Questions 398
- Leaving the Expert's Basis to Cross-Examination 399
- Disclosure to the Jury of Inadmissible Facts Relied on by the Expert 400

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CALI EXERCISE: Expert and Opinion Evidence

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