

Evidence – Section E-01

Fall 2018 – Siegel

Syllabus and Course Expectations

Learning Outcomes and Assessments:

This course will provide students a basic understanding of the concepts underlying, the elements of, and the operation of, the Federal Rules of Evidence (FRE). Students will understand the basic concept and treatment under the FRE of relevance, the specialized or categorical rules of exclusion, the concept and permissible uses of character evidence under the FRE, the concept and permissible methods of impeachment under the FRE, the concept of hearsay, the operation of the rule against hearsay and its principal exceptions under the FRE, the constitutional protection of confrontation for criminal defendants and its interaction with the rule against hearsay, the concept and treatment under the FRE of lay and expert opinion, and the basic law of privileges. For each of these concepts and rules, students will develop basic skill at making arguments concerning the application of these rules to specific factual contexts.

These outcomes will be assessed through methods of formative assessment and a summative assessment. The formative assessments include four online, open book, one hour multiple choice tests approximately every two-and-a-half weeks, and a forty-five minute, in-class, open book midterm examination using three short answer questions. Detailed written feedback on the quizzes (i.e., the correct answer, the answer you chose, and an explanation of correct and incorrect answers) will be provided after the 72 hour quiz period ends. Detailed oral and written analysis of the midterm will be provided immediately, as soon as the exam is completed. Individualized feedback on each student's written answers will be provided within seventy-two hours. The summative assessment will be a three hour, open book final examination, with a combination of multiple choice, short answer and essay questions.

Class Meetings: Monday, 8:00-9:25 p.m. and Thursday, 6:00-7:20 p.m., Rm. 507.

Punctual attendance is mandatory, pursuant to school rules and common sense. Excessive absences are reported to the Dean's Office and can preclude taking the examination. Each student is responsible for personally signing the attendance sheet, on the appropriate signature line only, each class meeting.

Materials: (Required)

- (1) George Fisher, *Evidence* (3rd Ed., Foundation Press) (ISBN 978-1609300609)
- (2) George Fisher, *Evidence – Federal Rules of Evidence & Statutory Supplement* (2017-18) (ISBN 978-1683288039).

Office Hours: Mon., 3:00-6:30 p.m.; Tues., 12:00-1:30 p.m.; Thurs, 3:30-5:00 p.m. and by appointment. Schedule meetings directly with me by email. My office is Room 429. Check my online office calendar as some days' office hours are cancelled due to conflicts. *I will find a mutually convenient time within a week of your emailing me.*

Telephone: (617) 422-7270. The local number is 270. Please use the voicemail.

Email: dsiegel@nesl.edu. Please post questions of general interest on TWEN.

TWEN Site: The TWEN site (<http://lawschool.westlaw.com/twen/>) has the syllabus, a discussion board and slides shown in class, as well as handouts, problems and quizzes. The slides don't substitute for reading or attending class, but may help in creating your own notes or outlines.

Use of Laptops, Tablets or Phones Prohibited in Class: Use of a laptop, tablet with a keyboard or cell phone during class is prohibited, unless you have accommodations that specifically provide for use of these devices. Violations will preclude you from taking the final examination. Virtually all published studies show that using a laptop during class versus taking notes by hand reduces your course grade, as well as your understanding of the material and your ability to recall it. [**You will need a laptop for the midterm on October 9, 2018.**]

Grade Components:

Item	Description	Course Grade %
Quizzes (4)	1 hour, open book, online for 72 hour periods	20% (5% per quiz)
Midterm Exam	45 minutes, in-class, open book, short answer (10/9/18)	10%
Final Exam	3 hours, open book, multiple choice, short answer & essay	70%
Participation	Engaged, focused comments and questions	Up to 1 grade step

Quizzes: There will be four 1 hour multiple choice quizzes during the semester, each of which counts for 5% of the course grade. You may take each quiz at any point during this 72 hour period and submit your responses. Failure to take a quiz during this period will result in a grade of zero for that quiz. Quizzes will be given:

Quiz 1: Fri., 9/14 at 9:00 a.m. – Mon., 9/17 at 9:00 a.m.

Quiz 2: Fri., 9/28 at 9:00 a.m. – Mon., 10/1 at 9:00 a.m.

Quiz 3: Fri., 10/19 at 9:00 a.m. – Mon., 10/22 at 9:00 a.m.

Quiz 4: Fri., 11/9 at 9:00 a.m. – Mon., 11/12 at 9:00 a.m.

The quizzes are done online, via TWEN, so plan your schedule now to permit approximately 1 hour on the assigned dates at a quiet computer with reliable internet service. If an emergency prevents you from taking a quiz during the 72 hour period, email me as soon as possible to make arrangements. I try to release the answers promptly after the quiz period, after which it's not possible to take the quiz late.

Please ensure your correct email address is registered with TWEN. If you have difficulty logging in to the quiz on TWEN, email me immediately.

After the answers are released, you can see the answer you selected and my explanation for what I find the best answer. *The most important part of doing the quizzes, regardless of your score, is reviewing your selections and the explanations.* If you correctly answered a question, it's important you chose the correct answer for the correct reason. *Please build in to your studying time 30 minutes or so after each quiz administration to review the explanations.* Most importantly, contact me with any questions. It is better to email me as soon as you have a question, before you forget it and before an incorrect understanding gets seated in your thinking.

You may use any outside resource you wish in completing the quizzes *except another person, persons, or information from others.* *Doing the quizzes together, discussing the quizzes during the 72 hour period with anyone else, or copying, disclosing, or reporting the quizzes during the 72 hour period will be a violation of Rule E.1. of the Student Disciplinary Code and will be reported to the Dean's Office.* After the quiz period, questions and analysis will be online for review.

Midterm Examination: This will be a 45 minute in-class examination on *Tuesday, October 9, 2018* (School is on a Monday schedule that day) comprised of short answer questions. It will run from 8:00-8:45 p.m. For this exam, *you will need to bring your laptop and upload the essays to TWEN during the class period.* We will review a suggested analysis for the exam during the remainder of the class. The midterm exam is worth 10% of the course grade.

Assignments: Page numbers refer to the casebook (CB). Readings designated "FRE" are the rules themselves, and are found in the rule supplement. When a rule citation is followed by "ACN" you are required to read the Advisory Committee's Note and any Congressional Committee reports in addition to the rule itself. The problems listed in the assignments are problems in the casebook. *Completing the assigned problems, in writing, is part of the assignment for each class.* There are typically arguments for both sides in some parts of each problem, so expect to prepare arguments and counterarguments.

Evidence is a rules-based course, thus **YOU MUST READ THE RULE** and the ACN (if it has been assigned or if you desire further clarification) when you prepare for class. **Do this FIRST**, before you read the casebook assignment. Read the assigned rule **SEVERAL TIMES**. The rules are short, but deceptively complex. The cases in the casebook are there for one or both of the following reasons: they show a "problem" that existed before the rules were created, or an ambiguous area in the application of the rules.

Classes will generally begin with an analysis of one or more evidentiary rules. Once the language of the rule is understood, the class will explore the rule in context using problems from the book. You should read all of the problems in the pages assigned. While you prepare for class, pay close attention to the problems that are listed on this syllabus, because they are good illustrations of the relevant legal concept and we will discuss them in class.

Class Participation: Everyone will be called on throughout the semester. The purpose of

calling on people is to facilitate intelligent discussion, not engender fear, anguish or humiliation. If, through some personal emergency, you have been unable to prepare for a particular class, a note before class will ensure that I do not call on you for that class. Class participation can count toward the final grade in the course. Effective class participation can raise your grade by one grade level (e.g. from B to B/B+). Ineffective participation can have the opposite impact. Only grades between C- and B+ inclusive can be affected by class participation. If you are repeatedly unable to prepare for a class, this affects the grade for class participation.

Exam: The final exam, worth 70% of the course grade, will be given on Thursday, December 6th at 6:00 p.m. It will be a three hour, completely open book exam that will cover all material in the course, with a combination of multiple choice, short answer and essay questions. You may use any written materials regardless of authorship. You may not use electronic materials unless you have accommodations. (The final exam will be available to take on ExamSoft.)

The tests are open book (or notes, outlines, or any document you wish) to remove any pressure to memorize material, and to dispel the notion that memorization will assist you. Time constraints, however, may preclude extensive consultation of outside material during the tests.

CLASS	TOPIC	READING	PROBLEMS
UNIT I: THE TRIAL			
<i>INTRODUCTORY PROBLEM – Complete on TWEN by 8/27 at 5:00 p.m.</i>			
1: Mon. 8/27	I. Introduction to Evidence and Trial: A system of rules for an unfamiliar decision-making process.	Syllabus; CB: 1-6. FRE 101-106, 401, 403.	
UNIT II: RELEVANCE			
2: Thurs. 8/30	II. Relevance: How to determine what matters and should be admitted in trial? A. Logical Relevance	CB: 22-34 Supp.: FRE 401 & ACN; FRE 402 & ACN	1.1, 1.2, 1.4
3: Thurs. 9/6	B. Legal (or Pragmatic) Relevance (Admissibility) 1. Risk of Prejudice or Confusion 2. Limited Admissibility	CB: 42-49, 54-58 Supp.: FRE 403 & ACN; FRE 104 & ACN	1.8
4: Mon. 9/10	C. Completeness D. Conditional Relevance	CB: 58-65, 82-94 Supp.: FRE 401, FRE 403, FRE 105 & ACN	1.9, 1.10, 1.11
5: Thurs. 9/13	III. Specialized Rules of Exclusion (Categorical Rules of Exclusion) A. Subsequent Remedial Measures B. Settlement Negotiations / Pleas C. Payment of Medical Expenses D. Liability Insurance Coverage	CB: 95-100, 110- 111, 117-126, 130, 137-144. Supp.: FRE 407-411 & ACN	2.1, 2.2, 2.5, 2.8
9/14-17	<i>Take TWEN Quiz #1: Fri., 9/14/18, 9:00 am – Mon., 9/17/18, 9:00 am</i>		
6: Mon. 9/17	IV. Character Evidence A. Character v. Propensity B. Exceptions to the Rule C. Proof Standard for 404(b) Evidence	CB: 145-161, 165- 168 Supp.: 404(a) but not exceptions, 404(b) and ACN for both rules	3.1, 3.2, 3.4

CLASS	TOPIC	READING	PROBLEMS
7: Thurs. 9/20	D. Non-Character Theories of Admission	CB: 169-180, 189-190, 193-194, 234-256 Supp.: FRE 404(b) & ACN, 406 & ACN.	3.6, 3.10, 3.11
8: Mon. 9/24	E. Propensity Evidence in Sexual Assault Cases	CB: 207-232, 332-337 Supp.: FRE 412 & ACN; 413 & 414	5.2
9: Thurs. 9/27	F. Character of Criminal Defendant G. Character of Crime Victim H. Habit or Routine Practice	CB: 234-256 Supp.: 404(a) & ACN, 405 & ACN, 406	3.15, 3.16, 3.17
9/28-10/1	<i>Take TWEN Quiz #2: Fri., 9/28/18, 9:00 am – Mon., 10/1/18, 9:00 am</i>		
10: Mon. 10/1	V. Impeachment A. Impeachment Modes B. Impeachment with Character Evidence	CB: 257-260, 269-274 Supp.: 404(a)(3), 607 & ACN, 608 & ACN	4.1
11: Thurs. 10/4	C. Impeachment with Prior Convictions D. Impeachment with Prior Inconsistent Statements E. Rehabilitation F. Extrinsic Evidence	CB: 284-298, 307-317 Supp: 608 & ACN, 609 & ACN, 613 & ACN	4.3, 4.5, 4.6, 4.8
12: Tues. 10/9 [Mon. Schedule]	<i>In-Class Midterm Examination (45 minutes; Questions analyzed afterward) Bring a laptop to class.</i>		
UNIT III: RELIABILITY			
13: Thurs. 10/11	VI. Hearsay A. Hearsay Definitions B. Non-Hearsay uses of Out of Court Statements (When is a “statement” under FRE 801 <i>not</i> hearsay because it’s not offered for the truth of the matter but to do something else?)	CB: 374-388, 391-400 Supp.: <i>Introductory Note on Hearsay</i> , 801(a) – (c) & ACN, 802	7.1, 7.2, 7.3, 7.9, 7.10

CLASS	TOPIC	READING	PROBLEMS
14: Mon. 10/15	C. Statements by Party Opponents and Adoptive Admissions	CB: 406-412 Supp.: FRE 801(d)(2) & ACN	7.11, 7.12, 7.13
15: Thurs. 10/18	D. Statements by Speaking Agents and Co-Conspirator Statements	CB: 414-430 Supp.: FRE 801(d)(2) & ACN	7.15, 7.16
10/19-22	<i>Take TWEN Quiz #3: Fri., 10/19/18, 9:00 am – Mon., 10/22/18, 9:00 am</i>		
16: Mon. 10/22	E. Hearsay Exceptions based on Deferred Cross-Examination Declarant-Witnesses' Prior Statements (When the Declarant is the Witness, and testifies "Outside of court, I said....")	CB: 430-432, 438-439, 444-465 Supp.: FRE 613, FRE 801(d)(1) and ACN	7.17, 7.19, 7.20
17: Thurs. 10/25	F. Hearsay Exceptions based on the Declarant's Unavailability 1. Former Testimony 2. Dying Declarations	CB: 474-475, 483-488, 497-504 Supp: FRE 804(a), 804(b)(1) & (2) and ACN, FRE 806	7.22, 7.23
18: Mon. 10/29	3. Statements Against Interest	CB: 488-497, 505-510 Supp: FRE 804(a), 804(b)(3) & (6) and ACN	7.24, 7.25
19: Thurs. 11/1	G. Unrestricted Hearsay Exceptions (i.e., <i>not</i> based on the Declarant's unavailability) 1. Present Sense Impressions 2. Excited Utterance 3. State of Mind	CB: 510-515 Supp: FRE 803(1), 803(2), 803(3) and ACN	7.29, 7.30, 7.31
20: Mon. 11/5	4. State of Mind and Future Conduct 5. To Obtain Medical Treatment 6. Past Recollections Recorded	CB: 515-519, 522-523, 531-536, 541-543 Supp: FRE 803(3), 803(4), 803(5) and ACN, FRE 612	7.33, 7.34, 7.37, 7.38

CLASS	TOPIC	READING	PROBLEMS
21: Thurs. 11/8	7. Records of Regularly Conducted Activities (Business Records) 8. Public Records 9. Catch-All	CB: 553-556, 569-585 Supp: FRE 803(6), 803(7), 803(8), 807 and ACN	7.39
11/9-12	<i>Take TWEN Quiz #4: Fri., 11/9/18, 9:00 am – Mon., 11/12/18, 9:00 am</i>		
22: Mon. 11/12	H. The Confrontation Clause and... 1. Hearsay	CB: 586-608, 614-660, 674-678; 675 (Flow chart)	8.1
23: Thurs. 11/15	2. the <i>Bruton</i> doctrine	CB: 694-704, 709-717	8.9
24: Mon. 11/19	VII. Lay Opinions and Expert Testimony	CB: 735-738, 748-756, 761-764 Supp: FRE 701 & 702 and ACN	9.1
UNIT IV: PRIVILEGES			
25: Mon. 11/26	VIII. Privileges	CB: 930-934, 955-959, 974-977, 983-992 Supp.: FRE 501 & 502 & ACN	12.2
26: Thurs. 11/29	Questions & Review <i>(No new material; please email questions anytime in advance)</i>		
Thurs. 12/6	<i>Final Examination, 6:00-9:00 p.m., Room TBD</i>		