

# Northeastern University School of Law

## Evidence

Fall 2010

Tuesday & Thursday, 3:20 p.m. – 5:20 p.m.  
97 Cargill Hall

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### COURSE OVERVIEW AND REQUIREMENTS

#### Textbooks:

- **Required:** George Fisher, *Evidence* (Foundation Press, 2008, 2<sup>d</sup> ed.); and George Fisher, *Federal Rules of Evidence, 2010-2011: Statutory and Case Supplement* with Advisory Committee Notes and Legislative History (Foundation Press, 2010).
- **Optional (hornbooks):** A list of suggested hornbooks will be provided/and I will leave them on reserve at the Law Library.

#### Course overview:

A course on evidence examines the rules that determine how parties in civil and criminal cases prove and disprove the legal claims you've been studying in your "substantive" law courses. If you care about legal claims and defenses, you must also be concerned about evidence rules.

We'll be focusing primarily on the Federal Rules of Evidence, which govern trials in federal courts and in the 42 states that have adopted the federal rules almost to the letter. Knowledge of the federal rules is sufficient for the evidence questions on almost all bar examinations.

The evidence rule codifications are in at least one important respect different from other major sets of rules with which you may be familiar, such as the Internal Revenue Code and the Bankruptcy Code. These other codes and accompanying regulations created and occupy the

entire field they regulate. By contrast, evidence rules grow out of centuries of trial practice and common law judicial rulings. As a result, techniques of persuasive storytelling -- both within the adversary system generally and in the context of a particular trial -- necessarily affect the rules' meaning and interpretation. Thus, many evidence rules set forth foundational requirements which are at bottom general guides to judicial discretion; in other words, there are, under the rules of evidence, findings of fact that a judge must often make, sometimes outside the presence of a jury, before deciding whether particular evidence is admissible. Therefore, this course also focuses on the types of foundational arguments that lawyers can put forward to try to persuade judges to apply evidence rules in their clients' favor, and on how the unique factual circumstances of individual cases can affect evidentiary rulings.

I look forward to getting to know you. I hope that you enjoy the course, find it intellectually stimulating, and come to believe and understand that the rules of evidence are vitally important -- even if not always seemingly fair -- in seeking justice. Although my primary goal is that you *learn* the rules of evidence, it is also very important that we discuss the rationales underlying them, if and how the rules *ought* to be changed, and how to avoid unfairness. For me, as corny as it may sound, achieving justice remains the fundamental reason I remain in this "business"; rules, including those governing evidence, are supposed to be about this endeavor also.

#### Class Attendance:

I consider regular class attendance a very important part of the course. It is also a requirement of the school, and of the accrediting authorities. You are enrolled in a professional school. I expect that each of you -- absent an emergency or other exceptional circumstance -- will be present at every class. You are each allowed 2 unexcused absences; after 2 absences, and before you are absent a 3rd time, I require that you inform me of other absences and the reason(s). A 3rd absence will be allowed ONLY for very important reasons *and* with prior notice to me, unless there are emergency or exceptional circumstances. I will expect you to arrange appointments and events outside of class time. I will take attendance at every class.

More than 2 absences may result in your receiving no credit for the course. That is, if you have not received permission from me prior to your 3rd absence, unless there is an emergency, I may notify the appropriate Dean that you are in violation of the attendance policy, and it may result in no credit for the course.

If you attend class on a regular basis, prepare for the readings and problems, and participate consistently, this will be reflected in your evaluation.

#### Class Work and Preparation:

The course book consists of cases, texts and problems. I will usually lecture, open the floor for discussion, and call on people as part of every class. During almost every class, a short video will be shown to help illustrate issues being covered. Problems in the readings may often be discussed in class, and it will be my practice to give you "suggested" answers to the problems.

It is absolutely necessary that you read the assignments, including the Rules of Evidence, for every class. You may be called upon to discuss a particular problem or other aspect of that day's readings, and the subject becomes very difficult to understand if you did not read the assignment.

NOTE: Because we have a very limited number of classes together, the first class will be a “real” class. Please come prepared.

Final Exam: The final examination will be a 3 hour, essay exam. The only materials you will be allowed to have with you are the Federal Rules of Evidence and a self-prepared outline; you will not be allowed to bring in class notes or other materials.

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### Assignments

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#### **Unit I: Relevance**

August 31	Read syllabus carefully - Introduction and General Principles of Relevance Probative-ness and Materiality	pp. 1-24
September 2	Conditional Relevance; Probative-ness Versus the Risk of Unfair Prejudice	pp. 25-61
September 7	Same subject (continued)	pp. 61-89
September 9	School Holiday	
September 14	Relevance; and, The Character-Propensity Rule	pp. 135-155
September 16	Character – Propensity; and, Routes Around the Box	pp. 155-183
September 21	Routes Around the Box; and, Propensity Evidence in Sexual Assault Cases	pp. 183-223
September 23	Proof of the Defendant’s and the Victim’s Character; Evidence of Habit	pp. 223-245
September 28	Character for Truthfulness: General Principles; Use of Past Convictions Rehabilitation Use of Extrinsic Evidence	pp. 246-278 (top) pp. 278-305
September 30	The Rape Shield Law	pp. 306-347

## **Unit II: Reliability**

October 5	Competency of Witnesses The Rule Against Hearsay	pp. 350-374
October 7	Defining Assertions	pp. 374-400
October 12	Exceptions to the Hearsay Rule: Introduction; Statements of Party-Opponents	pp. 400-430
October 14	Past Statements of Witnesses and Past Testimony	pp. 430-456
October 19	Past Statements of Witnesses and Past Testimony	pp. 456-484
October 21	Hearsay Exceptions Under Rule 804: "Declarant Unavailable"	pp. 484-510
October 26	Hearsay Exceptions Under Rule 803: "Availability of Declarant Immaterial"	pp. 510-540
October 28	Hearsay Exceptions Under Rule 803: "Availability of Declarant Immaterial" (contd.)	pp. 540-564
November 2	Confrontation and Hearsay Clause	pp. 565-596
November 4	Confrontation Continued	pp. 597-641
November 9	To Be Announced	
November 11	To Be Announced	