

**Northeastern University
School of Law**

Evidence

Summer 2010

**Monday & Wednesday, 2:10 p.m. – 4:10 p.m.
240 Dockser Hall**

**The Hon. Isaac Borenstein (Ret.)
Attorney at Law**

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COURSE OVERVIEW AND REQUIREMENTS

Textbooks:

- **Required:** George Fisher, *Evidence* (Foundation Press, 2008, 2^d ed.); **and** George Fisher, *Federal Rules of Evidence, 2009-2010: Statutory and Case Supplement* with Advisory Committee Notes and Legislative History (Foundation Press, 2009).
- **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. An "emergency" as one of your first 2 unexcused absences, still counts as one of the 2 absences; in other words, if you are sick or have an emergency as one of your 2 absences, it still counts as an absence for purposes of this policy.

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.

Assignments

Unit I: Relevance

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

Unit II: Reliability

July 7	Competency of Witnesses The Rule Against Hearsay	pp. 350-374
July 12	Defining Assertions	pp. 374-400
July 14	Exceptions to the Hearsay Rule: Introduction; Statements of Party-Opponents	pp. 400-430

July 19	Past Statements of Witnesses and Past Testimony	pp. 430-456
July 21	Past Statements of Witnesses and Past Testimony	pp. 456-484
July 26	Hearsay Exceptions Under Rule 804: "Declarant Unavailable"	pp. 484-510
July 28	Same subject (continued) Hearsay Exceptions Under Rule 803: "Availability of Declarant Immaterial"	pp. 510-540
August 2	Hearsay Exceptions Under Rule 803: "Availability of Declarant Immaterial" (contd.)	pp. 540-564
August 4	Confrontation and Hearsay Clause	pp. 565-597
August 9	Same assignment	“ “
August 11	Confrontation Continued	pp. 597-641