EVIDENCE
(2016 FALL SEMESTER)

SYLLABUS

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This will tell you everything you need to know about the class and the dreaded exam. Despite that, some of you will ask me, repeatedly, questions which are answered here. Those of you who don’t ask will, nonetheless, be happy the others did. So, in a way, this is an experiment to see if, for the 25th consecutive year, I can write a syllabus to which no one pays any attention.

HOW WE’LL LEARN ABOUT EVIDENCE

The object of the course is to give you a working knowledge of the Federal Rules of Evidence and, where they differ, the Wisconsin Rules of Evidence. To have a working knowledge, though, one must understand the concerns and policies which prompted written rules.

We will spend some of our time in class developing some of our own rules of evidence. Once we’ve done that, we will compare our product with the Federal Rules and, where they differ, the Wisconsin Rules.

LEARNING OUTCOMES

By the end of this course, students should:

• Have acquired a working knowledge of the Federal Rules of Evidence;
• Have a thorough understanding of the policies underlying those Rules;
• Know how the Wisconsin Rules of Evidence materially differ from the Federal Rules;
• Be able to identify evidentiary issues raised by the facts in relation to the pleadings, and by questions asked during a witness' examination; and

• With respect to those issues, articulate the strengths and weaknesses of the positions of the proponent of the evidence and of the opponent of the evidence.

THE BOOK(S)

This is a large class and experience has taught me that different people learn in different ways. In the past, I have assigned text. This year I will not. Rather, I am recommending two texts. If you wish to study from a text, CHOOSE THE ONE that is most suited to your style of learning and your budget. You will find a study guide for those texts below. One (Lilly) is a Hornbook. The other, (Allen) is a casebook.

If you choose to employ a text, I prefer that you not read the material on a topic until after we have discussed the topic in class. However, don’t feel obligated to do so.

You will need copies of the Federal Rules of Evidence and of the Wisconsin Rules of Evidence. These can be printed from the web.

The following are the suggested readings in Evidence. The suggested readings consist of those in (1) Lilly, Capra and Saltzburg, PRINCIPLES OF EVIDENCE (7TH Ed.) (“Lilly”); (2) Allen, Kuhns, Swift, Schwartz and Pardo, EVIDENCE (5TH Ed.) (“Allen”); and (3) duplicated materials including law review articles and selected cases, the citations for which are provided.

The Rule numbers listed are those of the Federal Rules of Evidence. These appear in the back of Lilly. In most instances, the Wisconsin counterpart can be determined by placing the numbers “90” in front of the Federal Rule. Rule 404 therefore is WIS. STAT. § 904.04. You are encouraged to read more of the text than has been suggested.

Every class takes on its own pace, so it’s impossible to tell you in advance how many sessions we’ll spend on each topic. We’ll spend three weeks, more or less, on Relevance and a day or day and one half on Mechanics, for example. Pace your reading accordingly.

Those readings identified by citation or by a web address are your responsibility to look up.

I will point out where the Wisconsin Rules differ. When I do that, it’s usually wise to make notes.
RELEVANCE

RULES 401-403  
Lilly, pp 33-73  
Allen, pp. 122-169, 315-324

RULES 404-415  
Lilly, pp. 73-122  
Allen, pp. 244-305  
Paul A. Ksicinski, *Uncharged Misconduct Evidence*, WISCONSIN DEFENDER, March/April 1996, see attachments

RULES, 608-609  
Lilly, pp. 307-334  
Allen, pp. 357-380  
suggested additional reading:

  *State v. Pullizano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990)  
  *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)  
  *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)


MECHANICS

RULE 103  
Lilly, pp. 5-29  
Allen, pp. 79-121  
*United States v. Mason*, 85 F.3d 471 (10th Cir. 1996)

COMPETENCE AND DIRECT EXAMINATION

RULES 601-603, 605, 606, 611, 612, 614, 615, 701, and 803 (5)  
Lilly, pp. 307-308  
Allen, p. 175-181

suggested additional reading:  
IMPEACHMENT

RUlES 607-613
Lilly, pp. 335-344
Allen, pp. 351-404

REHABILITATION

RULE 801 (d) (1) (B)
Lilly, pp. 345-346

EXPERT AND SCIENTIFIC TESTIMONY AND EVIDENCE

RUlES 701-705
Lilly, Chapter XI
Allen, pp. 633-715
Frye v. United States, 293 F. 1013 (C.A. D.C. 1923)
(see attachment)

DEMONSTRATIVE EVIDENCE AND AUTHENTICATION (REAL EVIDENCE)

RUlES 901 and 902, 1001-1006
Lilly, Chapter XIII
Allen, Chapter Four
Evidence Summary, Litigation, Spring, 1999

THE RULE AGAINST HEARSAY

RULE 801
Lilly, Chapter V
Allen, pp. 407-480
State v. Whitaker, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992)

ADMISSIONS

RULE 801
EXEMPTIONS

RULE 801(d)
Lilly, Chapter VI
Allen, pp. 448-480

EXCEPTIONS

RULES 803 and 804
Lilly, Chapter VII
Allen, pp. 483-578
WIS. STAT. § 908.045(2), attached
In General and Confrontation Clause
Lilly, Chapter VIII
Allen, pp. 579-624
Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

JUDICIAL NOTICE AND 104

RULE 201
Lilly, pp. 29-37
Allen, pp. 773-791

PRIVILEGES

RULE 501
Lilly, pp. Chapter X
Allen, Chapter Twelve
WIS. STAT. § 905.01, et seq. [print out a copy for yourself for use during class]
N.Y. Times article 04-20-03 “Lawyer Punished for Revelation That Brought Down a Judge” and “Attorney-Client Privilege Update” ACTL, 2012, attached

SUGGESTED FILMS-

Anatomy of a Murder
My Cousin Vinny
THE GRADE

There will be one examination, consisting of 150 true/false questions. The law school’s standard curve will be employed. Your grade for the course will be your grade on the examination. Class participation is a consideration to improve the grade when the examination score hovers at, for example, the cut-off between a B+ and an A. There are no past exams on file. Exams are graded using the method explained in the attachment, “A Guide to Grading Exams.”

I know that you will obsess, if not now then later, about a true/false exam. You ought not.

What you are about to learn is that the Rules of Evidence are not really rules. They are guidelines. Their employ will differ depending on the facts and legal issues presented in a given case, and on the judge’s exercise of discretion.

So, you ask, why would you give me give a true/false exam about something which sounds so nuanced, let alone make my entire grade dependent on it?

It could be that I’m a sadist.

But think about it. A true/false exam requires that the questions not be subject to differing interpretations. It means that I can only ask about the most basic principles. The exam is about the easy stuff.

You will have 4 hours to complete the exam. I promise that it’s ample time. What’s important is that you take the time to read each question carefully. The words and facts employed in each question are quite specific. It’s not to trick you but, rather, to prevent confusion about the question. In the past, those who’ve been disappointed in their grade on the exam completed it too quickly and didn’t use the time to read the questions with care.

To assist you in overcoming your angst, I will put on reserve two old copies of Broun and Blakey, EVIDENCE (2d and 5th Ed.). In the back of each of these are true/false questions—and the answers. Many of the questions are remarkably similar in kind to those which I will ask on the exam.

If, despite what I’ve just explained, you remain over-anxious about a True/False exam, you will wonder whether this class may be taken Pass/Fail. The answer is yes.
GOING TO COURT

You are required to spend one day, or two half days, viewing a jury trial. This requirement is born of two concerns: first, that no law school student should ever graduate without having seen a jury trial; and, second, that some understanding of the rules of evidence will affect your perception of the process. Therefore, the fact that you have previously seen a jury trial will not excuse you from this requirement. You need only email me informing me of the date(s) on which you viewed a trial, in which court, who the presiding judge was, the name of the case; and whether you attended a full or half day. You need do no more than that; however, I have always been grateful for my students’ thoughts about the trial they observed, the quality of representation, or the value of the exercise.

Your viewing may be in any U.S. Court.

Juries in the Dane County Circuit Court and in the Federal Court for the Western District of Wisconsin are usually selected on Monday mornings; and the trials proceed thereafter (usually that afternoon). Thus, Tuesday is a particularly propitious day for effecting this assignment. Be warned, however, that there are weeks when neither of the two courts have any jury trials occurring. Therefore, putting this assignment off until the last minute can be disastrous. There are few trials occurring between Christmas and New Year. Therefore, you must complete this assignment by the first class after Thanksgiving break. What usually happens is that most students put it off until the last minute, and then I am deluged with inquires about whether the trial has to be a jury trial. It does. Small claims actions, divorce proceedings, foreclosures and other forms of bench trials do not count. Those who do not complete this assignment will receive points off their grade equivalent to half a grade (thus, a grade which equates to a B- would become a C+).

In the Federal Court, if a case is scheduled for trial on Monday, the Clerk of Court’s office will know, on the preceding Friday afternoon, whether it will truly proceed to trial. So, it is wise to call in advance. You can also check on PACER.

In Dane County Circuit Court many cases scheduled for trial on Monday will settle on that morning. There is an office of the Jury Clerk and, on Monday, she is incredibly busy. By mid-afternoon, though, much of the dust has settled and a call placed to her office may well reveal what cases will be in trial on Tuesday. Her office closes at 4:30 p.m. You may also access each of the Dane County Circuit Court Judges’ calendars by going to http://www.countyofdane.com/court/judge/.

Keep in mind that at both courthouses you will be searched; so its wise to double check your backpack beforehand, and remove the hash pipe and Walther PPK you forgot you’d left in it.
THE BACK ROW

Sitting in the back row is NOT permitted unless all other seats are taken.

CRACKING JOKES

I understand that class occurs between 5:40 and 7:40 p.m.; that most of you have not eaten dinner and that many of you are missing your favorite reality show. Good humor is appreciated and always appropriate.

IAQ (INFREQUENTLY ASKED QUESTIONS)

At the beginning of each class, and after each break, I will ask whether anyone has any questions. What usually occurs is that no one has any. Rather, when we take the ten minute break, people will line up in front of me to ask me the questions that they didn’t want to ask out loud for fear that their classmates will think them stupid; never really considering that the aged professor may need to use the john badly. Most of the time, more than half of the six people lined up to talk to me during the break will have the very same question; thereby necessitating my answering it three times rather than once for everyone.

You are about to become lawyers; and most of you (whether trial lawyers or not) will have to speak out loud in order to advocate for your client, maintain a business and communicate with others. Now is the time to start practicing.

ATTENDANCE

I do not take attendance. There are far better ways to spend one’s time. While I prefer you attend, you are all adults and you are paying for this. If you would rather be elsewhere, that is your decision. If that is your decision, please watch the video clip at: http://www.youtube.com/watch?v=qeSdC7lbAIA&feature=share

CLASS PARTICIPATION

Class participation might enhance your grade. It will enhance your learning. I do not employ the Socratic method. You will not be called upon to recite. Ever. I will ask your thoughts about things to which there is often no correct answer; and I will do so because I’m genuinely interested in your thoughts. If, when I do, you wish to take a moment to ponder your reply, please do so. The notion of a lawyer actually thinking before speaking is astounding.
FEEDING

Class occurs during the dinner hour. I’d rather your blood sugar was not depleted. Thus, I don’t mind if you eat during class as long as you chew with your mouth closed.

FEEDBACK

I really appreciate it; and preferably before you fill out the semester end review when it’s too late for me to change any bad habits which I may have developed. If I’m doing something wrong, let me know. If you wish for more examples, or more emphasis on certain areas, or repeating certain presentations, please request it.

MEETING WITH TEACH

I work the night shift and, alas, am not afforded an office on site (let alone a lofty tower). If you’d like/need a one on one, call or e-mail my assistant, Maria Swenson (608–257–0945; mswenson@hbslawfirm.com), and she will get us set up pronto. You’ll like her better than me anyway.

E-MAILING ME

If you e-mail me, employ the subject line to tell me that the message is from a student (e.g.: “student question,” “student’s plaintive cry” or “student’s bitch”) so that I don’t spam it.

SPORTING EVENTS

Every year there are requests that I cancel class on a certain night, or nights, so that “everyone” can watch “the game.” (Curiously, it’s usually men who think “everyone” wants to see “the game.”) What a great idea! Perhaps this approach can be applied to my law practice, allowing me to ask the judge to call off my jury trial on Tuesday morning so that I can stay up late watching the game on Monday night. I’m sure it will enhance my standing with the court and with my client.

Or, perhaps, you should consider making friends with someone who owns a DVR.

ELECTRONIC RECORDING OF CLASS

Fine with me. If you are using a camera, please shoot from my left, which is my better side. You are not authorized, however, to disseminate it on YouTube, XTube, or anywhere else for that matter. You can use it, and you may show it to your classmates, to enhance your/their study.
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