

Evidence and Trial Procedure
FALL 2023

Professor David Bernstein

The text for this class is Mueller and Kirkpatrick, *Evidence under the Rules*, **9th edition** (MK).

You do not need to *purchase* a Federal Rules of Evidence Supplement, but you do need to get one. A free version is available online at <https://www.cali.org/books/federal-rules-evidence>. It comes in IPAD, PDF, and Kindle editions.

This course is largely based on the Federal Rules of Evidence. Please read each rule and the accompanying Advisory Committee Notes as each Rule is mentioned in the casebook.

I recommend Best, *Evidence, Examples and Explanations*, as a basic review text. However, with the proliferation of review books over the years, I'm sure there are other good options.

If you would like to meet with me, you can email me at dbernste@gmu.edu, I am happy to meet with you, in person or via Zoom, any time my schedule permits.

For those of you who like to review while driving or jogging or are just good at learning from audio, there are two good series available from West that review the evidence rules. One is Goode, Sum & Substance. The other is Rossi's Law School Legends Audio on Evidence. Both are available for free via your student West study aids subscription.

With regard to the assigned problems, if I haven't specified which problems are being covered or skipped for any given class session, assume that we will be covering all the problems that arise within the readings for that session.

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Syllabus

Aug. 21 MK 1-41 (Prob 1A)|

Aug. 23 Logical Relevance MK 42-70 (Probs 2-A, 2D)

Aug. 28 Pragmatic Relevance MK 70-86, 88-90 (Probs 2E, 2-F, 2G)

Aug. 30 Read Rule 801 MK 111-116 (Probs 3-A, 3-B) plus brief lecture on nonassertive conduct (or “conduct not intended to be an assertion”), MK 133-42 (skip problem 3-G, pp 138-40)

Sept. 4 NO CLASS: LABOR DAY

Sept. 6 Note: This class will be held via Zoom

Hearsay Review: Test Your Understanding MK 161-64 (skip quiz questions 6, 7, 11, 16, 25, 26, 30).

Sept. 11 Hearsay Exceptions--Declarant Testifying MK 165-182 (Prob 4A, 4B); if time, begin Statements by Party Opponents MK183-95

Sept. 13 Hearsay Exceptions--Declarant Testifying, Statements by Party Opponents MK183-95, 197-214

Sept. 18 Statements by Party Opponents, MK 214-31; Unrestricted Exceptions MK 235-44

Sept. 20 Unrestricted Exceptions MK 254-58 (skip Prob. 4-K); 261-73 (Prob. 4-L); review FRE 803(4); MK 285-91

Sept. 25 NO in-person class, Yom Kippur. Details of how this will be handled TBA.

Unrestricted Exceptions MK 289-98; 304-05; 311-20; 321-23 (skip Prob. 4N)

Sept. 27 ExceptionsCDeclarant Unavailable MK 328-31, 337-39, 347-58, 373-74

Oct. 2 Character Evidence MK 421-39 (Probs 5-A thru 5-F)

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Oct. 4 MK 442-60 (Probs 5-G, I, J, K, M skip the rest)

Oct. 9 NO CLASS, FALL BREAK

Oct. 10 (Observe Monday schedule)

Habit and Routine Practice MK 460-61

Remedial Measures MK 467-75

Settlement Negotiations MK 475-78

Proof of Payment of Medical Expenses MK 485-86

Proof of Insurance Coverage MK 486-87

Oct. 11 MK 625-30, 633-39, 643-52, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

Oct. 16 MK 652-667; NY Times Article, Wall St. J. article on TWEN, course Materials;
Gen. Electric Co. v. Joiner <https://supreme.justia.com/cases/federal/us/522/136/case.pdf>

Oct. 18 *United States v. Johnson*,

<https://web.archive.org/web/20010308162210/http://www.law.harvard.edu/publications/evidence/cases/us-v-joh.htm>.

MK 668-81;

Bernstein, The Unfinished Daubert Revolution,

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354733

Comparison of Rule 702 as amended with *Daubert* and *Joiner*

Pending amendment to Rule 702,

https://www.supremecourt.gov/orders/courtorders/frev23_5468.pdf (page 4)

Oct. 23 Competency of Witnesses MK 489-94, *Rock* Case to be distributed; MK 504-10

Oct. 25 Impeachment of Witnesses MK 535-59

Oct. 30 MK 559-86

Nov. 2 MK 596-600, 610-20

Nov. 6 MK 703-25 (burdens of proof and presumptions in civil cases)

Nov. 8 MK 779-814 (attorney-client privilege)

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Nov. 13 MK 815-23, 847-66

Nov. 15 TBA

Nov. 20 TBA

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Course Overview

The purpose of this class is to learn the Federal Rules of Evidence, mostly via reading and discussing cases and problems.

Learning outcomes

Students who complete this course should be conversant in the substance and application of the rules of evidence, including relevance, hearsay and its exceptions, character evidence, expert evidence, and privileges.

Office hours

I am happy to meet with you via Zoom at any mutually convenient time. Please email me for an appointment.

Basis of Evaluation & Assessments

Students' grades will be based on a final exam, consisting of multiple choice questions and/or essays. There are no pluses or minuses for class participation in this class.

Instructor Expectations

This class deals with many controversial and sometimes sensitive issues. Students are expected to participate and listen respectfully, and express disagreement in a civil manner. Students (and even the professor) sometimes express their views awkwardly, which can happen when one is speaking extemporaneously rather than from a script. We should all be generous in assuming that other participants in the class are well-meaning and do not intend to express animus toward any individual or group.

Course rules

Students are expected to participate in class. The professor will announce class participation rules before the first day of class.

Email Communication

Students must use their MasonLive email account to receive important University information, including communications related to this class.

Attendance

Regular and punctual attendance are required to earn academic credit. Attendance requirements for academic credit will follow the policies set forth in Academic Regulation 4-1. Should circumstances occur where you anticipate the possibility of missing a substantial

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number of class sessions (e.g. a serious illness), you should immediately contact the Assistant Dean, Student Academic Affairs.

Class Recordings Prohibited

Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by me, or arranged via the dean's office in case of a Covid-related exception.

Exam Conflicts

In accordance with AR 4-4.1, excuses and requests for permission not to sit for an examination when scheduled must be presented, with appropriate documentation, to the Assistant Dean, Student Academic Affairs. Except in emergencies, such requests should be presented no later than two weeks before the date of the examination.

Academic Integrity

It is expected that students adhere to the Antonin Scalia Law School Honor Code. The Honor Code prohibits lying, cheating, or stealing. This includes a student obligation to never represent the work of another as their own, and to never provide or accept unauthorized assistance on any school related assignment. The Honor Code is available here: <https://sls.gmu.edu/honor/>.

Classroom Accommodations: Disability Services at George Mason University is committed to providing equitable access to learning opportunities for all students by upholding laws that ensure equal treatment of people with disabilities. If you are seeking accommodations for this class, please visit <http://ds.gmu.edu/> for detailed information about the Disabilities Registration Process. Faculty may not receive or respond to requests for an accommodation. All requests must be handled by the office of Disability Services. You may contact Disability Services directly via email at ods@gmu.edu or phone at (703) 993-2474. If you have any questions about how in-class or testing accommodations are implemented at the law school, please contact the Assistant Dean, Student Academic Affairs for more information.

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University Life

University Life provides student support resources such as **Counseling and Psychological Services (<https://caps.gmu.edu/>)**, **Student Health Services (<https://shs.gmu.edu/>)**, and the **Student Support and Advocacy Center (<https://ssac.gmu.edu/>)**. For more information about University Life on the Arlington Campus, please visit: <https://ularlington.gmu.edu/>