

**EVIDENCE – LAW 222 (Section 002)**  
**FALL 2024**  
**Randy I. Bellows, Adjunct Faculty**  
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**Course Schedule:**

**Class Day/Time:** Tuesdays, 6:05 PM to 9:00 PM

**First Class:** Tuesday, August 27, 2024

**Last Class:** Friday, November 22, 2024\*

**No Class on:** November 5, 2024 (Election Day)

**Final Exam:** Monday, December 9, 2024

**Why Take a Course in Evidence?**

Some law students expect to spend their entire careers in the courtroom, perhaps as civil litigators or criminal defense attorneys, or prosecutors, or domestic relations practitioners. For those law students, the answer to the question – *Why take a course in Evidence?* – is obvious: The course teaches students the fundamental rules governing the admission and exclusion of evidence in courts of law, and how an attorney uses those rules to prove or disprove a claim or cause of action.

But even a law student who never intends to step foot in the courtroom needs to be well-versed in the rules of evidence. This is for two reasons: First, disputes can arise in virtually every area of the law; our courtrooms are the common arenas for the resolution of those disputes. So, even if you do not intend to be the trial lawyer who takes a matter to court, or defends a matter in court, the work that *precedes* litigation needs to be informed and guided by an awareness of the rules of evidence and how they might impact the matter in which you are engaged. Those rules may ultimately determine whether a contract will be enforced, a will's validity confirmed, a labor dispute resolved in your client's favor, or a government regulation upheld. Second, even non-litigators will occasionally find themselves standing before a judge or jury on behalf of a client and their cause. When that day comes, they too will be expected to know the "rules of the road" governing the admissibility of evidence.

**\*All classes are on Tuesdays, except for the final class on Friday, November 22, 2024.**

## **Learning Objectives:**

By the end of the course:

- Students should have a solid understanding of the rules governing the admission of evidence in courts of law, and should be especially well-versed in the Federal Rules of Evidence.
- Students should be proficient in recognizing common evidentiary issues and identifying the rule of evidence most pertinent to resolving the issue.
- Students should understand the rules governing the admission and exclusion of hearsay testimony, and the application of the 6<sup>th</sup> Amendment's Confrontation Clause to the admission of out-of-court statements in criminal cases.
- Students should be adept at making objections, and arguing for, and against, the admission of evidence based on the applicable rule of evidence. Students should also be able to recognize those circumstances where strategic considerations might counsel against making an objection even when there is a valid basis for the objection.
- Students should know how to lay the foundation for the admission of various types of testimony and exhibits, including business records, tangible evidence, photographs, audio and video recordings, digital data, and forensic evidence. Similarly, students should know how and under what circumstances a witness' testimony can be impeached, rehabilitated, or refreshed.
- Students should know how to make a record for purposes of appeal, including when and how to make a proffer of evidence.

## **Prerequisite:**

The only course prerequisite is Civil Procedure.

## **Course Materials:**

There are two required books for this course:

### **Title: Evidence, Cases and Materials**

Edition: 13<sup>th</sup>

Author: Roger C. Park & Richard D. Friedman

ISBN: 9781634603423

### **Title: Federal Rules of Evidence**

Edition: 2024-2025

Author: Daniel J. Capra

ISBN: 9798892092548

## **Grades:**

The grade in this class is based on a comprehensive final examination, further described below. In addition, in accordance with AR 4-4.2, final course grades can be raised or lowered by a single increment based on class participation (e.g., from B to B+ or from A- to B+.)

### **Final Examination:**

The final examination will take place on **Monday, December 9, 2024**, and will start at 6 p.m. and end at 9 p.m. The examination is closed book, but a copy of the Federal Rules of Evidence will be provided to each student for reference as necessary.

### **Class Attendance:**

- “Regular and punctual attendance and class preparation are required to earn academic credit.” (AR 4-1) “If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course. A student who is not present for at least 75 percent of a session of the course is absent from that session.” (AR 4-1.1)
- Since there are 13 class sessions, a student who misses more than three classes for any reason is not eligible to receive course credit.
- I use a sign-in sheet to monitor class attendance. To receive credit for a class, students must place their initials next to their name on the sign-in sheet.

### **Class Participation:**

Class participation begins with preparation. I expect students to do all assigned readings prior to class and to be prepared to discuss what they have learned. The class will be taught through both lectures and through class discussion. I do cold call on students, both to ensure that all students have a meaningful opportunity to participate in class discussion and also to ensure that all students have the practical experience of making arguments for, and against, the applicability of the Federal Rules of Evidence in support of, or against, the applicability of particular rules of evidence

### **Recording Class Sessions:**

Recording of class sessions by any means is prohibited. *See* AR 4-2.2: “Unless expressly permitted in writing by an instructor, 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 a camera).”

### **Academic Integrity:**

“Each student at Antonin Scalia Law School (“Scalia Law”) is expected to behave honorably and with the highest personal integrity toward other law students, toward the law school and university, and toward other members of the legal profession.” (Preamble to the Honor Code.) The Honor Code prohibits a student from lying, cheating, or stealing, to include plagiarism and the use of any prohibited resource in an exam, coursework, or course paper. The full Honor Code can be accessed here: <https://sls.gmu.edu/honor/>.

### **Appointments:**

I am available to speak with students by appointment. The best way to schedule an appointment is by emailing me. Appointments can take place either by telephone or in person on campus. The best way to communicate with me is by email, which I check multiple times during the day.

### **Class Materials:**

Any material I post on Blackboard, or use in class, are for the exclusive use of students registered in this course. These materials may not be shared with others or posted or circulated.

### **Students with Disabilities:**

Disability Services at George Mason University is committed to upholding the letter and spirit of the laws that ensure equal treatment of people with disabilities. Disability Services implements and coordinates reasonable accommodations and disability-related services that afford equal access to university programs and activities. For further information and to register for services, please refer to <https://ds.gmu.edu/law-school/>, or call (703) 993-2474.

### **Use of Technology:**

Students may use computers, tablets, etc., in the classroom, but only for the purpose of taking notes or accessing course material. Please ensure that cell phones do not ring in class.

### **Use of Generative Artificial Intelligence (GAI) in Academic Work:**

Use of Generative Artificial Intelligence in the drafting or writing of papers or any other course work or assignments in this class is prohibited. According to AR 4-3: “Generative artificial intelligence (GAI) is a type of artificial intelligence that uses algorithms to generate new content, such as text or images, based on the data it has been trained on. For purposes of this regulation, GAI is not intended to encompass legal research databases and word processing applications that, while incorporating AI- based elements or enhancements, do not generate novel text.” Use of GAI in a course that prohibits the use of GAI, such as this course, constitutes an academic integrity violation.

### **Name and Pronoun Use:**

Students are encouraged to share their name and gender pronouns with me and indicate how best to address them in class and via email. Further information can be obtained at GMU’s Chosen Name and Pronoun Policy, <https://universitypolicy.gmu.edu/policies/chosen-name-pronouns-policy/>.

### **University Email:**

Students must use their Mason email account to receive university or law school information, including communications related to this class.

### **Covid Protocols:**

Please refer to GMU's *Safe Return to Campus* web site for information regarding GMU's safety protocols. The site can be accessed at: <https://shs.gmu.edu/services/covidservices/isolationguidance/>.

### **Notice of Mandatory Reporting of Sexual Assault, Sexual Harassment, Interpersonal Violence, and Stalking:**

As a faculty member, I am designated as a "Non-Confidential Employee," and must report all disclosures of sexual assault, sexual harassment, interpersonal violence, and stalking to Mason's Title IX Coordinator per University Policy 1202. If a student wishes to speak with someone confidentially, please contact one of Mason's confidential resources, such as Student Support and Advocacy Center (SSAC) at 703-380-1434 or Counseling and Psychological Services (CAPS) at 703-993-2380. Students may also seek assistance or support measures from Mason's Title IX Coordinator by calling 703-993-8730, or emailing [titleix@gmu.edu](mailto:titleix@gmu.edu).

### **University Resources:**

Counseling and Psychological Services: <https://caps.gmu.edu/>

Student Health Services: <https://shs.gmu.edu/>

Mason Square Campus Clinic: After-Hours Nurse Advice – 703-991-2831

Mason Square Campus Clinic Location: Van Metre Hall, Room B102.

Student Support and Advocacy Center: <https://ssac.gmu.edu/>

Police: Emergency - Dial 911; 703-993-8070, Van Metre Hall, Room 110.

Police escort services: 703-993-8370.

Sexual Assault Services: 703-993-8186, Van Metre Hall, Room 222D.

Mason Square information: <https://masonsquare.gmu.edu>

### **A Note Regarding the Readings**

When a particular Federal Rule of Evidence is assigned reading, the assignment includes the Legislative History and Advisory Committee Notes that follow the rule in the Capra text.

## Course Schedule and Assignments

### CLASS 1: Tuesday, August 27, 2024

#### **Topics:**

- Course Introduction and Overview
- Making the Record, Objections and Waiver
- Direct and Cross-Examination
- Stipulations, Offers of Proof
- Admission of Exhibits

#### **Readings:**

- Park & Friedman: 1-74
- Capra: FRE 101-106, 611, 615, 1101

### CLASS 2: Tuesday, September 3, 2024

#### **Topics:**

- Relevancy and Admissibility Issues:
  - Probative Value vs. Prejudicial Effect
  - Inferences
  - Character and Habit
  - Methods of Proving Character

#### **Readings:**

- Park & Friedman: 75-122
- Capra: FRE 401-403, 404(a), 405, 406, 608, 803(21)

### CLASS 3: Tuesday, September 10, 2024

#### **Topics:**

- Relevancy and Admissibility Issues (continued):
  - Prior Bad Acts and the Exclusion of Propensity Evidence
  - Other Crimes
  - Similar Happenings
  - Subsequent Remedial Measures
  - Offers in Compromise and Negotiations
  - Liability Insurance
  - Rules Applicable in Sex-Offense Cases

#### **Readings:**

- Park & Friedman: 123-192
- Capra: FRE 404(b), 407-409, 411-415, 803(22)

#### **CLASS 4: Tuesday, September 17, 2024**

##### **Topics:**

- Hearsay:
  - Overview
  - Definitions
- Confrontation Clause & Hearsay

##### **Readings:**

- Park & Friedman: 197-233, 238-248, 293-312, 420-463
- Smith v. Arizona, 602 U.S. \_\_\_, 2024 U.S. Lexis 2712 (June 21, 2024)
- Capra: FRE 801, 802, 805

#### **CLASS 5: Tuesday, September 24, 2024**

##### **Topics:**

- Hearsay Exclusions:
  - Declarant-Witness' Prior Sworn Inconsistent Statements
  - Declarant-Witness' Prior Consistent Statements
  - Prior Identification
  - Opposing Party's Statements
  - Co-Conspirator Statements
- Hearsay Exceptions:
  - Excited Utterances
  - Present Sense Impression
  - State of Mind
  - Medical Diagnosis or Treatment

##### **Readings:**

- Park & Friedman: 249-292, 312-342, 385-391
- Capra: FRE 801(d)(2), 12/1/24 Amendments to 801(d)(2), 803(1-4)

#### **CLASS 6: Tuesday, October 1, 2024**

##### **Topics:**

- Hearsay Exceptions (continued):
  - Former Testimony
  - Declarations Against Interest
  - Dying Declarations and Forfeiture
  - Past Recollection Recorded
  - Statements in Treatises
  - Prior Judgments

##### **Readings:**

- Park & Friedman: 342-385, 391-399, 463-468
- Capra: FRE 803, 804, 12/1/24 Amendments to 804(d)(2).

## **CLASS 7: Tuesday, October 8, 2024**

### **Topics:**

- Hearsay Exceptions (continued):
  - Business and Public Records
  - Residual Exception
  - Miscellaneous Exceptions
- Writings:
  - Best Evidence Rule
  - Authentication

### **Readings:**

- Park & Friedman: 399-420, 468-474, 669-698
- Capra: FRE 803(6-18), 807, 901-903, 1001-1008, 12/1/24 Amendments to 1006

## **CLASS 8: Tuesday, October 15, 2024**

### **Topics:**

- Impeachment and Rehabilitation
  - Impeaching One's Own Witness
  - Methods of Impeachment and Rehabilitation
    - Prior Inconsistent Statements
    - Prior Consistent Statements
    - Character Evidence
      - Reputation for Truth and Veracity
      - Prior Bad Acts
      - Prior Convictions
      - Bias
      - Psychiatric Condition
    - Scope of Cross-Examination
    - Use of Leading Questions
    - Use of Writings in Questioning Adverse Witness
- Exclusion of Witnesses

### **Readings:**

- Park & Friedman: 485-562
- Capra: FRE 407, 408(b), 607-615, 12/1/24 Amendments to 613(b), 801(d)(1)(A), 801(d)(1)(B), 806



## **CLASS 9: Tuesday, October 22, 2024**

### **Topics:**

- Privileges
  - Attorney-Client Privilege and Work Product
  - Physician-Patient Privilege
  - Psychotherapist-Patient Privilege
  - Marital Privilege
  - Clergy-Communicant Privilege
  - Miscellaneous Privileges
  - Limitation on Waivers
  - Inadvertent Privilege Waivers

### **Readings:**

- Park & Friedman: 563-640
- Capra: FRE 501-502

## **CLASS 10: Tuesday, October 29, 2024**

### **Topics:**

- Witness Competency
- Judicial Notice
- Admissibility of Plea Colloquies and Plea Discussions

### **Readings:**

- Park & Friedman: 699-748
- Capra: FRE 201, 410, 601-606

## **NO CLASS ON ELECTION DAY: TUESDAY, NOVEMBER 5, 2024**

## **CLASS 11: Tuesday, November 12, 2024**

### **Topics:**

- Governmental Privileges:
  - State Secrets
  - Executive Privilege
  - Informer's Privilege
- Burden of Proof:
  - Burden of Persuasion
  - Burden of Production
- Presumptions vs. Inferences

### **Readings:**

- Park & Friedman: 641-648, 749-780
- Capra: FRE 301-302

## **CLASS 12: Tuesday, November 19, 2024**

### **Topics:**

- Opinion Testimony
- Expert Testimony
  - Smith v. Arizona (2024) and the Future of FRE 703
  - Diaz v. United States (2024) and the Future of FRE 704(b)

### **Readings:**

- Park & Friedman: 781-842
- Diaz v. United States, 602 U.S. \_\_\_\_, .2024 U.S. Lexis 2709 (June 20, 2024)
- Smith v. Arizona, 602 U.S. \_\_\_\_, 2024 U.S. Lexis 2712 (June 21, 2024) (previously assigned for Class 4.)
- Capra: FRE 701-706

## **CLASS 13: Friday, November 22, 2024 (Last Class)**

### **Topics:**

- Scientific, Demonstrative, and Technical Evidence:
  - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*
  - Application of *Daubert* to Other Forms of Expert Testimony
  - Demonstrative Evidence

### **Readings:**

- Park & Friedman: 842-940
- Capra: FRE 107 (Effective: 12/1/24), 702

## **FINAL EXAMINATION: MONDAY, DECEMBER 9, 2024, 6PM TO 9PM**