Syllabus -- Evidence, Fall 2017 (Bowman) - REVISED

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A SPECIAL NOTE ON SCHEDULING:

I recently found out that I have medical issue that will require fairly major surgery, now scheduled for October 12. Recovery from this surgery will take somewhere between 2-4 weeks.

Therefore, for the first seven weeks of the course, we will meet five times per week, rather than four. The additional session is currently scheduled to occur at 1-1:50 each Tuesday. As a result, by October 12, we will be about two weeks ahead of the normal progression of the class. If I am able to return within two week of the surgery, we will simply pick up where we left off and finish out the semester. If the recovery looks to run longer, Professor Trachtenberg has generously agreed to step in to teach to whatever degree is necessary.

I. Required Materials

A. Books

The books you are required to have for this class are:

1. Christopher Mueller and Laird Kirkpatrick, Evidence Under the Rules: Text, Cases, and Problems (8th Ed. 2015);
3. Supplemental Materials for Course in Evidence (posted in segments on Blackboard);
4. Occasional photocopied materials to be distributed in class.

The Mueller & Kirkpatrick and Capra books are available in the bookstore or online. The Supplemental Materials compiled by Prof. Ed Hunvald and myself will be posted in segments on Blackboard as and when required.

B. Computer learning aids

On a regular basis, you will be assigned optional exercises from the CALI Exercises.

1. The CALI Exercises

The CALI exercises are technologically simple, text-based, self-testing exercises. They are accessible on-line. You should find them useful to get a practical grasp on some of
the more abstract concepts we deal with in class, and to test your knowledge as we go through the course. A warning. Don’t be unduly dismayed of you find that, occasionally, your answer is different than the CALI-approved answer. Every experienced practitioner or evidence teacher I know disagrees with some of the CALI answers. However, the approved answer is right the overwhelming majority of the time, and when it’s not, it is valuable to think carefully about why you disagree. If you find that, despite careful rethinking of your reasoning, you still disagree with the approved answer, come talk with me in my office and we’ll figure out who’s right – you or the computer -- and why.

Instructions for how to access CALI lessons, including MU Law's authorization code are posted on Blackboard under "Course Documents/Instructions for CALI Lessons."

C. Study aids and supplemental materials

For those who would like a hardback treatise or hornbook on evidence as a study aid, I recommend MUELLER & KIRKPATRICK, EVIDENCE. The same authors have now produced a Black Letter Outline, also cleverly titled “Evidence.” Those preferring a shorter treatment might consider MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL. Both of these, as well as many other study aids, are now available to you free through the West Academic Study Aid subscription you should have heard about through the law library.

Also, the Capra-edited version of the Federal Rules comes with the “Federal Rules of Evidence Map” by David L. Faigman. It provides a visual, shorthand way of seeing the basic content of the Rules and how they relate to one another.

II. Blackboard

Throughout the semester, I will use the Blackboard system on LexisNexis to provide you with announcements, weekly reading assignments, supplemental materials, and so forth. THIS IS DIFFERENT FROM THE BLACKBOARD SYSTEM OPERATED BY THE UNIVERSITY. You must self-enroll in the course on Blackboard to access the material. If you are not familiar with Blackboard, please follow the following instructions to get yourself enrolled:

You will need your LexisNexis password to enroll in the course, and to access materials in the course.

Enrollment Instructions for LexisNexis Webcourses

2. Sign On using your Custom ID and Password.
3. You will arrive at a page with FAQs and manuals to help you use webcourses. Click on the Launch Web Courses button.
4. You will arrive at your personalized Web Courses Home Page. Click on the red Courses tab at the top of the page.
5. Click on the text link Browse Course Catalog
6. Click on Missouri, University of - Columbia
7. Locate the course you want to enroll in, and click on the enroll button out to the right-hand side of the course name

Technical Questions or Problems?

Please contact the UMC Law Help Desk at umclawhelpdesk@missouri.edu, or at 573-884-7800.

III. Grading

Your final grade will be calculated from six components:

1) 70% Essay-style final exam given at the close of the semester
2) 10% Mid-term (multiple choice, administered on-line)
3) 8% Two graded on-line quizzes, each worth 4% (multiple choice).
4) 8% Daily pre-quizzes.
5) 4% Required visit to trial or contested hearing (pass/fail).
6) Class participation – You will not receive a specific numerical or letter grade for class participation. However, I reserve the right to increase or decrease final grades by the effective equivalent of 1/3 of a letter grade (e.g., upward from a B to a B+, or downward from a B to a B-) based on my assessment of class participation.

A word about the graded midterm and two graded quizzes – For some of you, the idea of having multiple quizzes or tests prior to the final will be a novel concept, at least in law school. I have found that giving short quizzes that count for a small fraction of the final grade serves a couple of useful functions. First and probably foremost, quizzes encourage you to focus on the material consistently throughout the semester, rather than trying to learn it all in a rush at the end (which, to be candid, was what I tended to do back in the early Jurassic Period when I attended law school). Second, the results of the quizzes enable you to identify your strengths and weaknesses as you go. Third, I like to give students more than one opportunity to submit work that affects the final grade so that not everything depends on how you did on a single day. Fourth, the quizzes will be “objective” – meaning multiple choice – as distinct from the final which will be an essay. Some people perform better on objective tests than on essays, and others have the opposite tendency. I feel that giving students the opportunity to submit both types of work gives me a better overall picture of what you know.
Pre-quizzes -- These are 2-4 question on-line quizzes you take before class on designated days. There will be approximately 34 of them, that is, about 2-3 per five-class-day week. They are pass-fail. All you have to do is complete them to receive credit. I administer these because there is a body of research suggesting that testing people on material before they’ve really focused on it in detail assists in comprehension and retention.

Note on the courtroom visit requirement – It is one thing to talk about the rules of evidence in the abstract. It is quite another to see them applied (or, quite often, not applied) in the real world. Hence, to ensure that you get a little taste of reality, a requirement of this class is that you visit a courtroom or hearing room sometime during the semester and observe a portion of a trial or contested hearing. By “portion” I mean at least an hour or two. By contested hearing I mean a hearing in which both parties are represented by counsel and an evidentiary presentation is made to a judge or hearing officer who has the authority to admit or exclude evidence. The matter can be either civil or criminal, but it must be adversarial and involve the presentation of evidence. A proceeding like a change of plea in a criminal case, for example, would not count. Check with me if you have any questions about what would count. To receive credit for the assignment, you must submit a short memo to me (2-3 pages would be fine) in which you describe some evidentiary issue that arose (or an issue that you think should have been raised but was not) and provide brief comment on whether you think the matter was correctly resolved.

You may find it helpful in identifying a proceeding to watch to visit Casenet at this link https://www.courts.mo.gov/casenet/base/welcome.do Click on “Scheduled Hearings and Trials Search.” It allows you to search the court calendar of Missouri courts by circuit, judge, and date to find out what is calendared for a particular date. Boone County is in the 13th Judicial Circuit, though you can certainly attend proceedings in other circuits around the state (or in federal court). Of course, the fact that something is calendared doesn't guarantee it will happen, but it helps.

Also, the Prosecuting Attorney's Office has been kind enough to suggest that, if you want to know if there are any criminal jury trials in a given week, you can call them on Monday and they should know. The number is (573) 886-4100.

You can complete this assignment any time through the end of exam period. BUT, people tend to put it off until it is too late to find a hearing to watch. I’d recommend you get this out of the way early.

Note on Final Exam – Although neither the content nor the format of the final is set in stone, you may expect that it will contain at least one question in which you are asked to consider a trial transcript and identify and rule on possible objections, and that it may also contain one or more essay questions in which you will be asked to apply rules of evidence to fact patterns. It may also include one or more questions about the policy basis of evidentiary rules. The exam will be a take-home examination, somewhere between 6-8 hours in duration.
IV. Attendance & Preparation for Class

I consider it essential to your learning process that you come to class each day prepared to participate in a discussion of the assigned material. Sometimes, in the finest Paper Chase tradition, I will call on you and require you to air your views. By now, as second or third year law students, most of you will take this sort of thing in stride. For some, this may remain a trying experience. Do your best, however, not to take it too much to heart. Be assured that no one is trying to humiliate you. Remember that an important skill for any lawyer in any field is the ability to think clearly and speak cogently under pressure. What we do in class will be the merest baby steps towards your mastery of this skill. As with any skill, you have to start somewhere.

“Trial Teams”

On the first or second day of class, you will be assigned to a three-person “trial team.” From time to time, I will ask you prepare for certain in-class exercises as a team. Mostly, this will just mean that you should put your heads together before class, either in person or by phone or e-mail, to discuss the exercise together and, if necessary, agree on a unified approach to the problem. The first two such exercises will occur on Wednesday and Thursday of the first week of class.

V. Reading Assignments

Generally, I will give out reading assignments on Thursday of each week for the following week. I will customarily post the assignment on LexisNexis Blackboard. I do not give assignments earlier because I find some students, in an excess of zeal, will read far ahead and consider themselves “prepared” for class. However, when the time comes to discuss the material, the reading happened so long ago that the student doesn’t remember much about it.

Reading Assignments: 8/21-8/24/17

The reading assignments for the first week of class are as follows:

<table>
<thead>
<tr>
<th>Session</th>
<th>Subject</th>
<th>Assignment</th>
</tr>
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<tbody>
<tr>
<td>Mon., 8/21</td>
<td>Why Rules of Evidence?</td>
<td>Mueller and Kirkpatrick (M&amp;K) 1-20 (up to, but not including, § D)</td>
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| Tues, 8/22 | Fundamentals of Courtroom Presentation of Evidence | *M&K 20-24 (up to, but not including, “The special case of the accused as witness);  
*M&K 27 (beginning with “c. Real Evidence”) to 33 (up to, but not |
including, list of common “formal objections”);
*M&K 713-717; 734-736 (up to, but not including, Notes)
**“Stages of American Jury Trial” – posted on Blackboard under “Course Documents”

Tues., 8/22  [SECOND SESSION – 1:00 – 1:50]

**Admitting and Excluding Evidence** *M&K 31-50 (not Problem 1-B);
*Excerpt from Goode & Wellborn
(posted on Blackboard under
“Course Documents”)
*Fed. Rule of Evidence (FRE) 611

Transcript exercise, United States v. James: Together with the other members of your trial team, consider the direct and cross-examinations of Amanda and Hilda Swinton. Identify all possible objections to the form of these questions and answers. Refer to the lists of objections as to form in M&K and the Goode & Wellborn excerpt. Be prepared to point out and explain your objections in class.

DON’T FORGET to TAKE PRE-QUIZ #1 on Lexis-Nexis
Blackboard BEFORE 1:00 CLASS today – Tues., 8/22

Wed., 8/23  **Who may be a witness? (Competence)**

M&K 487-497; FRE 601, 602, 603; skim 505-509

Transcript exercise, United States v. James: Together with the other members of your trial team, consider the examination of Amanda and Hilda Swinton. Odd-numbered trial teams should be prepared to argue that Amanda Swinton is competent to testify. Even-numbered trial teams should be prepared to argue the reverse. All teams should consider whether a colorable objection could be made to the competence of Hilda Swinton based on the record so far.

DON’T FORGET to TAKE PRE-QUIZ #2 on Lexis-Nexis
Blackboard BEFORE CLASS today –Wed., 8/23

Thurs, 8/24  **Competence II**

M&K 487-497; FRE 601, 602, 603; skim 505-509


**TRANSCRIPT EXERCISE:** Trial Team 2 should be prepared to argue that Amanda Swinton is incompetent. Trial Team 9 should be prepared to argue that Amanda Swinton is competent. Trial Team 3 should be prepared to discuss the pros and cons of the competence of Hilda Swinton.

**VI. Subject Matter -- An Outline of the Course**

You may find it useful in keeping track of where we’ve been and where we’re headed to keep the following list of topics we will cover in the approximate order we’ll cover them:

1. Evidence and the Trial Process
2. Foundation requirements and the unwritten rules of admissibility
3. Competence of witnesses
4. Relevance
   – Logical relevance vs. “pragmatic relevance
   – Circumstantial evidence and probabilistic analysis
   – Character evidence and sexual history
   – Prior acts and habit evidence
   – Remedial measures and settlement negotiations
5. Hearsay and its many exceptions
   – Defining hearsay
   – Separating hearsay from non-hearsay
   – Prior statements of witnesses
   – Admissions by party opponent
   – Co-conspirator exception
   – State of mind
   – Statements for purposes of medical treatment
   – Past recollection recorded, business and public records, learned treatises
   – Statements from unavailable witnesses: dying declarations, etc.
   – Declarations against interest
   – Statements of personal or family history
   – The residual exception
   – Hearsay and the Confrontation Clause
6. Direct and cross-examination
7. Impeachment for bias
8. Impeachment on sensory or mental capacity
9. Character evidence
10. Repairing credibility
11. Opinion testimony
   – Opinion testimony of lay witnesses
   – Opinion testimony of expert witnesses
12. “Real evidence” and demonstrative exhibits
13. The law of privileges
14. The digital courtroom
VII. Learning Outcomes

The following statement is provided in compliance with Revised ABA Standard 301(b).

In the course in Evidence students will:
• become familiar with the Federal Rules of Evidence and other sources of evidence law, including selected provisions of Missouri statutory and case law;
• learn the policy underlying evidence law;
• learn to apply the Rules of Evidence to differing factual situations, and to craft arguments for and against admission of evidence;
• gain knowledge useful for passing the evidence portion of the bar exam;
• gain familiarity with how trials work

VIII. Academic Honesty

Academic integrity is fundamental to the activities and principles of a university. All members of the academic community must be confident that each person's work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The academic community regards breaches of the academic integrity rules as extremely serious matters. Sanctions for such a breach may include academic sanctions from the instructor, including reduction of your final grade or even failing the course for any violation, and in addition may include disciplinary sanctions imposed pursuant to the Honor Code, ranging from an admonition to academic probation to expulsion from the law school. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating, consult the course instructor.

IX. Medical Information & Americans With Disabilities Act

If you have emergency medical information to share with me, or if you need special arrangements in case the building must be evacuated, please inform me immediately. Please see me privately after class, or at my office in 310 Hulston Hall.

If you need academic accommodations because of a disability, please contact Associate Dean Rafael Gely or Registrar Denise Boessen who will work with you to determine an appropriate response to your needs.

To request academic accommodations (for example, a notetaker), students must also register with the Office of Disability Services, (http://disabilityservices.missouri.edu), S5 Memorial Union, 882-4696. It is the campus office responsible for reviewing documentation provided by students requesting academic accommodations, and for accommodations planning in cooperation with students and instructors, as needed and consistent with course requirements. For other MU resources for students with disabilities, click on "Disability Resources" on the MU homepage.