The required materials for the course are Allen, Kuhns, Swift, & Schwartz, Evidence: Text, Problems, and Cases (4th) and the West Publishing Co. Federal Rules of Evidence pamphlet. [NB: The fourth edition is substantially different from the third; chapters are reorganized, problems are renumbered, and many problems are new.]

We will try to cover one assignment per class, but sometimes we’ll fall behind, and occasionally we’ll do a bit more than one assignment. You should always prepare one full assignment beyond the point at which we end the class. For example, if on a Tuesday we have begun assignment 5, you should prepare through assignment 6 for the next day. If we’re still on assignment 5 at the end of the next class, you’ll have no new preparation for the third day. If we begin assignment 6 on the second day, you should prepare assignment 7 for the third day. We could get through both assignments on that day.

Our primary focus in the course will be on the Federal Rules of Evidence and their common law counterparts. For the most part, these rules regulate the admission and exclusion of evidence. Before turning to the specific rules governing admissibility, however, we will examine a transcript from a real case (Chapter One) and an essay on the process of proof (Chapter Two). The material in Chapter Two should help you understand the transcript in Chapter One. Together these two chapters are designed to give you a sense of the context within which the rules of evidence operate. In addition, the transcript provides the setting for a number of the problems that we will be considering in future assignments.

The first two assignments are considerably longer than the remaining assignments, but the material is not difficult. The class discussion for both assignments will focus on the transcript in Chapter One. In subsequent classes we will spend the bulk of our time working through the problems listed in the syllabus.

A few assignments refer to “appendix.” The appendix (with the appropriate assignment designations) is attached to this syllabus.

For each assignment, you should study the relevant Federal Rules and their legislative history, which appears in the Federal Rules pamphlet. The legislative history is usually helpful and sometimes critical to understanding the rules. (The material in the course book will make it clear which rules are relevant to the assignment.)

Some of the problems have clearly correct answers and are designed to illustrate how the rules work. Others raise issue of admissibility about which people may disagree. Some of these latter problems will be the subject of role-playing exercises. The role-playing problems appear in bold type and underlined in the assignments. You will be assigned to one side of the role-playing problems in teams of two. In class you may divide the argument between the two members of the team as you see fit (including having one member of the team responsible
for the entire argument). If job interviews or other commitments necessitate both team members being absent on the day the team is to present its argument, the team may appoint associate counsel to make the argument.

The grade for the course will be based solely on the examination except that the failure to present a reasoned argument for a role-playing problem will result in the deduction of two points from the final grade for each team member. (Team members initially assigned to problems are responsible for the performance of any associate counsel.)

1. The process of proof. Pages 1-20, 77-107. (If you're pressed for time, defer temporarily pages 91-95 (sec. 3), 95-97 (sec. 5), 104 (sec. d), 106-107 (sec. c).)

2. The process of proof. Pages 20-76. (Recommended: pages 107-116.)

3. Relevance. Pages 117-129; appendix; problems 3.1, 3.2, 3.3, & 3.4 at page 129-132. (Recommended: pages 132-133.)

4. Probative value and FRE 403. Pages 133-147, 149-154; problems 3.6, 3.7. 3.8, 3.12, & 3.13 at pages 147-149.

5. More on FRE 403; laying the foundation for witnesses; authentication and identification of exhibits. Pages 154-159, 160-161, 167-172, 173-182; problem 3.14 at page 159, problem 4.1 at page 171, and problems 4.4 & 4.5 at page 183. (Recommended: pages 161-166.) [We will spend only a few minutes on the material in Section A of Chapter Four.]


8. FRE 104 preliminary factfinding; the problem of conditional relevance. Pages 213-217, 218-224; problem 4.31 at page 225.

9. Introduction to character evidence; character evidence to show action in conformity with character. Pages 227-229, 273-276 (thru sec. 3-a), 232-234 (sec. 3-a), 276-281; problems 5.34, 5.36, & 5.37 at pages 281-282.


11. Character as an essential element; bad acts evidence. Pages 291-294, 230-232 (sec. 2), 234 (sec. b), 236-241; problems 5.43 & 5.44 at pages 294-295, and problem 5.5 at pages 241-
12. More on bad acts evidence. Pages 244-250, 251-254; problems 5.10, 5.11, & 5.12 at pages 243-244, and problems 5.13 & 5.17 at pages 250-251; appendix. (Recommended: pages 254-257.)


19. More on hearsay. Pages 425-430; problems 8.6, 8.7, 8.9, 8.10, 8.12, 8.13 & 8.15 at pages 430-432.


21. More on hearsay - utterances with unstated beliefs. Pages 440-449; problems 8.25, 8.26, 8.27, 8.28, 8.30, & 8.31 at pages 449-450. (Recommended: pages 450-452.)

22. Introduction to exemptions and exceptions; prior statements. Pages 452-467; problems 8.32, 8.33, 8.34, & 8.35 at pages 467-469.

23. Admissions. Pages 469-482 (thru sec. d); problems 8.36, 8.37, & 8.38 at pages 488-489; appendix.


26. Statements for diagnosis or treatment; past recollection recorded. Pages 512-516, 517-523; problems 8.56, 8.57, & 8.58 at page 516, and problems 8.61 & 8.62 at pages 523-524. [There will not be assigned counsel for Problem 8.62. Instead, each of you should assume the role of plaintiff’s counsel and be prepared to examine Sadie and/or Andrew (either or both of whom may have very faulty memories) in order to establish the license number. (Also, be prepared to answer the question in footnote 7 at page 522.)]

27. Records. Pages 524-534, 535-544; problems 8.63, 8.64, 8.65, & 8.66 at pages 434-435, and problems 8.69, 8.70, & 8.71 at pages 544-545.

28. Judgments; unavailability; former testimony. Pages 544-558; problem 8.73 at page 550, and problems 8.74 & 8.75 at page 558.

29. Other FRE 804 exceptions. Pages 559-567, 569-573; problems 8.77, 8.79, 8.80, 8.81 & 8.82 at pages 567-568.

30. The residual exception; confrontation; (reflection). Pages 574-580; 582-603; appendix; problems 8.87 & 8.88 at page 581. (Recommended: pages 603-607.)

31. Introduction to impeachment; impeachment with character evidence. Pages 351-361; problems 7.1, 7.2, 7.3 & 7.4 at pages 361-362. (Recommended: pages 410-411.)

32. More on impeachment with character evidence. Pages 362-369; problems 7.5, 7.6, 7.8, 7.10, & 7.11 at pages 369-372. [For Problem 7.8 prosecutors should be prepared to examine Davenport, and defense counsel should be prepared to object where appropriate.]


39 and beyond. TBA. [To the extent that time remains, we will consider portions of the material on privileges in Chapter Twelve.]
Problem:

Then two harlots came to the king, and stood before him. The one woman said, “Oh, my lord, this woman and I dwell in the same house; and I gave birth to a child while she was in the house. The on the third day after I was delivered, this woman also gave birth; and we were alone; there was no one else with us in the house, only we two were in the house. And this woman’s son died in the night, because she lay on it. And she arose at midnight, and took my son from beside me, while your maidservant slept, and laid it in her bosom, and laid her dead son in my bosom. When I rose in the morning to nurse my child, behold, it was dead; but when I looked at it closely in the morning, behold, it was not the child that I had borne.” But the other woman said, “No, the living child is mine, and the dead child is yours.” The first said, “No, the dead child is yours, and the living child is mine.” Thus they spoke before the king.

Then the king said, … “Bring me a sword.” So a sword was brought before the king. And the king said, “Divide the living child in two and give half to the one, and half to the other.” Then the woman whose son was alive said to the king, because her heart yearned for her son, “Oh, my lord, give her the living child, and by no means slay it.” But the other said, “It shall be neither mine nor yours; divide it.” Then the king answered and said, “Give the living child to the first woman, and by no means slay it; she is the mother.” And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice

I Kings 3:16-28 (Revised Standard Version)

But was the evidence relevant? How do you know?

Assignment 10.

Problem: Defendant is charged with sexually molesting a 10 year old child. In his defense he offers the testimony of witnesses who have known him in the community for a number of years that in their opinions Defendant is not the type of person to engage in sexual assaults or take advantage of children. Admissible?

Assignment 11.

In conjunction with the reading on bad acts evidence, consider the following excerpt – including the footnotes, which offer helpful examples, from McCormick on Evidence (John W. Strong, ed., 5th ed., vol. 1, sec. 190, pages 660-670 (1999):

The permissible purposes [for admitting bad acts evidence] include the following:
(1) To complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings. For example, in a prosecution for the murder of one child, the state was allowed to show that the defendant shot the child along with his other children and his wife while they were asleep…. This rationale should be
applied only when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar.

(2) To prove the existence of a larger plan, [citing Lewis v. United States, 771 F.2d 454, 458 (10th Cir. 1985)] (testimony that defendant accused of burglary of post office, first burglarized a garage to obtain a cutting torch that he then used in the post office burglary); United States v. Parnell, 581 F.2d 1374 (10th Cir. 1978) (previous fraudulent scheme admissible as “direct precursor” of conspiracy to purchase grain with forged cashiers checks)…] scheme or conspiracy, of which the crime on trial is a part. For example, when a criminal steals a car to use it in a robbery, the automobile theft can be proved in a prosecution for robbery. Although some courts construe “common plan” more broadly, each crime should be an integral part of the over-arching plan explicitly conceived and executed by the defendant or his confederates. This will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, or his intention.

(3) To prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused…. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. For example, in Rex v Smith, the “brides in the bath” case, George Joseph Smith was accused of murdering Bessie Mundy by drowning her in the small bathtub of their quarters…. Mundy had left all her property to Smith in a will executed after a bigamous marriage ceremony. The … court allowed the prosecution to show that Smith “married” several other women whom he drowned in their baths after they too left him their property. In all the drownings, Smith took elaborate steps to make it appear that he was not present during the drownings.

(4) To show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge. Rex v. Smith falls in this category. The death of one bride in the bath might be accident, but three drownings cannot be explained to innocently…. In these cases, the similarities between the act charged and the extrinsic acts need not be as extensive and striking as is required under purpose (3), and the various acts need not be manifestations of an explicit, unifying plan, as required for purpose (2).

(5) To establish motive. [citing United States v. Haldeman, 559 F.2d 31, 88 (D.C. Cir. 1976) (evidence of conspiracy of government officials to break into psychiatrist’s office to obtain records of an opponent of government’s war policy admissible to show motive for Watergate cover-up conspiracy)….] The evidence of motive may be probative of the identity of the criminal [citing State v. Green, 652 P.2d 697, 701 (Kan. 1982) (where the “defendant claimed in essence that someone had broken into his wife’s house to rob her and inflicted the fatal wounds prior to his arrival … evidence of the defendant’s prior assaults on his wife was of great probative value on the issue of identity”)…. or of malice or specific intent [citing United States v. Benton, 637 F.2d 1052, 1056 (5th Cir. 1981) (“ … appellant’s knowledge that Zambito might implicate him in the Florida homicides constituted a motive for appellant wanting to kill Zambito….)….] [See, for example, the shooting/robbery hypothetical discussed in the Evidence text at page 237; see generally David P. Leonard, Character and Motive in Evidence Law, 34 Loy. L.A. L. Rev. 439 (2001).]

(6) To establish opportunity, in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged. For example, a defendant charged with a burglary in which a sophisticated alarm system was deactivated might be shown to have neutralized similar systems in the course of other burglaries.
(7) To show, without considering motive, that defendant acted with malice, deliberation, or the requisite specific intent. [citing United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc) (evidence that defendant had possessed two stolen credit cards for ten months admissible to prove that he intended to keep a planted silver dollar taken from the mails rather than to return it to postal authorities, as he claimed…); United States v. Draiman, 784 F.2d 248, 254 (11th Cir. 1985 (two previously inflated insurance claims following burglaries admissible to show specific intent in mail fraud prosecution arising from third fraudulent claim following burglary)…)] Thus, weapons seized in an arrest have been held admissible to show an “intent to promote and protect” a conspiracy to import illicit drugs.

(8) To show identity. Although this is indisputably one of the ultimate purposes for which evidence of other criminal conduct will be received …, it is rarely a distinct ground for admission. Almost always, identity is the inference that flows from one or more of the theories just listed. The second (larger plan), third (distinctive device), and sixth [sic] (motive) seem to be most often relied upon to show identity.

(9) To show a passion or propensity for unusual and abnormal sexual relations. Initially, proof of other sex crimes was confined to offenses involving the same parties, but many jurisdictions now admit proof of other sex offenses with other persons, at least as to offenses involving sexual aberrations.

McCormick’s categories and those in the Evidence text and FRE 404(b) itself may be helpful organizing tools for you. And as an advocate for admissibility, you’ll want to fit the evidence into one of the tradition categories if you can. But don’t become obsessed with labels and categories. FRE 404(b) makes it clear that the categories in the second sentence are only examples of possible uses for bad acts evidence; and as the text points out the top of page 237, a proponent of bad acts evidence will avoid the FRE 404(b) prohibition as long as the proponent convinces the judge that the evidence is not being offered to prove a character trait. Avoiding the character label, however, does not ensure admissibility. There may, for example, be preliminary fact issues (see pages 239-240); and there will almost certainly be FRE 403 issues (see pages 240-241).

Add the following as part (d) to Problem 5.5 at pages 241-242:

Defendant is charged with carjacking, kidnapping, and interstate transportation for illegal sexual activity. According to the victim, Defendant helped her get her car out of a snow drift and then jumped in the car, pushed her away from the steering wheel, and drove the car into the next state, where he raped her. Following the rape he drove her to her home, where he stole her jewelry. A short while later he abandoned the car. The prosecution offers evidence that several hours before this incident Defendant had repeated rammed his pickup truck into the back of a car occupied by several of his acquaintances and then left the pickup truck in front of the local police station, from which it was towed to an impoundment lot.

Assignment 12.

Problem: Linda Turner is charged with selling two ounces of cocaine to Tom Peters.
Tom is in his late 20’s. Linda is 10 years older. The prosecution offers the following evidence: (a) Tom’s testimony that Linda began selling cocaine to him when he was in seventh grade; (b) the testimony of Tom’s 12-year-old son that last year Linda sold cocaine to him; (c) the testimony of Officer Fleming that when he arrested Linda on the current charge she had two ounces of heroin in her possession; (d) the testimony of Officer Fleming that three and a half years ago he arrested Linda for selling cocaine to a co-worker.

Assignment 23.

Problem: John Priest, an experienced African-American news broadcaster, was hired to work as “fill-in” news anchor by WMAQ radio and served that capacity for two years. WMAQ then announced the opening of a fulltime evening news anchor position at the station. Priest applied for the opening, but a Caucasian female was hired. One year later, an opening appeared in WMAQ’s overnight schedule. Along with Priest, another Caucasian female applied for this position, and the female was hired. Priest filed charges of discrimination with the EEOC claiming that he was not hired because of his race, and he resigned from WMAQ one year later. When the two females were hired, Priest was assigned to provide training for them. He wants to testify at the trial of his suit that, during their training, both women told him that they were “inexperienced” and had “little or no radio experience in a major market.” Is Priest’s testimony admissible against defendant WMAQ?

Problem: Peterson was injured when a Gray Honda ran a red light and hit her as she was crossing the street. She has sued Ames, the driver of the Honda. Brown was a passenger in the Honda.

(a) Peterson calls Officer Smith who offers to testify: “I arrived at the scene about 45 minutes after the accident occurred. I interviewed Ames and Brown, who were standing next to each other, and one of them said, ‘The front windshield was all fogged up immediately before the accident.’ I can’t remember which one made that statement.” Is Smith’s testimony admissible?

(b) Same as (a) except that Smith testifies that he talked to Ames and Brown separately in the squad car. He still can’t recall which of the two made the statement. Admissible?

(c) Same as (b) except the statement, made by either Ames or Brown, was “I had dozed off, and my eyes were closed at the moment of the accident.” Admissible?

Assignment 30.


The issue in Davis was the admissibility of statements made by Michelle McCottry in
response to questions asked by a 911 operator. During the call McCottry identified Davis and said that he was assaulting her. As the call continued, he went running out of the house.

In Hammon, the police responded to a domestic disturbance call and found Amy Hammon alone on her front porch. The police obtained her permission to search the premises, and during the search they came upon Amy’s husband, Hershel, in the kitchen. During police questioning, Amy acknowledged that Hershel had hit her.

Neither McCottry nor Amy Hammon testified at trial, so their hearsay statements, which were admitted at trial, were critical to the prosecutions. State courts affirmed the convictions in both cases.

According to the Supreme Court: “Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.”

In a footnote the Court added: “Our holding refers to interrogations because … the statements in the cases presently before us are the product of interrogations – which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial…. And of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”

The Court then observed: “[A]t least the initial interrogation conducted in connection with a 911 call is ordinarily not designed primarily to ‘establis[h]’ or ‘prov[e]’ some past fact, but to describe current circumstances requiring police assistance.

“The difference between the interrogation in Davis and the one in Crawford is apparent on the face of things. In Davis, McCottry was speaking about events as they were actually happening …. Sylvia Crawford’s interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry’s call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past. That is true even of the operator’s effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the stationhouse, to a series of
questions, with the officer-interrogator taping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.…

“This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot … ‘evolve into testimonial statements once that purpose has been achieved. In this case, for example, once the operator had gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises.) The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry’s statements were testimonial….

“Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in Hammon is a much easier task, since they were not much different from the statements we found to be testimonial in Crawford…. Objectively viewed, the primary, if indeed not the sole, purpose of the interrogation was to investigate a possible crime….

“Although we necessarily reject the Indiana Supreme Court’s implication that virtually any “initial inquiries” at the crime scene will not be testimonial, we do not hold the opposite – that no questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that ‘[o]fficers called to investigate … need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’ Such exigencies may often mean that ‘initial inquiries’ produce nontestimonial statements….

“Respondents in both cases, joined by a number of their amici, contend that the nature of the offenses charged in these two cases – domestic violence – requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the state in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in Crawford: that ‘the rule of forfeiture by wrongdoing … extinguishes confrontation claims on essentially equitable grounds.’…

“… The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

“We affirm the judgment of the Supreme Court of Washington…. We reverse the judgment of the Supreme Court of Indiana … and remand….”