Course: **EVIDENCE – Hamline University Law School**

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Semester: Spring 2010

Class Days/Times: Monday – 11:00 a.m. – 2:00 p.m.

SYLLABUS

MATERIALS

Text: *Courtroom Evidence Handbook*, 2009-2010 Student Edition, by Goode and Wellborn (West Publishing)

STUDY FOCUS

The law of Evidence is largely codified. Thus, your principal focus of study should be the rules themselves. Cases, problems, legislative history, and commentaries are illustrative and explanatory and can be very helpful in understanding the meanings and applications of the rules. But start and end with the rules themselves.

SKILLS

Two essential skills that set lawyers apart from intelligent, educated non-lawyers are (1) the ability to identify the applicable law and (2) the ability to make a correct analytical application of that law to solve a legal problem.

So, in this course, we will work on developing and refining those skills in three ways: (1) by spotting evidentiary issues, (2) by locating a rule (or principle if there is no precise rule) that might apply to an evidentiary issue, and (3) explaining how and why that rule applies.

ASSIGNMENTS

1. The Course Outline lists the majority of the reading assignments for the course. From time to time I will give other assignments as well.

2. Carefully read the rules themselves, and the text authors' comments and illustrations.

3. Read the cases listed on the course outline. As noted on the outline, you **only need to read the portions of the cases pertaining to the topic for which the cases are assigned.**

APPROACH TO TOPICS

I have organized each topic around the concept of "What We Need To Know." This is intended to provide focus and a preliminary structure for your study of evidence law. We will devote most time to rules that present recurring, rather than infrequent, evidentiary problems.

The outline is general. You need to expand it as the course progresses. There are three sources for the development and expansion of **"What We Need To Know":**

1. Assigned reading.

2. Class lectures.

3. Class discussion — do not underestimate this source. Many clarifications and refinements come from class discussion and these often create excellent test materials as well.

EVALUATIONS

1. There will be three graded exams. The last exam will be the final exam, will be a take-home exam, and will be relatively cumulative but not fully comprehensive of everything in the course.

2. I will also give shorter, periodic quizzes that will be required, but the grades will not count and I will not record them. These will be no-risk indicators of both your progress in the study of evidence law and of my approach to grading.

ATTENDANCE AND PARTICIPATION

1. The law school's policy is that class attendance is mandatory. Do not miss classes.

2. Class participation is critical, both as a prompting for preparation of assignments and as a means of learning as much as we can about evidence law. You may volunteer to participate but I will also call on students at random. I do not accept "not prepared" responses.

3. It is also the school's policy that, if you use a laptop in class, you may use it only for this class. So, you may not use it for any personal matter or for any other class work.

OBJECTIVES

At the conclusion of this course, if you sincerely do the work, you will have a general understanding of the law of evidence as a system for regulating proof. You will also have a good understanding of critical rules of evidence, both in theory and application.

HELP

1. Each of us learns new material in our own unique way and at our individual pace. Sometimes you need to get well into the semester before the material starts to make sense.

2. But I do not want anyone to fall behind. If you find that you are having trouble understanding any topic, I am willing to help. My work telephone number and email address are listed at the beginning of this syllabus, and I am happy to arrange personal meetings if necessary.

EVIDENCE: COURSE OUTLINE AND ASSIGNMENTS

1. We will cover 13 topics during the semester. Some will be given more attention than others. The criteria I have used to determine the allotment of coverage are:

    a. More attention is given to recurring evidentiary issues than to those arising just occasionally.

    b. Issues that arise from time to time but which, in all their nuances, would require far more time than we have, will be discussed in their fundamentals rather than comprehensively. But I will alert you to the nuances so that you may, if you wish, study them more thoroughly.

    c. The issue of privilege is likely also to be treated to some extent in other courses, particularly in the course on Professional Responsibility. Thus, we will cover the fundamentals and the highlights and leave many of the details to other courses.

2. At the beginning of each topic outline, I have listed three types of reading assignments.

    a. Rules from the code of evidence.

    b. Cases.

    c. Pages from the course text.

3. For the case-reading assignment note:

    a. You will have to find and read the cases. I will not supply copies.

    b. Most of the cases deal with matters that extend beyond the particular topic for which they are assigned. Thus, I have tried to identify the pages or sections that you should read. If I have not so indicated, read the entire case.

    c. So, do not be concerned about any item that does not relate to the topic.

d. You likely will, however, have to read some or all of the facts to have a context for the evidentiary issue. Do not skip the facts because most often they determine how the evidentiary issue is to be resolved.

4. To prepare for class, read the rules, cases, and text pages assigned. We will discuss them and problems I will pose or distribute.

5. I will do my best to give you an idea of how far ahead you should read as we go along.

Topic 1: Introduction to the Law of Evidence

Read:

* Rules – 101, 102, 1101, 611, 201, 602, 702, 803(2)

* Cases – *U.S. v. Reaves*, 636 F.Supp. 1575; *Stone v. Peacock*, 968 F.2d 1163; *U.S. v. Yates,* 553 F.2d 518*; U.S. v. Bibbs*, 564 F.2d 1165; *U.S. v. Thompson.*

* Text – Page 52; Chapter 4 (skim)

A. Trial
   1. Two key features
   2. Purpose(s)
   3. Structure
   4. Four tools of litigation

B. Evidence in General
   1. Evidence/proof
   2. Six vehicles of proof
   3. Evidence law
      a. Definition
      b. Sources
         (1) Common law
         (2) Code of evidence
      c. Codified rules
         (1) Applicability – 101, 1101
         (2) Four purposes – 102
         (3) Interpreting evidence rules – four sources

C. Principal Functions of Official Trial Participants
   1. Lawyer
      a. Duties of advocacy
      b. Special duties of prosecutor

2. Judge
    a. Overall management
    b. Rulings
    c. Instructions

3. Jury
    a. Issues of fact
        (1) Facts proved
        (2) Credibility assessment - *U.S. v. Thompson*
    b. Issues of law

D. Judicial Authority and Duties
1. Eight principal functions of trial judge
2. Judicial discretion
    a. Defined
    b. Extent
    c. Abuse of discretion
3. Illustrative controls
    a. Time limits – *U.S. v. Reaves*
    b. Order of presenting witnesses – *Stone v. Peacock*
    c. Commenting on evidence – *U.S. v. Yates*
    d. Fashioning fair procedures – *U.S. v. Bibbs*

E. Concepts of Evidence

1. Real, representative, testimonial
2. Direct, circumstantial
3. Substantive, impeachment
4. Admissibility, weight
5. Sufficiency
6. Standard of proof, burden of production, burden of proof

F. Foundation – Text Chapter 4
1. Definition
2. Importance
3. Evidentiary link
4. Examples: 602, 702, 803(2), 901(b)(6)

Topic 2: Evidentiary Procedures

Read:

*Rules – 103, 104(a), 105

*Cases – *Owen v. Patton*, 925 F.2d 1111; *U.S. v. Wilson*, 966 F.2d 243; *U.S. v. McQuisten*, 795 F.2d 858 (II and III only); *U.S. v. Wells*, 519 U.S. 482 (I and II only); *Jordan v. Medley*, 711 F.2d 211 (II only); *Gov't of Virgin Islands v. Archibald*, 987 F.2d 180; *U.S. v. Orlano*, 507 U.S. 725 (I and II only); *Tompkins v. Cyr*, 202 F.3d 770 (IV A – 5 only); *Blake v. Pellegrino*, 329 F.3d 43; *Smith v. Ford Motor Co.*, 626 F.2d 784.

*Text – Pages 53–59; 61 & 62; Chapter 3 (skim).

A. Preserving Error for Appellate Review – Rule 103
   1. Substantial right affected - *U.S. v. Medley*
   2. Corrective action taken

B. Error
   1. Definition – *U.S. v. Orlando*
   2. Types of error
      a. Reversible
      b. Harmless
      c. Plain – *U.S. v. Orlando*
   3. Forfeiture – *U.S. v. Orlando*
   4. Waiver – *Owen v. Patton*; *U.S. v. McQuisten*
   5. Standards of review – *Tompkins v. Cyr*
   6. Invited error - *U.S. v. Wells*
   7. Error in admitting evidence
      a. Objection
      b. Motion to strike
      c. Disregard – instruction
      d. Timeliness – *Gov't v. Archibald*
      e. Specificity – *U.S. v. Wilson*
   8. Error in excluding evidence
      a. Offer of proof
      b. Form

9. Motion in limine
    a. Nature
    b. Timing
    c. Effectiveness of ruling to preserve error
10. Continuing objection
    a. Purpose
    b. Specificity
11. Curative admissibility/opening the door – *Gov't v. Archibald*
12. Objections in depositions
13. Discovery concerns – *Smith v. Ford Motor Co.*

D. Limited Admissibility – Rule 105
    1. Nature
    2. Instruction

E. Questions of Admissibility –*Blake v. Pellegrino*; Rule 104(a)
    1. Role of judge
    2. Role of jury
    3. Evidence rules and privilege

F. Record
    1. Significance
    2. How created

Topic 3: Relevancy

Read:

*Rules – 401, 402, and 104(b)

*Cases – *Old Chief v. U.S.*, 519 U.S. 172 (II A only)*; U.S. v. Foster,* 986 F.2d 541*; U.S. v. Hall,* 653 F.2d 1002*; Walker v. Trico Mfg. Co., Inc.,* 487 F.2d 595 (II only); *U.S. v. Dean*, 980 F.2d 1286; *U.S. v. Douglas*, 482 F.3d 591.

*Text – Pages 73–79; 59 and 60.

A. Critical Importance of Relevancy – Weinstein's comment

B. Two Definitive Propositions

C. Rule 401 Definition
   1. Any tendency
   2. Fact of consequence - *U.S. v. Dean; U.S. v. Foster*
      a. Sources
         (1) Substantive law
         (2) Claims/defenses in case
         (3) Issues in case
      b. Categories of facts
         (1) Determinative
         (2) Context
         (3) Credibility
   3. Probability assessment
      a. Purpose of the evidence – *U.S. v. Hall*; *U.S. v. Douglas*
      b. Guidelines
         (1) Technical rule
         (2) Logic
         (3) Precedent
         (4) Experience – perception of how the world works
         (5) Common sense

c. No weighing of credibility
d. the line of idiocy

D. Not Inherent Characteristic
1. No relevancy in the abstract
2. Existence through relationship
3. Foundation to connect – *Walker v. Trico Mfg. Co.*
4. Availability of alternative proof – *Old Chief v. U.S.*

E. Conditional Relevance – Rule 104(b)
1. Connecting up
2. Failure to connect up – consequence

Topic 4: Exclusion of Relevant Evidence

Read:

*Rule - 403

*Cases – *U.S. v. Jackson*, 405 F. Supp. 938 (II only); *State v. Bocharski*, 22 P.3d 43 (gruesome photographs only); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (only as to slide show – approximately pages 1142-43); *Old Chief v. U.S.*, 519 U.S. 172 (II B and dissent); *U.S. v. McRae*, 593 F.2d 700 (photographs and relationship evidence only); *U.S. v. Harvey*, 991 F.2d 981 (III only); *Johnson v. Ford Motor Co.*, 988 F.2d 573 (II A only); *Torres-Arroyo v. Rullan*, 436 F.3d 1 (II B only); *Bowden v. McKenna*, 600 F.2d 282.

*Text – Pages 79–84.

A. A "Master" Rule
   1. Applicability
   2. Three importance features
      a. Exclusionary
      b. Balancing
      c. Substantiality
   3. Critical modifiers
      a. Substantially
      b. Unfair
      c. Undue
      d. Needless

B. Areas of Evidence
   1. Collateral
   2. Credibility
   3. Cumulative
   4. Repetitious
   5. Confusing
   6. Misleading
   7. Sensational or inflammatory
   8. Prejudicial

C. Balancing

1. Discretion
2. 403 probative value
3. Counterweight dangers
    a. Unfair prejudice
    b. Confusion
    c. Misleading
    d. Infringements on administrative integrity
4. Credibility factors
5. Minimizing unfair prejudice

D. Illustrative Cases

1. *Old Chief* – unfair prejudice and analytical method of balancing
2. *Jackson* – 403 analysis and solution with combined rules
3. *Bocharski* – Prejudicial effect of photos, and consequential fact
4. *Douglass* – Expert testimony in 403 context
5. *Johnson* – Other lawsuits and claims
6. *Harvey* – Exploring unfair prejudice
7. *Bowden* – Collateral issues and probative value
8. *McRae* – Gruesome photos
9. *Torres-Arroyo* – Confusion

Topic 5: Lay Witness Testimony

Read:

*Rules – 601, 602, 603, 604, 605, 606, 701, 104(a) and (b), 501

*Statutes – Minn. Stat. §§ 595.01, 595.02

*Cases – *U.S. v. Hoffner*, 777 F.2d 1423; *U.S. v. Yazzie*, 976 F.2d 1252; *U.S. v. Larry*, 536 F.2d 1149 (2nd assignment of error only).

*Text – Pages 165–176; 213–216; 130–144; 147–152.

A. Competency of Witnesses
   1. Who is a witness? Minn. Stat. § 595.01
   2. Basic competency rule - Minn. Stat. § 595.01, subd. 1
   3. Incompetent Witnesses
      a. No oath or affirmation – Rule 603
      b. Unsworn interpreter – Rule 604
      c. Presiding judge – Rule 605
      d. Juror in the case – Rule 606
      e. Person lacking sufficient understanding – Minn. Stat. § 595.01
      f. Person of unsound mind who lacks capacity to remember or relate facts truthfully – Minn. Stat. § 595.02, subd. 1(f)
      g. Intoxicated person who lacks capacity to remember or relate facts truthfully – Minn. Stat. § 595.02, subd. 1(f)
      h. Child under 10 if he or she lacks capacity to remember or relate facts truthfully – Minn. Stat. § 595.02, subd. 1(n)
      i. Person precluded from testifying by privilege - Minn. Stat. § 595.02, subd. 1(a) –(m) and (o). Common privileges:
         (1) Husband – wife
         (2) Attorney – client
         (3) Clergy – penitent

(4) Physician/dentist/chiropractor – patient
(5) Nurse/psychologist/social worker – client
(6) Waiver of privilege

j. Person lacking personal knowledge of facts – Rule 602

B. Personal Knowledge Requirement – Rule 602
1. Foundation
2. Laying foundation
3. Admissibility – 104(a) standard
4. Conditional relevancy – 104(b)
5. Inferred personal knowledge
6. Lack of certainty
7. Relationship to:
a. Opinion
b. Hearsay

C. Lay Opinion/Inference
1. General rule – 701
2. Exception – three requirements for applicability
3. Grounds for objection
4. Types of opinion typically allowed upon proper foundation
5. The collective facts doctrine

Topic 6: Expert Witnesses

Read:

*Rules – 702, 703, 704, 705

*Cases – *Daubert v. Merrell Dow Pharms.* , 509 U.S. 579; *U.S. v. Benson*, 941 F.2d 598; *Shahid v. City of Detroit* (II only), 889 F.2d. 1543; *Hygh v. Jacobs*, 961 F.2d 359 (A. only); *U.S. v. Cormier*, 468 F.3d 63 (II C only); *U.S. v. Lamarre*, 248 F.3d 642, ([1], [2], and [3] only); *U.S. v. Amuso*, 21 F.3d 1251 (I. D only); *Mitroff v. Xomox Corp.*, 797 F.2d 271 (II only); *Cook v. Amer. S.S. Co.*, 53 F.3d 733 (II A and B only);*Freeman v. Package Mach. Co.*, 865 F.2d 1331 (I. D only); *Ray v. Miller Meester Adver., Inc*., 664 N.W.2d 355 (I. C only).

*Text – Pages 216–235.

A. Who Is An Expert?
   1. Qualification
      a. General
      b. Specific
   2. Acquisition of expertise

B. Admissibility of Expert Evidence
   1. Subject matter
   2. Assistance
   3. Qualification
   4. Form of testimony
   5. Basis

C. Bases of Expert Opinion
   1. Three possible predicates
   2. Inadmissible evidence – the reasonable-reliance rule
   3. Limitations on disclosure
   4. Caution against hearsay conduit

D. Timing of Disclosure of Basis

E. Opinion on Ultimate Issue
   1. What is an “ultimate issue”?

2. Factors affecting admissibility

F Case Review

1. *Frye*
2. *Daubert, Kumho Tire, Joiner*
3. *Frye-Mack*

G. Problematic Areas

1. Statistical evidence and probability theory
2. DNA
3. Lie detection
4. Accuracy of eyewitness identification
5. Syndrome evidence
6. Profiles
7. Social framework
8. Human factors
9. Event reconstruction

Topic 7: Hearsay

Read:

*Rules – 801-807

*Cases – *U.S. v. Jackson*, 88 F.3d 845; *Suggs v. Stanley*, 324 F.3d 672 (II B); *U.S. v. Meserve*, 271 F.3d 314 (II A); *U.S. v. Matlock*, 109 F.3d 1313 (VI); *U.S. v. Lopez*, 271 F.3d 422 (III D); *U.S. v. Reed,* 227 F.3d 763 (I A & B); *Southern Stone Co., Inc. v. Singer*, 665 F.2d 698 (IV and dissent); *Hynes v. Coughlin*, 79 F.3d 285 (II B 2); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257 (III); *U.S. v. Renville*, 779 F.2d 430 (II & III); *U.S. v. Wables*, 731 F.2d 440; *U.S. v. Lieberman*, 637 F.2d 95 (II A & B); *U.S. v. Adefehinti,* 510 F.3d 319; *U.S. v. Midwest Fireworks Mfg. Co., Inc.*, 248 F.3d 563 (CPSC's exhibits); *U.S. v. Emery,* 186 F.3d 921 (IV); *U.S. v. Portsmouth Paving Corp.*, 694 F.2d 312 (III); *U.S. v. Cash*, 394 F.3d 560; *Crawford v. Washington*, 541 U.S. 36; *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527.

A. Exclusionary Rule

B. Overview
   1. It's hearsay by definition
   2. It fits the definition but is defined as non-hearsay
      a. Prior statements
      b. Party admissions
   3. It is hearsay but is admissible anyway
      a. 803 exceptions
      b. 804 exceptions
      c. 807 residual exception

C. Definition
   1. Statement
   2. Declarant
   3. Timing
   4. Purpose

D. Prior Statements of Witnesses

E. Party-Opponent Admissions

F. 803 Exceptions – Declarant Unavailability; Immaterial

G. 804 Exceptions – Declarant Unavailable

H. 807 – Catchall

I. Multiple Hearsay

J. Declarant Credibility

K. Right of Confrontation
    1. *Crawford* rule
    2. *Melendez-Diaz*

Topic 8: Examining Witnesses

Read:

*Rules – 611, 606, 607, 608, 609, 610, 612, 613, 615; Minn. R. Evid. 616

*Cases – *U.S.* *Loinaz v. EG & G*, 910 F.2d 1; *Johnson v. Ashby*, 808 F.2d 676; *v. Warf*, 529 F.2d 1170; *U.S. v. Abel*, 469 U.S. 45; *U.S. v. Winchenbach*, 197 F.3d 548 (III); *U.S. v. Turning Bear,* 357 F.3d 730; *U.S. v. Cecil*, 836 F.2d 1431; *U.S. v. McGee*, 408 F.3d 966; *U.S. v. Hayes*, 553 F.2d 824 (II); *U.S. v. Albers,* 93 F.3d 1469 (II & IV); and *U.S. v. Weller,* 238 F.3d 1215 (II D).

*Text – Pages 165–170, 173–212.

A. Court Control

B. Examination
   1. Direct – form/limits
   2. Cross – form/limits
   3. Leading questions
   4. Refreshing recollection
   5. Rule of completeness

C. Objections

D. Challenging Credibility
   1. Aim of credibility rules
   2. Credibility in issue
   3. Truthfulness
      a. Accuracy issues
      b. Sincerity issues

E. Impeachment
   1. Meaning
   2. Who may impeach
   3. Who may be impeached
   4. Extrinsic impeachment

5 Intrinsic impeachment

a. Bias
b. Incapacity
c. Prior inconsistent statement
d. Character for truthfulness/untruthfulness
e. Prior untruthful conduct
f. Prior criminal conviction
g. Contradiction

F. Religious Beliefs/Opinions

G. Bias

1. Federal rule/Minnesota rule
2. Areas of bias

H. Truthful/Untruthful Conduct

1. Reputation evidence
2. Opinion evidence
3. Specific instances

I. Criminal Convictions

1. Whose
2. “Conviction”
3. Two categories
4. Balancing
5. Time limit/exception
6. Proving conviction

J. Prior Inconsistent Statement

1. Rationale
2. Impeaching -vs- substantive evidence
3. Degree of inconsistency required
4. Rule in Queen Caroline’s case
5. Extrinsic evidence

K. Expert Opinion on Credibility

Topic 9: Character Evidence

Read:

*Rules – 404(a) and 405

*Cases – *Michelson v. U.S.*, 335 U.S. 469; *Sparks v. Gilley Trucking*, *Co., Inc*., 992 F.2d 50; *Parrish v. Luckie*, 963 F.2d 201; *U.S. v. Perrin* (I A & B); and *U.S. v. Roberts*, 887 F.2d 534.

*Text – Pages 85–88; 99–103.

A. What is Character?

B. Propensity Evidence

C. Basic Exclusionary Rule

D. Exceptions
   1. Essential element
   2. Circumstantial evidence of relevant trait
   3. Credibility
   4. Sexual misconduct – criminal/civil

E. Proving Admissible Character
   1. Three considerations
   2. Three methods of proof
   3. General rule as to use of methods of proof

Topic 10: Other Crimes, Wrongs, Acts

Read:

*Rule – 404(b)

*Cases – *Huddleston v. U.S.*, 485 U.S. 681; *U.S. v. Daraio*, 445 F.3d 253 (IV B); *U.S. v. Bell*, 516 F.3d 432 (II A & B & III); *Old Chief v. U.S.*, 519 U.S. 172; *U.S. v. Bowie*, 232 F.3d 923; *U.S. v. Williams*, 900 F.2d 823; *State v. Ness* (Minn. 2006), 707 N.W.2d 676; *State v. Montgomery*, 707 N.W.2d 392 (Minn. App. 2005) (issue #1*); State v. Johnson,* 568 N.W.2d 426 (Minn. 1997) (I).

*Text – Pages 89–99.

A. General Exclusionary Rule Revisited

B. Nonpropensity Purpose
   1. Extrinsic/intrinsic distraction
   2. Rules of thumb

C. Proving 404(b) Evidence

D. Procedural Requirements

E. Minnesota's 404(b) Rule – *Spreigl* Evidence

F. Reverse-*Spreigl* Evidence

Topic 11: Habit and Routine Practice

Read:

*Rule – 406

*Cases – *Maynard v. Sayles*, 817 F.2d 50; *U.S. v. Angwin*, 271 F.3d 786.

*Text – Pages 103–107.

A. Habit -vs- Character

B. Habit -vs- Non-Habit

C. Keys

D. Admissibility

Topic 12: Non-Testimonial Evidence

Read:

*Rules – 901- 902-1001, 1002, 1003, 1004, 1006

*Cases – *U.S. v. Taylor*, 648 F.2d 565; *U.S. v. Hemphill*, 514 F.3d 1350; *U.S. v. Grajales-Montoya*, 117 F.3d 356; *Ricketts v. City of Hartford*, 74 F.3d 1397; *U.S. v. Miller*, 994 F.2d 441; *U.S. v. Collado*, 957 F.2d 38; *U.S. v. Tannehill*, 49 F.3d 1049.

*Text – Pages 297–321.

A. Authentication and Identification
   1. Prima facie case of genuineness - basic rule
   2. Roles of judge and jury
   3. Illustrations of foundation
   4. Chain of custody

B. Self-Authentication

C. Writings, Recordings, and Photographs
   1. Originals, or “Best Evidence,” rule
   2. Duplicates
   3. Secondary evidence
   4. Public records
   5. Summaries
      a. Foundation
      b. Types
         (1) Evidentiary – exhibit or testimony
         (2) Pedagogical
         (3) Summary witnesses
   6. Party testimony or admissions
   7. Rules of judge and jury

Topic 13: Specialized Exclusions of Relevant Evidence

Read:

*Rules – 407-415

*Cases – *Clausen v. Sea-3, Inc.*, 21 F.3d 1181; *Cassino v. Reichhold Chems., Inc.,* 817 F.2d 1338*; U.S. v. Davis*, 617 F.2d 677.

*Text –- Pages 106–129.

A. Probable Relevance

B. Social Policy Considerations

C. Categories
   1. Subsequent remedies
   2. Settlements
   3. Payments
   4. Plea bargains
   5. Financial responsibility
   6. Naughty sex