Course: EVIDENCE—Hamline University Law School

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Semester: Summer 2011

Class Days/Times: Monday and Wednesday, 2:30 – 5:30 p.m.

#### **SYLLABUS**

**REQUIRED MATERIALS:** Courtroom Evidence Handbook, 2010-2011

Student Edition, by Goode and Wellborn

(West Publishing)

**STUDY FOCUS:** Because the law of Evidence is largely codified in both

the Federal and Minnesota systems, your principal focus of study should be the rules themselves. Cases, problems, legislative history, and commentaries can be helpful in understanding the intent of various rules and

in learning how the rules are applied to actual

situations.

SKILLS: Three fundamental skills that set lawyers apart from intelligent laypersons are (1) the ability to identify legal issues, (2) the ability to find applicable law, and (3) the ability to use legal analysis to apply the law and resolve the problem. In this course, the law will be in the rules and materials that help interpret the rules. So, your efforts should be directed at the skills of seeing evidentiary issues and applying the rules.

ASSIGNMENTS: Most of the reading assignments to prepare for class are listed on the Course Outline. I will also distribute other assignments in class. For any rule assigned, also read the Authors' Comments that pertain to that rule. You do not have to read the cases the authors cite unless I assign them specifically, but you may, of course, read any cases you wish.

### **APPROACH TO TOPICS: Note:**

- For each topic on the Course Outline, I have indicated what You Need To Know. These points will help give you some structure for your study. We will develop each point through class discussion and problem-solving.
- My approach to the course will be twofold. First, I will present a
  relatively broad survey of nearly all Evidence topics. Second, I will
  return to most of those topics for deeper investigations,
  concentrating on (1) recurring evidentiary issues and (2) some of
  the more perplexing issues. We will do problems and read
  illustrative cases for both approaches.
- During the survey approach, I will emphasize the highlights of each of the rules. During the second approach, I will try to develop our study more fully and I will emphasize the operation of the rules as a system.
- Throughout the course, class discussion will be invaluable and I will expect everyone to participate.
- **Note**: Many of the assigned cases deal with multiple issues. Read only the portions pertaining to the evidentiary topic for which the case is assigned. This, of course, includes any facts that might be necessary to give a context to the evidentiary problem.

**EVALUATIONS:** There will be three graded exams. The first two will be take-home exams and the third, and final, will be an in-class exam but open-book and will be cumulative. Each exam will be worth a certain number of points (to be determined). The final grade will be determined on the basis of the total points for all exams and will **approximate** the following percentages:

95% and above= A 85% - 94%= B 75% - 84%= C 60% - 74%= D Below 60% is a Fail

**CLASS ATTENDANCE:** It is the law school's policy that class attendance is mandatory. I will take the roll each class.

**ELECTRONIC DEVICES:** In accordance with law school policy, you may use computers and other electronic devices in class only for that class and not for personal or other academic or recreational purposes.

OBJECTIVES: At the conclusion of this course, if you sincerely do the required study, you will have a solid basic understanding of Evidence law in both theory and application. Please note: This course is not designed as a bar-exam prep course. Such a course is as much about how to take the bar exam as it is about the substance of Evidence law. This course will, however, provide good grounding in the topics you will need to know for the bar exam.

**HELP:** I will always make myself available outside class times if you need help.

#### **EVIDENCE COURSE OUTLINE**

### **Topic 1: Evidentiary Concepts and Procedures**

### Assignments:

- Read the following Federal Rules of Evidence (FRE) and the corresponding Authors' Commentary in the text: 101, 102, 103, 104(a), 105, 106, 201, 611, and 1101.
- Read these cases: Loinaz v. EG & G., Inc., 910 F.2d 1 (1<sup>st</sup> Cir. 1990);
   State v. Sontoya, 788 N.W.2d 868 (Minn. 2010) [only the facts and Part I]; and State v. Phelps, 1994 WL 175005 (Minn. App.1994).
- Read A Decent Explanation: Applying the Rules of Evidence, pages S-1 through S-4.
- Prepare to discuss the attached Topic 1 Problems on pages S-5 through S-7.

### YOU NEED TO KNOW:

1. *As to the codified rules:* Their scope, applicability and inapplicability; the guidelines for construing the rules; and the relation of the codified rules to common law rules and principles.

# 2. As to "evidence" in general:

- a. The difference between "evidence" and "proof," and the "vehicles" of proof.
- b. The meaning of "standard of proof," and what the standards are.
- c. The meanings of "burden of proof," "burden of production," and "burden of going forward."
- d. The difference between "admissibility" and "weight" of the evidence, and the role of "credibility."
- e. The meaning of "sufficiency" of the evidence.
- f. How "direct" and "circumstantial" evidence differ.

- g. The distinction in function between "substantive" and "impeachment" evidence.
- h. The distinctions among "real," "representative," and "testimonial" evidence.
- i. The meaning and function of "foundation."

### 3. As to lawyers' "self-help" devices:

- a. The purposes, functions and requirements of objections, motions to strike, and offers of proof.
- b. Legal grounds of objections and motions to strike.
- c. What a "continuing objection" is and when and why it is made.
- d. The concepts of "opening the door" and "curative admissibility."
- e. What the "record" is, why it is critical, how it is made, and who is responsible for making it.
- f. The "rule of context," or "completeness."

### 4. As to the trial judge's authority and duties:

- a. The concept and scope of "judicial discretion."
- b. How discretion can be abused.
- c. Rulings on admissibility, foundation, and evidentiary limitations.
- d. Jury instructions—timing and nature.
- e. Control over the presentation of the case.
- f. The concept of "judicial notice."

## 5. As to the matter of trial error:

- a. The distinctions among "harmless," "prejudicial, or reversible," "plain," and "invited" error.
- b. Appellate "standards of review" and their significance at trial.
- c. The difference between "forfeiture" and "waiver" of error.

### **Topic 2: Presenting Lay Witness Testimony**

### Assignments:

- Read FRE 104(a), 401 403, 501, 502, 601- 615, Minnesota Rule of Evidence (MRE) 616, FRE 701, 801(a) (c), 803(5), and Text chapters 3 and 4.
- Read Minn. Stat. Secs. 595.01; 595.02, subd. 1(f); 595.02, subd. 1(a), (b), (c), (d), and (n); and 595.02, subds. 3 and 4.
- Read *U.S. v. Yazzie*, 976 F.2d 1252 (9<sup>th</sup> Cir. 1992); *U.S. v. Neal*, 36 F.3d 1190 (1<sup>st</sup> Cir. 1994) [only the facts and section IV B]; *Stahl v. Sun Microsystems*, *Inc.*, 775 F.Supp. 1397 (D. Colo. 1991); *Bankers Trust Company v. Publicker Industries*, *Inc.*, 641 F.2d 1361 (2d Cir. 1981); and *Adelmann v. Elk River Lumber Co.*, 65 N.W.2d 661 (Minn. 1954).
- Problems to be distributed.

- 1. Who may be a "witness."
- 2. What "competency" and "privilege" mean and how they affect testimony.
- 3. The foundation necessary to qualify a lay witness to testify; how that foundation is challenged; and the court's role in determining the adequacy of foundation.
- 4. The manner of presenting lay testimony—direct exam and its limits, and applicable objections.
- 5. When lay opinion or inference is admissible.
- 6. The general relevancy rules, and the rule for excluding even relevant evidence.
- 7. How the lay witness's credibility may be challenged—cross-examination, and impeachment.
- 8. What happens if the witness forgets—refreshing recollection and recorded recollection.

9. The rules governing "out-of-court" statements—hearsay in general.

### **Topic 3: Presenting Expert Testimony**

### Assignments:

- Read FRE 702 706, and Text chapters 3 and 4.
- Read Ray v. Miller Meester Adver., Inc., 664 N.W.2d 355 (Minn. App. 2003) [I. C. only]; Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. V. Carmichael, 119 S.Ct. 1167 (1999); Goeb v. Tharaldson, 615 N.W.2d 800 (Minn. 2000); U.S. v. Locascio, 6 F.3d 924 (2d Cir. 1993); and McClellan v. Morrison, 434 A.2d 23 (Me. 1981).
- Problems to be distributed.

- 1. What the "subject-matter rule" is.
- 2. The ways in which a witness can qualify as an expert.
- 3. What expert testimony can be based upon.
- 4. What the "reasonable-reliance rule" is.
- 5. What the "disclosure rule" is.
- 6. The problem of the hearsay conduit.
- 7. The Daubert (Federal) and Frye-Mack (Minnesota) rules.
- 8. The limitations on expert opinion as to credibility and syndrome evidence.
- 9. How to lay foundation for expert qualifications and expert opinion.

### **Topic 4: Non-Testimonial Evidence**

### **Assignments:**

- Read FRE Articles IX and X; 803(6), 803(8), 803(9) (17), 803(22), and 803(23).
- Read U.S. v. Taylor, 648 F.2d 565 (9<sup>th</sup> Cir. 1981); U.S. v. Hemphill, 514 F.3d 1350 (D.C. Cir. 2008); Ricketts v. City of Hartford, 74 F.3d 1397 (2d Cir. 1996); U.S. v. Miller, 994 F.2d 441 (8<sup>th</sup> Cir. 1993); USS v. Town of Oyster Bay, 339 N.E.2d 147 (N.Y. 1975); U.S. v. Strissel, 920 F.2d 1162 (4<sup>th</sup> Cir. 1990); and Nichols v. Upjohn Company, 610 F.2d 293 (5<sup>th</sup> Cir. 1980).

- 1. What "authentication" and "identification" mean.
- 2. The "rule of prima facie genuineness" and the respective roles of judge and jury.
- 3. What "self-authentication" means.
- 4. The relation of non-testimonial evidence to the hearsay rules.
- 5. The concept of "chain of custody."
- 6. What the "best evidence," or "originals" rule is.
- 7. When it is proper to use duplicates and secondary evidence.
- 8. What the "summaries rule" is and how it is used.
- 9. How to lay foundation for:
  - a) a document
  - b) a tangible object
  - c) a computer record
  - d) a business record
  - e) a public report
  - f) a summary
  - g) an illustrative diagram

### **Topic 5: Relevancy Re-visited**

### **Assignments:**

- Read FRE 401, 402, 403, 404, 405, 406, 407 415 and 104(b).
- Read *U.S. v. Curtis,* 568 F.2d 643 (9<sup>th</sup> Cir. 1978); *Old Chief v. U.S.,* 519 U.S. 172 (1997); *U.S. v. McVeigh,* 153 F.3d 1166 (10<sup>th</sup> Cir. 1998); *U.S. v. Jenkins,* 887 A.2d 1013 (D.C. 2005); *Michelson v. U.S.,* 335 U.S. 469 (1948); *U.S. v. Jackson,* 405 F. Supp. 938 (N.Y. 1975) [II only]; *U.S. v. Lopez,* 271 F.3d 472 (3d Cir. 2001) [IIID. Only]; *U.S. v. Mills,* 704 F.2d 1553 (11<sup>th</sup> Cir. 1983); *Sparks v. Gilley Trucking Co., Inc.,* 992 F.2d 50 (4<sup>th</sup> Cir. 1993); *Huddleston v. U.S.,* 485 U.S. 681 (1988); *State v. Ness,* 707 N.W.2d 676 (Minn. 2006); *State v. Montgomery,* 707 N.W.2d 392 (Minn. App. 2005) [issue #1 only]; *State v. Johnson,* 568 N.W.2d 426 (Minn. 1997) [I only]; *U.S. v. Woods,* 484 F.2d 127 (4<sup>th</sup> Cir. 1973); and *State v. Smith,* 749 N.W.2d 88 (Minn. App. 2008).
- Problems to be distributed.

- 1. How to determine "facts of consequence."
- 2. Guidelines for assessing probabilities and illustrative relevancy "hooks."
- 3. What conditional relevancy is.
- 4. The general rule as to character evidence and its exceptions.
- 5. Proper methods of presenting admissible character evidence.
- 6. The rules for proving "other crimes, wrongs and acts"; Minnesota's *Spreigl* rule; and how to make a Rule 404(b) analysis.
- 7. Proof through evidence of habit or routine practice.
- 8. The general rules of specialized exclusions of relevant evidence.
- 9. The ins and outs of Rule 403.

## **Topic 6: Hearsay Re-visited**

### **Assignments:**

- Read FRE Article VIII.
- Read *U.S. v. Brown*, 548 F.2d 1194 (5<sup>th</sup> Cir. 1977); *Creaghe v. Iowa Home Mutual Casualty Co.*, 323 F.2d 981 (10 Cir. 1963); *U.S. v. Jones*, 663 F.2d 567 (5<sup>th</sup> Cir. 1981); *Stevenson v. Commonwealth*, 237 S.E.2d 779 (Va. 1977); *U.S. v. Summers*, 414 F.3d 1287 (10th Cir. 2005); *U.S. v. Fernandez*, 172 F. Supp. 2d 1265 (C.D. Cal. 2001); *U.S. v. Matlock*, 109 F.3d 1313 (8<sup>th</sup> Cir. 1997); *Hong v. Children's Memorial Hospital*, 993 F.2d 1257 (7<sup>th</sup> Cir. 1993); *U.S. v. Adefehinti*, 510 F.3d 319 (D.C. Cir. 2007); *U.S. v. Midwest Fireworks Mfg. Co.*, 248 F.3d 563 (6<sup>th</sup> Cir. 2001); *U.S. v. Reed*, 227 F.3d 763 (7<sup>th</sup> Cir. 2000); *U.S. v. Cash*, 394 F.3d 560 (7<sup>th</sup> Cir. 2005); *U.S. v. Jackson*, 88 F.3d 845 (10<sup>th</sup> Cir. 1996); *U.S. v. Emery*, 186 F.3d 921 (8<sup>th</sup> Cir. 1999) [IV only]; *U.S. v. Lieberman*, 637 F.2d 95 (2d Cir. 1980) [II A and B only]; *Crawford v. Washington*, 541 U.S. 36 (2004); and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).
- Problems to be distributed.

- 1. The elements of the definition of hearsay and the types of things that do not fit the definition.
- 2. The 2 definitional non-hearsay categories (prior statements of witnesses and party admissions) and how to lay foundation for evidence to be presented under each provision.
- 3. Key Rule 803 exceptions: (1) through (9), (17), (18) and (22), and how to lay foundation for their application.
- 4. Rule 804 concept of "unavailability," and key exceptions: (b)(1), (2), (3) and (6).

- 5. The way the residual hearsay "catchall" is used under Rule 807.
- 6. How to apply the rule as to multiple hearsay (805).
- 7. Impeaching hearsay declarants and others through Rule 806.
- 8. How the 6<sup>th</sup> Amendment's Confrontation Clause is implicated in a hearsay analysis.

### **Topic 7: Impeachment Re-visited**

### **Assignment:**

- Review FRE 403, 607, 608, 609, 613, MRE 616, 611(b), 801(d)(1)(A) and 803(18).
- Read *U.S v. Abel,* 469 U.S. 45 (1984); *Luce v. U.S.,* 469 US. 38 (1984); *U.S. v. Tse,* 375 F.3d 148 (1<sup>st</sup> Cir. 2004); *U.S. v. Mandel,* 591 F.2d 1347 (4<sup>th</sup> Cir. 1979) [facts and V only]; *Ruth v. Fenchel,* 121 A.2d 373 (N.J. 1956); and *People v. Singer,* 89 N.E.2d 710 (N.Y. 1949).
- Problems to be distributed.

- 1. Distinction between impeachment evidence and substantive evidence.
- 2. The possible deficiencies in testimonial capacities: Ability and opportunity to know, remember, and relate the facts.
- 3. How sincerity may be attacked
  - a. bias
  - b. prior inconsistent statement
  - c. prior criminal conviction
  - d. reputation/opinion/specific conduct showing untruthfulness.
- 4. How to impeach the expert witness with a learned treatise.
- 5. The scope of cross-examination.

- 6. How the impeached witness may be rehabilitated.
- 7. How to lay foundation for impeachment with a prior inconsistent statement.
- 8. Common objections to attempted impeachment:
  - a. argumentative questions
  - b. misleading/assuming facts not in evidence
  - c. compound questions
  - d. nonresponsive answers