

Evidence Syllabus –FALL 2013

Jim Morrow

Room: Law School 101 Mon. 3:30-6:45

Office Hrs. Monday 12:30pm – 2:00pm

Or after class or by appointment

Cell: (763) 670-1236, Best way to reach me

E-mail: jmorrow01@hamline.edu

Office: Law School 204W

Do not hesitate to see me, e-mail me, or call me.

(This is a good, but dated, definition of a trial attorney – J.Morrow)

“It is not the critic who counts, not the man who points out how * * * the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena; whose face is marred by * * * sweat and blood; who strives valiantly; who errs and comes up short again and again; who knows the great enthusiasms, and spends himself in a worthy cause; who, at best, knows in the end the triumph of high achievement; and who, at worst fails while daring greatly, so that his place shall never be with those * * * timid souls who know neither victory nor defeat.”

- *Teddy Roosevelt*

- TEXTS:**
- 1) Evidence, **EXAMPLES & EXPLANATIONS**, Arthur Best, 8th Edition
 - 2) Fall 2013 Morrow Evidence Supplement/Cases(at bookstore)
 - 3) Weekly Class Handouts will be put on Twen by Tuesday 5:00 pm
 - 4) **STRONGLY** recommended- The Advisory Committee Notes to the **NEW** FRE’s, see <http://www.law.cornell.edu/rules/fre/overview.html>

OBJECTIVE: We will study primarily the Federal Rules of Evidence (FRE), which are used in all federal courts and in at least 43 states. The FRE seek to promote accurate fact finding so that parties know before and during trial what evidence the judge is likely to allow. However, the FRE’s are rules/guidelines that allow substantial judicial discretion.

ASSIGNMENTS AND CLASS PARTICIPATION: The page numbers are for the Evidence, **EXAMPLES & EXPLANATIONS**, Arthur Best **8TH EDITION**, AKA-BEST.

Before each class you should read the assigned:

- Federal Rules of Evidence
- Best pages (do the reading and go over the examples/problems & answers),
- Fall 2013 Morrow Evidence Supplement/Cases
- I expect you to know the assigned **FRE’s** before class.

I will usually assign problems after each class. Please do all of the problems. Please do the problems in groups of 2 or 3 students. We will discuss most of the problems in class. I will call on students at random; before class if you don’t want to be called on please let me know; you will be allowed to do this 2 times during the semester.

CLASSROOM/COURTROOM PROCEDURE: Most lawyers are prepared, on time and only miss a court appearance if there is an emergency. Please be here, be on time and be prepared. This is a 3-hour class that requires a lot of preparation. 90% to 95% of the material on the Midterm and the Final is from class. Since we meet only 13 times, the maximum number of absences is 1; if you miss 2 classes you **will** be dropped from the course, **unless you see, call or email me ahead of time and have a good reason. If you miss 3 classes you will be dropped period. (Ex. P. Rother)**

COMPUTERS: During class you are expected to only be on your computer to take notes and/or view the Advisory Committee Note web site from page 1. Please refrain from text messaging and emailing, using cell phones, pagers, or any other communication device. Please refrain also from displaying wallpaper, screen savers, or other material on your computer screen, it distracts your classmates (three years ago a distracted student got an F on the Final). If you violate these rules you MAY be warned once, the second time, if not the first, you WILL be expelled from class. I encourage anonymous snitches to report violations. (See Journal of Legal Education, December 2007 Vol 57 No. 4 Banning Laptops in the Classroom).

THE MIDTERM WILL COUNT AS 1/3RD OF YOUR FINAL GRADE. ALL STUDENTS WILL TAKE THE MIDTERM. The midterm will be somewhat “open book” – you can bring Best, the Supplement, any handouts, class notes, and your outline. However, the midterm is long and hard, some students do not finish. In other words, you have to know the material because you will have little time to look things up.

FINAL: The final counts as 2/3rds of your final grade. All students will take a 3 ½ hour final. The final will be somewhat “open book” – you can bring Best, the Supplement, any handouts, class notes, and your outline. However, the final is long and hard; in other words you have to know the material because you will have little time to look things up.

EXTRA CREDIT E-MAIL – Please No Attachments!

You may bump your final grade up one step (e.g., from B to B+) by doing extra-credit e-mails. To receive this extra credit, you must satisfactorily complete the “extra credit e-mail” for 12 of the 13 class sessions. In the past approximately 90-95% of the class have done the extra credit e-mail.

The e-mail must be sent to me no later than 9:00 am Sunday at **jmorrow01@hamline.edu**. For credit, the e-mail **must** state on the subject line: **“Hamline Evidence. E-mail for (date of class), from (your name)”** Please use your full name - do not use your test number!

Example: **Hamline Evidence. E-mail for 1/30/12, from Delroy Tuorila**

What is a satisfactory “extra-credit e-mail?” Emails should be approximately 500 words. **My intention is that your emails will turn into your study outline.** Therefore, it is recommended that you invest as much time and effort as you feel is necessary to thoroughly understand the material.

Each e-mail must address the following items:

- 1) Questions/comments re: the muddiest or most confusing point/rule/problem from class.
- 2) Feedback/comments (+ or -) regarding that evidence class. (At least 25 words.)
- 3) A discussion of the key points from that class (**your outline**).
- 4) Your answers to any assigned problems.

Optional -5) A multiple-choice question(s) with answer(s) from the last class (for possible use on the Midterm and /or Final) may be composed individually or by a group.

**2011 SPRING FINAL EVIDENCE GRADING CURVE
BEFORE EXTRA CREDIT EMAIL BUMP UP**

Spring 2011 Final Grade Curve - <u>Before Bump Up</u>	
72 Total Students	
425 Total Points	
Total Number Wrong Out of 425 Points	
-30.2	1 – A -Cali
-37.46	1 – A - Curve Buster
-54.29 -65.34	4 – A
-71.45 -73.43	3 - A-
-78.05 -81.68	8 - B+
-90.26 -119.63	24 - B
-127.88 -130.52	6 - B-
-136.29 -140.09	7- C+
-143.06 -145.86	5 - C
-152.30 -169.46	7 - C-
-176.72 -186.95	5 - D+
-382.84	1 - F

.....

“We don’t need clones and robots. We’ve got plenty of them. Instead, we need rule-breakers and people who will disrupt and disturb the status quo. We need people who will think different. It’s time for the United States to embrace its inner Steve Jobs and live up to Apple’s credo, ‘because the people who are crazy enough to think they can change the world are the ones who do.’ ”

This system works in the real world and on the bar!

Fall 1998 I've wanted to write to you since about June 1, 1999. You see, that's about the time I started to review Evidence for the July 1999 Bar Exam. From the instant I started reviewing my materials, one thing became quite clear, I took to it like a fish to water. I could not believe how much came back to me. Many of the people I know who took the Bar in July struggled greatly with evidence. To no surprise, none of those people had you for their evidence professor. I waited 'till after the Bar exam results were released to write you and thank you so as not to jinx myself. I passed. I guess I learned and retained more through the evidence class you taught than I imagined (he got a B-). Without question, that is the one Bar subject I enjoyed questions about. I consulted Best on Evidence, which you required, over and over and found it just as valuable for the bar as I did for class. Your method worked fantastically for me.

Fall 2003

Hi Judge Morrow,

I just wanted to drop you a quick note to THANK YOU for your evidence class, which has apparently prepared me very well for my bar exam preparation. We just got our results from a 2 day simulated bar exam and I ranked in the upper 12th percentile against my peers NATIONALLY. This says something about the course you taught and for that I thank you.

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Fall 2004 Judge Morrow,

This week I attended the Barbri evidence lectures. It really came home during Barbri that beyond having fun and learning the material for the test we actually "learned" the material. Unlike other topic lectures where I remember a few things here and there, during this lecture there was not one thing that was new. It was as though you taught us both for the Bar and for real life (DOJ) situations. It was great fun to be able to plug in the CORRECT answers before the lecturer delivered them! The videos ('don't open the door') and your stories all come back with each topic. I studied just as hard in other classes but it was your class where I truly learned the material. THANK YOU!!!

Spring 2009 Judge Morrow,

I took your evidence course in 2009. I wanted to let you know that the way you teach your class works. I'm now a criminal defense attorney and my knowledge of the evidence rules gets tested in court on a daily basis. I used your outlines as supplements when studying for the MN and WI bar exams and have even had judges compliment me on my knowledge. I wanted to thank you for the way you taught and tell you to keep it up! As a trial attorney, it is tremendously valuable to be able to recite the rules in court and be able to correctly apply them. Sincerely,

2010 Evidence Student Judge Morrow-Just wanted to say hi and that I passed the bar! Thank you for teaching evidence so well for the real world and the bar. Evidence is not like any other class in law school and I think is the most encompassing topic area that affects all bar exam topics. All the hypotheticals in class paid off. And you made the bar review course portion on evidence easy

.....

2012 Evidence Student Hi Judge,

I am writing to let you know how well your evidence class prepared me for the bar. I am getting into evidence in my bar review course and have done the best on the evidence quizzes as opposed to the other topics by leaps and bounds. This is especially confidence-building considering how heavily evidence is tested on the bar. It is amazing how well I know and remember the rules you taught us.

2012 Evidence Student Hey Morrow, Just wanted to thank you for giving me one subject I could really feel confident about on the bar. I hardly had to touch evidence at all because you beat it into us so well during all of the practice questions in class. One of our MPT's was on dying decs, excited utterances and Crawford. It was one of the few areas where I really felt like I could speak with authority.

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Judge Morrow

I wanted to tell you that your advice from class paid off. I was slightly surprised to see that I earned an A on the midterm exam, as I left feeling kind of nervous afterwards. However, I just wanted to say thanks for highly encouraging that we do all of the problems in our weekly course packets. I also did ALL of your old tests and all the Best problems assigned. These 3 things made all the difference in my success!

The practice really pays off provided by doing tons and tons of practice problems. I think I have come to learn that this just takes practice, practice, practice).

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Advice from the Fall 2012 Evidence CALI Winner

- 1. Do the extra credit emails every week. (And actually do the outline part, don't just copy and paste your notes from class. You will be surprised how much better you remember it when you do.)
- 2. Make flashcards and memorize all the relevant FRE's early on. Class will be easier.
- 3. Don't be afraid to go into Judge Morrow's office when you are confused. He is always willing to explain the previous weeks lecture. It's okay if you don't have a specific question—he will give you an overview of any area you are confused on.
- 4. Save all of the practice problems and answers from class and redo them later as part of exam prep.
- 5. Do all of the practice exams available and time yourself.
- 6. Study like it's a closed book exam. Judge Morrow will tell you the final exam is brutal and most people don't finish. He's not kidding. You don't have time to look up many things in your notes.

2011 Cali Award Winner's Tips

Here are some tips that I thought might be useful for doing well in Judge Morrow's evidence class.

1. Get a handle on the material before class. The class will move fast at times. Having a basic understanding of the material before class made it easier for me to keep up with the tempo of the class. Don't get worried if you get lost every once in awhile. I sure did.
2. Create your own outline of the material. The handouts provided by Judge Morrow prior to class are extremely helpful. However, they also make it tempting to forego the creation of your own outline and rather rely solely on the handouts as an outline. I tried to make a rough outline of the material before class which was a combination of the handouts and any other information I thought was important from the reading. Judge Morrow usually emails the week's handout to the class as a word document a few days before the class meets. While I was doing the reading for the week I would open up the class handout as a word document, rewrite or explain the rules in my own words if necessary, and add any other information that I thought was important. You don't have to make an entirely separate outline, just add on to his and make it your own.
3. Studying hard for the midterm guarantees that you will already have at least half of material floating around in your head somewhere when it comes time to take the final. It makes studying for the final a lot easier.
4. Take the practice quizzes and tests. If you take enough practice quizzes and tests you'll recognize that some patterns emerge concerning the format of questions for certain rules of evidence on the final. Taking the practice quizzes and tests helped familiarize me with the format of the final and also made it easier for me to understand what certain questions were asking for since I had seen the type of question before. If you can get a

handle on the format of some of the questions on the final you will be able to answer them faster which will give you more time to take the multiple choice questions, which helps.

5. Go over all the handouts before the final. Before taking the final go through all the rules and sample problems in the handouts. Anything in the handouts is fair game for the final.

6. Go to the review sessions. The review sessions are more meaningful if you take a couple of the tests/quizzes beforehand.

7. Work hard. You don't have to be a genius to do well in Judge Morrow's class but you do have to work hard.

2010 FINAL PREPARATION ADVICE

I just wanted to drop you a quick note and say thank you for a great Spring Evidence class and for taking time to meet with me and provide input to help me prepare for the final exam. I don't know why more students don't take advantage of this opportunity, especially for this particular class, as it was especially helpful.

... Surprise! A clear understanding isn't enough. BS won't save you here. You really do have to know it backwards and forwards: know the rule, any "magic words", and the key cases.

After reviewing my midterm exam with you, I realized what I was doing that was hindering me (spending too much time trying to make sure I didn't miss anything on each question and NOT knowing the material well enough, which really slowed me down).

For the final exam, I changed my approach. Some things that would have helped me perform better on the midterm (in case you want to pass along to your current students), that I didn't incorporate until the final:

1) Approach the midterm strategically, not as presented. (Where are the points I can get quickly). Get the points you can quickly, and keep moving.

2) Listen carefully to the examples & "magic words" given in class, as these help target the right rules quickly.

3) Learn the "Stands For" & "Know" cases, which rules they relate to, & any related magic words.

4) Really go back and do the class problems and prior exams. Getting used to the format of this type of exam REALLY REALLY helps, as these are different from other law school exams.

Look at sample answer. Reviewing sample answers also helps to know what is "enough" and what one shouldn't spend time on. This has been more important for this course, than for any other law school course I've taken.

5) Even with a really great grid or outline, you have to know what's on your outline/grid and how to find it quickly (**pretty much know it**). The better you know it, the better you can earn more points quickly and keep moving.

Thanks for the great class. I'll definitely take your Trial Advocacy class.

2010 "A" Student

READ And STUDY ALL OF THE CLASS 1 Assignments -WE GO FAST & COVER A LOT IN CLASS 1

<u>Schedule Date</u>	<u>Topic</u>	<u>Assigned Reading</u>
Mon., 8/26 Class 1	Introduction	Know: (FRE) 102, 103, 104(a), 611(a-c), 1101
	Basic Evidence Vocabulary	<u>Read and Know</u> for 1st class: pgs. 13-17 of Syllabus! FRE 601, 602, 605, 615 (606-<u>Not on Final (NOF)/Skip</u>) READ: <u>Best</u>, 143-152; 167-173 (#2-10) “Dead Man’s Statutes”- (NOF/Skip)
	Competency of Witnesses	READ 1. <u>Lightly</u> , 677 F.2d 1027 (4 th Cir. 1982) 2. <u>Winkle</u> , 587 F.2d 705 (1979) 3. <u>Berger</u> , 295 U.S. 78 (1935) 4. <u>Gladden</u> , 54 So. 2d. 607 (1951)
	FRE 602	
	The General Requirement of Relevance	FRE 104(a), 401-403, 105 <u>Best 1-18</u> 1. <u>Larson & Larson</u> (1993) 2. <u>Foster</u> 986 F.2d 541 (D.C. Cir. 1993) 3. <u>Jaeger</u> , 973 P.2d 404 (Utah 1999)
	“Any Tendency”	

Mon., 9/2 NO CLASS – LABOR DAY

Mon., 9/9 Class 2	Review Class 1 Unfair Prejudice	FRE 403 1. <u>U.S. v. Yahweh</u> , 792 F. Supp. 104 (.1992) 2. <u>Hitt</u> , 981 F.2d 422 (1992) 3. <u>Shymanovitz</u> , 157 F.3d 1154 (1998)
	Specific Exclusions of Relevant Material/ Subsequent Remedial Measures/ Offer to Compromise	FRE 407, 408, 409 <u>Best, 19-32 (stop at character evid.)</u> 1. <u>Clausen</u> 21 F3d 1181 (1 st Cir. 1994) 2. <u>In Re Asbestos Litigation</u> 3. <u>EEOC v. Gear Petroleum Inc.</u>
	Insurance- 411 Criminal Plea Discussions	FRE 411, 410 1. <u>Williams</u> , 550 S.E.2d 796 (2001) 2. <u>Udeagu</u> , 110 F.R.D.172 (1986)

<u>Schedule Date</u>	<u>Topic</u>	<u>Assigned Reading</u>
Mon., 9/16 Class 3	Review Relevance Authentication (Foundation) Self Authentication	FRE 602, 901(a), 901(b) (1-6 & 9), 902(4-7); 902(11) covered in class 9 <u>Best, 213-220</u> 1. <u>Sayles</u> , 662 N.W.2d 1 (2003) 2. <u>S.A.M.</u> , 570 N.W.2d 162 (1997) 3. <u>Hager</u> , 325 N.W.2d 43 (1982) 4. <u>Weaver</u> , 1995 WL 314672 5. <u>US v. Safavian</u> 435 F. Supp. 2d 36 (2006) 6. <u>Lorraine</u> 241 F.R.D. 534 (2007) 7. <u>State v. Robinson</u> , MN APP., 2003

START CHARACTER EVIDENCE

	Habit	FRE 404(a) (2A) & 405(a), 405(b), 406 <u>Best, 32-49</u> 1. <u>Zackowitz</u> , 172 N.E. 466 (1930) 2. <u>Maki</u> , 1993 WL 89316
Mon., 9/23 Class 4	Review Character Evidence	FRE 404(a) (2A) and 405(a) FRE 404(a) (2B); FRE 404(a) (2C) <u>Best 43-57, 57-62 (#9 Skip/NOF)</u> N.O.F. (FRE 413-415) 1. <u>Michelson</u> , 335 US 469 (1948) 2. <u>Keiser</u> , 57 F3d 847 (1995)
	Character of the Accused and the victim	
	Other Crimes/ <u>Spreigl</u>	<u>Best, 36-40</u> FRE 404(b) (1) & (2); FRE 405(b) 1. <u>Jensen</u> , (1994) WL 1127 2. <u>Cogshell</u> , 538 N.W.2d 120 (1995) 3. <i>Weighing <u>Spreigl</u> Evidence: In Search of a Standard</i> 4. <u>Ness</u> , 707 N.W.2d 676 (2006) 5. <u>Bartylla</u> , 755 N.W.2d 8(2008) 6. <u>Schafer</u> , 142 F. 3 rd 1361 (1998)

Beginning today, treat everyone you meet as if they were going to be dead by midnight. Extend to them all the care, kindness and understanding you can muster, and do it with no thought of any reward. Your life will never be the same again.

- Og Mandina

Schedule Date	Topic	Assigned Reading
Mon., 9/30 Class 5	Finish & Review Character Evidence	FRE (607), 608 and 609 <u>Best 152-162; 168-176, (#11-18)</u>
	Impeachment: By Past Bad Acts By Character for Honesty By Conviction of Crimes	1. <u>Medical Therapy Scs.</u> 583 F.2d 36 (1978) 2. <u>Fallin</u> 540 N.W. 2d 518 (Minn.1995) 3. <u>Pinkerton's Inc.</u> , 762 F.2d591 (1985) 4. <u>Paige</u> , 464 F.Supp.99 (E.D. pa.1978) 5. <u>US. V. Brackeen</u> 969 F.2d 827 (1992) 6. <u>State v. Hill</u> , 801 NW 2d 646(2011)
Mon., 10/7 Class 6	Review Impeachment by Conviction Of Crimes	FRE 608 and 609; 412 <u>Best 152-162 (again);</u>
	Bias Impeachment Perception/Contradiction Prior Inconsistent Statement Past Sexual Conduct of Victim	FRE 613, 611(a), 610 <u>Best 163-177, (#19-21)</u> 1. <u>Abel</u> , 469 U.S. 45 (1984) 2. <u>US v. Sasso</u> 59 F3d 341 3. <u>Sands</u> , 365 N.W.2d 391 (1985) 4. <u>Ketter</u> , 364 N.W. 2d 459 (1985) 5. <u>Knox</u> , U.S.A.F. Ct. Mil.Rev. (1992)
Mon., 10/14 Class 7	Review Attorney-Client Privilege	Best 191-204(NOF - Spousal Privileges) 1. <u>Nix v. Whiteside</u> 475 US 157(1986)
	Original Writing Rule (Best Evidence Rule)	FRE 1001-1004 <u>Best 220-225</u> 1. <u>Meyers</u> , 171 F.2d 800 (1948) 2. <u>Lucasfilm</u> 808 F.2d 1316 (1987)

**Hearsay clip from Ferris Bueller's Day Off:
 "My best friend's sister's boyfriend's brother's girlfriend heard
 from this guy who knows this kid who's going with a girl who saw
 Ferris pass out at 31 Flavors last night. I guess it's pretty
 serious."**

Schedule Date	Topic	Assigned Reading
Mon., 10/21 Class 8	Midterm (Classes 1-7) 3:30pm - 5:30pm. Hearsay Introduction Defining Hearsay	FRE 801a, b, c Best 63-77, 80-90(start with Surveys), (#1-14, 16-17) N.O.F. Classic H.S. Puzzles 1. <u>Creaghe</u> 232 F2d 981 (1963) 2. <u>US v. Anfield</u> 539 F2d 674 (1976) 3. <u>US v. Jones</u> 663 F2d 567 (1981) 4. <u>Vinyard</u> 435 SW 2d 392 (1968)
Mon., 10/28 Class 9	Review Definition of Hearsay Party Admissions Start Prior Statements by A Witness	Review Class 8 Assignment FRE 801(d) (2)(A-E) Best 93-107 1. <u>Mahlandt</u> , 588 F.2d 626 (1978) 2. <u>Hoosier</u> , 542 F.2d 687 (1976) 3. <u>Bourjaily</u> , 483 U.S. 171 (1987) FRE 801(d)(1)(A,B,C) 1. <u>Day</u> , 789 F2d 1217 (1986) 2. <u>Tome v. U.S.</u> , 513 U.S. 150 (1995) 3. <u>Motta</u> , 659 P.2d 745 (1983)
Mon., 11/4 Class 10	Review Prior Statements Present Sense Impression Excited Utterance State of Mind Medical Diagnosis & Treatment Business Records	1. <u>Owens</u> , 484 U.S. 554 (1988) FRE 803 (1-4), 803(5) and 612 Best 108-112, 119-125, (#1-8) 1. <u>Miller v. Keating</u> (1985) 2. <u>Shepard</u> , 290 U.S. 96 (1933) 3. <u>Hillmon</u> , 145 U.S. 285 (1892) 4. <u>US v. Pheaster</u> , 544 F. 2d 353 (1976) 5. <u>Blake</u> , 933 P.2d 474 (Wyo. 1997) FRE 803(6) 1. <u>Palmer</u> , 318 U.S. 109 (1943) 2. <u>Johnson v. Lutz</u> , 170 N.E. 517(1930)

Mon., 11/11 Business & Public Records
Class 11

FRE 803(5), 612; 803 (6) & (8), 805
Best, 113-118, 121-128 (#9-17)

1. Petrocelli, 679 F.2d 286 (1982)
2. Norcon Inc., 971 P.2d 158 (1999)
3. US v. Hayes, 861 F.2d 1225 (1988)
4. US v. Weiland, 420 F.3d 1062 (2005)
5. Beech Aircraft, 488 U.S. 153(1988)
6. Baker, 371 A.2d 699 (Md. 1977)

Refreshing Recollection
Past Recollection Recorded

Schedule Date **Topic** **Assigned Reading**

Mon., 11/18 **Review**
Class 12

FRE 804(a)(1-5), 804(b)(1-4), 807
Best, 128-141

H.S. Declarant Unavailable
Former Testimony
Dying Declaration
Statement Against Interest
Forfeiture By Wrongdoing
“Catchall” or Residual Exception

1. Johns-Manville, 93 F.R.D. 853 (1981)
2. Martin, 695 N.W.2d 578 (2005)
3. State v. Harrod, 26 P.3d 492 (2001)
4. Gray, 405 F.3d 227 (4th Cir. 2005)
5. U.S. v. Laster, 258 F3d 514 (2001)
6. Weaver, 554 N.W.2d 240 (1996)

Confrontation Clause

1. Davis v. Washington, 126 S.Ct 2266 (2006)
2. Michigan v. Bryant, (2011)

Mon., 11/25 **Review**
Class 13

FRE 804(b) (1-4), 701

Lay Opinion

FRE 701-Best, 151

1. US v. Santos, 201 F.3d 953 (2000)
2. Holden, 134 A2d 868 (Pa. 1957)

Experts

FRE 702-704
Best, 179-190

1. Daubert, 509 US 579 (1993)
2. Goeb, 615 N.W.2d 800
3. Obeta, 796 N.W.2d 282(2011)

Learned Treaties

FRE 803(18)

Take your life in your own hands and what happens? A terrible thing: no one to blame.
Erica Jong

Optional Review Sessions: Both sessions in classroom 101

Mon., Dec 2nd - 4:30 p.m. – 7:00 p.m. Review everything up to Midterm

Tues., Dec 3rd - 4:30 p.m. – 7:00 p.m. Review everything after the Midterm

Finals start Dec.5th - Self-scheduled

It is one of the strange ironies of this strange life [that] those who work the hardest, who subject themselves to the strictest discipline, who give up certain pleasurable things in order to achieve a goal, are the happiest



Don't sacrifice your life to work and ideals. The most important things in life are human relations. I found that out too late.
--Katharine Susannah Prichard
Australian Author

Final Jury Instructions (Given at Conclusion of Evidence)

1. Members of the jury, the evidence and arguments in this case have been completed, and you will now receive instructions concerning the law.

It is your duty to determine the facts, and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case. You must not be governed or influenced by sympathy or prejudice for or against any party in this case. Your verdict must be based on evidence and not upon speculation, guess or conjecture. What the attorneys say is not evidence.

From time to time it has been the duty of the court to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You should disregard questions and exhibits which were withdrawn or to which objections were sustained. You should also disregard testimony and exhibits which the court has refused or stricken.

The evidence which you should consider consists only of the testimony of the witnesses and the exhibits which the court has received.

2. Credibility of Witnesses

You are the sole judge of the credibility of the witnesses and of the weight to be given the testimony of each. In determining what credibility is to be given any witness you may take into account his/her ability and opportunity to observe. His/her manner and appearance while testifying, and interest. Bias or prejudice he/she may have, and the reasonableness of his/her testimony considered in the light of all the evidence and any other factors that bear on the believability and weight of the witness' testimony.

Basic Evidence Vocabulary PLEASE LEARN THESE BEFORE THE FIRST CLASS; we will REVIEW some of them in the first class:

Sustained/Overruled

104(a)-judge decides admissibility using preponderance of proof

Case-in-chief/Rebuttal/Surrebuttal

Direct Examination

Cross-Examination

Redirect/Recross

Motion in Limine

FRE 101, 102 and 1101

FRE 103(a)(1) – No Objection

Timely Objection

Late Objection – Motion to Strike

Specific Grounds

No Speaking Objections

Offer of Proof – FRE 103(a)(2) -- Winkle

Hearing of a Jury/Bench Conference – FRE 103(c)

Plain Error/Clear Abuse of Discretion – FRE 103(d)

FRE 105/ Limited Admissibility

FRE 601/Lightly – “in camera examination”

FRE 611(a)

FRE 611(b)

FRE 611(c)

FORM OBJECTIONS – NOT IN THE FEDERAL RULES
The Trial Court Has Great Discretion

1. Repetitious (asked and answered). If the attorney is asking the same question or essentially the same question of the same witness, you can object as repetitious.
2. Cumulative. The cumulative objection means that you're calling three or four or more witnesses to prove the same exact point. Contrasted with repetitious, which just deals with the same witness.
3. Assumes facts not in evidence. A question that assumes something that has not been brought into evidence. A typical, although not politically correct example, is: "When did you stop beating your wife?" See **Berger**, 295 U.S. 78 (1935).
4. Misstates the evidence. Some evidence is admitted, but its misrepresented by the attorney. Often this objection is made in final argument, but it's also made in the course of a trial. See **Berger**, 295 U.S. 78 (1935).
5. Non-responsive. Witnesses are supposed to answer the specific question put to them, not add more (some judges prefer "asked & answered") or not answer the specific question at all. They can explain on redirect or with another question. Always move to strike when you object as non-responsive.
6. Vague or overbroad. Example: "What happened next?"
7. Narrative. Normally an attorney asking a specific question gets a specific answer. If the witness keeps going and adds more than the question calls for, besides non-responsive, you can also object, "This is turning into a narrative." If a witness tells a long story in response to a vague question, the objection could be, "The question calls for a narrative." Example: "Tell us what happened after your birth." The danger is that inadmissible evidence can easily slip in with the narrative answer.
8. Speculative. The witness is guessing; he/she does not have personal knowledge. Often contains the word "if" or "possible".
9. Multiple – compound. The multiple question asks two or more questions at once. It's very confusing (which question is the witness answering). The multiple question often contains an "and".
10. Argumentative. Questions are supposed to develop information. If the purpose of the question is only to make a little speech to the jury and not provide any new information, it's often argumentative. (Tone is important) See **Berger**, 295 U.S. 78 (1935).

A DOZEN PRACTICAL TIPS FOR WINNING OBJECTIONS

(By Winning Credibility with the Court) By J. Morrow

1. Study and know the important evidence and procedure rules. Know your Judge's evidentiary rules and ground rules.
2. Prepare your trial notebook with anticipated objections. List the witness, the Rule of Evidence, and possible case law. You must know the theory of your case because you have a split second to make an objection at the proper time. In other words, you must plan your objection strategy, just as you plan your opening, closing, direct and cross.
3. Educate the Judge. Always make a motion in limine regarding evidentiary rules, preferably in writing, or at least orally before trial starts. Be sure you know and have clarified the Court's pre-trial evidentiary rules. You will lose a lot of credibility with the Court if you violate his or her pre-trial evidentiary ruling. Make sure to object if the other side violates the judge's pre-trial ruling.
Educate the jury during jury selection if you plan to make a lot of objections. Lawyers have an obligation to their clients to make objections.
4. Stand up, speak up. Be assertive and persistent. However, don't be afraid to be reasonable; e.g., withdraw your objection if you find out you're wrong; e.g., deposition objections. When making an objection, you may give more than one reason.
5. No speaking objections. (1, 2, or 3 word legal basis only) Don't argue in front of the jury, but argue forcefully at the Bench or outside the presence of the jury.
6. Only object if it's inadmissible, it hurts your theory of the case, and you will win the objection (or you are making a record for appeal – Remember, trial judges have a great deal of discretion in evidentiary rulings and the appellate court rarely reverses the trial judges evidentiary decisions.)
7. Look to the Judge for cues, both nonverbal and verbal. The Judge will often tell you with her body language, facial expressions, and eye contact that she wants an objection.
8. When the other side objects, stand up to let the Judge know you want to make a response to the objection. If you want to do more than quote a rule, ask to approach the Bench. At the Bench, only talk to the Judge. Never talk to opposing counsel, even if he or she is talking to you. Look for the Judge's signal when you're supposed to talk. Make sure that the Judge rules. "Your Honor, has the Court made a ruling?"

9. If the objection is overruled, repeat what you said. If the objection is sustained; Don't Pout! Just go on with your examination; or "May I be heard, Your Honor?"
10. It's okay to ask the Judge to explain his or her ruling, but be careful and selective about it. If the Judge will let you, ask to approach the Bench rather than asking in open court, "Judge, would you explain the reason for your ruling?"
11. Make a good offer of proof, (preferably Q and A). Not only will it make a record for appeal, but it gives the Judge a second chance to consider your objection. Good Judges will sometimes change their mind after you educate them.
12. Ethics. You must have a good faith basis to object. You can't be playing games. If you are, you'll lose a lot of credibility with the Court. Minnesota Rules of Professional Responsibility 3.1 – 3.4.

*A trial lawyer's credibility with the Court
and jury is his/her most important resource*

JUDGE JIM MORROW
Cell - (763) 670-1236

**Our lives improve only when we take chances – and
the first and most difficult risk we can take is to be
honest with ourselves.**

- Walter Anderson

ATTITUDE

“The longer I live, the more I realize the impact of attitude on life. Attitude, to me, is more important than facts.

It is more important than the past, than education,
Than money, than circumstances, than failures, than success,
That what other people think or say or do.
It is more important than appearance, giftedness, or skill.
It will make or break a team...a church...a home.

The remarkable thing is we have a choice every day
Regarding the attitude we will embrace for that day.
We cannot change our past...We cannot change the fact that
People will act in a certain way.
We cannot change the inevitable.
The only thing we can do is play on the one string we have,
and that is our attitude...

I am convinced that life is 10% what happens to me
and 90% how we react to it. And so it is with you...
We are in charge of our Attitudes.

-Charles Swindoll