

# Evidence Spring SYLLABUS – 2009

**Jim Morrow**

**Room: Law School 101**

**Friday: 1:00pm-3:50pm**

**Office Hrs. Fri. 4:00 p.m. - 6:00 p.m.**

**Or by appointment,**

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

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**Home: (763) 421-4655 (not after 10 p.m.)**

**I am always available after class.**

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(This is a good definition of a trial attorney – J.A.M.)

“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*

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**TEXTS:**

- 1) **Best, EVIDENCE, EXAMPLES AND EXPLANATIONS**, 6<sup>th</sup> Edition
- 2) Morrow, 2009 Evidence Supplement (184 pgs.)
- 3) Weekly Class Handouts
- 4) For the Advisory Committee Notes to the FRE (optional – but **STRONGLY** recommended), 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 federal courts and in 42 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 which allow substantial judicial discretion.

**ASSIGNMENTS AND CLASS PARTICIPATION:** The page numbers are for Best, EVIDENCE, EXAMPLES AND EXPLANATIONS, 6<sup>TH</sup> EDITION. **Before** each class you should read the assigned Federal Rules of Evidence (Best pages 237-291), the assigned Best pages (do the reading and go over the examples), and the assigned Morrow 2009 Evidence Supplement cases. I will usually assign problems after each class. Please do all of the problems. I suggest you do the problems in groups of two or three 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. 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 very good reason. If you miss 3 classes you will be dropped.**

**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. Refrain also from displaying wallpaper, screen savers, or other material on your computer screen that can reasonably be expected to distract your classmates. If you violate these rules you will be permanently 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).

**MIDTERM :** There will be a midterm exam during the semester (class 8). The midterm grade will either count as one-third of your final grade, with the final exam counting as two-thirds, or, if the midterm does not **raise** your final grade, your final grade will be based only on your final exam. In the past five years, 10-20% of students have received a higher final grade because of the midterm. The midterm will be somewhat “open book” – you can bring Best, the Supplement, any handouts, class notes, and your outline.

**FINAL :** 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 hard and long, some students do not finish. In other words you have to know the material because you will have little time to look things up.

### **EXTRA CREDIT E-MAIL – No Attachments!**

You may bump your final grade up one step (e.g., from B to B+) by doing extra-credit e-mails and emailing them to me by 11:59 pm Thursday. To receive this extra credit, you must satisfactorily complete the “extra credit e-mail” for 11 of the 13 class sessions.

What is a satisfactory “extra-credit e-mail?” Emails should be approximately 500 words minimum. However, 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 - Any multiple choice question(s) with answer(s) from the last class (for the Midterm and /or Final) Send as a separate email with Subject line stating Multiple Choice.

**Extra Credit Email Continued**

The e-mail must be sent to me at [jmorrow01@hamline.edu](mailto:jmorrow01@hamline.edu). For tracking purposes, 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!

Ex. **Hamline Evidence. E-mail for 8/17/08, from Delroy Tuorila**

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2003 FINAL EVIDENCE GRADING CURVE **BEFORE** BUMP UP-105 POINTS TOTAL

|       |    |       |    |       |    |
|-------|----|-------|----|-------|----|
| -6    | A  | -20   | B  | -27   | C+ |
| -7    |    | -20   |    | -27 ½ |    |
| -8    |    | -20 ½ |    | -27 ½ |    |
| -21   |    |       |    |       |    |
| -10 ½ | A- | -21   |    | -29 ½ | C  |
| -10 ½ |    | -21   |    | -30   |    |
| -10 ½ |    | -21   |    | -30   |    |
| -11 ½ |    |       |    |       |    |
| -13 ½ | B+ | -23 ½ | B- | -45 ½ | D- |
| -13 ½ |    | -23 ½ |    |       |    |
| -14   |    | -23 ½ |    |       |    |
| -14   |    | -24   |    |       |    |
| -14   |    | -24 ½ |    |       |    |
| -14   |    | -25   |    |       |    |
| -14   |    |       |    |       |    |

READ ALL OF THIS **BEFORE** CLASS-WE GO FAST & COVER A LOT IN CLASS 1

| Schedule Date        | Topic  | Assigned Reading   |
|----------------------|--|--|
| Fri, 1/23<br>Class 1 | Introduction   | Fed. Rules of Evid. (FRE) 102,103,611(a-c)   |
|                      | Basic Evidence Vocabulary<br>Form Objections & 12 Tips Handouts- | <b>Read for 1<sup>st</sup> class Pg. 9 of Syllabus</b><br>Pgs. 10, 11 & 12 of Syllabus   |
|                      |  | FRE 601, 602, 603, 615 (606- <b>NOF/Skip</b> )<br><br><b>Best, 141-150; 165-171 (#2-10)</b><br>“Dead Man’s Statutes”- ( <b>NOF/Skip</b> )  |
|                      | Competency of Witnesses  | 1. <u>Lightly</u> , 677 F.2d 1027 (4 <sup>th</sup> Cir. 1982)<br>2. <u>Winkle</u> , 587 F.2d 705 (1979)<br>3. <u>Berger</u> , 295 U.S. 78 (1935)<br>4. <u>Phelps</u> , (1994) WL 175005 (Minn. App.) |
|                      | The General Requirement of Relevance                             | FRE 104(a), 401-402, 105<br><b>Best 1-18</b><br>1. <u>Larson &amp; Larson</u> (1993)<br>2. <u>Horning</u> , 535 N.W.2d 296 (1995)<br>3. <u>Jaeger</u> 973 P.2d 404 (Utah 1999)                       |

| Schedule Date         | Topic                                    | Assigned Reading   |
|-----------------------|--|--|
| Fri., 1/30<br>Class 2 | Review Class 1                           | FRE 403  |
|                       | Unfair Prejudice                         | 1. <u>U.S. v. Yahweh</u> , 792 F. Supp. 104 (.1992)<br>2. <u>Shymanovitz</u> , 157 F.3d 1154 (1998)<br>3. <u>Bloom</u> , 516 N.W.2d 159 (1994) |
|                       | Specific Exclusions of Relevant Material | FRE 407, 408, 409<br><b>Best, 19-32 (stop at character evid.)</b>  |
|                       | Subsequent Remedial Measures             | 1. <u>County of St. Louis</u> , (2001) WL 826947   |
|                       | Compromises and offers to Compromise     | 2. <u>Davidson v. Prince</u> , 813 P.2d 1225(1991)<br>FRE 410,411<br>Voir Dire (Handout)   |
|                       | Insurance                                | 1. <u>Williams</u> , 550 S.E.2d 796 (2001)   |
|                       | Criminal Plea Discussions                | 2. <u>Udeagu</u> , 110 F.R.D.172 (1986)<br>3 <u>Burch</u> , 156 F3d 1315 (1998)  |

| Schedule Date         | Topic                                   | Assigned Reading   |
|-----------------------|---|--|
| Fri., 2/6<br>Class 3  | Review Relevance                        | FRE 602, 901(a), 901(b)(1-9), 902(4-7), (11);  |
|                       | Authentication (Foundation)             | <b>Best, 211-218</b>   |
|                       | Self Authentication                     | 1. <u>S.A.M.</u> , 570 N.W.2d 162 (1997)<br>2. <u>Hager</u> , 325 N.W.2d 43 (1982)<br>3. <u>Weaver</u> , 1995 WL 314672<br>4. <u>US v. Simpson</u> 152 F3d 1241 (1998)<br>5. <u>State v. Robinson</u> , MN APP., 2003  |
|                       | Start Character Evidence                | FRE 404(a)(1), 405(a), 405(b), 406<br><b>Best, 32-43, 45-48 (#1-4, #6, #7)</b><br>1. <u>Zackowitz</u> , 172 N.E. 466 (1930)<br>2. <u>Williams</u> , 739 F.2d 297 (1984)  |
|                       | Habit                                   | 3. <u>Maki</u> , 1993 WL 89316   |
| Fri., 2/13<br>Class 4 | Review                                  |  |
|                       | Character Evidence                      | FRE 404(a)(1) and 405(a)<br><b>Best 43-52, 55-61 (#8, #9 Skip/NOF)</b><br><b>N.O.F. (FRE 412-415)</b>  |
|                       | Character of the Accused and the victim | 1. <u>Keiser</u> , 57 F3d 847 (1995)<br>2. <u>Nelson</u> , 1999 WL 993975  |
|                       | Other Crimes/ <u>Spreigl</u>            | FRE 404(b)<br>1. <u>Jensen</u> , (1994) WL 1127<br>2. <u>Cogshell</u> , 538 N.W.2d 120 (1995)<br>3. <i>Weighing Spreigl Evidence: In Search of a Standard</i><br>4. <u>Ness</u> , 707 N.W.2d 676 (2006)<br>5. <u>State v. Bartylla</u> , 755 N. w.2d 8(2008) |
| Fri., 2/20<br>Class 5 | Finish & Review                         |  |
|                       | Character Evidence                      | FRE (607), 608 and 609<br><b>Best 150-160;166-174,(#11, 13-18)</b>   |
|                       | Impeachment:                            | 1. <u>Bruguier</u> , 161 F3d 1145 (1999)   |
|                       | By Past Bad Acts                        | 2. <u>Fallin</u> , 540 N.W.2d 518(Minn.1995)   |
|                       | By Character for Honesty                | 3. <u>Pinkerton's Inc.</u> , 762 F.2d 591 (1985)   |
|                       | By Conviction of Crimes                 | 4. <u>Jensen</u> , II (again) See class 4<br>5. <u>Paige</u> , 464 F.Supp.99(E.D. pa.1978)   |

| Schedule Date         | Topic   | Assigned Reading   |
|-----------------------|---|--|
| Fri., 2/27<br>Class 6 | Review 608 & 609  | FRE 608 and 609  |
|                       | Impeachment by Conviction<br>Of Crimes  | <b>Best 150-160 (again);</b><br>1. <u>Lewis</u> , 2003 unpublished   |
|                       | Bias Impeachment  | 1. <u>Abel</u> , 469 U.S. 45 (1984)<br>2. <u>Garceau</u> , 370 N.W.2d 34 (1985)<br>FRE 613, 611(a)   |
|                       | Impeachment by:<br>Perception<br>Prior Statement of a Witness<br>Contradiction  | <b>Best 161-175, (#12, #19-21)</b><br>1. <u>Sands</u> , 365 N.W.2d 391 (1985)<br>2. <u>Ketter</u> , 364 N.W.2d 459 (1985)<br>3. <u>Koch v. Speiser</u> , 176 N.W. 754 (1920) |
| Fri., 3/6<br>Class 7  | <b>Review</b><br>Attorney-Client Privilege  | <b>Best 189-202</b><br>1. <u>S &amp; B v. US</u> 524 U.S. 399 (1998)<br>2. <u>Nix v. Whiteside</u> 475 US 157(1986)  |
|                       | Original Writing Rule   | FRE 1001-1004<br><b>Best 218-223</b><br>1. <u>Lucasfilm Ltd.</u> 808 F.2d 1316 (1987)  |
| Fri., 3/13<br>Class 8 | <b>Midterm (Classes 1-7) 1:00-2:30 p.m.</b><br>Hearsay Introduction<br>Defining Hearsay   | FRE 801a, b, c<br><b>Best 63-77, 80-90(start with Surveys), (#1-14, 16-17)</b><br>N.O.F. Classic H.S. Puzzles  |
|                       | Hearsay clip from Ferris Bueller's Day Off:<br><br>"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." | 1. <u>Wright v. Doe d. Tatham</u> , 7 Ad. & E. 313, 112 Eng. Rp. 488 (1837)  |

| Schedule Date                        | Topic  | Assigned Reading   |
|--------------------------------------|--|--|
| <b>Fri., 3/20</b><br><b>Class 9</b>  | Review/Cont. Definition of Hearsay<br>Party Admissions   | <b>Review/Read Class 8 Assignment</b><br>FRE 801(d)(2)(A-E)<br><b>Best 93-106</b><br>1. <u>American Eagle</u> , 85 F.3d 327<br>2. <u>Mahlandt</u> , 588 F.2d 626 (1978)<br>FRE 801(d)(1)(A,B,C)<br>3. <u>Day</u> , 789 F.2d 1217 (1986)<br>4. <u>Owens</u> , 484 U.S. 554 (1988)   |
| 3/27 SPRING BREAK – NO CLASS         |  |  |
| <b>Fri., 4/3</b><br><b>Class 10</b>  | Review/Finish Prior Statements<br><br>Present Sense Impression<br>Excited Utterance<br>State of Mind<br>Medical Diagnosis & Treatment                              | 1. <u>Tome v. U.S.</u> , 513 U.S. 150 (1995)<br><br>FRE 803 (1-4), 803(5) and 612<br><b>Best 107-111, 118-123, (#1-8)</b><br>1. <u>Shepard</u> , 290 U.S. 96 (1933)<br>2. <u>Mutual Life Ins. Co. v. Hillmon</u> ,<br>145 U.S. 285 (1892)  |
| 4/10 EASTER BREAK – NO CLASS         |  |  |
| <b>Fri., 4/17</b><br><b>Class 11</b> | Finish and/or Review<br>Refreshing Recollection<br>Past Recollection Recorded<br>Business & Public Records<br><br>Confrontation Clause                             | FRE 803(5), 612; 803 (6) & (8), 805<br><b>Best, 111-118, 120-127 (#8-17)</b><br>1. <u>Palmer</u> , 318 U.S. 109 (1943)<br>2. <u>Johnson v. Lutz</u> , 170 N.E. 517<br>(1930)<br>3. <u>Beech Aircraft</u> , 488 U.S.153(1988)<br><br><b>Best, 134-135, 140 (#11)</b><br>1. <u>Davis v. Washington</u> , 126 S.Ct<br>2266 (2006) |
| <b>Fri., 4/24</b><br><b>Class 12</b> | Review<br>H.S. Declarant Unavailable<br><br>Former Testimony<br>Dying Declaration<br>Statement Against Interest<br>“Catchall” or Residual Exception<br>Lay Opinion | FRE 804(a)(1-5), 804(b)(1-4), 807<br><b>Best, 127-140 (#1-10)</b><br>1. <u>Salerno</u> , 505 U.S.317 (1992)<br>2. <u>Martin</u> , 695 N.W.2d 578 (2005)<br>3. <u>MacDonald</u> , 688 F.2d 224 (1982)<br>4. <u>U.S. v. Laster</u> , 258 F3d 514 (2001)<br>FRE 701- <b>Best, 149</b>   |

**Schedule Date**  
**Fri, 4/24**  
**Class 12 Con't**

**Topic**  
Lay Opinoin

**Assigned Reading**  
1. Krueger, 707 F.2d 312 (1983)  
2. Holden, 134 A2d 868 (Pa. 1957)

**Fri., 5/1**  
**Class 13**

Review  
Experts

FRE 804(b) (1-3), 701  
FRE 702-705  
**Best, 177-188**  
1. Frye, 293 F. 1013  
2. Daubert, 509 US 579 (1993)  
3. Goeb, 615 N.W.2d 800  
FRE 803(18)  
1. Molkenbur, 411 NW.2d 249 (1987)

Learned Treatises

**Optional Review Sessions: Thurs 5/7 4:00 p.m.-6:30p.m. & Fri 5/8 1:00-3:50 p.m.**

**Final** TBA



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 people.  
--Brutus Hamilton

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

**Basic Evidence Vocabulary**    *Please learn these before the first class ; we will REVIEW some of them in the first class:*

Sustained

Overruled

Case-in-chief, Rebuttal; Surrebuttal

Direct Examination

Cross-Examination

Redirect; Recross;

Motion in Limine

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 611(a)

FRE 611(b)

FRE 611(c)

FRE 615 -- Phelps

Good Faith Basis/Rule 3.3, Rules of Professional Conduct

FRE 601/Lightly – “in camera examination”

FRE 102 - Superman Rule

FRE 103(a)(1) – No Objection

Timely Objection

Late Objection – Motion to Strike

Specific Grounds

## No Speaking Objections

### **FORM OBJECTIONS – IN THE FEDERAL RULES**

(These are not numbered in the FRE)

#### **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. 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. 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, 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 his or her body language, facial expressions, and eye contact that he or 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  
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**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