

**Evidence**  
**Spring Semester 2012**  
**Law 6330-02—M, T, H—1:40 to 2:55 PM, Room L315**

**Course Description and Objectives**

Our objective this semester is to learn the law of evidence so that you can recognize the problems of admissibility in practice and bring to bear the appropriate interpretive decisional law and arguments to the benefit of your client. This skill is essential for any attorney practicing in areas where litigation is possible even if no dispute ever comes to trial. This is because a decision on compromise must include in the calculation the likelihood of litigation and the relative strengths and weaknesses of the case on all sides. This in turn depends on an evaluation of the available sources of information and the possible problems and issues in getting the content of that information through to the finder of fact. In short, evidence admissibility issues bear on settlement evaluations as well as on the outcome of trials and appeals.

As we will discuss at the beginning of this course, the pertinent law of evidence for our purposes is set out in the first instance in The Federal Rules of Evidence, and in a Chapter 90 of the Florida Statutes, called “The Florida Evidence Code.” The former apply in federal litigation, including diversity cases, and the latter applies in litigation in Florida courts. The Federal Rules were recently “restyled” effective December 11, 2011. The Advisory Committee responsible for this rewriting stated it intended to work no substantive changes in the rules. Its design was simply to improve the writing into a more understandable version. Before this rewriting, the language of the Florida Evidence Code was very similar to, but not identical to, the Federal Rules.

Before the Federal Rules and the Florida Code became law (in the mid-1970’s and early 1980’s respectively) the law of evidence was created and refined by judges writing appellate opinions, i.e. there was a common law of evidence. Many of these opinions remain important pillars in the edifice of evidence law and the codification efforts of course were designed principally to distill this common law to a set of organized rules.

You should think of the codifications discussed above as the starting point for a search for the pertinent law of evidence bearing on the resolution of a recognized evidence issue. They are thus similar to statutes in other areas of law. They do not however, as they could not, eliminate the interpretive effort necessary to apply any particular rule to an issue imbedded in its unique set of facts. Hence, the “law of evidence” today is found often if not usually in appellate opinions interpreting and applying both codified rules and precedent to a unique set of facts. And as is true in most other law school subjects, the facts are often where the action is.

Thus, if one is to reach the course objective as stated in the first sentence of this section, one must understand the decisional law described above including its nuances and possible permutations. This level of understanding includes not only recollecting the important facts and

reasoning of the court, but also the ability to assess how the language can be bent to your purposes as an advocate arguing for a particular outcome given your new and unique facts.

The class will consist of your reading the judicial decisions and other materials assigned by me: (1) from our casebook (Waltz, et al, *Evidence, Cases and Materials* (Foundation Press, 11th Edition), and (2) some supplemental materials, including some Florida decisions, posted by me to the Course Blackboard. The class will consist mostly of lecture but I will expect students to be prepared and able to respond to questions concerning the assigned reading for the class. The reading is required and a condition for receiving credit for the class. If you sit for the exam you are certifying to me and to the College of Law that you have read all the assigned cases and materials. The reading burden is not onerous, but it is required.

You will read judicial decisions construing and applying both the common law of evidence, and the codified law of evidence in the Federal Rules of Evidence and the Florida Evidence Code. The Federal Rules served as the template for the drafting of the Florida Evidence Code back in the 1970's. Hence, Federal evidence decisions often provide persuasive authority for Florida judges and lawyers. That said, Federal decisions interpreting the Federal Rules of Evidence, including the United States Supreme Court decisions, are not controlling precedent in Florida. Further, there are some significant substantive differences in the rules themselves.

You will also read a few decisions that construe and apply the defendant's Sixth Amendment right to be confronted by the witnesses against him in a criminal case. This issue arises when the prosecution offers hearsay evidence containing out of court assertions by third parties who do not appear at trial as prosecution witnesses. Here, unlike Federal decisions interpreting and applying the Federal Rules of Evidence, decisions of the Supreme Court are controlling law in all the states.

### **The Casebook and Blackboard Materials**

The casebook is Waltz, Park & Friedman, *Evidence, Cases and Materials* (11<sup>th</sup> edition Foundation Press). The existing Federal appellate decisions apply the previous version of the Federal Rules. This version is set out in Appendix A of the casebook, beginning on page 937. I shall post to the Blackboard the *2011 Update Memo* supplied by the editors to their casebook. This Memo beginning on page 37 sets out the new restyled Federal Rules in a side-by-side comparison chart with the previous Rules. You will need to refer to this frequently in the class. As stated earlier the Committee responsible for the restyled rules stated its intent was to make stylistic changes only, in order to facilitate a better and easier understanding of the meaning of the Rules. Whether this turns out to be the case remains to be seen. I shall also post to the Blackboard an edited version of the Florida Evidence Code to which you will also need to refer.

### **Student Responsibilities—Class Attendance and Required Reading**

I will cover many topics and decisions in class that will not be in the assigned readings, or may be covered therein only superficially. Your grasp of all these matters will be evaluated by

the final examination and some of them will be detailed and specific in nature. In my opinion class attendance and the taking of good notes are necessary for success in this class.

The College of Law requires you to attend a minimum of 80% of class meetings to receive credit for the course. If you cannot satisfy this requirement please notify the Associate Dean to discuss your options. If you sit for the exam you are certifying to the College of Law that you have met its attendance rule.

The reading assignments are required by me. The reading is not optional. The class discussion and the readings will overlap in large part but there will be parts of each not included in the other. Both will be covered on the final examination.

### **The Final Exam and Specified Grading Standards**

Your grade will be exclusively a function of your performance on one final examination. I'll correlate performance to grade in compliance with the applicable College of Law rule specifying grade distribution. The examination will be "closed book"—no outside materials are permitted. The test will be mostly objective but you will also have an opportunity to write an answer in essay form. I will read your answer to evaluate student performance at the top of the raw score curve (i.e., to assign grades of 90 and above) and to break raw score ties at any level if necessary to comply with the COL grade rule. I will not evaluate essay answers to improve lower grades including failing grades. I will write questions that ask you to demonstrate your knowledge of the assigned readings and the subjects discussed in class and your ability to apply that knowledge.

### **Contact Information**

My specified office hours are Monday, Tuesday and Thursday from 1:00 to 1:40 pm, in a room to be designated later. Please see me in class to arrange a specific location and time, if necessary.

### **AMERICANS WITH DISABILITIES ACT:**

Students with disabilities needing academic accommodation should: (1) register with and provide documentation to the Student Disability Resource Center; (2) bring a letter to the associate dean indicating the need for accommodation and what type. This should be done during the first week of class.

For more information about services available to FSU students with disabilities, contact the

**Student Disability Resource Center  
874 Traditions Way  
108 Student Services Bldg.**

**Florida State University**  
**Tallahassee, FL 32306-4167**  
**(850) 644-9566 (TDD/Voice) (850) 644-8504 (TDD)**

**sdrc@admin.fsu.edu**

**ACADEMIC HONOR CODE:**

Students are expected to uphold the Academic Honor Code published in The Florida State University Bulletin and the Student Handbook. The Academic Honor System of The Florida State University is based on the premise that each student has the responsibility (1) to uphold the highest standards of academic integrity in the student's own work, (2) to refuse to tolerate violations of academic integrity in the university community, and (3) to foster a high sense of integrity and social responsibility on the part of the university community.

**Required Readings**

Casebook: Waltz, Park and Friedman, *Evidence, Cases and Materials* (11th edition, Foundation Press) (page references below are to the casebook); “BB” designates references to the Course Blackboard where the item is found in the “Course Library”). References to the Federal Rules of Evidence are to the “Restyled Rules” which are contained in the 2011 Update Memo posted to the Blackboard in the “Course Library.” They are listed there side-by-side with the Rules as formerly worded.

**I. The Sources of the Codified Rules of Evidence: Federal and Florida.**

A. **Read:** *Note on the Federal Rules & the Florida Evidence Code* (BB).

**II. Some Basic Procedural Issues.**

A. **Read:** *Weir v. State* (BB)

**III. “Relevance” as the Bedrock Requirement for Admissibility.**

A. Relevance to the Legal Issues Framed by the Pleadings

(1) **Read:** James, *Probability and the Law*, pp. 74-76.

B. Relevance to the Credibility of Witnesses.

(1) **Read:** *Knapp v. State*, pp. 79-80.

(2) **Read:** *State v. Oswald*, pp. 457-460

(3) **Ponder:** Questions 1-4, p. 460.

(4) **Scan:** FRE 608(a) & (b) and FRE 609(a) [FRE = Federal Rule(s) of Evidence]

**IV. The Judicial Discretion To Exclude Relevant Evidence.**

A. **Scan:** FRE 403 & FRE 404(b).

B. **Read:** *US v. Beasley*, pp. 121-125.

C. **Read:** *Old Chief v. US*, pp. 81-90.

**V. Establishing the Relevance of Documents and Physical Stuff – “Authenticity” .**

- A. **Scan:** FRE 901, 902, 1005, and 1006.
- B. **Read:** *US v. Hampton*, pp. 645-646 (including the Note at the bottom of p. 646).
- C. **Read:** *US v. Bonds* (BB).

## **VI. What Is Hearsay Evidence?**

- A. The General Theory.
  - (1) **Read:** *Estate of Murdock*, pp. 187-189.
  - (2) **Read:** *US v. Zenni*, pp. 198-203 (including the Note on pp. 202-203).
- B. Assertions Offered To Prove Something Other than “the Truth of the Matter Asserted.”
  - (1) **Read:** *Subramaniam v. Public Prosecutor*, pp. 189-190.
  - (2) **Read:** *Vinyard v Vinyard Funeral Home, Inc.*, pp. 190-191.
  - (3) **Read:** *Johnson v. Misericordia Com. Hosp.*, pp. 191-193
  - (4) **Read:** *US v Hernandez*, pp. 196-197.
  - (5) **Read:** *Henges, Assoc., Inc. v. Industrial Foam Products, Inc.* (BB)
- C. “Hidden Hearsay” and the Personal Knowledge Requirement.
  - (1) **Read:** *US v. Brown*, pp. 213-215
  - (2) **Read:** *City of Webster Groves v. Quick*, pp. 215-216.

**[To be continued.]**