

# Evidence Teaching Wisdom: A Survey

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## I. SURVEY CONCEPT

A law school course on evidence offers a rich variety of pedagogical approaches. The classroom possibilities in this area of the law stem from the role of evidence law in creating the factual record of a case. The familiar dynamics of the trial offer dramatic opportunities that can enhance learning. Abstract rules can be understood in a variety of ways: case analysis;<sup>1</sup> direct application to a series of problems;<sup>2</sup> the simulated posing, opposing, and resolving of objections arising under the Rules of Evidence;<sup>3</sup> or some combination of these approaches. It is not surprising that all of these pedagogical methods are reflected in the teaching approaches of evidence faculty.

This Survey secures data on the methods American law school faculty use to teach the law of evidence. The Survey provides insight into the teaching of evidence and facilitates discourse among evidence faculty on how we teach the course, for the benefit of new or occasional instructors as well as veterans. Specifically, the Survey focuses on the question of which classroom instruction approach predominates among evidence professors.<sup>4</sup>

The author learned the subject at Northwestern University School of Law from Professor Jon Waltz, an eminent evidence teacher

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1. See Edward L. Kimball & Larry C. Farmer, *Comparative Results of Teaching Evidence Three Ways*, 30 J. LEGAL EDUC. 196 (1979) (comparing student performance, satisfaction, and effort under casebook, problem, and self-instruction approaches to learning evidence).

2. *Id.*

3. *Id.*

4. Compare Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996) (including in the survey all full-time professors at ABA accredited schools—approximately 2,000—across a variety of law school subjects).

and scholar,<sup>5</sup> under what is termed the “case approach.” Having taught the subject for over twenty years using the “problem approach,” the author surveyed evidence law teachers of similar vintage to assess their aggregate wisdom about teaching effectiveness in this area of the law.

In the process of drafting a simple instrument to generate data on this point, the inquiry expanded to secure information on other topics that might be of interest to new and seasoned evidence faculty.<sup>6</sup> In addition to questions about the effectiveness and drawbacks of the problem and case approaches, the Survey asked about the following: (1) the percentage of classes that were lecture; (2) the use of audiovisual and other graphic aids; (3) midterm evaluations; (4) student participation; (5) supplementary materials; (6) syllabuses; (7) exams; and (8) the overriding challenges of teaching the subject of evidence. The Survey is included in this Article as Appendix I.

The Survey was limited to evidence teachers in the Association of American Law Schools Directory who were listed as having taught the subject for at least ten years.<sup>7</sup> The Directory, the most comprehensive reference of American law faculty, listed 328 names of evidence faculty in this tenure category. Internet communication made it possible to circulate the Survey quickly in the body of an e-mail message and secure practically instantaneous responses. The author encouraged respondents to respond briefly using the reply option. A number of surveys were undeliverable because of problems with the addresses carried in the Directory. Some who had been listed as having taught the course for the last ten years had discontinued the course offering. Most of the respondents replied immediately, although there were a few who set aside the Survey and responded later. The author did not follow up with those who did not respond and did not attempt to secure new addresses for those surveys that were not deliverable at the old addresses. Using this approach, the author secured seventy-nine usable responses, roughly 24% of the evidence teachers surveyed,<sup>8</sup> and of that number, fourteen (18%) were authors of either case- or problem-oriented evidence texts.<sup>9</sup>

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5. Professor Waltz is currently the Edna B. & Ednyfed H. Williams Professor of Law Emeritus at Northwestern.

6. The author received helpful feedback from colleague Kevin McMunigal about the scope of the survey.

7. AALS DIRECTORY OF LAW TEACHERS 1253–55 (2001–2002).

8. All percentages are rounded to the nearest percentage point.

9. This response rate is roughly comparable to the approximately 28% return rate in the Friedland survey, *supra* note 4, at 14. It is considerably better than the approximately 13% response rate in *Report of the Committee on Teaching Methods, The Problem Method, 1966: Survey and Appraisal*, 1966 ANN. MEETING ASS'N AM. L. SCH. 198 [hereinafter 1966 AALS Report].

There is no clear line of demarcation between the case and problem approaches to teaching evidence, and one's approach is, of course, driven by the teaching materials. Texts that use what is termed in this Article as the "case approach" typically feature cases, problems, questions, and commentary; the texts using what is called the "problem approach" contain problems, text, and some smaller number of cases as well. For purposes of distinguishing between approaches as clearly as possible, the Survey uses the following definitions: the case approach is defined as using texts that feature the edited versions of full judicial opinions followed by notes, questions, problems, or some combination of the three; the problem approach is defined as using teaching materials that feature textual discussion almost exclusively, followed mainly by problems, with few edited opinions. While most teachers will use one of these two teaching methods, others use a hybrid approach. Teaching materials for the hybrid approach might include a treatise, the Federal Rules of Evidence (FRE), problems, cases, and the professor's own materials.

## II. SURVEY RESULTS<sup>10</sup>

Among the seventy-nine respondents, thirty-six professors use what is described as the problem approach. This constitutes 46% of the respondents. The problem approach used by these professors conforms fairly strictly to the format of problem texts. The students read textual materials from the primary and secondary texts, work the problems in advance, and discuss the problems in class with some interspersed lecture.

Twenty-six (33%) of the respondents use the case approach. As discussed later, that approach usually involves more than simply having students read the Rules and brief cases for discussion in class.

The remaining seventeen respondents, or 21%, use some hybrid approach—usually a combination of problems, cases, simulations, and other techniques. A numerical breakdown of the survey data is set forth in Appendix III.

While the case and problem approaches have become standardized, the Survey reveals considerable variation in hybrid approaches. A sampling of these approaches includes the following: (1) using case-approach materials with about half the discussion in each class session based on hypothetical problem handouts and electronic teaching software; (2) combining a problem-oriented text with the professor's own materials, consisting of cases and some statutory materials; and (3) us-

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10. Surveys are on file with Seattle University Law Review. Unless otherwise noted, survey responses are the source of quoted material in the Article.

ing a problem approach supplemented by cases, or a case approach supplemented by problems, with simulations featuring role playing with the students and professor. The role-playing simulations are designed to help students recognize objectionable materials and learn to articulate objections and responses to objections. One professor occasionally offers a one-hour presentation course for a limited number of students (approximately twelve) selected from the much larger evidence class. During this small group session, students apply through simulations what they have learned from the regular course. Another professor lectures for the first ten weeks of the semester using an electronic textbook that features an annotated trial transcript to exemplify evidence principles. This is followed by one-half week of an "L.A. Law" episode (watched from beginning to end with student comments), and the remainder of the course consists of written problems that allow students to role-play as witnesses, direct and cross-examiners, and judges. One professor uses what he calls a paradigm approach, featuring a set of paradigm facts from a case or hypothetical for each concept or rule. Another uses trial vignettes in which evidence issues arise within a trial situation, such as an examination, offer, or motion. Students prepare for these exercises outside the classroom. Evidence professors tend to fall mainly into the two categories defined by the problem and case approaches. However, as this sampling suggests, the Survey revealed a rich variety of approaches to teaching evidence.

### A. Effectiveness

Survey respondents provided well-articulated rationales for choosing one method of teaching over another. The rationales focus on professorial judgments about how to best deliver value to the students.

#### 1. Problem Approach

Those professors choosing the problem approach expressed the recurring and interrelated themes of engagement, application, efficiency, and the advantages of the approach as a learning vehicle. Professors indicate that the problems better capture and hold the attention of students.<sup>11</sup> Comments relating to engagement note the fun and re-

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11. A number of the footnotes between 11 and 21 have numerical listings. These numbers are only for organizational purposes and were not part of the survey.

The comments that follow reflect the engagement theme: (1) "The problem method gets students to work directly with the text of the Federal Rules more effectively than the case method." (2) "It gives students a sense of how these issues arise in the real world." (3) "[Problems provide

alism of the problem approach, the direct work with the text of the FRE, and relief from the case method. Perhaps contributing most significantly to student engagement is the constant application of the Rules to problems.<sup>12</sup> The components of application, including knowledge of the content and structure of the Rules and the ability to control complexity under the problem approach, led professors to applaud this approach as a superior learning vehicle.<sup>13</sup> If the problem approach is the vehicle, efficiency in the coverage of materials is considered by some to be the engine, or at least a major spark plug. The problem method's characteristics facilitate coverage: problems are comprehensive and straightforward, and the supporting textual material has explanatory power.<sup>14</sup>

## 2. Case Approach

Professors preferring the case approach articulate the themes of realism and the value of judicial thinking regarding evidentiary issues. They see a value in exposing students to the actual contexts of evidentiary problems and the analysis that judges employ to address those

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the opportunity for] the study of evidence from the viewpoints of lawyers . . . and trial judges." (4) "[Problems are] more fun than another round of analyzing cases." (5) "[Problems are] a nice change . . . [from] the case method, which dominates . . . first year." (6) "Students stay engaged . . . . [P]roblems . . . seem[ ] to demystify the subject for them . . . ."

12. Professors made the following comments in reference to application: (1) "[The] problem approach effectively dramatizes how rules apply in practice." (2) "Problems . . . and . . . hypos help me to keep drilling the concepts so the students get it, and understand the correct analytical approach." (3) "Students learn a method of analysis much better with this approach." (4) "Students are likely to read and learn the FRE." (5) Not only does it [the problem approach] require them to take a more instrumental view of the rules, but the difficulty of actually applying them also highlights problems of ambiguity and other lack of clarity in the rules themselves."

13. This view is expressed in the following ways: (1) "The problems are more generalized and less subject to the anomalies of odd fact patterns." (2) "I think students learn the most from discussing specific hypothetical problems that move from the basic structure of the rules to more complex applications." (3) "Problems stimulate the most thoughtful discussion." (4) "[S]tudents think strategically about proving a case and then figuring out how they can prove it in view of . . . rules and cases." (5) "[Problems] help create context for the student, which assists both understanding and memory." (6) "Teaching evidence at the proper depth requires application and making the connections; . . . students learn more and better." (7) "Students must . . . know and understand the FRE rule(s) that is (are) applicable in order to work out an answer to each problem."

14. The efficiency theme is reflected in these comments: (1) "[With the problem approach] there are no hidden balls; the text lays out the rules/issues and the problems give a situation in which students can apply them." (2) "[S]tudents have had the opportunity to think about them [problems] and prepare answers to them prior to class—they don't have to 'write down' the problem at the same time as they are thinking about potential solutions." (3) "Text explains what is going on more effectively than cases can, and the problems force the students and the teachers to think and talk about what the rule might mean when applied." (4) "[T]he text eliminates the need for a lot of explanation. More points can be illustrated and/or worked on with the problems, and students really get into the development of theories of relevance."

problems. For these professors, cases are richly textured, real problems, and analysis of the opinions educates students by providing either an example or a basis for critique.<sup>15</sup> Some professors using the case approach expressed the view that cases are a better learning vehicle, and that they are more fun and efficient.<sup>16</sup>

### 3. Hybrid Approach

As one might expect, those respondents using a hybrid approach believe that neither the problem nor case approach is up to the challenge of satisfactorily teaching evidence students. The remarks of these respondents reflect a conscious blending of the themes of engagement, realism, application, judicial thinking, and efficiency, to produce a superior pedagogy. For proponents of the hybrid approach, teaching "evidence in action," or selecting from among the best features of the case and problem approaches, is a superior method of teaching.<sup>17</sup>

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15. These views are expressed in the comments that follow: (1) "Real cases put flesh and bone on the legal issues. I think it heightens student interest." (2) "[I]t's important for students to see how the issues actually arise and how courts grapple with them." (3) "Students learn evidence doctrine in the context of difficult cases that I select. They are presented interesting fact situations and can critique how courts handle, or mishandle, evidence doctrine." (4) "Cases give a perspective that problems alone do not." (5) "Cases provide stories that stretch the imaginations of the professor and students. They also provide a valuable lesson that courts are sometimes imperfect." (6) "I like the reality of the cases; and they are primary legal materials." (7) "[C]ases really are 'problems' but from 'real' life. . . . Also, the judicial thought that 'usually' goes into the opinions typically gives students a good sense of the competing policy arguments." (8) "[C]ases often reveal unexpected dimensions and contain . . . the stuff of life." (9) "Students are confronted with real-world cases, involving real issues, and [they] see how courts have dealt with them."

16. Those professors state: (1) "[The case approach] is a good way to raise evidence issues in context and to cover a large amount of material efficiently." (2) "[I find] it useful to have a concrete factual situation to use as a springboard to more general discussion of the particular problems raised by the decision." (3) "I can use the cases as vehicles for discussing the evidence rules. . . . [The] cases selected in the book are fun and memorable."

17. One respondent using a combination method (approximately 1/4 cases and 3/4 problems) says of this method:

Enthusiasm. Better preparation. More discussion. Better learning. . . . [Getting students to argue] points among themselves [in small groups is] . . . a terrific way to get them to teach themselves. Overall, what is most effective is the variety . . . . The variety helps keep them interested and the variety accounts for different ways of learning.

Regarding use of the problem approach with a case text, one professor states that "[p]roblems force the students to apply the Federal Rules, while cases add realism and also provide authoritative examples of applying the Rules." Another professor remarked,

[S]tudents stay engaged. Stressing hypos and problems in class seems to demystify the subject for them and makes for a brisk pace and a fun class. At the same time, casebook reading is something to which they are very accustomed as 2Ls and hence seems a reasonably economical way to both convey the essential background and en-

Choosing which approach to use requires professors to make conscious tradeoffs. Problem-approach users trade realism and judicial performance for the efficiency of textual exposition and the benefits of constant application. On the other hand, problem users settle for artificiality in dealing with fabricated rather than real problems. Free of a commitment to one approach over another, hybrid users are much more conscious of combining the best features of the two approaches with innovative, experimental tasks.

### B. Challenges

Professors were also candid about the challenges associated with each of these approaches. None of the three approaches is free of challenges. For the new or occasional evidence teacher, articulation of these method-specific problems provides the opportunity to match teaching methods with the teacher's strengths or preferences.

#### 1. Problem Approach

Although one professor proclaims that the problem approach presents no challenges, others note a variety of pedagogical issues. First, noting that the problem approach relies upon student preparation for its effectiveness, professors cite the unevenness of class preparation.<sup>18</sup> Second, the unpredictability of class pacing as students grapple with problems creates coverage issues.<sup>19</sup> Third, reorienting students from case analysis to understanding and applying rules, principles, and policies can generate student discomfort.<sup>20</sup> Fourth, profes-

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sure that they get that background in the context of real cases. I also occasionally use the cases themselves, and hypos spun from the cases in class discussion.

Finally, a respondent using simulations says that "students are exposed to evidence-in-action rather than evidence principles demonstrated in problems, appellate reports, or treatises."

18. Comments included the following: (1) "[The approach] doesn't work unless students are prepared." (2) "Getting students to invest time and effort in preparing the problems prior to class. Some invest a great deal of effort. Others invest little and wait for the professor to analyze the problem for them." Cf. Kimball & Farmer, *supra* note 1, at 202–04 (finding the time spent in individual study and preparation to be slightly less for students under the problem approach than the case approach, but in-class attendance time for students under the problem approach was slightly more).

19. Respondents stated: (1) "Really doing the problems carefully usually takes more time than you expect. Students can take the issues in a number of directions. . . ." (2) "Input to class may be somewhat disjointed and unorganized. [There is] difficulty in covering the massive body of materials in the time allowed when students spend a lot of time with each problem. Pacing the class/coverage is hard."

20. Comments included: (1) "Students have to be weaned from case analysis." (2) "Students have developed [the] skill of finding the few 'nuggets' in a multipage case report and now have to shift gears to reading text where the nuggets are in every paragraph or even sentence—getting them to make this shift effectively is the challenge." (3) "The problem approach raises students' anxiety by failing (often) to provide a clear 'right answer' to each problem, and that has

social discomfort may exist for professors without a background in trial work.<sup>21</sup> Finally, ensuring that students see the point of the problem is articulated as a challenge.

## 2. Case Approach

Like the problem approach, the case approach also has the single devotee who sees no real challenges in using the case approach; however, other professors using this approach note three kinds of challenges. First, professors note the challenge of getting students to appreciate how the rules are actually used in court and the effect of evidentiary error on the ultimate outcome of the case. One professor describes the challenge this way:

[The problem is] getting the students to see how the evidence issues arise in the hurly-burly of the trial and the various disguises in which they appear; and to see the effect of the evidence rules on what the litigator does pre-trial and at trial to avoid/prevent evidence problems[,] or to "tee them up" for a court ruling. The case law approach requires adding a whole other level of reality that is screened out by just reading appellate opinions. But, still, opinions tell "little stories," nicely self-contained and sometimes quite memorable. My job is to use them as a key-hole to the bigger world of what the trial lawyer does/must do given the overlay of extremely complicated evidence rules, and expose the students to that world.<sup>22</sup>

Second, professors cite the difficulty of generalizing from the particular case to the variety of issues raised by the applicable federal rule.<sup>23</sup> Finally, respondents cite other problems such as the complexity and inefficiency of the case approach as compared to the problem approach, and suggest that the problem textbook "offers the students a faster way to a basic level of comprehension than does the case method."<sup>24</sup>

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to be addressed." The professor making this observation actually sees this as a strength of the approach, not a weakness.

21. The following comments were made by respondents: (1) "The teacher has to know the trial context." (2) "[The approach] requires complete knowledge of the [R]ules and the comments." (3) "[T]he professor must be truly expert."

22. Another professor complains that appellate decisions "often present the unusual, and when an appellate court reverses a trial court[,] students get the misleading impression that evidence issues are frequently important grounds for reversal on appeal. We know the opposite to be true."

23. This was expressed as a challenge associated with covering points not directly raised by the selected cases and the difficulty of orienting students to the rules.

24. One professor suggests that depending on the casebook, the cases may be too advanced.



### 3. Hybrid Approach

Professors who try some combination of the case and problem approaches or simulations point to similar challenges—especially student preparation. Other problems associated with this approach include overcoming student resistance to a new approach, making difficult judgments about the amount of time to devote to innovations such as trial vignettes, avoiding overemphasis on advocacy, and handling student bashfulness.<sup>25</sup>

#### *C. Meeting the Challenges*

##### 1. Problem Approach

Professors address preparation problems by using a variety of devices to hold students accountable for the materials. A sampling of these devices includes the following: (1) assigning panels of students to each set of problems; (2) dividing the class into groups that are responsible for leading the class discussion or for taking opposing positions and ruling on evidentiary issues presented by the problems; (3) making sure that students know what material will be covered in class; and (4) counting class participation in the final grade.

Professors have also been diligent in addressing coverage, student discomfort, and confusion issues. Approaches to dealing with coverage concerns include lecturing, speeding up, assigning some materials as read-only, assigning problems and giving students the answers, and exercising more discipline in selecting the number of problems to assign. To ease student discomfort, professors rely on “practice, practice, and more practice” until students develop the necessary skills that lead to a greater degree of comfort with the problem approach. Summaries at the end of sections and key problems help students see the point of problems.

##### 2. Case Approach

To deal with the problem of appellate decisions obscuring the strategic use of evidence rules in practice, one professor said:

I stop talking about the holding of the case at hand and ask what the lawyer . . . should have done at trial or before trial to win or avoid the evidentiary problem. I also try to show them (many of

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25. One professor notes losing students because a bit of creativity and oral skill is required to lay a foundation or conduct a cross-examination. But, that professor adds, the rest of the class learns much from this as the students prepare to help others.

whom will not be litigators) that evidence law is a valuable subject outside of litigation.

Professors also take steps to compensate for other perceived deficiencies in the case approach. To avoid the misimpression that evidentiary issues are frequently a basis for reversal, one professor explains to students that the reversing appellate courts may be unusually sensitive to the impact of evidentiary rulings. This professor also uses cases to show how the abuse of discretion standard may be more malleable than it seems.<sup>26</sup> Professors supplement cases with many hypothetical problems that provide students with the opportunity to practice applying the rules. This helps students think beyond the narrow issues of cases. To help students attain a base level of comprehension, lecture, questions and answers, or a combination of the two is suggested. And where the cases are too advanced, starting the subject with simple hypothetical problems is suggested as a sensible alternative.

### 3. Hybrid Approach

Evidence professors become salespersons in trying to persuade students to accept a more activist model of instruction. Through pep talks that encourage the students to give the new method a try, professors manage to combat student resistance to innovative approaches. These pitches may include concrete suggestions. For example, the professor may have students sketch their plans for a direct examination on paper at home, and then leave the notes at home. Or, the professor might encourage students to take a clinical course simultaneously to reinforce the concepts of evidence law. Professors may also seek to instill in the students an appreciation for the opportunity to perform in the classroom. This is accomplished by informing the students that the stakes will never be lower than in the classroom, and that trying a case is an imperfect process.

#### *D. Switching Approaches*

The incidence of switching approaches provides further insight into the perceived advantages and disadvantages of the three teaching methods. Not unexpectedly, users of the hybrid approach switched most frequently, followed by the problem and then case approaches. This comparison suggests that fewer teachers have chosen the case approach as a result of dissatisfaction with other approaches. It also

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26. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997) (explaining that the abuse of discretion standard is applicable to judicial rulings to admit as well as exclude expert testimony).

shows a greater level of dissatisfaction with the case approach among problem-approach users. As expected, the case and problem approaches combine to produce the highest level of dissatisfaction among subscribers to a hybrid approach. Forty-one of the respondents, or 52%, have tried another approach to teaching evidence.<sup>27</sup>

### 1. Problem Approach

Of the thirty-six respondents currently using the problem approach, twenty-three (64%) have used the case approach and switched. Respondents gave reasons for the switch that are similar to the rationales adopted by current problem-approach users.<sup>28</sup>

### 2. Case Approach

Of the twenty-six respondents currently using the case approach, seven, or 27%, had used and abandoned the problem approach. Those who switched from the problem approach to the case approach gave reasons that provide a critique of the problem approach not seen in the previously cited rationale. One respondent stated that “problems in most books are usually too brief to provide the rich context in which evidentiary problems arise; it is too easy for our students to look at problems and then come to quick and facile conclusions, which leads to [a] false sense of preparation.” Another complained of the artificiality of fact patterns “designed to test only a single doctrine or aspect of evidence,” concluding that “problems are too sterile and antiseptic to allow for rich analysis.” Other critiques of the problem approach articulated by professors who formerly used that method include the following: (1) the problem approach focuses too much on technical details; (2) students do not take responsibility for their share of the work; (3) students need to be exposed to cases in which the Rules are applied; and (4) students and professors alike become bored with the problems.

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27. See Appendix III.

28. Switchers to the problem approach gave the following reasons: (1) cases do not help students manipulate and apply the Rules; (2) cases are boring for the professor and did not force students to learn for themselves as much as the problem method; (3) cases are boring for students; (4) cases present the anomalies of odd fact patterns; (5) problems are a lot more fun and a more efficient learning technique for a rules-based course; (6) cases confused students who thought the cases stood for rules of law rather than examples of the application of Rules; (7) appellate decisions contain facts that are only marginally important, which leads to students not reading cases carefully or spending too much time understanding facts, context, and procedural history; and (8) problems work better. One switching professor noted that “there is no substitute for a few really meaty cases, however. Students need to see how the courts reason as well.”

### 3. Hybrid Approach

Of the seventeen respondents using a hybrid approach, eleven, approximately 65%, had previously used another approach. Six of the respondents that had previously used another approach, or 55%, used and abandoned both the case and problems methods because of the shortcomings that have been identified for each.

#### *E. Other Data*

Professors using the problem approach spend from 0 to 60% of the course lecturing, with the highest number of respondents reporting that 5 to 25% of the course time is spent on lecture. Among those using the case method, the percentage of lecture time ranged from 0 to 100%, with the highest number of respondents selecting the 10 to 25 and over 50% ranges. Respondents in the hybrid category lecture 0 to 80% of class time, with the majority lecturing 25% of the time or less. It is not surprising that the more active problem and hybrid learning approaches feature less lecture time. Respondents in all categories use audio and visual aids such as electronic slide shows, transparencies, blackboards, whiteboards, props, case exhibits, videotapes, movies, trial vignettes, and outlines.

Thirty-two of the seventy-nine respondents (41%) give quizzes and other graded assignments during the semester.<sup>29</sup> Though this is most often true with those using the problem approach (53%), it is also true for those using the case (25%) and hybrid (22%) approaches.<sup>30</sup>

A noteworthy distinction between the problem and case approaches is the high incidence of team and small group assignments and role playing under the problem approach—92%—compared to 12% under the case approach. Only three of the case approach respondents reported assigning teams. Of the seventeen respondents using a hybrid approach, 29% build in role-playing simulations.<sup>31</sup> The remaining respondents in this category do not use team assignments or role playing.

All but four of the respondents use a statutory supplement in a separate volume. Those not using a separate volume rely on statutory appendices accompanying the text. The majority of statutory supplements used by respondents (52%) contain the FRE and Advisory Committee Notes (ACN). Seventeen percent contain only the FRE, and another 17% contain the FRE, ACN, author's commentary, and

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29. In most cases these count toward the final grade.

30. See Appendix III.

31. See Appendix III.

recent cases. Seven percent of the supplements include the FRE, ACN, and author's commentary, but do not contain cases.<sup>32</sup>

A majority of professors in each category use detailed syllabuses. Respondents in the hybrid category use somewhat detailed or very detailed syllabuses at the highest rate (76%), followed by the problem category (67%) and the case category (54%). This breakdown makes sense in light of the unconventionality of the hybrid approach: the professor's expectations require a more thorough explanation. Similarly, the problem approach may well call for a more detailed syllabus than the case approach because of the number of problems and amount of textual and supplementary material assigned, as well as role playing and group assignments that might be assigned under each topic.

Professors in all three categories extensively use partially or fully objective final examinations. Sixty-nine percent of the respondents using the problem approach use either partially or fully objective or short answer final exams. This type of exam is also used by 77% of the case approach users and 82% of those using the hybrid approach.<sup>33</sup>

Question fourteen of the Survey evoked a range of well-articulated responses that should both assist the new or occasional evidence teacher in planning the course and resonate with regular teachers. The question asked for the respondent's view of the greatest challenges in teaching evidence. Responses have been grouped by teaching approach and are set forth in Appendix II.

### III. CONCLUSION

The publication of the first problem text in 1973 suggests that the case approach was more prevalent thirty years ago,<sup>34</sup> although there was no comparable survey of teaching approaches in evidence at that time and the case approach had already come under some criti-

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32. These percentages are based on sixty-nine of the seventy-nine respondents answering this question.

33. Many cited the high volume of exams to be graded as a reason for this preference, and others defended the pedagogical soundness of these evaluation tools.

34. Cf. 1966 AALS Report, *supra* note 9, at 205 (featuring a survey of the use of the problem approach in American law schools and virtually no Evidence faculty respondents). See James M. Klebba, *Book Review*, 30 J. LEGAL EDUC. 601, 602 n.2 (1980) (noting that the first textbook using a problem approach was BROUN & MEISENHOLDER, PROBLEMS IN EVIDENCE (1973)). Klebba also notes that the first new Evidence textbook after the effective date of the FRE was a problems book, RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE (1977). *Id.* at 604.

cism.<sup>35</sup> Professors who switched from the problem to the case approach note that the former is far from perfect. However, this Survey reveals that innovations such as team and small group assignments and role playing are more closely associated with the problem and hybrid approaches.<sup>36</sup> Conversely, some of those switching from the case to the problem approach see the importance of using cases to bring realism and context to the students' perspective. While the Survey indicates that the problem approach predominates over the case approach among current evidence professors, the effective use of hybrid approaches by a significant minority of professors suggests the importance of thinking beyond a bipolar view of evidence-teaching methodology. The Survey is a richly textured snapshot of the thinking behind the teaching and evaluation practices of seasoned evidence faculty. It should inform new or occasional evidence teachers and also pique the imaginations of veterans.

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35. See, e.g., Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 164-66 (1965) (identifying the weaknesses of the case approach and recommending alternative teaching methods after the first year of law school).

36. See 1966 AALS Report, *supra* note 9, at 231 (noting that "[t]he diversity of the roles assumed and their distribution among the groups bear testimony to the problem method's flexibility"). Professor Kimball noted in reporting the results of his experiment that students rated the problem approach as more satisfying. See Kimball & Farmer, *supra* note 1, at 209. More recently, others have extolled the virtues of the problem approach. See, e.g., Myron Moskovitz, *Beyond the Case Method: It's Time to Teach With Problems*, 42 J. LEGAL EDUC. 24 (1992) (noting that the problem is preferable in legal education, as in medical and business education, because it is "especially designed to train professionals") and Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 657-58 (1984) (noting the efficacy of a problem approach in "code-oriented" courses).

## Appendix I

### SURVEY QUESTIONNAIRE: EVIDENCE SURVEY AMONG EVIDENCE PROFESSORS OF OVER TEN YEARS' EXPERIENCE (325)

Dear Professor []:

I am giving a talk on June 1, 2002, at a plenary on the nuts and bolts of teaching Evidence for the new or occasional Evidence teacher. In order to be able to offer something of value beyond my personal experience as an Evidence teacher for over 20 years, I decided to conduct this short survey among Evidence professors with more than 10 years of experience. This should give the new or occasional Evidence teacher the benefit of our aggregate wisdom on the topic.

Though I learned evidence using what I will call the "case approach," I have been using the "problem approach" since I began teaching it. In this talk, I would like to focus on the frequency of different approaches to teaching Evidence and the advantages and disadvantages that Evidence professors see in the approaches that they have selected.

For purposes of this survey, the "case approach" uses Evidence texts that feature the edited version of full judicial opinions followed by notes, questions, problems, or some combination of the three. Though most casebooks use the "case approach," I am using the label "problem approach" to describe books that feature textual discussion almost exclusively followed mainly by problems, with few edited opinions. While most evidence teachers will use one of these two teaching tools, others may use some hybrid approach such as a treatise or the Federal Rules supplemented by problems or cases.

Please take a few minutes to respond in a reply e-mail to the questions below with brief answers. I will share the results at the June Evidence Workshop and in some written format.

## SURVEY QUESTIONS

1. Do you use the "problem approach," "case approach," or some other approach to teaching the basic evidence course?
2. If you use another approach, please describe it briefly.
3. What is most effective about the approach that you use?
4. Are there special pedagogical challenges presented by this approach?
5. How have you dealt with these challenges?
6. Have you ever tried a different approach to teaching evidence?
7. Why did you not stay with it?
8. What percentage of your class discussion involves lecture?
  - a. Do you use audiovisual or other graphic teaching aids?
  - b. How do you grade any feedback, e.g., quizzes provided to students during the semester?
9. What method of student participation do you use, e.g., advanced teams or individual assignments, random selection, voluntary class participation?
10. Do you use a statutory supplement along with the primary textual material?
11. How many of the following does the supplement contain:
  - a. Federal Rules of Evidence?
  - b. Advisory Committee Notes?
  - c. Author's commentary?
  - d. Summaries of recent cases?
12. How detailed is your syllabus?
13. What kind of exam do you tend to write, e.g., objective, short answer, longer essay, and why?
14. In your view, what are the greatest challenges in teaching evidence?



## Appendix II

### THE GREATEST CHALLENGES OF TEACHING EVIDENCE: "IN THEIR OWN WORDS"

Following are responses to question fourteen of the survey: "In your view, what are the greatest challenges in teaching evidence?" The responses are grouped under the teaching approaches used by the professor.

#### *A. Problem Approach*

(1) "Giving the students the sense of the excitement of manipulating the rules for advocacy goals while at the same time making sure they understand the basic legal principles . . . ."

(2) "None; most students seem to enjoy evidence and can relate personally to it, so long as the material is tied to how evidence is actually used before and during trial."

(3) "Convincing students that there are really no right answers to the problems I propose and [getting them] to trust their own judgment."

(4) "Getting students to understand both the practical aspect of evidence law and the conceptual aspect. Most students have little or no experience with trials, so the teacher has to provide enough of an explanation of the trial context to enable students to see why evidence law makes a difference. At the same time, concepts like hearsay and character evidence—and even relevance—are abstract and difficult. The juxtaposition of the practical, which looks easy, and the theoretical, which is often hard, is a teaching challenge."

(5) "(1) Getting students to understand the trial process in which the evidence rules operate. (2) Getting students to grasp the basic ideas of relevance, character and hearsay."

(6) "Some of the topics are difficult but very interesting: hearsay, character evidence. Others are easy but sooooooooooooo boring: authentication, best evidence."

(7) "(1) Taking what is essentially a series of dry technical rules and making them an interesting, coherent whole. (2) Introducing the concepts of logical and inferential thinking to those students who have had no formal introduction to it, and have not heretofore developed an ability to recognize and articulate inferences."

(8) "Ideally it would be folded into trial practice in some way."

(9) “Many of the rules are indefensibly stupid . . . or widely evaded in practice; and the whole system tends to promote gaming and manipulating the system in order to gain tactical advantages or evade effective judicial supervision. . . . The other problem is that the most intellectually interesting issues of evidence law are not necessarily those that most engage students.”

(10) “[B]eing as clear as possible, . . . figuring out a way to make a dense concept (i.e., proving the truth of the matter asserted) understandable.”

(11) “Getting students to understand that they will not understand evidence if they do not do the problems.”

(12) “Understanding the importance of relevance and making sense of the character rules.”

(13) “Getting students to see how evidence, procedure, and substantive law all come together.”

(14) “Hearsay, without a doubt.”

(15) “Context and complexity.”

(16) “Teaching them that that hearsay, unlike proximate cause, has substance—an agreed definition that is mostly applied consistently. Helping them through the morass of character evidence rules. Getting them not to rely on 403 very much at all and never until every other argument had been examined and rejected.”

(17) “Trying to deal with some level of general knowledge about all the different kinds of cases [the] class works with . . . . There is too much . . . law in the course to be covered in the four hours allocated to it.”

(18) “Giving the students an appreciation for the rules in operation.”

(19) “Getting students to read ACN.”

(20) “Evidence is on the bar [exam]. All students think they must take it[,] yet a large number of them are committed to never participating in litigation. Also[,] we get an amazing number of students with absolutely no sense about what goes on at a trial other than what they have seen on TV. . . . [T]he great range of discretion afforded to trial judges is hard for the students to grasp . . . .”

(21) “Getting the students to be very specific and explicit in their reasoning and seeing the importance of relevancy analysis to all evidence issues.”

(22) “Keeping them working hard. Getting them to have a feel for [evidence] in context, rather than just in a book.”

### B. Case Approach

(1) "I would like to find a way to make some of the material more interesting to the students."

(2) "(a) Engaging the students who just want to 'do deals' when they graduate. (b) Putting them into the courtroom itself—where they have never been before, and about which they've learned lots of wrong things via TV and movies. (They have a lot to unlearn.) (c) Getting them to understand WHY the rules are so complicated and so counterintuitive. I start with a lecture on the Anglo-American justice system from the perspective of Mirjan Damaska (*Evidence Law Adrift*) and the European lawyer's befuddlement over why we have such complicated evidence rules. (Answer: the jury.) (d) Getting them to understand Hearsay and Character. 'Grotesque structures' all."

(3) "To convey to the students a sense of how the law of evidence works in the world of practicing law. In other words, to move it off the written page and into the realm of practical application within the context of the judicial system."

(4) "You need to motivate students to be prepared all the way through the course. They cannot learn it at the end of the semester (at least not well). It is also difficult to teach evidence in a way that puts the rule in the context of a trial."

(5) "It is impossible to understand the Rules of Evidence without a class understanding of the substantive law courses. Thus, it is important to bring in elements of other courses that the students have taken or are currently taking."

(6) "The greatest challenges are: (1) to communicate effectively the law of evidence in such a way that the students will understand it and will know how to use it; (2) to hold the attention of the students and try to maintain a level of interest on their part. . . . I do not understand why modern law students do not seem to have much interest in evidence . . . particularly if they are thinking of doing trial work."

(7) "Substance: hearsay and character evidence. [A]lso, many students are unaware of courtroom procedure."

(8) "What should be covered/omitted? Extent of detail on scientific evidence."

(9) "[E]ngaging the students' minds with the subject, keeping the subject interesting, . . . and then getting the material across as clearly as I can. . . . Another challenge is deciding how much material to cover and in what detail."

(10) "It is, of course, a challenge to keep up with developments in the field. And it is a challenge to remain fresh each year."

(11) "Covering a reasonable amount of material in the three semester hours allotted."

(12) "[S]tudents find evidence (particularly the definition of hearsay) very tricky and trying to get them comfortable is certainly a challenge."

(13) "As a wise man whose name I have forgotten said: 'Unlike constitutional law, you can be wrong in teaching evidence.'"

(14) "[T]he greatest challenge is getting students to identify with the problems from the standpoint of the attorney who is the proponent or opponent of certain evidence."

(15) "Keeping self amused after 28 times through the subject. Keeping from being too obvious and too explanatory."

### C. Hybrid or Other Approach

(1) "I see two chief challenges: (1) demystifying the subject: I think it is essential to assure the students that evidence is not a complicated and arcane foreign language but in fact a simple system meant for daily use by every lawyer, such that they can trust their sound instincts and reasoning; and (2) kindling student imagination about relevancy: Students understandably come to an evidence course with limited knowledge of substantive law (and thus what propositions are material in a case) and even less experience with how lawyers actually try to prove those propositions in imaginative and creative ways. Bringing that process to life for the students, and making them comfortable with that process, is a challenge."

(2) "Trying to defend the drafters of the [R]ules. [Inwardly, all the while thinking 'there must be a better way to draft.']"

(3) "Getting the students engaged (and the role playing does that better than anything else I've tried)."

(4) "[I]nducing students who are taking Evidence not because of their interest in it, but because they feel it is an essential part of a legal education, to read the readings carefully, to prepare for and participate extensively in class discussions, and to review the material during the semester."

(5) "Convincing students who only want to know enough evidence to pass the bar exam to take some other evidence class. . . . Getting them to accept the idea that all judges are politicians and that some of them are also stupid and malevolent. Showing them that the subject is not 'easy' in the way *Emanuel* wants it to be."

(6) "[T]o help the students see that evidence rules are . . . about particular inferences. . . . Another significant challenge is that the

students know very little substantive law, thus making the problem of materiality very difficult.”

(7) “Getting students who have no intent to ever use evidence . . . interested.”

(8) “The greatest challenge is to help students see both the forest and the trees. Most students learn an adequate amount about many trees but fail to see the forest which, in my view, is key to true and lasting understanding.”

(9) “Keeping it real, by which I mean retaining a practical focus without shortchanging the policy and historical considerations . . . that have contributed to the shaping of [e]vidence law today.”

## Appendix III

	Respondents		Respondents who switched approaches		Use of quizzes or other graded assignments		Use of role-playing or small group assignments		Use of somewhat or very detailed syllabus		Use of partially or fully objective final exam	
<b>Problem Approach</b>	36	46%	23	64%	17	53%	33	92%	24	67%	25	69%
<b>Case Approach</b>	26	33%	7	27%	8	25%	3	12%	14	54%	20	77%
<b>Hybrid Approach</b>	17	21%	11	65%	7	22%	5	29%	13	76%	14	82%
<b>Total</b>	79		41		32		41		51		59	

\*Values listed in the total row reflect the denominator used for calculating the percentages in that particular column. All other percentages were calculated based on the number of respondents within each category. For example,  $23 / 36 = 64\%$ ,  $7 / 26 = 27\%$ , etc.