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Flip the Switch: Swapping the Socratic Method for Applied Learning in Evidence LAW 646

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Flip the Switch: *Swapping the Socratic Method for Applied Learning in Evidence LAW 646*

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ABSTRACT

This course portfolio documents my evaluation of my teaching methods and student learning in an Evidence law course. My goal was to document positive outcomes associated with applied learning through a flipped course structure. The data, however, suggests that more research is necessary to determine whether there is strong correlation between a flipped course and student learning. The data suggests students are generally performing as expected in the course. It also indicates that providing lectures and problem sets before class is effective but may not be more effective than providing them in class, suggesting the timing of the lectures and problem sets may be less helpful than I had hoped. This evaluation also led me to recognize a flipped classroom may increase the divide between prepared and unprepared students. Finally, my evaluation highlighted students' resistance to active learning methods and a preference for a passive learning environment. This process has informed and provided direction for my future scholarship in legal pedagogy.

KEY TERMS

applied learning, flipped classroom, Socratic method, Evidence Law, problem-based teaching, student resistance to active learning methods

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I. The Objectives of My Portfolio

My goals for this course portfolio were to document and evaluate my teaching methods and student learning, to refine this course, and to inform my scholarship in legal pedagogy. My hope was to document positive outcomes associated with flipping the course to allow for applied learning methods. I hoped to increase active student participation with problem sets and decrease class lectures with before class video lectures.

I chose this particular course for two reasons: (1) I have been reworking my teaching methods, moving to a more structured, flipped, student-lead course and (2) I have been pondering the following questions and how to incorporate their answers into the course:

- What perspectives or attitudes do you want students to have?
- What is important for students to learn about your field?
- What should students learn about themselves as students or as contributors to society?
- How can I empower my students to be a positive force in our justice system?

One problem I face is trying to do too much with the time we have. I want students to leave the course knowing more than just the substantive Federal Rules of Evidence (the Rules); I want them to understand the Rules' impacts on society and be empowered to make positive societal change as they engage in the practice of law. I hope this portfolio process will help me prioritize student learning goals, and in turn my teaching objectives.

With this portfolio process, I endeavored to capture the new flipped structure and whether it increased student learning and to realistically focus the learning goals.

II. The Course

This course covers the Rules and their application in the American legal system, specifically in litigation and at trial. Due to time restrictions, this course cannot cover the complete set of Rules, but it covers the most used Rules in detail. Through the selected Rules, the course covers the broad principles of and rationales for the Rules; the significant laws related to the Rules; and how to argue for or against the admissibility of evidence. The course also touches upon the role and impact of the Rules on American law and society; I am working to increase the time spent on this last topic.

A. The Goals

The main course goal is for students to obtain an enduring knowledge of the substance of federal evidence law so they can use it in their future law practice and pass the Bar Exam. To do this, they must (1) recognize when, and which, Rules are in play; (2) know and recall the “key legal terms” and the law of each Rule; and (3) use the Rules—their legal meaning, precedent, rational and specific language—to argue for or against the admissibility of evidence.

Additional goals for the course are for students (1) to understand the role and impacts of the Rules on the practice of law, our legal system, and our society; (2) evaluate the historical and contemporary rationales for the Rules; and (3) consider their personal role in furthering or dismantling the role the Rules play in our legal system.

Students must achieve these goals because, upon passing the Bar, they will be stewards of our legal system. Even those who do not litigate will have clients affected by the Rules. Additionally, as representatives of our legal and justice system they should be knowledgeable about how it works and how it impacts the lives of others.

These goals are structured into this course through readings, modules, quizzes, and class sessions that put these goals into practice with specific evidentiary rules. This course is broken down into thirteen topics with their own specific student learning objectives and opportunities that connect to the larger course goals.¹ Each topic's objectives tie to the course goals², ranked as follows:

Rank	Course Goal
1	Enduring - Know the substance of federal evidence law
2	Enduring - Recognize when, and which, rules are in play and use the rules to argue for or against the admissibility of evidence
3	Enduring - Know the "key legal terms" to use for each rule
4	Important - Understand the role and impacts of the FRE in the practice of law and our legal system
5	Important - Know the rationales for the rules
6	Important - Understand societal impacts of the FRE

The enduring goals, goals 1-3, are the primary focus of this portfolio process. However, as a part of this course review, I also considered ways to increase the time dedicated to the broader picture of the Rules in our legal system, and thus society, and the lawyer's role in influencing the legal system, goals 4-6.

B. The Learning Outcomes

As previously mentioned, this course is broken down into thirteen topics with specific student learning objectives and opportunities³ for each topic that connect to the course goals⁴.

¹ See APX A

² See APX A

³ See APX B

⁴ See APX A

C. The Context

The Syllabus⁵, a Preparing for this Course lesson⁶, and topic specific materials⁷ are presented to students in the Canvas learning system. The topic modules are structured as follows:

- Topic Overview;
- Video Lecture;
- Problems to prepare for class;
- Quizzes to test student's knowledge;
- Questions to prompt a deeper understanding and facilitate class discussion; and
- Reflection questions and links.

Students attend two 75-minute classes a week for fourteen weeks. After each class, I post "Take Aways"—my summaries of the material, clarifications, answers, and additional problems sets as appropriate.

D. The Connection

This course is a foundational law school course. It is one of six subjects on the Bar Exam. This course is a pre-/co- requisite for Trial Advocacy, which is a prerequisite for the Criminal Practice Clinic. This course is an absolute must for all practicing litigators.

E. The Students

This course is for upper-level law students. All students in the course have completed their first year of law school and have some knowledge about litigation and trial work. Students are familiar with the difference between procedural and substantive law and have a familiarity with civil and criminal law. Most students have had some exposure to law practice, either through work experience or other law courses. Generally, there are two types of students who take this course: (1) students who need the knowledge because they plan to litigate and do trial work and (2) students who want the knowledge because they plan to take the Bar Exam.

The students who plan to litigate will likely have taken other litigation focused courses and may have spent significant time in the courtroom. Thus, they will have context for and be familiar with the Rules. They are also likely to need this course for future law school courses and recognize the importance of Evidence in their future profession. Often the later have little interest in litigation or trial work and may have different learning goals than the students who plan to use Evidence in their law practice.

⁵ See APX A

⁶ See APX C

⁷ See APX D

III. The Teaching Methods

Learning to use the rules of evidence is an active process. The law of evidence is revealed in the Federal Rules of Evidence. Learning real-world application and understanding comes from solving typical evidence problems, working through courtroom-style simulations, and having group discussion.⁸

This course is design to have students prepare for class with pre-class video lectures, problem sets, and quizzes; attend class with the goal of developing a deeper understanding of the rules, how they work, and societal impacts; and then reflect, practice, and engrain the knowledge for quick recall in the courtroom.

A. The Materials

The course materials consist of video lectures; a textbook and Rule book; additional readings; written introductions, summaries, and take aways; in-class lectures, discussions, and group work; before and after questions for deeper probing; reflection prompts; and practice problem sets and quizzes.

The text, *Learning Evidence*⁹, provides an overview of the law of evidence. It guides students through each evidentiary rule, outlining the basic principles and illustrating those concepts through concrete examples. It also has an online Student Learning Library with additional study resources: “Evidence in Practice” simulations; video mini-classes; multiple-choice quizzes tied to each chapter; a set of cumulative review multiple-choice questions; and access to several study aids, a law dictionary, and outlining tools.

The Federal Rules of Evidence rule book provides the lack letter law of evidence. I encourage but do not require the students to consult the Rule’s Advisory Committee Notes and Legislative History.

Students take a 3-hour, closed book, final exam at the end of the course that consists of 25 multiple-choice questions and five short answers. They are provided a copy of the Federal Rules of Evidence with the exam.

B. The Learning

This is an active course, the more students put into it, the more they will get out of it. as explained to students in the Syllabus¹⁰:

⁸ Unlike many law courses, appellate cases are not main tool we use. We discuss a few cases along the way and the text has case citations, but as designed, this course focuses on the evidence rules and their application.

⁹ Merrit & Simmons, *Learning Evidence: From the Federal Rules to the Courtroom* 5th Edition

¹⁰ See APPX A

Your text, *Learning Evidence*, provides an overview of the law of evidence. It will guide you through each evidentiary rule, outlining the basic principles and illustrating those concepts through concrete examples. I will provide additional material and reflection opportunities to facilitate the learning process. To further your ability to *use* the law of Evidence, we will use class time to build on the basics--we will integrate principles, explore advanced problems, discuss policy, do simulations, and probe ethical issues. The text and your classwork will help you to synthesize the raw Rule material, learn how the Rules work in practice, and make effective evidence arguments.

The preparation of the problems and the in-class simulation will give you the opportunity to learn to use the law.

1. Before-class Learning

Before class, I provide substantive information about the relevant Rule, video lectures, readings, problem sets, and quizzes.

I have recorded short video lectures for each topic. I present the substantive video lectures before class so students can use them to complete the before-class problems and quizzes.

For each topic, I assign problem sets and quizzes for students to complete before class. These exercises are the basis of our class discussion. Students must complete the quizzes prior to class. These quizzes are a learning tool; students only have to complete them to get credit for doing the quiz. I do not deduct points based on the score. However, failure to complete all of the quizzes will result in lowering the student's final grade by up to two number grades (i.e., turning a "7" into a "5"). The quizzes may be taken multiple times throughout the course. I encourage students to use take them again after class to confirm their knowledge and to use them as a study aid.

2. During-class Learning

Class time is designed to pull together the out-of-class materials, clarify the material, examine the material together, and solidify their understanding. I emphasize this in the Syllabus¹¹:

Class time is your time—your time to learn, ask questions, engage with your peers, and work with this material. You will likely get more out of class time if you think about the following before coming to class:

- What did you learn from your readings, modules, and in preparing for class?
- What questions do you have about this material?

¹¹ See APPX A

- What do you want to learn in class? What are your intentions/goals for class?
- Before class begins, be aware of the following: Where is your focus? What is distracting you? What can you do to minimize distractions? What can you do to focus on your intentions/goals for this time?
- Toward the end of class, determine if your questions have been answered and whether you have additional questions about this material.

During class, I use a combination of lecture, question and answer, and discussion. I also have students participate in in-class group work. Most class time is spent going over problems the students completed before class. Through the answers and discussion of the problems, I reiterate, reemphasize, or further explain the lesson material that was covered in the reading and my out-of-class video lecture. I usually call on students, and often ask for volunteers.

In class, students actively participate by answering the pre-class problem questions. I monitor student learning through the answers and adjust as necessary. During and after the discussion with the student, I supplement my video lecture and explain the material as needed. Throughout this process, repeatedly ask the whole class whether they have question about the answer, process, or rule of law. In addition, I check to see if students have questions about the pre-course quizzes and review those as needed.

3. After-class Learning

I encourage students to reflect on what they learned preparing for and attending class:

Confirm you have learned and understand the material

Everyone learns at their own pace and in their own way. One of the best ways to learn the FRE is to practice using them. Flashcards, quizzes, and other study materials can be helpful. I encourage you to use them as needed. I will provide a link to the textbook's student resources at the end of each topic. Whether you use it or other resources, I encourage you to do practice questions.

After class, confirm you have learned and understand the material



Take time to reflect on the material and review what you have learned, keeping in mind the [Course Goals & Learning Objectives](#). The problem sets in the [Learning Evidence Student Learning Library](#) may help you review the material and confirm your understanding.

I often post summary “Take Aways,” pose observational reflection prompts, and allow them to retake the quizzes to test their understanding.

4. After the Course, Before the Final Learning

Law students’ inevitability save much of their learning until they prepare for the final exam—most law courses provide only one graded assessment, usually an exam or paper, and it is usually at the conclusion of the course. Flipping the classroom allows students to access the course material as they study for the final—they can rewatch (or watch for the first time) the videos;

they can redo the quizzes to assess their understanding; and they can rework the problem sets with the benefit of a semester of learning.

C. The Rationale

These teaching methods facilitate students' achievement of the course goals—obtain enduring knowledge of the substance of federal evidence law so they can use it in their future law practice and on the Bar Exam—in numerous ways.

Flipping the course provides more structure, active learning opportunities, and out-of-class analytical work, which allows students more opportunities to transfer the knowledge to long-term memory, as well as cultivate their learning skills—a skill lawyers must develop. This teaching method does the following:

- provides students multiple forms and formats to interact with the material;¹²
- offers students some choice in when and how they approach the course materials;¹³
- allows students to work through the material before class;¹⁴ and
- provides repeated exposure to the substantive law¹⁵.

The course materials help students achieve the course objectives because they provide in-depth knowledge and information about the Rules of Evidence, their real-world application, and how to use them in the practice of law. The material provides information in different ways and at different times. Students have access to this information in-class and out-of-class. They can use it to build context when we begin a topic, they can refer to as we practice applying the Rules, and they can use it to confirm their understanding when we have completed a topic or when they are studying at the end of the course.

The out-of-class work is designed to help students learn the Rules, practice applying the Rules before our class discussion, facilitate a deep understanding of the Rule in class, confirm their knowledge after class discussions, and pull all the information together and study for the exam at the end of the course. Students must engage with the material before class and be ready to discuss it in class. Students can also use this material to facilitate their individual learning as needed.

The before class video lectures and problem sets allow students to engage with the material and be prepared to ask questions and dive deeper in class. Completing this work before class facilitates a better use of class time. It enables me to go beyond providing substantive legal rules and teach students how to *use* the Rules they are learning.

¹² Students have at their disposal the textbook; my videos lectures; my written introductions, take aways, and summaries; practice quizzes; the ability to work through pre-class problem sets; and reflection and practice materials.

¹³ This lets students adapt the materials to their individual learning style.

¹⁴ This allows students to evaluate their understanding and know what they need to get from class.

¹⁵ This encourages memory consolidation—transferring information to long-term memory.

Working problems together as a class allows me to walk through my own analytical process to facilitate comprehension. And it allows the non-partaking students to ask clarifying questions as we work through the problems. This allows me to measure student learning through the quality of our discussions and their questions and answers. Having students provide their answers to the problems allows me to check their understanding and analytical process. Although only one student is answering the problem, all students are evaluating (and hopefully refining!) their own answer and analytical process.

While not required, providing reflection prompts encourages students to process what they learned and identify what they still do not understand.

D. The Changes

Two years ago, I selected a new text that was more direct and easier to understand than most legal textbooks. I also added quizzes and problem sets. I have used this material for the past two semesters. Both semesters much of the class time was focused on application of the Rules in the real world—how they work in practice. The main difference was the timing of the lectures and problem sets.

Group 1: Last year, along with the new textbook, I incorporated quizzes for students to complete before class. During class, I lectured on the relevant Rules, we reviewed the quizzes, and we worked through the problems sets. Other than the readings and quizzes, the information was presented and discussed in class. On occasion, I would post “Take Aways.” I also began to post videos I had made during the Covid era after class. For some reason, likely snow days, I posted videos before class a few times. Students mentioned that they liked having the videos before class so that they could use the videos to prepare for class. Based on this student feedback, I decided to try to flip the course.

Group 2: This year, to build on the new material and flip the structure, I add pre-class videos that replace class lectures. I also assigned the problem sets before class, giving students an opportunity to work through them before class. The quizzes became almost secondary to the problem sets. Instead of being the focus on class discussion, they were mainly used out of class, before or after, by individual students to confirm their learning.

IV. The Analysis

I evaluated the three “enduring” course goals: Know the substance of federal evidence law; Recognize when, and which, rules are in play and use the rules to argue for or against the admissibility of evidence; Know the “key legal terms” to use for each rule.

Rank	Course Goal
1	Enduring - Know the substance of federal evidence law
2	Enduring - Recognize when, and which, rules are in play and use the rules to argue for or against the admissibility of evidence

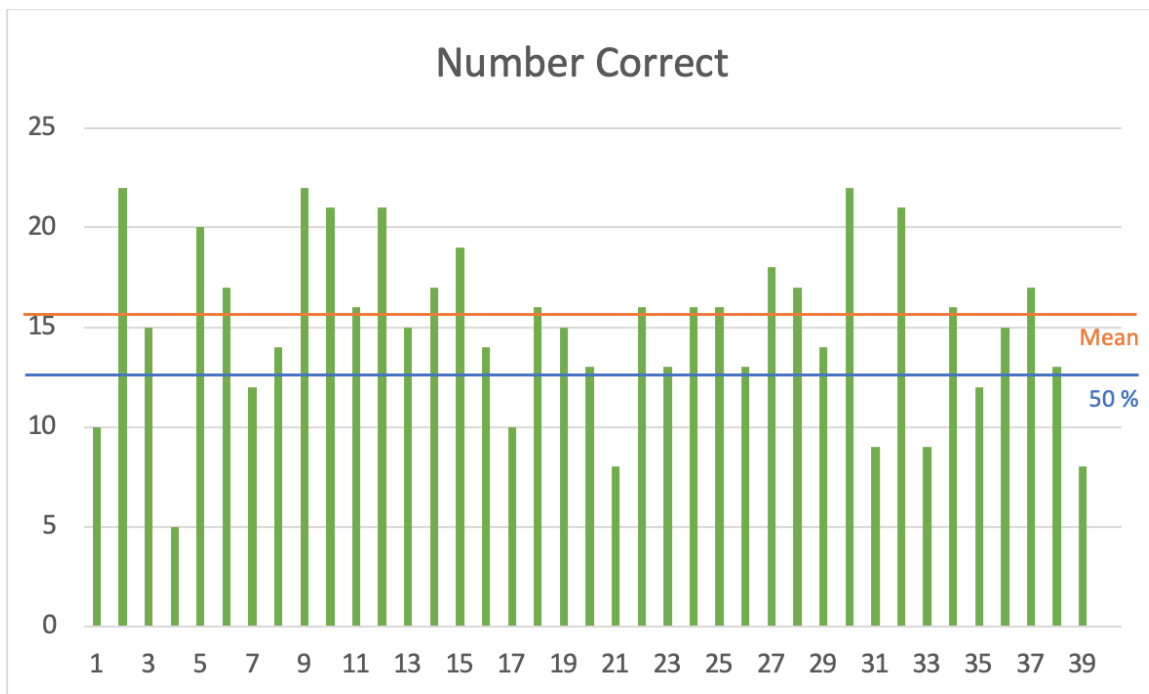
To evaluate these three course goals, I analyzed the raw scores on the multiple-choice section and the short-essay section of the final exam and assessed the quality of the short-essay answers.

I also had students complete pre- and post-course nongraded tests. As expected, the students performed better on the post-course test; however, this data set provided little insight because one would expect student performance to be better at after the course. Thus, I did not analyze it for this portfolio.

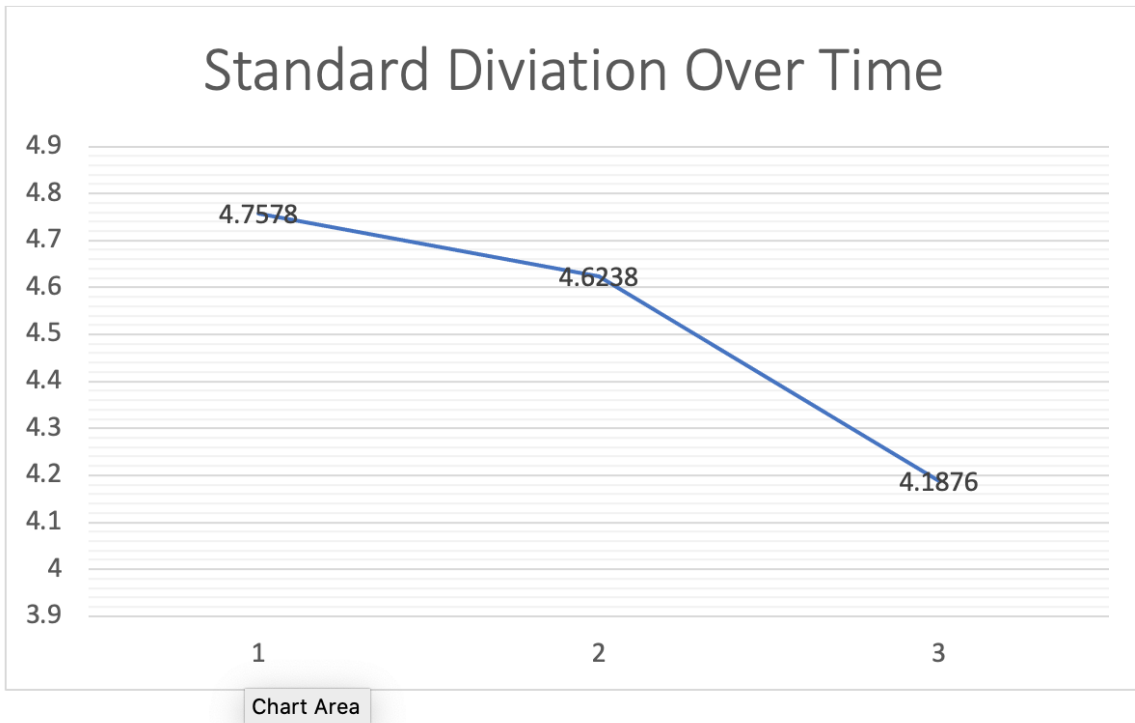
A. The Numbers

1. The Multiple-Choice Section

I analyzed the breakdown of Group 2 (this year's group) student performance on the multiple-choice section of the exam. There were 39 students in this course. The multiple-choice section consisted of 25 questions. The high score was 22; the low 5. The mean was 15.05; and the median was 15. The standard deviation was 4.18. Below is a chart showing the distribution of number correct and the mean.



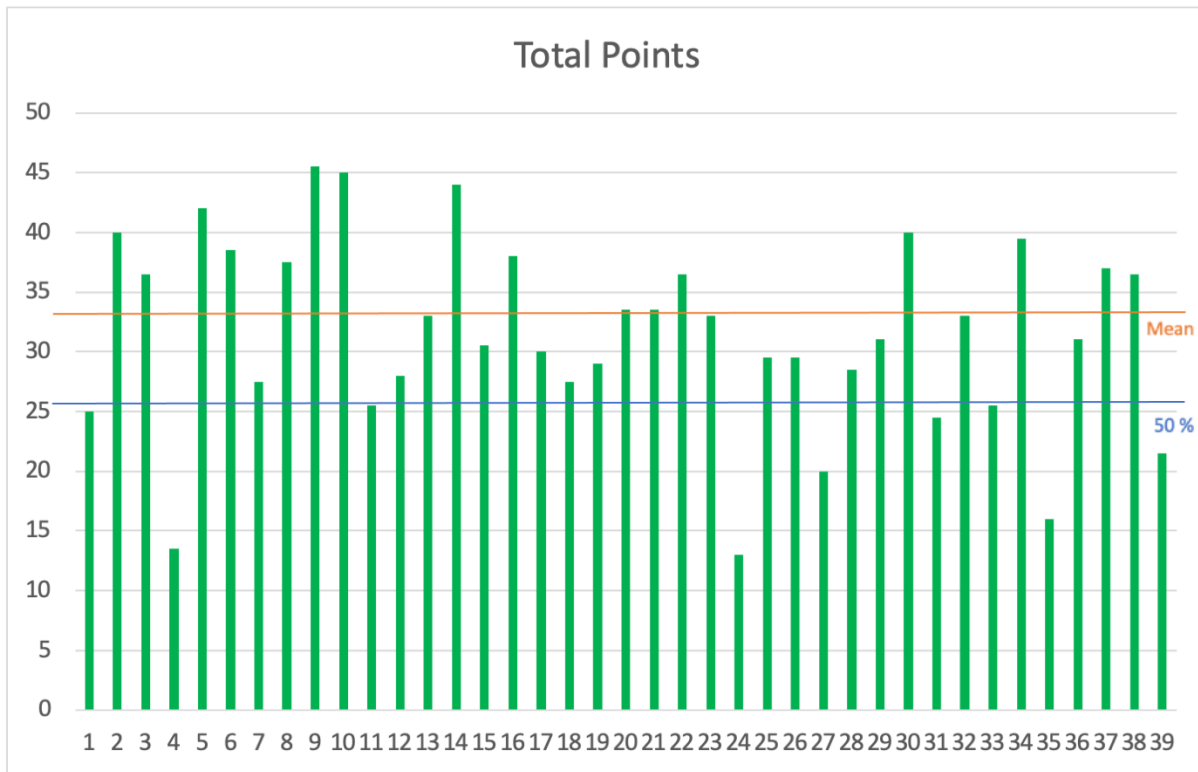
I then compared Group 2 performance to student performance on the multiple-choice section over time, to Group 1 (last year's group) and a previous group. The multiple-choice section was 25 questions. The number of students ranged from 31 to 39 students; the high score ranged from 22 to 25; the low score ranged from 3 to 5; and the mean ranged from 14.52 to 15.21. The standard deviation from three sets of data decreased over time:



Although the standard deviation decreased, the decrease was minimal, suggesting that student performance on the multiple-choice portion was relatively stagnant.

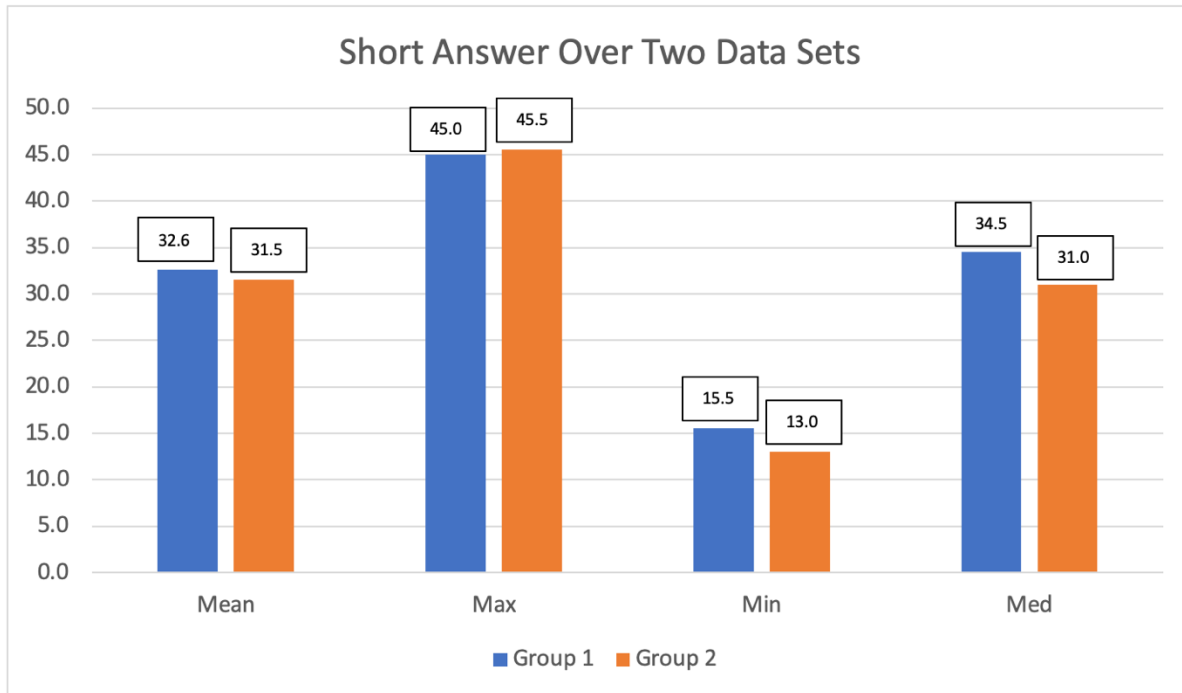
2. The Short Essay Section

I analyzed the breakdown of Group 2 student performance on the short essay section of the exam. There were 39 students in this course. The short essay section consisted of 5 questions with a total of 50 points. The high score was 45; the low 15.5. The mean was 32.6; and the median was 34. Below is a chart showing the distribution of points and the mean.



To compare student performance over time, I analyzed the breakdown of student performance on the short essay section over Group 1 and Group 2. The exam format and time allowance were the same.¹⁶ The short essay section remained 5 questions for a total of 50 points. There were 33 students in Group 1 and 39 in Group 2. Group 2 is the most recent data set.

¹⁶ The short-essay format was different before the textbook change; thus, I could only compare Groups 1 and 2.



The average decreased, but the decrease was minimal, suggesting that student performance on the short essay portion was also relatively stagnant.

B. The Quality

Where I saw the greatest difference was in the quality of the answers on the short-essay portion of the exam.

For Group 2, I reviewed the three highest, middle, and lowest exam scores on the short-essay portion to see if, and how well, students achieved the course goals. I looked for whether students showed knowledge of the substance of federal evidence law; recognized when, and which, Rules were in play and used the Rules to argue for or against the admissibility of evidence' and used the "key legal terms" of the Rules. Below is a chart of these scores by question. I included the raw multiple-choice scores to see whether student performance on the two portions correlated.

Total (50)	Qu1 (6)	Qu2 (10)	Qu3 (10)	Qu4 (15)	Q5 (10)	Raw MC (25)
<i>Highest</i>						
45.5	6	10	10	13.5	6	22
44	4	10	10	13	7	17
42	4	9	10	12	7	20
<i>Middle (Mean 31)</i>						
31	3	7.5	8	6.5	6	14
31	6	5	10	6.5	3.5	15
30.5	1	10	8	6	5.5	19
<i>Lowest</i>						
13	1	0	0	7	5	16
13.5	1	5	1	3	3.5	5
16	0	6	2	3.5	4.5	12

Students with the three highest scores on the short essay identified the correct legal issues and applicable Rules, used the key legal terms of the Rules, and applied the Rules to the fact pattern. Their answers showed an ability to understand the Rules and explain their application to others. With these skills and knowledge, the students were able to thoroughly apply the Rules and argue for or against admissibility of evidence.

Students with the three average short essay scores also identified the correct legal issues and applicable Rules, used the key legal terms of the Rules, and applied the Rules to the fact pattern. And their answers showed an ability to understand the Rules and explain their application to others. But they identified fewer issues than the highest scoring group and used fewer “key legal terms.” This made their application of the Rules less comprehensive than the highest performing students.

Students with the three lowest short essay scores had difficulty spotting the legal issues—they did not apply the correct Rule and thus were unable to explain it or show they knew the key legal terms of the Rules.

Student performance on the two portions did not correlate. The students with the lowest essay scores were not the students with the lowest multiple-choice scores. Nor were the students with the highest short-essay scores the students with the highest multiple-choice scores, except for the highest score—he received the highest total score on the exam and in the course.

I then reviewed the completeness of short-essay answers between Group 1 and Group 2. I compared the three highest short-essay scores from Group 1 with the three highest short-essay scores from Group 2. Both groups showed similar abilities to identify the correct legal issues and applicable Rules, use the key legal terms of the Rules, and apply the Rules to the fact pattern. Both groups were able to thoroughly apply the Rules and argue for or against admissibility of evidence.

C. The Observations

1. My Observation

I made two important observations between Group 1 and Group 2. When grading the entire set, all 39, of Group 2's short essays, I noticed that, on the whole, Group 2 students identified, discussed, and applied Rules that were indirectly related to the legal issues raised in the questions more frequently than Group 1. Group 2 also referenced the policies behind the Rules more frequently. Both of which satisfy the three important, as opposed to enduring, course goals.

Additionally, I observed that class participation increased with the new textbook and problem set—both Group 1 and Group 2 participated in class more than prior groups. But when I presented the lectures and problem sets *before* class, Group 2, class discussions were difficult and stark. In fact, there was a larger divide between students. I identified three types of students: (1) those who fully prepared and understood the material; (2) those who prepared and were working to understand; and (3) those who did not prepare enough to participate in class. This made class more difficult than with Group 1 or than when I previously used the Socratic method. Students who were fully prepared knew the answers, understood the basic concepts, and wanted to dive into the specifics and additional hypotheticals. Students who prepared but were struggling to understand, wanted to discuss the problem sets and basic rules and were somewhat ready to move beyond that material. Students who were not prepared struggled to keep up with the discussion and often could not answer questions or constructively participate when called on.

Interestingly, the divide was much smaller with Group 1, students who did not receive the problem sets and lectures before class. Most Group 1 students were in the prepared but struggling to understand category.

Finally, with Group 2, I observed that during class several students, usually the ones struggling with the material, would not know where the problem sets were on Canvas even though each topic page was identical, and the format was the same throughout the entire 13 topics. Clearly, they had not prepared for class if they did not know where to find the problem sets—the problem sets and video lectures were on the same Canvas page. I also had a student complain about how information was presented on Canvas. He said that if he had to go back to a page to click on another link, he “just wasn’t going to do it.” I did not see this with Group 1.

2. Student Observations

A student from Group 2, a former educator, also seemed to notice the student divide mentioned above. He told me that the course was pedagogically sound—I was providing the information in multiple formats, at appropriate times, and allowing students to interact with it as they needed. But he thought his peers were not preparing before class and thus were unable to productively participate in class and move the class to a deeper understanding.

Additionally, comments from students in both Group 1 and 2 indicate that students overwhelmingly like the new textbook and like the problem set format. I have received less comments about the before class lectures, but all comments have been positive. Group 1, which only received a few of the video lectures before class and never received the problem sets before class, preferred receiving the lectures before class. They felt that gave them more class time to solve the problems.

D. The Conclusion

Overall, the data leads me to believe that students are performing as expected in Evidence generally—over the course of the three semesters.

The three sets of Group 2 scores—Highest, Middle, and Lowest—indicate the following command of the three enduring course goals:

Highest performing students achieved the enduring course goals. Their multiple-choice and short-essay answers display robust knowledge of the substance of federal evidence law. These students recognized most of the Rules that were raised in the questions and were able to select the correct Rules. Their short-essay answers showed an ability to understand the Rules well enough use the “key legal terms” and to thoroughly analyze the Rules to correctly argue for or against admissibility of evidence.

Middle performing students somewhat achieved the enduring course goals. Their multiple-choice and short-essay answers display adequate knowledge of the substance of federal evidence law. These students were often able to recognize the Rules that were raised in the questions and select the correct Rules. Their short-essay answers acknowledged the “key legal terms,” and they were often able to analyze the Rules to put forth an argument for or against admissibility of evidence.

Lowest performing students likely achieved the course goals but not to an enduring nature. Their multiple-choice answers display some knowledge of the substance of federal evidence law, except for the student who scored “5.” Their short-essay answers indicate they struggled to recognize the Rules that were raised in the questions and select the correct Rules. They often did not use the “key legal terms”

and were unable to analyze the Rules to put forth an argument for or against admissibility of evidence.

The comparison between multiple-choice portions over time indicates that the new textbook and problem sets implemented two years ago are effective but may not be more effective than the previous textbook and problem sets.

The comparison between the short essays for Group 1 and Group 2 indicates that the timing of the lectures and problem sets may be less helpful than I had hoped.

The observations led to several conclusions.

First, the divide between prepared and unprepared students is a real concern. If not called on, students who do not properly prepare for class participate less in class; they ask fewer clarifying questions; and likely do not engage with the discussion at the same level as the prepared students. When called on, unprepared students likely degrade class discussion by getting off topic, confusing the issues, and using valuable class time to cover what they should already be familiar with. This frustrates other students and may prevent other students from learning. The unprepared student may get left behind. Students who fully prepare likely get bored in class and participate less—preventing them from diving deeper into the material and depriving the rest of the class their knowledge and input.

Second, my observations of Group 2's expanded short-essay answers suggested that students were somewhat meeting the three important, as opposed to enduring, course goals related to policy justifications and impacts of the Rules.

Finally, the observations, mine and the students', indicate that applied learning and a flipped classroom require active participation on the part of the student. I also saw a strong indication with Group 2 that students resist actively learning and want a passive learning environment.

V. The Reflection

A. Success

As I mentioned at the outside, students have two very different reasons for taking this course: (1) some want the knowledge because they plan to litigate and do trial work and (2) some want the knowledge simply to pass the Bar Exam.

This course was successful because it gave students the opportunity to learn for their individual needs. The future litigators were given many opportunities to dive deep into the subject matter and practice Evidence in a simulated real-world setting. The bar prep students were provided opportunities to learn the basic law of Evidence and prepare for the Bar Exam. Both groups were exposed to Bar Exam style multiple choice questions and given an opportunity to apply the law

to facts. I suspect the student participation and performance tracks these two, very different, reason for taking this course.

B. Planned changes

The observations made me wonder whether the lectures should be before class, but the problem sets presented and solved together in class—meaning no student would know the answers before class. My concern with this approach is that instead of lifting middle and lower performing students, it brings down the highest performing students. My preference would be to set higher expectations and hold the lowest performing students to them in class. But that is hard. It requires allowing students to feel uncomfortable in front of their peers the first few times they are unprepared. It also requires knowing the difference between when someone is unprepared and when someone is truly struggling to grasp basic information.

With this in mind, I will make a concerted effort to lead the students through the problem sets. I will review the prompts of the problem sets and, if necessary, revise them to require very specific, step by step, applications of the Rules. I will then follow that structure in class. I may go back to more in-class group work, allowing students to work the problem sets in class. I will also likely be more systematic about calling on students and take fewer volunteers. I may implement a cold-call approach. This may close the divide and facilitate better discussion between students.

I will likely make the quizzes optional. I may add more quizzes that consist of past Bar Exam questions.

Additionally, I will revise the prompts of my short essays to match the analysis structure used in class.

Further, I will expand my short essay rubric to include more points for analysis of tangentially related Rules and policy justifications and impacts of the Rules.

C. Portfolio Process

The portfolio process solidified the importance of evaluating my teaching and student learning—teaching and learning methods, content selection, delivery, and retention. Some of the data and some conclusions reenforced my teaching decisions, others prompted me to reevaluate my decisions and revise my approach. This is the second course I have evaluated with the FIRST program, and I will certainly participate again.

D. Future Plans

With my further research, I would like to focus on the following questions in the context of applied learning and flipped course teaching methods:

- Are the highest performing students learning the material quicker? Are they reaching a deeper understanding of the material?
- Are the lower scoring students utilizing the materials and fully participating? If not, what would encourage them to do so?
- How does the middle section of the class compare question by question over Group 1, Group 2, and the next group.
- Can an applied learning method account for the fact Law students cram for finals, often pulling the course together at the end of a course, instead of learning along the way?
- Do students resist active learning and, if so, why?

I also would like to collect student feedback on the following:

- How are students using the material?
- How are they preparing for class?
- How do they rate the textbook?
- How do they rate the problem sets?
- How do they rate getting the lecture before class?
- How do they rate getting the problem sets before class?
- Would they prefer more time in class for group work on the problem sets?
- Would they prefer a passive learning environment?

My conclusions also make me curious about how this applied learning method compares to the Socratic method. Honestly, teaching with an applied learning method, here the problem set and flipped classroom, consumes much more time and energy. Learning this way may also consume more student time and energy. If it does not produce better learning, then it is not worth the effort—for teacher or student.

VI. APPENDICES

A. Syllabus

LAW 636 - Evidence - Spring 2023 - Thursdays & Fridays 1:30-2:45 - Room 111



Prof. Chelsi K. Hayden - hayden@unl.edu - Room 235 - 402-472-3515

Welcome to Evidence! The purpose of this course is for you to obtain enduring knowledge of the substance of federal evidence law so you can use it in your future law practice and on the bar exam. The course goals focus on this purpose. The learning objectives for each topic build the foundation for you to be able to achieve the course goals and ultimately use the FRE in law practice--read them and consult them throughout the course to be sure you are achieving these goals. We will be actively engaging with the material and with each other to achieve these goals. I look forward to working with you as you learn this fun area of law.

[Course Goals & Learning Objectives](#)

This syllabus contains general information regarding the course and various policies. Please read all of this syllabus – you are responsible for the information contained in it. Please ask if you have questions about it.

[Course Material](#)

[Assessment](#)

[Accommodations & Assistance](#)

You can also access this information in the module [Course Information](#).

In addition to the policies mentioned here, the College of Law and the University have other policies that I am incorporating by reference into this Syllabus. As in all of your classes, the [College of Law Honor Code](#) applies.

Links for Questions & Office Hours



- You may submit questions online, and I will try to answer them in class.
- My online availability is varied; I am available in person Thursdays from 3:00-4:00.

You can also access these links on the [Home page](#) and in the module [Course Information](#).

This course is designed so all course materials can be accessed through the Home page. You may also use the links on the left side of each Canvas page.

[Home Page](#)

Course Goals and Learning Objectives

The purpose of this course is for you to obtain enduring knowledge of the substance of federal evidence law so you can use it in your future law practice and on the bar exam. The course goals focus on this purpose. The learning objectives for each topic build the foundation for you to be able to achieve the course goals and ultimately use the FRE in law practice.

Course Goals

Use the rules—their meaning, precedent, rationale, and specific language—to argue for or against the admissibility of evidence.

- Know the substance of federal evidence law
- Recognize when and which rules are in play
- Use the rules—their meaning, precedent, rationale, and specific language—to argue for or against the admissibility of evidence
- Know the "key legal terms" to use for each rule
- Know the rationales for the rules

Understand the broader picture of the FRE in our legal system and society, and the lawyer's role in the legal system

- Identify the role and impacts of the FRE in the practice of law and our legal system
- Recognize the societal impacts of the FRE

Learning Objectives

As you work through the course, review the learning objectives for each topic to ensure you understand the materials and are achieving the course goals.

Evidence & The American Trial System. 1. Know the various purposes for the US trial system and the basic procedures and structure of a trial 2. Identify how the purposes, procedures, and structure of the US trial system impact the development and application of the rules of Evidence 3. Recognize the exclusionary nature of the rules of Evidence 4. Understand the difference between the whole of evidence, the exclusionary function of the rules of Evidence, and evidence presented in court

Relevance 1. Identify and explain Factual Relevance: a. See facts as a part of a narrative of the case that must be coherent and consistent with common sense and scientific evidence b. Explain potentially inconsistent and contradictory facts as part of a narrative for each side c. Articulate common sense inferences from facts 2. Recognize when and articulate why evidence has Legal Relevance (FRE 402, 401): a. memorize the key legal terms in FRE 401 and know how they operate b. Know the first question you must always ask is, "what is the evidence being offered to prove?" c. Know why there is a low threshold for relevancy under FRE 401 d. Be able to argue whether a piece of evidence is relevant under FRE 401 3. Know when evidence may be excluded for Prejudice, Confusion, or Waste of Time (FRE 403): a. Identify the 403-balancing test, memorize its parts, know how each part works b. Understand what makes evidence unfairly prejudicial under Rule 403 c. Understand why evidence may be relevant under Rule 401 but inadmissible under Rule 403 d. Articulate sound legal arguments for why a piece of evidence should or should not be admissible under FRE 403

Special Policy Rules 1. Recognize when and articulate why evidence is excluded for policy reasons (FRE 407-411): a. Know the policy rationale behind FRE 407-411 b. Identify the permitted purpose for the evidence c. Articulate sound legal arguments about the relevance of the permitted purpose 2. Understand how Rule 403 affects the admissibility of this evidence: Argue that Rule 403 does or does not exclude the evidence

Conditional Relevance 1. Understand the difference between Rules 104(a) and 104(b): a. Know when the judge decides a preliminary fact issue b. Know when the jury decides a conditional relevance issue 2. Know the standards that each decision-maker must apply under Rules 104(a) & (b) 3. When it is an issue of conditional relevance, be able to identify the conditional fact that must be proven in order for a particular piece of evidence to be relevant

Character Evidence 1. Apply FRE 404(a) and 405: a. Know what type of evidence is "propensity" evidence; b. Know when propensity evidence might be offered; c. Know who must offer it; d. know what form it must be in when offered—opinion, reputation, or specific act evidence 2. Understand a piece of evidence may be admissible for one purpose but not another and articulate the correct purpose for all Rule 404(b) determinations 3. Recognize Character Evidence may be legally relevant and still inadmissible (recognize the exclusionary nature of the FRE) 4. Understand the interplay between 404/405 and 403 objections to Character Evidence 5. Argue for and against the admissibility of Character Evidence

Habit 1. Identify whether sufficient evidence of "habit" has been presented and whether Rule 406 applies 2. Understand the difference between "character" evidence and "habit" evidence 3. Understand the practical importance of being able to demonstrate the routine practice of an organization

Witnesses 1. Understand how evidence is presented through Lay Witnesses: a. Build your narrative and introduce evidence through a lay witness b. Understand the difference between and importance of leading and non-leading questions c. Know personal knowledge is required of witnesses and understand why 2. Use Rule 701's language and policy to identify appropriate lay opinion testimony and what differentiates it from inappropriate lay opinion 3. Understand the importance of making the record and properly objecting 4. Know how and when to request an offer of proof, to make a motion in limine, and to ask for a limiting instruction

Documents 1. Understand the various hurdles to admissibility for exhibits, specifically authentication; original documents rule; hearsay 2. Understand Authentication: a. Know the difference between Rule 901 authentication and Rule 902 self-authentication b. Lay the proper foundation in order to authenticate an exhibit and to prove that the exhibit "is what it purports to be" c. Be able to argue for and against the authenticity of various forms of electronic evidence 3. Understand the Original Documents Rule: a. Know when the original documents rule applies and how it can be satisfied b. Know when "other evidence" is appropriate under Rule 1004 c. Understand when to use and limitations of Rule 1006 for admitting summary documents

Impeachment 1. Understand these key points of impeachment: a. Understand that evidence can be relevant if it relates to a witness' credibility – even if the evidence does not otherwise relate to the legal claims or factual story b. Understand the difference between collateral and non-collateral impeachment c. Understand the difference between impeaching on cross-examination or with extrinsic evidence 2. Articulate impeachment arguments for Bias, Interest, Prejudice, Capacity: a. Identify impeachment on the basis of bias, interest, prejudice, or incapacity b. Know that this type of impeachment can be done on cross or with extrinsic evidence 3. Articulate impeachment arguments based on Character for Untruthfulness: a. Understand Rules 608 and 609 apply to certain type of impeachment that deals with whether a WITNESS has a CHARACTER for UNTRUTHFULNESS that would affect the witness's credibility b. Understand the types of facts that might be used to attack or defend a witness's character for untruthfulness and the arguments an advocate could make for and against their admissibility for this purpose c. Know the difference between the types of evidence—reputation, opinion, specific acts—permissible under Rules 608 & 609 d. Know when Rules 608 and 609 prohibit, allow, or require proof with extrinsic evidence e. Analyze whether a witness's prior conviction should be admitted under Rule 609 by recognizing which provisions of Rule 609 might apply and using the appropriate standard—automatic admission, 403, semi-reverse 403, or reverse 403 f. apply the Rules' anti-bolstering policy g. Understand the similarities and differences between Rule 404 and Rules 608 & 609 h. Understand the effect of Rule 609 on criminal defendants 4. Articulate impeachment arguments based on Prior Inconsistent Statements: a. Understand the proper procedure for impeaching with a prior inconsistent statement, including the use of Rule 613(b) when appropriate b. Differentiate between collateral and non-collateral impeachment by prior inconsistent statement c. Be able to identify inconsistent statements that would be appropriate for impeachment 5. Articulate impeachment arguments based on Contradiction: a. Differentiate between collateral and non-collateral impeachment by contradiction b. Identify when impeachment is permitted because a party "opened the door" to a previously inappropriate topic

Hearsay-General 1. Articulate whether a piece of evidence is or is not hearsay: a. Understand various parts of hearsay definition under 801(c)—statement; assertion; declarant; outside of court; offered for the truth of the matter asserted b. Identify factual situations where out of court statements are not being used for the truth of the matter asserted, but instead are being used for impeachment, to explain the conduct of the listener, as a verbal act, or to provide circumstantial evidence of the declarant's state of mind/memory/belief c. Identify when non-verbal and verbal conduct will be "assertions" 2. Articulate the reasons why the FRE bars hearsay testimony generally and be able to identify the three truth-testing tools we can use in the courtroom, and their relationship to the hearsay ban 3. Solidify your understanding of how a piece of evidence may be admissible for one purpose but not another: a. articulate the correct purpose for a piece of evidence b. understand the problems that might arise when hearsay statements are used for purposes other than for showing the truth of the matter asserted might 4. Recognize Hearsay within Hearsay and understand the necessity of having a hearsay exception for each hearsay statement when there is hearsay within hearsay 5. Know a hearsay declarant can be impeached similarly to an actual witness 6. Be familiar with FRE 807: a. Apply the elements of FRE 807 b. Understand that FRE 807 is used only as a last resort when no other hearsay exception can apply

Hearsay-Exemptions

1. Understand the prerequisites for all of the 801(d)(1) exceptions: that the declarant must be on the stand and subject to cross-examination 2. Explain the difference between 801(d)(1) exceptions and 801(d)(2) exceptions 3. Understand the rationales for creating and limiting the 801(d) exceptions 4. Know that evidence admitted under 801(d) hearsay exception can be used substantively and articulate how that may affect a trial 5. Know, analyze, and apply the different elements for the 801(d) exceptions 6. Know and apply the Tome timing rule under 801(d)(1)(B) 7. Examine whether statements permitted under 801(d) might raise Confrontation Clause problems

Hearsay-Exceptions 1. Understand and argue admissibility based on FRE 803 – Availability of Declarant Does Not Matter: a. Articulate the similarities and differences between the "present sense impression" and the "excited utterance" hearsay exceptions b. Understand the Hillmon doctrine and its limits c. Understand the important doctrinal issues that arise with the "medical diagnosis or treatment" hearsay exception d. Make and evaluate arguments for whether FRE 803(1) through (4) apply to various factual situations e. Argue whether 803(5); (6); and (8) apply to a particular document by focusing on the type of document (public/private); its use at trial (as an exhibit or read to the jury); who offers it (prosecution/plaintiff/defendant); what kind of trial (criminal/civil); and the analysis of key doctrinal concepts contained within the elements of each documentary hearsay exception 2. Understand and argue admissibility based on FRE 804 – Declarant Must Be Unavailable: a. Understand the unavailability requirement and how its application may vary depending on the provision of Rule 804(b) that you utilize b. Apply the "former testimony" exception and understand the difference between this exception and other ways a witness's former testimony may be used c. Apply the "predecessor in interest" requirement by understanding the different ways the rule for civil cases can be interpreted, including the Lloyd "community of interest" standard and the narrower "privity" standard d. Understand the elements of the "against interest" rule, when to apply the "corroborating circumstances" provision of the rule, and the import of the Williamson case e. Understand the "specific intent" aspect of the forfeiture provision of Rule 804 f. Understand how Rule 804 interacts with the Confrontation Clause

The Confrontation Clause 1. Understand that a Confrontation Clause analysis should be done in addition to a hearsay analysis every time an out-of-court statement is offered into evidence in a criminal case 2. Be able to articulate and apply the Crawford rule for when the Confrontation Clause might bar an out-of-court statement from being admitted 3. Understand the difference between "testimonial" and "non-testimonial" statements and be able to evaluate the proper category for a statement by comparing and contrasting the statement to known examples in each category 4. Be able to provide the strongest arguments for each side when evaluating whether a factual situation falls in the "ongoing emergency" exception to the Confrontation Clause analysis 5. Understand the difficulties involved in determining whether a "prior opportunity to cross" existed for Confrontation Clause purposes

Course Materials

Location, Dates, & Times

We will meet on Thursdays and Fridays from 1:30-2:45 in room 111. This is a long time to focus on one subject and may test our attention spans. I will do my best to work in active exercises, but it will take your active engagement to make this class a success. Together we can make this a fun, engaging learning experience.

Required Texts

- Merrit & Simmons, *Learning Evidence: From the Federal Rules to the Courtroom* 5th Edition
- The Federal Rules of Evidence (in the back of the textbook)

The Rules, Advisory Committee Notes and Legislative History can be found for free in a hypertext linked web version here: <https://www.law.cornell.edu/rules/fre>. The Notes and Legislative History are contained as a separate link for each individual rule and are often helpful if you have trouble understanding the Rule.

Recommended Material

Reviewing the problems and answers in these resources may prove beneficial for the final exam. One part of the final exam for this class will involve multiple-choice questions, so these books may be a good source for practice problems.

- *Learning Evidence* Learning Library. This library includes several student resources: "Evidence in Practice" simulations; video mini-classes; multiple-choice quizzes tied to each chapter; a set of cumulative review multiple-choice questions; and access to several study aids, a law dictionary, and outlining tools.
- *Learning Evidence* student resource website provided with your textbook.
- Two additional options are David P. Leonard, *Questions & Answers: Evidence* (LexisNexis 2003) and *ExamPro: Evidence* (Thomson/West 2006) (there may be more recent versions, which are fine to use as well). These books contain hundreds of multiple-choice questions and answers.
- Finally, you may find the CALI lessons helpful. These lessons provide an opportunity to learn and test your understanding of evidence law. They are accessed from the Internet for free (www.cali.org - if you need assistance with a password or logging onto the CALI website, please see Sandy Placzek in the Library).

Assessment

Your grade will be based upon before-class exercises, class participation, and a final exam.

Before Class Exercises and Quizzes

Throughout the semester, I will assign exercises and quizzes for you to complete before class. These exercises will form our class discussion. You must complete the Before Class Quizzes prior to class; please complete them no later than noon the day before class so that I can review them and provide in-class feedback. These quizzes are a learning tool; you only have to complete them to get credit for doing the quiz. I will not deduct points based on your score. Failure to complete all of the quizzes will result in lowering your final grade by up to two number grades (i.e., turning a "7" into a "5"). These Quizzes can be found in the Modules for each topic and in the Quizzes. They will appear as they are assigned.

Class Participation

As previously explained, I reserve the right to lower your grade for failure to participate in class.

Final Exam

You will take a final exam that contains essay, short-answer, and multiple-choice questions testing your knowledge of the Federal Rules of Evidence and the common law concepts we discuss in class.

Attendance & Course Participation

The College of Law's policy states, "Students are required to attend classes regularly and to prepare all assigned work thoroughly. Inadequate class attendance or preparation may result in the student being dropped from the course or may adversely affect the final grade the student receives in the course." More information on the College of Law's attendance policy can be found on [this SharePoint page](#).

Attendance

General Unexcused absences. You are permitted three unexcused absences throughout the semester. I appreciate you emailing me if you are going to miss class; however, advance notice of your absence from class does not make the absence excused.

Illness and Covid related absences. Covid related absences are excused when: (1) a student receives a specific exemption from the Dean's Office as an accommodation or because of a COVID-19 related reason, (2) a student is under self-quarantine under the direction of a public Health Department or their personal health care provider, or (3) a student is sick. Students are not required to provide formal documentation and will not be penalized for absences resulting from their illness or self-quarantine.

Class Participation

I reserve the right to adjust your grade appropriately based upon class participation. I expect everyone to be prepared every day--see Out-of-Class Study below. In practice, you will not be able to "pass" when called upon by the court. I will call on students randomly to discuss the cases, present arguments, and respond to the material and problems assigned for that day. I will expect you to participate fully in every class.

Unlike a traditional "Socratic" class, your participation is not rewarded as an extra in a simulation class. Instead, it is the expected norm, the method for learning. Failure to perform can have a negative effect on your grade.

Please understand that "failure to perform" does not mean being "wrong"; it means that your performance makes it clear that you have not prepared for class. You will see during the course that it is easy to discriminate between the common circumstance of not fully understanding something and failure to prepare. The heart of this course, and the core of your learning, is the effective presentation of argument as a lawyer. "Effective presentation" does not mean that you are necessarily comfortable on your feet (many of us are not); it means that you can make the appropriate argument. If you have done the work, participation will be no problem. And as it turns out, the more you get on your feet the more you will become comfortable doing it.

Out-of-Class Study

Under ABA and University guidelines, you are expected to work for about two hours for every hour you attend class. For a three-hour course like Evidence, the expectation is that you will spend approximately 9 hours each week on Evidence - three in class and six outside of class.

Part of your out-of-class study will be reading the material and preparing problems for class. I have tried to create assignments to match this expectation, although there is some variation. Ultimately, of course, these are averages and will vary from week to week and from student to student.

B. Course Learning Goals and Learning Objectives by Topic

Course Goals & Learning Objectives for each Evidence Topic

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Understand the broader picture of the FRE in our legal system and society, and the lawyer's role in the legal system

- Identify the role and impacts of the FRE in the practice of law and our legal system
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Interest, Prejudice, Capacity: a. Identify impeachment on the basis of bias, interest, prejudice, or incapacity b. Know that this type of impeachment can be done on cross or with extrinsic evidence **3. Articulate impeachment arguments based on Character for Untruthfulness:** a. Understand Rules 608 and 609 apply to certain type of impeachment that deals with whether a WITNESS has a CHARACTER for UNTRUTHFULNESS that would affect the witness's credibility b. Understand the types of facts that might be used to attack or defend a witness's character for untruthfulness and the arguments an advocate could make for and against their admissibility for this purpose c. Know the difference between the types of evidence--reputation, opinion, specific acts--permissible under Rules 608 & 609 d. Know when Rules 608 and 609 prohibit, allow, or require proof with extrinsic evidence e. Analyze whether a witness's prior conviction should be admitted under Rule 609 by recognizing which provisions of Rule 609 might apply and using the appropriate standard--automatic admission, 403, semi-reverse 403, or reverse 403 f. apply the Rules' anti-bolstering policy g. Understand the similarities and differences between Rule 404 and Rules 608 & 609 h. Understand the effect of Rule 609 on criminal defendants **4. Articulate impeachment arguments based on Prior Inconsistent Statements:** a. Understand the proper procedure for impeaching with a prior inconsistent statement, including the use of Rule 613(b) when appropriate b. Differentiate between collateral and non-collateral impeachment by prior inconsistent statement c. Be able to identify inconsistent statements that would be appropriate for impeachment **5. Articulate impeachment arguments based on Contradiction:** a. Differentiate between collateral and non-collateral impeachment by contradiction b. Identify when impeachment is permitted because a party "opened the door" to a previously inappropriate topic"

Hearsay-General 1. Articulate whether a piece of evidence is or is not hearsay: a. Understand various parts of hearsay definition under 801(c)--statement; assertion; declarant; outside of court; offered for the truth of the matter asserted b. Identify factual situations where out of court statements are not being used for the truth of the matter asserted, but instead are being used for impeachment, to explain the conduct of the listener, as a verbal act, or to provide circumstantial evidence of the declarant's state of mind/memory/belief c. Identify when non-verbal and verbal conduct will be "assertions" **2. Articulate the reasons why the FRE bars hearsay testimony generally and Be able to identify the three truth-testing tools we can use in the courtroom, and their relationship to the hearsay ban 3. Solidify your understanding of how a piece of evidence may be admissible for one purpose but not another:** a. articulate the correct purpose for a piece of evidence b. understand the problems that might arise when hearsay statements are used for purposes other than for showing the truth of the matter asserted might **4. Recognize Hearsay within Hearsay and understand the necessity of having a hearsay exception for each hearsay statement when there is hearsay within hearsay 5. Know a hearsay declarant can be impeached similarly to an actual witness 6. Be familiar with FRE 807:** a. Apply the elements of FRE 807 b. Understand that FRE 807 is used only as a last resort when no other hearsay exception can apply

Hearsay-Exemptions 1. Understand the prerequisites for all of the 801(d)(1) exceptions: that the declarant must be on the stand and subject to cross-examination 2. Explain the difference between 801(d)(1) exceptions and 801(d)(2) exceptions 3. Understand the rationales for

creating and limiting the 801(d) exceptions 4. Know that evidence admitted under 801(d) hearsay exception can be used substantively and articulate how that may affect a trial 5. Know, analyze, and apply the different elements for the 801(d) exceptions 6. Know and apply the Tome timing rule under 801(d)(1)(B) 7. Examine whether statements permitted under 801(d) might raise Confrontation Clause problems

Hearsay-Exceptions 1. Understand and argue admissibility based on FRE 803 – Availability of Declarant Does Not Matter: a. Articulate the similarities and differences between the “present sense impression” and the “excited utterance” hearsay exceptions b. Understand the Hillmon doctrine and its limits c. Understand the important doctrinal issues that arise with the “medical diagnosis or treatment” hearsay exception d. Make and evaluate arguments for whether FRE 803(1) through (4) apply to various factual situations e. Argue whether 803(5); (6); and (8) apply to a particular document by focusing on the type of document (public/private); its use at trial (as an exhibit or read to the jury); who offers it (prosecution/plaintiff/defendant); what kind of trial (criminal/civil); and the analysis of key doctrinal concepts contained within the elements of each documentary hearsay exception **2. Understand and argue admissibility based on FRE 804 – Declarant Must be Unavailable:** a. Understand the unavailability requirement and how its application may vary depending on the provision of Rule 804(b) that you utilize b. Apply the “former testimony” exception and understand the difference between this exception and other ways a witness’s former testimony may be used c. Apply the “predecessor in interest” requirement by understanding the different ways the rule for civil cases can be interpreted, including the Lloyd “community of interest” standard and the narrower “privity” standard d. Understand the elements of the “against interest” rule, when to apply the “corroborating circumstances” provision of the rule, and the import of the Williamson case e. Understand the “specific intent” aspect of the forfeiture provision of Rule 804 f. Understand how Rule 804 interacts with the Confrontation Clause

The Confrontation Clause 1. Understand that a Confrontation Clause analysis should be done in addition to a hearsay analysis every time an out-of-court statement is offered into evidence in a criminal case 2. Be able to articulate and apply the Crawford rule for when the Confrontation Clause might bar an out-of-court statement from being admitted 3. Understand the difference between “testimonial” and “non-testimonial” statements and be able to evaluate the proper category for a statement by comparing and contrasting the statement to known examples in each category 4. Be able to provide the strongest arguments for each side when evaluating whether a factual situation falls in the “ongoing emergency” exception to the Confrontation Clause analysis 5. Understand the difficulties involved in determining whether a “prior opportunity to cross” existed for Confrontation Clause purposes

C. Preparing for this Course Lesson

Preparing for this Course Module

Learning Evidence

Welcome to Evidence. This course is not a common law course of the kind to which you are accustomed. Learning to use the rules of evidence is an active process.

Unlike many of your other courses, appellate cases are not the tools we will use to discover the law of evidence. The law of evidence is discovered in the Federal Rules of Evidence. You will hear about a few cases along the way and the text has case citations, but our focus will be on the evidence rules and their application.

Your text, *Learning Evidence*, provides an overview of the law of evidence. It will guide you through each evidentiary rule, outlining the basic principles and illustrating those concepts through concrete examples. I will provide additional material and reflection opportunities to facilitate the learning process. To further your ability to use the law of Evidence, we will use class time to build on the basics--we will integrate principles, explore advanced problems, discuss policy, do simulations, and probe ethical issues. The text and your classwork will help you to synthesize the raw Rule material, learn how the Rules work in practice, and make effective evidence arguments.

Learning through Simulation

A simulation course like this one may be different from your previous law school experience. Ultimately, learning the law of evidence is not the end; it is only the beginning. You must thoroughly understand the law of evidence as a precondition to learning to use the law of evidence to argue about evidence admission or exclusion. The Rules and the textbook will provide the law. The preparation of the problems and the in-class simulation will give you the opportunity to learn to use the law.

Sometimes using the law of evidence is not so much about right answers as it is about better arguments for exclusion or admission, you will approach some of the problems in the course "in role" as a lawyer with a client who has a stake in the outcome of the case. There is no way to over-emphasize that the success of learning to use the law of evidence through simulation depends upon thinking about and articulating arguments from various perspectives -- that of your client, opposing counsel, and the judge. You must do this to figure out how to get evidence that hurts your case excluded and evidence that helps your case admitted. As a real lawyer, it is not necessarily your job to find and articulate the "right" decision that a judge will make for a particular evidence problem; it is your job to articulate the best evidence argument to sustain your client's position.

To help you to perform in your role as a lawyer for a client, we often will operate the class as if we were in a courtroom when we discuss the problems. I will choose students to argue the admissibility of the evidence and discuss the best arguments in class. You will be talking in class. A lot.

Finally, please understand that learning the language of the courtroom through simulation is a cumulative process. This course is unlike those classes where you might catch up on reading and understanding toward the end of a semester. If you fall behind on the assignments, you will lose the cumulative effect. There is no effective way to make up the learning.

Prepare for Class

There is a Canvas page for each topic in Modules structured similar to this page. These pages provide information we will use in class, including substantive information about that area of law, video lectures, additional readings, problem sets, and quizzes. This information supplements your reading. During class, I will presume you are familiar with the information and expect you to use the information and ask questions about it as needed.



Video lectures. I am presenting this information before class so that you can use it to complete the before-class problems and questions. It will also allow you to engage with the material and be prepared to ask questions and dive deeper in class.

Prepare for class



Read the relevant chapters and [FRE](#).

The textbook readings and relevant FRE are listed on the course schedule. I will post additional readings for the topic here.



Work through these problems and be prepared to explain your answers in class.

It is essential to work through these problems before class. They will be the basis of our class discussion.



Test your ability to apply the Rules. Be prepared to explain your answers in class.

The quizzes are an opportunity for you to evaluate how well you are learning the material. We will cover them in class as needed. I will answer questions about the quizzes in class.



On your feet. Be prepared to raise, respond, and argue as if you were in court.

These problems are designed to allow you to use the rules by articulating your objections and responses. When you make your legal argument, I want to hear the language of the applicable rule and how it applies to the specific piece of evidence and the specific case. As we progress through the course, you should consider the effects of the other rules and whether you need to address those.



Develop a deeper understanding.

Here I will pose ideas for you to consider that hope will inform our class discussions.

This is an active course. The more you put into it, the more you will get out of it. Class time is your time--your time to learn, ask questions, engage with your peers, and work with this material. You will likely get more out of class time if you think about the following before coming to class:

- What did you learn from your readings, modules, and in preparing for class?
- What questions do you have about this material?
- What do you want to learn in class? What are your intentions/goals for class?
- Before class begins, be aware of the following: Where is your focus? What is distracting you? What can you do to minimize distractions? What can you do to focus on your intentions/goals for this time?
- Toward the end of class, determine if your questions have been answered and whether you have additional questions about this material.

Participate in Class

Again, class is your time. My hope is we will engage in the material together.

Confirm you have learned and understand the material

Everyone learns at their own pace and in their own way. One of the best ways to learn the FRE is to practice using them. Flashcards, quizzes, and other study materials can be helpful. I encourage you to use them as needed. I will provide a link to the textbook's student resources at the end of each topic. Whether you use it or other resources, I encourage you to do practice questions.

After class, confirm you have learned and understand the material



Take time to reflect on the material and review what you have learned, keeping in mind the [Course Goals & Learning Objectives](#). The problem sets in the *Learning Evidence Student Learning Library* [↗](#) may help you review the material and confirm your understanding.

Documenting Student Learning

I recently redesigned this course. In the past few years, I have selected a new textbook, restructured the final, and redesigned the use of class time. These changes are based on my research on student learning and feedback from students. For example, last year's students liked the pre-class videos--as opposed to in-class lectures--because it allowed them to have the information as they worked through the problems and gave us more class time to work through examples and problem sets.

As I respond to students' suggestions and redesign aspects of this course, it is important that those changes increase student learning. To that end, I am tracking the effects of the course changes by documenting student learning. On the next page, you will find an Informed Consent form to complete as a part of this process. Please note you are required to complete the form, but you are not required to consent.

D. Example of Topic Specific Materials

Topic Page Example

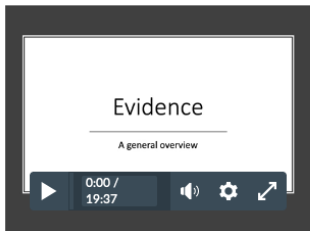
Introduction to Evidence

This material will help give you a broad overview of Evidence as a subject and how the study of Evidence is intertwined with an understanding of how trials work. We will also consider what is "the truth" and how do we find it.

Here, we will look at how we would evaluate a case without worrying about how the FRE might impact it. In other words - what is the truth of what happened; if we had access to all the facts in the world (the Big Box One)? We might think of this as trying to figure out what is relevant to consider when we act as humans trying to find the truth.



Before Class Video Overview of FRE



CC Version: [↗](#) Here is a link for a Vidgrid version with machine captions.

Prepare for class



Read the relevant chapters and [FRE](#) [↗](#).



Work through these problems and be prepared to explain your answers in class.

[Problems: Intro to Evidence](#)



Test your ability to apply the Rules. Be prepared to explain your answers in class.

[Quiz 1 -- Intro to Evidence](#)



Develop a deeper understanding.

Consider the following:

- The various purposes for the US version of the trial
- The key features of the US trial system and how they impact the rules of Evidence
- The Evidence Rules as a set of cumulative exclusionary rules
- How the rules serve the purposes of efficiency and accuracy



Get the most out of class

- Read the [learning objectives](#) for this topic and prepare to engage with the material in class.
- What did you learn from your readings, modules, and in preparing for class?
- What questions do you have about this material?
- What do you want to learn in class? What are your intentions/goals for class?
- Before class begins, be aware of the following: Where is your focus? What is distracting you? What can you do to minimize distractions? What can you do to focus on your intentions/goals for this time?
- Toward the end of class, determine if your questions have been answered and whether you have additional questions about this material.

After class, confirm you have learned and understand the material



Take time to reflect on the material and review what you have learned, keeping in mind the [Course Goals & Learning Objectives](#). The problem sets in the *Learning Evidence* [Student Learning Library](#) [↗](#) may help you review the material and confirm your understanding.

Now that you have a broad understanding of Evidence and how trial works, consider the following:

- Why not let all evidence in? (i.e., why have a series of exclusionary rules instead of just letting it all in?)
- Why have a set of rules determine the outcome? (i.e., why not just let the judge decide whether to let it in or not?)