

EVIDENCE

Prof. Sandra Guerra Thompson

Course Description

This course aims to provide you with a working knowledge of the Federal Rules of Evidence as well as the Texas Rules of Evidence. Texas, like most states, has adopted a set of evidence rules based on the federal rules, so we will only refer to the Texas rules only when they significantly differ from the federal rules.

The rules of evidence govern the introduction of all types of evidence (*e.g.*, testimonial, tangible, documentary, photographic, demonstrative, or scientific). In order to fully comprehend the rules as applied during a trial it is essential to study them in the context of litigation. We will therefore study the application of the rules through a series of problems interspersed throughout the course. These problems call on you to play the role of an attorney who is handling an evidentiary issue in court. You may be required to lay the foundation for admission of evidence or to object to the attempt to admit evidence by opposing counsel. You may also be called upon to offer direct- or cross-examination of a witness or to object to such testimony. You will not be graded for your performance, but you will be expected to make a good-faith effort. Besides advancing your understanding of the Rules, you will probably find it to be fun!

Attendance Policy

Students must attend 80% of the classes taught. In other words, you may miss no more than six classes. An attendance sheet will be circulated at the beginning of each class. Since you may have to be absent due to illness, family emergency or other pressing matters, please use your absences carefully so as not to run into a problem abiding by this rule. It is not necessary to notify me if you will be absent.

Classroom Administration

You are expected to be prepared to discuss the lecture material that I assign for each day of class. I will call on you at random. Please be prepared to give a clear recitation of the facts of the case and the court's decision or to offer an educated response to the practice problems in the book. If you will not be prepared for class, I ask that you let me know by email (sgthompson@Central.uh.edu) before class.

Final Examination

The final examination will be a three-hour exam. It will be a closed-book exam with the exception that during the exam you will be allowed to use your copy of the supplement with Federal and Texas Rules provided for this course. (And, yes, you may write notes, highlight and place small tabs on the rules.) That said, please recognize the importance of knowing where in the rules to find the answers you need and of understanding the subtle interpretive issues hidden

within many of the rules. In other words, do not count on “looking up” the answer during the exam.

You will be expected to know the Federal Rules that we study in this course and *only* the Texas Rules that are assigned in this course. Again, I will only highlight significant differences for you to learn by assigning those Texas rules as part of the readings for the course.

The exam will consist entirely of multiple choice and true-false questions. The questions will include approximately an equal number of civil and criminal law applications of the rules. Many of the rules apply equally to both civil and criminal, but there are some special rules that apply to criminal cases, mostly pertaining to certain constitutional rights.

“Open Door” Policy

My office is located on the first floor of BLB in room 122, and the phone number is 713-743-2134 (office) and 713-661-5422 (home office). I can also be reached by e-mail at sgthompson@Central.uh.edu. Feel free to ask me questions by email or phone if that is easier for you. In addition, I will hold office hours this semester on Tuesdays from 1:00-2:30. If I am otherwise in the office, please feel free to stop by my office anytime you have a question or problem or make an appointment to see me at a time that is convenient for you. *The only thing that I ask is that you not drop by immediately before class as I will be busy preparing.* I LOVE meeting with students outside of class and consider it an important part of my job. Please do not hesitate to come by and see me to discuss evidence issues, career plans, your course schedule, or whatever is on your mind.

Evidence
Fall 2012
Prof. Sandra Guerra Thompson

T & Th 7:30-9:00
Office: 122 BLB
Ph. 713-743-2134
Office Hrs.: Tuesdays 1:00-2:30 or by appt.

Assignments

Course Materials

The textbook: Mueller & Kirkpatrick, Evidence under the Rules (7th Ed.). You may purchase the hardcopy or the SMARTe version. Wolters Kluwer is offering a new discounted price for the Mueller & Kirkpatrick SMARTe, a web based book. This offer is for the SMARTe edition only. The price at www.aspenlaw.com/smart website is \$102.00. You can watch a video demonstration about SMARTe at the website given in this email. The ISBN number is 9781454806585. This is a 50% discount for the web based book only.

I am not advocating that you use the electronic version, but I wanted to let you know of this option.

In the UHLC Copy Center, you can find two booklets for this course. One includes a collection of readings. The other is your rules booklet, containing the Federal Rules of Evidence and the Texas Rules of Evidence.

“T” refers to the textbook by Mueller & Kirkpatrick, Evidence under the Rules (7th Ed.).

“Supp.” refers to readings in this collection of supplementary materials.

“FRE” refers to the Federal Rules of Evidence found in your Rules Booklet.

“TxRE” refers to the Texas Rules of Evidence found in your Rules Booklet. The Texas Rules will be assigned *whenever they significantly differ from the FRE*.

For guidance in preparing the assigned role-playing exercises that call on you to admit evidence, see “How To Offer Evidence: Basic Predicates” in this Supplement.

- 8/28 **Evidence Law and The System**
- T: 1-48; read FRE 101, 102, 103, 104, 611(b); TxRE 611(b). Please also be prepared to offer a photograph and a gun into evidence. (For information about offering a photograph into evidence, *see* Supp.: “How to Offer Evidence: Basic Predicates.”)
- 8/30 **Relevance**
- T: 49-79 (not including Prob. 2-E); FRE: 401, 402, 403
- 9/4 **Relevance (cont’d)--Limited Admissibility, Completeness and Circumstantial Proof; Foundational Evidence, Authentication**
- T: 79-89, 853-880; FRE 105, 403, 901, 902; TxRE 105, 902(10) (no federal counterpart for self-authenticating business records); 902(11) (no federal counterpart).
- 9/6 **Hearsay--Definition, Assertive and Non-Assertive Conduct; Indirect Hearsay & Statements that are Not Hearsay; Prior Statements of Testifying Witnesses**
- T: 105-132; FRE: 801 (a)-(c), 801 (d)(1)(A), 802; TxRE: 801(c) (no federal counterpart; incorporates the reasoning of Wright v. Tatham).
- 9/11 **Hearsay under Rule 801 & the Borderland of the Doctrine: Statements with Performative Aspects, and Using Statements to Prove Matters Assumed**
- T: 132-150. *Note:* The materials on the “borderland” of the doctrine often baffle students, hence the reference to a “borderland.” Please trust that you will understand the doctrine eventually if you just relax, concentrate, and be patient.
- 9/13 **Testing Your Understanding of Hearsay
Hearsay Exceptions--Prior Inconsistent Statements**
- T: 151-166; FRE: 801(d)(1)(A), 613; TxRE: 801(e)(1)(A) (exception for grand jury testimony), 801(e)(1)(D) (no federal counterpart; regards procedure for taking child victim testimony).
- Note:* TxRE 801(e)(1)(D) refers to the Texas Rules of Criminal Procedure 38.071 (in Rules Booklet). Under that rule, a videotaped or filmed oral statement of a child younger than 13 taken and offered in certain types of criminal cases is admissible as proof of the truth of the matter asserted therein, if the trial court determines that the child would be unavailable to testify in the presence of the defendant.

Quiz: Please take the Hearsay Quiz at T: 151. The suggested answers are found in this Supplement. We will discuss the answers in class. *Caution:* You will miss an important opportunity to test your understanding of hearsay if you do not take the quiz seriously.

9/18 **Hearsay Exceptions (cont'd)--Prior Consistent Statements, Prior Statements of Identification, and Admissions of a Party-Opponent; Individual Admissions**

T: 166-191 (FRE: 801(d)(1)(B)-C); 801(d)(2)

Question: Imagine that you are representing a person charged with a crime at the joint trial of your client and an alleged accomplice. If the prosecution seeks to introduce the confession of the alleged accomplice who has implicated himself as well as your client, what trial motion will you make?

9/20 **Hearsay Exceptions (cont'd)--Adoptive Admissions, Admissions by Speaking Agents, Admissions by Employees and Agents**

T: 192-211; FRE: 801(d)(2), 104.

9/25 **Co-conspirator Statements; Unrestricted Exceptions--Present Sense Impressions, Excited Utterances**

T: 211-234; FRE: 801 (d)(2), 104, 803(1)-(3)

Exercise: In *Houston Oxygen Co. v. Davis*, an automobile passenger, Mrs. Cooper, makes statements to Mr. Sanders, who was driving the car. At trial, Mr. Sanders testifies regarding Mrs. Cooper's statements. Mr. Sanders would testify that Mrs. Cooper, referring to another car, said something to the effect that, "they must have been drunk," and "we would find them somewhere on the road wrecked if they kept that rate of speed up." See T: 223, n. 8. Please be prepared to offer, and to oppose the offer of, the testimony of Mr. Sanders regarding Mrs. Cooper's out-of-court statements. You may also want to refer to the guide on offering "Present Sense Impressions or Contemporaneous Statements" in this Supp.

9/27 **Unrestricted Hearsay Exceptions (cont'd)-- State of Mind, Statements to Physicians; Past Recollection Recorded**

T: 236-265; FRE: 803(3)-(5), 612; TxRE 612. Prob.1 in Supp.

Note: Compare writings used to refresh memory under Rule 612 to offering past recollections recorded.

Exercise: Please be prepared to offer the evidence at issue in Problem 1 in this Supplement. You may also want to refer to Supp.: “Past Recollection Recorded and Present Recollection Refreshed or Revived”

10/2 **Unrestricted Hearsay Exceptions: Business Records, Public Records, Learned Treatises**

T: 265-303; FRE: 803 (6)-(8), 612; TxRE 612 803(6) (self-authenticating business records)

10/4 **Restricted Exceptions—Declarant Unavailable-- The Unavailability Requirement; Former Testimony, Dying Declarations**

T: 303-325; FRE: 804(a), 804(b)(1) & 804(b)(2)

Please work carefully through the problems in the notes at pp. 310-311.

Exercise: Assume that your opponent has just offered the testimony of an expert witness on direct examination, and the testimony is inconsistent with statements found in a learned treatise. How would you go about offering the statements from the learned treatise into evidence?

Exercises: Be prepared to offer a business record through the custodian of the records and as a self-authenticating document. Also be prepared to use a witness’s statement to refresh her recollection and as a recorded recollection. (see materials in your supp. for guidance.)

10/9 **Declarations against Interest, Statements of Personal or Family History, Statements Admissible Because of Forfeiture by Misconduct, The “Catchall Exceptions”; The Minor Exceptions**

T: 325-366; FRE: 804(b)(3)-(6); 803(9)-(23); 807; TxRE: 803(24) (no unavailability required for statements against interest and broader than the federal rule), 804(b)(2) (applies in all criminal cases, not just homicide cases); Supp.: Texas Code of Criminal Procedure 38.071 & 38.072 (in Rules Booklet).

10/11 No class.

10/16 **Impact of the Confrontation Clause**

T: 366-414 (not including Prob. 4-O); Supp.: Hearsay Exceptions Quiz, Hearsay Exceptions Quiz Suggested Answers.

Please take the Hearsay Exceptions Quiz and review the suggested answers. We will briefly discuss your questions regarding the quiz in class.

10/18

Relevance Revisited: Character Evidence--Character of a Criminal Defendant to Prove Conduct on a Particular Occasion; Character of a Victim; Character as an Element of a Charge, Claim, or Defense; Using Prior Acts ("Bad Acts") to Prove Motive, Intent, Plan, and Related Points

T: 415-438; FRE 404, 405, 406, 407; TxRE 404(b) (different notice requirements), 407 (subsequent remedial measures admissible in products liability/strict liability cases), 412; in Rules Booklet: Tx Code of Cr. Pro. 38.37 (Texas counterpart to FRE 414), Tx Civil Practice & Remedies Code § 18.061 (communications of sympathy--no federal counterpart).

Exercise: Please be prepared to cross-examine Mrs. Ima Neighbor, a character witness for Ms. Bea Crook who is on trial for an assault on her work supervisor in 2005. Mrs. Neighbor has just testified on direct that she has known the defendant from the neighborhood in Washington, D.C., where the defendant has lived since 1961. She testifies that the defendant is a peaceful person. You should cross-examine Mrs. Neighbor regarding two previous convictions of Ms. Crook. Ms. Crook had been convicted for assaulting a co-worker in Delaware in 2002, causing bruises and lacerations. She was also convicted of physical abuse of a child (her own) in 2000. What is the purpose of your asking her about these convictions? The answer to this question will help you figure out the proper form of your questions on cross-examination. Hint: Unlike most cross-examination, this exercise does not call on you to use leading questions.

10/23

Character Evidence (cont'd)- in Sex Offense Cases; Habit, Routine Practice, Remedial Measures; Communications of Sympathy; Settlement Negotiations, Payment of Medical Expenses, Proof of Insurance Coverage;

T: 438-470; FRE: 408-415; TxRE 410 (different treatment of nolo contendere pleas and no provision for criminal perjury cases); 411 (agency, ownership or control must be disputed for insurance evidence to be admissible on those issues); Supp: Texas Rules of Criminal Procedure 38.38.

10/25

Competency of Witnesses; Direct and Cross-Examination; Exclusion of Witnesses

T: 471-520; FRE: 601, 602, 603, 606, 611-612, 615; TxRE: 601, 611(b) (no limit on scope of cross-examination), 612.

10/30

Impeachment of Witnesses for Bias, Sensory or Mental Capacity, "Truth and Veracity"--Non-Conviction Misconduct; -Prior Convictions

T: 521-555; Supp: “What are Crimes of Moral Turpitude?”; FRE: 608(b), 609; TxRE: 608(b) (no cross-examination or specific instances of misconduct); 609(a) (must provide public record; also applies to crimes of “moral turpitude”), 609(c)(2) (no federal counterpart).

Note: I have developed my own understanding of the definition of “moral turpitude” as defined by the Texas courts. I call it the “drunken cowboy rule.” In effect, all the naughty things that a bunch of good ‘ol boys would do *are not* crimes of moral turpitude. For example, wranglin’ with other cowboys (disorderly conduct, assault), and having a few drinks with the boys (public intoxication, DWI). But the things that a cowboy’s mama would slap him upside the head for doin’ *are* crimes of moral turpitude. For example, lyin’ and cheatin’ (perjury, fraud, theft) and “hittin’ gals” or otherwise harming them (domestic violence, sexual crimes including prostitution).

11/1 **Impeachment (cont’d): “Truth and Veracity”- Prior Convictions; Prior Inconsistent Statements; Contradiction**

T: 555-589; FRE 607, 613; TxRE: 613(a) (retains traditional rule requiring a foundation to be laid prior to use of prior inconsistent statement), 613(b),(c) (no federal counterparts).

11/6 **Impeachment (cont’d): Contradiction & Repairing Credibility; Forbidden Attacks; Lay Opinion Testimony**

T: 589-619; FRE: 608 (a), 610, 701, 801(d)(1)(B)

Question: If, in the course of eliciting a witness’s background on direct examination, a witness denies having ever been married, may opposing party offer a divorce decree which establishes that the witness had in fact been married?

11/8 **Expert Testimony; Scientific Evidence**

T: 619-660; FRE: 702-706 (no Texas counterpart for rule 706); TxRE: 704 (unlike FRE, no exception for expert opinions regarding criminal defendant’s mental state), 705(b)-(d) (no federal counterparts), 706 (no federal counterpart).

11/13 **Scientific Evidence (Guest Lecturer Stan Schneider)**

Supp: *Nenno v. Texas*; *Hernandez v. Texas*; *Tillman v. Texas*. (Note: I sent the *Tillman* case to the class electronically, and it is now posted online with other course information. It is now substituted for the *Medrano* case found in your supplement.)

Optional Reading: National Academy of Science, *Strengthening Forensic Science in the United States: A Path Forward* (2009), pp.1-33; ‘Troubling’ cases

seen in HPD crime lab report (Hous. Chron. 6/17/07); Profile of Ronald Gene Taylor from Innocence Project website, innocenceproject.org.

11/15 **Burdens of Proof and Presumptions--Civil Cases**

T: 683-704; FRE: 301, 302; TxRE: Art. III (no rules on presumptions have yet been adopted); Supp.: Notes on Presumptions, Inferences and Procedure

11/20 **Burdens (cont'd)--Criminal Cases**

T: 704-729

11/27 **Privileges: Attorney-Client Privilege**

T: 755-786, FRE: 501, 502; TxRE: 503. Skim all of TxRE Article V.

11/29 **Attorney-Client Privilege--Exceptions; Psychotherapist-Patient Privilege**

T: 786-816, TxRE 510.

12/4 **Spousal Privileges; Judicial Notice**

T: 816-833, 731-753; FRE: 201, TxRE: 504, 202-204 (no federal counterparts). Supp.: "Basic Predicates," Part IV; Texas Code of Criminal Procedure 38.10 (in Rules Booklet). We will not discuss every problem and case in the materials on judicial notice, but you should familiarize yourself with the materials which are pretty straightforward.

Exercise: Please be prepared to request that the court take judicial notice of an adjudicative fact. You should think up an adjudicative fact that we can pretend is in issue in your case, and then you should provide the "information" you would offer in court to establish the fact.

12/6 **The "Best Evidence" Doctrine**

T: 881-901; FRE: Art. X; TxRE: 107 (no federal counterpart), 1004(c) (no federal counterpart); 1009 (no federal counterpart).

12/15 Exam, 9:00-12:00, Rooms TBA.