

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 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.

Study Guides

I often get questions about what study guides I recommend. Unfortunately, I cannot suggest a particular guide as being "best." All study guides that cover the Federal Rules of Evidence should be helpful. You should try to find something that suits your style of studying. Some students like audio tapes. Others prefer flash cards. One student showed me a hearsay flowchart that she found helpful.

The library has other resources available as well. The treatise authored by the same authors as your case book is available online. Mueller and Kirkpatrick, Federal Evidence, 3rd ed., originally published in 2007 with annual updates (a 6-volume set), is found on Westlaw. Here is the path: WestlawNext/All Content tab/Secondary Sources/by Type—texts & Treatises/By Topic—Evidence/Federal Evidence (Mueller & Kirkpatrick). Once you get there you can click any of the chapters for the detailed TOC.

For practice problems, some students have found the CALI exercises helpful in preparing you for a multiple choice exam. They are available online through the law library. You should use the authorization code HOUSTUstu90, with the student's UH e-mail address as his/her logon ID. The password can be personalized. Please consult a law librarian for assistance.

Computer/Tablet/Cellphone Use in the Classroom

During class, your computers, tablets, and cellphones must be used only for course-related purposes. Unless otherwise announced in class, you may use your computers to take notes and look up statutes, rules, and other materials that we are discussing.

Non-course-related use of e-mail, texting, or the internet, including Twitter, Facebook, chat programs, or other comparable communication is not allowed. Using your computer, tablet or cellphone for non-course purposes can be distracting to your fellow students. Sanctions for violating this provision can include adjusting a student's final course grade downward or suspending a student's right to use a computer in this class, and such sanctions may be imposed without warning at my sole discretion. If you have a genuine emergency that requires you to engage in non-course communication during class, please leave the room to do so.

Final Examination

The final examination will be a three-hour multiple choice and true/false 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 that has been provided for this course. (And, yes, you may write notes, highlight and place small tabs on the rules. You may take it apart and put it back together, but do not add additional sheets.) That said, do not count on "looking up" the answer during the exam. You should recognize the importance of knowing where in the rules to find the answers you need and understanding the subtle interpretive issues hidden within many of the rules. In other words,

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.

Unfortunately, I am unable to provide you with a practice exam. The exam questions are hard to write and often require tweaking over the years. Thus, your exam will consist of many old questions that I've used in the past as well as many new ones. I simply don't have an old test that I can share with you.

“Open Door” Policy

Please let me know if you would like to come by and see me, and I will happily make an appointment to see you. Since I am teaching in the late afternoon and evenings on Mondays and Wednesdays, it is not convenient for me to have meetings with you just prior to our class.

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. If I am otherwise in the office, please feel free to stop by my office anytime.

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 2017
Prof. Sandra Guerra Thompson**

Office: 122 BLB
Ph. 713-743-2134
Hm. Office: 713-661-5422
sgthompson@Central.uh.edu
Office Hours: Monday 1:30-3:30 or by appointment

Assignments

Course Materials

The textbook: Mueller & Kirkpatrick, Evidence under the Rules (8th Ed.).

Two photocopied supplements: One includes a collection of readings. The other is your rules booklet, containing the Federal Rules of Evidence and the Texas Rules of Evidence. (You will be able to use the rules booklet during the exam. You may write or electronically print on it, but you may not add additional pages.)

“T” refers to the textbook by Mueller & Kirkpatrick, Evidence under the Rules (8th Ed.).

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

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

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

“T.C.Cr.Proc.” refers to selected provisions of the Texas Code of Criminal Procedure found in your Rules packet.

8/22 Evidence Law and the System

T: 1-51; 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.”)

- 8/24 **Guest speaker (no readings assigned)**
- 9/5 **Relevance**

T: 53-83 (not including Prob. 2-E); FRE: 401, 402, 403; T.C.Cr.Proc., Art. 38.04, 38.05
- 9/7 **Relevance (cont'd)--Limited Admissibility, Completeness and Circumstantial Proof; Foundational Evidence, Authentication**

T: 83-95, 895-927; FRE 105, 403, 901, 902; TxRE 105, 902(10) (no federal counterpart for self-authenticating business records); 902(11) (no federal counterpart); T.C.Cr.Proc. 38.27, 38.42
- 9/12 **Hearsay--Definition, Assertive and Non-Assertive Conduct; Indirect Hearsay & Statements that are Not Hearsay; Prior Statements of Testifying Witnesses**

T: 111-143; FRE: 801 (a)-(c), 801 (d)(1)(A), 802; TxRE: 801(c) (no federal counterpart; incorporates the reasoning of Wright v. Tatham).
- 9/14 **Hearsay under Rule 801 & the Borderland of the Doctrine: Statements with Performative Aspects, and Using Statements to Prove Matters Assumed**

T: 143-161. *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.
- 9/19 **Testing Your Understanding of Hearsay
Hearsay Exceptions--Prior Inconsistent Statements**

T: 161-176; FRE: 801(d)(1)(A), 613; TxRE: 801(e)(1)(A) (exception for grand jury testimony).

Quiz: Please take the Hearsay Quiz at T: 161-164. 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.
- 9/21 **Impact of the Confrontation Clause**

T: 381-422 (not including Prob. 4-O)
- 9/26 **Hearsay Exceptions (cont'd)--Prior Consistent Statements, Prior Statements of Identification, and Admissions of a Party-Opponent; Individual Admissions**

T: 176-199 (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?

9/28 **Hearsay Exceptions (cont'd)--Adoptive Admissions, Admissions by Speaking Agents, Admissions by Employees and Agents**

T: 200-226; FRE: 801(d)(2), 104.

10/3 **Co-conspirator Statements; Unrestricted Exceptions--Present Sense Impressions, Excited Utterances; State of Mind**

T: 226-253; FRE: 801 (d)(2), 104, 803(1)-(3)

10/5 **Unrestricted Hearsay Exceptions (cont'd)-- State of Mind—Subsequent Conduct, Statements to Physicians; Past Recollection Recorded**

T: 253-289; 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”

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

T: 289-325; FRE: 803 (6)-(8), 612; TxRE 612 803(6) (self-authenticating business records); T.C.Cr.Proc. 38.41.

10/12 **Restricted Exceptions--Declarant Unavailable-- The Unavailability Requirement; Former Testimony, Dying Declarations**

T: 325-350; FRE: 804(a), 804(b)(1) & 804(b)(2)

Please work carefully through the problems in the notes at pp. 332-333.

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.)

10/17

Declarations against Interest, Statements of Personal or Family History, Statements Admissible Because of Forfeiture by Misconduct, The "Catchall Exceptions"; The Minor Exceptions

T: 351-381; 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); T.C.Cr.Proc. 38.071, 38.072, 38.075, 38.49; 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.

10/19

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: 423-450; FRE 404, 405

10/24

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: 451-485; FRE: 406-415; TxRE 404(b) (different notice requirements), 407 ("recall letters" are admissible to prove product defect), 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); T.C.Cr.Proc. 38.37 (Texas counterpart to FRE 414), 38.38; T. Civ. Prac. & Rem. C. § 18.061 (communications of sympathy--no federal counterpart).

10/26

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

T: 487-538; FRE: 601, 602, 603, 606, 611-612, 615; TxRE: 601, 611(b) (no limit on scope of cross-examination), 612; Supp: Pena-Rodriguez v. Colorado.

10/31 **Impeachment of Witnesses for Bias, Sensory or Mental Capacity, “Truth and Veracity”--Non-Conviction Misconduct; -Prior Convictions**

T: 539-572; 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).

11/2 **Impeachment (cont’d): “Truth and Veracity”- Prior Convictions; Prior Inconsistent Statements; Contradiction**

T: 572-609; 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).

11/7 **Impeachment (cont’d): Contradiction & Repairing Credibility; Forbidden Attacks; Lay Opinion Testimony**

T: 609-645; 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?

11/9 **Expert Testimony; Scientific Evidence**

T: 645-691; 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); T.C.Cr.Proc. 38.20.

11/14 **Burdens of Proof and Presumptions (covered with brief lecture); Privileges: Attorney-Client Privilege**

T: 789-822, FRE: 501, 502; TxRE: 503, 511. Skim all of TxRE Article V.

11/16 **Attorney-Client Privilege—Exceptions; Psychotherapist-Patient Privilege**
T: 822-857, TxRE 510, 513.

11/21 **Spousal Privileges; Judicial Notice; The “Best Evidence” Doctrine**

These readings will be shortened when I have a chance to study it. T: 857-875, 763-766, 929-951; FRE: 201, Art. X; TxRE: 107 (no federal counterpart), 202-204 (no federal counterparts); 504; 1004(c) (no federal counterpart); 1009 (no federal counterpart). Supp.: “Basic Predicates,” Part IV; Texas Code of Criminal Procedure 38.10 (in Rules Booklet).

TBA Review Session

12/1 **Exam 9:00-12:00**