Evidence
Spring 2025 | Brem

About Me. A first-generation college graduate and Big Law refugee, I joined the University of Houston Law Center faculty in 2000. I research and write about the intersection of legal rhetoric, evidence, procedure, and substantive law, as well as introductory U.S. legal concepts for novice students and foreign-trained attorneys - especially those trained in the civil law tradition. I teach LSS, Evidence, Federal Pretrial Drafting, and U.S. Legal Skills. Prior to teaching, I specialized in oil and gas and general commercial litigation, and catastrophic personal injury defense.

Contact me in person (Room 341M), via email (kbrem@uh.edu), or on Teams (713.743.5945). I will hold office hours weekly either in person or virtually – your preference – and by appointment. If you prefer to meet virtually, let me know via email and join me on this Zoom link.

Course Objectives. Rules of Evidence govern the use of testimony, documents, and physical objects as proof in legal proceedings. These rules determine what can be introduced in court and the extent to which what *is* introduced can be used to prove a litigant's case. At trial, your objective as the lawyer is to either get evidence in or keep it out. Understanding these rules and the policies that underlie them will enable you to do so.

This semester, expect to master the following:

- Competency
- Relevance
- Prejudice
- Impeachment
- The Use (and misuse) of Character Evidence
- Authentication and the Best Evidence Rule
- Opinion Testimony (from lay and expert witnesses)
- Hearsay (including exemptions and exceptions to the rule against hearsay)
- Complications related to the Confrontation Clause
- Privileges

Along the way, expect to gain a deeper understanding of the nexus between the rules of evidence, procedure, and ethics so that you can perform well on the bar exam and in practice.

Assessment. Your grade will be calculated based on your performance on two interim assessments and a final exam. If your interim assessment grades raise your average, they will count towards your final grade; if they do not, your final grade will be based solely on your final exam. The final exam will be closed-book and comprised of both essay and multiple-choice questions.

Date	Assessment	% of Final Grade
February 18 In-Class	Interim Assessment 1 Relevance, Prejudice, Impeachment, Character	15%
April 1 In-Class	Interim Assessment 2 Authentication, Opinion Testimony, Hearsay	15%
TBD	Cumulative Final Exam	70%

Honor Code. The UHLC Honor Code applies to this course. For more information on the UHLC Honor Code, please consult the code itself, available at this link.

Course Materials. Rent or buy Deborah J. Merritt and Ric Simmons, *Learning Evidence: From the Federal Rules to the Courtroom* (5th ed. 2022) (ISBN 978-1684675784). This includes access to the recommended CasebookPlus Learning Library. If you purchase a used book, instead, you may still purchase access to the CasebookPlus Learning Library at westacademic.com. The cost is $50 and the ISBN for the Learning Library alone is 978-1636594453. Use discount code WAHOUSTON for a 15% discount.

Attendance | Class Administration. This class will meet in person. Be prepared to discuss the lecture material that I assign for each class. I will call on you at random. If you will not be prepared for class, please email me before class to let me know.

Inclusion. I want to address each of you in a manner that corresponds to your identity. Feel free to reach out to me at any time if you want to make me aware of your chosen name or preferred pronouns, or if you have concerns about how your classmates or I address you.

The Fine Print. **Academic Adjustments | Auxiliary Aids.** The University of Houston is committed to providing an academic environment and educational programs that are accessible for its students. Any student with a disability who is experiencing barriers to learning, assessment, or participation is encouraged to contact the Justin Dart, Jr. Student Accessibility Center to learn more about academic accommodations and support that may be available to them. Students seeking academic accommodations will need to register with the Dart Center as soon as possible to ensure timely implementation of approved accommodations. Please contact the Dart Center by visiting this website, calling (713) 743-5400, or emailing jdcenter@Central.uh.edu.

We ask also that you contact Samantha Ary, Academic Records Coordinator at the Law Center. Ms. Ary's office is in the Office of Student Services suite. She can be reached by email or at (713) 743-7466. Requests for accommodation that involve graded assignments should be directed to Ms. Ary as soon as possible to allow adequate time to process the request. She can assist you as you navigate the Dart Center process.

Class Recordings. I will record classes and post links to these recordings on the class web course as soon as they are available. You may use these recordings for your own studying and notetaking purposes, but please do not share them with anyone. University policy mandates that an instructor's recordings are not authorized to be shared with anyone without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral to the Dean of Students Office and may result in disciplinary action

Food Insecurity. The Cougar Cupboard is available to all enrolled students who may need access to additional food. For more information, click here.

Mental Health and Wellness Resources. The University of Houston has a number of resources to support students' mental health and overall wellness, including CoogsCARE and the UH Go App. UH Counseling and Psychological Services (CAPS) offers 24/7 mental health support for all students, addressing various concerns like stress, college adjustment and sadness. CAPS provides individual and couples counseling, group therapy, workshops and connections to other support services on and off-campus. For assistance visit uh.edu/caps, call 713-743-5454, or visit a Let's Talk location in-person or virtually. Let's Talk are daily, informal confidential consultations with CAPS therapists where no appointment or paperwork is needed.

The Student Health Center offers a Psychiatry Clinic for enrolled UH students. Call 713-743-5149 during clinic hours, Monday through Friday 8 a.m. - 4:30 p.m. to schedule an appointment.

The A.D. Bruce Religion Center offers spiritual support and a variety of programs centered on well-being.

Need Support Now? - If you or someone you know is struggling or in crisis, help is available. Call CAPS crisis support 24/7 at 713-743-5454, or the National Suicide and Crisis Lifeline: call or text 988, or chat 988lifeline.org.

The Texas Lawyers' Assistance Program (TLAP) also supports law students who are dealing with stress, anxiety, depression, substance abuse, and other mental health problems. You can reach TLAP at any time at 1-800-343-8527. TLAP's website includes a page with links to resources about mental health that are of interest to law students: https://www.tlaphelps.org/law-studentsLinks to an external site.. Check it out.

Title IX/Sexual Misconduct. Per the UHS Sexual Misconduct Policy, I am a "responsible employee" for reporting purposes under Title IX regulations and state law and must report incidents of sexual misconduct (sexual harassment, non-consensual sexual contact, sexual assault, sexual exploitation, sexual intimidation, intimate partner violence, or stalking) about which I become aware to the Title IX office. Please know there are places on campus where you can make a report in confidence. You can find more information about resources here on the Title IX website.

Syllabus. I assign reading by the week. I recommend completing your reading for the week *before* coming to class on Tuesdays. From time to time, reading assignments may change to meet class needs. I will announce all changes orally in class and in writing via Canvas.

Week 1 **Jan 14 | 16**	**Read Chapters 2 – 9, 11, and 13 | Complete Learning Library Quizzes for Chapter 6** Introduction to the Study of Evidence • Origins of the Rules • Categories of Evidence • Admissibility: Raising and Resolving Evidentiary Objections (FRE 101, 1101, 103, 105) • Determining Relevance (FRE 401 – 402, 406) At trial, a party tells its story through evidence. Evidence can be testimony from a fact or expert witness; documents; photos; videos; or tangible items – like the car that was involved in an accident or the gun that was used in a murder. Evidence can also be demonstrative, that is evidence that is representative of something relevant to the case. Think of a bag of powdered sugar introduced at trial to show the jury the amount of cocaine found on a defendant's person. Rule 402 provides that relevant evidence is generally admissible. Rule 401 defines the term "relevant" broadly. Evidence is relevant if it has *any* tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. The question for the trial judge is whether a reasonable person would find the probability of a consequential fact to be altered, one way or the other, by the proffered evidence. The important thing for the judge and for counsel to remember is that the evidence does not by itself have to prove the ultimate proposition for which it is offered; nor does it have to make that ultimate proposition more probable than not. To be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence. Sometimes courts will permit a party to admit evidence for one purpose, but not another. When this happens, the court will instruct the jury to consider the evidence for only the limited purpose.
Week 2 Jan 21 | 23	**Read Chapters 10 & 12 | Complete Learning Library Quizzes for Chapters 7 & 9 – 12** Relevance and Unfair Prejudice (FRE 403, 407-411) • Excluding Relevant Evidence Based on Policy (FRE 407 – 411) • Discretionary Exclusion of Relevant Evidence (FRE 403) Despite the breadth of this definition of "relevance," Rule 403 provides that evidence may be excluded if it will cause prejudice, confusion, or undue delay. And rules 407 – 411 place some limits on the admissibility of evidence for specific policy reasons that, in the view of the rules committee, supersede a party's right to tell its story using all relevant evidence.
Week 3 Jan 28 | 30	**Read Chapters 14, 16 – 20; 25 - 27** Putting a Witness on the Stand | Impeachment (FRE 601 – 607, 611-615) • Competence (FRE 601) • Personal Knowledge (FRE 602) • Miscellany (FRE 603-606) • Examining (Lay) Witnesses (FRE 611, 612 – 615) • Impeaching a Witness (FRE 607, 611, 613) Character Evidence • Character Evidence and Criminal Convictions (FRE 404(a), 608(b)(1), 609) • Miscellany (FRE 60(a), 608(b)(2), 610) • Reputation or Opinion Evidence of Untruthful Character

	The court controls how each party tells its story. When a witness testifies, the court prefers open-ended questions so that the testimony is presented using the witness's words, not the lawyer's. An exception is cross-examination, where the court permits leading questions for a more controlled examination. To testify, witnesses must take an oath or an appropriate substitute and understand the consequences of doing so. They must have perceived something of relevance in the case and recollect it. And they must be able to communicate the testimony to the finder of fact. This means that witnesses must be "competent" to testify. Discrediting or "impeaching" witnesses is an essential part of many trials. Most trials center on the testimony offered by live witnesses; documents and real evidence often assume meaning only in the context of a witness's testimony. To prevail in court, it usually is not enough for a litigant to present a convincing case of his own to the jury. The litigant often must discredit at least some of the opponent's witnesses to win. Character is defined in Black's Law Dictionary as "the aggregate of the moral qualities which belong to and distinguish an individual person." For purposes of evidence law, character evidence is generally used to show the nature of a person as it pertains to a particular trait, i.e., reckless, careful, hot-tempered, peaceful, violent, calm, etc. Federal Rule of Evidence 404(a) provides the basic principle that a party cannot prove a person's character if the purpose is to create an inference that the person acted in accordance with the character trait on a particular occasion. The basic reasons for this exclusion are two: 1. A person's character trait is not always an accurate predictor of how the person will act – for example, violent people do not always act violently; and 2. The trial should be about what people did at the time in question, not what kind of people they are; we don't want the trial to turn into a popularity contest. As it is often said, "we try cases, not people." There are exceptions provided in the Rule. The major challenge for lawyers, judges, and students of evidence is to determine whether a party is offering evidence of a character trait in order to prove conduct in accordance with that character trait – or for some other purpose. If the advocate can convince the judge that the evidence is offered for some other purpose, it will come in.
Week 4 Feb 4 | 6	**Read Chapters 28 and 30 – 33 | Take Learning Library Quiz on Chapter 31** Character Evidence | Crimes, Wrongs, and Other Acts • Character Evidence to Show Propensity (FRE 404(a)(2); 405)a)) • Crimes, Wrongs, and Other Acts (FRE 404(b)) Habit | The Rape Shield Law | Sexual Assault & Child Molestation Cases • Habit (FRE 406) • Rape Shield Law (FRE 412) • Propensity in Sexual-Assault and Child-Molestation Cases (FRE 413 – 415
Week 5 Feb 11 | 13	**Read Chapters 59 & 69 | Take Learning Library Quiz on Chapter 69** Authentication | Judicial Notice • Authentication (FRE 901, 902) • Judicial Notice (FRE 201, 901, 902) In order to be admitted, a party must prove that its evidence is authentic and that the evidence is presented in a reliable manner. Sometimes, evidence may be so uncontroversial that a party can ask the court to take notice of the evidence without offering further proof of it. And sometimes evidence can lead to a presumption without the need to offer further proof of the presumption. Review
Week 6 Feb 18 | 20	In-Class Interim Assessment 1 (Feb 18)

	Read Chapters 35 – 38 | Take Learning Library Quizzes on Chapters 36 & 37 The Rule Against Hearsay (FRE 801(a) – (c) & 802) • What is Hearsay and Why Don't We Like It? • What Do We Mean by "The Truth of the Matter Asserted"? • What is an Assertion? • What is a Statement? Despite its reputation, hearsay is not complicated. It's just information received from other people or documents that cannot adequately be substantiated; in a different context, you might call it rumor. Rumor's fine, but would you rather be convicted on the basis of rumor, or fact? Most people would say fact, and I don't blame them. The rules committee agrees and generally excludes hearsay, which is an out-of-court statement offered to prove the truth it asserts. But sometimes, a party cannot tell its story any other way except through hearsay. When this is true, and the out-of-court statement the party offers falls within a category of statements that are generally reliable, then courts will balance the need of the party to tell its story and the right of the other party to test the reliability of the evidence against it through cross-examination. Policy considerations supersede a party's right to cross-examine evidence offered against it. Certain categories of statements are either excluded from the rule altogether, or the rules committee makes an exception that allows the hearsay to be admitted.
Week 7 Feb 25 | 27	**Read Chapters 39, 53, and 55 | Take Learning Library Quizzes on Chapters 39 and 53** Statements That are Called "Not Hearsay" (but actually *are* hearsay) (FRE 801(d)(1) and 801(d)(2)) • Admissible Hearsay – Chapter 38 Continued • Hearsay Exemption: Prior Statements by Witnesses • Hearsay Exemption: Statements by an Opposing Party • Hearsay Exemption: Statements of Co-conspirators
Week 8 Mar 4 | 6	**Read Chapters 40 – 43; 45 – 46 (including chart on page 478)** The Rule Against Hearsay: Unrestricted Hearsay Exceptions (FRE 803(1) – (24); 612) • Hearsay Exceptions: Present Sense Impressions and Excited Utterance • Hearsay Exception: State of Mind • Hearsay Exception: Medical Treatment • Hearsay Exception: Recorded Recollection • Hearsay Exception: Business Record • Hearsay Exception: Public Record
	SPRING BREAK
Week 9 Mar 18 | 20	**Read Chapters 48 – 52** The Rule Against Hearsay: Restricted Hearsay Exceptions (FRE 804, 807) • Rule 804 Introduction: What is Unavailability? • Hearsay Exception: Former Testimony • Hearsay Exception: Dying Declarations • Hearsay Exception: Statement Against Interest • Hearsay Exception: Forfeiture
Week 10 Mar 25 | 27	**Read Chapters 44, 56 and 58** Final Thoughts on Hearsay • Hearsay Within Hearsay • The Residual Exception • The Sixth Amendment and Hearsay The confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation clause thus serves two purposes: to allow a defendant the right to

	face his or her accusing witness in open court for truth-testing cross-examinations, and to give the jury an opportunity to determine the credibility of the witness through observation of the witness's demeanor. *Mattox v. United States*, 16 U.S. 237 (1895). The protections afforded a criminal defendant under the confrontation Cause of the Sixth Amendment are also applicable in state court proceedings by virtue of the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Hearsay is excluded from evidence for the same reason that underlies the Confrontation Clause – such declarations are generally not subject to cross-examination. *See California v. Green*, 399 U.S. 149, 155 (1970) (hearsay rules and the Confrontation Clause generally designed to protect similar values); and *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (hearsay rules and the Confrontation Clause "stem from the same roots"). Thus, read together, the Confrontation Clause and the hearsay rule would seem to provide a basis for excluding from evidence any statements that fall under the definition of hearsay and for which no right of cross-examination is granted to the defendant in a criminal case. But a conflict between the Confrontation Clause and hearsay rule arises as a result of the exclusions from and the exceptions to the hearsay rule, which allow a vast number and type of out-of-court declarations to be admitted into evidence without the declarant being present in court for cross-examination by the defendant. Review
Week 11 Apr 1 | 3	In-Class Interim Assessment 2 (Apr 1) **Read Chapters 60 – 62** Opinion Testimony • Lay Opinions • What Subjects are Appropriate for Expert Testimony • Qualifying Experts The rules provide that fact witnesses generally may not offer opinion testimony (though they may do so in very limited circumstances). But expert witnesses may offer opinion testimony if the expert is qualified and offers reliable testimony.
Week 12 Apr 8 | 10	**Read Chapters 63 – 64; Take Learning Library Quizzes for Chapters 61 – 64** More on Expert Testimony • Bases of Expert Opinion • Limits on Opinion and Expert Testimony
Week 13 Apr 15 | 17	**Read Chapters 66 – 68; Take Learning Library Quiz for Chapter 67** Privileges • Introduction to Privileges • Attorney-Client Privileges • Other Privileges Recall our discussion of relevance earlier in the semester. Sometimes even relevant evidence will be excluded, either because it is unduly prejudicial, causes confusion or delay, or because it runs afoul of certain desirable policy considerations. Evidence can also be excluded because it is privileged. Privileges are simply additional policy considerations that, in the eyes of the rules committee, supersede a party's right to tell its story using all relevant evidence.
Week 14 Apr 22 | 24	**Read Chapters 24 & 70; Take Learning Library Comprehensive Quiz Before November 21** The Best Evidence RuleClass Wrap-Up and Exam Review • Rule of Completeness (FRE 106) • Best Evidence Rule (FRE 1001 - 1008