

ADVANCED EVIDENCE (Law-6003)
STETSON LL.M. IN ADVOCACY
(Fall 2022)

Adjunct Professor Kenneth P. Troccoli
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INSTRUCTOR INFORMATION

Email: Ktroccoli@law.stetson.edu
Telephone: 301-512-9923 (c)
Office Hrs: Available after each class and at other times remotely upon request.

COURSE INFORMATION

Description/Goals: This is an experiential class designed to develop and enhance practical skills that are necessary when making evidentiary arguments. Using the Federal Rules of Evidence (FRE) and Supreme Court precedents, the class will review particular substantive areas of evidence law and practice application of the federal rules when making arguments or when raising/responding to evidentiary objections. The judge, rather than the jury, decides issues involving the admissibility of evidence, so arguments need to be crafted to emphasize the logical rather than the emotional. All students will be presumed to have already completed a JD degree level class in Evidence. Students will build upon that knowledge and develop a better understanding of particular evidentiary rules and how and when to actually use them.

Class Times (remote via Zoom): This is an online class, so all class work will be done remotely. With the agreement of the class, “live” remote class sessions (lasting up one hour) will be held at regular times and perhaps as often as once a week. The online learning platform for this course is Canvas, which will be used for the posting of all course materials and announcements. Use your Stetson credentials to login to Canvas.

Class Structure: We will use two case files to work through specific evidentiary issues involving relevance, unfair prejudice, witness testimony, hearsay, character evidence, habit, laying a foundation, privileges, and opinion testimony. For the first half of the semester, we will use the case file in *State v. Mitchell* (a criminal homicide case) and for the second half, we will use the case file in *MacIntyre v. Easterfield* (a civil defamation action). The assignments (listed below) include:

- Problems

- Memos & Motions in Limine
- Oral presentations/argument
- Pre-Recorded lectures

REQUIRED TEXTS & CLASS MATERIALS

- Robert Burns, Steven Lubet & Richard Moberly, *Problems and Materials in Evidence and Trial Advocacy* (6th Ed., 2017) Volume 1- Cases and Volume 2 - Problems.
- The Federal Rules of Evidence (posted to Canvas and available at <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>).
- Other class materials (e.g., presentation slides and pre-recorded lectures) will be posted to the class Canvas webpage.

NON-REQUIRED (OPTIONAL) MATERIALS

- Adjunct Professor and Senior Circuit Court Judge David A. Demers has prepared comprehensive presentation slides on most of the FRE and some rules of evidence under Florida law. As a secondary resource, these slides will be posted in the “Judge Demers’ Materials” module on the class webpage.
- An excellent resource for learning the Federal Rules of Evidence is the textbook by Deborah Merritt & Ric Simmons, *Learning Evidence: From the Federal Rules to the Courtroom* (5th Ed., 2021). A printed or digital copy of this textbook may be purchased at <https://eproducts.westacademic.com>.

LEARNING OUTCOMES & ASSESSMENT MEASURES

LEARNING OUTCOMES	ASSESSMENT MEASURES
Learn and apply the Federal Rules of Evidence (FRE), including how to lay the foundation for the admission of evidence.	Class presentations/role-plays, written submissions to assignments from textbook, and class feedback.
Analyze the role that facts and evidence play in litigation and evaluate the kinds of evidence and the strategies used to create persuasive arguments.	Discussion of materials in criminal and civil case files, presentation slides and pre-recorded lectures on particular aspects of the FRE.
Understand the basis and justification for objections and how to respond to the	Simulated arguments to evidentiary problems drawn from civil and criminal

objections made by opposing counsel.	case files, class discussions/feedback.
Critically analyze, understand, and evaluate the appropriate times and techniques to make and respond to evidentiary objections.	Class presentations, written assignments addressing specific evidentiary problems based on simulated case files, and class discussions/feedback.
Strategically plan, draft, and present pretrial evidentiary motions.	Submission of motions in limine based on problems from case files, class discussions/feedback.

GRADING

The grading scale for this class is: High Honors, Honors, Pass, Credit, and Fail. Your grade will be calculated as follows:

- 50% = Presentations (e.g., role-plays) in the live classes.
 - There are 6 Presentations: Weeks 2-5, 7 & 10.
- 35% = Written Submissions (e.g., motions in limine and answers to problems).
 - There are 10 Written Submissions: Weeks 2-6, 8-9 & 11-13.
- 15% = Discussions (e.g., posts on the Discussion board, in-class participation, constructive feedback provided to classmates, being prepared to discuss any of the assigned materials and topics of discussion in class, engaging in and contributing to thoughtful class discussion, and demonstrating professional conduct during class).
 - There is 1 Discussion (Week 1), but an unspecified additional number may occur.

Failure to complete any assignment in a timely manner may affect the student's grade. Please note there is no final exam for this class.

CLASS MEETINGS

With the agreement of the class, "live" remote class sessions (lasting up one hour) will be held on Tuesday evenings starting at 7:30 p.m. (EST). Classes will take place remotely via Zoom (audio and video) and can be accessed at the Zoom link listed below. (This link has also been posted to the class Canvas webpage in the "Course Resources" module) Please use that link to connect to the online (live) classes. Please mute your mic when entering the class so as not to disrupt other students. It is recommended (but not required) that you keep your camera on during class. The Zoom link to attend remotely is:

<https://stetson-edu.zoom.us/j/94344937648?pwd=ZE45a0JrWmhMd09tYUVmUUpkTkFHUT09>

(The meeting id is 943 4493 7648 and the passcode is 309282.)

CLASS RECORDINGS

All live classes will be recorded, and after the conclusion of each class, the link for the recorded class will be posted to that class's module. Class recordings will be retained until the end of the reading period. (Please be patient with the posting of the link as it may take time to process the recording.) Students may not record class sessions or any class-related content, using any type of recording devices (e.g., smart phone, computer, digital recorder) unless prior permission from the instructor is obtained and there are no objections from any of the students in the class. If permission is granted, recordings are limited to personal student use and may not be distributed, sold, or posted on social media outlets.

ATTENDANCE

It is important that you timely respond to assignments – including commenting on your classmates' offerings – recognizing that certain flexibility with respect to individual schedules is expected. Students are expected to be aware of and follow Stetson's *Attendance Requirements for Electronic Education Courses*, a copy of which will be posted to the "Course Resources" module on the class webpage.

Because this is a skills course, when class is in session, your participation in class exercises and role plays, as well as, during in-class presentations, is critical. Unplanned unavoidable absences, for illness or family emergencies, or similar reasons, may be excused but will be subject to make-up requirements.

CLASS DECORUM

This is an inclusive classroom: all students are welcome in this class. Having a classroom full of students with a diversity of life experiences makes our learning richer and more meaningful. This class will be better if you vigorously participate. You can expect I will facilitate your participation by supporting an environment where you can express and respond to ideas freely and respectfully. In this class, you are encouraged to share your own ideas, be creative in collaboration with others, and engage in critique of the law we explore. Robust dialogue in a room of lawyers is critical; that dialogue exposes the law's strengths and weaknesses. In all

situations, however, your dialogue should be civil, respectful, and honor the dignity of everyone in the conversation. Remember: lawyers make arguments and challenge ideas, but they always respect people.

I am also committed to affirming identities, realities, and voices of all students, especially those from historically marginalized or underrepresented backgrounds. This course values the use of person-centered language and gender pronouns, and respect for the experiences of others. Stetson University recognizes that not all people have historically had access to the U.S. legal system and that we as lawyers must commit ourselves to understanding the system that we've inherited and act to remedy these perpetuating wrongs.

Stetson University also expects faculty, staff, and students to exhibit the highest standards of personal integrity and professional responsibility and we are committed to an environment of open and honest communication. If you believe that Stetson's policies or standards may have been violated, or if you have concerns about the actions of another Stetson community member, you may anonymously report your concerns by telephone (888-447-8649) or via Ethics Point: <https://secure.ethicspoint.com/domain/media/en/gui/35308/index.html>

ACCOMMODATIONS

According to the Stetson University College of Law policies on ADA Accommodations and ESL Testing Modifications, students with disabilities or foreign students may seek reasonable accommodations and/or ESL testing modifications for this course. Accommodations and/or modifications cannot be made unless written notice is provided to the ADA Coordinator. To seek accommodations students must communicate with the ADA Coordinator as soon as possible at ada@law.stetson.edu and follow the procedures found on the school's Accessibility Resources website: <http://www.stetson.edu/law/accessibility/index.php>.

ASSIGNMENTS

(Due by noon on Monday of each week unless otherwise noted. Please email me if you need an extension on any assignment.)

The assignments for each week of class are listed below. Written assignments will also be posted to the "Assignments" section of the Canvas webpage and completed written assignments should be posted in that section. The presentation slides for each class (and any pre-recorded lectures or other material) will also be posted to the class webpage before each class in that week's module. Please note that the class assignments are subject to change and may be modified based on our ongoing progress. Likewise, time limitations may not permit us to cover in class all of the assigned problems. Students are responsible for any announcements and

supplemental materials posted to the course's webpage. Please check the site regularly as it will serve as a resource when studying the material in the textbooks.

Volume 1 ("Cases) of the textbook contains two case files (*State v. Mitchell* and *MacIntyre v. Easterfield*) and Volume 2 ("Problems") contains problems that we will use to work through evidentiary issues. The amount of work required for this class is significant, with an emphasis on developing and practicing *skills*. Students are expected to complete all written assignments in a timely manner so that the live class sessions – which will be devoted to discussing the written assignments and simulating oral arguments, including role-playing – will be beneficial to everyone. **Note: all assignments are due by noon on Monday of each week unless otherwise noted.**

Finally, constructive feedback from your classmates is an important component of this class and your final grade. Students are encouraged to provide constructive feedback in the live class sessions and by posting comments in the Discussions section of the class webpage.

**Week # 1 (Mon. Aug. 29 – Sun. Sept. 4) –
Introduction to Evidence & Evidentiary Objections –
FRE 101-103 & 105**

- Review FRE Art. I, particularly R. 103 (Rulings on Evidence).
- Read the syllabus and the *State v. Mitchell* case file (pp. 1 – 90).
- By noon on Wednesday, August 31, post a statement on the Discussion Board (in Canvas) relating the exposure you have had to evidentiary issues in practice. In other words, let the class know if you have had practice in the courtroom and made evidentiary arguments (and to what extent), or if you have had no experience beyond your JD class in Evidence, or something in between. From this benchmark, you can evaluate your progress over the course of the semester. Additionally, provide a number between 1 to 10 on how comfortable you are with the Federal Rules of Evidence, 10 being "totally comfortable" and 1 being "what are the Federal Rules of Evidence?"
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written materials posted in this week's module.

**Week # 2 (Mon. Sept. 5 – Sun. Sept. 11) –
Relevance and Unfair Prejudice – FRE 401-403**

- Review FRE Art. IV (Relevance and Its Limits), particularly FRE 401-403.
- By noon on Tuesday, September 6, for *Mitchell*, prepare a memo (no more than 2 double-spaced pages) detailing a winning defense strategy ("theory of the case") including a list of the witnesses you would anticipate calling and

the physical evidence (e.g., documents, photos, objects, letters, reports) which you would anticipate seeking to admit into evidence at trial. For the physical evidence, please also cite the specific FRE that your opponent may cite to oppose admission of the evidence.

- For *Mitchell*, both the Prosecution and Defense (to be assigned) should be prepared to orally argue as follows:
 - Prosecution: for and/or against the admission of the evidence in Problems 13 and 18 (dealing with relevance).
 - Defense: for and/or against the admission of the evidence in Problems 14-15 and 18 (dealing with relevance).
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 3 (Mon. Sept. 12 – Sun. Sept. 18) – Witnesses & Witness Impeachment – FRE Article VI

- Review FRE Art. VI (Witnesses).
- For *Mitchell*, prepare a defense motion in limine (no more than 2 double-spaced pages) seeking to exclude three (3) statements (or portions) of a State witness's expected testimony. Be sure to cite the specific FRE on which you base your arguments. Both sides should be prepared to orally argue for and against the motion. Note: this is not meant to be a research assignment, so you may not conduct any legal research—you are limited to the law that you find in the textbook, FRE and class materials.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 4 (Mon. Sept. 19 – Sun. Sept. 25) – Witness Impeachment – FRE Article VI

- Review FRE Art. VI (Witnesses).
- For *Mitchell*, prepare a memo (no more than 2 double-spaced pages) answering the following Problems (involving Rs. 401-403, 602 & 608): Problems 112, 113, 116, and 141.
- Both sides should be prepared to orally argue Problem 127 (involving Rs. 609 & 403). (For purposes of R. 609, you should assume that the prior conviction is a felony.)
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 5 (Mon. Sept. 26 – Sun. Oct. 2) – Hearsay Introduction & Hearsay Exclusions – FRE 801-802 & 805-806

- Review FRE Article VIII (Hearsay), particularly Rs. 801-802 and 805-806.
- Prepare a written memo (no more than two double-spaced pages) answering the eight Introductory Problems on pp. 5 & 6 of your Problems workbook (involving Rs. 801-802).
- For *Mitchell*, the State is calling Quinn Washington (p. 43 of Cases text) as a witness. Be prepared to orally argue for and against the admissibility (considering Rs. 801-802 & 805-806) of her expected testimony described in paragraph two on p. 44.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 6 (Mon. Oct. 3 – Sun. Oct. 9) – Hearsay Exceptions – FRE 803

- Review FRE Art. VIII (Hearsay), particularly Rs. 803(1), (2), (3), & (4).
- For *Mitchell*, prepare a written memo (no more than two double-spaced pages) answering the questions raised in the following Problems involving Rs. 801-802 & 803(1), (2), & (3): Problems 259, 260, 263 and 299. Be sure to cite the specific FRE on which you base your arguments.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 7 (Mon. Oct. 10 – Sun. Oct. 16) – Character and Habit Evidence – FRE 404(a) & 406

- Review FRE Article IV, particularly Rs. 404 – 406.
- Read the *MacIntyre v. Easterfield* case file in the Case Textbook (pp. 93 – 163).
- Be prepared to orally argue any character or habit evidence issues (Rs. 404-406) in Problems 23 (*Mitchell*), and 24 & 49 (*MacIntyre*).
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 8 (Mon. Oct. 17 – Sun. Oct. 23) – Hearsay Exceptions – FRE 803

- Review FRE Article VIII, particularly Rs. 803(5) & (6).
- For *McIntyre*, prepare a memo (no more than three double-spaced pages), answering Problem 267. More specifically, list the direct-exam questions to the witness that are necessary to lay the foundation to admit the employment application as a business record, and note any possible hearsay objections/arguments based on that foundation.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 9 (Mon. Oct. 24 – Sun. Oct. 30) – Hearsay Exceptions and Hearsay Within Hearsay – FRE 803 & 805

- Review remaining FRE 803 exceptions and R. 805.
- For *MacIntyre*, prepare a memo (no more than two double-spaced pages) answering Problems 274, 281 and 286.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 10 (Mon. Oct. 31 – Sun. Nov. 6) – Hearsay Exceptions – Unavailable Declarant & Residual Exception – FRE 804 & 807

- Review FRE 804 and 807.
- Choose one hearsay exception from R. 804 or 807 and be prepared to present and discuss your exception with the class, including a discussion of the elements/requirements of the exception. The presentation should be no longer than ten (10) minutes and should include an example of the application of the exception/exemption using any of the material in the *MacIntyre* case file or from another source. The presentation may, but is not required to, utilize presentation slides (e.g., PowerPoint or Google), and/or audio/video files (e.g., YouTube clips).
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 11 (Mon. Nov. 7 – Sun. Nov. 13) – Privileges Generally and Spousal Privileges – FRE 501-502

- Review FRE Art. V (Privileges).
- For *MacIntyre*, prepare a memo (no more than two double-spaced pages) answering Problems 184, 188 and 189 (involving the spousal privileges). Note: this is not meant to be a research assignment, so you may not conduct any legal research—you are limited to the law that you find in the textbooks, FRE, and class materials.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 12 (Mon. Nov. 14 – Sun. Nov. 20) – Opinion Testimony – FRE 701-702 & 704

- Review FRE Art. VII, particularly Rs. 701-702 & 704.
- For *MacIntyre*, prepare a memo (no more than two double-spaced pages)

answering Problems 159 and 167 – 169 (involving Rs. 701-702 & 704). Note: this is not meant to be a research assignment, so you may not conduct any legal research—you are limited to the law that you find in the textbook, FRE, and class materials.

- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week's module.

Week # 13 (Mon. Nov. 21 – Tues. Nov. 22) (last week of classes) – Limiting Instructions – FRE 105

- Review FRE 105 (Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes).
- In *Bruton v. United States*, 391 U.S. 123, 132-33 (1968) (copy posted to Canvas), the Supreme Court commented on the efficacy of the limiting instruction (R. 105) in the context of a joint criminal trial where evidence is admissible against one defendant, but inadmissible (because of hearsay and the 6th Amendment Confrontation Clause right) against the other. The Court quoted several judges who were critical of the limiting instruction, including Judge Learned Hand who was quoted as saying that the limiting instruction “is a recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else . . . [and] it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition.” *Id.*, n.8 (internal quotation marks omitted).
- Read the *Bruton* opinion at pp. 132-33, and prepare a memo (no more than two double-spaced pages) stating whether you agree with Judge Hand’s opinion about the efficacy of the limiting instruction and whether you believe that a jury can follow an instruction under R. 105 to consider a piece of evidence only for one (permitted) purpose but not for another (prohibited) purpose. Note: this is not meant to be a research assignment, so you may not conduct any legal research—you are limited to the law that you find in the textbooks, FRE, and class materials.
- Watch any pre-recorded lecture(s) and review any presentation slides and/or written material posted in this week’s module.