

# 8<sup>th</sup> Annual Online Conference Materials

## Race, Gender, Vulnerable Populations, and the Rules of Evidence Course Description:

This seminar examines the intersection of constructions of race, gender, and vulnerable populations and rules of evidence and interrogates whether this interplay impacts achieving the purpose of the rules—to ascertain the truth and secure just verdicts. The topics addressed include the federal rape shield law (Fed. R. Evid. 412), competency (Fed. R. Evid. 601 and historical witness competency rules), impeachment by evidence of criminal convictions (Fed. R. Evid. 609), the admissibility of similar crimes evidence in sexual assault and child molestation cases (Fed. R. Evid. 413-415), character evidence (Fed. R. Evid. 404), evidence of flight as consciousness of guilt, and eyewitness evidence. Students will critically analyze these rules (and others) and applicable case law and consider alternate approaches in a collegial and respectful environment.

**The Psychology of Persuasion** course seeks to provide advanced advocacy skills by rethinking traditional courtroom dynamics. Students will learn to see trial as a fundamentally social interaction that can be observed, analyzed, and influenced. By analyzing communication as a process consisting of the sender, the recipient, the message, and the situation, students will understand how to use each factor for more persuasive arguments. Using an interdisciplinary approach, the course will provide a framework for thinking about how best to engage the trier of fact in that interaction.

# **ADVANCED EVIDENCE: OBJECTIONS AND ARGUMENT SPRING 2023—ASSIGNMENTS (REVISED 1/29/23)**

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Law 790 (LEC 2; 2.0 units)

Wednesdays, 10:00 – 12:00 pm: First Class on Zoom, then in Capello Courtroom (1310)

## **Professor Information**

Professor: Eileen A. Scallen (scallen@law.ucla.edu)

Office hours: By appointment. I will also plan to stick around after class if you want to chat then.

## **Course Materials**

- Fred Galves et al, Evidence Simulations 2d edition (West Academic Publishing 2018) (“Text”).
- Federal Rules of Evidence (any version will do, but you must have a copy of the rules in front of you at all classes).
- Additional articles and materials (provided on Bruin Learn).

## **Course Description**

This course gives students the opportunity and challenge of applying the rules of evidence in the same fashion as practicing lawyers: via written motions, oral argument, and courtroom objections. This course involves substantial participation in simulations during class sessions and substantial written work outside of class sessions. Topics will include relevance, character evidence, hearsay, and expert testimony, among others.

## Learning Goals

By the end of the course, students should feel comfortable:

- 1) identifying, applying, and arguing evidentiary rules based on a given set of facts;
- 2) presenting written evidentiary arguments clearly and persuasively;
- 3) arguing evidentiary issues to, and responding to questions from, a judge;
- 4) raising and responding to objections to live testimony; and
- 5) receiving and providing feedback (including self-critique) for in-class exercises.

## Prerequisites

Students must have completed Evidence. Trial Advocacy is recommended but not required.

## Grading

This course is letter-graded. Grades will be based on attendance, preparation, written work, in-class performances, and contributions to class discussion. The best written and oral work is thorough, persuasive, polished, and attentive to legal and factual detail. There is no final exam.

## Cases

We will be using the Derry fact pattern (see Galves et al.: Appendices A & B, pp. 115-117 and Additional Background document on Bruin Learn), for all exercises and assignments.

This fact pattern includes a criminal case, *State v. Derry*, and civil case, *Rogers v. Derry*. As you know, the Federal Rules of Evidence sometimes treat admissibility of evidence in a criminal case differently from evidence in a civil case, so at times

you will be asked to play a lawyer in the criminal case, and other times you will be dealing with the civil case. You will need to be very familiar with the doctrinal law and facts described in these materials. I suggest you review them when doing each assigned task.

## **Written Assignments**

In some weeks, you will be assigned written motions/briefs or judicial orders. All written assignments should be double-spaced in Times New Roman 12-point font with one-inch margins. Unless otherwise specified, written assignments may not exceed four pages. Pleading paper or other fancy formatting is unnecessary. I am more interested in the content of your arguments.

Motions and oppositions should be “served” as attachments by email on (1) your opposing counsel, (2) any students assigned as judges for the motion, and (3) your professor.

Unless otherwise specified in the assignment, the moving party’s deadline for service for the motion is no later than 5 pm on the Saturday before the class where the motion is to be argued. The opposition is due no later than noon on the Tuesday before our Wednesday class.

These timelines track real motion practice—the time for filing an opposition is usually short, and, generally, no reply is allowed for non-dispositive motions. The best lawyers (on either side of a motion in limine) have analyzed the evidence already and know what objections or responses a party may make to certain pieces of evidence—if you are opposing the motion, you should anticipate what the other side will argue and be ready to respond.

## **Full Scope of Arguments**

Some assignments will require you to argue weaker positions. You may not concede them. For example, if your client moves to exclude Exhibits A and B, and you think your argument against Ex. A is much stronger than your argument against Ex. B, you cannot proceed only against Ex. A. I want you to gain experience arguing weaker positions – and I want to make sure the opposing student has a full opportunity to argue their position. (After the oral argument we will discuss whether it would be strategically wise for an attorney in that scenario to concede.)

## **Attendance**

Because the course revolves around in-class simulations, attendance is crucial – particularly on days when you are scheduled to perform as a lawyer. However, I realize that sometimes the real world gets in the way. To that end, at the beginning of the semester I will attempt to schedule everyone's attorney performances for days when they indicate availability. Important Note: more than one absence during the semester may impact a student's final grade.

## **Office Hours**

My office hours are by appointment—not because I don't want to meet with students, but rather just the opposite: I enjoy with speaking students, and I know that any selected times will only work for a fraction of your schedules. So, if you want to discuss course concepts, assignments, or anything else, please email me to set up a time!

## **Weekly Assignments:**

I reserve the right to change the schedule or curriculum, but I will announce any changes in writing and as much in advance as possible. The Reading Assignments refer to what you should read before each class.

**You are being assigned to a general “group” of students (Blue or Gold) who will perform on the class days as designated below. Your assignment is described in detail in the directions for each week. In general, all students will have the same reading assignment (or review assignment), but the specific performance tasks of the groups will differ.**

**Please ask me if you see any discrepancy or have questions about these week-by-week assignments.**

### **Blue Group:**

### **Gold Group:**

**NOTE: Because we sometimes will have an uneven number of “players,” it will be necessary for all students to think through problems and “play” the opposition at times.**

- **Jan. 18: (VIA ZOOM) Primary topic: Introductions; Objecting to Evidence**
  - **All students:**



- (1) Study Course Policies and Assignment sheet (this handout);
- (2) Read FRE 103, Comm. Notes (on Bruin Learn); focus on 2000 Amendment;
- (3) Read Steven Lubet, *Objecting*, 16 Am. J. Trial Advoc. 213 (1992)(on Bruin Learn);
- (4) Read Text pp. 1-7.

- **Jan. 25: Primary topic: Relevance**

- **All students:**

- Read Appendix A (Criminal Case), Appendix B (Civil Case) and Additional Case File Background document on Bruin Learn;
- Read Text pp. 27-39.
- Read FRE 401, 402, and 403

- **Blue Group:**

- Shortly after class on January 19, you will receive an assignment from your “supervisor” (me) by email. You will be given a role as Defense Attorney or Prosecutor (see below). No later than 5 pm, Tuesday, Jan. 24, send a memo (a longer email is fine) to your “supervisor” (me!) advising me on whether the defense should proceed with its motion and why (or, if you are the prosecutor, should oppose the motion and why). You are being asked to analyze the possible relevance issues under Rules 401/403. Unlike other weeks, in which your written work will be aimed at persuading a judge, this email to your supervisor should provide an objective analysis, laying out strengths and weaknesses of your side’s (moving party or opposition) position and the opposition’s side.
- Please note—the Text just above the evidence items says you may only use Rule 401, but I want you to argue BOTH Rules 401 and 403—so ignore that Text limitation.
- In class on Jan. 25, the Defense will decide to proceed with its motion to exclude certain evidence and argue it orally. The Prosecution will argue against the motion. Remember, your arguments are still limited to FRE 401 and 403 (and the Advisory Committee Notes to those rules); no cases may be cited.

- **Gold Group:** You are all Judges today. Judges should be ready to rule on the motion in class (based only on reading the Text and the oral argument of the Criminal Defense Lawyer—you will not receive the written work product this week) and to provide constructive feedback to the “attorneys.”

Here is who will argue and judge on each piece of evidence:

Docket No.	Motion	Defense	Prosecutor	Judges
1	Criminal Defense motion to exclude Item 1, p. 29	Student X	Student Y	Students Z and A
2	Criminal Defense motion to exclude Item 2, p. 29	Student G	Student D	Student C
3	Criminal Defense motion to exclude testimony from George Lyman, the Service Department Manager for NITA Ford, where he supervises Frank Derry, a mechanic. If allowed, Lyman would testify that on several occasions, Frank has told George that he had to leave work for illness, but then George has seen Frank in the park at lunchtime sitting on a bench having lunch with some lady who is not Frank’s wife Thelma.	Student	ALL students should think of counter-arguments and be ready to raise them.	Student

- **Feb. 1: Primary topic: Relevance**

- **All students:** Same reading assignment as Jan. 25.
- **Gold Group:** Defense moves to exclude certain evidence and Prosecution opposes (see below for specific assignments). Arguments

are limited to FRE 401 and 403, their Advisory Committee Notes, and no cases may be cited. Your specific motion and roles are assigned below. Defense Attorneys and Prosecutors/Plaintiff: follow the general rules regarding due dates “service” of your written motion/opposition stated in the syllabus (moving papers due by 5 pm on Saturday before class, oppositions served no later than noon Tuesday before class—remember to serve on the other party, the judges, and me (your professor!)). For purposes of serving your motion/opposition, I will post a list of your classmates and their emails under “Basic Course Information.”

- **Blue Group:** You be Judges today. Judges, you should have read the papers you were served before coming to class and be prepared to ask questions during oral argument. You should then be prepared to rule on the motion and to provide constructive feedback to your classmates.

Docket No.	Motion	Moving Party	Opposing Party	Judges
1	Criminal Defense motion to exclude Item 3, p. 30. Assume that these witnesses are also neighbors, but not the Rogers. Assume that this testimony would be in addition to Rogers’s specific answers on pp. 35-36 (which we will assume were not from a civil trial but were given to the prosecutor’s investigator).	Student	Student	Student
2	Criminal Defense motion to preclude Rogers from testifying to the content of the first two answers he gave on p. 35 (again, assume these answers were not from the civil trial but instead were given to an investigator from the prosecution’s office).			
3	Imagine that after the fire, Thelma Derry sues her husband Frank for civil battery, claiming physical, emotional, and punitive damages. Defendant moves to exclude Exhibits P-7 through P-14 (pp. 37-39) in that civil case.		All students: think of all potential counterarguments and be ready to raise them.	

- **Feb. 8: Primary Topic: Character Evidence and Impeachment**
  - **All Students:**
    - Read Text pp. 41-57.
    - Read FRE 404-405; 608-609 (see AMENDED Rule 404(b) on Bruin Learn)
    - Prepare to argue in-trial objections concerning the testimony on pages 46-50 (this may take us two class sessions to fully discuss).
  - **Blue Group:** By written motion and oral argument, the parties dispute the admissibility of certain evidence referenced below (from pages 56-57). Your specific motion and roles are below. Adhere to the general deadlines for service of the motion and opposition. The parties should limit their arguments to FRE Articles 4 and 6, and ignore any other issues, including hearsay or authentication. No cases may be cited, though parties may reference “Gordon factors” (discussed on p. 55), if appropriate.
  - **Gold Group:** You are the Judges today. You should have read the papers before coming to class and be prepared to ask questions during oral argument. You should then be prepared to rule on the motion and to provide constructive feedback to your classmates.

Docket No.	Motion	Moving party	Opposing party	Judges
1	Civil Defense motion to exclude evidence in #3 on p. 57. Assume that no more than 9 years has passed since Derry’s felony aggravated assault conviction and his release from confinement.		Motion should be served on all students and professor. Judges will think of questions. The rest of us will make the opposition arguments.	
2	Criminal Defense motion to exclude evidence in #4 on p. 57 (assume Defendant has just testified on direct exam and make same assumption about the age of his aggravated assault conviction).			

3	Prosecution motion to exclude evidence in #5 on p. 57.		Motion should be served on all students and professor. Judges will think of questions. The rest of us will make the opposition arguments.	
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- **Feb. 15: Primary Topic: Character Evidence and Impeachment**

- **All Students:**

- Read Text pp. 41-57 (same as Feb. 17)
- Read FRE 404-405; 608-609 (see AMENDED Rule 404(b) on Bruin Learn)
- Prepare to finish arguing in-trial objections concerning the testimony on pages 46-50 (this may take us two class sessions to fully discuss).

- **Gold Group:** By written motion and oral argument, the parties dispute the admissibility of certain evidence referenced below (from pages 56-57). Your specific motion and roles are below. Adhere to the general deadlines for service of the motion and opposition. The parties should limit their arguments to FRE Articles 4 and 6, and ignore any other issues, including hearsay or authentication. No cases may be cited, though parties may reference “Gordon factors” (discussed on p. 55), if appropriate.

- **Blue Group:** You are the Judges today. You should have read the papers before coming to class and be prepared to ask questions during oral argument. You should then be prepared to rule on the motion and to provide constructive feedback to your classmates.

Docket No.	Motion	Moving party	Opposing party	Judges
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1	Prosecution motion to exclude evidence referenced in #1 <sup>1</sup> on p. 56.			
2	Plaintiff motion to exclude evidence referenced in #2 on p. 57.			
3	Assume that in #5 on p. 57, the Court ruled for the Defense in the criminal case. Defense then brings a motion to preclude the prosecution from: A) asking Edward Derry, "did you know that Thelma won an award at her work last year for being "Our Favorite Co-worker?" and B) offering Thelma's award plaque itself in evidence.		Motion should be served on all students and professor. Judges will think of questions. The rest of us will make the opposition arguments.	

- **Feb. 22 Primary Topics: Creating Clear Questions on Direct Examination; Forgetful Witnesses; Identifying Hearsay/Not Hearsay**
  - **All Students:**
    - Read Text, pp. 9-25, 75-80.
    - Prepare exercise on p. 78 (bottom) to 80.
    - Review Rule 801(a)-(c)
    - Read Handout on Objections as to Form on Bruin Learn (Text pp. 5-7 also discusses this, but I wanted to provide you with a handy chart from my favorite Evidence text).
  - **Blue Group:** Plaintiff calls Nat Rogers to the stand. The direct examination will consist of Parts 1 and 2 on pages 24-25; after Part 1 is complete, the attorney and witness will trade roles and conduct Part 2.
  - **Gold Group:** You will serve as defense counsel and may object.

Docket No.	Plaintiff attorney for Part 1, and Rogers for Part 2	Rogers for Part 1, and Plaintiff's attorney for Part 2	Defense Attys
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<sup>1</sup> Assume Officer Pat Lukasz is the police officer who investigated the alleged arson and a witness for the prosecution whose credibility and competence is important to the prosecution's case.

1			
2			
3			

- **Mar. 1. Primary Topics: Creating Clear Questions on Cross-Examination; Identifying Hearsay/Not Hearsay**

- **All students:**
  - Same reading assignment as last week. Review it!
  - Complete the exercise on pages 78-80; we will discuss what we did not get to last week in class.
- **Gold Group:** You are the Plaintiff's counsel, and cross-examine Frank Derry as explained in Part 3 on page 25.
- Remaining Gold group members will alternate portraying the witness.
- **Blue Group:** You are the defense counsel as assigned below and may object.

Docket No.	Plaintiff attorney	Defense attorney
1		
2		
3		
4		
5		

- **Mar. 8: Primary Topic: Exceptions and Exemptions to the Hearsay Rule**

- **All Students**
  - Read Textbook, pp. 81-93 (note—only SOME hearsay exceptions are discussed in the text, but I want you to review all of them).
  - Read Rules 801(d); Rules 803-804, 807.
  - All class members will participate as attorneys and judges in a video objection exercise concerning hearsay, though no preparation is required beyond familiarity with the assigned reading.
- **Blue Group**

- You are the Prosecution and will prepare direct examinations that introduce four pieces of evidence (testimony and/or exhibits) via four different hearsay exceptions—including at least one piece of evidence that involves a document. Working in pairs of your choice (i.e, pick a partner from the Blue group) to prepare, you may “call” or invent any witness and invent whatever evidence you wish to satisfy the exceptions.

Limitation: You cannot repeat a hearsay exception. So if you use “excited utterance” for one piece of evidence, you and your partner cannot use that exception for the other three pieces of evidence. Do not use the hearsay exemptions (Rule 801(d)) for this class period. One student will perform as the attorney and the other as the witness on direct examination; after two pieces of hearsay evidence are admitted, you will swap lawyer-witness roles and offer the other two pieces. Please email the “witness” professor your “scripts” laying the foundation for the exceptions to the professor no later than 5 pm, March 7 (day before class).

- **Gold Group**

- Be prepared to listen carefully to the direct examination and object on your feet if you spot a problem. Students who do not object will be asked to rule on the objection.

- **Mar. 15. Primary Topic: Exceptions and Exemptions to the Hearsay Rule**

- **All Students:**

- Same reading assignment as last week. Review it!
- Remember to review all hearsay exemptions and exceptions: Rules 801(d); Rules 803-804.
- All class members will participate as attorneys and judges in a video objection exercise, though no preparation is required beyond familiarity with the assigned reading.

- **Gold Group:** You are the Prosecution and will prepare direct examinations that introduce four pieces of evidence (testimony and/or exhibits) via four different hearsay exceptions and/or exemptions—including at least one that involves a document. Working in pairs of



your choice (pick a partner from the Gold group), you may “call” any witness and invent whatever evidence you wish to satisfy the exceptions/exemptions.

You may NOT use any hearsay exception that was used in the previous class (Mar. 9). You MAY use the hearsay exemptions in Rule 801(d). If you use a hearsay exception or exemption, neither you nor partner can “repeat” it; for example, if the first person uses the “adopted admission” exemption, that lawyer cannot use it again, nor can their partner. One student will perform as the attorney and the other as the witness on direct examination; after two pieces of hearsay evidence are admitted, you will swap lawyer-witness roles and offer the other two pieces. Please email the professor your “scripts” laying the foundation for the exceptions to your witness and the professor no later than 5 pm, March 14 (day before class).

- **Blue Group:**
  - Be prepared to listen carefully to the direct examination and object on your feet. Students who do not object will be asked to rule on the objection.
  
- **Mar 22: Primary Topic: Lay and Expert Opinion**
  - **All Students:**
    - Read Text pp 59-72.
    - Read motion and opposition briefs in *United States v. Cervantes* (on Bruin Learn).
    - Read Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in Texas v. Willingham*, 14 Minn. J.L. Sci. & Tech. 817 (2013).
    - You are the trial judge in *United States v. Cervantes*. After reading the parties’ briefs and Dioso-Villa background article, draft an order (no longer than two pages) granting or denying the motion in limine and explaining why. If you need additional information, that would be a defect in the motion or opposition, and your order should so state. You will apply federal rules and federal case law cited in the required reading.

- **Orders should be submitted to the professor no later than 5 pm on Tuesday, March 27.** You may work individually or in pairs (pairs will be evaluated as a team—no individual feedback!).
- **Mar. 29 (No Class—Spring Break)**
- **April 5: Primary Topic: Hearsay, Experts, and the Confrontation Clause**
  - **All Students:**
    - Review the motion and opposition briefs in *United States v. Cervantes* (on Bruin Learn) again.
    - Read *People v. Sanchez* (CA 2016) on Bruin Learn
    - If time in class, everyone will participate as attorneys and judges in a video objection exercise concerning lay and expert opinion evidence, though no preparation is required beyond familiarity with the assigned reading.
  - **Blue Group:** You will represent the defense in *U.S. v. Cervantes*. The original motion in limine did not discuss the applicability of the Confrontation Clause. Write an addendum (no longer than two pages) to the motion in limine, raising and arguing any Confrontation Clause violations. Note that while *People v. Sanchez* is a California Supreme Court case, it explains the current controlling federal law on Confrontation Clause and is persuasive authority for the U.S. District Court in *Cervantes*.
  - **Gold Group:** You will represent the prosecution in *U.S. v. Cervantes*. You did not originally discuss the Confrontation Clause, but you will write an addendum (no longer than two pages) to your opposition, arguing that there is no Confrontation Clause problem.
  - **Addendums should be emailed to the professor no later than 5 pm on Tuesday, April 4.** You may work individually or in pairs (same deal—you will get feedback as a pair).

- **April 12. Primary Topic: Authentication/Review and Summary**

- **All Students:**
  - Read Text pp. 95-112
- **Blue Group:** You will be attorneys who offer exhibits (referenced on pages 107-08) into evidence and opposing counsel may object. For each exhibit, you decide which witness(es) to call to admit the exhibit, choosing from the list in Footnote 6 on page 107, and which student will portray your witness. The proponents should prepare their witness beforehand (provide a script or outline of what you want them to say) and provide the witness and the professor with a copy of it by noon on April 11.
- **Gold Group:** You will be asked to object to the items offered as indicated below—you may object on the basis of improper foundation for authentication and any other basis we have discussed in this class (relevance, hearsay, form of the question, etc.). Those students not objecting will rule on the objection.

Docket No.	Exhibit	Proponent	Objecting attorney
1	Prosecution offers evidence in #1 on p. 107.		
3	Prosecution offers evidence in #2 on p. 107. (Defendant testifies)		
4	Prosecution offers evidence in #2 on p. 107. (Defendant doesn't testify)		
5	Prosecution offers evidence in #5 on p. 108.		

- **April 19: Primary Topic: Authentication/Review and Summary**

- **All Students:**
  - Same reading assignment as April 12: Text pp. 95-112.
- **Gold Group:** You will be attorneys who offer exhibits (referenced on pages 107-08) into evidence and opposing counsel may object. For each exhibit, you decide which witness(es) to call to admit the exhibit,

choosing from the list in Footnote 6 on page 107, and which student will portray your witness. The proponents should prepare their witness beforehand (provide a script or outline of what you want them to say) and provide the witness and the professor with a copy of it by 5 pm on April 18 (day before class).

- **Blue Group:** You will be asked to object to the items offered as indicated below—you may object on the basis of improper foundation for authentication and any other basis we have discussed in this class (relevance, hearsay, form of the question, etc.). Those students not objecting will rule on the objection.

Docket No.	Exhibit	Proponent	Objecting attorney
1	Prosecution offers evidence in #3 on p. 108.		
2			
3	Prosecution offers evidence in #4 on p. 108.		
4			
5	Prosecution offers evidence in #6 on p. 108.		

## **Additional School of Law Policies**

UCLA Law strives to provide accommodations in a way that supports students with disabilities while maintaining their anonymity and the fundamental nature of our law program. As such, students needing academic accommodations should not contact their professors directly, but contact Carmina Ocampo, Director of Student Life ([ocampo@law.ucla.edu](mailto:ocampo@law.ucla.edu)) or the UCLA Center for Accessible Education (CAE) at [www.cae.ucla.edu](http://www.cae.ucla.edu). When possible, students should start this process within the first two weeks of the semester, as reasonable notice is needed to coordinate accommodations.

Students needing assistance with medical or mental health issues, substance abuse, anxiety or depression or other health-related matters should contact the Office for Student Affairs at [studentaffairs@law.ucla.edu](mailto:studentaffairs@law.ucla.edu), UCLA Counseling and Psychological Services (CAPS) at 310-825-0768 or the Ashe Student Health & Wellness Center at 310-825-4073. CAPS operates a satellite clinic in our Law Library on Mondays, Tuesdays and Wednesdays, 10:00 a.m.-1:00p.m. in Room 1112Q of the Law Library. UCLA has many resources to help students so please take advantage of them.

Regular attendance is required for all classes at UCLA Law. Pursuant to our academic standards, students who do not regularly attend class may, at the professor's discretion, receive a grade of "F" or be dropped from the class. Students for whom this may be an issue will receive a written warning before this final action and may need to attend all remaining classes after the written warning is given.

**TRIAL ADVOCACY: A New Approach**  
**LAW 795-512H (Special Topics in Law)**  
**(Syllabus ver. 005, 4-17-23)**

Week 1 (Aug 23)

Reading before Class: Chs. 1-7 of H. Stern and S. Saltzburg, *Trying Cases to Win: In One Volume* (student ed.) (West Academic).

Lecture - Course Overview; Becoming an Advocate and Developing Themes, Arguments and Presentations; and Opening Statements or Opening Arguments?

Weeks 2 & 3 (Aug 30 & Sep 6)

Reading before Class: Ch. 15 of *Trying Cases to Win*, Case File 1

WK 2 – Lecture on Exhibits then Practice Openings in Class (Case File 1)<sup>1</sup>

WK 3 - Scrimmage against Syracuse with students delivering alternating PL and DEF Opening Statements

Weeks 4 & 5 (Sep 13 & 20)

Reading before Class: Chs. 8,9 10 & 13 of *Trying Cases to Win*; Case File 2

Direct Examination, Witness Preparation, Deciding the Order of Witnesses, and Adverse Witnesses

WK 4 - Lecture and then Practice Direct Examinations in Class (Case File 2)

WK 5 – Direct examination scrimmage against Syracuse (witnesses will come from and be prepared by opposite school)

Week 6 & 7 (Sep 27 & Oct 4)

Reading before Class: Chs. 11, 12 & 14 of *Trying Cases to Win*; Case File 3

Expert Witnesses; Cross-Examination

WK 6 - Lecture then Practice Cross-Examinations in Class (Case File 3) – Cross will be based upon a written statement, not a live direct examination

WK 7 - – Scrimmage against Syracuse (witnesses will come from opposite school and cross-examination based upon a written statement, not a live direct examination)

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<sup>1</sup> At the instructors' discretion, we may use case files for more than one week or multiple case files in a week.

Week 8 & 9 (Oct 11 & 18)

Reading before Class: Case File 4

Wks 8 & 9 - More Direct and Cross – Both direct and cross using live witnesses. If possible, all done as scrimmages with Syracuse (Case file 4)

Weeks 10 & 11 (Oct 25 & Nov 1)

Reading before Class: Ch. 15 of *Trying Cases to Win*; Case File 5

WK 10 - Closing Arguments – Lecture then practice closing arguments in class (Case file 5)

WK 11 – Scrimmage closing arguments with Syracuse

Week 12 (Nov 8)

Reading before Class: Case File 6

Final Trials preparation and trial dress rehearsal run-throughs (Case file 6)

Week 13 (Nov. 15)

Final Trials against Syracuse – First week (Case file 6)

Week 14 (Nov. 22) - TBD (Thanksgiving Eve)

Week 15 (Nov. 29)

Final Trials against Syracuse – Second week (Case file 6)

*Emory School of Law*  
**Forensic Evidence**  
Fall 2022 Syllabus

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**GENERAL COURSE INFORMATION**

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**Professor:**

Name

Email

Cell phone

**Class:**

Day/Time:

Room:

Zoom link:

**Office Hours**

In-person:

Via Zoom:

**Note:** If you would like to schedule a time to meet outside of the standing office hours, please email both of us and include your availability and preference for meeting in-person or via Zoom.

**Required Texts/Course Materials:**

All readings and most course materials will be provided electronically to you via Canvas and Emory Course Reserves, with the exception of The Sample Expert Notice and Transcripts, both highlighted in yellow in the Reading Assignment section below, which we will provide to you in hardcopy during class the week before they are assigned.

**Prerequisites:**

Evidence & Constitutional Criminal Procedure: Investigations (unless you receive approval to take a prerequisite as a corequisite.)

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**LEARNING OBJECTIVES, GOALS & EXPECTATIONS**

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**Course Overview:** From techniques that have been used for decades to emerging technologies, forensic evidence has become a prevailing feature in criminal cases. However, many techniques have never been demonstrated to be scientifically valid and/or are used well beyond the limits of their reliability. The use of forensics raises important issues regarding scientific validity, evidentiary reliability, and privacy, as well as how those forces impact due process, racial injustice, and mass criminalization. This course will survey the use of different kinds of forensic evidence, focusing on the intersection of legal frameworks and scientific reliability, in relation to forensic testing, lab operations, and expert testimony. The significance of cognitive bias, racial justice, and constitutional rights will be



examined throughout. Students will also be able to compare the different forms of forensic evidence and contemplate ways to strengthen the use of forensics and protect against the misuse of forensic and surveillance technologies in the criminal legal system. At the center of these considerations will be the human beings whose lives are directly impacted by the use of such evidence. In addition to studied topics, the course will also have a skills-based component that ties the theoretical and practical together to prepare students for forensic litigation. Despite the increased frequency of which forensic evidence is a part of criminal cases, most lawyers and judges feel ill-equipped to properly address these issues in litigation. By beginning this learning process in law school, as a matter of both doctrine and skill, we can ensure that the profession is adequately prepared to grapple with this rapidly growing and fast changing component of criminal litigation.

**Goals & Learning Objectives:** By the end of this course, you should:

- Understand the basic techniques used in forensic analysis, how to assess scientific validity, and identify and understand the limitations, flaws and implications of different methods.
- Understand the legal frameworks governing admissibility of expert testimony and critically assess their purpose, efficacy, and limitations.
- Understand the role of human factors and cognitive bias in forensic analysis.
- Understand the intersection of forensic evidence and constitutional protections as a matter of criminal procedure and policy.
- Be able to identify and think critically about the ways forensics has contributed to racial inequity and mass criminalization.
- Have developed a baseline set of practical skills necessary to litigate expert admissibility.

### **Mutual Expectations**

*What you can expect from us:* We will show up on time and prepared each week for class. We will not only be respectful of differing views and diversity of opinion but encourage it. We will foster and facilitate robust discussion where ideas, including those different from our own, are heard and respected. We will hold weekly office hours on campus Tuesdays from 4:00-6:20pm. Our hope is for both of us to be there each week; however, we are both practicing attorneys representing clients whose lives are at stake. To that end, there may be unavoidable client emergencies that arise. In such cases, at least one of us will be present for office hours. We will provide a rubric of grading criteria for all assignments so that you have transparency and accountability in how you will be evaluated. We will return any graded assignment within two weeks of completion.

*What we expect from you:* We expect that you also will show up on time and prepared each week for class. That means arriving having completed all assigned readings, ready to engage in critical thinking and discussion about the contents and ask any questions you have. This is not a typical law lecture course, where you are expected to take copious notes and answer when called on. Rather, this is a discussion-based seminar. We expect everyone to participate and engage with the ideas and topics; not merely take notes on what we think or have to say. Each one of you comes to this course with a different life

experience, set of values and beliefs, and level of familiarity with the subjects. We expect that everyone will be respectful of one another and encourage a safe learning environment for all. Individual questions that do not directly relate to class should be asked outside of the designated class time out of respect for other's learning. We will make ourselves available at a mutually agreed upon time in addition to office hours. We understand that life happens, and other circumstances may impact your wellbeing or ability to be present and participate. We will work with you to succeed. Students

**Attendance:**

The Emory Student Handbook and A.B.A. require you to attend class regularly, and that is our expectation too. A student who attends fewer than 80% of class is deemed to have excessive absences, regardless of whether the absences are excused or not. It is your responsibility to monitor your absences, communicate with us regarding missed classes and make up any missed content. Please reach out if you need support to stay on track. If you are in danger of falling short of the 80% attendance requirements, we will discuss your options under the specific circumstances with the goal of helping you succeed in the given situation. You will not lose credit or be at risk of failing unknowingly. Your grade will not necessarily be impacted by an absence; however, unexplained absences will negatively impact the reading/participation portion of your grade. To the extent possible, please notify both of us in advance via email if you know you will be absent from class. In the case of an emergency or other unexpected circumstances, please notify us via email as soon as it is feasible. It is your responsibility to make up any missed material; however, please communicate with us so that we can support you and facilitate your learning. If you cannot attend a class on a religious holiday, it will not be considered an absence, however, we ask that you let us know if that is the case. The bottom line is we want to facilitate your learning and success in this class and take into account the circumstances impacting your attendance. The most important thing is to communicate with us about the situation so that we can work with you to stay on track and succeed.

**Accessibility:**

If you have a documented disability and anticipate barriers related to the format or requirements of this course, or if you believe you have a disability (e.g. mental health, attention, learning, vision, hearing, physical or systemic) and are in need of accommodations for this semester, you should contact the Office of Accessibility Services (OAS) to learn more about the registration process and steps for requesting accommodations. Website: [accessibility.emory.edu](http://accessibility.emory.edu); Phone: 404-727-9877; Email: [accessibility@emory.edu](mailto:accessibility@emory.edu).

If you are a currently registered with OAS and have not received your accommodation notification letter within the first week of class, please notify OAS immediately. Students who have OAS-approved accommodations in place are encouraged to contact us during the first week of the semester, to discuss your specific needs for the course as related to your approved classroom accommodations and any exam accommodations that will need to be implemented during the semester. Accommodations for final exams will be administered by the Office of Academic Engagement and Student Success. All discussions with OAS,

Student Support, and faculty concerning the nature of your disability remain confidential.

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## COURSE ASSIGNMENTS, GRADING & EVALUATION

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**Note:** *this course is subject to the mandatory mean*

**Reading/Class Participation (25% of final grade):**

All of the readings will be made available electronically through Canvas and Course Reserves, although most are also publicly available online. The topics and paired readings are tentative in that we may make refinements or changes based on class discussion and content comprehension, and the pace at which we move through the material. For some of the readings, indicated in the assigned readings section below, we will let you know which subset of selected pages are assigned closer to assignment. You will be given advance notice of any changes, which would only substitute or reduce, not substantively change or increase, the readings currently listed in the syllabus. We will directly provide you with the sample expert notice and transcripts, both of which are highlighted in yellow on the syllabus. You will be expected to have read the required readings in advanced of class and participate in class discussion. The discussion in class will enhance your understanding and knowledge of the topics if you do the reading beforehand. Some of the material will be unfamiliar and may be difficult to grasp. We do not expect you to master the concepts in advance of class but rather commit to engaging with the material, including asking questions and contributing to discussion in a respectful way. Students will be graded based on their demonstrated level of preparedness, engagement, and participation.

**Short Paper (15% of final grade):**

Pick any of the listed course topics and write an analysis of the issues or questions raised by the assigned readings. Incorporate at least one of the optional readings. Paper should be 500-700 words, double spaced, size twelve font and turned in at the beginning of class for the week you select. You may email it to us before the start of class and/or bring a hard copy to class. A grading rubric will be handed out on the first day of class to guide students on what the expectations and grading criterion are for the assignment.

**Final Simulation (60% of final grade):**

In lieu of a final exam, this course has a final mock admissibility simulation, litigating an admissibility issue from briefing through hearing, including an expert examination and closing argument. Students will be given a case packet with facts regarding the Government's intent to offer expert opinion testimony regarding a forensic examination of evidence. All students case packets will focus on one forensic discipline; however, students will make a strategic choice about how to focus and frame the admissibility challenge, drawing on the content covered in class and contained in the case packet. Students may expand upon the relevant law covered in the course and provided in the packet with their own additional research. Students will be assigned to be either the prosecution proffering forensic evidence or the defense moving to exclude the evidence as not scientifically reliable. Students will be divided into pairs, one in the role of the defense attorney and one

in the role of prosecutor. The students assigned to the defense will need to determine the grounds on which they are moving to preclude forensic evidence, and then notify the corresponding prosecution student by 5:00 pm on Friday November 4, 2022. Students should copy both professors on the email.

Each Student will submit a written brief in support of his/her/their assigned role, (20% of final grade). At the simulated admissibility hearing, depending on their assigned role, the student will conduct a direct examination or cross examination of the expert witness, (20% of final grade) and will argue to either allow or exclude the forensic evidence (20% of final grade). Lawyers and judges in the national criminal legal community will be invited to serve as judges and witnesses for the simulated hearing.

Specific instructions and a grading rubric will be handed out with the assignment and case file no later than the November 1<sup>st</sup> class. The written brief is due at the last regularly scheduled class. The oral arguments will take place during the course's designated exam period, subject to change based on logistics and feasibility.

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**Class Schedule (Adjusted 10-4-2022)**

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**Class 1** (Aug. 16): Introduction to Forensics, Racism

**Class 2** (Aug. 23): Cognitive Bias;  
Admissibility and Legal Frameworks

**Class 3** (Aug 30): Discovery, Disclosure & *Brady*

**Class 4** (Sept. 6): Pattern Matching Evidence Part I

**Class 5** (Sept. 13): Pattern Matching Evidence Part II

**Class 6** (Sept. 20): Pattern Matching Evidence Part III

*No Class on Sept. 27 in observance of Rosh Hashanah*

**Class 7** (Oct. 4): DNA Evidence

**Class 8** (Oct. 11): Confrontation;  
Digital Evidence and the Fourth Amendment  
Class on Zoom: <https://emory.zoom.us/j/7475049844> Meeting ID 747 504 9844

**Class 9** (Oct. 18): Mass Surveillance: Privacy, Accuracy and Race

**Class 10** (Oct. 25): Clinical Testimony and Cognitive Bias: Anecdotal Observation vs.  
Empirical Research

**Class 11** (Nov. 1): Social Sciences: Memory, Misidentification and False Confession

***FINAL INSTRUCTIONS & MATERIALS DISTRIBUTED IN CLASS***

**Deadline** (Nov. 4): ***Defense must notify Prosecution of grounds for motion to exclude via email copying both professors by 5pm.***

**Class 12** (Nov. 8): Expert Testimony in Theory and Practice  
Lab Integrity, Regulation and Oversight

**Class 13** (Nov. 15): Final Discussion

**Brief Due** (Nov. 21): ***FINAL BRIEF DUE VIA EMAIL BY 6:30 PM***

**Final** (Dec. 8-9): ***ADMISSIBILITY HEARINGS SIMULATIONS ON ZOOM***

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## Reading Assignments

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**Introduction to Forensics, Racism and Cognitive Bias:** Examining the historical roots and racial impact of forensics in the criminal legal system. Introduction to the disciplines & common flaws, scientific validity & cognitive bias.

Required Readings:

- The National Registry of Exonerations, Exonerations by Race/Ethnicity and Crime, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx>
- Strengthening Forensic Science in the United States (NAS Report) p. 35-52, 111-126
- The President's Council of Advisors on Science and Technology (PCAST Report) p. 21-24, 44-66, 98-100
- Kukuka, Jeff, and Itiel Dror. "Human Factors in Forensic Science: Psychological Causes of Error and Bias" PsyArXiv, 28 Feb. 2022. Web.

Optional Readings/Additional Resources:

- Jessica Brand, Faulty Forensics: Explained (May 4, 2018)
- Maneka Sinha, The Entrenched Carceralism of Forensics. Inquest. July 26, 20
- Cole, Simon A. "Twins, Twain, Galton, and Gilman: Fingerprinting, Individualization, Brotherhood, and Race in *Pudd'nhead Wilson*." *Configurations*, vol. 15 no. 3, 2007, p. 227-265. *Project MUSE*, doi:10.1353/con.0.0036.

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**Legal Frameworks & Theories of Admissibility:** *Assessing the reliability of scientific evidence: the federal standard for admissibility, the relationship between Frye & Daubert, defining the relevant scientific community, and the tension between law & science.*

Required Readings:

- *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
- *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) - majority opinion
- Fed. R. Evid. 702, 28 U.S.C.A
- Ga. Code Ann., § 24-7-702
- Paul Giannelli, *Forensic Science: Daubert's Failure*, 68 Case W. Res. L. Rev. 869, 870-73, 910-12, 917-24 (2018)
- Brandon Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 Fordham L. Rev. 1559 (2018) P. 1559-1567

Optional Readings/ Additional Resources:

- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)
- *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997)
- *People v. Williams*, 35 N.Y.3d 24 (2020)

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**Discovery, Disclosures and Brady:** *Statutory requirements & purpose; Gap between theory and practice; Compliance with ethical and legal obligations.*

Required Readings:

- Fed. R. Cr. P. 16 (16(a)(1)(E)-16(a)(1)(G), 16(B)(1)(A)-(C))
- O.C.G.A §§ 17-16-1; 17-16-4(a)(4); 17-16-7
- *Brady v. Maryland*, 373 U.S. 83 (1963)
- Full text: Judge's Protest Resignation Letter. Hon. Jed S. Rakoff, published in The Washington Post, January 2015.
- **Sample Expert Disclosures (shared in class)**

Optional Readings/ Additional Resources:

- *Kyles v. Whitley*, 514 U.S. 419 (1995)
- *Arizona v. Youngblood*, 488 U.S. 51 (1988)
- Jessica Brand, *The Epidemic of Brady Violations Explained*. The Appeal. April 25, 2018

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**Pattern Matching Evidence:** *Firearms and Toolmarks Examinations; Fingerprint Comparisons; Individualization, Source Attribution and Error Rates*

**PART I**

Required Readings:

- NAS Report, pp. 136-45, 150-55
- PCAST Report, pp. 59-63, 87-114
- Forensic Science Assessments: A Quality and Gap Analysis Latent Fingerprint Examination American Association for the Advancement of Science Report ("AAAS Latent Fingerprint Report"), September 15, 2017. p. 60-73

Optional Readings/ Additional Resources:

- National Research Council ("NRC") of the National Academies Ballistic Imaging Report, 2008 ("2008 NRC Ballistic Imaging Report"), Part 1 Chapters 2-3D
- AAAS Latent Fingerprint Report, pp. 5-42
- United States Department of Justice, Office of the Inspector General A Review of the FBI's Handling of the Brandon Mayfield Case ("OIG Special Report on Brandon Mayfield"), March 2006

**PART 2**

Required Readings

- *United States v. Tibbs*, 2019 WL 4359486 and 2019 D.C. Super. LEXIS 9 (D.C. Super. 2019)
- *People v. Ross*, 129 N.Y.S.3d 629, 642 (Sup. Ct. Bronx County 2020)
- *State v. McPhaul*, 808 S.E.2d 294 (N.C. Ct. App. 2017)

J. Swofford & J. G. Cino, *Lay Understanding of "Identification": How Jurors Interpret Forensic Identification Testimony*, 68 J. Forensic Identification 29 (2018)

Optional Readings/ Additional Resources:

- *United States v. Adams*, 444 F. Supp. 3d 1248, 1266 (D. Or. 2020)
- Garrett, B. L., Scurich, N., & Crozier, W. E. (2020). Mock jurors' evaluation of firearm examiner testimony. *Law and Human Behavior*, 44(5), 412–423. <https://doi.org/10.1037/lhb0000423>
- APM Podcast: In the Dark. Could they really match those bullets in the Tardy Furniture case? May 8, 2018, by Rehman Tungekar  
<https://www.apmreports.org/story/2018/05/08/ballistics-match-bullets-tardy-furniture>

**PART 3**

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**DNA Evidence:** *DNA collection & testing: The road from simple single source comparisons to complex mixtures and probabilistic genotyping systems; Discussion of how public narrative has been helpful and harmful to the use of forensics and understanding of scientific reliability in court systems; The racial impact.*

Required Readings:

- *Maryland v. King*, 569 U.S. 435, 464 (2013)
- NIST DNA Mixtures: A Forensic Science Explainer, April 2, 2019.
- PCAST Report, 69-83
- *United States v. Gissantaner*, 990 F.3d 457 (6th Cir. 2021)
- DNA Mixture Interpretation: A NIST Scientific Foundation Review, NISTIR 8351-DRAFT, National Institute of Standards and Technology ("NIST Draft DNA Mixture Interpretation Report"), June 2021, p. 20-25

Optional Reading/ Additional Resources:

- *United States v. Lewis*, No. CR 18-194, 2020 WL 1027151 (D. Minn. Mar. 3, 2020)
  - Roth, Andrea L., 'Spit and Acquit': Prosecutors as Surveillance Entrepreneurs (April 29, 2019). *California Law Review*, Vol. 107, 2019,
  - Ram, Natalie, Genetic Privacy After Carpenter. 105 Va. L. Rev. (2019 Forthcoming),
  - *Regulating Forensic Genetic Genealogy*, 373 Science 1444 (2021) (with Erin E. Murphy and Sonia M. Suter).
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**Confrontation:** *SCOTUS & GA State jurisprudence; Litigating source code; Machine testimony*

Required Readings:

- *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)
- *Williams v. Illinois*, 132 S. Ct. 2221 (2012)
- *Leger v. State*, 291 Ga. 584 (2012)
- *People v. Wakefield*, 2022 WL 1217463, (N.Y. Apr. 26, 2022),

Optional Reading/ Additional Resources:

- *Bullcoming v. New Mexico*, 564 U.S. 647 (2011)
- *Disharoon v. State*, 291 Ga. 45 (2012)
- *Crosby v. State*, 319 Ga.App. 459 (2012)
- *People v. Wakefield*, 175 A.D.3d 158 (3rd Dept. 2019), 107 NYS3d 487. Fahey, J., granted leave September 29, 2020
- Andrea Roth, *Machine Testimony*, Yale Law Journal, Vol. 126, No. 1, 2017

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**Digital Evidence and the Fourth Amendment:** *Cell Site Location Information, GPS, Cell Site Simulators, Cell Phone Searches & Extractions, GeoFence Warrants, E-monitoring*

Required Readings:

- *Riley v. California*, 134 S. Ct. 2473 (2014) (skim if already familiar)
- *Jones v. United States*, 565 U.S. 4000 (2012) (skim if already familiar)
- *Carpenter v. United States*, 138 S. Ct. 2206 (2018). (skim if already familiar)
- *United States v. Chatrue*, No. 3:19-cr-130 (E.D.Va.) ruling (2022)
- James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-carceration*, Inquest, July 30, 2021. Available at <https://inquest.org/the-case-against-e-carceration/>

Optional Reading/ Additional Resources

- Key documents in *United States v. Chatrue*, No. 3:19-cr-130 (E.D. Va.), NACDL Fourth Amendment Center, March 31, 2022. Available at [https://www.nacdl.org/Content/United-States-v-Chatrue,-No-3-19-cr-130-\(E-D-Va-\)](https://www.nacdl.org/Content/United-States-v-Chatrue,-No-3-19-cr-130-(E-D-Va-))
- Jennifer Lynch and Nathaniel Sobel, *New Federal Court Rulings Find Geofence Warrants Unconstitutional*, Electronic Frontier Foundation, August 21, 2020. Available at <https://www.eff.org/deeplinks/2020/08/new-federal-court-rulings-find-geofence-warrants-unconstitutional-0>
- Tokson, Matthew. *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law 2018-2021* 135 Harvard L. Review 1790 (2022)

**Mass Surveillance - Privacy, Accuracy and Race:** *Facial Recognition & Digital Surveillance, DNA Collection & Storage, Genetic Genealogy, ShotSpotter; Predictive Policing, Gang Databases*

Required Readings:

- Southerland, Vincent, The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies (March 2, 2022). UCLA Law Review, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=4048371>
- MacArthur Center's, ShotSpotter Creates Thousands of Unfounded Police Deployments, Fuels Unconstitutional Stop-and-Frisk, and Can Lead to False Arrests
- Jan Ransom and Ashley Southhall, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database.* New York Times, August 15, 2019

Optional Readings/Additional Resources:

- Written Testimony of Professor Andrew Guthrie Ferguson Before the House of Representatives Committee on Oversight and Reform. Hearing on: Facial Recognition Technology: (Part 1) It's Impact on our Civil Rights and Liberties, May 22, 2019.
- New York City Council hearing on DNA collection and storage: Oral Testimony; Written Testimony; NYC Bar Report, February 25, 2020. Available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4320022&GUID=D6C58364-FD4F-44EC-9229-CF530C3EB5B4&Options=&Search=>
- Dave Davies. Surveillance and Local Police: How Technology Is Evolving Faster than Regulation. NPR Heard on Fresh Air. Jan. 27, 2021
- Stop LAPD Spying: Data-Driven Policing, Available at <https://stoplapdspying.org/our-fights/data-driven-policing/>
- Carceral Tech Resistance Network, Available at <https://www.carceral.tech/practice>

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**Clinical Testimony and Cognitive Bias:** *CSAAS, SBS & other "syndrome testimony;" the difference between clinical anecdote and empirical research-based science, examining the flaws of clinical testimony and sources of cognitive*

Required Readings:

- *State of New Jersey v. J.L.G. (A-50-16) (078718) July 31, 2019.* Read p. 1-4, skim p. 15-35, 45-50  
Itiel Dror, et al. Cognitive bias in forensic pathology decisions, 2/20/2021, Journal of Forensic Sciences
- Bill Rankin. *Gwinnett dad wrongly convicted of shaken baby case 18 years ago, motion argues,* Atlanta Journal Constitution, April 23, 2021

**Social Sciences - Memory, Misidentification and False Confessions:** *Science of Memory: 3 phases of memory & mis-id risk factors; Efficacy of litigation frameworks in ensuring reliability: the Manson framework & requirement of unduly suggestive police action; non-state actors' influence; The suggestiveness of first time in-court identifications. False Confessions Risk Factors; Interrogation techniques examined; Race as a risk factor & the limitations of suppression legal frameworks; Interrogation scenes from When They See Us (Netflix Miniseries 2019)*

Required Readings:

- *Manson v. Brathwaite*, 432 U.S. 98 (1977)
- *Commonwealth v. Johnson*, 473 Mass. 594 (2016)
- Huwe Burton Time Served: 19 Years, Huwe Burton Exonerated of Murder After Spending 19 Years in Prison (innocenceproject.org) Available at <https://innocenceproject.org/cases/huwe-burton/>

Optional Readings/ Additional Resources:

- *State v. Martinez*, 478 P.3d 880 (N.M. 2020)
- Curtis Stephen, "What Happens Before the Police Press Record" The Appeal. March 14, 2019
- Kassir, Drizin, et al. *Police-Induced Confessions: Risk Factors and Recommendations*. 34 Law and Human Behavior (2010) 34: 3-38.

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**Expert Testimony in Theory and Practice:** *Qualification of experts; Scope & basis of opinion testimony; Goals & mechanics of voir dire & examination*

Required Readings:

- Fed. Rules Evid. Rule 703, 28 U.S.C.A
- Fed. Rules Evid. Rule 803(18), 28 U.S.C.A.
- Ga. Code Ann. §24-7-703
- National Commission on Forensic Science, Views of the Commission - Judicial Vouching. June 21, 2016
- 9th Circuit Jury Instruction on Opinion Evidence
- Ga Jury Instructions – 1.31.30 Expert Witness (p. 47)
- **Sample transcripts** provided after class

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**Lab Integrity:** *Lab operations, transparency, accountability, regulation & oversight*

Required Readings:

Optional Readings/ Additional Resources:

- Giannelli, P.C. "Wrongful Convictions and Forensic Science: The Need to Regulate

- Crime Labs.” *North Carolina Law Review*, 2007, Vol. 86, Issue 1, pp. 163-235
- Kean, S. “Why Did Annie Dookhan Lie?” *Science History Institute Distillations*, July 13, 2021
  - Emily Davies. “D.C. commits to sweeping post-conviction review after report uncovers breakdowns in city’s forensic arm.” *The Washington Post*. Dec. 13, 2021
  - Houston Forensic Science Center FAQs and Electronic Records Database
  - The National Commission on Forensic Science (“NCFS”) Work Products, Documents Re: Accreditation and Proficiency Testing; Human Factors; Transparency of Quality Management Systems Documents. Available at <https://www.justice.gov/archives/ncfs/work-products-adopted-commission>
  - Garrett, B.L. *Autopsy of a Crime Lab: Exposing the Flaws in Forensics*. University of California Press, 2021
- 

### Final Discussion:

#### Required Readings:

- Sinha, Maneka, Radically Reimagining Forensic Evidence (July 22, 2021). 73 *Alabama Law Review* 879 (2022), U of Maryland Legal Studies Research Paper No. 2021-10, Available at SSRN: <https://ssrn.com/abstract=3891788> (select pages)
  - Washington Post 6-part online written symposium on the use of forensics in the criminal justice system. Facilitated by Radley Balko
  - Podcast The Untold Story: Criminal Injustice, Jay Learns that Forensic Science Isn’t Very Scientific, Feb. 22, 2022. <https://omny.fm/shows/the-untold-story-policing-1/jay-learns-that-forensic-science-isnt-very-scienti>
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#### **Additional Resources Posted on Canvass:**

- PCAST Study Checklist
- Responses to PCAST
- Judge Edwards Presentation May 2010
- OSAC Links
- Gov’t Expert Firearms Transcripts

**Forensic Evidence: Course Description Fall 2023**

LAW 632B: Forensic Evidence

CREDIT: 3

PROFESSOR: Prokesch

PREREQUISITES: Evidence and Constitutional Criminal Procedure: Investigations (with permission one of the two courses may be taken as a co-requisite)

ENROLLMENT: register thru OPUS during the registration period; limit: *was supposed to be 14 students, the registrar set it at 30, which was discovered after 22 students enrolled, and thus capped at 22.*

GRADING: *Reading and Engagement (25%)* class attendance, participation in discussion, and demonstration of having read the assignments and engaging with the material; *Short Paper (15%)* Pick any of the topics and write an analysis of the issues discussed in or raised by that week's assigned readings and incorporate at least one of the option readings. Paper should be 500- 750 words double spaced, size twelve font, and turned in at the beginning of class for the week you select; *Final Simulation Group Project (60%)* Litigate an admissibility issue from briefing through hearing including an expert examination and closing argument. Students will be given a case packet regarding the Government's intent to offer the expert opinion testimony regarding a forensic examination of evidence. All students case packets will focus on one forensic discipline; however, students will make a strategic choice about how to focus and frame the admissibility challenge, drawing on the content covered in class and contained in the case packet. Students may expand upon the relevant law covered in course with their own additional research. Students will be assigned to either the prosecution proffering the forensic evidence or the defense moving to exclude the evidence as not scientifically reliable. Students assigned to the role of defense attorney will be paired with students assigned to the role of prosecutor. Each student will submit a written brief in support of his/her/their assigned role. At the simulated admissibility hearing, depending on assigned role, students will conduct either a direct or cross examination of the witness and will argue to either admit or exclude the forensic evidence. Note depending on class size, students will either work in pairs (1 prosecutor and 1 defense attorney) or group of four (2 prosecutors and 2 defense attorneys)

DESCRIPTION: This course will survey the use of forensic evidence, focusing on the intersection of legal frameworks and scientific reliability, the significance of cognitive bias, racial justice, and constitutional rights. Students will also learn to compare the different forms of forensic evidence and contemplate ways to strengthen the use of reliable science and protect against the misuse of science and surveillance in the criminal legal system.

ATTENDANCE POLICY: Attendance is required and will be factored into the Reading and Engagement portion of students' grade. This course can only be a collective, participatory learning experience if students show up and engage. However, life happens. If you are unable to attend class for any reason, please let me know as soon as possible, preferably via email. I will work with you to accommodate your circumstances and help ensure you make up any missed material.

Last updated: February 2023

### **Tentative Class Schedule**

- Class 1** (date): Introduction, Historical Context & Race
- Class 2** (date): Cognitive Bias
- Class 3** (date): Admissibility and Legal Frameworks
- Class 4** (date): Discovery, Disclosure & *Brady*
- Class 5** (date): Pattern Matching Evidence Part I
- Class 6** (date): Pattern Matching Evidence Part II
- Class 7** (date): Pattern Matching Evidence Part III  
(including error rates, individualization & source attribution)
- Class 8** (date): DNA Evidence
- Class 9** (date): Confrontation: Documentation & Algorithms
- Class 10** (date): Digital Evidence and the Fourth Amendment
- Class 11** (date): Mass Surveillance: Privacy, Accuracy and Race Part I (Digital)
- Class 12** (date): Mass Surveillance: Privacy, Accuracy and Race Part II (DNA)
- Class 13** (date): Expert Testimony in Theory and Practice
- Class 14** (date): Lab Integrity, Regulation and Standards  
The Path Forward

Temple University Beasley School of Law

# ADVOCACY TEACHING INNOVATIONS

*Teaching Remote Advocacy*

*WHY BOTHER?*

Hon. Matthew Williams  
King County Superior Court





# Pre-Pandemic In-Person Court Appearances

- Depositions
- Motion Arguments
- Evidentiary Hearings
- Bench Trials
- Jury Trials





# Pandemic SOLUTIONS

## REMOTE Court Appearances

- Depositions
- Motion Arguments
- Evidentiary Hearings
- Bench Trials
- Jury Trials

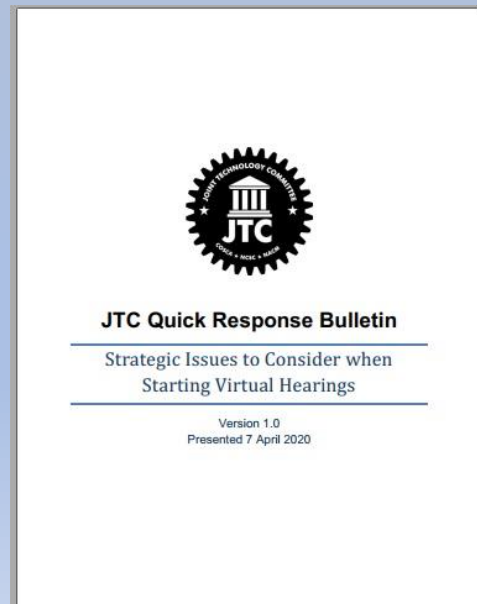


# THE PROPHECY

“Pandemic perspective” has changed perceived limitations. Processes that only a month ago were limited to face-to-face settings are now effectively being handled virtually. When the pandemic is over, newly gained capabilities and expectations will have changed the world.”

*NCSC – JTC Quick Response Bulletin – April 7, 2020*

**“It will not be possible or even desirable to return to pre-pandemic norms.”**



# King County, Washington

## 54 Trial Judges – 8 Commissioners

### Virtual Trials/Hearings



20,000+ - Remote Hearings

2000+ - Remote BENCH Trials

400+ – Remote Jury Trials

Remote Voir Dire in All Criminal & Civil Cases

Evolving and Collaborative Process

# REMOTE ADVOCACY

## Why this isn't going away

- ECONOMICS - Reduction in Travel Time & Trial Costs
- More CONTROL by lawyers
- Greater Access to Justice/Jury Service
  - Greater Response Rates
  - More Diverse Jury Pools
- \*More Focused & Attentive Judges/Jurors\*

“The people who are most opposed to doing zoom jury trials ...are people who have never tried to do one.”  
“If you haven't done one or seen people do one...you have those prejudices to fall back on.”

Judge Robert Lasnik – USDC – Western District of Washington

# INCORPORATING REMOTE SKILLS 2020 & Beyond

## The Same Basics – With Different Execution

ADVC 305 E 20FS Comprehensive Trial Advocacy

20FS Fall Semester 2020

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**Comprehensive Trial Advocacy**

**COURSE OVERVIEW**

- WEEK 1:** August 24, 2020 - Introduction to Trial Advocacy
- WEEK 2:** August 31, 2020 - Opening/Closing
- WEEK 3:** September 9, 2020 - Introduction to Witness Examination
- WEEK 4:** September 14 & 16, 2020 - Direct & Cross of a Witness Introduction to Trial Evidence and Exhibit Handling.
- WEEK 5:** September 21 & 23, 2020 - Special Witnesses: Integrating the Rules of Evidence into Direct and Cross
- WEEK 6:** September 28 & 30, 2020 - Exhibit Handling in Context: Integrating Exhibits and the Evidence Dance into Direct and Cross
- WEEK 7:** October 5 & 7, 2020 - Impeachment
- WEEK 8:** October 12 & 14, 2020 - Objection Lab and Motions
- WEEK 9:** October 19 & 21, 2020 - Advanced Impeachment/ Refreshment & Expert Witnesses
- WEEK 10:** October 26 & 28, 2020 - Introduction to *State v. Sandler*
- WEEK 11:** November 2 & 4, 2020 - *State v. Sandler* - Dx/Cx
- WEEK 12:** November 9, 2020 - *State v. Sandler* - Dx/Cx
- WEEK 13:** November 16 & 18, 2020 - Jury Selection & Voir Dire
- WEEK 14 - November 23, 2020** - Student Choice Workshop. No additional materials - review week 1-13 materials and come prepared to identify an area you want to work on. Faculty will provide an exercise based on your choice(s).
- November 25, 2020** - No Class - Prep for PTC/MIL

**COURSE STATUS:** Unpublish | **Published**

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**Coming Up** | **View Calendar**  
 Nothing for the next week

11. Integrating Exhibits to Tell the Story - DX/CX of John Gooding

This is a ZOOM Class Join URL: <https://seattleu.zoom.us/j/284668729882>

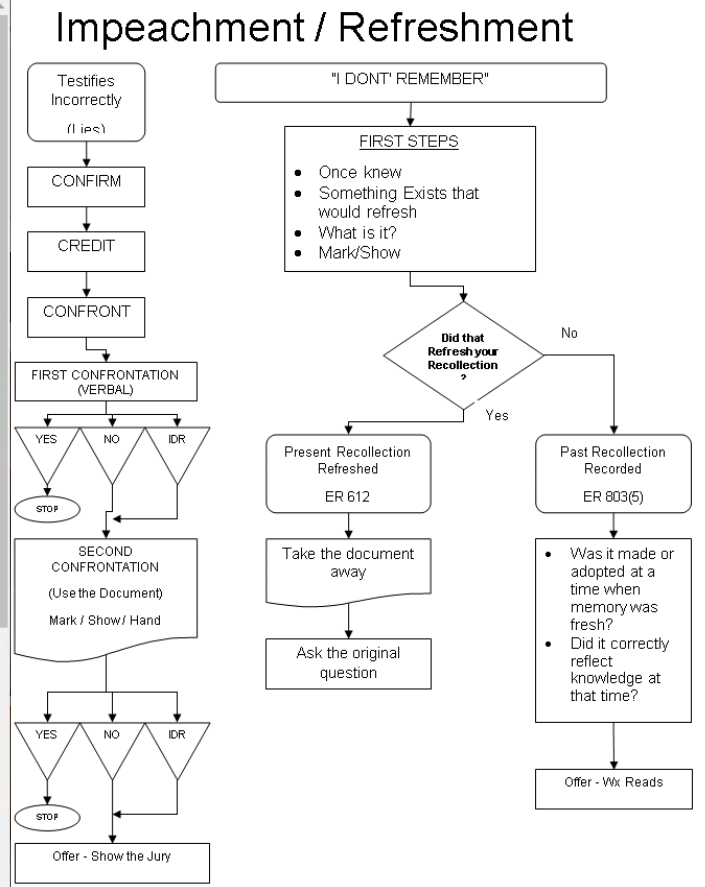
Witnesses frequently have many aspects to their story. The use of visuals can help jurors remember that a witness may have seen multiple events. The use of visual can also be a way to pressure test what a witness thinks they saw. In this exercise we explore how to best use visuals to help a witness tell their story...and how to test the perspective of the witness. We also will advance our understanding of the most effective way to organize and perform "Destructive" Examination.

**WHAT TO DO BEFORE WE MEET**

- Review Assignments 31, 36, and 49
- Review Case File Entries 79 & 90
- Read Berger/Clark/Mitchell Text:
  - Chapter 10, Section VI (C) (pp 365-67)
- Optional:
  - Professor Younger's 10 Commandments of Cross-Examination.

**WHAT WE WILL DO WHEN WE MEET**

Assigned Students will perform the Direct and Cross of John Gooding in: **ROOM 1**



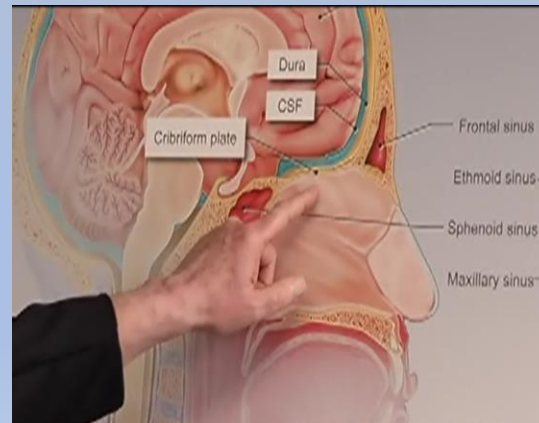
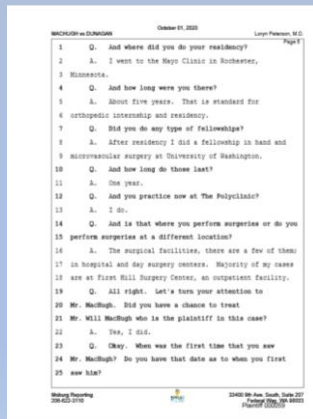
# The Difference in HOW we teach

- Asynchronous (Not Live)
- ON-Line (Live but Remote)
- In Person
- Hybrid (A little bit of this...)

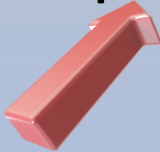
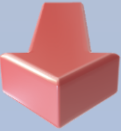


# The Difference in WHAT we teach -

- Teaching VISUAL Planning and Execution
  - Remote Exhibit Handling
  - Exhibit/Display Handling – More Scrutiny
  - Planning for Impeachment/Refreshment



# The Difference -

- Proxemics – Mov't With Purpose
- VISUAL - PERSPECTIVE
  - Micro Expressions
  - Cross  v. 
- AUDIO & LANGUAGE ISSUES
  - Focus – Tone
  - CONTROL & Aggression
- SUBSTANCE not Flash







REMOTE Advocacy is NOT  
Improvisation

# It feels overwhelming....

“At some point, everything is gonna go south on you and your going to say, ‘this is it. This is how I end. Now you can either accept that, or you can get to work. That’s all it is. You just...begin. You do the math. You solve one problem...and then you solve the next one...and then the next. And if you solve enough problems you get to come home.”

Mark Watney – *The Martian* (2015)

