

**EVIDENCE**  
University of St. Thomas School of Law (705)  
Spring Semester, 2010  
Dates: Tuesday and Thursday, 4:30-6:25  
Room: 235

Prof. Joe Dixon  
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Office hours by appointment

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Office hours: after class or by appointment

**GENERAL INFORMATION AND SCHEDULE OF READINGS**

-- Please read the following carefully --

**Text**

The text is:

Jon R. Waltz, Roger C. Park, Richard D. Friedman, *Evidence, Cases and Materials*, Eleventh Edition (Foundation Press/Thomson West 2005) ISBN 978-1-59941-448-5.

*NB*: Always be prepared to discuss in class the hypotheticals that appear throughout the text, and the “exams” on pages 217 and 384.

Helpful resources

The Advisory Committee Notes to the Federal Rules of Evidence.

*McCormick on Evidence*, 6<sup>th</sup> ed. (Thomson West).

Imwinkelried, *Evidentiary Foundations*, 7th ed. (LexisNexis).

Weinstein, Berger, *Weinstein’s Evidence Manual Student Edition*, 8th ed., (LexisNexis).

Nutshells from Thomson West: Graham, *Federal Rules of Evidence*; Rothstein, Raeder, and Crump, *Evidence*.

### **Course Goals and Methodology**

The goal of this course is to attain a basic knowledge of the theory and practice of evidence law. Using the case method, we will become familiar with the language of the relevant law and the common law concepts on which our present evidence code rests.

Class presentations will sometimes discuss case readings, sometimes build on those readings. Professors Dixon and Cribari have spent much of their lives in the trial and appellate courts of various state and federal jurisdictions, and teach from the courtroom perspective. That is, we teach with the client in mind (whether that client is the United States or a private person). Remember that this class is “Evidence,” a class designed to prepare you for life in the courtroom. The courtroom is an adversarial, confrontational theatre where justice is not self-executing but happens because we make it happen. We need to begin to feel at home in that atmosphere, and I hope our class will have much of the energy and electricity, the passion, of the courtroom. We will do our best to make that happen. (Note that word, “passion.” From the Latin “patior,” a verb that, curiously, is translated actively but conjugated passively. What better reminder that passion has two components: the courage to act and the willingness to be acted upon.)

### **Meeting with Students:**

We are willing to meet with students whenever we can, to discuss any questions or concerns a student may have regarding the subjects we teach or law school generally or life and career. Please understand that we are only at St. Thomas to teach one course this semester. We have litigating and teaching responsibilities elsewhere. Nonetheless, we plan to make ourselves as available as we can. You are welcome to speak with us after class, or to come to the office and speak with us whenever we are in the office. If you would prefer to set up an appointment in advance, feel free to speak with us after class or to e-mail us to arrange a time when we can meet.

We will generally not be available during the half-hour that precedes our class.

### **Examination and Grading:**

There will be a final examination on which the majority of the grade will be based. We have not yet determined the format for the examination, e.g., take-home v. in-class; open v. closed book, etc. We will hold at least one review session prior to the final examination. During the final weeks of class, we will announce the time and place of any review sessions not scheduled for class time.

We plan to administer a mid-term examination, the details of which will be announced during the semester.

We traditionally make use of any discretionary points available to us in order to raise or lower grades one level based on course participation. Please refer to our Policy On Use

Of Cell Phones, Laptops And Recording Devices During Class, *infra*. We will, of course, execute any mandatory curve policies, but we will not punish excellence. Those who demonstrate excellence on the examination will not have their grades diminished for the sake of the low end of the curve. We will review examinations with students, but we will not discuss any grade unless it is a D or lower.

With regard to examinations and grading generally, my view is that legal writing is nothing but legal thinking written down, and I look for that thinking. I will test, as best I can, for your thought processes, not just for memorized data points. I do not credit the “shotgun” approach to exam-taking. “I’ll tell the professor everything I can think of and maybe I’ll get the answer” doesn’t work with me. I look for reasoned answers, answers that involve the difficult task of making choices. To make a choice - whether in relation to a question on an exam, to a question about our use of time while at St. Thomas, or to a question about a client’s life or liberty – is a profoundly human, and spiritual, action. Paradoxically, we experience our essential human freedom in actions that require us to place limits on what we mean by that freedom.

### **Policies on Attendance and Class Participation**

Consistent with the American Bar Association Law School Accreditation guidelines, class attendance is required and expected. In accordance with University of St. Thomas School of Law Policy III-C-5-D, you are entitled to miss one class session to attend an activity required in connection with the Mentor Program without penalty, but you must inform us in advance of such an absence, and you will be responsible for the material covered in class. We may take attendance for this class.

We teach in an interactive way and call on students to participate, so we notice when people are absent or unprepared. Please e-mail us ahead of time, should you anticipate an absence. As noted above, we calculate course participation into the final grade. Because we have elected to use a casebook with little explanatory text, it is unlikely a student can attain a high grade in this course without regular class attendance.

Each student is expected to have read the assigned readings *prior* to the appropriate class session and to be prepared to discuss them. Please do not advise us if you are unprepared for class. Being unprepared for class gains you no concessions, just as being unprepared for trial accomplishes nothing other than to give your opponent an advantage over you and your client. You are preparing for a career in a highly competitive environment, an environment in which you will encounter arbitrary rules and mandatory deadlines the violation of which can result in your client’s loss of property, liberty and even life.\

### **Advanced reading assignment:**

Please have read pages 1-70 for the first class.

**Class-by-class assignments:****DIXON CLASSES**

- January 12 1-70 Making the Record (101-105) (**Joint first part of first class.**)  
1-70 cont'd; 71-80 Relevance: The Foundational Principle (401, 402)
- January 14 71-80 cont'd; 81-94 Unfair Prejudice  
94-110 Evidence of one's character (404(a), 405)
- January 19 111-39 Evidence that might be of character but isn't (sort of) (404(b))  
111-39 cont'd; 139-46 Evidence of one's habits (406) (Skip pages 146-65)
- January 21 165-79 Similar happenings; subsequent precautions (407)  
179-82 Offers in compromise (408); lecture on plea negotiations (410)

**CRIBARI CLASSES**

- January 26 146-165 Rape Shield Legislation and Relevance (412-15); please also read  
United States v. Yammine, 67 M.J.717, 2009 CCA Lexis 170 (May 12, 2009);  
  
184-96 "now for something completely different:" hearsay (801(a-c), 802)
- January 28 184-96 cont'd; 196-217 Hearsay cont'd. If we have time, we will begin  
the Morgan Evidence Exam
- February 2 217-21 Morgan Evidence Exam (hearsay review)  
221-35 Present sense impressions, excited utterances (803(1), (2))
- February 4 235-54 Admissions of parties opponent (801(d)(2)(A-D))  
235-54 Cont'd
- February 9 254-64 Co-conspirator statements (801(d)(2)(E))  
264-75 Former testimony (804(b)(1))

**DIXON CLASSES**

- February 11 275-87 Statements against interest (804(b)(3))  
288-311 State of Mind (803(3))
- February 16 311-21 Medical diagnosis (803(4)); dying declarations (804(b)(2))  
321-26 Prior identification (801(d)(1)(C))
- February 18 326-37 Present recollection refreshed (612), past  
recollection recorded (803(5)); 338-62 Business records (803(6))

- February 23 338-62 cont'd.; 362-77 Public records (803(8))
- February 25 377-82 Judgment of Prior Conviction (803(22), 801(d)(2)(A)) (Skip pages 382-84); 384-88 Future of Hearsay (807); Mid-Term Examination.
- March 2 Mid-Term Review

### CRIBARI CLASSES

**Nota Bene:** additional readings for the Confrontation Clause classes: *Melendez-Diaz v. Massachusetts*, No. 07-591 (June 25, 2009); *Magruder v. Virginia*, 657 S.E.2d 113 (Va., 2008), *cert. granted* June 29, 2009 (No. 07-11191) (Question Presented: If state allows prosecutor to introduce certificate of forensic laboratory analysis, without presenting testimony of analyst who prepared the certificate, does state avoid violating confrontation clause of Sixth Amendment by providing that accused has right to call analyst as his own witness?)

- March 4 398-404 Confrontation I (*Ohio v. Roberts* to *Crawford*)  
404-16 Confrontation II (*Crawford*)  
416-31 Confrontation III (*Davis, Holmes, Green*)
- March 9 432-46 Confrontation IV (*Giles*, forfeiture and waiver)  
Confrontation V (*Melendez-Diaz* and related issues)
- March 11 447-57 What to do with witnesses: impeach them (601-607)  
457-82 Impeachment by contradiction; by character (608)  
482-99 By prior conviction (609)
- March 16 499-520 By psychiatric condition, prior statement (613, 801(d)(1)(A-B))  
507-20 cont'd; 520-26 by bias
- March 18 527-54 Attorney-client confidentiality (501, 502)  
596-606 News-person's Privileges (*vel non*)

### DIXON CLASSES

- March 23 554-79 Doctor-patient confidentiality  
579-85 Marital privileges
- March 25 607-32 Governmental privileges  
585-96 Miscellaneous privileges and/or F.R. Ev. 502
- March 30/April 1 Break

### CRIBARI CLASSES

- April 6            633-42 “Writings” and the best evidence rule (Article X)  
                      642-49 Authentication (Article IX)
- April 8            650-83 Competency of Witnesses; 684-96 Judicial notice (201)
- April 13          Expert Witnesses

### **DIXON CLASSES**

- April 15          Review

### **Policy on the Use of Cell Phones, Recording Devices and Laptops During Class**

#### **Cell phones**

If we hear your cell phone ring during class, or if we observe you “IM-ing” or sending text messages during class, you will be asked to leave the class and we will deduct one grade level from your final grade for this course. If it is necessary that you receive phone calls or check your cell phone during class, set your phone on vibrate so it does not disturb anyone and leave the room to answer or check it.

#### **Recording devices**

The use of recording devices during class is banned.

#### **Laptops**

Based on Prof. Dixon’s courtroom experiences and Prof. Cribari’s experiences teaching at the University of Denver Sturm College of Law, the University of Minnesota, and University of Connecticut law schools (including classes in computer forensics), and after discussion with many professors at a variety of law schools - discussions specifically addressing the use of laptops in larger classes taught from the practice perspective, we have banned the use of laptops for this class. ***The use of laptops or word processing devices will not be allowed in this class.*** You will not be able to hide in, or behind, a laptop in the courtroom; neither will it be available to you for legal support. The same applies to this class.

(It is our understanding that this policy comports with the expectations set forth by The University of St. Thomas School of Law as promulgated in “Responsibilities of Adjunct Professor – Classroom Atmosphere.”)

#### **Students with Disabilities:**

If you need course adaptations or accommodations because of a disability, please make an appointment in the Enhancement Program - Disability Services, located on the St. Paul

campus in Room 119 O'Shaughnessy Educational Center (651-962-6315). If you already have a form from the Disability Services office indicating that you have a disability that requires accommodations, please present it to Director of Academic Achievement, Scott Swanson, as soon as possible so that he can facilitate the process for obtaining adaptations or accommodations.

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