Strategies and Techniques for Teaching Evidence

EDITORIAL ADVISORS

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Contents

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Strategies and Techniques for Teaching Evidence

I. Introduction

Welcome to the study of Evidence. Evidence is a very enjoyable class to teach, because it touches on issues of trial practice, with the possibility of lots of simulations and colorful stories from the world of litigation. However, it can be a very challenging class as well. Although it is technically an elective at most law schools, almost all second-year students take it even if they have no particular interest in the subject because it is on the multistate bar exam. For this reason, a typical Evidence class will be large, composed of some students who want to be litigators and are eager to learn the topic, and others who never expect to set foot in a courtroom and are taking the class because they feel like they must.

Evidence is an unusual class in other ways as well. It is a rule-based class, like Civil Procedure and (to a lesser extent) Criminal Procedure: Adjudication. This means that the law the students are learning comes almost exclusively from the Federal Rules of Evidence, rather than a series of statutes or a body of case law, leading professors to focus on the specific language of each rule rather than on how courts have interpreted the language. As a result, case law is less important in understanding what the rules actually mean (with the exception of a few cutting-edge issues, such as the Confrontation Clause cases and expert testimony). Instead, cases (or hypotheticals) are used to show how the rules apply in practice to the myriad different fact patterns that can arise in a trial.

Evidence is also challenging because students are frequently overwhelmed by the sheer number of rules they must learn and apply. This is not necessarily because there is more law to learn here than in other areas, but rather because the rules build on each other in a cumulative manner. By the end of the semester, students faced with a new fact pattern must consider literally dozens of different rules, some of which (like Rule 403 or Rule 404(b)) are essentially judgment calls that are dependent on the specific facts of the case. The challenge for professors is to present the rules in a logical, sensible framework

so that students know which rules are most likely to apply in which contexts.[1]

In the end, as I tell my students, Evidence is a class about the search for truth; that is, how to best design a system that will determine the truth about what happened, in a context with stakes that can be incredibly high—millions of dollars of damages, or a person's life or liberty. The truth comes out in a binary form (guilty or not guilty, liable or not liable), but the amount of data that is processed to reach that binary truth is considerable. As if this challenge were not enough, Evidence law has plenty of secondary policy goals as well: We want to determine the truth but we also want to encourage settlements, protect the privacy rights of rape victims, protect the criminal defendant from unfair evidence, and so on. The final part of the challenge is this: We have decided that the truth has to be determined by a jury—a group of lay people with no specialized legal training, who can easily be misled by prejudicial or unreliable evidence. This is a monumental—and extremely important—task, and the law of Evidence represents our best attempt at accomplishing that task.

II. Teaching Objectives: Bar Class vs. Theory Class vs. Prelitigation Class

Professors will have different ideas about what to focus on in their course. How much black-letter law and doctrine? How much policy? And, especially in a practical course like Evidence, how much skills training; that is, how much do you actually require students to apply what they are learning through simulations? When my students are surveyed at the beginning of the semester, they are usually equally split about their own goals between wanting to learn black-letter law (usually because of the bar exam), and wanting to prepare to be a litigator. Very few of them say they are interested in the underlying policy issues surrounding the Rules.

[1] For the most part, each individual rule is not complicated for students to understand, with two notable exceptions: the rules on character and the hearsay doctrine. These take extra time to explain and work with, and it is best to start with some of the easier rules to give the students a comfort level with general doctrines of Evidence before attacking these issues.

Luckily, these three objectives are not mutually exclusive—in fact, if taught properly, they reinforce each other. Teaching a substantial amount of black-letter law is necessary preparation for the bar exam, and frequent explanations of how that law is applied in practice will both bring the law to life and provide guidance to young litigators-in-training. And to understand how the rules apply to different fact patterns, students need to know the policy behind the rules. Most professors know about this relationship between policy and practice, but it helps to explain it explicitly to the students early in the semester, perhaps even on the first day. Students, especially by their second year, often only want to hear the "right or wrong" answer without long discussions about the policy implications of each rule. To combat this, I usually explain to students on the very first day that we will be discussing policy issues, and I explain why this is necessary: Very often there is not a clear "right or wrong" answer, so a good advocate will need to argue policy to convince a judge that her interpretation is correct.[2]

III. Preparing for Teaching Evidence

Let's assume you have just been told that you are teaching Evidence for the first time. You have some time to prepare—perhaps three or four months. How do you begin preparing for the class? There are two major points to address: choosing a book and gaining your own familiarity with the rules of evidence.

[2] The students who are only interested in the class because of the bar exam might take some extra convincing. Presumably most of these students intend to be transactional lawyers with no interest in litigation. You can explain to them that even transactional lawyers need to be familiar with the rules of evidence, because if one of their transactions breaks down (which will inevitably happen at some point), the subject of the transaction will end up in litigation. At that point, it makes a big difference whether the transactional attorneys who were involved in the case were aware of how the rules of Evidence apply to the information they generated. If they had been working with an awareness of the rules, they would have been careful not to generate documents that would be admissible against their client during the upcoming litigation. If not, they would have made the job of their partners in the litigation department much more difficult, at great cost to their client.

A. CHOOSING A BOOK

There are literally dozens of Evidence books on the market today. There is obviously no way to read through all of them before making a decision about which one to use. Instead, you should first narrow your search by deciding what kind of book you want: a traditional casebook or a problem-based book. Traditional casebooks teach the law through the cases: Students read judicial opinions and they see how courts interpret the rules as well as how the rules apply to specific fact patterns.[3] Problem-based books contain few cases and instead demonstrate the operation of the rule through various hypotheticals that students solve as they work their way through the rules. In making this decision, you are essentially choosing between two methods of teaching Evidence: the "case method" or the "problem method." The case method features edited versions of judicial opinions along with case notes that ask further questions about the case or provide shorter summaries of other cases. The problem method describes the law almost exclusively through direct explanation and then presents the reader with a series of problems that apply the law to different fact patterns. According to a recent survey, a slight plurality (46 percent) of experienced Evidence professors utilize the problem method, whereas 33 percent primarily employ the case method, and the remainder use a hybrid approach.[4]

The traditional case method offers the usual benefit of exposing students to how judges think and write about evidentiary issues. It also gives students practice in reading cases and deriving rules of law from the text, which is a skill they will use throughout their practice. It also provides real-life examples of how the rules operate in practice. On the downside, the method is somewhat cumbersome, as it is difficult to provide an insightful judicial analysis for every application of every rule. Cases can be edited severely to just provide the facts and the ruling, but then the judicial analysis has by definition been omitted: The truncated cases are merely being used as

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[3] In first-year classes, this method of teaching has the extra advantage of forcing students to learn how to read cases and derive rules of law from those cases. By the time students have reached the second year, however, they have probably mastered this skill.

[4] Calvin William Sharpe, *Evidence Teaching Wisdom: A Survey*, 26 Seattle L. R. 569, 571 (2003). The author of the study surveyed more than 300 Evidence professors, all with over ten years of experience teaching the subject, and received 79 responses. *Id.* at 570.

de facto problems. Also, the case method is an imperfect method of demonstrating how the rules of evidence operate in practice, because in real life the rules of evidence operate at the trial level, not at the appellate level.

Teaching through problems overcomes these disadvantages. Short problems can be used to demonstrate the application of almost every aspect of each rule, and in some ways the problems (even if they are not based on cases) are more "realistic" because they present the students with the scenario that every litigator faces: Here are the facts; what is admissible? Problems can be constructed as pretrial hypotheticals, setting out the facts and asking the students whether the crucial piece of evidence would or should be admitted, or as in-trial hypotheticals, setting out a trial transcript and asking whether the attorney should object at a certain point and on what grounds. Both types of problems prepare students for applying the rules of evidence better than reading a detailed analysis of the issue from a judicial opinion. Students are generally more engaged by the problem method and more active in class discussion. However, teaching primarily through problems brings its own disadvantages. First, the professor must find some other way to teach the doctrinal debates and policy justifications behind each rule. And second, even in Evidence there are certain cases (*Old Chief*, *Daubert*, *Crawford*) that students must read to be well-versed in the subject.

My own strong preference is for the problem method, interspersed with some lecture on the doctrinal debates (and then reinforced with problems or exercises in which students work through these debates themselves). I also make an effort to expose students to the "core cases" of the subject so they are aware that occasionally the Supreme Court does affect the law of Evidence.

After choosing the type of book you would like, you should look through the table of contents of several books of that type to see which ones address the topics in an order that seems logical and natural to you. Most books begin with the concept of relevance and then introduce Article IV of the Rules, but some begin with Article I and discuss the procedure of how trials work. Still others begin with Article VI and discuss the basics of interrogating witnesses. There is no "right" order for presenting the material; the important thing is to find an order that works for you. Of course, you can always use your syllabus to assign the chapters or subchapters in any order that you want, but many students find this disconcerting. Furthermore,

in a class like Evidence, where so much of the law builds on what students have already learned, it is difficult to skip around within a book. For example, when the issue of propensity evidence is first addressed in a book, the book will generally give an overview of the difference between character and propensity, and the dangers of character evidence with regard to misleading the jury. Some books discuss Rules 608 and 609 before Rules 404 and 405, and so the introductory remarks about character and propensity occur in the chapter that contains Rules 608 and 609. If you want to cover rules 404 and 405 first, your students will not be exposed to these introductory remarks, unless you have them read a few pages from the Rule 608 chapter before returning to the Rule 404 chapter.

Finally, look at the teacher's manual of each book you are considering. Especially for a first-time teacher, a teacher's manual can be the most important resource that you have. Not only should it provide you with questions to guide the class discussion on the important cases and rules, but it should also provide you with extra problems you can give to the class and suggest exercises you can use to engage the students. The more detailed the teacher's manual, the easier it will be to teach the class, particularly the first time.

B. KNOWING THE RULES AND OTHER BACKGROUND INFORMATION

This might seem like an obvious point, but you need to become intimately familiar with the Federal Rules of Evidence before the semester starts. Even if you are a former litigator and so are very familiar with most of the rules, there are probably a number of them that you never encountered in practice. Take the time to actually read them straight through. You will see connections between them that you might not have seen before, and it will give you a good idea of the order in which you want to present them to your class. Also, make a note of which rules seem confusing or hard for you to understand—chances are, your students will feel the same way about them when you try to teach them. Try to think about (and make a record of) real-life examples for each of the rules as you run through them, so you have a good grasp of how they work in practice.

In addition to (re)familiarizing yourself with the federal rules, you should read through your own state's evidence rules and note

any major differences between the two. Although most professors teach from the federal rules, many professors also want their students to learn about the rules of their own jurisdiction. Even if you are not interested in teaching the law of your specific state, it can be helpful to point out a few of the variations between the state rules and the federal rules to show how different legislatures make distinct choices in writing their evidence rules. These brief forays into comparative law can provide students with a deeper understanding of the purpose of certain provisions, and also demonstrate how different legislatures pursuing different goals end up with different rules, leading to vastly disparate results. If you teach at a law school where you expect most of your students to remain in the state to practice, you should ensure that you cover all the significant differences between the Federal Rules and your local state's rules.

Prior trial experience can also be useful as an Evidence professor: It gives the professor a familiarity with the way the rules work in practice and can provide the professor with "real-life" examples to illustrate points in class. Of course, if you have never been a litigator, you can still be a very successful Evidence professor, but it might be worthwhile to take some steps to fill in this gap in your knowledge. First, it is important to familiarize yourself with the way courtrooms actually operate. Take a day and go down to the federal or county courthouse and watch a few different trials. Take notice of where the various parties sit or stand, and pay attention to the roles played by the judge, the court clerk, the court reporter, and so on.

Second, if there is anyone on your faculty who does have trial experience, do not be shy about asking them even the most basic questions about trial practice: What is the procedure for admitting real evidence? What are the different styles used by attorneys to object to evidence? Are attorneys allowed to move around the courtroom during opening and closing arguments? Many of these answers will differ from courtroom to courtroom, so the more data points you can get regarding these topics, the better.

Third, pay attention to the high-profile trials in the media. Although the mainstream media will invariably focus on the more dramatic or prurient aspects of these cases, you can learn about the actual evidentiary issues that arise in these cases with only a minimal amount of digging online. Thus, with a little bit of effort, you can present these cases to your students—and the questions of evidence that they offer—as real-life examples of the evidence rules in action.

These examples drawn from high-profile cases are in some ways better than the personal war stories that former trial attorneys might use, because many students will be aware of these cases and eager to learn the legal machinations behind the headlines.

Whether or not you have prior litigation experience, it is a good idea to read a few law review articles on certain Evidence topics. Evidence is not a field that generates a large amount of scholarship, and much of the scholarship involves relatively complex and advanced issues that will not be directly useful in teaching students. However, reading some of the scholarship in a few areas—character evidence, hearsay, experts, privileges—will give you a broader sense of the policy issues that underlie the rules of Evidence, and a deeper understanding of the challenges that the courts and the Advisory Committee face when they interpret or amend the rules.

You should also have access to one or two good hornbooks on Evidence to help you answer the inevitable questions from students that you do not know the answers to off the top of your head. Two excellent hornbooks are *Weinstein's Evidence Manual,* by Jack B. Weinstein and Margaret A. Berger (LexisNexis), and *Courtroom Evidence Handbook,* by Steven Goode and Olin Guy Wellborn III (West). The former provides detailed but clear explanations of what all the rules actually mean, whereas the latter contains many annotations for each rule, discussing how courts have applied the rule to different fact patterns.

Finally, you should join the Evidence listserv. This is a very active e-mail group through which Evidence professors from around the country share information, ask and answer questions, and discuss Evidence law. Following the thread of these conversations will give you some idea of the current issues in Evidence law. Also, if your students pose a question in class that you cannot answer, you can always pose it to the listserv and get responses from some of the best Evidence professors in the country. Currently the listserv is administered by Professor Roger C. Park at University of California–Hastings.

C. CREATING A SYLLABUS

A syllabus is a critical component of class organization. The syllabus should be in two parts: a description of the class and a chart

with the daily or weekly assignments. The description should list basic information about the class: required texts, your office hours, your grading policy, and so on. It should also provide some basic introduction to the class: a roadmap of what the students will study and perhaps an explanation of your goals in teaching the class and your expectations of them as students. For example, you can describe your on-call policy, explain the need for students to come prepared to class (or notify you if they are not), direct the students to the class Web site, or tell them what basic skills and information you expect they will learn in the class.

The second part of the syllabus is a chart that sketches out, at least in rough terms, what the assignments will be throughout the semester. I would strongly suggest that you *not* attach specific dates to each assignment—you will invariably be off-schedule (usually you will be behind the syllabus), and this will cause confusion and some consternation among your students. You should list an assignment for each day or week of the class, and include the pages to be read, the topic that will be covered, and any extra assignments (papers, mandatory postings on the Web site, oral presentations) that will be due at the same time. This allows students to see the entire semester at a glance, which gives the class a sense of direction, makes it possible for students to plan ahead for major assignments like written papers, and gives students the chance to read ahead if they want. I tell my students that after each class they should assume we will begin the material in the next reading assignment, even if (as is usually the case) we have not finished the material from the current day's reading assignment.

Remember when planning out the assignment chart that you will almost invariably move through the material more slowly than you first expect. Usually two cases or problems a day will fill a 50-minute class, and three cases or problems will fill a 70-minute class, but sometimes class discussion will become much more active than you expected. When this happens during the semester, do not feel the need to rush through the material to stay "on schedule." Explain to the students on the very first day that the syllabus is meant to be a rough guide, not a strict schedule, and that every class is different: Some classes will spend more time on certain issues than others, so it is impossible to predict exactly how long it will take to get through all the material.

D. CLASS WEB SITE

Before class begins, you will probably want to set up a class Web site. Both Westlaw and Lexis offer relatively user-friendly platforms where you can design a class Web site with a lot of useful functions—quizzes, assignment drop-boxes, in-class polling, and so on—but the two essential functions of the Web site are much more basic. First, the Web site is a convenient place for you to post all the materials that you want the students to have access to: the syllabus, handouts, assignments, presentation slides (if you choose to post them), and so on. Second, the Web site allows for easy e-mail communication between you and your students and for students to communicate with each other. This easy access to all the students' e-mail addresses comes in handy in a dozen different ways: if you need to change the reading assignment for the next day, or if your students need to contact each other to coordinate group work, or if you want to clarify (or correct) a point made in class that day. The more advanced features of the Web site can also be useful; I describe some of them in the "Teaching Method" section later.

IV. Substantive Material

Evidence is a very broad topic, and it is very difficult to cover all of the material in one semester, even in a four-credit course. My strong suggestion when choosing between breadth and depth is to err on the side of depth—that is, to be willing to sacrifice some of the subtopics of evidence (authentication or even privilege) to ensure the students get a solid understanding of the topics you are able to cover.

When teaching Evidence (or almost any field of law), professors are never able to teach all of the black-letter law that students would need to be able to practice in the field. Even if it were feasible to cover all of the current rules and exceptions in one semester, a student might practice in a different jurisdiction with different rules, and she will likely remain in practice for over 40 years—long enough for many of the doctrines learned to change dramatically. Therefore, instead of trying to achieve complete coverage, a professor should have two goals. First, the professor should ensure that the students know how to derive the law for themselves—both where to find the

relevant rules and statutes and cases and also how to read them to derive a rule of law. This goal is (hopefully) accomplished during the first year of law school, although a professor in any subject should spend some amount of time explaining how to access the law on that subject (e.g., state or federal codes of evidence, advisory committee notes, etc.). The second goal is to ensure that students learn the basic concepts of that specific field of law so that when they go out in practice and read about particular provisions or case holdings, they are easily able to understand how the law operates in practice and they can place the law in the broader context of the discipline. This is known as *scaffolding*. Students do not have time to construct an entire building, but we can help them start constructing the building and then create a scaffolding around it. That way, when students come across new pieces of the building, they are able to fit those new pieces into their existing structure.

In the case of Evidence, there are a number of general propositions the students need to learn to build this scaffolding. They need to know that all evidence will be admitted unless an attorney lodges an objection, that trial judges make the initial determination of admissibility, and that the judge's ruling is reviewed under an abuse of discretion standard. They need to understand that the most important question to ask when considering whether a piece of evidence is admissible is the purpose for which the evidence will be used by the jury. They need to know that evidence can be admitted for an admissible purpose even if it has an inadmissible purpose, and that the trial judge must give a limiting instruction in those situations. And so on. Students also need to understand certain concepts that they will likely not be able to teach themselves in practice or in their bar review class, such as the way that Rule 403 interacts with all the other rules, or the way to determine whether a piece of evidence is being offered for the truth of the matter asserted, or the different ways that courts treat different kinds of character evidence. These concepts require significant class time because they are difficult for many students to understand, and the professor might need to use many examples and field a number of questions for each topic. If these discussions are cut short because the professor wants to ensure that he reaches the rules on presumptions before the semester ends, the professor is sacrificing true understanding of the core material in exchange for superficial coverage of the less important rules.

A. INTRODUCTION TO THE RULES OF EVIDENCE/ARTICLE I

I recommend starting with a broad view of the rules of evidence themselves: why we have evidence rules, how they are made, and how they operate. Remember that most students have never actually seen a trial; their experience of how attorneys and judges interact in a courtroom is limited to the misinformation they see on television and in the movies. Thus, a first step is simply to explain how a trial actually works: jury selection, opening statement, prosecution (or plaintiff) presents witnesses, defense presents witnesses, closing arguments, jury instructions, verdict. This allows students to understand where the rules of evidence operate in relation to the trial. You can also tie this discussion in with the various rules from Article I: when and how objections are made, how limiting instructions work, the standard of review for appeals, and so on.

During these first few classes you should also discuss the purposes of the rules of evidence. Ask your students what they think trials would be like if there were no rules of evidence. Students will quickly see that trials would last far too long, that juries would be exposed to unreliable and inappropriate information, and that they would reveal information that should be kept confidential (e.g., the sexual history of rape victims or communications between a client and a lawyer).

You should explain how these rules are drafted (by a committee of experts) and how they become law (through approval by the Supreme Court, approval by Congress, or both). Students also need to know that although the Federal Rules of Evidence are the basis for most state evidentiary codes, there are significant variations between different jurisdictions.

Finally, you should discuss the different types of evidence: testimonial, real, writings (really a subcategory of real evidence), stipulations, and judicial notice. You can engage the students by bringing in sample pieces of evidence. If you are a former trial lawyer, bring in some actual items that were used as evidence in one of your own trials, and explain why they were relevant. Otherwise, you can ask clinical professors in your school for some items they (and their students) used as evidence, or you can just bring in items that are commonly used as evidence: maps, diaries, photographs, confessions, knives, (fake) bags of crack cocaine, and so on.

You can especially have fun with examples of demonstrative evidence. Start out small: Ask a student to reenact how he lifted a

heavy box the last time he moved residences, or have a student re-create how quietly she whispered something to a friend. One effective example of demonstrative evidence (which I saw an attorney employ during my clerkship) has to do with making juries get a sense of how long it takes for a certain amount of time to pass. Tell the students that an eyewitness testified she was robbed at gunpoint, and that on cross-examination the defense attorney elicited the fact that she was only able to see the defendant's face for 45 seconds. Then role-play the prosecutor's redirect: Ask the student to portray the eyewitness and confirm that she saw the defendant's face for 45 seconds. Then ask the student witness to watch the clock and notify you when 45 seconds are up. During the ensuing (and seemingly interminable) silence, you can wander around the classroom, sit in an open chair, look bored, check e-mail on your cell phone—until finally the student witness tells you the time is up. Your students will be surprised at how long 45 seconds can seem, and hopefully get some sense of the power of demonstrative evidence.

In addition to covering these basics, it is a good idea to begin the class with an interesting exercise or interactive problem. A number of suggestions for the first day of teaching can be found in Appendix A.

B. ARTICLE IV (WITHOUT CHARACTER EVIDENCE)

The logical place to start on the substantive rules is with Article IV—relevance, Rule 403, and the specialized rules of exclusion (Rules 407–411). Relevance and Rule 403 are foundational subjects for Evidence, and the specialized rules that follow are perhaps the easiest, most intuitive rules in the book. I skip the rules on character (Rules 404–406) until students are more comfortable with the basic concepts.

Rule 401 does not come up in practice very often, but it introduces the students to two fundamental concepts: first, that a piece of evidence is relevant as long as it has some amount of probative value, however small; and second, that a piece of evidence might be admissible (in this context, relevant) for one purpose but not another. For the first concept, use this old saying by Dean Wigmore: "A brick is not a wall." The "wall" is what a lawyer needs to prove his case: Each piece of evidence represents a certain amount of bricks that helps to build the wall. It could be a sufficient amount of bricks to

build the entire wall (e.g., a full confession by the defendant), or it might only be one brick (e.g., a witness who saw the defendant near the scene of the crime an hour before the crime occurred). As long as the piece of evidence adds bricks to the wall (or takes bricks away from the wall), it is relevant.

As an example of the second concept, ask students if they think the clothing the defendant was wearing is relevant in a lawsuit to determine who was liable in a traffic accident. Most will say no. Then you can bring out (and put on) an extra-long scarf and explain that the plaintiff's theory of the case is that the defendant's scarf got caught in the wheels of his motorcycle as he drove down the street. To use another example, all students will agree that it is irrelevant in a trial for armed robbery that the defendant's horoscope said, "You must avoid all risky endeavors and violent behavior today." But what if the witness testifies that she believes in astrology and always follows the advice in her horoscope? Then the horoscope becomes relevant (although admittedly not very probative) to show that she was a little less likely to commit the crime on that day.

Rule 403 is a fun rule to teach, because there are innumerable examples of evidence that have probative value but also a significant danger of unfair prejudice. Examples include (1) gory crime scene pictures; (2) photos from an autopsy; (3) "day-in-the-life" movies made by plaintiff's attorneys to show how the injury has affected the plaintiff's ability to brush his teeth, drive to work, or hug his children; (4) the plaintiff's eyeball (preserved in a glass jar), lost by the plaintiff due to defendant's allegedly negligent conduct; or (5) demonstrative evidence that re-creates the commission of a particularly brutal and violent crime.

One excellent problem involving Rule 403 is derived from O.J. Simpson's first criminal trial, and it involves the testimony of Los Angeles Police Detective Mark Fuhrman, one of the primary witnesses against the defendant. Simpson's defense attorney asked Detective Fuhrman on cross-examination whether he had ever used the word *nigger,* and he denied having used it at any time in the prior ten years. The defense then asked permission to play a tape of a recent interview a journalist conducted with Fuhrman, in which he uses the offensive word dozens of times. The prosecutor objected on Rule 403 grounds, arguing that if the jurors heard her star witness use this racially charged word over and over again, they would

be unfairly prejudiced against the witness. Instead, the prosecutor offered to simply stipulate that Fuhrman had used the word at some point. The defense argued that hearing Fuhrman actually saying the word over and over had probative value to show the extent of his racial prejudice. You can have students argue this question from both sides: What is the (legitimate) probative value of hearing these tapes, and how does it compare to the (illegitimate) animosity the jury will feel against the witness afterward?

This is the segment of the class when you also want to talk about the *Old Chief* case,[5] one of the few Supreme Court cases that students need to know. Discussing this case helps students to understand the dilemma courts face when trying to "sanitize" evidence by presenting it to the jury in a way that removes its unfairly prejudicial effect but maintains its probative value.

Finally, you should spend a number of classes walking the class through Rules 407 through 411. These are relatively simple rules, and they reinforce the concept of balancing probative value with prejudicial effect. They also introduce the students to another fundamental principle of Evidence law: Even if a piece of evidence does have probative value, we might exclude it because we want to further other policy goals (e.g., encouraging companies to fix defective products or encouraging parties to settle cases).

C. ARTICLE VI

Article VI is probably the most fun to teach of all of the topics in Evidence. It is not too challenging for students, and there is a lot of opportunity for role-playing and trial practice simulation. In fact, it is hard to teach this topic without engaging in some kind of trial simulations.

You should begin with the "easy rules": Rules 601, 602, 603, 604, 605, 607, 610, 612, 614, and 615. Not only are these ten rules very straightforward and simple to understand, but they can also be understood on their own without too much of a need to place them in context of the rest of the rules (unlike, say, the rules on character, which are hopelessly intertwined with each other and with Rule 403). Most of these rules are simply common sense: Interpreters must be

[5] Old Chief v. United States, 519 U.S. 172 (1997).

qualified (Rule 604), and judges are not allowed to testify in a case over which they are presiding (Rule 605).

Many of these rules only make sense if the students know the state of the law in the 1970s, when the rules were first promulgated. Rule 607, for example, strikes modern students as odd and superfluous. Of course any party can impeach any witness; why would you need a rule that expressly permits this? You need to explain the old-fashioned rule of *vouching,* in which a party who called a witness was "vouching" for the credibility of that witness, and therefore not permitted to turn around and impeach her. Rule 601 poses similar issues, so students can best understand the rule if they know about the restrictions on competency (barring testimony from felons, parties to the case, non-Christians, etc.) that used to riddle the common law system. Describing this history also allows you to emphasize the permissive underlying ideology of the Rules of Evidence: When in doubt, go ahead and admit the evidence and let the jury decide what to do with it (i.e., the potential problems with the evidence affect its weight, not its admissibility).

You might want to linger a bit on Rule 601 (competency) and talk about capacity. Students should understand that, even though the rule does not prohibit anyone from testifying on legal grounds, a witness still needs to have each of the four capacities to testify: (1) narration, (2) understanding the importance of telling the truth, (3) memory, and (4) perception. If a witness is merely *deficient* in one of these capacities, she will be able to testify and opposing counsel will point out the deficiencies on cross-examination. But if a witness completely lacks any of these four capacities, he cannot testify in court. Students can easily understand these four capacities in this context. Once they understand it here, it will be easier for them when you return to this topic in discussing methods of impeachment (which involve attacking one of these four capacities) and the hearsay rule (which exists because of the need to test these four capacities on cross-examination). Rule 601 also allows you to talk about the need to voir dire young children to ensure they have each of the four capacities.

The rest of Article VI can be divided into two parts: regulating how witnesses testify, and regulating how we impeach witnesses. Rule 611 is the foundation for understanding how witnesses testify, and offers an opportunity to discuss many different types of objections: asked and answered, compound question, calls for narrative, and so on.

Rule 611 also explicitly references two important objections: beyond the scope and leading. The best way to explain these two concepts is to show students how they work together. On direct, an attorney is constructing a case, telling a story about what happened. The only legitimate way to do this is to have the witnesses tell the story in their own words; thus, witnesses should respond to nonleading questions. If attorneys are allowed to ask leading questions on direct, the attorneys are in fact telling the story and the witnesses are passively agreeing with it. But on cross-examination, an attorney is (usually) not building a case; instead, cross-examination is about controlling the witness so that you can limit or attack what the witness said on direct. Leading questions are the best way to control a witness—they allow cross-examination to be more efficient—so leading questions are allowed on cross. But if the cross-examiner wants to begin telling his own story and strays from the topic of the direct examination (i.e., goes beyond the scope), he should no longer be allowed to use leading questions. Instead, the cross-examiner should wait and then call the witness during his own case-in-chief, when only nonleading questions will be allowed.

While on the topic of cross-examination, you should also point out that cross-examination is not always about impeachment; in the real world, many witnesses cannot be effectively impeached and if the attorney tries to impeach, it only damages the attorney's image in front of the jury. Cross-examination can also be used to elicit positive information from a witness or simply to limit the damage done by the witness (e.g., "You don't know who threw the first punch, do you?").

Finally, you can tackle the only difficult aspect of Article VI—methods of impeachment. You should review *all* the methods of impeachment—attacking memory, perception, and sincerity—even though they are not all regulated by the rules. This is important so that students can put the rules into context: When an attorney uses a prior inconsistent statement, what type of attack is it? Why should this type of attack be restricted whereas others are not? Without a broader overview of how all the different methods of impeachment work together, it is impossible to understand the rules that regulate these methods.

The most complicated aspect of impeaching sincerity is the set of rules on attacking character. If you teach the class in the order suggested here, this will be the first time that students deal with the character rules. As an aside, many professors prefer to teach the

character rules head on when marching through Article IV, instead of skipping the character rules there and coming back to them later, as I suggest. This alternative approach has the advantage of allowing the professor to take the time to set up a framework for understanding character early on, and then by the time the students reach Article VI, they can easily place the character rules regarding witnesses into that framework. I think that it makes more sense to wait for the main discussion of the character rules until you are done with Article VI—the character rules for witnesses in Article VI are relatively easy to understand and can serve as a useful introduction to the main character rules, which you will turn to next.

Regardless of which order you choose, there are two main points to emphasize about the character rules for witnesses. The first is that extrinsic evidence cannot be admitted to prove a collateral matter. This can be a challenging concept for students. Second is the complicated formula set out by Rule 609 to determine whether a prior crime is admissible to impeach. The rule is not written very well, so it is useful to create a flow chart or a table for students so that they can understand which questions to ask (Did the crime occur within the last ten years? Is it a crime of falsity?) and in which order.

Students are also frequently puzzled by the underlying rationale of Rule 609. In essence, Rule 609 is based on a hidden assumption: A witness's prior felony conviction, even if the crime has no element of falsity, is probative in determining whether that witness is telling the truth on the stand. To make this assumption more transparent—and to challenge students' opinions of the assumption—I hand out a survey before covering Rule 609. The survey lists approximately 30 different crimes, from shoplifting to drunk driving to murder, and asks students to rate the probative value (on a scale of 1–100) of the crime in determining whether the witness is testifying truthfully. The second page of the survey then lists the same crimes and asks students to rate the unfair prejudice (on a scale of 1–100) that a jury would feel toward the defendant if they heard about him committing that crime.[6] I then process the surveys by subtracting the unfair prejudice from the probative value. A negative result means the unfair prejudice outweighs the probative value; a large negative number (say, over 20) means the unfair prejudice substantially outweighs the probative

[6] I tell students to assume that the crime the defendant is now on trial for is completely unrelated to the crimes they are ranking, thus ensuring the minimum level of unfair prejudice for each crime.

value. In the next class, I show the students the results. Invariably, no crime (aside from crimes of falsity) has a positive number, and almost all the numbers are substantially negative. In other words, students do not believe that prior convictions should be used to impeach the credibility of witnesses.

This exercise shows that students today simply do not accept the underlying premise of Rule 609 (that a nonfalsity prior felony conviction has a probative value for untruthfulness that outweighs its danger for unfair prejudice). It also shows the students a more general proposition: The rules are frequently based on assumptions that the students do not share. Of course, students still have to understand these assumptions, even if they do not agree with them. But it is important to make the underlying assumptions behind the rules transparent, especially if those assumptions are not intuitive to the students.

D. CHARACTER EVIDENCE

Aside from hearsay, character evidence is the most difficult topic in Evidence. The primary problem is that the term *character evidence* is a term of art used by lawyers and judges, and therefore it is a misleading term when students first hear it. In fact, character evidence is routinely admitted to prove something *other than* character, and that is what Rule 404(b) is all about. The real problem with character evidence is not that it proves something about the person's character—if it does, and if character is relevant (as in a child custody case or defamation case), then the evidence is admissible. The bars on admissibility only arise when character evidence is used to prove propensity, which is in itself a challenging concept.

The best way to guide students through this mess is to address it head-on when you first discuss character evidence (in fact, if you cover Rules 607–609 first, you might want to address the issue at that point). I tell students that character evidence is a broad term that refers to any evidence that *could* be used to prove something about someone's character, but (as always with evidence) the real question is the *purpose* for which the evidence is being submitted. Character evidence could be offered for four different reasons: (1) to prove someone's character, which is almost never relevant, but when it is (as in child custody or defamation cases) it is admissible in any form;

(2) to prove someone's propensity to commit a certain act, which is almost always barred by Rule 404(a); (3) to prove a witness's propensity to lie or tell the truth on the stand, which is governed by Rules 608 and 609; and (4) to prove something other than character that is relevant to the case, which is allowed under Rule 404(b). I am careful throughout the rest of the course to avoid the use of the term *character evidence,* instead using terms like "evidence offered to prove propensity" or "other acts evidence."

Rule 404(b) provides an excellent opportunity to practice applying Rule 403, as so many of those cases involve weighing the probative value of the evidence's legitimate purpose against the unfair prejudice of the illegitimate propensity aspect of the evidence. Given the large number of legitimate purposes listed in Rule 404(b), it is useful to give the students a number of different fact patterns so they can see the rule in action.

E. SEXUAL ASSAULT PROVISIONS

The rules for sexual assault cases are an especially sensitive topic for students. As with teaching rape in Criminal Law, your goal as a professor is to encourage an open and candid discussion about these issues without offending any student or inviting inappropriate comments. A short speech at the beginning of this section about the need to maintain professionalism is usually enough to make students understand the sensitivities involved, but obviously it is also important to monitor the discussions carefully and occasionally reframe a question or a comment to downplay its potentially offensive nature and highlight its legal or policy aspects.

The rape shield law (Rule 412) is fascinating to teach for three reasons. First, it provides an opportunity to explain to students the history of rape trials. Most students are not aware of the unsavory methods of proof that used to be commonly employed by defense attorneys in rape cases, such as attacking the character of the victim by asking about her prior sexual encounters or asking other witnesses about her sexual reputation. Students can be surprised by how recently this conduct was permitted, and they will understand Rule 412 more fully if they appreciate how dramatically it changed the law.

Second, you can use Rule 412 as an example of the interplay between societal norms and the law. Most students believe that societal norms influence the law, but they are not always aware of the feedback effect—that is, how the law can also influence societal norms. In the late 1970s and throughout the 1980s, rape victim advocates made an impressive—and successful—political push to pass rape shield laws in every state in the nation. The passage of these laws helped to change society's views of rape victims and the act of rape itself, damaging the popular presumption that "promiscuous" women generally consent to intercourse. This in turn led to a rethinking of the substantive rape laws, allowing for a broader definition of rape, one that is based on the lack of consent by the victim rather than the force used by the defendant.

Finally, Rule 412 brings up a number of interesting policy questions, including the question of whether the pendulum has now swung too far in the other direction. Rule 412 does allow for some narrow exceptions whereby the defendant can admit the prior sexual conduct of the victim, but many students will argue that broader exceptions are needed. Discussing this issue leads to a good review of Rule 403 issues.

Rules 413 through 415 are interesting primarily because they are a good example of why Congress should never bypass the Advisory Committee when creating rules of Evidence. The rules are generally thought to be ill-conceived, inconsistent with the rest of the rules on character evidence, and unfair to criminal defendants. Unlike the rest of the Federal Rules, they have been adopted by a only small handful of states.

F. HEARSAY – ARTICLE VIII

Hearsay is probably the most difficult topic to teach in this course. It helps to remind students right away of the basic question of Evidence law: What is the proponent of the evidence trying to prove? They have already become familiar with this question when dealing with character evidence and many other rules, and it is the foundation to understanding hearsay as well. Also, students will understand the hearsay rule better if you have already covered impeachment, because the students are already aware of the problems of perception, memory, credibility, and clarity that cross-examination is meant to test.

One analogy I like to give students has to do with MIRV missiles. These are missiles that are launched from the ground and then split up into multiple warheads in space and come down on five or ten different targets. I explain that a piece of evidence is like a MIRV missile: It starts off as one piece of evidence, but it could have many different purposes, each of which could potentially damage the opposing side in a different way. The hearsay rule is like a partially effective strategic defense system: It will knock out any of the warheads that are being used to prove the truth of the matter asserted purpose, but let the others through. (In case Cold War armaments seem too dated for your students, tell them that the MIRV missiles behave like the blue birds in the Angry Birds app on their cell phone.) Suppose a victim writes the following on a police statement: "A man in a red shirt ataked me and tok all my mony." This piece of evidence can be used to prove many different facts: (1) the declarant was conscious at the time she wrote the statement; (2) the declarant can write English; (3) the declarant is not very well educated; (4) the declarant was robbed by a man in a red shirt; and (5) the police were made aware of the fact that a robbery had been alleged by this victim. Only the fourth point represents a hearsay use of the statement, so the hearsay doctrine applies to only that use of the statement. Of course, none of the other four facts might be relevant, and therefore they might be excluded on relevance grounds, but it is important for students to think broadly about all the different facts one statement can tend to prove.

It is good to introduce hearsay with a number of examples, so that students can see the problems inherent in admitting hearsay and further understand that those problems only exist when the statements are being offered for the truth of the matter asserted. I begin hearsay with two fact patterns. First, I tell the class that a second-year student has been charged with cheating on his Property exam last year. The only witness against the student defendant is the Property professor's teaching assistant (TA), as portrayed by one of the students in class (whom I have prepped beforehand). The TA did not see anything relevant herself, but the professor told the TA all the incriminating evidence against the defendant. The professor said she was working in her office late one night writing her exam, and when she stepped out to get some coffee from the teacher's lounge, she returned to see the defendant leaving her office and running down the hall away from her. After the TA reports all of this, I invite the

rest of the class to ask questions of the TA to cross-examine her. The cross-examination questions all involve testing perception, memory, credibility, and clarity—but of course they can only test the TA, not the professor. So the cross-examination is completely useless, and the students quickly see the frustration inherent in trying to determine the accuracy of a hearsay statement.

I then give the class a second fact pattern, involving a plaintiff who bought a used car and then had to replace the brakes on it at a cost of $2,000. The plaintiff is suing the used car dealership. The dealership concedes that the brakes were faulty, but argues that its salesman told the plaintiff about the defect before the sale took place. In this case the witness (again portrayed by a student who has been prepped) is the sales manager, who was standing near the salesman's desk while the salesman sold the car to the plaintiff. The sales manager will say he heard the salesman tell the plaintiff, "The brakes on this car are shot; it will cost about $2,000 to replace them." After the sales manager reports these facts, I again invite students to cross-examine the witness. This time, the cross-examination is very effective: "How loud was the showroom floor?" "How close by were you to the desk?" "What were the exact words the salesman used?" The students quickly learn that if all we care about is the fact the statement was made, and not the truth of its contents, the hearsay doctrine should not apply.

The hearsay exceptions seem daunting to students because there are so many of them. You can put your students at ease to some extent by explaining that many of the exceptions are rarely used and will not be covered in the course. You can also make each of the exceptions easier to understand if you emphasize the policy reasons behind each of them. Even if the policy reasons do not make sense, they are necessary for students to apply the exception to a fact pattern. For example, many students might not agree that individuals speaking while excited are less likely to lie, but students must learn the reasoning behind the rule to determine how exciting the event has to be for the exception to apply, or how long a delay is permissible between the event and the statement.

Students frequently do not seem to see why the hearsay exceptions matter so much. Many students think that if an attorney cannot get the declarant's out-of-court statement into evidence, the attorney can solve the problem by simply calling the declarant to the stand and having the jury hear her live testimony. I tell students that it was not

until I was a trial lawyer that I understood how quickly potential witnesses disappear or become uncooperative, especially in criminal cases. Declarants call 911 and describe a crime in progress but leave no trace of how to reach them again; they come to your office for an interview and then disappear; they testify in the grand jury and then call you the next day and say they want to drop the charges. It is the latter category of declarants that is the most heart-wrenching, and like many former prosecutors, I have many stories of victims who have turned uncooperative, leading me on a desperate search through the hearsay exceptions to try to bring in their prior statements. Excited utterance? Statement for medical diagnosis? Prior statement under oath? Statement against interest? What does the wording of each exception provide for? What policy justifications underlie each rule, and how can we convince a judge that admitting the statement will further that justification? Inviting the students along this odyssey to evaluate the admissibility of each statement under each of the possible exceptions is an excellent confluence of black-letter law issue spotting, real-life litigation work, and consideration of policy issues.

G. CONFRONTATION CLAUSE

This aspect of Evidence law is still evolving, as the Supreme Court hones its *Crawford* ruling and struggles to come up with a workable definition of *testimonial*.[7] Some professors find this area of law fascinating, partly because the state of the law is still in flux, and partly because it involves juicy constitutional law issues instead of the mundane evidence rules. But I would suggest you fight the urge to talk about this topic too much. One day of lecture and discussion is probably sufficient. Students certainly need to be aware that Confrontation Clause issues exist, the general scope of when it applies, and the areas that are still under review by the Court. Until the law settles it is probably not necessary to do much more than that.

H. OPINIONS AND EXPERTS – ARTICLE VII

Opinion testimony is another challenging area of Evidence law. The first order of business is to make sure students understand the difference between lay opinion and expert opinion. Students should

[7] *See* Crawford v. Washington, 541 U.S. 36 (2004).

realize that lay witnesses testify to opinions all the time (e.g., "The defendant looked scared," or "It was very bright inside the room"). This is permitted, as long as the lay witness refrains from using any kind of technical or scientific knowledge in making inferences. In this area it is useful to give your class an obvious example of lay opinion, then an obvious example of expert opinion, and then a number of close calls, so that students can see what factors courts use in distinguishing between the two.

When you turn to expert testimony, I would strongly recommend discussing the *Frye* test before turning to the *Daubert* test.[8] Although *Frye* has not been good law on the federal level for over a generation, it is useful to teach for two reasons. First, it is still the law in a number of states, so students need to be familiar with it. But even more important, the *Daubert* test is most easily understood by contrasting it with the old *Frye* test. Essentially, the *Frye* test mandated that judges defer to the scientific experts to determine what is admissible, and the *Daubert* test reverses the rule by appointing the trial judges as "gatekeepers," who are advised by experts but ultimately must make their own decisions about reliability and thus admissibility. You can engage the students in a debate about which approach makes more sense, highlighting the benefits and drawbacks of each test. This is also an opportunity to present cutting-edge issues such as DNA sequencing, computer forensic experts, and psychological studies about witness reliability, and discuss how the *Daubert*/*Kumho Tire*[9] test must remain flexible to accommodate new scientific and technical advances.

The most challenging aspect of expert testimony is the issue of what underlying data can be used and under what circumstances it can be disclosed to the jury, as set out in Rules 703 and 705. Students must synthesize these rules with the hearsay doctrine and (in the case of criminal trials) the Confrontation Clause. As long as students have a firm grasp of the hearsay doctrine, they should be able to navigate these issues successfully, but the rules will not be intuitive to them at first.

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[8] The *Frye* test comes from a surprisingly short D.C. Circuit case, Frye v. United States, 293 F.1013 (D.C. Cir. 1923), which set a national standard for evaluating expert testimony until Daubert v. Merrell-Dow Pharmaceuticals, 509 U.S. 579 (1993).

[9] *See* Kumho Tire v. Carmichael, 526 U.S. 137 (1999).

I. PRIVILEGES – ARTICLE V

The privilege doctrine is one of the more interesting topics for students because the existence of privileges is so blatantly contrary to the primary goal of trials: determining the truth. One party is offering relevant, nonprejudicial information that will help the jury decide the case and we have decided to prevent the jury from hearing it to protect a vague principle of social policy. In some cases, guilty people might go free, or innocent people might go to jail, all to encourage free communication in future years between an attorney and her client or between a husband and wife. Students are familiar with the concept of privileges, so they are comfortable with this trade-off; in fact, they are so familiar with the concept that they are frequently *too* comfortable. Therefore, you should make sure they understand the real damage that privileges do to the truth-seeking process. One way to make this transparent is to divide the students into groups and have them debate the question of whether to create a new privilege—for example, a journalist–source privilege, or a parent–child privilege. This forces students to struggle with measuring the value of a privilege in protecting an abstract but socially important relationship against the concrete but hard-to-measure effect on individual trials.

As you work your way through the details of each type of privilege, you should explain to students that there are four questions that they must be able to answer for each type of privilege:

1. Is the privilege absolute or qualified, and if it is qualified, how can it be pierced?
2. Who does the privilege protect?
3. Who can waive the privilege?
4. What is the scope of the privilege?

This gets especially tricky for privileges in the corporate context, and for the three different types of marital privilege. Once again, this is a time when an understanding of the policy rationales behind the rule can help students remember the details of the rule itself. For example, if the rule maker's goal in creating a marital privilege is to protect the marriage, then there is no reason to enforce the privilege after the marriage is over, and even if the marriage is still intact it would be sensible to allow either spouse to waive it. However, if the rule maker's goal is to encourage open and intimate communication

within a marriage, then the privilege has to survive the dissolution of the marriage and be needs to be controlled by both parties to the marriage jointly. This is because the parties, while married, must be confident that any secrets they tell each other will stay confidential forever, regardless of what happens to the marriage or how willing their partner will be to testify against them later.

A good theme to review at this point, as the course nears its conclusion, is that the scope and limits of the Rules of Evidence are determined in large part by the goals that the Advisory Committee wanted to achieve. Thus, if you disagree with the goals (as many students will throughout the semester, whether the goal is to encourage subsequent remedial measures or allow a prosecutor to impeach a defendant with prior convictions), you will disagree with the way the rule is drafted. To internalize the rule, you must understand (if not agree with) the purpose of the rule.

J. AUTHENTICATION – ARTICLES IX, X

Authentication is the least interesting and the least challenging aspect of Evidence, and for that reason it tends to be the first topic that gets cut when trying to squeeze all of the information into a four-credit class. Even if you decide to cut this material, however, I would urge you to give the class a five-minute lecture on the basics: the "Best Evidence" rule, how to authenticate a piece of real evidence, and the need to comply with authentication and hearsay for any document you want to admit.

This area of law is becoming slightly more interesting (and significant) as digital evidence is becoming more common; for example, authenticating a posting on Facebook or a text received from a cell phone can be trickier than authenticating a written letter. If you do cover authentication, you might want to start with these issues to make the topic seem more relevant and interesting to students.

K. ETHICS

Evidence is a subject that is full of ethical issues. It is an ideal course for the "pervasive" method of teaching ethics—that is, addressing ethical issues throughout the semester as they apply to

different topics, rather than setting aside a specific class period to talk about ethical questions. The following are a few examples of ethical issues that arise naturally during the course.

1. Is It Justifiable to Ask a Question if You Know It Is Improper?

There are many different aspects to this question. First, it could be used to encourage students to challenge our adversary system of trials, a system that dictates how the Rules of Evidence operate. Because of the adversary system, the default rule for any piece of evidence is admissibility: Unless the other side objects, the evidence will come in and the jury will consider it. What if you know the opposing counsel does not know her Evidence law, and therefore will not recognize hearsay or character evidence when you bring it up? Or what if it is clear the opposing counsel is not paying attention? Some judges will jump in if a piece of evidence is clearly inadmissible, but many will not. If an attorney has a duty to zealously represent his client, at what point should he exercise his own judgment and not ask a question that is clearly improper?

A related issue is whether it is permissible to ask an improper question even if you know it will be objected to (and sustained), just so the jury can hear the question and speculate about the answer. This issue makes students consider the jury system, and how easily jurors can be manipulated by attorneys that play these kinds of games.

My own thought is that it is always unethical to ask a question that you know is improper—but that the legal world is not always that clear-cut. A question might be "almost certainly" improper; a piece of evidence might be "almost certainly" inadmissible. Can you then in good faith ask the question or offer the evidence on the slight chance that the judge will rule in your favor? Most trial attorneys would probably say yes.

2. Is It Appropriate for a Lawyer to Offer Evidence, Ostensibly for a Legitimate Purpose, When It Is Actually Being Offered for a Different, Illegitimate Purpose?

Lawyers do this all the time. For example, prosecutors routinely seek to admit a defendant's prior convictions under Rule 609. The rule allows prosecutors to do this, but only to impeach a defendant's testimony. Most prosecutors, if being honest, would admit that the

reason they are offering the evidence is not because they believe it has any real impeachment value, but because they want the jury to make the (improper) assumption that because the defendant committed a crime before, he is more likely to have committed the crime in the case at issue. The same issue arises in Rule 404(b) questions. A party can convince a judge to admit a prior bad act for some purpose other than propensity, and the judge will give a jury an instruction to disregard the propensity purpose of the evidence, but the improper effect on the jury is undeniable. At what point (if ever) do attorneys have the responsibility to self-censor the evidence they seek to admit?

3. Can You Offer Evidence Meant Only to Impeach, but That You Hope the Jury Will Also Consider for the Truth of the Matter Asserted?

This issue is really just a specific example of the previous question, but it occurs so often in criminal trials that it is worth its own discussion. A common scenario is that a witness makes numerous statements to the police or in front of the grand jury inculpating the defendant, but then recants by the time of the trial—either because she is threatened (e.g., in an organized crime case), or because she forgives the defendant (e.g., in a domestic violence case). None of these former statements are admissible for the truth of the matter asserted, but the prosecutor could still call her to the stand, elicit the (perjured) testimony about how innocent the defendant is, and then impeach her with the statements she made to the police 15 minutes after the incident. Even though the prior statements are inadmissible as substantive evidence, they make a powerful impression on a jury—possibly even more powerful because she is now denying them under obvious duress. Or if she claims not to remember anything, the prosecutor can ask if he can refresh her recollection with her own statement to the police officer given 15 minutes after the incident. Even if she says no, the jury knows about the statement and will assume that it was incriminatory. In both cases the jury will understand perfectly what is going on, regardless of the sternly worded instruction the trial judge will administer. As long as the prosecutor has presented some independent substantive evidence of the crime, the case will survive a directed verdict motion and the "impeachment" questions will have made a powerful, illegitimate impact on the jury.

4. How Far Can Attorneys Go in Preparing Their Own Witnesses for Direct and Cross-Examination?

Students will be surprised to learn how much work trial lawyers do to prepare their witnesses. Once the lawyer has a witness's statement, the lawyer will frequently suggest some alterations—not changing the facts, but merely changing the terminology, style, or emphasis of the testimony.

Sometimes these suggestions are merely intended to make the witness sound better to the jury: advising experts to use simpler, nontechnical terms, for example, or advising less educated witnesses to answer "Yes, sir" instead of "Yeah" when answering a question. Other times the attorney will suggest changes to make it more likely that certain evidence will or will not be admitted. For example, a police officer who first reports in a pretrial interview that a victim "seemed upset" when reporting a crime might be encouraged to go into more detail about the victim's mental state: Was she crying? Was her voice shaking? Was she yelling? If the police officer volunteers this information spontaneously during his testimony, it is more likely a judge will rule that the victim's statements are admissible as an excited utterance. Similarly, a civil defendant who wants to prevent the jury from hearing about his subsequent remedial measure has to be very careful with his testimony. If he "contests feasibility" of the subsequent remedial measure, then the measure will be admitted against him. It could take quite some time to work with the witness beforehand to find the correct words to use that will avoid admission of negligent design but not contest the feasibility of an improvement. How active can attorneys be in suggesting language to witnesses in these circumstances?

Regardless of how students come down on these various ethical issues, it is very important for them to be aware of them, because if they become litigators, they are certain to come across attorneys who are willing to engage in such tactics. Thus, to be an effective litigator, the student must be able to defend against them—perhaps with a motion in limine to get a ruling before the jury even enters the room; perhaps by better preparing witnesses to be aware of certain tricks; or even perhaps by pointing out the opposing counsel's low tactics directly during closing argument.

L. COURSE REVIEW

Evidence is a class in which all the small pieces of law add to each other in a cumulative fashion until the student is left with a large mosaic of rules. There is a significant danger that students will only see each individual stone as it is placed into the mosaic and will never step back to see how all the rules fit together. An occasional overview of the forest can both help students understand each individual rule more completely and see how each rule works with all the others. Thus, I suggest holding a review session after every few weeks of classes to reinforce what students have learned up to that point and to allow students to make connections that they otherwise could not make. These sessions need only take 60 minutes or so, perhaps during a lunch hour, and they are merely a summary of each of the rules so far—more like a bar review lecture than an in-depth, discussion-oriented law school class. I usually hold one session after we complete Article VI (Witnesses), one after we complete Article IV (including the character and rape shield laws), one after we complete hearsay, and one after we complete experts and privileges. The classes are optional, but they are usually very well attended.

V. Teaching Methods

A good professor should always be thinking about how to improve her performance in the classroom. Many professors teach a class a certain way, decide that the class was adequate, and then teach it the same way year after year, reluctant to try anything new because (1) it is more work; (2) it involves taking risks that might end up backfiring; or (3) if the class works fine the original way, there is a risk that trying to "fix" it will actually make the class worse. I urge you to overcome this reluctance. One of the benefits of teaching is that a professor always gets another chance to come back the next day—and the next year—to teach again if a certain method does not work, so there is a very low risk in trying something new. And the payoff can be spectacular: Students might enthusiastically respond to a certain type of exercise or stimulation, and that enthusiasm will then carry over to other classes in which the students will be more engaged and attentive. Evidence class is a perfect setting for this sort

of experimentation because it offers many opportunities for small-group work, student presentations, trial simulations, and so on.

A. COMBINING CASE LAW WITH PROBLEMS

The first critical decision you must make is whether you want to teach Evidence primarily through the case method or the problem method. I discuss the pros and cons of this decision in the earlier section on choosing a textbook, as that is the stage at which you must make that choice. But it is unlikely you will want to adopt purely one method or the other. Professors who teach primarily using case law will want to design a few problems so the students can apply the rules, and professors who teach using problems will need to present the occasional court case so students can see how judges interact with the rules.

Thus, in either case you will need to decide how to review cases with students. One option is the traditional Socratic method of asking students to summarize the relevant facts, holding, and rule of law of the case. Another option is to provide a brief summary of the facts yourself and then ask the students directly to describe the legal issue the court had to decide and how the court went about deciding it. Either way, students will see how courts interpret the rules and the type of analysis they use in applying them to fact patterns.

If you have chosen a book without problems, you will have to design your own in-class problems for students. The problems need not be—indeed they should not be—intricate and difficult. Instead, they should be basic problems that can fit on a Microsoft PowerPoint slide or be orally described briefly in class. In presenting problems, the best strategy is to begin with basic problems that have a certain (and relatively obvious) right and wrong answer. In effect, this is just another way of explaining what the rule means by showing how it applies to a simple fact pattern. Then move on to problems that do not have a certain right or wrong answer, and so require the students to consider both sides of the issue and decide how a judge should rule.

B. INTERACTING WITH STUDENTS IN THE CLASSROOM

One important initial question that you will have to decide is whether you want to call on students by cold-calling or using an

on-call system. Again, both methods have their advantages and disadvantages: Cold-calling helps to ensure that every student arrives to class prepared and ready to engage in a discussion, whereas telling students ahead of time that they are on call generally leads to better prepared students and a higher quality discussion. I personally tend to favor cold-calling, and I tell my students that even if they are not the ones called on, they should imagine themselves being asked these questions and try to formulate answers in their own heads instead of simply passively listening to their classmates.[10] Many students say they feel more anxiety in a cold-calling class, and some have said they are so anxious that they might be called on that they find it hard to concentrate on the material. One solution to this is to begin each class with a certain row of students, and make it clear that you will simply move down that row for the entire class. In this way, students will not know beforehand whether they will be called on, but (assuming they are part of the 90 percent who are not in the targeted row) during class they can relax and attend to the material.

Regardless of whether you choose cold-calling or an on-call system, you will face the challenge of how to keep students engaged in a large class. After all, you can only talk to one of them at a time, which generally means that 75 or more of them will simply be passively listening. There are a number of ways around this problem. One is to routinely ask for a show of hands whenever you pose a problem to the class: How many of you think this evidence is admissible? How many think it is not? (And you must require students to take a stand. To encourage this, you can lightly tease the students who are too shy or too ambivalent to vote at all by explaining that you have just made them trial judges, and as trial judges, they no longer have the luxury of saying "I don't know"—they must make a decision, and a fast one at that). This quick exercise has a number of benefits: It gets students in the habit of raising their hands in class; it forces students to think about each problem instead of sitting back passively and watching the class; and it subsequently encourages students to volunteer for the next question ("Why do you think that?") because they now

[10] Occasionally I will get a bit tricky with my students and give them all a problem at the end of a class and tell them to all be prepared to discuss that problem in the next class. Then I will quietly e-mail three or four students right after class and tell them that they are the ones I am actually going to call on. This way every student prepares, believing he or she could be called on, but the students I actually call on have prepared especially well. This gives me the best of both worlds—until students catch on midway through the semester.

know that they are not alone in their opinion—at least some students share it, and so they can volunteer and become a spokesperson for that group.

Another basic exercise is to pose a question and then split the class into two groups: Those in the back four rows will argue that the evidence is admissible, and those in the front four rows will argue that the evidence is inadmissible. Then tell the students to stay in their seats but to form small groups of two or three and brainstorm arguments for their side. Explain that after three minutes you will call on one of the groups from each side to represent its position to the class. This exercise gets the students discussing the problem in small groups, and the students take it seriously because they are worried that they might be in the group that must present their work to the rest of the class. You can wander up and down the aisles and eavesdrop to ensure they stay focused, but generally the prospect of being called on to defend their position is sufficient motivation.

After the three minutes are up, call on a group from each side to argue its case. When each side has had its say, you will invariably have more students who want to respond or make another point. Because all of the students have just spent three minutes discussing the issue, they are fully engaged in the problem, much more so than if you had simply posed the problem to two individual students.

C. POWERPOINT: USEFUL BUT FREQUENTLY ABUSED

Most law professors now use PowerPoint presentations as an integral part of the class. There are great benefits to this tool, but also a number of drawbacks that professors should avoid.[11] Here are the most important "dos" and "don'ts":

Do:

1. Use more images and fewer words on each slide. Images can serve a number of purposes: They can serve as a mnemonic "anchor" for students to remember a case or a principle of law; they can show relationships between parties or legal concepts; and they can (especially in Evidence) show actual

[11] For an excellent overview of how to effectively use PowerPoint, read Deborah Jones Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology,* 14 B.U. J. Sci. & Tech. L. 39 (2008). Most of the suggestions in the text are drawn from this article.

representations of pieces of evidence (e.g., business records, guns, DNA sequencing reports, etc.). Too many words, on the other hand, can lead students to ignore what you (and the other students) are saying and simply copy the text from the screen.

2. Post language from the law you are discussing so that students can refer to specific wording as the discussion progresses. You can even have the PowerPoint circle or highlight certain words or terms as you discuss them.

3. Post the relevant facts of a problem that the class is discussing. This will prevent the problem of students having to memorize every feature of a complex fact pattern while desperately trying to work out an answer to the problem.

4. Use slides to show students the "big picture" of the law (e.g., when summarizing at the beginning or end of a class) and then "zoom in" to the specific aspect that the class will be discussing that day. This visual representation of how the day's lesson fits into the overall structure of the course is especially useful in a class like Evidence, where a lot of small pieces add up to a large body of law.

Don't:

1. Read directly from the PowerPoint sildes. The slides should contain images and a few words or phrases that focus students on the topic but leaves them free to listen to what you and their fellow students are saying.

2. Add too many distractions to the slides. PowerPoint has innumerable fancy bells and whistles: noises, spinning entrances, music, and so on. Although professors tend to think these features engage students by breaking up the monotony of a lecture, they are far more likely to distract them from what you are trying to teach.

3. Allow the PowerPoint presentation to control the flow of classroom discussion and stifle interaction between you and the students. If the answers to all of the questions are posted on the slides, a professor will find it difficult to respond to a student's unexpected but incisive answer and use that as a

basis for a new discussion. Again, keeping the slides simple will help with this goal. Even with simple slides, though, professors must be willing to remain flexible and deviate from the planned (and predesigned) trajectory of the class if the discussion organically develops in an unexpected way.

One final question regarding PowerPoint is when (if ever) to post the slides online for the students. Almost all professors will post their PowerPoint slides after each class, so students can download them and use them as a study aid when reviewing for an exam. Some professors will post their PowerPoint slides before class, so that students will be able to follow along more easily and take notes (usually using their laptops) next to each slide. The disadvantage to preposting the slides is that if the slides contain any problems or questions, the preposted slides cannot contain the answers to those problems—and if the slides do not contain the answers to the problems, they are less useful as a study aid. One resolution to this problem is to post the slides twice: Before class (preferably a day before, but at least an hour before) post a redacted version of the day's slides, with all of the answers to the questions omitted, and then immediately after class post the entire slide show, including all the answers.

D. ROLE-PLAYING DEMONSTRATIONS

One of the easiest ways to get students involved in the class is to pick students to role-play short, prescripted trial colloquies between an attorney and a witness. You can conduct these role-plays between two students, or you could play one role and let the student play the other. I have found that this technique works much better if the professor plays one of the roles, because when two students read a script back and forth they tend to lack energy and enthusiasm, and class attention wanes. When a professor plays one of the roles, she can stay in character and maintain a high energy level, which in turn ensures the student playing the other role also stays in character and energetic.

It is fairly easy to write a basic script that shows how to authenticate a piece of real evidence, certify a witness as an expert, cross-examine a witness about an incident the day before, lay the foundation for a business record, conduct a voir dire of a child

witness, or any number of other trial scenarios. Select a student a few minutes before class, give the student a copy of the script, and ask the student to read his side of the script when called on in class. At the appropriate time during the class, you can say, "So let's see an example of how to certify an expert in class. I believe Dr. Jones is here in the classroom? Good. Dr. Jones, let's assume you've already been called to the witness stand and have sworn or affirmed to tell the truth. I would then ask you…."

Because these dialogues are relatively short (—one or two minutes), it is usually best if the student remains seated during the demonstration, so you should choose a student near the back of the classroom. You can choose a student who would not otherwise volunteer in class. The student will get some experience speaking to a large group without the pressure of giving a wrong answer or saying something foolish. Meanwhile, the rest of the class will get a practical demonstration of how these various courtroom tasks are accomplished in the real world.

To make the exercise even more interactive, you can sprinkle some objectionable questions or answers into the script and then appoint another student to be the opposing counsel. Tell this student to yell out an objection (along with the grounds, of course) if she hears an improper question or answer. Then whenever there is an objection, you can stop the role play and ask various students in the class to rule on the objection. When the role-play is over, you can ask yet another student if there was any point when an objection was not made but should have been made.

Another type of role-playing is to write a script that describes a conversation in the real world, rather than testimony in court. For example, the student could portray a police officer and you could portray a suspect offering to give up information. After the dialogue is over, ask the class whether or not they have just witnessed a "plea bargaining" situation or a confession for the purposes of Rule 410.

E. COMPLEX PROBLEMS

Early on in my class, I tell my students that there are two kinds of problems in Evidence: those that have a single, unambiguous answer, and those that do not. The first kind of problem is the kind you should present to a student early on when discussing a given

topic: "Is this discussion a 'settlement negotiation' under Rule 408?" "Is the statement by the doorman hearsay or not?" "Can this prior conviction come in under Rule 609?" After the student gives the answer, you can then ask the student to explain why the answer is correct (or you can point out why it is not correct).

Once you have progressed some distance into a topic, however, it is useful to give students the second type of question, in which there is no definite correct answer. These questions can involve various levels of preparation on the part of the students. On the most basic level, you select two students during the class period and present them with a problem, assigning each of them to take a side and defend that side. If you want the debate to be a little more thoughtful, you can use the method described earlier, in which you present the problem and allow the students to discuss it among themselves for a few minutes and then selected students to argue each side to the rest of the class.

To get students to really dig into the more complex problems, however, you need to give them the problem ahead of time and let them look at it outside of class. I have designed about 12 different evidentiary problems—each with about a page-long fact pattern—and I use about one problem per week throughout the semester. At the beginning of the course, I have all the students sign up for one of the problems on the class Web site. The number of students who sign up for each problem depends on the overall size of the class, but I usually have six students sign up for each problem (three for each side). One week before the problem is going to be discussed in class, I send the problem out to those six students and tell them to prepare two things: a one-page written argument, which is to be e-mailed to me the day before (which I then review to ensure they are on the right track), and a three-minute oral presentation to be made in class. On the day of the presentation, each side makes its opening statement, and then we open it up to questions from the class. The class invariably gets very involved in the problem, and I usually have to cut off questions after about 15 minutes. Then the class votes on which side should win, and we have a brief discussion about the problem, during which I ask students what they thought the most effective argument was for each side and why.

A final option is to eschew the signup sheets and simply give the entire class the problem the day before and tell them to spend about 15 minutes preparing a brief argument to the class on one side or the other. This forces every student to wrestle with the problem

overnight, but results in a lower level of preparation for the subsequent presentation in class, as students will not give the problem nearly as much thought as they would if they knew for certain that they were going to present to the class.

The problems that I give to students vary in structure. Usually the problem is a motion in limine to a trial court judge or an appellate argument, but sometimes I give the students a policy question and put them in the role of lobbyists testifying in front of a legislative committee. For example, I might ask the students presenting to argue for or against adopting Rule 413 (involving the prior sexual assaults for those accused of sexual assault) or for or against adopting a journalist–source privilege.

These exercises take up a significant amount of class time, but they allow students to delve more deeply into the complicated rules and the unsettled policy questions in the course. They also help to sustain student interest throughout the semester, because they break up the usual routine of the class. They also give students at least a small taste of simulated trial practice experience, so they can see what it is like to actually manipulate the rules of evidence in a courtroom.

F. ONLINE QUIZZES

In any large class, especially one in which the primary evaluation tool is a final exam at the end of the semester, it is difficult for the professor to know during the semester how well the students are grasping the material. One way of receiving this feedback is to give the students simple multiple-choice quizzes at the end of each week. Most class Web pages have a very easy-to-use online quiz function. Before the semester starts, you can create a few multiple-choice questions for each topic that you cover, and then you can upload these quizzes to the Web site. At the end of each week, have the students go online and take the quiz (which should only require 10 or 15 minutes). The Web site automatically grades all of the student responses and gives the professor a breakdown of correct responses by question and by student.

You can require students to complete the quizzes and count the quiz scores toward the final course grade—although in that case you might have to design new quiz questions every year to prevent students from looking at last year's answers. Another option is to

make the quizzes available to students as an optional study tool. A final option, which is the one I use, is to require the quizzes and calculate each student's score, but not count the score toward the final grade. A student who fails to take the quiz, in other words, loses a point toward the final course grade, but any student who completes the quiz suffers no penalty. This allows students to test their knowledge in a pressure-free environment.

If you do require the quizzes, it makes sense to spend a few minutes reviewing them—or at least the harder questions—at the beginning of the first class the following week. The online quiz function allows you to download the quiz results each week and see the average score for the week, the average overall score for the semester so far, and the easiest and hardest questions for that week. You can share this information with the students and review some or all of the questions in class. When you do review a question, you can call on a student who you know got the answer correct and ask him to state the correct answer and explain how he arrived at that answer.

These quizzes serve three important functions. First, they allow students to immediately apply what they have learned to solve a problem, which is an effective way to reinforce the material in their minds. Second, they provide students with valuable (and, in law school, rare) feedback as to how well they are understanding the material so far. Third, they provide the professor with equally valuable feedback as to how well the class as a whole understands each aspect of the material. For example, if the quiz results show that only 10 percent of the students correctly answered a question about party-opponent statements, the professor should take that as a sign that she should spend some more time discussing that particular hearsay exemption. Although the in-class review does take up some amount of class time, it is an easy way to get students to talk intelligently about Evidence, and for other students to clear up misunderstandings they might have about the material.

G. "WAR STORIES," MEDIA TRIALS, MOVIE CLIPS

Another way to engage the students is by discussing real-life cases in which a given evidentiary rule was applied. Professors who are former litigators frequently tell "war stories" about their own trial experiences, and the news media cover a number of well-publicized

trials that provide examples of significant evidentiary rulings. Students enjoy listening to stories about real trials, and hearing concrete examples of the evidence rules in action can help them to understand the rules more effectively. Just as with any pedagogical tool, however, the real-life examples can be overused, especially by professors who are former trial lawyers who have tried dozens of fascinating cases and want to share their experiences with their students. Unfortunately, fascinating trial stories do not necessarily make for useful teaching moments. Make sure that the legal point you make with your real-life story is clear and succinct, or the story will merely be a distraction to the students.

Likewise, there are dozens of excellent movies that portray dramatic trial scenes. Students like watching film clips in class, and if the scene is effective, it can be a colorful (and therefore memorable) illustration of a rule of Evidence. Also, a good trial scene from a movie can spur an excellent classroom discussion. Once again, though, do not overdo it—you should not show a trial scene just because it is entertaining, nor should you show one that takes ten minutes to develop the relevant facts. Instead, make sure that every film clip you show contains one or two important legal points that are highlighted in a short scene that is easy to follow for students who have probably not seen the movie. To make the most of these film clips, select two students before the scene is shown and give them a couple of questions that they should answer at the end: Is there any spot in the scene where they would have objected if they had been the opposing attorney? Did the judge rule correctly on the objections? Can they think of a more effective way that the attorney could have presented this evidence?

All Evidence professors have their lists of favorite movies to play in class. I have listed a couple dozen movie scenes, indexed by Evidence topic, in Appendix B.

H. WRITING ASSIGNMENTS AND RELATED CLASSROOM DISCUSSION

Although it is necessary to understand some amount of policy to understand how the rules work in practice, there are times at which the study of policy moves beyond what can be justified as necessary for being an effective litigator. Here I think Evidence professors face

their greatest challenge, because neither the bar preparation students nor future litigators will be enthusiastic about learning policy for intellectual enrichment purposes. I believe the key to encouraging students to consider deeper policy questions is to present these questions in an interactive setting and give the students a stake in the outcome.

Three times during the semester I ask my students to write a short paper on a specific policy question. The topic is designed to force the students to consider the policy reasoning behind the rules of Evidence and to think creatively about how these policies might apply in the context of proposing a specific change to the existing Evidence regime. Past assignments have included creating a new hearsay exception, nominating a rule of Evidence to be abolished, or describing how the rules of Evidence should be changed if juries were abolished. The papers cannot be more than three pages long—generally one page for the proposal and two pages describing how the new proposal would work and justifying the decision. Students are not allowed to do any outside research, although they are encouraged to work together in groups. The papers are due at the end of the week, and over the weekend I am able to grade them and select four of the most interesting ideas for an exercise during the first class of the following week, when I spend the entire class on an exercise.

The exercise generally runs as follows: I hand out copies of the four most interesting proposals to the students, and instruct the students to read through each proposal. I then put them in roles as members of the Advisory Committee and ask them to choose which of the proposals would be the best policy to implement. Students vote for a proposal by moving to a certain section of the lecture hall, so that five minutes into the class, the students have split themselves into four groups based on which proposal they wish to support. Each group is instructed to prepare arguments for its own proposal (and against the others), and after another ten minutes of preparation, I let them begin the debate. At any point, a student is allowed to leave one group and join another one, so that the size of the groups (and thus the number of votes for each proposal) varies as the class progresses. Groups are also allowed to amend their own proposals, either to correct a weakness pointed out by another group, or as a concession to convince more students to join them. After about fifteen minutes of debate, I dissolve the smallest group and instruct its members to join one of the remaining three; just before class ends, I dissolve the

smallest of the remaining three to create a majority for one of the surviving two groups.

There are many benefits to this exercise. First, requiring the students to write a paper on the issue beforehand means that each of the students has given serious and critical thought to the topic and has already formed strong opinions about the policy questions even before the class starts. I have found this to be true whether or not the papers are graded. This preclass preparation results in a very high level of discussion during class that is much more sophisticated than would be found in a standard classroom discussion. Having students prepare their arguments and amend the proposals in groups forces them to collaborate on their ideas and goals, and allowing students to move freely between groups during the exercise means that they put forward practical arguments intended to persuade others and then listen closely to the objections made by their opponents. Finally, giving students a personal stake in the outcome—both by requiring each of them to write and justify their own proposals before class, and by requiring them to persuade others of their chosen proposal in class—makes the students passionate about policy issues that otherwise seem theoretical and remote.

The disadvantage, obviously, is that in a large class (say, over 60 students), the individual groups can get a little unwieldy, and some students do not participate in the preparation or the argument. However, this is always a problem when professors attempt to engage in policy discussions in larger classes, and in theory, even the quietest students will be listening to the arguments more closely because they will probably be forced to change their informed decision at some point during the class.

Even if you do not want to spend an entire class on this exercise, you should consider requiring one or two brief writing assignments during the semester. If they are kept short (three pages or less), they do not take much time to review, and they force students to think about the policy issues underlying the rules during the semester, not just at exam time. Other ideas for writing assignments include the following:

1. After the students have finished learning the hearsay exceptions, ask them to determine the "best" hearsay exception by seeding 16 of the exceptions into brackets and then comparing them two at a time, with the winner of each pair advancing to the next round. In the spring semester,

this assignment usually coincides with the NCAA college basketball tournament, so students will be familiar with the process of filling out brackets and determining a champion through binary elimination. After filling out the brackets, have the students write a three-page paper briefly describing the "matchups" that occurred (e.g., statements made for medical diagnosis or treatment are more reliable than excited utterances; party-opponent statements more useful than dying declarations, etc.). The descriptions of the matchups will get more detailed as the pairings get closer to the championship, with the commentary on the final matchup requiring half a page of analysis.

2. Toward the end of the semester, give the students an "Evidence in Fiction" assignment, in which they are instructed to find some fact pattern from a book, movie, television show, play, poem, or other work of fiction and imagine that one of the characters in that fact pattern is on trial for his actions. Students then analyze what evidence would be admissible in this hypothetical trial. For example, if King Claudius were being tried for killing Hamlet, what statements from the other characters would be admissible against him? If Han Solo were prosecuted for killing the bounty hunter in Mos Eisley cantina, could the prosecutor automatically introduce his past criminal acts against him, or would she have to wait until after he testifies? Students can work together in groups to find a fact pattern, and then conduct their own "issue spotting" for the scenarios they find. Every year I assign this paper, I receive an astonishing diversity of fact patterns, from the Bible to T. S. Eliot poetry to the plotline of video games, and the Evidence analysis is always impressive.

3. As exam time gets near, ask each student to write her own exam question (with a model answer). Then post the top 20 exam questions (without the model answers) on the class Web site, and tell students that the actual in-class exam will consist of three of those questions. This is effectively a leveraged take-home exam: Students will have to prepare answers to 20 different questions, thus ensuring they cover a breadth of material in their exam preparation.

I. CLICKERS

Another way of interacting with students is to use classroom response systems, known as "clickers." These require a bit of planning ahead: You have to make sure your classroom can support the technology, and then at the beginning of the semester you have to hand out clickers (which look like TV remote controls) to all of the students. You should make it clear that the students need to bring the clickers to every class and that they will have to turn them in at the end of the semester.

Clickers allow the entire class to answer multiple-choice questions that you pose during class, with the responses instantly sent to the software system and displayed on a specially designed PowerPoint slide. For example, you could ask the class whether a witness should be able to testify that he was told by his mechanic that the brakes on his car were about to go out. Then post four possible answers on your PowerPoint slide:

A. Not permissible—this is inadmissible hearsay.

B. Permissible only if the mechanic later testifies to confirm he made the statement.

C. Permissible if it is offered to prove the witness had notice that the brakes were about to go out.

D. Permissible if the mechanic is certified as an expert.

Students will push the A, B, C, or D button on the clickers, and in a few moments the slide will say:

A. 5%

B. 30%

C. 62%

D. 3%

Thus, most of the class got the correct answer, but nearly a third believed that B was correct. You can ask for a student who answered C to volunteer and explain the reasoning behind her decision, and also to explain why B is incorrect.

Of course, you can also ask a question that does not have a definite right or wrong answer: one that requires applying the Rule 403 balancing test, for example, or one in which character evidence might or might not also be relevant for a 404(b) purpose. In these cases, you might get an even split in the class regarding admissibility,

and you can ask for a volunteer from each camp to make his argument to the class. After the discussion is over, you can explain how most judges would vote on the issue. If it is indeed a close call, explain that many judges would be split on this question; if most judges would vote one way or another, explain that as well.

Clickers provide the same advantages that quizzes do: They force every student to apply the law to new fact patterns and thus learn by doing rather than just listening; they allow students to test their knowledge on a regular basis and thereby get feedback on how well they know the material; and they provide feedback for you as a professor to see how many students understand the material. Clickers are also beneficial because they are a form of in-class interaction, allowing all the students to participate simultaneously and see the results posted instantly in the classroom. They also have the added bonus of encouraging discussion: Once students answer the question with the clickers, they are more likely to become engaged in the discussion that follows because they have been forced to take a side in the debate. Many professors also note that clickers are a better method of polling than a show of hands, because students must vote without being able to look around to see how everyone else is voting, and because their anonymity encourages students to vote the way they truly believe rather than how the rest of the class is voting.

J. OUTSIDE OF CLASS: ONLINE DISCUSSION/WIKIS

Finally, there are various ways to engage students outside the classroom. Obviously you can post office hours and encourage students to stop by your office with questions, but most of your students will not take advantage of this opportunity. Fortunately the Internet has created many opportunities for out-of-class participation. It is very easy to create an online discussion group on your class Web site, and you can encourage students to post questions there for you to answer. This will allow students to get answers to their questions even if they are too shy to ask in class (or even too shy to approach you after class or during office hours). Another benefit of this method is that all the other students can see your responses to the questions.

If one student asks a question, it is likely that many students have the same question. Even if a student does not have a specific question about a topic, reading a detailed answer written by the professor on a specific topic can help to reinforce the student's understanding of the material.

If you want to make the online aspect of the course even more important, you can require participation on the Web site. For example, you could post a question on the discussion board once per week and tell students that they must provide a half-page response to at least three of the questions throughout the semester. Obviously these questions should not have a right or wrong answer; they should be questions that would encourage discussion, such as policy questions or ethical questions. Conversely, you could require five students each week to post their own reflections, in the form of questions or opinions on policy issues that were discussed in class. Students could get points for class participation if they commented on other students' posts. This technique might not lend itself to Evidence as well as it does to other, more policy-oriented classes (e.g., Constitutional Law or Criminal Procedure), but it can be an effective way to engage students who are reluctant to speak up in class.

One online possibility that works well for a class like Evidence is to encourage students to create a class Wiki.[12] At the beginning of the semester, you can set up the structure of the Wiki to fit your preference. For example, you could create a page for each rule of evidence that you cover in class and perhaps paste the text of that rule onto the top of that page. Then you can give students the power to modify the Wiki throughout the semester, creating their own explanations, adding cases that they have found useful, or posing their own questions. Essentially you are encouraging the students to create a communal outline to which they all contribute and that they can all use to review before or even during the exam. You as the professor should probably monitor the Wiki to ensure that the information is accurate, but your job is not to clarify or rewrite the students' work; the idea is to get students to synthesize the material themselves—and to review each other's work and attempt to improve it.

[12] Most class Web sites have a Wiki option, or you can create your own at a Web site like https://my.pbworks.com.

VI. Evaluating Students

Law school classes, especially large classes like Evidence, are routinely criticized for providing insufficient feedback to students and evaluating their performance based on one final exam at the end of the semester. This is somewhat a function of the economics of law school (e.g., most professors do not have teaching assistants to help with grading) and somewhat a function of how professors prioritize their time among class preparation, student feedback, and all of their other duties such as scholarship and service. However, given modern technology and some creativity, it is possible to provide feedback and evaluation to students throughout the semester. Earlier, I described a number of different techniques that can be used to provide students with evaluation and feedback: weekly online quizzes, short writing assignments, and oral presentations (which could also include short writing assignments). You can also grade students for class participation, although this requires evaluating the quality as well as the quantity of students' comments. If you choose to use these methods of evaluation and feedback throughout the semester, the final exam might only be worth 50 percent of the students' final grades.

Regardless of what other evaluation methods you use, you will need to write and grade a final exam. There are two initial decisions to make in designing an exam: (1) Should it be an in-class exam or a take-home exam? (2) Should it be open book or closed book? Although there are good arguments for all different types of exams, I recommend an in-class, open-book exam for Evidence. Although take-home exams allow a professor to ask deeper, more complex problems, Evidence is not a subject that involves a large number of sophisticated policy questions, so there is not a great advantage to the extra time that a take-home exam gives students. And Evidence involves so many different rules with so many specific provisions and exceptions that a closed-book exam would disproportionately reward students who are able to memorize all of the details of the rules over those students who understand why the rule exists and

how to apply it in practice.[13] Finally, an in-class, open-book exam most closely simulates how Evidence is actually used in practice: in a time-sensitive setting such as a trial in which an attorney can refer briefly to books and notes, but will not have the luxury of studying the law in detail and writing a lengthy response to a specific question.

Once you have resolved these initial questions, you must then decide what type of questions you want to ask: multiple choice, short answer, or essay. Here you do not have to choose between the different options: You can and should design a test that has two or three different types of questions. A test with both an "objective" element (e.g., multiple choice or short answer) and a "subjective" element (e.g., an essay) is able to cover both the breadth and the depth of the class. Evidence involves so many rules with so many details that it would be impossible to test the entire breadth of the material with essay questions, unless the essay questions involved nothing but issue spotting. And although Evidence is primarily a subject about black-letter law, there are plenty of gray areas. Students need to be able to demonstrate an ability to see both sides of an issue and justify their conclusion by referencing the purpose of the rule, which is impossible to do with multiple-choice questions.

My exam begins with 25 multiple-choice questions. Most of them are straightforward, but a few have tricks that are hard to catch in a timed exam context unless the student is very familiar with how the rules operate. The key to using multiple-choice questions is to ensure that there really is only one unambiguously correct answer to each question. This can be harder than it sounds. After I write my questions and double check them, I always send them on to someone else to answer them and report back to me as to whether there is any ambiguity. Sometimes I use another Evidence professor on my faculty; other times I use an Evidence professor at another school; and a couple of times I have given them to a third-year student who is

[13] Some Evidence professors choose a closed-book exam, because that best simulates the conditions of the bar exam, and so many Evidence students are taking Evidence because it is on the multistate bar exam. Although there is logic to this argument, I ultimately reject it because (1) preparing for the bar exam is a different process than preparing for a law school exam, as students are required to memorize a large amount of material for a large amount of different topics; and (2) I would like all my students—even those who are taking the class only because of the bar exam—to get more out of the class than bar preparation, and an open-book exam will allow me to test their deeper understanding of the details of the rules, how the rules apply to different fact patterns, and the policy behind the rules.

working as a research assistant (although I have only done this with students that I trust completely not to divulge anything about the questions to other students). Even with all these safeguards, though, ambiguous questions can sneak through. Thus, I tell students before the exam that if they believe there are two correct answers to any question, they are free to write a brief explanation as to why this is so. Many students do not take me up on this offer, because it is a timed exam and I tell them ahead of time that I have "play-tested" the questions and am fairly certain there are no ambiguities. Those that do tend to be the brighter students who both have extra time during the exam and can recognize the ambiguities in a question. If I am convinced during the grading process that a question is ambiguous, I will give full credit for either "correct" answer. This has not happened very often—perhaps one question out of every three exams I give—but it provides one extra layer of protection against an unfair question.

Short-answer questions are also useful for covering the breadth of material in the course. One option is to design simple questions presenting the students with a brief fact pattern—much like a multiple-choice question—and then have them make a ruling on admissibility and explain their ruling in one or two sentences. Another option is to provide the students with a simulated partial trial transcript, with questions of admissibility interspersed throughout the transcript at the points where the judge must make an evidentiary ruling. This latter option best replicates how Evidence is practiced in the real world, and it allows you to test issue spotting in a unique but important way: Some pieces of evidence are admissible only if certain parties have testified or certain evidence has already been offered, and students will have to be aware of these facts as they go through the transcript and make their rulings. Students are told they must rule on the admissibility of the evidence (sustained or overruled) and provide a brief explanation of their answer. Sometimes the explanation is as brief as the applicable Rule number (e.g., "803(2)" if the statement is an excited utterance), and sometimes it is a short sentence explaining how the Rule would apply. Here is an example of how the transcript looks, starting from the beginning of the prosecutor's cross-examination of the defendant (I tell the students that in the transcript the judge always overrules the objection—just so that the transcript can keep going—but that her rulings are unrelated to the correct answer for each case):

Prosecutor: Mr. Tucker, you work as a security guard, is that correct?

Defendant: Yes, part time.

P: And isn't it true that your employer has told you that if you are convicted of this crime you will be fired from your job?

D/C: This is beyond the scope of the direct.

Answer #46

Judge: Overruled.

D: Yes, that's true.

P: What did you watch on television the night of the incident, Mr. Tucker?

D: Excuse me?

P: You claim you were at your cousin's house watching TV all night, what programs did you watch?

D: Um, we watched some college hoops, I think.

P: Really? Isn't it true that there are no college basketball games being played in August?

D/C: Objection! Relevance.

Answer #47

Judge: Overruled.

D: I don't … I don't know what we watched.

P: Let's move on. Isn't it true that you were convicted of a misdemeanor assault against Carolyn Tucker when she was your girlfriend six years ago?

D/C: Objection!

Answer #48

Judge: Overruled.

D: Yes, that's true, but she hit me back.

P: Good for her. What about two years ago, were you convicted of giving a false statement to the police after an alleged burglary?

D/C: Objection!

Answer #49

Judge: Overruled.

D: There was a burglary, sir. I didn't lie about that.

P: Were you convicted of the crime of giving a false statement to the police?

D: Yes.

P: Did you tell the police that your big-screen TV was stolen in the burglary?

D: Yes.

P: But you never owned a big-screen TV, did you?

D: No, I did not.

P: And then did you file a report with your insurance company claiming a loss for the stolen TV that you never owned?

D/C: Objection! There were never any criminal charges filed regarding the insurance claim.

Answer #50

The answers I would expect from these questions would be something along the lines of this:

46. Overruled: Impeachment not beyond the scope—Rule 611(b)
47. Overruled: Relevant for impeachment—Rule 611(b)
48. Sustained: Misdemeanor assault not relevant for impeachment—Rule 609(a)(1)
49. Overruled: Prior conviction for crimen falsi is admissible—Rule 609(a)(2)
50. Overruled: Prior bad act is admissible if it proves untruthfulness—Rule 608(b)

The entire transcript is usually about 12 pages long, with around 30 objections for the students to rule on.

The essay questions will necessarily be shorter if you also have multiple-choice and short-answer questions, but you will not need to construct absurd hypotheticals to squeeze in an issue for every rule. Instead, you can present the students with a fact pattern that contains three or four complex issues and ask them to analyze each issue they find. If you want to emphasize policy issues, you can also ask them to explain whether the outcome is just, and how they might amend the applicable rules to reach a normatively better solution. If you want them to do some issue spotting as well, you can always add in a few more simple issues for them to find and quickly resolve before discussing the more complicated questions.

Grading the multiple-choice and short-answer questions is relatively easy; the only problem that might arise is if a student gets some parts of the short answer correct but not others (e.g., she cites the correct rule, but then makes the incorrect ruling). I usually give partial credit for such answers, remembering that the student is under a good amount of pressure, and giving her the benefit of the doubt. For essay exams, you should create a grading rubric after writing the question that sets out how many points each part of the essay is worth. For example, issue one might be worth one point for spotting the issue, two points for answering it correctly (or, if there is no "correct" answer, for giving a reasonable answer), and one to five points for the quality of the discussion. It is best when designing the question to keep the issues as segregated as possible, so that if a student misses one issue completely, he will not automatically miss aspects of the other issues in the hypothetical.

VII. Conclusion

If Evidence is taught well, it can be extremely interesting to students and perhaps even inspire some of them to become trial attorneys. At the very least, it should give the students a greater appreciation for how trials are conducted in our system and for the countervailing goals that the rules of Evidence try to balance: searching for the truth, using juries to decide the facts, keeping trials reasonably efficient, encouraging settlements, protecting privileged communications, and so on. Evidence also gives professors plenty of opportunities to keep the students engaged: discussions about

high-profile trials, simulations, film clips, oral arguments, and so on. Finally, Evidence gives students a chance to grapple with some of the fundamental questions about the law. How can we craft broad rules that will result in just outcomes for the nearly infinite number of different fact patterns that will arise in real life? How much discretion should be given to individual actors in the system (particularly trial judges) to ensure that the rules are applied fairly? In what ways does the law reflect societal assumptions, expectations, and values (e.g., in barring jurors from hearing about most character evidence because it is unfairly prejudicial)—and at what point should the law be used as a tool to try to change these assumptions, expectations, and values (e.g., with rape shield laws or rules about which experts are reliable)? There are many different aspects of Evidence to explore and emphasize, and many different choices to make as an Evidence professor.

Appendix A: The First Day

On the first day of class, you should try to get the students actively involved in the class and cover the basic principles of Evidence law, so that they can begin to build their framework for understanding why the rules exist and how they work. It helps to start with a hypothetical fact pattern right away—usually one that is based on a well-publicized recent or ongoing trial. Describe the fact pattern to the students and tell them that they are now all in the role of trial judges and they have to make a ruling as to the admissibility of certain pieces of evidence. Reassure them that they are not expected to know (or even guess) as to what the law would require, but instead simply vote based on what they believe should be admitted. Make sure you require all students to raise their hands either for admissibility or exclusion. This in itself is useful because within the first five minutes of class it gets the students used to raising their hands and reacting to what you are saying at the podium. Once students have voted on each issue, ask for a volunteer from each side to explain why they would admit or exclude this piece of evidence.

For example, you could open the class by giving students the basic facts of a sexual assault case. In this example, Greg is accused of raping Brenda, and the prosecutor wants to admit the following evidence:

1. Testimony from one of the defendant's former employees who will testify that she had consensual sexual intercourse with the defendant (who is married) in exchange for promotions and raises.
2. Testimony from one of the defendant's coworkers who will testify that the defendant sexually assaulted her nine years ago, although the coworker never pressed charges.
3. Testimony that one week after the charges were filed against the defendant, his lawyers approached the alleged victim and offered her $10,000 if she would drop the charges against him.

The defendant, for his part, wants to offer the following information:

1. Government records that show that the alleged victim lied on her citizenship application two years ago, claiming she was employed at a time when she was not.
2. Government records that show that the alleged victim lied on her citizenship application two years ago, claiming she had been raped in her home country, when in fact no rape occurred.
3. Evidence that the alleged victim went to work at her night job a few hours after the incident, and did not report the incident to the police until the next morning.
4. Evidence from three other men who will claim that over the past six months, each of them has given the alleged victim cash in exchange for sexual favors.

Depending on how long you want the discussion to be and which issues you want the students to address, you can adjust the hypothetical to add or subtract certain topics. For example, you could ask whether the defendant is allowed to bring in a psychologist who has studied rape trauma syndrome, and has made findings that are backed by some research but are still somewhat controversial. Or you could ask whether the prosecutor should be permitted to admit statistical evidence about how often an individual who commits one sexual assault repeats the crime later in life. Or perhaps the defendant fired his first defense attorney, and the prosecutor now wants to call

the original defense attorney to testify about what the defendant told him during the course of the representation. Or (if you are very ambitious) you can add in a hearsay question: The victim refuses to testify, so the prosecutor wants to call the victim's best friend, who will testify that the victim told her all about the incident the next day.

Students will invariably have strong (and usually divergent) opinions about each of these issues, and many will be willing to share their reasoning with the class. In the course of the ensuing discussion, students will spontaneously offer up many of the basic tenets of Evidence law: the need to protect the jury from unduly prejudicial information, the risks (and benefits) of assuming that a person is lying on the stand if he lied in the past, the probative value of past actions to prove character and propensity, and so on. Of course, students will not use the appropriate terms when they describe these issues, but you can identify them as they arise and push students to examine their preconceptions and assumptions about jurors, witnesses, and relevance. As the issues arise, you can write them on the board, and by the end of the discussion (which could take about half of the class period) you will have a good number of the themes of the class on the board, generated organically by the students' own analysis.

Many times during this discussion, students will want to answer with a simple statement of the law ("We have an attorney–client privilege in our country") or a basic statement of common sense ("You shouldn't be judged based on what you did nine years ago"). You should not be satisfied with these simple statements; instead, you need to gently but firmly push the students for a deeper explanation and justification. Why do we have an attorney–client privilege if the attorney has relevant information and she no longer even works for the defendant? Why can't the jury judge a witness or a party based on actions from nine years ago, when we make assumptions in everyday life about how someone will act based on actions he took in the past?

After this discussion, you can easily turn to the second part of the class, in which you review the four basic justifications for the rules of Evidence. Once again, you can ask students to volunteer answers to the primary question: *Why* do we need rules of evidence? Why not just let attorneys bring in any information they want and let the jury decide the case when they are done? Most Evidence textbooks list four primary justifications for the rules of evidence:

1. To ensure efficient trials and conserve time and money (rules on relevance).
2. To ensure the jury only hears reliable facts (rules on hearsay, expert testimony, authentication).
3. To further other policy interests (rules on attorney–client privilege or protecting settlement negotiations)
4. To protect the jury from unduly prejudicial information (rules on character evidence, including prior criminal or dishonest actions).

In the wake of the discussion you all have just had regarding the hypothetical, students should be able to derive these four primary purposes of Evidence law, and you can write them on the board (or use PowerPoint) as they are discussed. For each justification, make sure you give an example of a rule that is based on the justification, and (if possible) an example from the hypothetical you just discussed.

By reviewing the justifications for the rules of Evidence after the initial discussion of the hypothetical, you make the justifications seem concrete and significant, not merely abstract principles, because the students have already seen how these justifications apply in practice and why they matter.

Appendix B: Evidence in Movies

Many professors like to use movie clips to enliven the classroom atmosphere and demonstrate a legal point, but Evidence provides far more opportunities for this technique than other subjects. Obviously, you do not want to overdo this technique—I would suggest no more than one or two per week.

You can get the most out of these film clips by picking out two or three students immediately before showing the clip and telling them they will need to answer legal questions about the scene afterward (e.g., "After this film clip, tell me at least two points at which the opposing counsel should have objected, and what objection she should have used"). Depending on the context, you might or might not tell them what questions you will be asking.

The following list is certainly not exhaustive. Other Evidence professors will surely have their own favorites that they would be

willing to share with you. Students will also approach you with suggestions about trial scenes in movies, but you need to be very selective when evaluating those suggestions. Remember that when you use a film clip in class it should be not only entertaining, but also pedagogically useful. Also, film clips use up valuable class time; to be most effective, the clip must be able to present a discrete, comprehensible legal issue in only two or three minutes. Many excellent trial movies (*Adam's Rib, To Kill a Mockingbird*, *Inherit the Wind, The Caine Mutiny, 12 Angry Men*) were reluctantly left off of this list, because they do not contain any concise scenes that effectively, memorably, and clearly illustrate a legal principle.

Finally, Hollywood is notorious for its mistakes in presenting legal rules and procedures. Frequently judges make blatantly incorrect rulings in movies. Almost always, the attorneys are allowed to grandstand and make speeches in ways that would never be allowed in a real courtroom. It is important to point these errors out to students so that they do not come away with a false impression of how trials actually work. Even better, it is useful when the students themselves can point out the errors after learning the correct rules and then watching the film clip—they can become the legal "experts" who get to correct the judges and attorneys in the movies.

ARTICLE I

Rule 103: Rulings on Evidence (Effect of Curative Instructions on the Jury)

***Anatomy of a Murder* (Columbia Pictures, 1959; Scene 12)**

Jimmy Stewart portrays a defense attorney who intentionally asks an inappropriate question to influence the jury, and the judge gives a curative instruction, telling the jury to disregard the question and answer. Stewart then explains to his client that there is no way any jury could realistically follow that instruction.

ARTICLE II

Rule 201: Judicial Notice

***Miracle on 34th Street* (20th Century Fox, 1947; Scene 22)**

This clip shows the defense attorney in a civil commitment case trying to prove that his client is in fact Santa Claus. He is given

permission to read facts from an almanac about the national post office. Presumably the judge is taking judicial notice of these facts (although he never uses that term). The prosecuting attorney then agrees that the post office is efficient and authoritative, in effect stipulating to the authority of the post office (although again the word *stipulation* is never used). You can ask students whether the judge should have taken judicial notice of the almanac facts. (The answer is yes, although the fact that it is a federal crime to deliver mail to the wrong person is a fact about the laws of this country and therefore a bit tricky. Students should recognize it is admissible because it is an adjudicative fact and not a legislative fact.) Also point out that once the judge takes judicial notice of these facts, there is no need for the opposing party to also stipulate to them.

ARTICLE IV

Rule 401: Relevance

***My Cousin Vinny* (20th Century Fox, 1992; Scene 17, 2:18 into the scene)**

Joe Pesci portrays a defense attorney who asks the prosecution witness what he had for breakfast on the morning of the crime. This seemingly irrelevant piece of information becomes critical evidence that destroys the credibility of the witness. The clip demonstrates that relevance is contextual—that is, you cannot decide whether or not a piece of evidence is relevant unless you know about the other facts and law of the case.

***Monty Python and the Holy Grail* (Sony Pictures, 1974; Scene 5)**

This clip demonstrates how our conception of what is "relevant" changes over time as our cultural, societal, and scientific outlook changes. In a brief "trial" to determine whether or not a woman is a witch, the judge hears evidence as to whether or not the defendant weighs as much as a duck. Although such an idea sounds ridiculous to modern-day students, you can explain that what is "relevant" is no more or less than what the judge on the bench thinks is relevant—and point out that only a generation ago, many trial judges considered a rape survivor's past sexual history and reputation as relevant to determine whether or not she consented in the current case.

Rule 403: Unfair Prejudice and Demonstrative Evidence

***Philadelphia* (Columbia TriStar, 1993; Scene 20, 4:16 into the scene)**

In this clip, a law firm is being sued for discriminating against its former employee because he has AIDS. The defendant law firm uses a mirror during cross-examination as demonstrative evidence to show the jury that at this time, the plaintiff (Tom Hanks) has no visible lesions on his face, so there is no way the law firm could have known that he had AIDS when he was fired. The plaintiff's attorney (Denzel Washington) should object to this evidence because the defendant did not lay the foundation by establishing that the lesions on his face now are identical to the lesions on his face at the time he was fired. The plaintiff's attorney does not do this—instead, he does something better: On redirect, he has the plaintiff remove his shirt and show the jury a large number of very visible lesions. The defendant's attorney objects to this under Rule 403, but is (correctly) overruled: Not only are the lesions appropriate demonstrative evidence to show the jury that the lesions were in fact visible at the time the plaintiff was fired, but the defendant "opened the door" by pointing out that the plaintiff currently has no visible lesions.

Rule 404: Character Evidence

***Kramer vs. Kramer* (Columbia Pictures, 1979; Scene 21)**

This clip shows the testimony of the mother (Meryl Streep) in a custody dispute against the father (Dustin Hoffman). On cross-examination, the father's attorney is permitted to ask all sorts of questions about the character of the father and mother: is the father abusive, does he drink, how many men has the mother slept with, and so on. This clip can be shown to demonstrate that Rule 404 does not bar character evidence but only propensity evidence. If character is directly relevant (as in a child custody case), Rule 404 does not bar it. The clip can also be used to show how perceptions of relevance can change over time—in 1979, the number of sexual partners that a woman had in her life was deemed relevant to how good a mother she was. In modern society, most judges would not consider that fact to be relevant.

ARTICLE VI

Rule 614(b): Judge Examining a Witness

***The Verdict* (20th Century Fox, 1982; Scene 15)**

At the end of this scene, the judge takes control of the interrogation of the plaintiff's expert witness, essentially asking unfair leading questions and destroying the plaintiff's case. This can be used as an example of what judges should not do when exercising their rights under Rule 614(b). Rule 614(b) is meant for judges to be able to help out attorneys who are struggling (either from their own incompetence or because of the evasiveness of the witness), but in this scene, the judge abuses his right to ask questions of the witness and acts as a partisan to help the opposing side.

Rule 607/611: Cross-Examination and Impeachment

***Witness for the Prosecution* (United Artists, 1957; Scene 10, about halfway through the scene)**

In a murder trial, the defense attorney cross-examines the prosecution's star witness and effectively impeaches her by attacking her perception and her bias. The clip can also be used to begin a discussion about extrinsic evidence and the *Hitchcock* rule: Would the defense attorney be allowed to bring in extrinsic evidence to prove the witness's poor perception and bias? (The answer is yes.)

***A Few Good Men* (Columbia Pictures, 1992)**

Two Marines are on trial for the murder of a fellow soldier. A Marine colonel (Jack Nicholson) has testified that he had ordered the victim to be transferred off the base for his own safety on the next available plane, but the defendants beat the victim to death before he could be transferred. The defense wants to prove that the colonel never gave that order, and that in fact, there was an earlier plane that could have taken the victim off the base before he was murdered. When the colonel denies that any such plane existed, the defense attorney (Tom Cruise) threatens to call two airmen who worked on the airbase that night and saw the plane arrive. The question to ask students is whether or not the calling of the airmen would be extrinsic, collateral evidence barred by the *Hitchcock* rule. The answer is this: It is probably not, because it proves a fact (the existence of the earlier flight) that is relevant for something other than the impeachment of the colonel.

Rule 609: Impeaching with Past Criminal Convictions
***Anatomy of a Murder* (Columbia Pictures, 1959; Scene 24)**

In a murder trial, the prosecutor brings out a prison "snitch" who testifies that the defendant confessed to him in the jail cell the night before. The defense attorney (Jimmy Stewart) impeaches the witness by asking him about his many prior convictions (and prior arrests). You can ask students how many of these convictions would be admissible under Federal Rule 609. Then you should point out that the defense attorney has two additional arguments for asking some of these questions. First, the fact that the witness is currently awaiting sentence on a case shows that he has an incentive to help the prosecutor. Second, the witness at the very beginning of the cross-examination denies that he has ever been convicted of anything other than his current case. This means that he is now lying on the stand about every one of his past convictions, which arguably means that the defense attorney can point out these lies to the jury.

Also, note that the defense attorney receives the witness's prior criminal record only after he begins his cross-examination. You should point out to students that a witness's prior criminal record is always disclosed to the opposing party long before the trial begins, and in fact is frequently the subject of a motion in limine.

Rule 702: Testimony by Expert Witnesses
***My Cousin Vinny* (20th Century Fox, 1992; Scene 21)**

This clip is a good example of how Hollywood tends to overdramatize courtroom procedure to the point of inaccuracy. Here, the defense attorney (Joe Pesci) calls his fiancée (Marisa Tomei) as an expert in automotive mechanics. The prosecutor conducts a voir dire in which he "tests" the proposed expert's knowledge by asking her a complicated question about a car engine. You should point out that although this makes for good theater, in reality, the voir dire process is almost never about "testing" the expert's credentials—the opposing party knows all about the expert's credentials long before trial, and almost all proposed experts have more than sufficient credentials. Instead, the voir dire process is really about making the expert seem a little less impressive in front of the jury before she gets a chance to give her substantive testimony. This point is made even more vivid if you show the next film clip right after this one.

***The Verdict* (20th Century Fox, 1982; Scene 15)**

The plaintiff's attorney (Paul Newman) has called an expert witness in a medical malpractice case. Unfortunately, his expert is not very well qualified. The opposing counsel conducts a voir dire, the purpose of which is merely to belittle the expert in front of the jury. Even after the opposing counsel has made the witness look ignorant and foolish, he still stipulates that the witness should be certified as an expert. You can present this in contrast to the *My Cousin Vinny* clip to show how voir dire is actually used in the real world: not to prove to the judge that the witness is not qualified, but to convince the jury that the witness should not be credited. You can also point out the challenges in finding an impressive expert witness—especially for the "little guy" plaintiffs, and especially when you are asking a doctor to testify against other doctors in a malpractice case.

ARTICLE VIII

Rule 801: Hearsay

***Monty Python and the Holy Grail* (Sony Pictures, 1974)**

This clip is set in the Dark Ages in Britain. One of the characters is pulling a cart stacked with corpses through the streets, calling on the residents of the village to "Bring out your dead!" Another man attempts to put his father onto the cart, but the father protests, "I'm not dead yet." The cart-puller eventually kills the father and throws him onto the cart. The legal question is whether the father's statement, "I'm not dead yet," is hearsay if offered to prove the truth of the matter asserted. This is a tricky question—as it turns out, the statement is admissible, but only to prove the declarant (the father) was able to speak and thus clearly still alive, not to prove that the contents of the statement are true (even though the contents of the statement prove the same fact).

Rule 804(2) & (3) – Dying Declaration, Statement Against Interest

***Hamlet* (Columbia Pictures, 1986; Scene 56, Act V, Scene ii)**

This clip shows the final swordfight between Hamlet and Laertes. The King has plotted to kill Hamlet and has poisoned Laertes's sword and Hamlet's wine. In the end, Laertes stabs Hamlet, the swords are exchanged, Hamlet stabs Laertes, and the Queen unknowingly drinks the poisoned wine—so Hamlet, Laertes, and the Queen all die. Before he dies, Laertes makes a speech implicating the King

in the murders. You can ask students whether Laertes's statement implicating the King would be admissible in a prosecution against the King for murder. (Answer: They would be admissible against him with regard to the murder of Hamlet and Laertes as a dying declaration and perhaps a statement against interest, but not admissible against the Queen under any exception.)

Rule 801, 803, 804(b)(2), and 804(b)(3), *The Simpsons,* "Treehouse of Horror IV" (1993; Season 5, Episode 5, First vignette)

Homer Simpson has sold his soul for a doughnut, and now his wife, Marge, is challenging the validity of the sale in a special proceeding (we must assume that the Federal Rules of Evidence apply). She wins the case by bringing out a document that Homer wrote to her on their wedding night, in which he states "I pledge my soul to you for all eternity," thus proving that she, and not Satan, has the rights to Homer's soul. You can ask students whether this out-of-court statement should have been admitted. This is a good review of hearsay and the exceptions—students can argue that the statement is a state of mind, a dying declaration, or a statement against interest. In fact, it is not hearsay at all, because it is a legally operative statement akin to a contract. This can serve as a good reminder to students to first consider whether a statement is hearsay and only then to look to the exceptions.

For those of you who want even more movie ideas, try *Reel Justice: The Courtroom Goes to the Movies*, by Paul Bergman and Michael Asimov (Andrews McMeel Publishing 2006), which reviews and describes literally hundreds of courtroom-based movies.