Evidence

Weeks 1-2

I. Sources of Evidence Law
   a. common law made by judges in the course of deciding cases and writing opinions.
      i. This is incredibly inefficient for the variety of evidentiary decisions that must be made at a moment's notice…
      ii. Wigmore, Thayer, Cormick, Morgan etc. wrote treatises on the common law of evidence, but it was still a mess.
   b. Codification: rules of evidence have been turned into statutes largely over the last 75 years.
      i. Federal and state rules of civil and criminal procedure—controls how cases progress through the system, how to reserve issues for appeal, etc. These were created and adapted almost entirely by the courts
      ii. 1975: federal rules of evidence became effective, and encouraged the codification of rules of evidence at the state level as well. More than 4/5ths of the states have adapted rules of evidence patterned on the federal version, often with even the same rule numbers. Created by the courts, then spent two years going through both houses of Congress and getting signed by the president. Because of this there is a rich legislative history behind many of the rules.
      iii. There are a few points where the states have departed from what the federal gov't has decided. Something to look out for. The FRE book also includes a report on caselaw divergence from the FRE.
      iv. 2011: the rules were "restyled" and the Congress claimed that there was no change in effects. Older cases use the old words, newer cases use the new words.

II. Unit 1
   a. What is the law of evidence? A body of rules and principles governing:
      i. The rules of admissibility/exclusion and judicial notice
         1. The facts, data, testimony, and etc. that a decision maker can rely upon in making a decision. What things may the decision maker properly consider?
         2. Often, the FRE's define what is admissible by excluding things that may not be admitting. The exclusionary rules are driven by the fact that we have a jury. The desire is to keep away from the jury items of evidence that are likely to be misused. We don't trust juries. They are considered incapable of ascertaining the truth from uncensored evidence. "Calculated and supposedly helpful obstructionism." Further, keep the case shorter (can't consider everything, takes too long).
         3. Also note: the doctrine of judicial notice. The judge/jury/decision maker is often aware of things that are not on the record, but they may consider these things. Putting an objection before the court allows the judge/jury to be aware of evidence that has not been put on the record.
      ii. Rules of Technique

1. Governs the manner in which truth is presented to the decision maker, and the way in which the record is made and kept clean. (objections, motion to strike, and etc.).
2. Foundation for the admission of a document, of an expert conclusion, and etc.
3. The law of evidence is extremely technical, and mastering the tools within them is an essential skill of trial lawyers. (trial advocacy)

iii. Rules of evaluation
1. Govern the manner in which the decision maker may use whatever makes it to the record.
2. Ultimately the record is a list of facts that must still be interpreted.
3. The law of evidence frequently limits, in highly artificial ways, the use to which proof may be put in the evaluative process that leads to a decision.
4. For example, you can use this piece of evidence (x) for some purposes, but not others. (Character evidence, not for the truth of the matter asserted hearsay exceptions, credibility, etc.)
5. "Many rules admitting certain types of evidence are admitted on the shaky assumption that the decision- maker can consider the evidence for only a limited person." We have almost no means of making sure the jury uses the evidence in the way they are meant to.

iv. Roadmap for the class:
1. Rule excluding irrelevant evidence. The first line of defense for any evidence you don't want on the record. Facts that can't possibly be of any assistance to the decision maker in deciding the case. The relevance of a proffered item of evidence (and whether it should be admitted/excluded) is a decision for the trial judge.
    a. Authentication: the rules by which you prove that the item is the authentic item that would be relevant to deciding the issues. (custodian/chain of custody)
2. Rules that Exclude even Relevant Evidence
    a. Competency to testify
    b. Spousal privilege and other common law rules/constitutional protections (5th amendment)
    c. Personal knowledge—can only testify to the things of which you have personal knowledge (hearsay, speculation)
    d. Best evidence rule—documents/photos/writings, when they can solve disputes about their contents, must be put onto the record.
    e. Prejudice, Confusion, Waste of Time (Rule 403)
    f. Hearsay rule—an out of court statement made for the truth of the matter asserted…and other parts of the definition. 7 weeks' worth of material. An important tactical weapon for trial attorneys…abandon all hope ye who enter here.
    g. Rule excluding opinion.
    h. Technique

III. Unit 2: Rule excluding Irrelevant Evidence

a. Rule 402: irrelevant evidence is not admissible.
b. What does relevance mean?
c. "Solomon's Wisdom in Judgment"
    i. Issue: who is the biological mother?
    ii. Facts: Mother 1 and 2 both lived in the same house, and had an infant of the same age. One child died in the night. In the morning, Mother 2 had the living child. Mother 1 claims the living child is hers.
    iii. Imagine: Mother 2 goes on the stage, and testifies that the living child is hers and how much she misses it. Lawyer for M1 jumps up for cross examination and asks, "Isn't it true that you would rather see the child dead than in M1's arms." Lawyer for M2 objects to relevance. Is the question going to lead to the admission of relevant evidence onto the record?
        1. Not relevant: doesn't prove that she is biologically the mother. There can be other reasons why the M2 doesn't want to see the child with the other mothers, maybe M1 is an abuser.
        2. Relevant: a real mother would not want to see her child dead. This has probative value on determining who the real mother is.
    iv. Diagramming relevant evidence:
        1. A) statement of fact: M2 prefers death + M) Love prefers right → B) M2 doesn't love the child + N) Biological Mothers do love their children → C) M2 is not the biological mother
        2. Template: A) (evidence) + M) (premise drawn from experience) → B) (inference) + N) (premise drawn from experience) → C) final inference/proposition (must be material). Can have multiple steps in this chain.
    v. The relevance of M1's attorney's question is only relevant if you are willing to accept the premises (M & N) as true.
    vi. If that is the only evidence in the case, is that sufficient to take the child away from M2? She did have the child in the morning. Relevance and sufficiency are two different things.
    vii. Is there any other proposition that the piece of evidence could support?
        1. Character—why would we put a child with someone so spiteful?
        2. Credibility—why would we believe someone who wants to see a child dead?
        3. If this was envisioned as a custody dispute, we clearly wouldn't put the child with M2, because the purpose is to determine the best custodian of the child. "best interests of the child" standard.
            a. A) Mother prefers death + M) Death is not in the best interest of the child → B) M2 would not act in Best interest of the child + N) Good custodian would act in best interest of the child →C) M2 is not the best custodian.
            b. The evidence could've convinced Solomon of who would be the better custodian/mother rather than who is the biological mother.