Law 536: Evidence  
Course Memorandum  
Fall 2015

Professor Chris Behan  
T-Th, 10:30-12:15, Courtroom (Room 108)  
Course D2L Page: https://online.siu.edu/d2l/home/201065

1. **Course Overview.**

The law of evidence forms the core of the adversarial trial system. No cause of action, however just, can prevail at trial unless an advocate presents admissible evidence to and persuades a finder of fact that her side should win. The rules of evidence used in American courtrooms have evolved over centuries to provide a workable framework for the introduction of testimony and exhibits at trial. Understanding evidence is the first step in mastering the courtroom. The purpose of this course is to teach you evidence within the context of the trial process. To that end, we will learn the background and theory behind each rule of evidence, then apply the rule in a trial setting.

2. **Learning Objectives.**

At the end of this course, students will be able to:

- Understand the common law and statutory bases for the Federal Rules of Evidence and use that knowledge to frame arguments for the application, interpretation, extension, and modification of the Rules.
- Correctly identify evidentiary issues, in the context both of problems and of courtroom trial and appellate exercises.
- Demonstrate competence in solving evidentiary issues in the context both of problems and of courtroom trial and appellate exercises.
- Draft an evidentiary *motion in limine* in a criminal sexual assault case, combining rule interpretation, case application and analysis, and policy arguments.

3. **Class Meetings.**

This class meets Tuesday and Thursday from 10:30 AM-12:15 PM., starting Tuesday, August 25, 2015 and ending Thursday, December 3, 2015. We will take a 5-minute break in the middle of each class.

From time to time, I may cancel class to attend conferences, mock trial tournaments or other professional obligations. I will provide plenty of advance notice to assist in your planning. To make up for these missed classes, I will use a combination of out-of-class assignments, podcasts and physical make-up classes.

We will have a seating chart. On Thursday, August 27, sit with your litigation team in the courtroom. This will be your assigned seating area during the semester.

4. **Course Materials.**

highly recommend buying used books when they are available. I also highly recommend buying a used book this semester because the second edition of the book will be coming out in January 2016. This semester is the last time I will be using the first edition.

If you prefer e-books, electronic versions of the book for Kindle, IPad and other electronic readers are available at either Amazon.com or Lexis’s website at: http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?prodId=prod16080469#.

Although the Lexis editors, my research assistants, and I made every effort to eliminate typographical and other errors, to my chagrin, we missed several errors. These have been corrected in the manuscript for the next edition of the book. I do apologize for the errors and fervently wish they did not exist.

There are two optional supplementary resource materials that I recommend. The first is Goode & Wellborn’s COURTROOM EVIDENCE (2015-2016 Student Edition). This book contains sample scripts for objections and evidentiary foundations. It is an excellent resource for preparing for application exercises. It also contains digests of leading evidence cases to help illustrate the rules of evidence in practice. This is the kind of reference book you will take into the courtroom with you when you go into practice.

The second is the advisory committee notes for each rule. Both Lexis and Westlaw publish the advisory committee notes, but they are also available online for free on Westlaw and Lexis and at many websites, including http://federalevidence.com/node/1335, a link to which is provided on the D2L page. The advisory committee notes are extremely useful in understanding the rules of evidence and I highly recommend that you read them.

5. Contact Information and TA Information

   a. General. My office is Room 136. Telephone number is 453-8722. E-mail address is cbehan@siu.edu. My cell number is 618-503-0147. I prefer text messages to calls. If you text, identify yourself in the text.

   b. Office Hours. My office hours are Wednesday from 3:00-4:30. You don’t need an appointment to see me during office hours. I am also available by appointment. Contact Staci Eakins, the School of Law receptionist, to make appointments. Her number is 618-453-8736. Her email address is seakins@siu.edu.

   c. Teaching Assistants. I have one teaching assistant, Becky Wilson, a superb student who excelled in my evidence class last year. She will provide written feedback on some written assignments and will be available to answer questions and provide assistance in all matters pertaining to the course.

   d. Electronic Communication.

      (1) Email. Check your e-mail regularly. I will use your D2L e-mail address to send messages pertaining to class. Make sure you are actually checking the email address you used to register for D2L. The School of Law has adopted a rule requiring students to use their assigned siu.edu email address for law school-related business. Thus, excuses such as, “well, I use my gmail account and that’s why I never got your email,” are unacceptable.

      (2) Discussion Forum. If you have questions about the administration or content of the class, please post them to the Discussion Forum on the D2L page. You can access this forum by going to the Activities drop down menu, then selecting Discussions, then selecting Questions
About the Course. I prefer for students to post their questions to the forum so other students can see them and get the benefit of the answer. Chances are, if you have a question, someone else does as well.

e. **Problems and Issues.** Despite the best efforts of professors and students, class is not always perfect. Sometimes a lecture or concept is unclear. Sometimes a fellow student will do or say something insensitive or inappropriate that is not fully resolved by the professor in the classroom. You may experience personal frustration with something I do or say in the classroom. If you experience a problem or identify an issue in the class, please come see me so we can discuss it and resolve it. Some of my best growth and development as a professor has come from students taking the time to alert me to issues or problems I had not previously been aware of.

6. **Class Structure and Rhythm**

We will follow a predictable class structure and rhythm, as follows:

(1) **Before Class**

(a) **Reading Assignment.** There is a reading assignment for each class session. You are expected to read the assignment, understand the cases, and work out the problems on your own prior to class.

(b) **Podcast Lecture.** I will post a podcast lecture that covers the evidentiary rule and the cases in the textbook prior to each class. For Tuesday, it will be posted no later than midnight on the Saturday immediately preceding class. For Thursday classes, it will be posted no later than 5 pm on the Tuesday immediately preceding class. You are responsible for the material in the podcast lecture.

(c) **Occasional Quizzes.** From time to time, I will post timed multiple-choice quizzes on the D2L page. These quizzes are based on the reading assignments and podcast lectures and must be completed prior to the class in which the material is covered. If you fail to take the quiz by the deadline, you will not be permitted to make it up. I will give you more information on how this works at the beginning of the semester.

(2) **During Class**

(a) **Assigned Problems.** Every chapter in the book contains assigned problems. Everyone must be prepared to discuss these problems in class. Litigation teams (discussed in paragraph 5, below) are assigned in advance to prepare adversarial arguments for both sides of the problems.

(b) **Application Exercises.** Every chapter in the book contains an application exercise. Some application exercises are assigned to every individual in the class. If so, the reading schedule indicates this with the bolded word **Everyone.** Some exercises are assigned to every team in the class. If so, the reading schedule indicates this with the bolded words **Every Team.** The remaining exercises are assigned to teams by number. For exercises involving teams, the exercises occur in the courtroom, presided over by student judges. From time to time, I will send supplementary material to assigned teams and judges to assist in clarifying an exercise or adding additional elements to it.

(c) **In-Class Problems.** In addition to the problems in the book, I will distribute additional
problems for discussion in class. Everyone in the class is on call to participate in class discussions of these problems. I will not post these problems on the D2L page or save extra copies to give to students who miss class. If you miss class, you are on your own to obtain a copy of these problems.

7. **Class Participation**

Class participation is not only a key to successful learning, it is an integral part of this course. I intend for you to thoroughly learn evidence, and the best way to accomplish that is through frequent class participation.

Students must form 4-person litigation teams by 4:00 on Wednesday, August 26. We will have a total of 12 teams in the class. Each litigation team must select a name and turn in a 3x5 index card to Patty Lynn in room 133 with the following information: (1) team name; (2) individuals on the team; (3) for each individual on the team, your hometown, undergraduate school and degree, and an interesting (must actually be interesting; nothing dull) fact about you.

In most of our class sessions, students will participate in one of two primary roles: problem/case counsel, application exercise advocate and/or role player. Each of those roles is explained below:

**Problem Counsel.** Each chapter in the text contains a number of problems. I will cold-call on teams randomly to participate in class. You will not know in advance whether you’ll be called on in class. If you are unprepared to participate, or if your performance indicates substandard preparation, you will be assessed a penalty of 5 raw points from the class preparation portion of your grade (see below).

**Application Exercise Advocate Role Player.** Each chapter in the text contains one or more application exercises. Most application exercises take place in a courtroom environment and include counsel, witness and judge roles. Assigned teams must prepare for every single role in the application exercise except the judge role, which I will play. If you need additional people to serve as witnesses, it is your responsibility to recruit them from the class and ensure they are ready to participate. Thorough preparation is paramount.

Application exercises are graded on a team basis. Each team must prepare a written version of the application exercise, using a template that will be provided. In addition, the team will be graded on its preparation and performance as role players in the courtroom. If the team needs additional role players for its exercise, it may recruit them from the class, or, in the alternative, team members can play multiple roles.

8. **Listening, Note-Taking, Computers and the Internet.**

I expect you to listen and be mentally engaged in class. Active, sustained listening is an absolutely critical skill for lawyers. This is especially true in evidence and trial work. In order to make and respond to objections, you must listen closely to everything that is being said in the courtroom.

Be courteous to the others in the classroom by keeping distractions to a minimum and giving the class your full attention. Do not text, send instant messages, or hold conversations with others during class. If it is absolutely necessary for you to leave the classroom while class is in session, please minimize the disruption when entering or exiting the room.

You may use computers in class to take notes and access the Advisory Committee Notes during class. Those are the authorized uses and there are no others. If this is abused on an individual or group
basis, I reserve the right to ban laptops from the classroom.

9. **Policy on Recording Class**

Links to all pre-class podcasts will be made available on the D2L page, and you may freely access them at any time after they are posted. The School of Law will not be making either audio or video recordings of this class.

You are not authorized to make your own audio or video recordings of my classes.

10. **Attendance Policy**

Attendance is required. In accordance with law school rules, you may miss no more than six (6) class sessions during the semester (for a 4-credit hour class meeting twice a week, this is the maximum number of possible absences under our rules) without having to withdraw from the class or face the grade penalty under the School of Law rules. You are responsible to manage your own absences and, as an adult and a professional, should realize that if you take all absences early in the semester and run into a problem later in the semester, you will have created a problem for yourself from which no one else is obligated to rescue you. Regardless of your reason for doing so, if you miss class on a day when your team is assigned a presentation or application exercise, you will receive a zero for that assignment.

I will pass around an attendance sheet every day at the beginning of class. Your original, genuine signature on the attendance sheet certifies two things: (1) you are physically present at the beginning of class; and (2) you are prepared for class.

Make a habit of coming to class on time. It is a tremendous distraction to everyone when someone strolls in after class has begun.

I do not permit noting out in my classes. At student request, I recently experimented with it in a class and remembered why I have prohibited it in the past.

However, I do permit one “pass” for the semester for each person. It’s a get-out-of-jail free card in case you aren’t prepared. If you roll the dice and I call on you when you are not prepared, you can say “pass,” and I will move on. You can’t use this more than once in the semester. If you try, you will receive an automatic .2 reduction on your final grade (for instance, a 4.0 would be reduced to a 3.8, and so forth.)

11. **Workload.** The American Bar Association standards for accrediting law schools contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310(b)(1), “a “credit hour” is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.” This is a 4-credit hour class, meaning that we will spend four 50-minute blocks of time together each week (a 100-minute block each Tuesday and Thursday). The amount of assigned reading and out of class preparation should take you about 4 hours for each class session and 8 hours for the week. All told, applying the ABA standard to the number of credits offered for this class, you should plan on spending a total of 12 hours per week (4 in class and 8 preparing for class) on course-related work.

12. **Grading and Evaluation:**

I will evaluate your work in several ways:
a. Classroom preparation and participation (20% of your final grade). This consists of three components:

1. Written and verbal performance as a team on group presentation exercise, as per assignment memo (5% of final grade). There are five possible grades for your combined written work and verbal performance: Superior (15 points), Exceeds Standards (12.5 points), Meets Standards (10 points), Below Standards (5 points), Unsatisfactory (0 points). **Please note: this is a team requirement. You are only allowed to turn in one document, as a team, with a certificate of equal contribution signed by all team members. If you turn in an individual document, you will receive a zero on it. If your signature does not appear on the certificate, you receive a zero on the assignment (and as a team member, you absolutely should not stand for a non-contributing individual signing the certificate). If your signature appears on the certificate, but you demonstrate a lack of preparation during the exercise that indicates you haven’t actually worked with the team, or I otherwise find out you did not contribute to the team effort, the entire team receives a zero on the exercise for permitting you to sign the certificate.**

2. Individual performance on problems in class (5% of final grade). Although I will call on teams, I will grade you individually on your preparation and participation. You cannot hide behind your team members and receive credit for their preparation and participation. You can be expected to be called on multiple times during the semester. For the semester as a whole, there are five possible grades for your individual preparation and performance: Superior (15 points), Exceeds Standards (12.5 points), Meets Standards (10 points), Below Standards (5 points), Unsatisfactory (0 points). **Please note: if I call on you and you are unprepared or inadequately prepared, you will receive an automatic 5 point reduction from the final score you would otherwise have received. This could result in a negative score.**

3. Written and verbal performance as a team in team application exercises (10% of final grade; there are two team application exercises, each worth 5% of final grade). There are five possible grades for your combined written work and verbal performance: Superior (15 points), Exceeds Standards (12.5 points), Meets Standards (10 points), Below Standards (5 points), Unsatisfactory (0 points). **Please note: this is a team requirement. You are only allowed to turn in one document per exercise, as a team, with a certificate of equal contribution signed by all team members. If you turn in an individual document, you will receive a zero on it. If your signature does not appear on the certificate, you receive a zero on the assignment (and as a team member, you absolutely should not stand for a non-contributing individual signing the certificate). If your signature appears on the certificate, but you demonstrate a lack of preparation during the exercise that indicates you haven’t actually worked with the team, or I otherwise find out you did not contribute to the team effort, the entire team receives a zero on the exercise for permitting you to sign the certificate.**

b. Quizzes (combined, 15% of final grade). These quizzes will be timed multiple choice quizzes on the D2L page. They must be completed before the class in which the material is discussed.

c. Motions Assignment (15% of final grade). One of the application exercises is a graded motion under Federal Rule of Evidence 412. You’ll receive a separate assignment memorandum with a fact pattern and instructions.
d. **Final examination (50%)**. Exam will be closed-book, with the exception of a single-sheet handout that I will provide to you before the exam, and upon which you can add anything that will fit in your own handwriting. The examination will be a combination of multiple choice questions and three short-essay questions. Two of the three short-essay questions will be problems we cover during the course (remember, there are problems in the book and problems that I will distribute separately).

13. **Emergency Procedures.**

Southern Illinois University Carbondale is committed to providing a safe and healthy environment for study and work. Because some health and safety circumstances are beyond our control, we ask that you become familiar with the SIUC Emergency Response Plan and Building Emergency Response Team (BERT) program. Emergency response information is available on posters in buildings on campus, available on the BERT’s website at [www.bert.siu.edu](http://www.bert.siu.edu), Department of Public Safety’s website [www.dps.siu.edu](http://www.dps.siu.edu) (disaster drop down) and in the Emergency Response Guidelines pamphlet. Know how to respond to each type of emergency.

Instructors will provide guidance and direction to students in the classroom in the event of an emergency affecting your location. **It is important that you follow these instructions and stay with your instructor during an evacuation or sheltering emergency.** The BERT will provide assistance to your instructor in evacuating the building or sheltering within the facility.

14. **Students with Disabilities.**

Disability Support Services provides the required academic and programmatic support services to students with permanent and temporary disabilities. DSS provides centralized coordination and referral services. To utilize DSS services, students must come to the DSS to open cases. The process involves interviews, reviews of student-supplied documentation, and completion of Disability Accommodation Agreements. [http://disabilityservices.siu.edu/](http://disabilityservices.siu.edu/). Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreement to the School of Law Registrar’s Office to ensure the School of Law provides the proper classroom and examination accommodations.

15. **Students with Physical, Emotional, Mental, or Financial Needs.**

The purpose of Saluki Cares is to develop, facilitate and coordinate a university-wide program of care and support for students in any type of distress—physical, emotional, financial, or personal. By working closely with faculty, staff, students and their families, SIU will continue to display a culture of care and demonstrate to our students and their families that they are an important part of the community. For Information on Saluki Cares: (618) 453-5714, or [siucares@siu.edu](mailto:siucares@siu.edu), [http://salukicares.siu.edu/index.html](http://salukicares.siu.edu/index.html). At the School of Law, Assistant Dean Judi Ray is also available to help students access university resources. Her email is [judiray@siu.edu](mailto:judiray@siu.edu), and her phone number is 618-453-3135.

14. **Reading Schedule.**

The reading schedule for the semester is below. The schedule is subject to change if I feel we need more time to cover a topic in class. The Behan *Evidence and the Advocate* readings are mandatory.
The Goode and Wellborn readings are optional but highly recommended. The application assignments are contained in the *Evidence and the Advocate* text. I reserve the right to adjust the reading schedule as needed. *(Note: After the first class, I will assign a unique number to each team that will correspond to the assignments in the Application Exercise column. You will not need team numbers for the first week of class).*

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<tr>
<th>Week</th>
<th>Class</th>
<th>Date</th>
<th>In-Class Topics</th>
<th>Reading Assignment &amp; Podcast</th>
<th>Application Exercise (Team #)</th>
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</table>
| 1    | 1     | 25 Aug| • Introduction and Purposes of Evidence Law                                     | • Evidence and the Advocate (EA), Chapter One  
• Corresponding Sections of Goode & Wellborn (G&W)  
• Note: No podcast for first class meeting            | Every Person: Turn in hard copy of application exercises at beginning of class.               |
| 2    | 27 Aug| • Procedural Basics of Evidence Law: Rules 103-105  
• Procedures for Preliminary Hearings: Rules 104(a) and (b) | • EA, Chapters Two and Three  
• Corresponding G&W | Every Team: Turn in hard copy of materials                                               |
<p>| 3    | 1     | 1 Sep | • Judicial Notice, Burdens of Proof and Presumptions: Rules 201-302             | • EA, Chapter Four &amp; Corresponding G&amp;W                                                      | 1-3 (see assignment memo on D2L) |
| 4    | 3 Sep | • Introduction to Relevance: Rules 401-402                                       | • EA, Chapter Five &amp; corresponding G&amp;W                                                      | 12                            |
| 5    | 5     | 8 Sep | • Exclusion of Relevant Evidence for Detrimental Impact on Trial Process: Rule 403 | • EA, Chapter Six &amp; corresponding G&amp;W                                                      | 1                            |
| 6    | 10 Sep| • Extrinsic Social Policies and the Exclusion of Relevant Evidence: Rules 407-411 | • EA, Chapter Seven &amp; Corresponding G&amp;W                                                     | 4-8 (see assignment memo on D2L)                                                                  |
| 7    | 7     | 15 Sep| • Privileges                                                                      | • EA, Chapter 31                                                                           | 9-12 (see assignment memo on D2L)                                                             |
| 8    | 17 Sep| • Rape Shield Rule: Rule 412                                                       | • EA, Chapter Eight &amp; corresponding G&amp;W                                                     | Everyone, per assignment memo                                                             |
| 9    | 22 Sep| • Character and Habit Evidence in Criminal Cases: Rules 404(a) and 405            | • EA, Chapter Nine and corresponding G&amp;W                                                    | 2                             |
| 10   | 24 Sep| • Character &amp; Habit Evidence in Civil Cases: Rules 404 and 405                    | • EA, Chapter 10 &amp; G&amp;W                                                                      | 3                             |
| 11   | 29 Sep| • Uncharged Misconduct and Other Acts: Rule 404(b)                                 | • EA, Chapter 11 &amp; G&amp;W                                                                     | 4                             |
| 12   | 1 Oct | • Sexual Propensity Evidence: Rules 413-415                                       | • EA, Chapter 12 &amp; G&amp;W                                                                     | 5                             |
| 13   | 6 Oct | • Witness Competency: Rules 601-605                                               | • EA, Chapter 13 &amp; G&amp;W                                                                     | 6                             |</p>
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<td>14</td>
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<td>8 Oct</td>
<td>• Refreshing Witness Recollection: Rule 612&lt;br&gt;• Introduction to Impeachment: Rules 608-609</td>
<td>• EA, Chapters 14 &amp; 15 &amp; G&amp;W</td>
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<td>8</td>
<td>15</td>
<td>13 Oct</td>
<td>• Finish Impeachment: Rule 613</td>
<td>• EA, Chapter 16 &amp; G&amp;W</td>
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<td>16</td>
<td>15</td>
<td>15 Oct</td>
<td>• Authentication: Rules 901-902</td>
<td>• EA, Chapter 17 &amp; G&amp;W</td>
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<td>9</td>
<td>17</td>
<td>20 Oct</td>
<td>• Best Evidence Rule: Rules 1001-1008&lt;br&gt;• Electronic Evidence</td>
<td>• EA, Chapter 18 &amp; G&amp;W&lt;br&gt;• EA, Chapter 19 &amp; GW</td>
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<td>18</td>
<td>22</td>
<td>22 Oct</td>
<td>• Intro to Hearsay: Rule 801</td>
<td>• EA, Chapter 20 &amp; GW</td>
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<td>19</td>
<td>27 Oct</td>
<td>• Hearsay and Confrontation: Rule 802</td>
<td>• EA, Chapter 21 &amp; GW</td>
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<td>29</td>
<td>29 Oct</td>
<td>• Res Gestae Hearsay Exceptions: Rules 803(1)-803(4)</td>
<td>• EA, Chapter 22 &amp; GW</td>
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<td>11</td>
<td>21</td>
<td>3 Nov</td>
<td>• Past Recollection Recorded and Business Records: 803(5) and 803(6)</td>
<td>• EA, Chapter 23 &amp; GW</td>
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<td>22</td>
<td>5</td>
<td>5 Nov</td>
<td>• Public Records: 803(8)-803(10)</td>
<td>• EA, Chapter 24 &amp; GW</td>
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<td>12</td>
<td>23</td>
<td>10 Nov</td>
<td>• Hearsay Exceptions Requiring Unavailability: 804</td>
<td>• EA, Chapter 25 &amp; GW</td>
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<td>24</td>
<td>13</td>
<td>13 Nov</td>
<td>• Hearsay Finale: 806-807</td>
<td>• EA, Chapter 26 &amp; GW</td>
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<td>13</td>
<td>25</td>
<td>17 Nov</td>
<td>• Intro to Opinion Testimony: 701 and 702</td>
<td>• EA, Chapter 27 &amp; GW</td>
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<td>26</td>
<td>19</td>
<td>19 Nov</td>
<td>• Qualifications of Experts: 702</td>
<td>• EA, Chapter 28 &amp; GW</td>
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<td>21 November-29 November</td>
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<td>• Reliability of Expert Testimony: 702</td>
<td>• EA, Chapter 29 &amp; GW</td>
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<td>• Basis and Scope of Expert Testimony: 703-705</td>
<td>• EA, Chapter 30 &amp; GW</td>
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