

WESTERN STATE COLLEGE OF LAW

Evidence 213A – Spring 2014

SYLLABUS

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A. Objectives:

Evidence law determines and limits the facts and information that may be presented by an advocate to a judge or a jury in support of her cause. In this introductory course we will examine what allows a person to be a witness, the role of a jury, shortcuts to proof, relevance, character and habit evidence, impeachment, hearsay and related exclusions and exceptions (by far the biggest single topic), the impact of the confrontation and due process clauses of the Constitution on the admission of evidence, authentication and best evidence, opinion testimony and privileges. We will do this by reference to case law, to the Federal Rules of Evidence (“FRE”) and to the California Evidence Code (“CEC”).

We will see that “evidence issues” arise in criminal and in civil proceedings; and they arise in both the pretrial phase of a matter and at trial. Our job in this course will be several fold: (i) first, as with virtually all law school courses, we will learn and understand “the rules,” both federal and California as well as the interpretative case law; (ii) we will practice applying the rules to real life practice problems (of which there are approximately 120 in our text); and (iii) in the process, we will exercise that most important of all lawyer skills, imagination, in creating arguments for and against the admissibility of particular evidence.

In order to obtain the maximum benefit from our 56 hours of classroom time, you will need to read the assigned materials carefully and completely and attempt to understand them **before** class.

Vocabulary is important. Effective lawyers talk and write like lawyers. Use of the correct word(s) and complete, coherent sentences is not a sinister requirement of overly picayune law professors. It is essential to the effective study and practice of law. For example, a hearsay exemption is not the same as a hearsay exception. You may find a word or expression in your reading for which you just don’t know the meaning. Rather than meandering “in a fog”, try to find or ask about the meaning.

Writing is important. Even though many evidence issues are initially decided “on the run” in the midst, for example, of testimony by a witness, most lawyers write more than they talk. Please notice that this syllabus is written in relatively short sentences and relatively short paragraphs. Practice good writing as much as you can. Write in short complete sentences and short paragraphs using proper grammar, spelling, punctuation, capitalization and syntax. Every single written opinion in our text and every single formal rule of evidence is the product of someone’s attempt to do some very careful, lawyerly writing.

B. Required Texts:

1. Wonsowicz, Evidence – A Context and Practice Casebook, Carolina Academic Press, 2012
2. Miller, Leach & Uhrig, Federal & California Evidence Rules, Wolters Kluwer, 2012
3. Fishman, A Student’s Guide to Hearsay, LexisNexis, 4th Edition 2013

C. Suggested Supplemental Reading (These books may be available in the library or they may be available on short term loan from me. Unless you have a lot of extra money to spend, you should not purchase these books.)

1. Lilly, Capra & Saltzburg, Principles of Evidence, West, 6th edition 2012
2. Mendez, Evidence-A Concise Comparison of the Federal Rules With the California Code, West, 2013 Edition – this text is harder to use than the required Miller text but its explanation of the difference between the Federal and California rules is more complete and easier to understand.
3. Best, Evidence, Examples & Explanations, Kluwer, 8th edition, 2012

D. Preparing for the classroom

Evidence law was, at one time, universally derived from case (“common”) law. Today many jurisdictions, including California (the CEC) and the federal courts (the FRE) have codified their rules of evidence. 42 states have adopted the FRE as their model. However, we will see that even in those jurisdictions, case law interpretation of the evidence codes still shapes and refines the rules of evidence. Therefore, the “case method” with which you are already familiar will be used extensively in class to help us to apply the codes.

Please brief all of the assigned cases and bring both the Wonsowicz text and the Miller rules comparison book to every class.

The California bar exam tests both CEC and FRE. There are some major differences. Therefore, where a federal rule of evidence is mentioned in your assigned textbook reading and/or in this syllabus you **MUST find and read:**

1. The corresponding facing pages in Part I of the Miller book;
2. The corresponding legislative history material in Part II of the Miller book; and
3. The text and related legislative and law review commission comments to the corresponding CEC section in part III of the Miller book.

In other words you should be prepared to be prepared to discuss and compare the FRE provision with the CEC provision. The required reading from the text for each class is relatively modest (approximately 20 pages per class) so the comparison and supplemental reading will be an integral part of each class.

As described above, there are approximately 120 practice problems in the text. In order to be prepared for class you should have prepared your answers to those practice problems **before class**. I will not use the clicker for this class but I may give and grade individual quizzes on the assigned practice problems.

By far the largest single subject covered in this class is hearsay and the related confrontation and due process clause issues. We will spend at least nine classes on these subjects beginning with class number 12. A number of former students and at least one professor believe that the very best hearsay tool is the Fishman soft cover book, *A Student's Guide to Hearsay*. Therefore, I have made it a required text for the course and made it required reading. **In addition to what I described above regarding comparing FREs and CECs, you will be responsible for locating and reading the pertinent pages from the Fishman text.**

The text uses a documentary movie – *The Staircase* – as illustrative of the role of the rules of evidence we will be studying. I have assigned 29 clips from the movie as mandatory “watching.” The assistants on the 3rd floor will have disks which contain the 29 clips for every student in the class. **Please pick up your disk before the first class.** You should be able to watch the clips on the disk on your personal computer or on a computer in the library. If you do not watch the clips a portion of our class discussion will not mean very much. **Clips 1-3 are required viewing for the first class.**

Finally, during the semester I may assign certain **mandatory supplemental reading** in addition to what is contained in the reading assignments section (section L) of this syllabus.

Optional work: In addition to the required and recommended texts, there is another learning resource available to you. This resource is a set of computer-aided exercises known as “CALI” that is located in the computer lab located in the Library. I have listed one or more CALI exercises as optional preparation for particular classes. You can perform these exercises on your personal computer. They can be found at www.cali.org; the sign in name is WESTNNstu235. The CALI exercises cover a variety of evidence topics and can be a valuable way to strengthen your ability to deal intelligently and creatively with the issues and concepts explored in class. Maximum benefit can be derived by performing these exercises in teams of two or more students.

E. Room assignment and class schedule

This class will meet on Monday and Wednesday from 1 pm to 3 pm in room 102.

The class will not meet on Martin Luther King Day, Monday, January 20, or on President's Day, Monday, February 17 when no classes will meet or on Wednesday, March 19 when I will be out of town with a moot court team. We will “make up” that March class earlier in the semester – probably on Friday, February 28 at a time that we will discuss this first day of classes

The result of these changes is two-fold: (i) the reading assignments section of this syllabus (section L) is arranged by class number (1-28) and date not by week; and (ii) the last day of class as for all Monday classes will be Monday, April 28. There will be a review class at some date after April 28

F. Practice Questions, Exams and Grading

I will have several practice true/false/explain questions and at least one practice essay for you to write if you choose. I will post them on the webcourse before the midterm and before the final. As has been my practice, if you send me practice question answers I will send you my sample answer. If, after reading the sample answers you have questions you can make an appointment to see me. *Do not wait until the eve of the midterm or until the end of the semester to begin writing a practice exam and answering practice questions.*

There will be a graded mid-term exam (probably 25 true/false/explain questions) and a final examination consisting of multiple choice questions, true/false/explain questions and an essay question. Each student will receive a numeric final course grade which will consist of the sum of up to 15% of the mid-term grade and up to 85% of the final examination grade. To the extent that I give take home or unannounced quizzes in class, the quizzes will count for as much as 5% of the final grade.

As of now the midterm exam is scheduled for Wednesday, February 26 (the 13th class) at 1 pm and will cover assignments through page 222 in the Wonsowicz text and related readings. Hearsay will not be covered on the midterm. The final exam is presently scheduled for Monday, May 5 from 1-5 pm.

G. Classroom participation

Legal education is a cooperative, participatory venture and oral communication skills will be important throughout your life. Each of you must be prepared to participate in class on a regular basis. If you have not read the materials or do not have a brief for an assigned case, you are unprepared. I will randomly call on students in class to describe cases or rules and to answer questions. **There will be no such thing as a “free pass” day as there is normally no such thing in practice. An “I don’t know” answer will be unacceptable the entire semester.**

Among other reasons for you to be prepared is that it is fairly inconsiderate of the time and efforts of your fellow students to come to class unprepared.

Please note, however, that there is a significant difference between being unprepared and being unable to answer a particular answer. No one knows the answer to every law-related question. You will **not** be down-graded or ridiculed for venturing an incorrect answer. You should, however, be sufficiently familiar with the cases, notes, questions and examples to discuss them when called upon to do so.

As you probably observed during other semesters, classroom participation has several benefits. First, if well done, it helps the class. Second, it enables you to test your knowledge and understanding “free”. The more you test that the better you will understand the material. Finally, clear oral communication is one of the essentials of a high quality work life.

H. Attendance and Decorum

I will take attendance at the beginning of each class by asking you to sign in for the class on a roll sheet. If you are not signed in, you are absent. **In accordance with school rules, if you miss more than four (4) 2 hour classes, you will be academically dismissed from the course**

and will receive a grade of 0. I do not make the school's attendance policies and I will not change them.

You should be in your seat at the commencement of class. Once again, it is fairly inconsiderate (not to mention unprofessional) to walk in late. Similarly, you should not leave until the end of class. If you have an emergency that causes you to have to leave during the class, please do so unobtrusively. If you have a disability which prevents you from remaining in your seat during the class, please contact the Dean of Students.

It should go without saying but I do not expect that cell phones, i-pods, i-pads, head phones, blackberries or pagers and the like will be seen, heard or used in the classroom. You may use your computer but it should be open to course related materials and not to your email, eBay etc. However, the use of computers in the classroom should not interfere with your ability to pay attention to what is going on. I have observed that students who are too intent on recording every word often will have little understanding of what those words mean.

I. Seating Chart

A seating chart will be distributed at the beginning of the first class session. Please print your name **legibly** in the seat you choose for your permanent seat. If you wish to change your seat, please notify me so that I can make the appropriate changes on the chart.

J Office Hours:

I am delighted to talk with a student or students almost any time. I will remain after class for questions when that is possible. I will be available by appointment almost every single weekday and some weekends. Please make appointments through the appointment book located at the faculty reception desk on the third floor. If you cannot make a scheduled appointment, please notify the faculty secretary as soon as possible so that another student can see me during that time slot. If you do not have an appointment and want to "take your chances", you are welcome to just drop by my office or to call my extension, 1142. If none of this works for you, let me know and we will work something out.

A word from the experience of the past: many students who should have seen me did not. If you feel lost or confused you should do everything you can to get yourself to where you understand the material. That includes getting extra help from me.

K. Web Course

Sometime before January 13 (our first class), I will set up a LexisNexis Web Course for this class and enroll you in the course. **Please check the web course by at least January 6.** If you are unable to access it, send me an email or, better yet, seek help in the library. During the semester I will use the web course to send you emails, make class announcements and post course documents such as this syllabus, practice questions, practice exams and charts and outlines relating to the topics we will study. **You should check the web course regularly during the semester.**

The web course will be important to your success in this class. It would be a very bad idea to dither about making sure you have access to this site. There are computers in the library if you need one.

L. Reading Assignments (subject to modification):

Day(s)	Subject(s)	Required Reading*	Supplemental Required & Optional Exercises*
1-2 Jan 13 & 15	Trial, Witnesses, Jury, Shortcuts, Introduction to Relevance	Wonsowicz 1-56 FRE 601, CEC 700, 701 (795) FRE 602, CEC 702 FRE 603, 710** FRE 606(b), 1150** FRE 201, CEC 450-458** FRE 301 & 302, CEC 600-607, 620, 630 & 660** FRE 401 & 402, CEC210, 350 & 351	Clips 1-3
3 Jan 22	Relevance, Prejudice	Wonsowicz 56-77 FRE 104(a), FRE 104(b), FRE 403, FRE 105,	Clips 4-7
4-5 Jan 27 & 29	Special Relevance Rules	Wonsowicz 78-108 FRE 407, FRE 408, FRE 409, FRE 410, FRE 411,	
6-7 Feb 3 & 5	Character, Propensity	Wonsowicz 109-148 FRE 404(b), FRE 406,	Clips 8-9 CALI “Character Evidence Under the Federal Rules” – optional
8- 9 Feb 10 & 12	Exceptions to Character/ Propensity Ban	Wonsowicz 149-176 FRE 404(a)(1), FRE 404(a)(2), FRE 405, FRE 414, FRE 415,	Clip 10
10-11 Feb 18 (note this is a Tues) & 19	Impeachment	Wonsowicz 177-221 FRE 404 (a)(3), FRE 607, FRE 608, FRE 609, FRE 412,	Clips 11-14 CALI “Impeachment and Rehabilitation of Witnesses” – optional

12 Feb 24	Introduction to Hearsay	Wonsowicz 223-245 FRE 801(a), FRE 801(b), FRE 801(c),	Fishman pages 1-38 (except for those sections dealing with the confrontation clause) Clips 15-17 CALI “Hearsay form Square One: The Definition of Hearsay” – optional
13 Feb 26	MIDTERM	(through page 222 only)	
14-16 Feb 28, Mar 3 & Mar 5	Hearsay Exemptions	Wonsowicz 245-277 FRE 802, FRE 801(d)(1)(A), FRE 801(d)(1)(B), FRE 801(d)(1)(C), FRE 801(d)(2)(A), FRE 801(d)(2)(B), FRE 801(d)(2)(C), FRE 801(d)(2)(D), FRE 801(d)(2)(E)	Fishman pages 41-101 (except for those sections dealing with the confrontation clause) CALI “The Concept of Hearsay” – optional
17-20 Mar 17, 24, 26 & 31	Hearsay Exceptions	Wonsowicz 277-348 FRE 803(1), FRE 803(2), FRE 803(3), FRE 803(4), FRE 803(5), FRE 612, FRE 803(6), FRE 803(7), FRE 805 FRE 803(8), FRE 803(10), FRE 804(a), FRE 804(b)(1), FRE 804(b)(2), FRE 804(b)(3), FRE 804(b)(4), FRE 804(b)(6), FRE 806 FRE807	Fishman pages 119-307 (except for those sections dealing with the confrontation clause) Clips 18-21 CALI “The Hearsay Rule and Its Exceptions” – optional

21-22 Apr 2 & 7	Confrontation Clause and Due Process	Wonsowicz 349-412 Sixth Amendment Due process clauses of the 5 th and 14 th Amendments	Fishman pages 101-118 (and those portions of 119-307 relating to specific confrontation clause issues) Clip 22
23 Apr 9	Authentication and Best Evidence	Wonsowicz 414-430 FRE 901, FRE 902, FRE 1001, FRE 1002, FRE 1003, FRE 1004,	Clip 23 CALI “Best Evidence Under the Federal Rules” – optional
24-26 Apr 14, 16 & 21	Opinion	Wonsowicz 431-480 FRE 701, FRE 702, FRE 704, FRE 703, FRE 705,	Clips 24-27 CALI “Expert and Opinion Evidence” – optional
27-28 Apr 23 & 28	Privileges	Wonsowicz 481-518 FRE 501, FRE 502,	Clips 28-29

* The required reading will always include (i) the comparative materials regarding the FREs and CECs mentioned at page 2 of this syllabus; and (ii) the pertinent sections of the Fishman text. The CEC references after the first two classes have been left blank on purpose. You should fill those in and read the pertinent CEC materials.

** Denotes significant differences between FRE and CEC. You should continue this notation for the classes after the first two.