

# WESTERN STATE COLLEGE OF LAW

## Evidence 213A - Fall 2013 REVISED 28 August 2013 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, 8<sup>th</sup> 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.” They are available at **[insert website]**. You should be able to watch them 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 reading for the first class.**

Finally, during the semester I will 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](http://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.

The class will not meet on Labor Day, Monday, September 2 when no classes meet. The school scheduled make-up date for that class is Monday, December 2. But I will be out of town that Monday and all of Thanksgiving week, including Monday, November 25 and Wednesday, November 27. So, we will have three make-up classes. **Those make-up classes will be held on Friday, September 6 in Room 102, Friday, October 11 in Room 102 and Friday, November 8 from 12:15 pm to 2:15 pm in Room 110.** The four students who have a conflict with their intellectual property class will be able to attend the first part of the class and may watch a tape of the second part. Otherwise, an absence from a make-up class that is not excused in advance will be treated the same as an absence from any other class.

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 course will end before Thanksgiving week – the last class is Wednesday, November 20. There will be a review class at some date after December 3.

## F. Practice Questions, Exams and Grading

As this is my first semester teaching evidence, I will borrow “practice exams” from other professors and from prior bar exam questions and post them on the web course after 4-5 weeks. I will be available to review answers to those practice exams and practice questions. We will review some of these in class and you may choose to review some with me in my office. *Do not wait until the eve of the midterm or until the end of the semester to begin taking practice exams and answering practice questions.*

There will be a graded mid-term exam (probably essay, although I have not decided yet) and a final examination consisting of multiple choice questions, short answer 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 unannounced quizzes in class based on the assigned problems from the book, the quizzes will count for as much as 5% of the final grade.

As of now the midterm exam is scheduled for Monday, October 7 (the 13th class) at 1pm 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 has not been scheduled yet.

## 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 three (3) 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 August 26 (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 August 21.** 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):**

<b>Day(s)</b>	<b>Subject(s)</b>	<b>Required Reading*</b>	<b>Supplemental Required &amp; Optional Exercises*</b>
1-2 Aug 26 & 28	Trial, Witnesses, Jury, Shortcuts, Intro 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 Sept 4	Relevance, Prejudice	Wonsowicz 56-77 FRE 104(a), FRE 104(b), FRE 403, FRE 105,	Clips 4-7
4-5 Sept 6 & 9	Special Relevance Rules	Wonsowicz 78-108 FRE 407, FRE 408, FRE 409, FRE 410, FRE 411,	
6-7 Sept 11 & 16	Character, Propensity	Wonsowicz 109-148 FRE 404(b), FRE 406,	Clips 8-9  CALI “Character Evidence Under the Federal Rules” – optional
8- 9 Sept 18 & 23	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 Sept 25 & 30	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 Oct 2	Introduction to Hearsay	Wonsowicz 223-245 FRE 801(a), FRE 801(b), FRE 801(c),	Pertinent Fishman text pages  Clips 15-17  CALI “Hearsay form Square One: The Definition of Hearsay” – optional
13 Oct 7	<b>MIDTERM</b>	(through page 222 only)	
14-15 Oct 9 & 14	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),	Pertinent Fishman text pages  CALI “The Concept of Hearsay” – optional
16-19 Oct 16, 18, 21 & 23	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)(6), FRE 807 FRE806	Pertinent Fishman text pages  Clips 18-21  CALI “The Hearsay Rule and Its Exceptions” – optional
20-22 Oct 28 & 30, & Nov 4	Confrontation Clause and Due Process	Wonsowicz 349-412 Sixth Amendment Due process clauses of the 5 <sup>th</sup> and 14 <sup>th</sup> Amendments	Pertinent Fishman text pages  Clip 22

23 Nov 6	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 Nov 11, 13 & 18	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 Nov 20 & 22*	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.