

EVIDENCE PRACTICE: Section 216A – Spring 2014

SYLLABUS

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1. Objectives:

Our primary objective is to help you learn to put to practical use, in a trial setting, the theory and principles of evidence law, as well as the analytical approach to evidence issues, which you learned in the required Evidence course. Each class session will be devoted to dealing with a series of assigned problems which will require you to argue for and against the admissibility of particular items of evidence during the course of two on-going trials – one criminal (*State v. Mitchell*) and the other civil (*MacIntyre v. Easterfield*).

Our two other goals are to reinforce your understanding of the evidence concepts – like relevancy and hearsay -- which you explored in the required Evidence course as well as to expose you again to concepts -- like privilege and expert testimony -- which may not have been covered in depth in the basic survey course.

2. Required Texts:

Problems and Materials in Evidence and Trial Advocacy, Volumes I [Cases] and II [Problems], Burns, Lubet and Moberly, **Fifth Editions**; publisher - National Institute for Trial Advocacy.

Trial Evidence, Mauet and Wolfson, **Fifth Edition**; publisher – Wolters Kluwer Law & Business

Optional Text:

Courtroom Evidence – A Teaching Commentary, Graham and Ohlbaum; publisher – National Institute for Trial Advocacy.

3. Methodology and Teams:

Our work in the classroom will revolve around the assigned problems. All of these problems are found in Burns, Lubet and Moberly, Volume II. The problems are based on two complex case files contained in Burns, Lubet and Moberly, Volume I. The two complex cases are one criminal case – *State v. Mitchell* – and one civil case – *MacIntyre v. Easterfield*.

The assigned problems frequently require you to argue for and against the admissibility of a particular item of evidence. You must work through each of the assigned problems before class and be prepared, in class, to argue to the court in the role of counsel for one of the parties.

We will approach the problems in teams. The class is limited to the 20 students currently enrolled and I will be out of the country from January 2 through January 12. Therefore, prior to January 1, I will divide the class into ten teams of two. Five teams (we'll call them the Dodgers) will be the prosecutors in *Mitchell* and the defense lawyers in *MacIntyre*. The other five teams (we'll call them the Angels) will be the defense lawyers in *Mitchell* and the plaintiff's lawyers in *MacIntyre*. Before each class, each team should work together to prepare that team's arguments on the assigned problems for presentation to the court during class. A team may choose which of its members will address a particular problem BUT I expect that, over the course of the semester, arguments will be divided equally.

***** If you have a preference regarding who you would like as the other person on your team of 2 or a preference for being a "Dodger" vs being an "Angel" and if you let me know by December 26 at noon, I will try to accommodate the preference. If I do not hear from you I will assign you to a team and a side. *****

Most of the classes will proceed by requiring the advocates to state their best arguments for and against the admissibility of evidence, addressing the teacher (or sometimes a student) as judge. After the conclusion of argument, I will open up consideration of the issues raised by the argument to the entire class for discussion.

Please notice that you will not know before the start of a class which team(s) of Dodgers will argue against which teams of Angels on any particular problem and we will argue several problems in each class. In general, new teams will be chosen to argue each problem.

We will most likely *not* cover in class all of the problems that you have been assigned for a given class session. Working through problems on your own, even if not discussed in class, is an effective way of reinforcing your understanding of the practical application of evidence principles.

For further instructions on working with these problems, please read the "Introduction" in Volume II.

4. Preparation for the First Day of Class:

One of the basic themes of this course is the critical role played by the "factual theory of the case" in determining what evidence is relevant and, therefore, admissible. There are often several possible "factual theories of the case" that can be constructed by counsel. These theories are often conflicting. One of the crucial responsibilities of the trial advocate is to consciously and carefully choose which factual theory to construct and to present to the trier of fact through the Opening Statement.

On the first day of class, we will do a refresher on hearsay by working through Problems 1 through 8. We will then lay the foundation for the rest of the course by considering the critical role of importance of constructing a plausible "theory of the case" that tells "a good story" – a "narrative" – that each side presents in its Opening Statement. *See* Problems 9 through 12. Focusing on *State v. Mitchell*, I will first call upon students to assume the role of a detective to tell the story of "what happened" from the detective's perspective. Then, I will ask other

students to assume their assigned advocate's role to critically evaluate the detective's narrative from that advocate's perspective. Finally, I will call upon students to present Opening Statements in *Mitchell* for the prosecution and the defense.

In addition to Problems 1 through 12, the first week's assignment also include problems 13 through 22.

5. Exams and Grading:

Each student will receive a numeric final course grade. 55% of the final course grade will be based on a written, final closed-book examination administered during final examination week. This final examination will consist of problems based upon the *Mitchell* and *Easterfield* case files. 45% of the final course grade will be based on student oral arguments in class during the course of the semester. I have decided that I will attempt to grade every argument on 0-2-4-6-10 scale with 0 being unprepared and 10 being excellent. On the theory that both partners prepared the argument, the non-arguing partner for any given argument will receive ½ of the points awarded to the arguing partner.

There will be no midterm exam and no quizzes. The final exam is presently scheduled for Monday, May 12 from 1-4 pm.

6. 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 two (2) 3 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.

7. 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.

8. 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

I have set up a LexisNexis Web Course for this class and have enrolled each of the 20 registered students 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. **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.

WEEK	SUBJECT	ASSIGNED PROBLEMS	READING ASSIGNMENT	FEDERAL RULES OF EVIDENCE (“FRE”) ASSIGNMENT
1	<p>Structure and Methods of the Course;</p> <p>Introductory Problems on Hearsay</p> <p>Introduction to Relevance : Common Sense Inference and the Factual Theory of the Case</p>	<p>Problems 1 - 8</p> <p>Problems 9 - 22</p>	<p>Read carefully case file of <i>State v. Mitchell</i>;</p> <p>Mauet & Wolfson 1-40; 75 – 85.</p>	<p>Federal Rules of Evidence (FRE) 801; 101 – 103 (only the rules, no commentary); 401-403.</p>
2	<p>Relevance:</p> <ul style="list-style-type: none"> • Character Evidence; Prior Bad Acts • Conditional Relevance • Habit, Custom, Character 	<p>Problems 23 – 39</p> <p>Problems 40 – 46</p> <p>Problems 47 - 52</p>	<p>Read carefully case file of <i>MacIntyre v. Easterfield</i>.</p> <p>Mauet & Wolfson 85 – 123.</p>	<p>FRE 404 – 405; 104; 406.</p>
3	<p>Relevance:</p> <ul style="list-style-type: none"> • Specific Policy Exclusions • Scientific Evidence and Statistical Evidence 	<p>Problems 53 – 61</p> <p>Problems 62 - 63</p>	<p>Mauet & Wolfson 235 – 252</p>	<p>FRE 407 – 415; 702 and 703.</p>
4	<p>Writing and Exhibits:</p> <ul style="list-style-type: none"> • Authentication • Real Evidence • Best Evidence Rule • Major Documentary Hearsay Exceptions: Past Recollection Recorded; Business Records; Official Records 	<p>Problems 73 – 80</p> <p>Problems 81 – 82</p> <p>Problems 83 - 86</p> <p>Problems 88 - 97</p>	<p>Mauet & Wolfson, 303 – 346</p>	<p>FRE 901 – 903; 1001 – 1008, 803(5), (6), (7), (8).</p>

5	Witness Examination and Rulings on Evidence	Problems 98 - 111	Mauet & Wolfson 9 – 26 [re-read], 365 – 381	FRE 103 – 106, 607 - 610
6	Impeachment: <ul style="list-style-type: none"> • Bias, Interest, Prejudice • Character for Untruthfulness 	Problems 112 – 127	Mauet & Wolfson 355 – 374; 386 - 405	FRE 607 – 610
7	Impeachment: <ul style="list-style-type: none"> • Prior Inconsistent Statement • Contradiction Rehabilitation: <ul style="list-style-type: none"> • Prior Consistent statement 	Problems 128 - 148	Mauet & Wolfson 374 – 385; 142 - 145	FRE 613, 801(d) (1) (A) and (B).
8	Burden of Proof and Presumptions. Witnesses generally; <i>Lay Witness Opinions</i>	Problems 149 – 153 Problems 155 - 171	Mauet & Wolfson 350 – 354 Mauet & Wolfson 55 – 61	FRE 301 and 302, FRE 601 – 606, 701
9	Expert Witness Testimony	Problems 172 – 183	Mauet & Wolfson 273 - 302, 262 - 265	FRE 701 – 705, 803(18).
10	Introduction to Privileges <i>Specific Privileges</i> <ul style="list-style-type: none"> • Marital Communications and Marital Testimonial • Attorney-Client • Psychotherapist-Patient • Miscellaneous • Waiver 	Problems 184 – 213	Mauet & Wolfson 252 - 256 Mauet & Wolfson 256 - 271	FRE 501 and 502; Standards 501 – 513 [<i>See</i> Waltz & Park, Appendix C.] Cal. Evidence Code, Division 8 [<i>See</i> Waltz & Park, Appendix D.]
11	Hearsay <ul style="list-style-type: none"> • Introduction • Definitions: “Hearsay and “Non-Hearsay” 	Problems 214 – 241	Mauet & Wolfson 125 - 127 Mauet & Wolfson 127 - 141	FRE 801

<p>12</p>	<p>Hearsay continued:</p> <ul style="list-style-type: none"> • Introduction to Hearsay Exceptions and the Confrontation Clause • “Definitional Exclusions”: Hearsay Exemptions <p>Hearsay Exceptions:</p> <ul style="list-style-type: none"> • Availability of Declarant <i>Immaterial</i> – FRE 803 	<p>Problems 242 - 247</p> <p>Problems 248 - 257</p> <p>Problems 258 – 278</p>	<p>Mauet & Wolfson 163 – 165; 168 - 173</p> <p>Mauet & Wolfson 141 - 162</p> <p>Mauet & Wolfson 165 - 234</p>	<p>FRE 803, 804</p> <p>FRE 801(d)(1) & (2)</p> <p>FRE 803</p>
<p>13</p>	<ul style="list-style-type: none"> • FRE 803 continued • Unavailability of Declarant <i>Required</i> – FRE 804 • Hearsay within Hearsay and Impeaching the Hearsay Declarant • The “Catch All” Exception • Additional Hearsay Problems 	<p>Problems 279 – 283</p> <p>Problems 284 – 288</p> <p>Problems 289 – 290</p> <p>Problems 291 - 304</p>		<p>FRE 804</p> <p>FRE 805, 806 & 613</p> <p>FRE 807</p>
<p>14</p>	<ul style="list-style-type: none"> • Additional Hearsay Problems <i>continued</i> <p>Judicial Notice</p>	<p>Problems 305 - 312</p>	<p>Mauet & Wolfson 347 – 350</p>	<p>FRE 201</p>