

WESTERN STATE COLLEGE OF LAW

EVIDENCE PRACTICE: Section 216A – Spring 2017

SYLLABUS

Professor: Glenn S. Koppel
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1. Objectives:

(1) Practice Skills/ Advocacy of Legal Argument/ Legal Analysis

My primary objective is to train you 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, as counsel for plaintiff, prosecutor and defendant, to advocate 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*).

(2) Doctrinal Knowledge

My 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 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, Volume I – Cases, Fifth Edition [Burns, Lubet and Moberly] and Volume II - Problems, Fifth Edition [Burns, Lubet and Moberly]; publisher - National Institute for Trial Advocacy.

Trial Evidence, Mauet and Wolfson – Sixth Edition;
publisher - Aspen Law & Business.

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

4. Methodology:

Our work in the classroom will revolve around the assigned “problems.” All of these problems are derived from Burns, Lubet and Moberly, Volume II – Problems. These problems are based on two complex case files contained in Burns, Lubet and Moberly, Volume I – Cases. These case files are based on a criminal case – *State v. Mitchell* – and a civil case – *MacIntyre v. Easterfield*.

The assigned problems usually 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.

On the first day of class, I will divide the class into a roughly equal number of A's and B's. A's will be the prosecutors in *Mitchell* and the defense lawyers in *MacIntyre*. B's will be the defense lawyers in *Mitchell* and the plaintiff's lawyers in *MacIntyre*. I will also pair up teams of prosecutors and defense lawyers. Before each class, each team should *work together to prepare that team's arguments, relating to the assigned problems, for presentation to the court during class.*

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 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.

In order to adequately prepare to discuss or argue each assigned problem, you are required to *draft written notes* outlining your analyses of the evidence issues presented in each problem. These notes should assist you to make your oral presentation or argument in class. Review your notes before each class so that you do not have to read those notes verbatim.

Please note that 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 essential 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.

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 deliberately and self-consciously choose which factual theory – often called the “narrative” – to construct and to present to the trier of fact through the Opening Statement.

The first day of class will focus on *constructing differing factual narratives or theories of the case* in *State v. Mitchell*. **It is, therefore, absolutely essential that you master the contents of the *Mitchell* case file before the first day of class.** 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. (You should have prepared a written narrative to assist you in making your oral presentation in class.) 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, to conclude Problem 1, I will call upon students to present Opening Statements in *Mitchell* for the prosecution and the defense.

We will then proceed to work through Problems 1 – 8 (Introductory Problems on Hearsay) and 9 – 22 (Introduction to Relevance : Common Sense Inference and the Factual Theory of the Case). Students should be prepared to discuss or argue these problems in class by drafting written analyses of the issues presented by these problems.

5. **Exams and Grading:**

Each student will receive a numeric Final Course Grade. 45% of the Final Course Grade will be based on two rounds of oral arguments on admissibility issues raised in selected "problems" drawn from Volume II. 40% 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. 15% of the Final Course Grade will be based on "selected" student oral arguments in class during the middle of the semester.

6. **Preparation for Class and Classroom Participation:**

The Methodology of this course is based completely on active student participation. You are, of course, required to read the materials assigned for each class session. Additionally, you must be prepared, in your role as advocate, to engage in oral argument based on the assigned problems and, in your role as class member, to actively participate after each argument in class-wide discussion of the issues raised by that argument. As noted in section 4 (Methodology) above, in preparation for your oral argument, you are required to prepare written notes for each assigned problem. Review these notes before each class (as would a practicing attorney before a court appearance) so that you do not have to read them *verbatim* during oral argument in class. ***This weekly preparation should take you, on average, at least six hours per week if not more.***

7. **Attendance and Decorum:**

Successful completion of this course is dependent upon satisfaction of the W.S.U. Attendance Policy which is reprinted in the Student Handbook. I will take attendance at the beginning of each class. If you arrive late or depart early you may be marked absent for that session. If you arrive late, do not sign the role sheet. IF YOU MISS MORE THAN THREE (3) CLASSES DURING THE SEMESTER YOU WILL RECEIVE A GRADE OF "F" AND WILL NOT BE PERMITTED TO ATTEND SUBSEQUENT CLASSES. ALSO NOTE THAT STUDENTS CANNOT MAKE UP AN ABSENCE BY ATTENDING ANOTHER PROFESSOR'S CLASS.

8. **Seating Chart**

A seating chart will be distributed at the beginning of the second 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.

9. **Office Hours:**

My office hours will be posted in the Appointments Book located on the counter in front of Sierra Douglas' office. Please make appointments – one at a time – in the Appointments Book. If you are unable to show up for a scheduled appointment, please notify me as soon as possible that you are canceling your appointment in order to make room for another student for that time slot. I will also be available the rest of the week as time permits.

10. **DISABILITY SERVICES STATEMENT**

Western State College of Law provides accommodations to qualified students with disabilities. The **Disabilities** Services Office assists qualified students with disabilities in acquiring reasonable and appropriate accommodations and in supporting equal access to services, programs, and activities at Western State College of Law.

To seek reasonable accommodations, a student must contact Senior Assistant Dean Donna Espinoza, Student Services Director and Disabilities Services Coordinator, whose office is in the Students Services Suite 119. Dean Espinoza's phone number and email address are: (714) 459-1117; despinoza@wsulaw.edu. When seeking accommodations, a student should notify Dean Espinoza of her or his specific limitations and, if known, her or his specific requested accommodations. Students who seek accommodations will be asked to supply medical documentation of the need for accommodation. Classroom accommodations are not retroactive, but are effective only upon the student sharing approved accommodations with the instructor or professor. Therefore, students are encouraged to request accommodations as early as feasible with Dean Espinoza to allow for time to gather necessary documentation. If you have a concern or complaint in this regard, please notify Dean Espinoza; or please notify Dean Allen Easley at aeasley@wsulaw.edu or (714) 459-1168. Complaints will be handled in accordance with the College of Law's "Policy against Discrimination and Harassment."

11. **Argosy University Institutional Learning Outcomes**

1. **Analytical Reasoning**

Analyze issues objectively, interpret and synthesize data and ideas, and develop feasible, flexible, and creative solutions to real world problems

2. Effective Communication

Identify audiences, assess information provided, interpret needs, and present relevant information using appropriate written, oral, and listening skills and media to meet the needs of the situation

3. Information Competency

Gather, evaluate, and ethically use information from a variety of relevant technological and library resources to make decisions and take action

4. Interpersonal Effectiveness

Develop individual and group interpersonal skills to improve and foster participation and interaction critical for achieving individual and group goals

5. Personal and Professional Integrity and Ethical Behavior

Demonstrate a multi dimensional awareness of individual and social responsibility to act ethically and with integrity in a diverse, global society.

6. Professional Competence

Apply skills appropriate to program objectives and employ critical reasoning to contribute to one's field and profession

12. Western State College of Law – Programmatic Learning Outcomes

Western State College of Law’s curriculum is designed so that every student achieves a level of competency prior to graduation in each of the eight Programmatic Learning Outcomes listed below:

(3) Doctrinal Knowledge

Students will demonstrate knowledge of substantive and procedural law in the core curriculum subjects, including Contracts, Criminal Law, Criminal Procedure, Torts, Real Property, Business Association, Evidence, Civil Procedures, Constitutional Law, Estates, Community Property, Remedies, and Professional Responsibility.

(4) Practice Skills

Students will demonstrate the development of other law practice skills. Each student’s chosen outcomes within this category will be varied based on the student’s particular interests, coursework and work experiences. They may include, but are not limited to, the following topics: oral presentation and advocacy; interviewing; counseling; client service and business development; negotiations, mediation, arbitration, or other alternate dispute resolution methods; advanced legal research and writing (excluding purely academic papers and the first four units earned in introductory first-year legal research and writing class); applied legal writing such as drafting contracts, pleadings, other legal instruments; law practice management or the use of technology in law practice; cultural competency; collaboration or project management;

financial analysis, such as accounting, budgeting project management, and valuation; cost benefit analysis in administrative agencies; use of technology, data analyses, or predictive coding; business strategy and behavior; pre-trial preparation, fact investigation, such as discovery, e-discovery, motion practice, assessing evidence, or utilizing experts; trial practice; professional civility and applied ethics; a law clinic that includes a classroom component; or a legal externship that includes a classroom component.

(5) Legal Analysis

Students will demonstrate the ability to identify the factual and legal issues implicated by a fact pattern and to appropriately use cases (including identifying the salient features of an appropriate precedent case, identifying legally significant similarities or differences between the precedent case and a fact pattern and explaining why those are legally significant) and rules (including the ability to connect legally significant facts in a fact pattern to the rule) to predict how a court would decide the issue. Students will also demonstrate the ability to identify and evaluate the public policies of a precedent case or rule, and be able to evaluate how public policy can impact the application of a rule to the legal issue.

(6) Legal Research

Students will demonstrate the ability to locate relevant legal authority using a variety of book and electronic resources, and to properly cite to such legal authority.

(7) Communication

Students will demonstrate the ability to communicate both orally and in writing in a manner appropriate to a particular task to effectively convey the author or speaker's ideas. This includes audience sensitivity in written and oral communication (the ability to adopt a tone, style and level of detail appropriate to the needs, knowledge and expertise of the audience); and written communication basic proficiency (the ability to use the conventions of grammar, spelling, punctuation, diction and usage appropriate to the task and sufficient to convey effectively the author's ideas).

(8) Advocacy of Legal Argument

Students will demonstrate the ability, in both oral and written formats, to evaluate the legal, economic and social strengths and weaknesses of a case and use case and statutory authority as well as public policy to persuade others. Making policy-based arguments includes the ability to identify and evaluate the public policies of a precedent case or rule and their implications, and be able to assert such appropriate arguments to support a particular application or distinction of a precedent case to a legal controversy or a particular resolution of the application of a rule to the legal controversy.

(9) Client Sensitivity and Cultural Competency

Students will demonstrate an awareness of clients' needs and goals, including a sensitivity to clients' background and circumstances (including, but not limited to, socio-economic, gender, race, ethnicity, educational, disability and/or religious background(s)), the ability to make decisions that reflect an

appropriate focus on those needs and goals, and awareness that cultural issues may affect the relevance of facts and application of the law.

(10) Legal Ethics

Students will demonstrate the ability to identify ethical issues in law practice contexts and make appropriate decisions to resolve such issues.

13. Reading Assignments

WEEK	TOPIC	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; 67</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 – 124.</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 237 – 254</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 	<p>Problems 73 – 80</p> <p>Problems 81 – 82</p> <p>Problems 83 – 86</p> <p>Problems 88 - 97</p>	<p>Mauet & Wolfson, 305 – 348</p>	<p>FRE 901 – 903; 1001 – 1008, 803(5), (6), (7), (8).</p>

	Records; Official Records			
5	Witness Examination and Rulings on Evidence	Problems 98 - 111	Mauet & Wolfson 9 – 26 [re-read]	FRE 103 – 106, 607 - 610
6	Impeachment: <ul style="list-style-type: none"> • Bias, Interest, Prejudice • Character for Untruthfulness 	Problems 112 – 127	Mauet & Wolfson 357 – 376; 388 - 407	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 376 – 387; 142 - 145	FRE 613, 801(d) (1) (A) and (B).
8	Burden of Proof and Presumptions. Witnesses generally; Lay Witness Opinion	Problems 149 – 153 Problems 155 - 171	Mauet & Wolfson 349 – 356 Mauet & Wolfson 55 – 61	FRE 301 and 302, FRE 601 – 606, 701
9	Expert Witness Testimony	Problems 172 – 183	Mauet & Wolfson 273 – 304	FRE 701 – 705, 803(18).
10	Introduction to Privileges Specific Privileges <ul style="list-style-type: none"> • Marital Communications and Marital Testimonial • Attorney-Client • Psychotherapist-Patient • Miscellaneous • Waiver 	Problems 184 – 213	Mauet & Wolfson 254 - 258 Mauet & Wolfson 258 - 273	FRE 501 and 502; Standards 501 – 513 (not enacted) http://www.law.harvard.edu/publications/evidenceiii/rules.htm Cal. Evidence Code, Division 8
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

12	<p>Hearsay continued:</p> <ul style="list-style-type: none"> • 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 Problems 248 - 257</p> <p>Problems 258 – 278</p>	<p>Mauet & Wolfson 163 – 164; 168 - 173 Mauet & Wolfson 141 - 162</p> <p>Mauet & Wolfson 165 - 234</p>	<p>FRE 803, 804 FRE 801(d)(1) & (2)</p> <p>FRE 803</p>
13	<ul style="list-style-type: none"> • 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 Problems 291 - 304</p>		<p>FRE 804</p> <p>FRE 805, 806 & 613</p> <p>FRE 807</p>
14	<ul style="list-style-type: none"> • Additional Hearsay Problems <i>continued</i> <p>Judicial Notice</p>	<p>Problems 305 - 312</p>	<p>Mauet & Wolfson 349 - 352</p>	<p>FRE 201</p>