

Western State University College of Law  
Evidence § 213B, Professor Douglas W. Schroeder  
Syllabus (Fall 2015)

## **I. Welcoming Remarks**

Evidence can be one of the most engaging courses in your law school experience. For many students, this course is where "the rubber meets the road." Abstract theories of civil and criminal law take shape in the setting of a contested trial, a battle of wits in which one party's lawyer tries to prove the elements of a claim or defense via "helpful" evidence while maneuvering to limit the opposing party's ability to introduce "harmful" evidence. The rules you'll learn in this class impact almost every other area of law: if the substantive law provides a skeletal framework for legal issues, the law of evidence puts flesh on those bones. The people and situations we'll encounter in the readings for this course are usually interesting, sometimes intriguing, and occasionally infamous. Chances are you'll find yourself sharing information learned in this class with friends or family. By the end of this course, you should feel prepared to handle these issues on the bar exam and in a courtroom. Welcome to a stimulating and challenging course of study.

## **II. Required and Optional Materials**

*Required Materials:* (1) Wonsowicz, *Evidence: A Context and Practice Casebook* (2012); (2) Miller, et al., *Federal & California Evidence Rules 2014-2015* (printed on facing pages for comparative study); (3) Fishman, *A Student's Guide to Hearsay*, LexisNexis, 4th Edition Revised 2012; (4) Turning Technologies "QT" radio frequency response pads. (See official book list for further descriptions.)

*Optional:* (1) Orenstein, *Acing Evidence* (West, 2014) [highly recommended]; (2) Lilly, et al., *Principles of Evidence—Concise Hornbook Series* (6th ed., 2012) [recommended]; (3) Best, *Examples & Explanations: Evidence* (8th ed. 2012).

## **III. Our Primary Objective and How We'll Achieve It**

The main objective of this course is for students to master the primary rules of evidence from a practical standpoint and a scholarly perspective. The former standpoint (e.g., bar passage, trial practice) is often a student's main focus. Yet, the latter perspective is crucial too: knowing the reason behind a rule can be as important as knowing the rule itself. We can tell a lot about where the law is heading by knowing where it's been. Hence, we will devote time not only to the "black letter" text of the Federal Rules of Evidence and California Evidence Code sections, but also review their origins and evolution, and the case law applying and construing them.

Reading and briefing cases, digesting the rules and statutes, and completing the Computer Assisted Legal Instruction ("CALI") assignments, will be the students' primary tasks in preparing for class. This work must be done outside the classroom so that our limited class time together can be devoted to discussing the most salient points and examples.

Most of the cases you'll read are contained in the Wonsowicz textbook. Our primary source for the Federal Rules of Evidence ("FRE") and California Evidence Code ("CEC") sections (and their respective advisory comments and historical notes) will be the Miller text, which prints the corresponding rules and statutes on facing pages. ***Bring both of these required texts to every class.*** During the hearsay module, also bring the Fishman book to class. Additional or different reading assignments may be provided during class or via the web-course (Blackboard), so be sure to check Blackboard regularly.

When a case, hypothetical, or the syllabus addresses a particular rule of evidence:

(1) Read the corresponding FRE and CEC sections in the Miller book. (Note: the FRE underwent a significant restyling effective December 2011. The majority of cases you'll be reading were decided under earlier versions of the FRE or their counterparts.) The Miller book contains many excellent synopses of similarities and differences between particular FRE and CEC provisions. These points are set forth in shaded boxes in the first section of the book. Reading these remarks will clarify the rules and help you succeed in applying them on exams (and in the practice of law after graduating).

(2) If a case was decided under a former rule or statute, be prepared to discuss how the holding might be affected if the case arose under the present version of that rule or statute.

(3) Some states have adopted the FRE as their rules of evidence, while others have enacted hybrid or distinct rules. California has its own Evidence Code. If an assigned case or hypothetical arose under the FRE (or identical state rule), be prepared to discuss how the holding might be affected if the problem were decided according to the CEC. Conversely, if a case was decided under the CEC, be prepared to discuss any differences posed by the corresponding FRE. If the case or hypothetical arose under a unique or hybrid rule of evidence, be prepared to discuss how the holding may be affected if the problem were decided (a) under the FRE and (b) under the CEC. In other words, always be prepared to address a case or problem by resort to the FRE *and* the CEC, and to highlight any substantive differences between the federal and California rules.

(4) When a case or hypothetical refers to a particular FRE or CEC section, consult its legislative history (e.g., advisory committee comments and California Law

Revision Commission comments) as reprinted in the Miller text. Be prepared to discuss how that history did or could impact the decision of the question under consideration.

(5) When the rule under review is one relating to hearsay, be sure to read the pertinent pages of the Fishman book, *A Student's Guide to Hearsay*. As the reading list reflects, hearsay (and related Confrontation Clause) issues are a major component of this course; they are routinely tested on the bar exam, and will be heavily tested on the final exam in this class. The Fishman book is an excellent aid to understanding and applying these rules. We will be discussing concepts from Fishman during class sessions, so it's important to read the Fishman guide before each class for which a particular rule is assigned on the reading list.

CALI modules are assigned at various points on the syllabus. *Completion of the assigned CALI exercises is mandatory* and will be tracked for inclusion in your "class participation" grade. **(Note: specific hyperlinks / URL's are provided for the CALI assignments via Blackboard for this course. Please be sure to use only those specific links as otherwise your participation will not be recorded for grading purposes.)**

Interactive techniques used in this course may include small groups, demonstrations, impromptu quizzes (graded for participation) and dynamic feedback via electronic response pads ("clickers"). *Use of clickers is mandatory. Each student must bring his/her clicker to every class session*; failure to do so can be counted against the student's "class participation" grade or be deemed an unexcused absence. To foster discussion and participation, the accuracy\* of a student's oral or electronic response generally will not be considered in calculating that student's "class participation" grade. (\* If a student's responses tend to show a lack of preparation, his/her "class participation" grade will be adversely affected.)

#### **IV. Grading, Preparedness, Participation, and Attendance**

Given the interactive nature of this course, and the breadth of material to be covered in a relatively short time, **it is imperative students come prepared to every class session**. Your degree of preparedness will impact not only your productivity in this course, but that of the instructor and your fellow students. **Hence, "class participation" (which encompasses preparedness, attendance, out-of-class assignments, and in-class activities) will constitute a significant part (20% to 25%) of the course grade**. As prior students will attest, there is a direct correlation between preparation and success in this class.

Reading and other out-of-class work will be assigned as indicated in the reading list, and as communicated via the web-course (Blackboard). Check these resources between

sessions to ensure you are prepared for each class. The reading list is a *guideline* in terms of *anticipated* timing. We may spend longer on a topic than indicated; or, we may proceed ahead of schedule. *Please stay at least one week ahead in your work and reading, as we may finish a module earlier than otherwise indicated.* Statements to the effect "I didn't expect the class to reach this point yet," or "I forgot the material because I read it too long ago," are not acceptable excuses for being unprepared.

The Wonsowicz text book contains numerous practical "Problems" and quizzes throughout each chapter. Please come to class with written notes of your answers to these questions. They are an important part of the assigned reading; many will be discussed during class, and students will be called on to provide their answer and rationale for reaching it.

Rules of the university concerning attendance and absences will be followed. If you miss three (3) or more of the scheduled class sessions for this course, you will receive a grade of "F" and will not be permitted to attend subsequent classes. (Please note: attendance affects your class participation grade, so this policy is not a "free pass" to miss two classes.)

Coming late to class, or leaving and returning to the room during class, are disruptive to others. Please refrain from walking in and out during the class unless absolutely necessary. Please arrive into the classroom at least five minutes ahead of the scheduled start time. Arriving late can be deemed an unexcused absence, or otherwise negatively impact your class participation grade. Coming unprepared to class is tantamount to being absent. Thus, a student who is unprepared during a class session may be deemed "absent" for that session despite his/her physical presence.

A midterm examination will cover all assigned material to that date (whether or not the subject was discussed in class or assigned for completion outside of class.) **The midterm examination will constitute 20% to 25% of the course grade.** You should plan on the mid-term being administered on the date set on the reading list, unless notified otherwise.

A final exam will be administered at the end of the semester. The final exam may cover material from any points listed on the syllabus and web-course (Blackboard), whether or not discussed during class (i.e., reading and tasks for completion out-of-class, such as CALI, are "fair-game" for testing). The final examination may be multiple-choice, essay, or a combination of the two. The score on the final exam will account for **50% to 60%** of a student's grade.

## V. Tips for Succeeding on Exams

Few, if any, students enjoy taking timed exams. Yet, written exams are the main tool for assessing knowledge in law school, and are the gateway to admission to the bar of this great profession. In light of the importance of exams, I've prepared several tools to help you succeed by writing better answers.

*Tips for Success:* A summary sheet of my tips for success in assessing calls of the questions, and writing essay exam answers for evidence, will be posted on the Blackboard webcourse. Please review these tips early and often.

*Rubric:* I have prepared a rubric that articulates in detail the primary elements of an essay answer (Rule, Analysis, Conclusion, and overall Composition) and the features that distinguish the qualities of answers across a four-level spectrum. This rubric will be posted on the Blackboard web-course. It will be used in grading essays in this class. The rubric sets forth objective standards for self- and peer-assessment. It is a good tool for writing and assessing real or practice exams.

*Strive for Efficiency:* Given the nature of this class (including the number of rules involved), an essay exam can often seem like a "racehorse question." In other words, there may be several calls of the question, with several sub-issues, that must be addressed within a limited time. Strive to develop an outlining and exam writing approach that balances speed against thoroughness. An answer that is hastily written likely will miss issues or omit key facts. Conversely, writing an in-depth ("law review style") answer to a particular question will likely exhaust time which is needed for other issues. Think about grading as a mathematical proposition: it is better to write an answer that scores 75% on 100% of the issues than to write a perfect (100%) answer that only addresses two-thirds (67%) of the issues.



Envision the continuum diagrammed above. Absolute thoroughness (or perfectionism) is at the left, absolute speed (or haste) at the right. The midpoint is efficiency; this fulcrum is where you should aim when writing exams for this class.

*Write It; Don't Fight It:* Maintaining a positive mindset (avoiding distraction or paralysis from exam-induced anxiety) is a great trait for law students to develop. Successful athletes and trial lawyers alike know the value of keeping a winning mindset even in the face of unexpected obstacles or temporary setbacks. For exams, my mantra is: "write it; don't fight it." The question "is whatever it is." It's not going to change because a student resents it or wishes it were different, shorter, or simpler. If an essay exam is a "racehorse,"

realize the professor does not expect a law review article. Rather, the expectation is for an answer that *concisely* identifies the issue, *succinctly* states the elements of the rule, and *efficiently* uses a few key facts in applying the rule, in order to reach a definite but *terse* conclusion. In the context of multiple-choice, don't let the absence of a "perfect" answer-choice become a distraction. Choose the "best" choice among the given possibilities, don't fret, and move to the next question. These tips may sound basic, but it takes mental discipline and practice to apply them in the context of a timed exam.

## VI. Seating Chart

A seating chart will be circulated at the start of the first session. Please *print your name legibly* for the permanent seat you choose. If you later wish to change your seat, please notify me in advance so I can consider your request and make any appropriate changes to the chart.

## VII. Rules Relating to Electronic Devices

Use of electronic devices (including phones, tablets, laptops, cameras, or other devices capable of transmitting or receiving data, or transmitting, recording or reproducing audio or video or images) during class will be permitted only for activities directly related to coursework for this class if authorized by the instructor before or during a particular class session. Texting, instant messaging, checking email, or accessing shopping, auction, or social media sites (such as Facebook, Twitter, Instagram or Tumblr) are prohibited activities while class is in session. (If you have a genuine exigency requiring you to monitor an electronic device for an urgent text or email message, please seek my permission in advance of that particular class.) Taking or transmitting photographic images during class, or recording or transmitting audio or video of any portion of any lecture, comments or remarks by the instructor is **strictly prohibited** absent the instructor's advance written permission. A violation of any of these policies may result in ejection of an offending student from the class, being deemed "absent," and/or a negative "class-participation" grade, in addition to any other remedy or penalty available under the rules of the university or under state and federal law.

## VIII. A Note about Bias and Prejudice

The evidence proffered, withheld, or excluded during adversarial proceedings is often influenced by human perceptions, attitudes, and motivations. During this course, we may discuss some potentially hot-button topics, such as prejudice, bias, and stereotypes involving race, religion, ethnicity, gender, sexual orientation, immigration status, and socioeconomic status. For instance, these topics can arise during the modules on relevance, bias and prejudice, impeachment, hearsay, character and habit. Please understand that any discussion along these lines is not meant to perpetuate or condone any discriminatory

attitudes or stereotypes. These attitudes exist in society; proper application of the rules of evidence is one tool to address them. Consequently, we must have the opportunity for a candid discussion of these issues in class. By being aware of the contexts in which issues of bias and prejudice arise, and the evidentiary rules designed to counter them, we can be better equipped to remedy them in the courtroom and in our profession.

## **IX. 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 Second Floor Students Services Suite. Dean Espinoza's phone number and email address are: (714) 459-1117; [despinoza@wsulaw.edu](mailto: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 Associate Dean of Students Charles Sheppard at [csheppard@wsulaw.edu](mailto:csheppard@wsulaw.edu) or (714) 459-1152. Complaints will be handled in accordance with the College of Law's "Policy against Discrimination and Harassment."

## **X. Don't Panic — We Can and Should Enjoy this Course**

Author Douglas Adams lessened the anxiety of interstellar travelers by inscribing the phrase *DON'T PANIC* "in large friendly letters" on the cover of his fictional *Hitchhiker's Guide to the Galaxy*. That same advice applies to this course. Some concepts will demand greater effort to master than others. Some students will seem to have "photographic memories" enabling them to recite a rule easily, while others must devote methodical effort to learning the rules. Some students read quickly, others slowly. Some are verbose, others reticent. Don't worry: you should succeed in this course so long as you devote ample time to your studies, and are willing to actively engage in the learning process with fellow students and the instructor. Your success as a student is a measure of my success as an educator. We share the common goal of successfully completing this course; let's endeavor to enjoy the journey along the way to our destination.