

**WESTERN STATE COLLEGE OF LAW**

**EVIDENCE 213B**

**Fall 2024 SYLLABUS**

**Mondays and first four Wednesdays**

**6:30 PM- 9:40 PM**

**4 Units**

**Professor Jeffrey Bretoi**

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**1. Objectives and Learning Outcomes:**

This course has two objectives. First and foremost, the course will assist you to develop the analytical skills which are essential for you to “handle” evidence issues, i.e., to identify from the facts the appropriate issues to be addressed and to address these issues by **creatively and intelligently** applying the rules of evidence to the facts. Part of this process will be the development of an approach to analyzing evidence issues. Second, the course will provide you with an introductory survey of most of the important issues in evidence law. This will include how the 6<sup>th</sup> Amendment Right of Confrontation preempts any statutory evidence rule in criminal cases.

Evidence issues arise in criminal and civil proceedings; and they arise in both the pretrial phase of the matter and at trial. Our goal in this course will be several fold: (i) first, as with virtually all law school courses, we will learn and understand both Federal and California “rules”, as well as the interpretive case law; (ii) we will practice applying the rules to real life practice problems; 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.

Because of time limitations, some evidence topics, such as presumptions and judicial notice, will not be addressed. These are, however, important areas of evidence law. Students can obtain a basic understanding of these topics from Capra & Saltzburg’s Principles of Evidence- Concise Hornbook Series, a respected and concisely written hornbook (see infra “Optional Books”). After completing the current course, students can develop a more refined understanding and mastery of these and other evidence issues by taking one or more advanced evidence electives such as Advanced Trial Advocacy, Evidence Practice, Trial Practice Civil, or Trial Practice Criminal. Consult the W.S.C.L. Catalog for course descriptions.

It is expected that when you have completed this course, you will be able to: i) demonstrate knowledge of substantive evidence law; ii) argue the admissibility of evidence in different contexts by applying the evidence rules that you have learned; iii) identify the evidentiary issues implicated in any fact pattern and apply the learned rules to reach the appropriate conclusions about the admissibility of the evidence at issue; iv) effectively communicate the issues involved, the legal argument and the proper analysis both verbally and in writing; v) identify the legislative history and social policy behind each of the evidence rules.

## **2. Required Texts:**

Evidence: Cases and Material, Roger Park and Richard Friedman (West Academic, 2019/Thirteenth edition)

2023 Supplement to Park & Friedman, Evidence (13<sup>th</sup> ed.)

Federal & California Evidence Rules, Thomas Leach and Emily Uhrig, (Aspen Publishing, 2023-2024 edition)

## **3. Optional Books:**

Principles of Evidence- Concise Hornbook Series, Capra & Saltzburg (West Academic, 2022/9<sup>th</sup> edition)

A Student's Guide to Hearsay, Clifford Fishman (Carolina Academic, 2018/5<sup>th</sup> edition)

## **4. "In-Class" Methodology:**

Evidence law was, at one time, universally derived from case law (common law). Today, many jurisdictions have codified their respective laws of evidence including the federal courts, in the *Federal Rules of Evidence* (FRE) and California, in the *California Evidence Code* (CEC). However, even in these 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 develop your ability to apply the codes in different factual context. You are expected to brief all the assigned reading cases and analyze each of the problems and hypotheticals in the Park & Friedman Casebook and bring that casebook and the Leach & Uhrig rules book to each class session.

**Both the Federal Rules and the California Code are bar-tested subjects.** This means that, when you take the California Bar Exam (and, therefore, exams in this class), you will be tested on the FREs and the California Evidence Code. For this reason, *both* the Federal Rules of Evidence *and* the California Evidence Code are the centerpiece of this course. There are some *major differences* between the FREs and the California Evidence Code, as well as major differences in California evidence law between admissibility of evidence in criminal as compared to civil cases.

Therefore, when the assigned casebook material refers to a Federal Rule of Evidence, read both the text of the rule in Appendix A of the Park & Friedman casebook and the related legislative history in Appendix B. As with any statutory material, legislative history is an essential legal resource for statutory interpretation. When the assigned casebook material refers to a section of the California Evidence Code, read the text of that section in Appendix D of the casebook and compare that section with its federal rule counterpart. Please prepare to state in class how a particular California Evidence Code section differs from its FRE counterpart. *California evidence law is a bar-test subject.* You will find the Leach & Uhrig book's comparison of California and Federal evidence code provisions especially useful in this regard.

When an assignment includes a case from a state jurisdiction that has not adopted the Federal Rules of Evidence, please prepare the state in class how you think that case would have been decided under the Federal Rules.

*Keep 25 pages ahead of the last class but re-read before each class so you are ready and sharp to participate in classroom discussion of the material.*

## CALI LESSONS

Please note that, on the Assigned Readings for certain weeks, I have assigned certain CALI lessons. CALI.org is the website for the Center for Computer Assisted Legal Instruction (aka CALI). *You are required to complete each lesson by the end of the week for which it is assigned.* Taking advantage of CALI's interactive lessons is essential because it allows students to apply the rules they learn in the classroom, and through timely feedback, better understand any legal subject.

To receive proper credit, **all lessons MUST be accessed through the link below. Otherwise, your completion will not be recorded and reviewable by the professor.**

The student Lesson Link page is at <https://www.cali.org/courses/10116>

To complete the lessons, you must register with CALI and be logged in to CALI. The student code required for registration is: WESTNNstu235 (If you have any questions or trouble registering, please see one of the librarians for help.) The Lesson Link URL is <https://www.cali.org/courses/10116>

## TURNING TECHNOLOGY POLLING

We will be using the **Turning Technology Polling system** in class. A **CLICKER** or the **APP** is a **mandatory** requirement for this course. We will use it in most class session. **IF** the class is held in person (as we presently anticipate), you may use the APP or lease a Turning Technologies **Clicker** as an alternative to the APP. The clicker is the QT by Turning Technology. It will be available for leasing at the bookstore or directly from the company. You may also buy one from previous students in Evidence. You will need to register the clicker for the class at [turningtechnologies.com](http://turningtechnologies.com). In the alternative, you may purchase an **APP** for your cellphone from Turning technologies. Turning Technologies is now part of ECHO360. You can download this APP from <https://account.turningtechnologies.com/account/authenticate/index?create=true> . **IF** the class is held strictly online (depending on the health crisis status) the Clicker will not work with an online class. **My recommendation** is that you get the **APP** because it will work if we are in-person and also if we are online.

## 5. Preparation for Class and Classroom Participation:

Legal education is a co-operative venture that requires your active engagement in class discussion. Class Participation is also a component of the grade in this course. Students are encouraged to ask questions. All views are welcome. A common maxim in law is that "reasonable minds may differ". You are expected to respect others who disagree with you. The quality of your answers and comments is more important than the quantity.

**Class participation** is a **mandatory** part of this course. A student whom I deem unprepared will be treated as absent for that day. You will be expected to stay sufficiently ahead of the class in your preparation to ensure your readiness to participate for each class. Neither the assertion that you did not anticipate the class getting so far, nor that you read the assignment too long ago to remember it, will excuse a failure to be prepared for class. **15%** of your semester grade will be based on your **preparation** for class, your **attendance**, your class **participation** and any required **assignments (including CALIs)** that must be timely completed or turned in.

**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. 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.

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.** Please note, **however, that there is a significant difference between being unprepared and being unable to answer a particular question.** No one knows the answer to every law-related question. You will **not** be downgraded or ridiculed for venturing an incorrect answer. You should, however, be sufficiently familiar with the cases, notes, questions and problems 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 entire class. Second, it enables you to test your knowledge and understanding. 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 legal work life. Among other reasons for you to be prepared is that it is fairly inconsiderate of the time and efforts of your fellow students and your professor to come to class unprepared.

**Preparation** is a component of the grade in this course. Students are expected to have carefully read and briefed all cases (including dissenting/concurring opinions) and to have read and analyzed each of the casebook problems scheduled for discussion in class. You are expected, on average, to spend at least 2 hours of preparation for every one hour of class time. During the first four weeks of the semester, we meet twice a week, and it is estimated that, on average, the assigned reading and other classroom preparation should require 12 or more hours outside of class for each class session. Thereafter, as we meet once a week, classroom preparation should require 6 or more hours outside of class for each class session. Each student should be prepared to be called upon in class to summarize the **pertinent facts**, issues, law and court findings and rulings of a case and/or discuss the resolution of any of the assigned casebook problems. The quality of the recitation is more important than the quantity. A **concise** summary of the **pertinent facts** is far better than a recitation of all the facts (many of those are not relevant to the evidentiary issues presented) in the case. In order to discuss a case intelligently in the limited time available in class, students should prepare a brief to assist them in recitation and discussion and have it readily available if called upon in class. In other words, students should not be fumbling through their textbooks or computer screens to find their "brief". Book briefing is a poor idea and is discouraged; it is not an effective and acceptable sole method of briefing; it also often causes delays in the presentation of cases in class. Be prepared to also discuss the problems, notes and comments from the casebook.

## **6. Exams and Grading:**

There will be a "closed-book" midterm exam in Essay format (and perhaps Multiple Choice also) which will count as 15% of your final grade. There will also be a four-hour "closed-book" final examination which will count as 70% of your final grade. The final exam will consist of an essay component (and perhaps a multiple-choice component). **The final examination may test you on any material assigned in the Park & Friedman Casebook, as well as any material covered in class and in the assigned CALI (computer-aided) or other exercises.** The remaining 15% of your semester grade will be based on your preparation for class, your attendance, your class participation and timely completion of all required assignments (including CALIs). As the semester progresses, I may indicate in class and/or Lexis Classroom any additional required

assignments. It is your responsibility to be aware of any such assignments and their due dates. You should check the Lexis Classroom site regularly for any changes in the syllabus and/or any assignments.

After the first weeks of class, some past essay examinations will be placed on Lexis Classroom; you can use those as practice exams. As the semester progresses, if you would like feedback on your answers to some of these exam questions, please make an appointment. You must email me your practice exam question and answer at least 2 days before your consultation so that I can review them beforehand.

**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. 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.

## **7. Attendance & Decorum**

Successful completion of this course is dependent upon satisfaction of the W.S.C.L. Attendance Policy, which is reprinted in the Student Handbook. If you arrive late, do not sign the sign-in sheet; you will be deemed “absent” for that session. If you depart early, you may be marked absent for that session. IF YOU MISS MORE THAN FOUR (4) DAY CLASSES OR TWO (2) EVENING CLASSES YOU WILL RECEIVE A GRADE OF “F” AND WILL NOT BE PERMITTED TO ATTEND SUBSEQUENT CLASSES.

ALSO BE AWARE THAT, PURSUANT TO W.S.U.L.’S ATTENDANCE POLICY, STUDENTS CANNOT MAKE UP AN ABSENCE BY ATTENDING ANOTHER PROFESSOR’S CLASS.

Students leaving and returning to their seats, while class is in session, disrupts the concentration of students and, therefore, the learning environment. Therefore, once class begins, students may not leave the classroom prior to the end of the session, or (for the evening class) prior to the scheduled break, unless you let me know, in advance, that you have a particular physical condition that renders you unable to comply with this rule. Violation of this rule may be deemed an “early departure” for which a student may be marked absent. Also, *please turn off your cell phones during class.*

## **8. Office Hours: By appointment.**

A word from the experience of the past: many students who should have seen me during office hours did not. If you feel lost or confused, you should do everything you can to get yourself to where you understand the material. This includes getting help from me outside of class. I have flexible office hours. Please make appointments by emailing me at [jbrettoi@wsulaw.edu](mailto:jbrettoi@wsulaw.edu) to schedule a mutually convenient appointment. If you are running late for an appointment or if you cannot keep a schedule appointment, please email me to cancel.

## **9. 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.

## **10. Webcourse: Lexis Classroom**

To register for the online portion of the course you will need to use Lexis Classroom. You can access this by going to [Http://www.LexisNexis.com/LawSchool](http://www.LexisNexis.com/LawSchool). Click on Lexis Classroom on the top bar and select “add course” to open the course selection page. Select Evidence 213B (Fall 2024).

## **11. Disability Service 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 Library Building, Room 275-B. 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 Dean Marisa Cianciarulo at [mcianciarulo@wsulaw.edu](mailto:mcianciarulo@wsulaw.edu) or (714) 459-1168. Complaints will be handled in accordance with the College of Law’s “Policy against Discrimination and Harassment.”

## **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:**

### **(1) 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.

### **(2) 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.

**(3) 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.

**(4) 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.

**(5) 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).

**(6) 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.

**(7) 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.

**(8) 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 and Other Assignments:** It is estimated that, on average, the assigned reading and other classroom preparation should require six (6) or more hours outside of class for each class session.

**EVIDENCE 213B FALL 2024 Syllabus**

<b>Week</b>	<b>Subject</b>	<b>Reading Assignment</b>	<b>Computer Aided Instruction Assignment/ Federal Rules of Evidence California Evidence Code Multiple Choice Assignments</b>
August 19, 21 <i>6 hours</i>	“Making the Record”  Introduction to Relevance and Inference (Logical Relevance)  Discretion to exclude (Legal Relevance)	1-74  75-84  87-96; 100-109 <i>(including Ballou v. Henri Studios)</i>	  FRE 401, 402 CEC 210, 350, 351, 500- 522  FRE 403; CEC 352 FRE 105: CEC 355  FRE 106; CEC 356
August 26, 28 <i>6 hours</i>	Character Evidence  Prior Sexual Conduct	109-151  151-172	<b>CALI:</b> “Character Evidence Under Federal Rules”  FRE 404, 405, 406; CEC 1101-1103, 1105  FRE 412-415; CEC 1103, 1106, 1108, 1109
September 4 <i>3 hours</i>	Relevance and its Counterweights <ul style="list-style-type: none"><li>• Similar Happenings</li><li>• Subsequent Precautions</li><li>• Offers to Compromise</li><li>• Payment of Medical Expenses</li><li>• Liability Insurance</li></ul>	172-192	FRE 407, 408, 409, 410, 411 CEC 1151, 1152, 1153, 1154, 1155
September 9, 11 <i>6 hours</i>	Competency of Witnesses  Impeachment and Cross Examination	699-707  485-563	<b>CALI:</b> “Impeachment and Rehabilitation of Witnesses”  FRE 607-613, 615, 801(d)(1) CEC 452.5, 721, 766-770, 780, 785-791, 1235, 1236

Week	Subject	Reading Assignment	<i>Computer Aided Instruction Assignment/ Federal Rules of Evidence California Evidence Code Multiple Choice Assignments</i>
September 16 <i>3 hours</i>	Writings <ul style="list-style-type: none"> <li>• Best Evidence Rule</li> <li>• Authentication</li> </ul> Opinions, Expertise and Experts	669-697          781-840	<b>CALI:</b> “Best Evidence Rule under the Federal Rules”  FRE 1001-1008; CEC 1520-1523, 1550, 1551 FRE 901-903; CEC 1400-1421; 1450-1454, 1552-1553, 1530-1532  <b>CALI:</b> “Expert and Opinion Testimony”  FRE 701-706; CEC 800-805, 720, 721, 722
September 23 <i>3 hours</i>	Scientific Evidence: <b>Daubert</b> test v. <b>Kelly-Frye</b> test	840-862 873-879 890-894	FRE 701-706 CEC 800-805, 720, 721, 722
September 30 <i>3 hours</i>	Hearsay: Rationales and Meanings    Questions 1-75	193-234    234-238	<b>CALI:</b> “The Concept of Hearsay” and “Confrontation of Hearsay Declarants”  FRE 801; CEC 1200  <i>Complete and turn in answers to questions 1-75 by 10/11/24.</i>
October 7 <i>3 hours</i>	<b>Midterm</b>  Introduction to the Confrontation Clause: <i>Crawford v Washington</i>  Preliminary Questions of Fact  Dying Declarations	238-248    367-385	6 <sup>th</sup> Amendment  FRE 104(a)(b); CEC 403, 405  FRE 804(b)(2), 804(b)(6); CEC 1242
October 14 <i>3 hours</i>	Spontaneous and Contemporaneous Exclamations	280-312	FRE 803(2); CEC 1240 FRE 803(1); CEC 1241
October 21 <i>3 hours</i>	Opposing Party’s Statement (Admissions)	249-280	FRE 801(d)(2) CEC 1220-1223
October 28 <i>3 hours</i>	Former Testimony  Declarations Against Interest	342-353  353-367	FRE 804(b)(1); CEC 1290-1293  FRE 804(b)(3); CEC 1230
November 4 <i>3 hours</i>	State of Mind/Physical Condition (Hillmon Doctrine)  Statement of Medical Diagnosis or Treatment	312-337  337-342	FRE 803(3); CEC 1250, 1251, 1252, 1260, 1261  FRE 803(4); CEC 1253

Week	Subject	Reading Assignment	<b>Computer Aided Instruction Assignment/ Federal Rules of Evidence California Evidence Code Multiple Choice Assignments</b>
<b>November 12</b> <u>Tuesday</u> 3 hours	Prior Identification  Past Recollection Recorded  Business and Public Records	385-391  391-399  399-454	FRE 801(d)(1)(C); CEC 1238  FRE 803(5); CEC 1237  FRE 803(6), 803(7); CEC 1270-1280
November 18 3 hours	Multiple Levels of Hearsay  Statements Describing Child Abuse or Domestic Abuse ( <i>Ohio v Clark</i> )  Prior Judgments  Prior Inconsistent Statement  Prior Consistent Statement  Residual Exception  Questions 76-125	  454-463  463-466  546-551  551-553  468-474  480-484	<b>CALI: "FRE 801(d) &amp; Multiple Hearsay"</b>  FRE 805; CEC 1201  FRE 803(22); CEC 1300  FRE 801(d)(1)(A); CEC 1235  FRE 801(d)(1)(B); CEC 1236, 791  FRE 807 (None in CA)  <i>Complete and turn in answers to questions 76-125 by 11/28/24.</i>
November 25 3 hours	Privileges <ul style="list-style-type: none"> <li>• Attorney-Client</li> <li>• Physician-Patient &amp; Psychotherapist</li> <li>• Marital</li> <li>• Clergy</li> </ul> Misc ( <b>optional reading</b> )	563-593 593-603  610-617 617-622 623- 667	FRE 501; CEC 911-919, 950-962 CEC 990-1007 CEC 1010-1027 CEC 970-973; 980-987 CEC 1030-1034 <b>Optional Reading:</b> CEC 930, 940, 965-968, 1035-1070