



# WESTERN STATE COLLEGE OF LAW

AT ARGOSY UNIVERSITY

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## **Evidence Practice**

**Adjunct Professor Kimberly Menninger**

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**Spring 2017**

**Wednesday 6:40 – 9:50**

**January 17, 2018 – April 26, 2018**



## **REQUIRED TEXT**

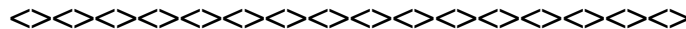
Thomas A. Mauet and Warren D. Wolfson, *Trial Evidence*, (Wolters Kluwer)

Robert Burns, *Problems and Materials in Evidence and Trial Advocacy*  
(Lexis/NITA) 6<sup>th</sup> Edition

Additional Readings will come from:

Federal Rules of Evidence

California Evidence Code



## **COURSE DESCRIPTION**

Welcome to Evidence Practice!

- ◆ This class is a practical course where students will learn how to:
  - Expand their knowledge of and familiarity with the Evidence Code,
  - Admit and exclude various types of evidence in a criminal and a civil court setting.
  - Practice and demonstrate their competence and knowledge of the Evidence Code through active class participation.
  - Master the art of addressing evidentiary issues in a public setting, orally and instinctively.

## **LEARNING GOALS**

After completion of this course, students should be able to:

- ◆ Evaluate Evidence to determine if it is relevant;
- ◆ Evaluate Evidence to determine if it is admissible;
- ◆ Use the Evidence Code to find ways to admit evidence;
- ◆ Use the Evidence Code to exclude evidence;
- ◆ Use the Evidence Code to limit the use of evidence;
- ◆ Lay foundation for evidence to be admitted
- ◆ Learn how to think and speak on your feet;
- ◆ Propose evidentiary arguments for your position
- ◆ Respond to evidentiary arguments against your position.

## **METHODOLOGY:**

Each class will be spent working through the assigned “problems”. All of the problems are derived from the Burns, Lubet and Moberly, Volume II Problems book. The problems are based on two case files that are depicted therein, one of portrays a criminal case and one a civil case. We begin with the criminal case of

the State v. Mitchell and will end with the civil case of MacIntyre v. Easterfield. The assigned problems will 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 to argue to the court the role of counsel for one of the parties.

On the first day of class, I will divide the class into 2 parts; 1's and 2's. The 1's will be the prosecutors and the 2's will be the defense attorneys for the criminal case.

When we begin the civil case all of the 1's and 2's will flip positions and the 2's will now be the plaintiff's attorneys while the 1's will represent the defense.

Each class each of you will be paired up with opposing counsel in class and will need to be prepared to address each challenge that is set up in the "problem" book. Part of your challenge is not knowing what the opposition has planned for you on any given day and being able to respond to it. Prosecutors may work with prosecutors and defense attorneys with defense attorneys before class to prepare their positions.

To adequately prepare to discuss or argue each problem you are required to draft written notes outlining your analysis of the evidentiary issues you identify and the manner in which you intend to address them. 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 them verbatim. Points will be deducted for reading.

For further instructions on working 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. Although there is only one set of facts of an event that are "true", there are often several possible "factual theories" of a case that can be constructed by

counsel. These theories will often conflict with each other. A good advocate will need to select a theory they wish to pursue throughout the trial. This theory should be presented throughout the case from the opening statement to the closing argument unless the facts change so significantly that the theory can no longer be pursued.

The first day of class will focus on constructing differing factual narratives or theories of the criminal case of the State v. Mitchell.

**It is therefore absolutely essential that you master the contents of the Mitchell case file before the first day of the class.**

- Students will be randomly called upon to assume the role of a detective to tell the story of “what happened” from the detective’s perspective (each of you each should have a prepared written narrative to assist you in making your oral presentation in class).
- Students will be asked to assume their assigned advocate’s role to critically evaluate the detective’s narrative from that advocate’s perspective.
- Students will be called on to present Opening Statements in the case of the People of the State of California v. Mitchell for the prosecution and the Defense.
- We will address problems 1 -8 as counsel are assigned in class (Students should come prepared to discuss or argue these problems in class by drafting written analyses of the issues presented by these problems).

## **ATTENDANCE, EXAMINATIONS, & GRADES**

Class attendance is mandatory. Students who miss more than two class sessions are subject to administrative dismissal from the course per the WSCL Attendance Policy (reprinted in the Student Handbook).

Students earn a numeric grade for the course. The grade will consist of a “mock-trial” mid-term and final exam that will focus on the evidentiary issues in the two case studies in Volume 1 as well as the weekly in class problems set forth in Volume 2.

The breakdown will be:

30 points for class participation and class briefs;

30 points for the mid-term &

40 points for the final exam.

Both exams will be verbal, given in mock trial scenarios and both will focus on areas of evidentiary challenges taken from Volumes 1 and 2.

Advocacy and preparation will be expected as students play their respective roles. Students will be graded on their knowledge, articulation, and presentation of these issues before the class.

The Methodology for this course is based completely on active student participation. All students are expected to:

- Read the materials assigned for each class session.
- Research the evidence code and any case law that you believe will support your position for admissibility or exclusion (you may use California or Federal sources).
- Be prepared, in your role as advocate, to engage in oral argument based on the assigned problems and, in your role as class member;
- Actively participate after each argument in class-wide discussion of the issues raised by that argument.
- 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.
- Be willing to speak in class and actively participate at all class sessions.

**This weekly preparation should take you, on average, at least six hours per week if not more.**

# **SYLLABUS**

## **Evidence Practice**

### **WEEK 1: WEDNESDAY, January 17, 2018**

Introduction on Hearsay

Federal Rules of Evidence (FRE) 801, 101-103, 401-403

Problems 1 – 8

Problems 9-22

Read Mauet & Wolfson 1-40 and 75-85

### **WEEK 2: WEDNESDAY, January 24, 2018**

Read carefully the case of MacIntyre v. Easterfield

Character Evidence

Prior Bad Acts

Conditional Relevance

Habit, Custom, Character

Federal Rules of Evidence (FRE) 404-405; 104; 406

Problems 23-39, 67, 40-46, 47-52

Read Mauet & Wolfson 85-124

### **WEEK 3: WEDNESDAY, January 31, 2018**

Specific Policy Exclusions

Scientific Evidence and Statistical Evidence

Federal Rules of Evidence (FRE) 407 – 415; 702 -703

Problems 53-63

Mauet & Wolfson 237-254

### **WEEK 4: Wednesday, February 7, 2018**

Writing and Exhibits

Authentication

Real Evidence

Best Evidence Rule

Major Documentary Hearsay Exceptions

Past Recollection Recorded; Business Exception Records

Official Records

Federal Rules of Evidence (FRE) 901-903; 1001-1008; 803(5), (6), (7), (8)

Problems 73-86, 88-97

### **WEEK 5: Wednesday February 14, 2018**

Witness Examination and Rulings on Evidence  
Federal Rules of Evidence (FRE) 103-106, 607-610  
Problems 98-111  
Mauet & Wolfson 9-26 (re-read)

**WEEK 6: Wednesday, February 21, 2018**

Impeachment:  
Bias, Interest, Prejudice  
Character for Untruthfulness  
Federal Rules of Evidence (FRE) 607-610  
Problems 112-127  
Mauet & Wolfson 357-376; 388-407

**WEEK 7: Wednesday, February 28, 2018**

Impeachment:  
Prior Inconsistent Statements  
Contradiction  
Rehabilitation  
Prior Consistent Statement  
Federal Rules of Evidence (FRE) 613, 801(d) (1) (A) and (B)  
Problems 128-148  
Mauet & Wolfson 376-387, 142-145

**WEEK 8: Wednesday March 7, 2018**

Burden of Proof and Presumptions  
Witnesses Generally  
Lay Witness Opinion  
Federal Rules of Evidence 301 and 302, 601-606, 701  
Problems 149-153, 155-171  
Mauet & Wolfson 349-356, 55-61

**March 14, 2018 Vacation Spring Break**

**WEEK 9: Wednesday, March 21, 2018**

**This date will be rescheduled in consultation with the class and will be the mid-term**

**WEEK 10: Wednesday, March 28, 2018**

Expert Witness

Privileges

Marital communications

Marital testimonial

Attorney-Client

Psychotherapist-Patient

Miscellaneous

Waiver

Federal Rules of Evidence (FRE) 501 and 502; 701-705, 803(18) Standards 501-513 (not enacted)

California Evidence Code Sections: 900-1070

Problems 172 -213

Mauet & Wolfson 254-304

**WEEK 11: Wednesday, April 4, 2018**

Hearsay

Federal Rules of Evidence (FRE) 801

Problems 214 – 241

Mauet & Wolfson 125-141

**WEEK 12: Wednesday, April 11, 2018**

Hearsay

Federal Rules of Evidence (FRE) 803, 804, 801(d) (1) & (2)

Problems 242 – 278

Mauet & Wolfson 141 – 234

**WEEK 13: Wednesday April 18, 2018**

Hearsay

Federal Rules of Evidence (FRE) 804, 805, 806, 807 & 613

Problems: 279 – 304

**WEEK 14: Wednesday April 25, 2018**

Last Day of Instruction

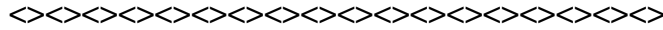
Hearsay

Federal Rules of Evidence (FRE) 201

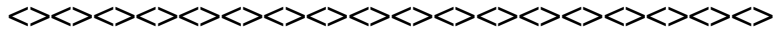


Problems 305 – 312  
Mauet & Wolfson 349 – 352

**Final**



**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. Dean Espinoza’s contact information: (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 Allen Easley at (714) 459-1168. Complaints will be handled in accordance with the College of Law’s “Policy against Discrimination and Harassment.”



**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

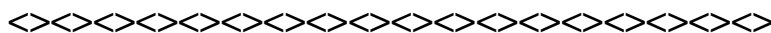
Students will demonstrate the ability, in both oral and written formats, to evaluate the legal, economic and social strengths and weaknesses of a case and use case and statutory authority as well as public policy to persuade others. Making policy-based arguments includes the ability to identify and evaluate 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.



## **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.