Syllabus

Principles of Evidence

Berkeley Law School

Professor Neuborne Spring 2023

Welcome to Principles (Not Rules) of Evidence.

We’ll be using a classic Evidence casebook, Weinstein, et. al., Evidence: Cases and Materials (Foundation Press -10th ed.) that has evolved in ten editions from James Bradley Thayer’s first Evidence casebook in 1902. I’m sorry about the hefty price tag. I find the book useful as a research resource, as well as an excellent teaching guide.

Be warned – some of the cases chosen by Judge Weinstein, who died last year at 98, after a brilliant career as a law professor at Columbia Law School and a federal trial court judge in the Eastern District of New York, are wrongly decided. Judge Weinstein did not want students to simply swallow the case material. He wanted you to understand the principles that underlie the Evidence rules and to think critically about applying them. In my experience with trying cases for more than a half century, Judge Weinstein was not only right as a matter of pedagogy; he was right as a matter of everyday practice of law. When Evidence issues arise in the controlled chaos of complex litigation, your ability to understand the underlying principles will be crucial in forging persuasive arguments to a judge, who is, often, as puzzled as you are.

Page numbers in the syllabus are to the Weinstein casebook. I will occasionally assign additional cases that are officially reported. Please read the additional assigned cases either in the official reports, or on-line. Almost all can be found free of charge on Scotusblog.

The Casebook Notes following the assigned cases are often extensive (sometimes, too extensive) and can be daunting. I’ll assign the Note materials that you should concentrate on – the rest are optional for an introductory course, although they are very valuable as a research tool. Assignments to Federal Rules of Evidence (FRE) in the syllabus are to the 2022 Federal Rules of Evidence. You should download a free copy of the current FRE. I often find the Advisory Committee notes reproduced in the FRE helpful in interpreting the Rules. We’ll be concentrating on Rules 801-07 (Hearsay); 607-13 (Cross-Examination); and 403-15 (Relevance, and the Limits of Inference).

We’ll also spend time on defining and allocating the burdens of production and persuasion (the burdens of proof) and the role of presumptions in the trial process.

Since classes move at different speed, at the close of each week’s classes, I will assign the precise material to be covered each week.

Conversational Notes

I will also provide you with a set of conversational notes about each class before the session. The notes are intended as an informal dialogue about the material to be covered each session. I hope that you will read them before the class and use them to help decipher the cases and ask me any questions you think useful about the material. As you’ll see, I will attempt in class to diagram much of the complex analytical thinking underlying the Evidence rules. The notes should help frame the diagrams, which, in turn, should make better sense of the rules. I encourage you to challenge or question my take on the issues.

This year, we’ll cover three principal areas in detail: Hearsay and the Confrontation Clause; Circumstantial Evidence and the Limits of Inference (primarily the use of statistical proof; and the use of past behavior to prove current acts); and Burdens of Proof and Presumptions. I’ll touch briefly, as well, on cross examination techniques, expert testimony, and evidentiary privilege.

As we’ll see, much of the Anglo-American approach to Evidence has been shaped by the adoption of an adversarial model of litigation, especially at trial; and by the role of the jury as a fact-finder in both criminal and many civil cases. Those of you trained in the non-jury, inquisitorial civil law tradition may find these rules strange. The class will be made much richer if you share your legal system’s approach to the issues we will be looking at. The future may call for synthesizing the competing approaches to Evidence (in international arbitrations, or International Criminal Courts, for example).

Introduction

At common law, the common law rules of Evidence in Anglo-American courts were judge-made, growing incrementally case-by-case over centuries. During the second half of the 20th century, most major jurisdictions, including the Federal Courts and California (but not New York), codified the law of Evidence, shifting it from a common law to a textual discipline.

Over time, as textualism became a dominant mode of legal analysis, many judges and lawyers lost touch with the common law principles on which the law of Evidence rests, focusing instead on lexical arguments about how to apply ambiguous text. Such a shift from common law reasoning to textual construction has benefits. It encourages the use of democratic forces to shape and reform the rules of Evidence. It also simplifies (or claims to simplify) the task of learning and applying the rules of Evidence by setting them out in a definitive manner in a single place.

But the shift from common law to text also has had serious drawbacks. The darker side of democratic reform is politicization, encouraging lobbying by interest groups, and occasionally reducing discussion about Evidence issues to slogans. Moreover, judges, confronted with binding (but very often ambiguous) text, may be tempted, even commanded by theories of textualism (like literalism, plain meaning, or originalism), to sever the text from its common law roots, altering the course of the law’s growth and generating arbitrary and poorly thought-through purely textual evidentiary rules. I will attempt, in this course, to recover the underlying common law principles that continue to operate under the surface of the codified rules. Thus, the course name: “Principles” (not “Rules) of Evidence.” But we won’t ignore the rules.

Let’s begin

**I**

**Hearsay**

1. Hearsay – FRE – 801-807

Triangulating Hearsay:

Of Proponents; Declarants; Witnesses; Statements; and Purpose

Background Reading

L. Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957 (1974)

1. Definition

*Leake v. Hagert* – Casebook 561

Notes – Casebook 562-566

*Bady v. Murphy-Kjos* – Casebook 566

Notes – Casebook 567-570

*State v. Charger* - Casebook 570

*Notes – Casebook 574-579*

*Holland v. State –* Casebook 579

Notes – Casebook 581-585

*United States v. Johnson* – Casebook 585

Notes – Casebook 586-588

*Wright v. Doe D. Tatham* - Casebook 588

Notes – Casebook 591-93

*Stoddard v. State* – Casebook 593

Notes – Casebook 605-607

*Kinder v. Commonwealth* – Casebook 607

1. Prior Inconsistent Statements of Witnesses for the Truth

of the Earlier Statement

*Lindsay v. Mazzio’s Corporation* – Casebook 615

*Notes* – Casebook 619-620

*California v*. *Green* – Casebook 620

Casebook 628-631

*United States v. Butterworth* – Casebook 631

Notes – Casebook 633-642

*State v. Muhammad* – Casebook 642

Notes – Casebook 645-649

1. Past Recollection Recorded

Notes – Casebook 649-651

1. Former Testimony

*United States v. Reed* – Casebook 652

*Holmquist v*. *Farm Family Casualty Ins. Co.* Casebook 655

Notes – Casebook 659-660

*Lloyd v. American Export Lines* – Casebook 660

Notes – Casebook 665-671

*United States v. McFall* – Casebook 672

Notes – Casebook 675-679

1. Opponent-Party Admissions

Notes – Casebook 679-681

*Bill v. Farm Bureau Life Ins. Co.* – Casebook 681

*United States v.* Spiller – Casebook 684

Note – Casebook 685-697

*United States v. Mckeon* – Casebook 697

Notes – Casebook 703-710

1. Co-Conspirators’ Statements

*Bourjaily v. United States* – Casebook 719

Notes – Casebook 715-726

1. Declarations Against Interest

Notes – Casebook 726

*State v. Wing* – Casebook 727

*Cole v*. *Cole* – Casebook 729

Notes – Casebook 730-732

*Carpenter v. Davis* – Casebook 732

Notes – Casebook 737-742

*Williamson v. United States* – Casebook 742

Notes – Casebook 751-755

1. Business Entries and Public Records

Notes – Casebook 756-757

*United States v. Jacoby* – Casebook 757

Notes – Casebook 762-767

*State v. Hood* – Casebook 767

Notes – Casebook 770-778

*Palmer v. Hoffman* – Casebook 779

Notes – Casebook 781-785

*Beech Aircraft v. Rainey* – Casebook 785

*Notes - Casebook 790*-794

*Commonwealth v*. *DiGiacomo* – Casebook 795

*Notes* – Casebook 797-798

1. Excited and/or Contemporaneous Utterances

*Bryant v. State* – Casebook 798

Notes – Casebook 800-809

*Commonwealth v. Coleman* – Casebook 809

Notes – Casebook 812-816

*United States v. Hieng* – Casebook 816

1. Statements of Physical or Mental Condition of Declarant

Notes – Casebook 821-822

*United States v. Tome* – Casebook 823

Notes – Casebook 826-830

*United States v. DiMaria* – Casebook 830

Notes – Casebook 833-843

*Mutual Life Ins. Co. v. Hillmon* – Casebook 843

*United States v*. *Pheaster*- Casebook 846

*Shepard v*. *United States* – Casebook 851

Notes – Casebook 854-860

1. Dying Declarations

Notes – Casebook 860-861

1. Forfeiture by Wrongdoing

*Giles v. California* – Casebook 871

1. Residual Exception

Notes – Casebook 897-898

*Robinson v Shapiro* – Casebook 898

1. The Confrontation Clause

Notes – Casebook 908-909

*Crawford v. Washington* – Casebook 909

Notes – Casebook 923-925

*Michigan v. Bryant* – Casebook 925

Notes – Casebook 938-942

*Melendez-Diaz v. Massachusetts* Casebook 942

Notes – Casebook 949-952

*Williams v. Illinois –* Casebook 952

Notes – Casebook 959-963

1. Techniques of Impeachment

*Denver City Tramway Co. v. Lomovt* – Casebook 456

*United States v. Abel* – Casebook 469

*United States v. Patterson*, Casebook 482

*United States v. Jefferson* – Casebook 486

*People v. Sorge* – Casebook 494

*State v. Ternan* – Casebook 506

*United States v. Dotson* – Casebook 507

Notes – Casebook 459-469; 474-482;

487-493; 497-506; 511-517

II.

**The Limits of Inference**

(a) Statistical proof

*Smith v. Rapid Transit, Inc –* Casebook 73

Blue Bus Hypothetical

Context and Issue:

Civil v. Criminal

Predictive-Retrospective

Causation

Mental state

1. Evidence of Other Crimes – FRE 404

*People v. Zackowitz* – Casebook 965

Notes – Casebook 968-972

*United States v. Accardo*, Casebook 972

Notes – Casebook 976-978

*United States v. Montalvo* – Casebook 979

*People v. Steele* – Casebook 980

Notes – Casebook 981-982

*People v. Santarelli* – Casebook 982

Notes – Casebook 1021-1023

*United States v. Mound* – Casebook 1023

*Huddleston v. United States* – Casebook 1034

1. Criminal Defendant’s Reputation; Criminal Defendant’s Character

Victim’s Character – FRE 405

*Michelson v. United States* – Casebook 1047

*Manna v*. *State* – Casebook 1055

*Burgeon v*. *State* – Casebook 1070

1. Character and Reputation in Civil Cases

*United States v. Peterson* – Casebook 1085

1. Prior Similar Acts

*Dallas Railway v. Farnsworth* – Casebook 1091

1. Habit and Custom – FRE 406

*Halloran v. Virginia Chemicals, Inc.* – Casebook 1113

III.

**An Overview of Adjudicative Fact-Finding**

The Rule of Law as a Syllogism:

Finding the Minor Premise

Towards a Taxonomy of Facts:

Adjudicative; Legislative; Jurisdictional; Constitutional

(1)

Judicial Notice

FRE 201

Casebook 1501-1513

1527-1531

1546-1555

(2)

Factfinding Techniques:

Adversarial versus Inquisitorial Fact-Finding

(3)

What Does It Mean to Have a Neutral Finder-of-Fact?

*Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009)

*Flowers v. Mississippi*, 588 U.S. \_\_ (2019)

Casebook 1337-1339

(4)

Who “Finds” the Facts: Judge? Jury? Administrative Official? Legislator? Arbitrator?

*Crowell v. Benson*, 282 U.S. 22 (1932)

*Curtis v. Loether,* 415 U.S. 189 (1974)

*Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977)

*Epic Systems Corp. v. Lewis*, 584 U.S.\_\_(2018)

(5)

Allocating the Risks of Error:

The Burdens of Proof - FRE 301

(a) The Burden of Pleading:

The Idea of Civil Probable Cause

Charting the Difference Between

“Conceivable;” “Plausible;” and “Probable”

Rules 8 and 9 Federal Rules of Civil Procedure

Casebook 1342

*Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002)

*Bell Atlantic v. Twombly*, 550 U.S. 444 (2007)

Ex-President Trump’s Challenge to the 2020 Presidential Election

(b) The Burdens of Production and Persuasion:

Size, Allocation, Shifting

Casebook 1344-1353

*In re Winship*, Casebook 1380

*Mullaney v. Wilbur*, 421 U.S. 684 (1975)

*Patterson v. New York* – Casebook 1354

*Martin v*. *Ohio* – Casebook 1361

*Apprendi v*. *New Jersey*, 530 U.S. 466 (2000)

Notes – Casebook 1369-1375

*United States v. Taylor* – Casebook 1375

Notes – 1377-1380

Casebook 1407-1417

(c ) Presumptions – FRE 302

Casebook 1417-1421

*Hinds v. John Hancock* – Casebook 1422

Notes – Casebook 1431-1435

*United States v. Jessup* Casebook 1435

*O’Dea v*. Amodeo – Casebook 1444

Notes – Casebook 1448-1450

*Texas Department of Community Affairs v.*

*Burdine* – Casebook 1450

Notes – Casebook 1456-1458

*County Court of Ulster v. Allen* – Casebook 1458

Notes – Casebook 1470-1473

*Francis v. Franklin* – Casebook 1473

*Rose v*. *Clark* – Casebook 1493

**IV.**

**A Brief Look at Evidentiary Privilege (Lecture)**

1. Lawyer-Client
2. Marital
3. Doctor-Patient
4. Executive

**V.**

**Expert Testimony (Lecture)**