### [DRAFT SYLLABUS. Updated 1/3/13 – Check back for further updates]

**241 sec. 1 - Evidence (Spring 2013)**

**Instructor: Mai Linh Spencer    
Units: 4  
Meeting Time: MTuW 8:40-9:50  
Meeting Location: 105**

**Office Hours: By appointment or catch me after class at Café Zeb**

**Email: mlspencer@law.berkeley.edu**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

COURSE INFORMATION AND DRAFT SYLLABUS

Welcome to Spring 2013 Evidence, sec. 1! Below, you will find some basic, but important, information about course logistics and expectations, as well as the syllabus. I am looking forward to meeting and working with all of you. We are going to have a great semester.

Books/Materials

For our casebook, we will use Allen, Kuhns, Swift, Schwartz, Pardo, *Evidence: Text, Problems, and Cases* (5th ed. 2011). Note that this edition refers to the recently restyled Federal Rules of Evidence, so please do not use older editions.

Other, OPTIONAL books that you may find useful are: David Sklansky, *Federal Rules of Evidence and California Evidence Code 2012* and Miguel A. Mendez, *EVIDENCE: A Concise Comparison of the Federal Rules with the California Code* (2012 ed.). I will not assign reading in either of these books. When I assign a provision from the California Evidence Code, you can simply read it on line (e.g. http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid).

I have posted the Federal Rules of Evidence with Advisory Committee Notes on bSpace, under Resources. I will occasionally ask you to read the Notes to a Rule.

**Class:** Because the rules of evidence deserve every precious minute we have allotted, **we will start class on time**. Meaning at 8:40 a.m. sharp. (Don’t forget your coffee, Red Bull, or whatever else you need to get going!) In deference to your many other worthy classes and obligations, we will also end class on time.

**Changes to our normal schedule:**

Monday, January 21: no class (MLK Day)

Monday, February 18: no class (Presidents’ Day)

Monday – Wednesday, March 25-27: no class (Spring Break)

Monday, April 22: make-up class

Tuesday, April 23: make-up class

**Class Participation**

Class attendance is mandatory. For most classes, I will ask you to read the Rule(s) and casebook and to do problems applying the rule(s) before class; then, in class we will discuss the material and work through as many of the assigned problems as time permits. Because of this problem-based format, it is important to at least try the problems on your own ahead of time so that we are all on the same page – literally – when class starts.

What is true of all law school classes, but especially Evidence, is that you will learn much, much more if you come to class prepared and then participate in class. If everyone is prepared and participates regularly, we will all benefit. My sole goal is to create the most effective learning environment possible. I believe that through class participation (planned and spontaneous, volunteered and solicited) one learns both substantive law and essential litigation/presentation skills. I do not believe in intimidating or humiliating students (or teachers). With this in mind, I offer my guidelines on participation.

We will have an on-call expert panel each day. I will provide a google doc and ask each of you to sign up to be on call for approximately four classes. Of course, folks who are not on call are free and encouraged to ask and answer questions. In addition, we will often have small-group discussions with a representative from each group reporting back to the entire class her/his group’s findings or argument for/against admissibility of a piece of evidence. On occasion, I will ask for volunteers to prepare and argue a particular piece of evidence, so that you can cement your understanding of the applicable rules and practice your oral advocacy skills.

I encourage questions in class, although I may not always be able to answer them immediately.

I will consider class participation as part of your grade for tie-breaking purposes only.

Office Hours: I will hold office hours immediately after class days, at Café Zeb. A sign-up sheet will be posted on bSpace where you can reserve a time. Please also feel free to email me to make an appointment for a different time. Because I do not have an office on campus, I may need to meet you at my own office in downtown Berkeley (a 15 minute walk from Boalt).

Communication with me: The best way to reach me is by email. You can also call me at my office, 415-229-9190.

**Student Learning Outcomes (what I hope we will achieve this semester)**

**By the end of this course, you will:**

* **demonstrate a working knowledge of the Federal Rules of Evidence and the underlying rationale for each rule, as well as related common-law and constitutional doctrines**
* **be able to apply the rules to a given item of evidence and argue persuasively for or against its admissibility**
* **recognize and be able to articulate how a given item of evidence fits into a case theory**
* **identify a few places where the California Evidence Code deviates significantly from the federal rules and be generally familiar with those CEC sections**
* **appreciate the various policy concerns, history, and practical courtroom pressures on the development of evidentiary rules**
* **have a basic understanding of the mechanics of admitting evidence and how/why to make a record for appellate review**
* **develop a critical eye toward where rules fall short, can be improved, and/or are impracticable**

**Exam/Assignments/Grading:**

* **Exam (90%):** There will be a 3-hour exam on Friday, May 3, 2013, at 8:30am. The exam will be part multiple choice/short answers and part essay. It will very likely be closed book; you will be given a hard copy of the FRE and CEC.
* **Written Motion *in Limine*  (10%):** In the middle of the semester, you will write a short motion arguing for or against the admission of a piece of evidence. You will have two weeks to complete this assignment. You may work in a group of up to four students
* **Class participation:** As noted above, I will consider your participation for tie-breaking purposes only.

**SYLLABUS**

As you can see, the syllabus largely follows our casebook (CB), with some references to the specific provisions of the Federal Rules of Evidence (FRE) and the California Evidence Code (CEC). I have not assigned reading for specific class days; rather, reading and discussion topics are divided by topic. This will allow us to use our time more flexibly, but may require you to read more for Monday and Tuesday classes than you might otherwise, to ensure that you are prepared for all the material covered in those classes.

Please note that this syllabus and the reading assignments are not set in stone. They are my best guess at this time as to what we will cover when. We may need to adjust as the semester unfolds. I have indicated below where I expect that we will move particularly swiftly or slowly.

**Chapter 1. The Case of *People v. Johnson* (Transcript)**

*We will devote two classes to discussion of the Johnson trial and related issues.*

The two assignments below may seem like a lot of reading, but it will go quickly. CB Chapter One is the lightly redacted transcript of a criminal trial in Del Norte County Superior Court. We will devote most of the first two classes to discussing the transcript, the case, trials generally, and how evidence persuades the factfinder (jury or judge). Part of the class will take place in small groups, so it is imperative that you come prepared to talk about your views of the evidence and the case. Don’t worry: you will not be cold-called on the first or second day of class. But you will get much more out of those classes, and have a better foundation for the rest of the semester, if you have read the full transcript and thought about the case before we meet. According to one estimate, it takes four hours to read Chapter One.

**Topics: Welcome/Introduction; Evidence at Work in a Real Case; Case Theory**

(1) Reading: CB li-lii, 1-39, 79-86

Handouts (3 pages, posted on bSpace under Resources): Mauet, Develop a theory of the case; Vetter, Successful Civil Litigation

Class Discussion:

-- What does the prosecutor need to prove to obtain a conviction? I.e., what are the elements of Penal Code section 4501.5?

-- What is the prosecutor’s “case theory” (his story of what happened during the incident)? What specific testimony or other evidence did you find most persuasive as to the prosecution case, i.e. what best proved that case theory? (Note the page(s) in the CB where the evidence was introduced.) Why did you find it persuasive?

If you have time and interest, take a look at a few photos of Pelican Bay State Prison (including a food port, though not in Facility B) at:

http://informant.kalwnews.org/2011/08/photos-inside-pelican-bay-state-prison/

For photos of side-handled batons, see: <http://www.code3tactical.com/pr-24-batons.aspx>

For one inmate’s description of the SHU, see: <http://www.sfgate.com/opinion/openforum/article/The-crime-of-punishment-at-Pelican-Bay-State-3597332.php>

For the prison guard union’s summaries of recent incidents involving inmates, see:

<http://www.ccpoa.org/members/california_pens/facility/pelican_bay>

(2) Reading: CB 39-77, 86-89

Class Discussion:

-- What is the defense case theory? What testimony or other evidence did you find most persuasive as to the defense case? (Note pages in CB.) Why did you find it persuasive?

-- Did defense counsel use the evidence elicited at trial effectively in his closing argument? How could he have improved the use of the evidence in that argument?

**Chapter 2. The Process of Proof: How Trials Are Structured; Objections; Intro to Appellate Review**

*We will spend no more than one class covering concepts from this chapter. This chapter will serve as background information for the rest of the course; by being generally familiar with how trials and appeals work, you will better understand the context in which the rules of evidence operate.*

FRE 103 and 611

Reading: CB 90-109

Class Discussion: parties’ closing arguments in Johnson; relationship between lawyers’ conduct at trial and appellate review.

**Chapter 3. Relevancy, Probative Value, and the Rule 403 Dangers**

**A. Relevancy – The Basic Concept**

FRE 401 and 402

(1) Reading: CB 121-131

Problems 3.1, 3.2

Class Discussion:

Intro to EF’s (evidentiary facts), IF’s (inferred facts), FOC’s (facts of consequence), and EE’s (essential elements)

Direct vs. Circumstantial Evidence

Inferences; Generalizations

(2) Reading: CB 131-138

Problems 3.3, 3.4, 3.5

Class Discussion: case analysis of *Knapp*; *Stevers*

**B. Rule 403 Limits on the Admission of Relevant Evidence: Probative Value vs. Unfair** **Prejudice**

(1) FRE 403

Reading: CB 140-157

Problems 3.10, 3.12, 3.14

Think about:

The text of FRE 403 does not distinguish between civil and criminal trials, or between the prosecution and a criminal defendant. In other words, the rule appears to apply equally regardless of who is offering the piece of evidence in what kind of trial. Should it?

The Sixth Amendment affords a criminal defendant the right to present a defense. Does that affect the Rule 403 analysis? Should it?

(2) Appellate Review of Rule 403 Error

Reading: CB 157-168

Problem 3.17

**Chapter 4. Laying the Foundation for Proof**

Reading: CB 175-187

**Chapter 5. The Character, Propensity, AND Specific Act Rules**

**A. Character Evidence and Specific Acts Evidence Generally Inadmissible to Prove Conduct on a Particular Occasion**

FRE 104, 404

Advisory Committee Note to FRE 404 (posted on bSpace under Resources)

CEC 1101 (posted on bSpace under Resources/Chapter 5)

Reading: CB 223-227, 235-244

Problems: 5.2, 5.4

Volunteer exercise: Return to page 58 et seq. of the *Johnson* transcript, where the parties discuss whether Lt. Stokes should be permitted to testify. We are going to have a do-over of that argument, focusing on whether Stokes’s testimony should be excluded under (1) FRE 602 and/or (2) FRE 403.

**B. Specific Acts Relevant Without a Character Inference**

FRE 404(b), 104(b)

Reading: CB 244-266

Problems: 5.6, 6.7, 5.10, 5.14, 5.17

**C. Permissible Use of Character Evidence**

FRE 404(a), 405, 803(21)

Reading: CB 284-305; *United States v. Montelongo* (posted on bSpace)

Problems: 5.34, 5.35, 5.36, 5.40, 5.42

**D. Sexual Assault Cases**

FRE 413-415

CEC 1108

Reading: CB 306-314

**Chapter 6. The Other Relevance Rules: Subsequent Remedial Measures, Etc.**

FRE 407-411 (Although the reading below covers only FRE 407, please read all five rules carefully)

Reading: CB 327-334; *People v. Mehserle* (posted on bSpace)

**Chapter 7. The Impeachment and Rehabilitation of Witnesses**

**A. Basic Concept of Impeachment**

*We may spend less than one class on this background material*

Reading: CB 351-356

Handout: Observation, Memory, Facts, and Evidence (to be posted)

**B. Impeachment by Character and Prior Bad Acts**

*We will spend up to two classes on Rules 608 and 609*

FRE 608, 609(a) and (b) and Advisory Committee Notes

Reading: CB 357-382

Problems: 7.5, 7.7, 7.13, 7.14, 7.15, 7.21

**C. Prior Inconsistent Statements**

FRE 401, 403, 613

Reading: CB 353-355 (§ 1.c), 382-385

Problems: 7.24, 7.28

**D. Other Impeachment: Bias and Contradiction**

Reading: CB 393-398; 400-404

Problems: 7.33, 7.39

**E. California Distinctions**

(1) Truth-in-Evidence and Related Law

Cal. Const. art. 1, § 28(f)(2)

CEC 788

*People v. Castro* (1985) 38 Cal.3d 301 (to be posted)

(2) California PIS

CEC 1235 and Law Review Commission Comments

Handout: [California brief, to be posted]

**Chapter 8. The Hearsay Rule**

**A. Definition of Hearsay and Why We Don’t Like It**

FRE 801 & 802, including Advisory Committee Notes to both

Reading: CB 407-419

Problems: 8.1-8.4

**B. Non-Hearsay Uses of Out-of-Court Statements**

FRE 801(c)

Reading: 419-426

Problems: 8.6-8.16

**C. Conduct as Hearsay**

FRE 801(a)-(c), 104 (a), (b)

Reading: CB 426-434

Problems: 8.17-8.31

**D. Prior Statement of Witness**

FRE 801(d)(1) and Advisory Committee Notes

Reading: CB 448-462

Problems: 8.32, 8.33

**E. Admissions**

FRE 801(d)(2)(A)-(D) and Advisory Committee Notes

Reading: 462-475

Problems: 8.37 8.38, 8.39, 8.42

FRE 801(d)(2)(E) and Advisory Committee Note

Reading: 475-482

Problems: 8.41, 8.45

**F. Present Sense Impression and Excited Utterance**

FRE 803(1) and (2)

Reading: CB 483-495

Problems: 8.46, 8.47, 8.49, 8.51

**G. State of Mind**

FRE 803(3)

Reading: CB 496-505

Problems: 8.52, 8.53, 8.55, 8.57

**H. Statement for Medical Diagnosis/Treatment**

FRE 803(4)

Reading: 505-510

Problems: 8.60, 8.61, 8.64

**I. Past Recollection Recorded (and Refreshing Witness’s Memory)**

FRE 803(5), 612

Reading: CB 510-517

Handout: Jencks Act (posted on bSpace)

Problems: 8.65

On-call experts will give a demo

**J. Business Records**

FRE 803(6)

Reading: CB 518-528

Problems: 8.64, 8.65

**K. Declarant’s Unavailability; Former Testimony**

FRE 804(a), (b)(1)

Reading: CB 543-554

Problems: 8.80, 8.81

**L. Declarations Against Interest**

FRE 804(b)(3)

Reading: CB 557-562

Problems: 8.85, 8.86, 8.87

On-call experts will give a demo

**M. The Confrontation Clause**

*We will spend three classes on the Conf. Clause, as follows.*

(1) CC, Part I

Reading: CB 579-594

Problems: 8.97, 8.98

(2) CC, Part II

Reading: CB 594-610

Problems: 8.99, 8.100, 8.101

(3) CC, Part III

Reading: CB 611-618

Problems: 8.102, 8.103

**N. Forfeiture by Wrongdoing; the Residual Exception**

FRE 804(b)(6), 807

Reading: 566-571; 572-579

Problems: 8.91, 8.93, 8.95

**Chapter 9. Expert Witnesses**

FRE 702, 703, 705

CEC 801

Reading: TBD

**Chapter 12. Privileges**

FRE 502

Reading: TBD

Problems: TBD