**Law 241; Section 1**

**Spring 2024**

**The Law of Evidence: An Experiential Approach (draft 11/23/23)**

Professor David Oppenheimer

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**Class meeting times: Tuesdays and Thursdays from 2:10-3:25 pm Pacific Time in Room 132**

Office Hours:

* Drop-In Group Office Hours: Wednesdays from 9:30-11:00.
* Individual Office Hours by Appointment: Thursdays from 9:30-11:00 in ten-minute increments. Use the calendar function on the b-course page to make an appointment. LINK NEEDED
* If these times are inconvenient, email me for another appointment time.

**Required Books:**

There are four required books for this course.

1. **The first** contains one of our two casefiles, *State v. Mitchell*, with the exercises associated with the case.

Burns, Lubet, Moberly & Seckinger, ***Evidence in Context*** (5th Ed. 2017) (NITA) (NITA is the National Institute for Trial Advocacy.) • ISBN 978-1-60156-585-3

1. **The second** is our other casefile.

Oppenheimer & Moss, **Rowe v. Pacific Quad – Trial Materials** – (6th ed. 2019) (NITA)

ISBN 978-1-60156-807-6

eISBN 978-1-60156-808-3

The exercises for the Rowe v. Pacific Quad casefile can be found on the b-course site.

1. **The third** is a basic text/hornbook on evidence law and is referred to in this syllabus as Park at al. (Roger Park being the lead author of the book). You may want to buy this book so that you have a hard copy, but you can also **access it for free through your Westlaw account via the Boalt Hall Library** because it is treated as a student study aid. *(Hey, how sweet is that?)*
2. Park, Leonard, Orenstein, Nance & Goldberg, ***Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials*** (4th edition, 2018 West Publishing) **ISBN 978-1-63460-935-7; OR**

Park, Leonard, Orenstein, Nance & Goldberg, ***Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials*** (5th edition, 2022 West Publishing) **ISBN 978-1-63659-126-1**

1. **The fourth** is the ***Federal Rules of Evidence*** (“FRE”). You can download it for free from several websites. Lexis will distribute free copies on the first day of class.

**Course Description**

This 3-unit course will explore the law of evidence as applied in American (primarily federal) courts. We will use an experiential learning-by-doing approach, with part of our class time spent with students arguing for the admission or exclusion of evidence, sometimes in the full classroom (or Zoom room) and sometimes in small groups (or break out rooms), based on 101 problems drawn from two simulated casefiles. Both cases involve important but disturbing gender equality issues. One involves an allegation of Spousal Violence/Murder; the other is a civil sexual harassment in employment case. You will need to become familiar with every aspect of the two cases, and apply the law of evidence, as found in the Federal Rules of Evidence and a few case decisions, to argue why the law permits or prohibits the admission or exclusion of the evidence offered.

There is no traditional casebook in this class. We will use a "hornbook", the Federal Rules of Evidence, and two casefiles published by the National Institute of Trial Advocacy (NITA).

For each class, beginning in week two, twenty students will sign up in advance to be on call that day and will serve as small group discussion leaders for that day’s class. Thus, with 80 enrolled students, each student will be on call and will serve as a small group discussion leader for ten dates.

All students will be assigned to the **BLUE** team or the **GOLD** team and will prepare each day’s advocacy exercises based on their team membership. Each class will begin with a brief lecture on the day’s materials, followed by all the students meeting in groups of 4 to discuss the first problem of the day. Usually, each group discussion will include two **BLUE** team members and two **GOLD** team members. Usually, following the breakout room discussion, several of the students on call will perform the exercise, followed by class discussion. We will then repeat the process for each problem.

Class will meet two days a week for 75 minutes/class.

Class is canceled on April 11, 16 and 18. These classes will be made up at 2:30 pm on January 26, February 23 and April 5.

There will be two 2-hour take-home exams, which will be given on the weekends of February 9-11 and March 8-10.

Course coverage will include relevance, character evidence, witness examination, offers of evidence (and thus objections to offers of evidence), authentication of documents and other physical evidence, motions in limine, impeachment and rehabilitation, privileges, opinion testimony, scientific evidence, and hearsay.

Grading
Grades will be based on the two mid-term exams, a final exam, and class participation. Here is the grading formula:
• The two mid-term exams, which will be take-homes, will each consist of 10 multiple choice questions worth 1 point for each question (a total of 20 points). At least some of the questions and answers will be subsequently reviewed in class for formative assessment purposes;
• The final exam, which will be a take-home, will include ten short problems requiring you to support the admission or exclusion of evidence with a limit of 150 words each, worth 50 total points (5 points each), and 18 multiple-choice questions worth 1 point for each question (a total of 68 points);
• Up to 12 class participation points will be awarded as follows. Two points will be awarded when a student who has signed up to be on call that day leads their small group discussion, is called on, is prepared, and satisfactorily participates (or is not reached). Thus, if you sign up to be on call, are called on and pass, or you are not present, or you are clearly not prepared, you’ll have lost an opportunity to earn two participation points. My goal is to give every student at least 8 opportunities to earn participation points (and to award 12 participation points to every student). If I don’t call on a student who is on call that day because I run out of time, they will still earn two points for the day. The only way to lose points is to sign up to be on call and then be absent without cause or unprepared. Each time I’ve taught this course every student received maximum participation points.

**Due to the nature of this class, real-time attendance is required (without an alternative way to earn equivalent credit) except in cases of illness, Covid exposure, or emergency.**

**Learning Outcomes:**

Students in the course will be expected to achieve the following Berkeley Law Learning Outcomes:

(a) Knowledge and understanding of the procedural law of evidence.

(b) Legal analysis and reasoning, problem-solving, and oral communication in the legal context.

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system.

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession. and

(e) Using the law to solve real-world problems and to create a more just society.

Students in the course will be expected to achieve the following Learning Outcomes specific to this course:

1. Understanding the basic principles of the law of evidence.
2. Understanding how the law of evidence is applied in U.S. federal courts.
3. Understanding how to make an objection to the use of evidence, or to respond to an objection to the introduction of evidence, relying on the Federal Rules of Evidence and principles of oral advocacy.
4. Improving the ability to work collaboratively. and
5. Improving the ability to read and interpret codes and hornbooks.

**Workload**

A “credit hour” at Berkeley Law is an amount of work that reasonably approximates three-four hours of work per week for 15 weeks, including a) classroom time, b) time spent preparing for class, c) time spent studying for, and taking, final exams, d) time spent researching, writing, and revising papers and other written work, and e) time spent preparing for and completing any other final project, presentation, or performance. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour, and the 15 weeks includes the exam period. Thus, for this three-unit course that meets for 150 minutes/week **you should expect to spend six-nine hours per week on out of class, course-related work as described above.**

In the first few weeks of class students will need to thoroughly learn the contents of the assigned casefiles. Thereafter, the reading assignments will be relatively brief; much of the preparation time will be focused on solving the problems. I recommend that you identify another student and form a partnership, studying together and/or in collaboration with other partnerships, to prepare for class by analyzing the problems together. Even when you are not “on call” you will be arguing the merits of the exercises in small groups and will learn from preparing the exercises. Over the course of the semester, each student should prepare approximately 100 evidence problems.

**Accommodations**

Student Services schedules all exams, including accommodated exams, as the law school is committed to anonymous grading.   Any student who seeks an accommodated or rescheduled exam for documented medical reasons or for religious observance should contact Kyle Kate Dudley, Assistant Director of Student Services, Accessible Education at kylekatedudley@law.berkeley.edu. If any student needs accommodations for the class participation exercises, the student should contact Kyle so that we can all meet and design an appropriate accommodation.

**Attendance**

Attendance and thorough preparation are required, and I expect you to attend class unless illness, a Covid exposure, or an emergency require you to be absent.

Life is filled with distractions, some of which we cannot avoid, and some of which we cannot resist. If you prepare carefully and take this course seriously, you will be well prepared for the Evidence section of the bar exam and will be better prepared than most new lawyers when you begin confronting Evidence problems in practice.

Class meetings will be recorded and downloaded to our b-course page. If a student joins the class late, they must watch the recordings of any class they missed.

*If you are in need of economic, food, or housing support, you can find help at*[*basicneeds.berkeley.edu*](https://berkeley.us7.list-manage.com/track/click?u=331aebf326f7b1750bcbd4726&id=489be68c20&e=c0fc8f8414)*. You may be eligible for money to buy groceries via*[*calfresh.berkeley.edu*](https://berkeley.us7.list-manage.com/track/click?u=331aebf326f7b1750bcbd4726&id=edd1c482e4&e=c0fc8f8414)*or our*[*Food Assistance Program*](https://berkeley.us7.list-manage.com/track/click?u=331aebf326f7b1750bcbd4726&id=7ed4c70f1b&e=c0fc8f8414)*. If you are in need of food immediately, please visit our UC Berkeley Food Pantry at*[*pantry.berkeley.edu*](https://berkeley.us7.list-manage.com/track/click?u=331aebf326f7b1750bcbd4726&id=4a1982dd06&e=c0fc8f8414)*.*

**In any kind of emergency, you can reach me by phone or text on my mobile phone, at (510) 326-3865.**

Calendar of Assignments

1. Relevance and its exceptions (including character evidence and privilege): Weeks 1-5
2. Introduction to the Requirement of Relevance: Week 1
3. Policy Exceptions to the Relevance Principle: Week 2
4. Character Evidence: Weeks 3-4
5. Privilege Exceptions: Week 5

Mid-term #1 (Feb. 9-11)

1. Hearsay and the Confrontation Clause: Weeks 6-10

Mid-term #2 (March 8-10)

1. Documents: Week 11
2. Impeachment: Weeks 11-13
3. Scientific evidence and lay and expert opinions: Weeks 13- 14

Week 1 (classes 1-2)

Tuesday, January 9

Class 1: Introduction

* Read FRE Table of Contents and Rules 101, 102, 401, and 402
* Read Park 4th ed pp. 3-17 or 5th ed. Pp. 3-17
* Begin reading the *State v. Mitchell* casefile from *Evidence in Context*.
* Exercises 1-3: Please prepare to discuss ***State v. Mitchell* problems 2 and 4** and the following discussion question: How should Brooke Thompson’s racism affect: (1) her credibility as a witness, (2) our willingness to use her testimony as evidence in support of our case, and (3) how we feel about using her testimony? Should her testimony regarding “minorities” be admissible? If yes, for what purpose should it be admitted? Don’t research this question. I want to discuss it based on what we think the rules ought to provide, not what they actually provide. (We will return to that question later in the semester.)

Thursday, January 11

Class 2: Relevance and the Factual Theory of the Case; Logical Relevance; Rule of Completeness.

* Finish reading and begin re-reading the *State v. Mitchell* casefile from the NITA book. (Trust me, you’ll see all kinds of things you missed the first time.)
* Re-read FRE Rules 401-402, Read FRE Rules 105, 106
* Read Park 4th ed. pp. 17-34, 163-169, or 5th ed. Pp. 17-35, 171-177.
* Exercises 4-5: ***State v. Mitchell* Problems 5 and 8**.
* **Students should sign up by Friday via b-courses to select their team (Blue or Gold) and to be on call eight times between weeks 2-13**

Week 2 (classes 3-4)

Tuesday, January 16

Class 3: Pragmatic Relevance; Rulings on evidence

* Consider re-reading the *State v. Mitchell* casefile. (This is your call, but if you re-read it, you’ll probably see lots of important things you missed the first two times you read it.)
* Read FRE Rule 403, 103
* Read Park et al 4th ed. pp. 169-186, 73-91 or 5th ed. Pp. 177-195, 79-97.
* Read Syllabus in United States v. Old Chief, which is posted to the b-course site.
* Exercises 6-8: ***State v. Mitchell* Problems 10A, 10C, 10D**

Thursday, January 18

Class 4: Policy exceptions to the general rule permitting the admission of relevant evidence: Subsequent remedial measures, apologies and offers to pay medical expenses; Witness competency.

* Read the *Rowe v. Pacific Quad* casefile.
* Read FRE Rules 104, 105, 407 and 409
* Read Park et al 4th ed. pp. 196-215, skim pp. 305-320; 5th ed. Pp. 206-226, skim pp. 315-331.
* Exercise 9: ***State v. Mitchell* Problem 46**
* Exercise 10: ***Rowe v. Pacific Quad* Problem 35**

Week 3 (classes 5-7)

Tuesday, January 23

Class 5: Policy exceptions to the general rule permitting the admission of relevant evidence: Offers to compromise, Pleas, Liability Insurance:

* Reread the *Rowe v. Pacific Quad* casefile
* Read FRE Rule 408, 410, 411
* Read Park et al 4th ed. pp. 187-193, 216-230; 5th ed. Pp. 197-206, 226-240.
* Exercise 11: ***State v. Mitchell* Problem 51 (first sentence only)**
* Exercises 12-13: ***Rowe v. Pacific Quad* Problems 34, 36**

Thursday, January 25

Class 6: Exceptions to the general rule permitting the admission of relevant evidence: Character evidence I

* Read FRE Rules 404 and 405
* Read Park et al 4th ed. pp. 231-244, 251-258, 293-294; 5th ed. 241-254, 262-269, 304-305.
* Exercises 9-11: ***State v. Mitchell* Problems 15, 17, 28.**

Friday, January 26: MAKEUP CLASS 2:30-3:45

Class 7: Character evidence problems continued: Specific purposes for which uncharged misconduct evidence may be offered (motive, modus operandi, opportunity, knowledge, intent, preparation); evidence of habit or routine practice

* Re-Read the *Rowe v. Pacific Quad* casefile
* Re-Read FRE Rules 404 and 405; Read FRE Rule 406
* Read Park et al 4th ed. pp. 258-277, 293-301; 5th ed. Pp. 269-291, 293-298, 305-312.
* Exercises 12-14: ***Rowe v. Pacific Quad* Problems 23, 24, 31**

Week 4 (classes 8-9)

Tuesday, January 30

Class 8: The use of character evidence in sexual assault cases.

* Read FRE 412, 413, 414 and 415
* Read Park et al 4th ed. pp. 244-251, 280-282, 287-293; 5th ed. 254-262, 291-293, 298-304.
* Exercises 15-16: ***Rowe v. Pacific Quad* Problems 26 and 30.**
* [*NY Times Article on Cosby and Weinstein cases*](https://www.nytimes.com/2018/06/25/nyregion/weinstein-sexual-assault.html)

Thursday, February 1

Class 9: Exceptions to the general rule permitting the admission of relevant evidence: Privileges

The attorney-client privilege

* Read FRE Rule 501, 502
* Read Park et al 4th ed. pp. 113-140; 5th ed. Pp. 119-146.
* Exercises 22-23 ***State v. Mitchell* Problems 278, 279**
* Exercise 24: ***Rowe v. Pacific Quad* Problem 38**
* Exercise 25: **State v. Mitchell Problems 285, 293**

Week 5 (classes 10-11)

Tuesday, February 6

Class 10: Exceptions to the general rule permitting the admission of relevant evidence: Privileges

The physician-patient, psychotherapist-patient, marital, and other privileges.

* Read Park et al 4th ed. pp. 140-159; 5th ed. Pp. 146-167.
* Exercises 26-27: ***State v. Mitchell* Problems 272, 273**
* Exercise 28: ***Rowe v. Pacific Quad* Problem 39**
* Exercise 29: ***State v. Mitchell* Problem 288**

Thursday, February 8

Class 11: Introduction to the hearsay rule

* Read FRE Rules 801 (a) – (c), 802
* Read Park et al 4th ed. pp. 489-510; 5th ed. Pp. 501-522.
* Exercises 30-31: ***State v. Mitchell* Problems 143, 157**
* Exercise 32: ***Rowe v. Pacific Quad* Problem 47**

**Friday, February 9 – Sunday, February 11:**

**Mid-Term Exam No. 1**

**Covering classes 1-10**

**10 multiple choice questions**

**2 hour take-home**

**The exam may be downloaded and taken in any 2-hour period between 4:00 pm on Friday February 9 and 10:00 pm on Sunday February 11.**

Week 6 (classes 12-13)

Tuesday, February 13

Class 12: Statements exempt from the hearsay rule – Prior inconsistent statements, Prior consistent statements, Statements of prior identification, Statements of a party-opponent

* Read FRE Rule 801(d)(1) and (2)
* Read Park et al 4th ed. pp. 511-512, 521-546; 5th ed. Pp. 523-524, 533-558.
* Exercises 33-35: ***Rowe v. Pacific Quad* Problems 45, 47 (again), 50,**
* Exercises 36-37: ***State v. Mitchell* Problems 178 and 179**
* We may also review some exam questions today

Thursday, February 15

Class 13: Exceptions to the hearsay rule, Part I

* Read FRE Rules 803(1), 803(2) and 803(3)
* Read Park et al 4th ed. pp. 547-559; 5th ed. Pp. 559-571.
* Exercises 38-40: ***State v. Mitchell* Problems 187, 188, 234**
* Exercise 41: ***Rowe v. Pacific Quad* Problem 53**

Week 7 (classes 14-16)

Tuesday, February 20

Class 14: Exceptions to the hearsay rule, Part II

* Read FRE Rules 803(4), 803(5), 803(6) and 803(7)
* Read Park et al 4th ed. pp. 559-577; 5th ed. Pp. 571-588
* Exercise 42: ***State v. Mitchell* Problem 191**
* Exercises 43-44: ***Rowe v. Pacific Quad* Problems 54, 81**

Thursday, February 22

Class 15: Exceptions to the hearsay rule, Part III

* Read FRE Rules 803(8), 803(9), 803(10), 803(18), 803(16), 803(22), 803(23)
* Read Park et al 4th ed. pp. 577-595, 603-608; 5th ed. Pp. 589-606, 614-620.
* Exercise 45: ***State v. Mitchell* Problem 197**
* Exercise 46-47: ***Rowe v. Pacific Quad* Problems 125 & 126**

Friday, February 23 (make-up class): 2:30-3:45

Class 16: Exceptions to the hearsay rule (unavailable declarant), Part IV

Read FRE Rules 804(a), 804(b)(1), 804(b)(2), 804(b)(3), 804(b)(6)

* Read Park et al 4th ed. pp. 609-635; 5th ed. Pp. 621-647.
* Exercise 48: ***Rowe v. Pacific Quad* Problem 55**
* Review of 803 and 804 exceptions

Week 8 (classes 17-18)

Tuesday, February 27

Class 17: Exceptions to the hearsay rule, Part V

* Read FRE Rules 807, 805 and 806.
* Read Park et al 4th ed. pp. 512-520, 637-655; 5th ed. Pp. 524-532, 649-667.
* Exercise 49-50: ***Rowe v. Pacific Quad* Problem 56 & 65**
* **NOTE: Rule 807 was amended after publication of the 4th edition and before publication of the 5th edition.**

Thursday, February 29

Class 18: The Confrontation Clause of the Sixth Amendment

* Read Park et al. 4th ed. pp. 667-703; 5th ed pp. 679-718.
* Exercise 51-53: ***State v. Mitchell* Problems 170, 171 and173**
* Exercise 54: ***State v. Mitchell* Problem175**

Week 9 (classes 19-20)

Tuesday, March 5

Class 19: Hearsay reviewed and applied

* Read Park et al 4th ed. pp. 657-665; 5th ed. pp. 669-677.
* Exercises 55-56: ***State v. Mitchell* Problem 233, 234 (again)**
* Exercise 57: ***Rowe v. Pacific Quad* Problem 116**
* Exercises 58-59: ***Kaplan* Q’s 23, 24**
* Exercises 60-62: ***Themis* Q’s 17, 18, 20**

Thursday March 7

Class 20: Offering and opposing evidence; Offers of Proof; Motions in limine

* Read FRE Rules 103, 105, 106, 611, 612
* Read Park 4th ed. pp. 73-98 (some of which you’ve read before) and 321-332; 5th ed. 79-116, 333-344.
* Exercises 63-68: ***State v. Mitchell* Problems 108, 109, 111, 114, 120 and 121**

**Friday, March 8- Sunday March 10:**

**Mid-Term Exam No. 2**

**10 multiple choice questions covering classes 11-19**

**2 hour take-home**

**The exam may be downloaded and taken in any 2 hour period between 4:00 pm on Thursday March 8 and 10:00 pm on Sunday March 10.**

Week 10 (classes 21-22)

Tuesday, March 12

Class 21: Working with Documents and Real Evidence: Authentication and the Original Documents Rule

* Read FRE Rules 901, 902, 1001-1007
* Read Park et al 4th ed. pp. 429-439, 454-458, 461-465, 469-480; 5th ed. pp. 441-480.
* Exercises 69-71: ***State v. Mitchell* Problems 123, 137, 128**
* Exercise 72: ***Rowe v. Pacific Quad* Problem 114**

Thursday, March 14

Class 22: Introduction to Witness Impeachment; General methods of impeachment.

Impeachment with evidence of bias, or lack of capacity

Read FRE Rules 602, 607, 611

* Read Park et al 4th ed. pp. 381-390, 419-422; 5th ed. 393-403, 432-435.
* Exercises 73-74: ***State v. Mitchell* Problems 65, 69**
* Exercises 75-76: ***Rowe v. Pacific Quad* Problems 90, 105**

Week 12 (classes 23-24)

Tuesday, March 19

Class 23: Impeachment by Contradiction; Impeachment with extrinsic evidence on a collateral matter

* Read Park et al 4th ed. pp. 396-398; 5th ed. 406-411
* Exercises 77-79: ***Rowe v. Pacific Quad* Problem 101, 102, 109**

Thursday, March 21

Class 24: Impeachment by prior inconsistent statement; Rehabilitation by prior consistent statement

* Read FRE Rule 607, 613, 105
* Read Park et al 4th ed. pp. 391-395, 522-528 (reviewing hearsay reading); 5th ed. pp. 403-406, 533-540 (reviewing hearsay reading).
* Exercises 80-84: ***Rowe v. Pacific Quad* Problems 93, 98, 99, 111, 112**

**SPRING BREAK: March 23-31**

Week 13 (classes 25-27)

Tuesday, April 2

Class 25: Impeachment and rehabilitation through character evidence regarding honesty.

Read FRE Rules 404(a), 608

Read Park et al 4th ed. pp. 399-407, 422-425; 5th ed. pp. 411-419, 435-438.

Exercises 85-88: ***Rowe v. Pacific Quad* Problems 31, 32, 121, 122**

Thursday, April 4

Class 26: Impeachment with prior criminal convictions; Review of Impeachment

Read FRE Rule 609, 806

Read Park et al 4th ed. pp. 407-418; 5th ed. pp. 420-432, 530-532.

* Exercise 89: ***State v. Mitchell* Problem 80**
* Exercises 90-93: ***Rowe v. Pacific Quad* Problems 33, 94, 95, 96**

Friday, April 5: MAKE-UP CLASS 2:30-3:45

Class 27: Opinion testimony: lay opinions

* Read FRE Rule 602, 701
* Read Park et al 4th ed. pp. 333-340; 5th ed. pp 345-352.
* Exercises 94-96: ***State v. Mitchell* Problems 241, 250, 252**
* Exercises 97-99: ***Rowe v. Pacific Quad* Problems 67, 73, 74**

Week 14 (class 28)

Tuesday, April 9: FINAL CLASS MEETING

Class 28: Opinion testimony and scientific evidence

* Read FRE Rule 702, 703, 704 and 705
* Read Park et al 4th ed. pp. 340-379; 5th ed. pp. 352-392.
* Read: ABA journal article on Frye/Daubert proving pain through neuroscience

<http://www.abajournal.com/magazine/article/personal_injury_lawyers_turn_to_neuroscience_to_back_claims_of_chronic_pain/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email>

* View: <https://www.youtube.com/watch?v=ScmJvmzDcG0>
* Exercise 100: ***State v. Mitchell* Problem 260**

Review Session

TBD

Final Exam

The final exam will be a 5-hour take home exam, consisting of eighteen multiple choice questions worth one point each, and ten short problems requiring you to support the admission or exclusion of evidence with a limit of 150 words each, worth 50 total points (5 points each), for a total of 68 points.

Note that sample short essay questions and a model answer to one of my prior exams are posted on the B Course site.