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Avoiding Mock Trial by Ambush: A Trial Advocacy Competition Primer

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Avoiding Mock Trial by Ambush:
A Trial Advocacy Competition Primer

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I. Introduction

It is a truth universally acknowledged that law school does little to prepare one for the trials and tribulations of "real world" law practice.[1] Doctrinal classes do cover real world cases, but the cases are generally limited to Supreme Court opinions and the occasional federal appellate decision based on some summary judgment, the facts of which are excised from the casebook. Skills classes and legal writing seminars may cover memorandum or motion drafting. Almost every student is required to complete a brief and maybe a ten-minute oral argument based on a fictitious or greatly redacted original judgment.[2] This string of experiences is thought to serve as a basis of knowledge that a

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[1] In January, 2014, the ABA Task Force on Legal Education expressed this concern:

> *Skills and Competencies:* A given law school can have multiple purposes. But the core purpose common to all law schools is to prepare individuals to provide legal and related services in a professionally responsible fashion. This elementary fact is often minimized. The calls for more attention to skills training, experiential learning, and the development of practice-related competencies have been heard and many law schools have expanded practice-preparation opportunities for students. Yet, there is need to do much more. The balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients.

AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf; *see also* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); ROY STUCKEY ET AL., BEST PRACTICES IN LEGAL EDUCATION (2007); AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATION CONTINUUM (1992) *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf.

[2] James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 Stetson L. Rev. 75,

baby lawyer can build upon once she is kicked out of the protective nest of academia to flounder through client relations and malpractice premiums.

Both the first year legal writing curriculum and the extracurricular advocacy opportunities that exist for law students historically focus on *appellate* advocacy. However, most young lawyers find themselves in trial court, not appellate court, so many students are beginning to think about how to best prepare themselves for a career in trial courts. There will always be one or two slick suited lawyers mimicking the "I-dentical" of *My Cousin Vinny* or beginning opening statements with a knock-knock joke, but good training should at least limit the number who think that these are good strategies.

Fortunately, there is a somewhat informal system of education already in place should students seek instruction on the art of trial practice. Mock trial, also known as trial advocacy, is the redheaded stepchild of the traditional brief-and-argue appellate court instruction provided by most law schools. For students, trial advocacy may be seen as an exclusive club intended only for extroverted trial lawyers. Traditional intraschool competitions often foster this feeling of exclusivity by providing a packet with fake witness statements and telling students to fend for themselves.[3] The students who do venture into interschool competitions, and their coaches who may be other students or professors with little to no courtroom experience, are provided with a team and maybe travel expenses, but the literature is void of instruction as to how a student can actually prepare for a mock trial competition.

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75 (2008) ("Virtually all law students are required to learn oral advocacy skills at some point during their legal education. Typically, these skills are cultivated through at least one oral argument assignment, which often consists of an appellate oral argument that is given as part of the students' first-year legal research and writing course or as part of a moot court competition.").

This work is intended as a short but complete introduction to trial advocacy competition. Specifically, it is intended as a road map for students and coaches who have taken the plunge into mock trial competitions. There is currently a lack of introductory material for beginning trial advocacy students. Traditional casebooks are unsuited to learning trial advocacy. Treatises provide too much detail and are geared towards more experienced advocates who can better grasp the importance of the nuances and details the books explore. Trial advocacy books, also geared towards advocates, assume basic knowledge of evidence and how it applies in a courtroom.[4] This article cannot replace the valuable tomes on trial advocacy by Mauet,[5] the National Institute for Trial Advocacy,[6] Pozner and Dodd,[7] or MacCarthy.[8] Rather, it is offered to bridge the gap between these large works for individual trial advocates and the needs of student teams who must work together to develop a trial strategy within the confines of a case packet and competition rules.

II. The Growth of Trial Advocacy Competitions

Although good trial advocacy classes give students an introduction to the trial courtroom setting, something about the competitive process seems to motivate students in a way that a traditional classroom environment cannot. Legendary trial team coach and Professor Eddie Ohlbaum[9] noted back in 1993 how the trial team experience can enhance

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[3] *See* CHARLES H. ROSE III, FUNDAMENTAL TRIAL ADVOCACY 4 (2nd ed. 2011).
[4] Alan D. Hornstein & Jerome E. Deise, *Greater than the Sum of Its Parts: Integrating Trial Evidence & Advocacy*, 7 Clinical L. Rev. 77, 96 (2000).
[5] THOMAS A. MAUET, TRIAL TECHNIQUES (8th ed. 2010).
[6] NITA – NAT'L INST. FOR TRIAL ADVOC., http://www.nita.org (last visited July 21, 2014).
[7] LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (2nd ed. 2004).
[8] TERENCE F. MACCARTHY, MACCARTHY ON CROSS-EXAMINATION (2007).
[9] Faculty Biographies: Edward D. Ohlbaum, TEMPLE UNIVERSITY BEASLEY SCHOOL OF

learning opportunities:

> First, the trial team framework demands a substantial investment of time and effort from participants. A teaching method that requires several initial case theory and evidence classes and subsists on repeated performance and critique sessions calls for long hours—blocks of time during evenings and weekends are necessary, for example. Second, the team arrangement requires students to take responsibility for their colleagues, because a collaborative presentation is only as strong as its weakest link. Moreover, the student's level of intensity and commitment markedly increase when preparation leads to performance with an incentive to win.[10]

The trial team experience gives students the opportunity to master the law of evidence and learn courtroom demeanor before representing actual clients whether in a clinical setting or after law school. In preparation for competition, students develop statements and questions on their own. Lessons about evidence, objections, and presentation are enforced by exercises in practice.

Because of these unique learning opportunities and because of the exposure trial competitions give students to the bench and bar, the number of mock trial competitions has exploded over the last several years. For many years, the main two trial competitions that most law schools participated in were the National Trial Competition sponsored by the Texas Young Lawyers' Association[11] and the American Association of Justice Student Trial

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LAW, http://www.law.temple.edu/pages/faculty/n_faculty_ohlbaum_main.aspx (last visited July 21, 2014).

[10] Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 Temp. L. Rev. 1, 8 (1993).

[11] *National Trial Competition*, TEX. YOUNG LAW. ASS'N, http://www.tyla.org/tyla/index.cfm/resources/law-students1/trial-advocacy-competitions/national-trial-competition/ (last visited July 21, 2014) ("The National Trial Competition was established in 1975 to encourage and strengthen students' advocacy skills through quality competition and valuable interaction with members of the bench and bar. The program is designed to expose law students to the nature of trial practice and to serve as a supplement to their education.").

Advocacy Competition.[12] However, national law school trial competitions have taken off in the last ten years. Here is a non-exhaustive list of competitions that have been founded since 2004: Buffalo-Niagara Mock Trial Competition (2004),[13] National Ethics Trial Competition (2006),[14] Capitol City Challenge sponsored by American University Washington College of Law (2009),[15] National Top Gun Mock Trial Competition sponsored by Baylor Law School (2010),[16] In Vino Veritas Golden Gate Law School National Trial Competition co-sponsored by the American Bar Association (2012),[17] South Texas Mock Trial Challenge (2012),[18] and the Florida State University Mock Trial Competition (2013).[19] Law schools are now fielding up to fifteen mock trial teams per year.[20]

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[12] *Student Trial Advocacy Competition*, AM. ASS'N FOR JUST., http://www.justice.org/cps/rde/xchg/justice/hs.xsl/1734.htm (last visited July 21, 2014).

[13] *Buffalo-Niagara Mock Trial Competition*, SUNY BUFF. L. SCH., http://www.law.buffalo.edu/beyond/competitions/buffaloNiagara.html (last visited July 21, 2014).

[14] *National Ethics Trial Competition*, U. OF THE PAC.: MCGEORGE SCH. OF L., http://www.mcgeorge.edu/Faculty_and_Scholarship/Centers_and_Institutes/Center_for_Advocacy_and_Dispute_Resolution/National_Ethics_Trial_Competition.htm (last visited July 21, 2014).

[15] *Mock Trial Honor Society*, AM. U.: WASH. C. OF L., http://www.wcl.american.edu/org/mocktrial/ccc09.cfm (last visited July 21, 2014).

[16] *2014 Top Gun National Mock Trial Competition*, BAYLOR L. SCH., http://www.baylor.edu/law/advocacy/index.php?id=76255 (last visited July 21, 2014).

[17] *In Vino Veritas GGU-BLS Mock Trial Competition*, GGU LITIG. CENTER, http://www.ggulitigation.com/in-vino-competition.html (last visited July 21, 2014).

[18] S. TEX. MOCK TRIAL CHALLENGE, http://mocktrialchallenge.org/ (last visited July 21, 2014).

[19] *Law School Hosting National Mock Trial Competition*, THE FLA. ST. U. C. OF L., http://law.fsu.edu/events/mocktrialcompetition2014.html (last visited July 21, 2014).

[20] *See, e.g.*, BRENDAN MOORE TRIAL ADVOC. CENTER: FORDHAM U. SCH. OF L., http://www.mooreadvocates.com/ (last visited July 21, 2014) (15 competitions); *The Center for Advocacy & Dispute Resolution*, THE J. MARSHALL L. SCH., http://www.jmls.edu/academics/advocacy-dispute/competitions/ (last visited July 21, 2014) (15 competitions); *Trial Team – Competitions*, STETSON L., http://www.stetson.edu/law/academics/advocacy/home/trial-team-competitions.php (last

This article serves as one stop resource for all the law students and coaches who are looking for information on how to prepare for and win these competitions.

III. The Basics of Mock Trial

A law school mock trial team generally consists of two to five students, the most common being a set of four who work together to prepare both sides of a case.[21] Each "trial team" is really two teams, one for each side of the case (prosecution/plaintiff and defense). For every side, two students are assigned to be attorneys and two students are assigned to be the witnesses for the team.[22] Schools are generally responsible for sending one group of students that will together be prepared to represent either side of the case. In some cases, students may act as counsel on both sides of the case. The more prevalent practice is to have students who are witnesses in one side act as the attorneys for the other side of the case.

Teams prepare the litigation of a criminal or civil case using only the materials

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visited July 21, 2014) (12 competitions).

[21] *Compare National Criminal Justice Trial Competition*, THE J. MARSHALL L. SCH., http://www.jmls.edu/criminal-justice-comp/ (last visited July 21, 2014) ("Four students constitute a team — in each round, two students act as advocates and two as witnesses. During the trials, each student advocate must conduct a direct examination of a witness, a cross examination of a witness, and present either the opening statement or the closing argument. In the following round student advocates play the role of witnesses."), *and National Ethics Trial Competition*, U. OF THE PAC.: MCGEORGE SCH. OF L, http://www.mcgeorge.edu/Documents/2013RulesAndCaseFile.pdf (last visited July 21, 2014) ("Each team shall be comprised of four law students. In each round, two students will be advocates and two students will play the witnesses for their side."), *with 2013 Local Rules*, S. TEX. MOCK TRIAL CHALLENGE, http://www.mocktrialchallenge.org/docs/2013Local_Rules.pdf (last visited July 21, 2014) ("A team will consist of four law students enrolled in the same ABA accredited law school . . . . In every round, two team members will serve as attorneys and one team member will serve as a witness . . . . The fourth team member (not participating as an advocate or a witness in a particular round) is still considered a team member for purposes of these rules.").

[22] *National Ethics Trial Competition*, *supra* note 21, at vi.

provided in a case packet by the competition organizers. The case packet generally consists of a basic statement of the case, some rules and stipulations, a Bill of Information or statement of charges (criminal) or a Pleading or list of claims (civil).[23] This is generally followed by four witness statements (two witnesses for each side) and a number of exhibits.[24] The exhibits are not automatically admissible at trial unless stated in the stipulations, and can include statements of "unavailable" witnesses, photographs, maps, and test results. Some case packets also include jury instructions or relevant case law that can be used in motions and argument.[25]

Preparation for a competition generally lasts one semester and culminates in a competition among law school teams, sometimes from around the country and abroad. The majority of competitions last three days and consist of preliminary, semi-final, and final rounds. Some large national competitions hold regional competitions during one weekend and then host a final national competition at a different time with the winners of each regional.

A round is the performance of one trial by two competing teams. Rounds consist of pre-trial motions (scored in some competitions but not others), opening statements by both teams, two witnesses for the prosecution/plaintiff, two witnesses by the defense, and closing statements by both teams. The prosecution/plaintiff begins first during opening and closing statements, and they have the opportunity for rebuttal after defense closing. Rounds are scored by a judge or judges and are based on the team total of individual scores for each attorney for each part of the trial. A sample ballot and scoring criteria should be

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[23] *See id.* at 6-7.
[24] *Id.* at 8-81.
[25] *Id.* at 83-88.

provided to the teams in advance by the competition organizers.[26]

In each round, two students from each team compete as attorneys. The student-attorneys divide trial responsibilities evenly: one performs opening statements, and one performs closing arguments. Each attorney directs one witness and crosses another witness. The attorney who is directing a witness is responsible for objecting during the entire portion of that witness's testimony: direct and cross. Likewise, the attorney who is crossing the witness on the stand for the other side must object during that witness's testimony.

Witnesses in a mock trial are either played by the members of the team who are not acting as attorneys during that particular round or the witnesses are supplied by the competition. The competition rules will explain the team requirements for the tournament. Witness performances are not scored in law school mock trial as they are in college mock trial. Nevertheless, the performance of a witness plays a valuable, if silent, role in the scoring of the student-attorneys directing and crossing the witness.

IV. Preparing for Competition

A. Groundwork

It is common practice among both civil and criminal trial attorneys to organize

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[26] *See*, *e.g.*, *American Bar Association Labor & Employment Law Mock Trial Competition Official Ballot*, AM. B. ASS'N, http://www.americanbar.org/content/dam/aba/administrative/labor_law/trial_ad/2011_aball_trialadcomp_ballot.authcheckdam.pdf (last visited July 21, 2014); *National Trial Competition NTC Scoring Criteria*, TEX. YOUNG LAW. ASS'N, http://www.tyla.org/tyla/assets/File/Scoring%20Criteria.pdf (last visited July 21, 2014); *National Trial Competition Official Scoring Ballot*, TEX. YOUNG LAW. ASS'N, http://www.tyla.org/tyla/assets/File/Official%20Scoring%20Ballot.pdf) (last visited July 21, 2014).

information into what is referred to as the "Trial Notebook."[27] As one's practice evolves, two types of notebooks develop: one collecting general information relevant to trials in general, and one collecting information on each trial. The information in this article is organized into sections in a general trial notebook: court rules, themes and preparation, opening statements, directs, crosses, exhibits, and closing arguments.[28] A practitioner's notebook would also include sections for voir dire and jury instructions. [29]

It is recommended that a trial advocacy program, coach, or team develop a general trial notebook that is updated and shared with students in all competitions.[30] Some trial advocacy programs publish collected materials online,[31] and many individual attorneys or law firms publish trial advocacy websites to promote their courtroom skills or share information.[32] The law library is also a great resource for published materials.[33]

The working trial notebook can be maintained as a paper binder, in an accordion folder, or on a computer.[34] The format chosen must work for the user and ensure that: 1. Drafts can be shared with other users immediately, 2. Alterations of individual questions

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[27] MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 10 (3rd ed. 2008).
[28] *Id.*
[29] *Id.*
[30] Hornstein & Deise, *supra* note 4, at 166 (noting the usefulness of a "law library" in a trial advocacy course).
[31] *See*, *e.g.*, *Advocacy Resource Center*, STETSON L. (Aug. 11, 2011), http://www.stetson.edu/law/advocacy-resource-center/.
[32] *See*, *e.g.*, THE TRIAL PRACT. TIPS WEBLOG, http://www.illinoistrialpractice.com (last visited July 21, 2014); TRIAL THEATRE, http://www.trialtheater.com/wordpress/category/trial-skills/closing-argument/ (last visited July 21, 2014); PLAINTIFF TRIAL LAW. TIPS, http://plaintifftriallawyertips.com (last visited July 21, 2014).
[33] The stacks of a law library provide ample reading material, which is useful if preparing for trial during a month-long power outage caused by a major hurricane. Library of Congress call number KF8915 for trial advocacy and KF 8935 for evidence contain many useful works.
[34] *Id. See also* MAUET, *supra* note 5, at 486-89.

and overall structure can be made easily by the individual and the coach, and 3. Previous drafts are not deleted or thrown away. Changes to the drafts should be distributed to all team members before or at the beginning of each meeting.[35]

B. Competition Binder

The competition binder, which will also be used in the final practices, must use a system that travels well and can be used by any member of the team. It includes clean, unmarked, un-hole-punched, stapled copies of each witness statement, stipulation, and exhibit.

Also have clearly written or, preferably, printed copies of questions for witnesses, statements, and arguments for known objections. Even if you use one-page outlines for questions and statements, always have copies of the planned questions. A written copy of all of the questions aids the student whose nerves cause her to enter a fugue state and forget even the name of the witness. It also can save the unfortunate alternate who learns he has to fill in for one of his team-members fifteen minutes before the next round starts.[36]

C. Competition Rules

Every real-life trial is governed by the rules of the individual judge, the local court rules, and state or federal rules of procedure and evidence. Trial competitions substitute competition rules for the local court.

Every student must have a copy of the Rules of Evidence used in the competition (usually federal) and the rules of the competition. Every competition has its own quirks,

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[35] Ohlbaum, *supra* note 10, at 42-43.
[36] *Id.*

and students must be familiar with the peculiarities. Pay particular attention to the following:

- Who supplies the witnesses?
- Can the witnesses be played as either male or female, or both?
- How many pre-trial motions are allowed, if any?
- What are the time limits for trial? Does that time include pre-trial motions or objections during trial?
- Are there limits on enlargements of exhibits, projectors, and computers?
- What is the definition of "beyond the scope of the packet" and "reasonable inference," and what can be done about it?
- What are the stipulations? (Including whether exhibits have been stipulated authentic and who is stipulated to be unavailable)

D. Digesting the Case Packet

Generally, case packets are organized with two witnesses for the plaintiff/prosecution and two witnesses for the defense. There may also be stipulations, pleadings, and exhibits.

The first time a student reads the facts of the case is the only time she has an open mind about the case and the meaning of each piece of evidence. It is also the only time the advocate can truly be in the mind of the jury: receiving information as it comes without any prior knowledge of its importance to the case. If an advocate does not see the importance of a piece of evidence the first time it is read, it is likely a juror won't understand its importance the first time it is presented in trial. An advocate should keep

track of the things that required more explanation the first time they were read: by the fifteenth run-through of the direct examination of a witness, one loses the ability to discern which things require more explanation.

During the first read-through of the packet, mark or highlight the facts and opinions that jump out as important. Anything that is good; anything that is bad; anything that is interesting. A master list of good and bad facts will be compiled later during a team meeting.[37]

Note any questions about the case or the witness at that time. Make a note of where that question arose—even though the question may be answered later—the jury may have the same question when it hears the testimony.

Review the rules and stipulations of the competition again after reading through the packet. Many of the stipulations may make more sense in context with the facts of the case. Others may require explanation. Many competitions allow a limited time for clarifications of the rules or of the packet itself. If there is a deadline to ask questions, make sure the team prepares in time to ask questions. If there is not a deadline, make sure the team submits questions as early as possible.

E. Theories, Themes, and Facts

Over time, advocates have developed different systems of organizing and approaching the presentation or defense of a case. Some advocates begin with the closing argument by identifying all of the points one must develop in trial in order to present an effective, winning close.[38]

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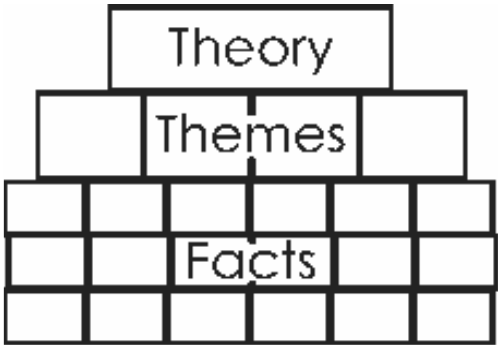
[37] *See infra* Section 5.1.4 on "Good Facts, Bad Facts" exercise.
[38] *See*, *e.g.*, Hornstein & Deise, *supra* note 4, at 88-89 (Trial advocacy courses generally

Other advocates, typically criminal defense attorneys, organize a case by identifying the points that can be elicited via cross-examination of their opponent's witnesses.[39] In this way, the case can be developed while investigation is underway and facts are still being determined. A theory based on closing arguments must begin by knowing what facts will be available during closing.

The advantage and disadvantage of trial advocacy competitions is that all participants at the outset know all the facts. No new fact will be developed on the eve of trial that changes the team's theory. Likewise, no new fact can be ascertained to clear up a hole in the case. The theoretical model used to approach the organization of all the facts and the development of a case theory is a matter of personal preference and one that students will develop for themselves over time, depending on the case. For a student's first case, two things are important: every case is grounded in facts, and every case needs a theory that explains those facts in a way that will win the case at trial.[40]



Every case is grounded in facts. Themes arise from those facts and organize them into digestible bits. Themes support your one theory of the case. The theory should unify all of the team's themes and fit all of the facts. It's how to prove the case at trial.

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begin with the closing argument and have students incorporate and test theories of the case before any witness examinations are assigned.).

[39] *See, e.g.*, POZNER & DODD, *supra* note 7.

[40] Ohlbaum, *supra* note 10, at 25 ("The development of case theory is a necessary predicate to persuasive courtroom technique and that examinations and speeches must be grounded in case theory.")

1. **The Theory**

Most people emphasize the importance of theme in a jury trial, especially when it's a mock trial. Themes make good television. They don't, however, make cases that stand up on appeal. Don't take this the wrong way: a case needs to have a theme. What is most important, however, is the theory. Theory is a starting point for preparation of the case.[41] It needs to be broad enough that if the jury believes the team theory, the verdict reflects that belief. [42]

A theory is that one sentence sound bite that explains your side of the case.

E.g. 1 (Prosecution):	*The defendant laid in wait for the victim, jumped out, and shot her.*
E.g. 2 (Criminal Defense):	*The eyewitness is mistaken; Rick Steves is the shooter.*
E.g. 3 (Plaintiff):	*The administration's willful ignorance created an unsafe condition and killed Bobby.*
E.g. 4: (Civil Defense):	*Bobby's freak accident could not have been prevented by the school.*

The theory is introduced at the beginning of trial and repeated throughout.[43] Every fact in the case needs to either support the team theory or be irrelevant to the theory. If there are facts that go against the theory, the team needs a better theory.[44]

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[41] Hornstein & Deise, *supra* note 4, at 88.
[42] *See* STEVEN LUBET, MODERN TRIAL ADVOCACY 19-20 (3rd ed. 2010); ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS 33-36 (4th ed. 2011).
[43] Hornstein & Deise, *supra* note 4, at 87-88.
[44] *Id.* at 33.

2. **The Themes**

Themes unify facts into identifiable patterns. They are the flavorings that add body to the theory and help persuade the jurors to believe one side's theory over the other side's.[45] Some themes are the tag-lines at the bottom of movie posters:

Rage, Revenge, Retribution.

Sometimes, they really are out to get you.

Themes are also valuable in that they control the emotion of the case.[46] Some explain sets of facts that don't necessarily prove the case but still have persuasive value because of their emotional hold:

The defendant did what any innocent person would do.

Social science tells us that jurors fit facts to the theory they believe; they don't use facts to find a theory. Themes are the tools you use to persuade the jurors fit the facts to your theory.[47] Great mock trial teams find ways to include the themes in every part of the trial: opening, directs, cross-exams, and closings. Some themes can even be used to show the relevance of a fact to your theory: a pat answer to a "relevance" objection.

3. **The Facts**

Use the facts in the case packet to test the team's theory and themes. A good theme will help fit the facts to the theory. A good theory will make every fact either good for the side or neutral. There are no bad facts, only bad theories.[48]

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[45] *See* MAUET, supra note 5, at 25.
[46] *Id.*; MACCARTHY, *supra* note 8, at 11.
[47] S*ee* MAUET, *supra* note 5, at 25.
[48] *See* ROSE, *supra* note 3, at 10-11.

4. **Team Exercise: Good Facts/Bad Facts**

For this exercise, divide the team into prosecution/plaintiff and defense. It's the first team event.

The purpose of this exercise is to identify every fact, no matter how small, that could possibly be used in the litigation of the case. From this list, the team will eventually test its theories and themes to ensure that every good fact is used and every bad fact is neutralized.[49]

The ground rules are:

- No argument.
- No discussions as to how the fact could be explained away or kept out of evidence.
- Conclusions are not facts.

The team will need a large surface to write on that can be seen by the entire team.

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[49] Ohlbaum, *supra* note 10, at 34. (Theory "session may be organized by listing the 'good facts' and 'bad facts' for each [side] . . . . " The article suggests this session should include examination of the factual and legal grounds for the admissibility of each fact, and how each fact may be presented or attacked. For the purposes of a trial competition preparation, it is the opinion of the authors that the facts should be listed first without any argument or discussion over their admissibility and meaning. Only after all the facts have been identified should the overall case theory and themes be developed.

A good theory may make an otherwise inadmissible fact admissible. Theory may make a fact relevant or make the relevance probative. For example, character evidence is generally inadmissible, but a prosecution's theory that the defendant had practiced his craft of bank robbery before may make a prior bank robbery admissible to prove identity. FED. R. EVID. 404(B).

A good theme may even change what some facts mean to the observer. By waiting to assign meanings to facts, advocates can avoid some cognitive bias that may lead them to reject some theories before they are even considered.).

Designate one person to write the facts on the board. Designate one additional team member to record the final list and share it with the team later.

Divide the board into two parts: prosecution/plaintiff and defense. Anything good for the Ps or bad for the Ds goes under the Prosecution/Plaintiff side. Good for the Ds or bad for the Ps goes under Defense. Here's a sample:

Prosecution	**Defense**
» Gun found on D » D fingerprint at scene » Gun on D matches bullet in vic	» No confession » Vic fight with friend not D

Remember to include "obvious" things like "the victim is dead" – a fact, no matter how obvious to the attorney, needs to be proven at trial. This will be the master list to make sure the team has a witness to prove each needed fact.

Depending on how complicated the fact pattern and the amount of thought the team members put into preparing for this session, it could take anywhere from a half-hour to two or more hours to complete the good fact/bad fact list. This process is never completely finished, but the goal of the session is to identify all of the facts contained in the case packet that are relevant to the case or the credibility of the witnesses.

After the list is finished, patterns will emerge on their own. The prosecution or plaintiff team can start to identify the facts that are essential to proving the charges or

claims necessary to overcome the burden of proof. The defense team can identify facts that disprove any charge or claim or that tell a story that make the charge or claim untrue. Use this to develop the case themes and theories.[50] For each side of the case, students should draft an informal theory memo synthesizing the main theory into a sentence or two and listing the themes of the case that will be developed to support that theory.[51]

F. The Timeline

In many cases, the order of events will be vital in proving or disproving the charges and claims of the prosecution/plaintiff. Each witness has his or her own timeline of what occurred when and who said what to whom. Sometimes these accounts mesh, and sometimes they don't. The only way to know for sure is to develop a timeline of the case.[52]

The timeline should supplement the team's good fact/bad fact chart. Every fact should have at least a relative time and date associated with it, even if it's "x occurred before y."[53] Take note of the time and the source of all of the facts in order to create the timeline:

Date/Time	Information	Source
Jan 1, 2014	Brochure is published by Everest Adventures	Date on brochure (Exhibit 1)
Feb 2, 2014,	Beck Weathers calls Defendant to discuss	Defendant phone records,

[50] *Id.* at 11.
[51] Hornstein & Deise, *supra* note 4, at 100 (Example of trial advocacy students being required to draft memoranda on the theory of the case to contextualize the rest of the case preparations throughout the semester.).
[52] *See* PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 17-21 (5th ed. 2013).
[53] *Id.*

6:10 pm	medical issue	Defendant statement.
Between Feb 2, 2014 and Feb 10, 2014	Beck Weathers visits another doctor	Widow

For every fact, the team needs a witness or a stipulation to introduce the fact. Some use the good fact/bad fact chart to organize the source of every fact, and some use the timeline to do the same (the third column above is an example). Pick a method that works for the case, and keep the chart updated!

G. Clarifications from the Organizers

Sometimes there are questions about the case that are not solved through the first reading of the packet. These are usually answered by a timeline or through discussions with the team and coach, but not always. Occasionally, there is a fundamental problem with the packet that requires solving by the competition organizer.

The most important thing to remember when asking for clarification is to keep it simple. Often, the person fielding the questions is a law student or professor with little or no trial experience. This person may not have the background to understand the questions or their importance in preparing a trial. Answers from this person usually modify the problem to resolve one issue while creating another. In some cases, this organizer will turn the questions over to the packet writer who has little to no mock trial experience. The writer will not have the background to understand the importance of certainty and clarity in

a mock trial already limited by having two witnesses per side and no appeals. Answers from this person generally insist the answer to the question is already addressed in the packet. The favored response from any organizer is to place the burden of fixing the problem on the trial judge of each round.

> *E.g.: The only evidence against the defendant is toxicology report that is written by witness X when only witnesses A, B, C, and D are called at trial. This report is hearsay and its introduction may violate the Confrontation Clause if used against the defendant. The stipulation is that the report does not violate the confrontation clause.*
>
> *A question to the organizers may be: "It is stipulated that Report X does not violate the confrontation clause. Report X was written by Witness X. Is Witness X 'unavailable' for trial as defined by the hearsay rules? Is Report X stipulated to be admissible?"*

The best question to both the know-nothing and the know-it-all organizers starts by stating the problem using direct quotes and citations from the packet. Then, frame the question as having an either-or answer. Either A is true or B is true. This prevents the know-nothing from inventing C as an answer and keeps the know-it-all from insisting that A and B co-exist. If the question cannot be asked in an "A or B" form, it may not actually be a problem with the packet. The best indicator of this is when one "side" has a problem with the facts but the other "side" does not. It could just be a matter of interpretation.

Do not be afraid to ask for clarification even if the deadline for questions has passed. When an answer forces the team to throw out its theory for one side of the case, chalk it up to experience and start fresh. There are other teams in the same situation.

V. Pretrial Matters

A. Pre-trial conference

This is an informal meeting between the two teams before the round starts. After making sure the teams are in the right room, there are a few matters to iron out before the judges arrive. Teams should exchange attorney names and pronunciations. Inform each other of the order the witnesses will be called and the genders of the witnesses. Point out which witness is which, if they are in the room. Teams should show each other the exhibits that will be used during the round and provide any notices that may be required by law.[54]

B. Woodshedding the witnesses

In competitions that provide witnesses for the rounds, this is the opportunity to make sure that the correct witnesses have been supplied and to talk with the witnesses before the round start. Each competition has a different set of rules to follow during woodshedding, but this time should generally be used to make sure the witness knows the packet and to inform the witness about the case theory, themes, and facts that will be important to his examination.

C. Housekeeping

Housekeeping is the first chance one has to speak before the Court. It has two purposes: to answer the remaining questions you have about the rules of the particular trial round and to inform the judge (and opposing counsel) how this trial is going to go.

Some teams ("That Team") employ gamesmanship in announcing housekeeping matters: each team jumps up and attempts to speak first as soon as the judges sit down. The team should decide if this strategy fits the character it wishes to portray. Generally, the

prosecution/plaintiff is the side that speaks first in court.[55]

1. **Make "appearances" for the record.**

Each student states her name, spelling the last name. One student should also state the team number or other identifying name if one was assigned by the competition. Do not inform the judges of the team's school, even if they ask. This is the easiest way to a disqualification in any competition.

If the team represents a party who would normally be sitting at counsel table (a defendant or plaintiff), have the person playing that witness sit at counsel table and announce his presence during appearances. In real trials, a criminal defendant's presence must be noted on the record, so this appearance will gain brownie points with criminal attorneys who are judging.

> *E.g. "Good morning, your honor, my name is John Smith S-M-I-T-H, and this is my co-counsel Amy Green G-R-E-E-N. We represent the defendant, Ms. Brown, who is present in court."*

2. **Stipulations**

Announce any stipulations in the packet that the team plans on using at trial. This is to ensure the judge is aware of the stipulations and to make sure the other side agrees that the stipulations have been made.

In some cases, a team may wish to have both parties agree to the admissibility of a document or the existence of a fact. A stipulation means that the fact or item is admitted as evidence at trial without either side having to prove the fact or lay the foundation to

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[54] *See*, *e.g.*, FED. R. EVID. 404(B); 805.
[55] *See* HAYDOCK & SONSTENG, note 42, at 26-28.

introduce the item. This focuses the trial on the issues that are actually in dispute.

3. **Use of the courtroom**

Attorneys must always ask for permission to approach the judge's bench. There are three other times when attorney movement in the courtroom may be subject to a restrictive rule of court: when using the well during statement and questioning, when approaching a witness called by that attorney, and when approaching a witness called by the other side.

The general rule in court is that attorneys may move in the well while they are delivering opening and closing statements and do not have to remain behind the counsel table or podium during examinations. In federal court, the "old" rule was that counsel must always touch the podium while speaking. In some state jurisdictions, it is common for attorneys to sit at counsel throughout the course of trial. Be aware of these "sitting jurisdictions" because the judges for your round in your courtroom may think it is odd or strange for you to be standing or moving around. The safest course of action is to simply ask for permission to use the well or to "move freely about the courtroom during trial."[56]

If permission to move about freely is not given, remember to ask to approach a witness during direct and cross-examination.

4. **Constructive sidebars**

A trial competition is a learning experience for all students in the room, and the usual courtroom practice of approaching the bench ("sidebar") to argue objections obstructs this purpose by preventing the student-witnesses from hearing what occurs

[56] *See, e.g.*, S.D.N.Y CT. R. ("Please stand a respectful distance from the jury at all times, addressing the jury and witnesses from the podium only, unless the Court gives you

during that portion of the trial. In cases where there are additional scoring judges who serve as mock jurors, a sidebar prevents these judges from scoring this portion of the trial.

Some competitions prevent all sidebar conversations, while others remain silent on their use. Students should seek to preserve the fiction of a real trial with real jurors, as a major practice point is determining what objections the jury can hear and what ones should not be. To preserve this fiction, ask for a "constructive sidebar," where all sidebar conversations occur without the attorneys approaching the bench and within the hearing of everyone in the room. Everyone is to pretend as if the sidebar discussion is happening outside the presence of the jury.

5. **Gender of the witnesses**

If the packet dictates a male witness and the witness team consists of two women, the teams must change the sex of the character (Mycroft in the packet becomes Mary) or the female student must play the character as male. This should have been objected to during a request for clarification prior to the competition, but sometimes the packet is not changed. Use housekeeping to inform the judge of the team's solution.

Properly written packets use characters that can be either male or female, if only for the reason that it is illegal for state schools to pick students for teams based on their sex.

6. **Motions in limine**

Announce that you have motions in limine, but wait until prompted to begin arguing the motions.

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permission to approach the witness or to publish an exhibit to the jury.").

D. Motions

In most competitions, motions are allowed right before opening statements. Generally, motions in limine are the only ones allowed: motions to suppress, to quash, or for summary judgment are generally too long and complex to include in mock trials. Motions in limine (meaning "at the threshold," not "to limit") are lodged to determine what will be admissible at trial.[57] Treat them like objections in advance of trial, only longer and better researched.[58] The prosecution/plaintiff goes first in motions.

The old 1L exam writing method of IRAC is the best way to deal with each motion, remembering that at this point the judge might not know what the case is about:

1. Identify the Issue - tell the judge what piece of evidence you are talking about.
2. Recite the Rule - tell the judge what rule applies.
3. Analyze the Rule/Issue - tell the judge why the evidence comes in or doesn't under the rule.
4. Clarify your Conclusion - tell the judge that the evidence should come out or in now and not after argument before the jury.

VI. The Trial – From Opening to Closing

Now that you have gotten through the preliminary matters and pretrial motions, now it is time to begin with Opening statements. Opening statements are followed by the

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[57] *See* MAUET, *supra* note 5, at 448-49.

[58] *See* ROSE, *supra* note 3 at 12 ("Seven Fundamental Tasks of Successful Motions Practice: Know the local rules; Draft sound legal motions; Identify the source of your evidence; Do not forget to balance your law, facts and moral theme; Know your audience; Argue to the judge, not with opposing counsel; Understand the effect of the judge's rulings.").

prosecution or plaintiff's case-in-chief, then the defense. Most mock trials do not allow for rebuttal witnesses to be called by the prosecution or plaintiff. Student advocates need to be able to develop their questions, prepare foundations for any exhibits they will want to introduce, and prepare for objections during the witness presentations. The mock trial ends with closing arguments.

A. Opening Statements

Opening statements begin with a "hook"[59]—a 10-15 second statement that makes the jury or judges look up and pay attention. This could be one of the case themes or it could be the case theory, if it's catchy enough.[60]

> *Sky diving. Bungee Jumping. Climbing Mount Everest. Extreme sports with extreme and obvious risks.*

What follows in mock trial is the student introducing herself, her co-counsel, and her client to the jury.**[61]** In real life, she typically would have done this in voir dire of the jury venire.

> *My name is Lissa Jacobs, and along with my co-counsel Sara Zalude, we have the privilege of representing Jordan Lee, owner of Everest Adventures.*

If the "hook" is not your theory, what may follow next is a formulation of the case theory. This is the roadmap before beginning the story of the case.[62]

> *We are here today because on May 15, 2014, Jordan Lee and*

[59] *Blues Traveler – Hook*, YOUTUBE (Jan., 2010), http://www.youtube.com/watch?v=pdz5kCaCRFM
[60] *See generally* MAUET, *supra* note 5, at 61-84.
[61] *Id.* at 62-64.
[62] *Id.* at 62.

> *his expedition crew became victims of the extreme and obvious risks inherent in climbing Mount Everest. Beck Weathers did not survive the frozen, oxygen-poor trip to the top of Mount Everest: an area climbers refer to as the Death Zone.*

Next, paint a picture for the jury that explains the major facts that are important to the case theory.[63] This is like a Statement of the Case in appellate work, but it doesn't have to be as comprehensive. Be absolutely truthful, make no promises that cannot be kept, and choose all words carefully to put the emotion and therefore the jurors on the team's side.

> *Jordan is a fifteen-year veteran mountain climber. He apprenticed with one of the best alpine climbers the world has ever seen: Ed Vistures. Two years ago, Jordan and his wife finally scraped together enough money to start their own mountain climbing company: Everest Adventures. Jordan pre-screened numerous applicants for the 2014 expedition to the top of Mount Everest, carefully weeding out those whose doctors' check-ups or climbing skills did not meet the high standards necessary to climb the world's tallest peak. Beck Weathers was one of the applicants who, on paper, made the cut . . . .*

Notice how in this example, the defense in a wrongful suit against Everest Adventures, much emphasis is placed on personifying Jordan Lee and his company. Making the jury empathize with the client, or at least see the client as a person, is vital from the very first minute of the presentation.[64] If the client is at the counsel table, and he should be if he is a witness, the attorney can stand behind or beside him as she introduces him. She can place her on his shoulder and visually express kindness and affection for him. If the jury sees that she respects or likes him (and is unafraid of him in the case of a

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[63] *Id.* at 64-66.
[64] *Id.* at 62-64.

criminal defendant) then it will be easier for the jury to like the client and the case.

Notice also that the theme of the case is present throughout the opening: climbing Mount Everest is dangerous. The theory of the case is that the victim's death was not caused by the defendant but by the mountain itself. The theme does not prove this theory by itself, but it does provide a lens through which the facts fit the theory.[65]

The opening will continue with the story, in this case what happened on Mount Everest the day the victim died. Depending on the type of case, witnesses can be introduced through the story. Eyewitnesses, in order to emphasize their correctness, should be brought in to parts of the story where their testimony is the most vital.

> *Tracy Norwood was on the mountain that day with Justin Weathers and Jordan Lee. Together the three of them left Camp Five and made their way to the Hillary Step.*

If there are pieces of evidence that will be admitted, such as a murder weapon with no chain of custody issues, use them during the opening.[66]

> *Jordan Lee published this brochure on his website everestadventures.com. You're going to get to see this brochure later and you're going to hear Mr. Lee tell you about the medical and physical requirements that he listed on this brochure.*

Do not mention items that may not be admissible: if their mention is not a mistrial, they will at least become the focus of the opponent's closing: "Opposing counsel promised you an email from the defendant proving his guilt. Where is it? Why don't we have it? How can you do your job without it?"

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[65] *Id.* at 62.
[66] *Id.* at 69-70.

Above all else, remember the three main points to an opening: communicating your theory of the case, getting the jury to like the attorney (and therefore her client), and telling the jury how to listen to the evidence that will be presented or previewing the testimony and evidence.[67] During opening, counsel is not just a storyteller: she is an advocate. She does not "argue" the law. Instead, she tells the jury a chain of events that could be believed and makes them believe it. The other side tells tales. She tells the truth.

B. Direct Examinations

The entire justice system is based on the notion that cases are proven through the direct examination of witnesses. Opening statements and closing arguments may win cases, but directs prove them. This is the opportunity to have a "normal" person (i.e. a non-lawyer) tell the client's side of the story.[68]

Students are often at a loss when faced with a blank page and the task of writing their first direct examination. Fortunately, the most important part has already been written: the team's theory of the case. Everything that will happen during the direct is going to support this theory. Next, the student must develop the story of the witness: how does this witness advance the case theory?

If the team has developed a thorough timeline, students can use that to identify which facts can be elicited from each witness. Which facts help the case? Which facts hurt? Make sure the story for the witness neutralizes all those "bad" facts, fits with the case theory, and can be adopted by the witness without risk of perjury.

Just as each witness needs a story that supports the case theory, there will be themes

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[67] *Id.* at 67-68.
[68] *See* LUBET, *supra* note 42, at 37.

in the witness's examination that support the witness's story and the case theory. One of the themes that can be developed for each witness is presented through the witness's label or nickname. Every person who is important to the case – and in a mock trial this includes all witnesses – should have a nickname. A prosecution case will have a "victim" or an "eyewitness." A plaintiff's case will also have a "victim," be it a personal injury claim or a contract dispute. Other examples of labels or nicknames could be more descriptive, like the "well-meaning secretary," the "trusting co-worker," or the "first-responder." The label should help hone the themes to be developed through the witness, and it gives an easy way for a juror to remember which witness is which and why the witness is important.

After the case theory and themes and the witness theory and themes are developed, the student can identify the facts about which the witness needs to testify.

Next, begin to think about the order in which those facts should be shown to the jury. This is not necessarily the order in which the facts appear in the witness's statement. The order of the witnesses can vary, too. Does the team want to start with the emotional witness or end with him? Is one witness needed to introduce a piece of evidence before another witness can talk about it?

The first thing a direct examination should do is answer the jury's first questions: "Who is this person, and why should I believe her?"[69] Personalize the witness. What does she do, if that's relevant? Does she have a family, if that's relevant? Why is she testifying today? The jury must know why the witness is credible before she testifies to the facts that are in dispute in the case.

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[69] *Id.* at 38.

Questions on direct must be non-leading.[70] This means that the questions must not suggest an answer. In practice, questions should generally begin with a "Who," "What," "Where", "When," "Why," or "How." You may also begin with lines such as "Could you describe . . . ?" or "Can you explain . . . ?"

> *Q: Whom did you talk to?*
>
> *A: I spoke with Chris Alman and Dana Dalton.*
>
> *Q: What observations did you make of Dana Dalton?*
>
> *A: She was shaken; quite upset; in shock. Her eyes were red as if she had been crying.*
>
> *Q: Could you describe for the jury what Dana did after you arrived?*
>
> *A: She stood up from her chair and began to yell at me.*

The script should build up to a point and emphasize elements by a technique called "looping."[71] This is not merely repeating the answer in the next question. Looping incorporates part of the witness's answer into the next question. Be careful not to overuse this technique, as it can become tiresome.

> *A: (witness) That's why I called the police.*
>
> *Q: What was the first thing that happened after you called the police?*
>
> *A: A truck almost ran me over.*
>
> *Q: What color was the truck that almost ran you over?*
>
> *A: Red.*
>
> *Q: What direction was the red truck that almost ran you over coming from?*
>
> *A: It was coming from the accident site.*

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[70] *Id.* at 40.
[71] *See* BERGMAN, *supra* note 52, at 192-94.

Most directs culminate in an answer to a point of dispute in the trial. If the jury believes the witness, the testimony will prove an element necessary to win the case. The beginning credibility questions set the stage for why the witness should be believed. After laying the foundation of credibility early on in the direct, the attorney can later form a question that reminds the jury why it should believe the witness's answer.

> *Q: Officer Benton, you've been a police officer for 20 years, have you ever had experience with people who had been drinking?*
>
> *A: Yes, of course*
>
> *Q: Did you have any reason to suspect that Dalton had been drinking or was otherwise impaired?*
>
> *A: No.*

Note that the last question starts with a "did you." This is a red flag for a "Leading" objection, but in this case it doesn't suggest an answer as the witness could answer "yes" or "no." The previous question is related to drinking, and there is no elegant way of rephrasing the question to be non-leading. If the student has shown an awareness of and has followed the rules of evidence so far, a judge will almost always allow this form of question.[72] Just in case, know how and why each of the questions in the direct is non-leading, and be ready to rephrase if necessary.

Once the student has developed a basic list of questions, the next step is identifying the structure and signposts needed to make the information more understandable to the jury. The direct should be broken up into sections in order to avoid the monotony of "question, answer, question, answer." Build up to and focus on one main point, then pause. Announce that the next set of questions will be on a new point. This is called signposting,

bullet pointing, or headlining.[73]

> *Q: Now I want to talk to you about what this red truck that almost ran you over did after it left the scene of the accident. What did you see next?*

Use of documents during direct examination is covered under Section 13, Visual Aids.

1. **Expert witnesses**

Some case packets will contain an "expert" witness. Experts are people qualified by experience, training, or education to provide an opinion to aid the jury in deciding the case.[74] A witness is not an expert automatically: the attorney must first introduce evidence of the witness's expertise. After the witness testifies about his qualifications, the attorney tenders the witness as an expert in a particular field. The opposing counsel has the opportunity to voir dire the expert on his qualifications and object to the witness being qualified as an expert in the tendered field. The judge can accept the witness as an expert in the field, not accept the witness as an expert, or can choose to limit the scope of the witness's expertise to a smaller field than the one requested by the directing attorney.

Once the field of the witness's expertise is determined, the attorney can ask the witness to provide opinions relevant to the case. The expert is also allowed to answer hypothetical questions and so is not limited to his personal knowledge or the facts reviewed about the case.

Ask the expert non-leading questions and allow the expert to give the jury the

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[72] *Id.*
[73] *See* FONTHAM, *supra* note 27, at 315-16.

answer. Juries will more readily believe the expert than the lawyer.

C. Cross Examinations

The defendant's right to cross-examination is enshrined in the Sixth Amendment to the U.S. Constitution. In practice, both parties in both criminal and civil trials have a statutory right to cross-examine witnesses called by the other side. Cross allows a party to examine the biases, inconsistencies, and other weaknesses of the opposition's witness and to draw out evidence held by the opposing witness that is helpful to the party's theory of the case.

Above all else: keep it simple. Yes or no answers only. One fact per question.[75]

Jurors expect the "Matlock Moment," when the defense attorney badgers the key prosecution witness into finally admitting to killing the victim and framing the defendant. This moment it will never come, at least in a mock trial. It is the tendency of most lawyers to try and win the case on every cross. This will not happen, as no one witness has all of the necessary pieces to the other side's case. The trick is to find the key points this witness can testify about and to expose them, even if it is a very coached witness who won't admit or remember that the sky is blue.

A witness on cross is either neutral or negative to the case.[76] A neutral witness does not advance any points that are detrimental to the case theory and is not openly hostel to the client. An example would be a loss-prevention manager testifying about a theft that occurred at one of the many stores he oversees. He is important to the prosecution to prove there was a theft, but is neutral to the defense if the theory is that there was a theft but the

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[74] FED. R. EVID. 702.
[75] *See* ROSE, *supra* note 3, at 155-57.

defendant didn't do it. There is no reason to attack this witness if he can't place the defendant at the scene. Get the most out of neutral witnesses before they realize they are helping the opposing side, and then get away before they can hurt.

A negative witness has said something on direct that, if believed, could destroy the case. Quickly and nicely ask the witness about the case using yes or no questions. Then turn up the heat and attack them for all of their biases and shortcomings.[77] Even while attacking the witness, though, remember that cross is ". . . not the art of examining crossly."[78] Always maintain a cool demeanor, and never argue with the witness.

Here is an example of the beginning of a cross examination of a negative witness from a previous competition:

> *Q: There is a state certification for accident reconstructionists. (A: No.)*
>
> *Q: You're not a certified accident reconstructionist. (A: No.)*
>
> *Q: You haven't taken the state certification exam. (A: No.)*
>
> *Q: You're not even qualified to sit for state certification exam. (A: No.)*
>
> *Q: Because you haven't taken the required 40 hour course on accident reconstruction. (A: Right.)*
>
> *Q: None of your investigations you mentioned were done as a certified accident reconstructionist. (A: No.)*

Note that there is only one fact per question.[79] The wording of the questions is deliberate and precise—use the exact wording from the witness's statement given in the case packet. The prepared witness will know she has to answer the question correctly or

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[76] *Id.*
[77] *Id.*
[78] MACCARTHY, *supra* note 8, at 10 (citing Horace Rumpole, barrister for John Mortimer.)
[79] *Id.* at 163.

face impeachment.[80] The unprepared witness will provide an opportunity to impeach. Because the cross-question uses the same words as the witness statement, the witness cannot argue over semantics.

When turning to a new point, announce for the jury that it will next hear about a new set of facts, if doing so will not give away the game plan to the witness. Sometimes, a "professional" witness, like a police officer or an expert, will give more reliable answers if he does not know where the questions are leading.

Generally, an attorney should know the answer to every question she asks a witness.[81] In a mock trial, she should always know the answer. The answer should be either "yes" or "no," and it should probably be "yes" as that's less confusing to the jury.[82] Don't permit the witness to explain the answer, and don't argue with the witness. It is not a conversation; it is a monolog with the witness providing affirmation. Similarly, the attorney is not really asking the witnesses questions—the attorney is providing answers.[83] (Notice the questions above are merely statements.) The attorney's tone should be authoritative, not questioning.[84] The questioning attorney does not even have to ask, "Is that correct?" The witness should know that an answer is required. Make the witness look like an idiot if she asks, "Is that a question?" The jury knows it is one.

Don't try to win the case on cross. The witness will never give the opposing side the "correct" answer to a question that ties up its case in a nice bow. All one has to do on cross is look good, make the witness look bad, and develop the points that exist which help the

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[80] *See* MAUET, *supra* note 5, at 277.
[81] *See* MACCARTHY, *supra* note 8, at 111.
[82] *Id.* at 91-92.
[83] *See* ROSE, *supra* note 2, at 165-74.
[84] MAUET, *supra* note 5, at 263.

case theory and themes. Putting the pieces together is the job of the closing attorney.

1. **Expert witnesses**

An attorney has the opportunity to cross-examine an expert twice: first on his qualifications during voir dire and second on his opinions. Voir dire of a witness comes directly after the witness is tendered as an expert in a particular field. It is focused on the experience, training, and education of the witness. Questions about the number of cases the witness has handled, the number of times she has been qualified as an expert, and where she went to school are warranted. Questions about the opinion formed or actions taken in this particular case are not allowed.

Students should be prepared to object to a witness's expertise or to object to the scope of the expertise if the theory of the case is undermined by the existence of an expert on the other side. When determining whether to object to a witness's expertise, ask: If the witness is an expert, so what? Sometimes, the theory of the case will be aided by the opposing witness's expertise and testimony. In other cases, the expertise may be irrelevant to the case theory. If a DNA expert testifies that the victim's blood is on the defendant's shoes, that expertise should be questioned if the defense theory is that the defendant is innocent. If the theory is that the defendant acted in self-defense, there is no need to question the expertise of the scientist, because it doesn't matter that the DNA is there.

It is possible that the methodology used by the expert is questionable under *Daubert* or *Frye*.[85] This type of objection may not be available in a competition due to the

[85] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (holding that FED. R. EVID. 702 did not incorporate the Frye "general acceptance" test as a basis for assessing the admissibility of scientific expert testimony, but that the rule incorporated a flexible reliability standard instead); Frye v. United States, 293 F. 1013 (1923) (holding that expert

restraints of the case packet length and number of witnesses.

D. Closing Arguments

Closing is one of the hardest things to master in a mock trial, as it requires practice and actual thought. Openings, directs, even crosses can be scripted in advance using the input of coaches and other team members. Closings should definitely be scripted in advance, but portions of that script fly out the window as soon as the round begins and the opposing team announces a novel idea.[86]

A closing should be catchy and should take no longer than necessary. Start with the major theme or with the case theory. This should mirror the start of the team's opening. Next, tell the jury "you just heard . . ." and go into the team's version of the story using what has been introduced in trial. This should be modeled on the story used in the opening. It's your "here's what happened" moment.[87]

Next, consider talking about the burden of proof. First, if the team is the side that has the burden, say so, and say that the team has met that burden. If the side doesn't have the burden, talk about how high that burden is and that the other side did not do its job.[88] Second, give the jury a roadmap with the reasons why the burden was met or not met.[89]

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testimony must be based on scientific methods that are sufficiently established and accepted).

[86] *See* LUBET, *supra* note 42, at 390-91.

[87] *Id.* at 390.

[88] *See* BERGMAN, *supra* note 52, at 520-21 ("The judge will instruct you that we have to prove our case by a preponderance of the evidence . . . . Assume that you have a balance scale and you place all of our evidence on one side of the scale and all of the defendant's evidence on the other side. If our side of the scale is heavier even by the weight of a single feather, we have proved our case by a preponderance of the evidence.").

[89] *Id.* at 498.

Trilogies are often remembered, so use three reasons if possible.[90] Finally, go into each of the reasons using actual quotes and real evidence that was introduced at trial.[91]

If the case packet provides a statute or jury instructions, use them. Tell the jury "The law says . . ." or "I believe the judge will instruct you . . ." and then apply the facts to the law. Use the case themes to show why the facts fit the law to the team's benefit.[92]

Speak in short words, use simple sentences, and pause every five to six sentences. Look the individual jurors directly in the eye. Use the entire space available in the courtroom, moving confidently and with purpose around the well every time the closing transitions to another major theme or point.[93] Move to a new position during a pause in delivery, not while speaking. Remember the maxim: Use your hands when you're speaking, not your feet.[94]

End with the case theory and the team's main theme. Tell the jury to vote "guilty," "not guilty," "liable," or "not liable," whichever you want them to vote.[95] If the attorney cannot say the words, the jury won't.

E. Objections

Objections have two purposes: legally to ensure that only admissible evidence is

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[90] ROSE, *supra* note 3, at 397; MACCARTHY, *supra* note 8, at 25, FN 2.
[91] *See* HAYDOCK & SONSTENG, *supra* note 42, at 657 ("An attorney may not introduce or argue new matters during closing arguments beyond the scope of admitted evidence, including oral testimony and exhibits.").
[92] *See* BERGMAN, *supra* note 52, at 528 ("[Y]ou typically should explain important instructions and relate them to your arguments . . . . [W]hen relying on an inferential argument you may want to explain the instruction and its application.").
[93] HAYDOCK & SONSTENG, *supra* note 42, at 654. (This movement in the courtroom during statements is sometimes referred to as the "NITA triangle.").
[94] FONTHAM, *supra* note 27, at 702.
[95] *Id.* at 709 (Example of a conclusion in a closing argument: "Conclusion . . . [y]ou should bring back a verdict of no liability.").

admitted and tactically to control or take back control of the courtroom.[96] They come in two forms: speaking objections, where the attorney is allowed to describe the objection and argue why it should be sustained; and non-speaking objections, where the attorney is only allowed to name the title of the objection and the rule number it is based on. Students must be well versed in rule numbers and capable of making and responding to objections. Begin with the title of the objection and know its rule number. This highlights the student's knowledge of the rules of evidence and focuses the parties on the appropriate issue.[97]

While drafting direct and cross-examinations, the questioning attorney must attempt to phrase questions that will not draw objections. Questions must be constructed so that their answers build to a main point and logical conclusion that will put the jury on the client's side, if not prove the case.[98]

The opposing counsel, the one who is tasked with objecting to the questions on this particular witness, must object to all important or prejudicial errors of law made in either the questions of counsel or the witness's answers. She must object to harmful information only if there is a basis for this objection.[99]

Objections are an art: do not lodge an objection just because the evidence is technically objectionable. Jurors (and judges) become frustrated when the objection attorney nit-picks and barrages the court with a litany of technical objections.[100] Determine

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[96] *See* LUBET, *supra* note 42, at 190.
[97] Ohlbaum, *supra* note 10, at 51-52 (suggesting that objections take the following form: 1. Objection and rule number, 2. Request for sidebar and explain the basis of the objection, 3. Tell the court what further objectionable material will follow after this particular statement, 4. Explain how the evidence unfairly advances the opponent's case and damages one's own, 5. State further legal authority if needed or requested.).
[98] *See* BERGMAN, *supra* note 52, at 155-61.
[99] *Id.* at 558 ("[Y]ou have an ethical responsibility to object only in good faith.").
[100] *See id.*

when to make an objection by asking if the objection or its argument will advance the case theory and themes.[101] If the objectionable testimony is irrelevant or not damaging to the case theory, then it is likely that an objection is not necessary.

In balancing whether or not to object, counsel must not refrain from objecting in order to be nice or speed up the progression of trial. No client likes a pushover. Remember that every attorney represents a client who has legal rights and a personal stake in the outcome of the case. For example, defendants must make the prosecution do its job, and part of that job is establishing the proper foundation before entering evidence. Don't apologize for making someone follow the law. The Constitution is not a technicality.

The witness, in a mock trial at least, must listen to the objections and the judge and attempt to phrase information in a way that will not ring alarm bells for objections. He must attempt to get on the record the important facts necessary to the case that the Questioning Attorney has forgotten because of a well-timed objection. He must also give up on introducing facts that the judge has clearly ruled inadmissible.

In most competitions, students are scored once per witness, and there is no separate score for objections. For this reason, only the attorney crossing the witness can object to the direct of that witness. Only the attorney directing the witness can object to the cross.[102] The other team member doesn't have to sit idle: she can silently pass notes on objections or responses, when it is clear that the help is needed. She can also ensure that no line of questioning is forgotten in a flurry of unforeseen objections.

There are regional differences in the titles of particular objections, but those used here are the most common. Because some mock trial judges may be unfamiliar with the

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[101] Hornstein & Deise, *supra* note 4, at 89**.**

practice of non-speaking objections or may use different names for the objections, students should be familiar with the concept and rule behind each objection and be prepared to kindly provide context for the particular rule or exception cited. Also, some competitions allow the use of case law so have that handy if it is allowed.

Objections complain of procedural error based on the rules of evidence or rules of court or of legal error based on federal or state constitutions, law, or code. In mock trial, objections will be based on the rules of evidence and the case packet. Most criminal competitions permit objections based on the Federal Constitution as well.

Broadly speaking, there are three categories of objections: those based on documents, those based on the form of the question posed, and those based on the content of the answer or the expected answer.

1. **Objections Based on Documents**

Documents will be supplied in the case packet for introduction during trial. Generally, documents must be introduced during the questioning of a witness with personal knowledge of the document. An expert who has relied on the document to form an opinion relevant to the case can also refer to a document. A distinction must be made between objections based on the document itself and those based on the information contained in the document. Even if the document itself is not objectionable, objections can still be made based on the questions posed about the document and on the information contained in the document. For example, all documents are potentially hearsay. So are all the contents in that document. Photographs, diagrams, or maps are typically not hearsay if the witness has personal knowledge of what is depicted and proper foundation has been laid.

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[102] *See, e.g.*, SOUTH TEXAS MOCK TRIAL CHALLENGE, *supra* note 21, at 3.

a) Best Evidence (1002)[103]

This objection usually occurs when a witness is being asked a question about a document that is available to be entered into evidence but has not been. The document should be entered as proof of its contents.

b) Lack of Authentication (901(a))[104]

The document being offered into evidence has not been properly identified and verified as authentic.

A competent witness must be used to identify a document. Exceptions are when a document is self-authenticating or when the document's authenticity has not stipulated to as true and accurate.

Many competitions stipulate to authenticity. In that case, the only objections to be made are to the information contained in the document itself. Most competition judge's l want to see you actually introduce the document with a witness even though a document that is authentic can oftentimes legally be introduced without a competent witness. The document's relevance must be readily apparent for it to be used without a witness. In a mock trial, this introduction is problematic since there is no way to score an attorney's introduction and use of a document unless it occurs during an examination.

If documents are stipulated to be genuine, some judges consider this the same as stipulated authenticity and do not require further foundation be laid to introduce the

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[103] FED. R. EVID. 1002; CHRISTOPHER W. BEHAN, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 315 (2012) ("The Best Evidence Rule is inaptly named. It has nothing at all to do with ensuring the presentation of the highest quality evidence possible at trial . . . . Instead, the Best Evidence Rule requires the introduction of original documents or recordings under relatively narrow circumstances . . . . The rule ought to be called the Original Document Rule.").

[104] FED. R. EVID. 902(a); BEHAN, *supra* note 103, at 291-97.

document. Be sure to be preparing to lay proper foundation though.

2. Objections Based on the Form of the Question

Objections based on the form of the question are used during direct examination to ensure that the witness, not the attorney, is testifying to the relevant facts of the case. On cross, objections are used to protect the witness from confusing, repetitive, or overly hostile questions.

a) Argumentative (611(a))[105]

The questioning attorney is not questioning a witness about fact or opinion but is instead making an argument of law or application of law that should be argued to the jury in summation.

This is not an objection to opposing counsel making a good point on cross. Good crosses consist of statements said in the direction of the witness to which the witness says yes or no. It may have an argumentative tone. The question is whether it is argument instead of evidence.

b) Asked and Answered (611(a))[106]

The question being asked has been asked by this attorney and answered by this witness.

This is not an objection to a question on cross that has been covered in direct.

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[105] FED. R. EVID. 611(a).

[106] ROSE, *supra* note 3, at 503 ("Unfair to allow counsel to emphasize evidence through repetition. An especially useful objection during re-direct examination; greater leeway on cross-exam, however, to test recollection."). *But see* MACCARTHY, *supra* note 8, at 128 ("There is no such proper objection.").

c) Assumes Facts Not in Evidence (611(a))[107]

A question by the directing attorney that contains information not yet in the record.

This could be an objection to a question based on a hypothetical set of facts that is posed to a lay witness.

On cross, the counsel is the one testifying, so this is not an objection to a proper question containing only one fact. It may be used to protect a witness from a potential trap when the premise of the question assumes a fact to which the witness does not agree, since a simple "yes" or "no" answer would not expose that disagreement.

d) Beyond Scope (of direct) (611(b))[108]

While questioning the witness on cross, the opposing counsel did not cover the evidence being elicited, and it is not relevant to any of the previous issues covered. The rule allows two important exceptions: first, any question related to a matter "affecting the credibility of the witness" is certainly allowed, and second, the court may exercise its discretion and allow questions "into additional matters as if on direct examination."[109]

e) Compound (611(a))[110]

The question is really two questions posed as one.

Objection should only be used when the question is misleading and the jury could misconstrue the answer. Technically, this objection could be raised every time an attorney

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[107] FED. R. EVID. 611(a); BERGMAN, *supra* note 52, at 572-73 ("A question is improper when an attorney makes an assertion as a precursor to a question. The form of the question does not allow a witness to respond to the attorney's assertion. The problem most commonly occurs during cross examination.").
[108] FED. R. EVID. 611(b).
[109] *Id.*
[110] BERGMAN, *supra* note 52, at 571 ("A compound question consists of multiple parts, creating uncertainty about which part a witness might answer. The problem usually arises during direct examination.").

begins a statement with, "And . . ."

f) Cumulative (403; 611(a))[111]

The material being asked has been covered before and is already in evidence.

This objection is typically made once a document is entered into evidence and then the witness attempts to repeat or read exactly what is in the document. The advocate typically argues something like "Objection. Cumulative. Your honor, the document is in evidence, this is cumulative and a waste of time to have the witness read the contents." Keep in mind that the judge may allow repetition, clarification, or explanation of important facts even if it is technically "cumulative." Repetition is also permissible if an important point has been lost in the middle of a lengthy argument over an objection.

g) Improper Impeachment (607-610, 613)[112]

Many things "are" improper impeachment, but this objection generally covers impeachment based on a prior inconsistent statement. The most important factors of a correct impeachment are:

1. Have a concise question that the witness is currently not answering truthfully. Make sure the witness did actually answer the question.
2. Refer the witness to the inconsistent statement, providing the opposing counsel with a page or line number to which you are referring.

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[111] FED. R. EVID. 403; FED. R. EVID. 611(a); ROSE, *supra* note 3, at 504 ("The trial judge has discretion to control repetitive evidence. Repeated presentation of the same evidence by more exhibits or more witnesses is unfair, unnecessary and wastes time.").

[112] FED. R. EVID. 607-610, 613; Behan, *supra* note 103, at 245 ("Traditionally, the reasons for impeaching witnesses fall into five broad categories: (1) the witness has an untruthful character; (2) the witness is biased or has a motive to falsify testimony; (3) the witness has a defective capacity to observe, recall or communicate; (4) the witness has made prior statements that are inconsistent with his trial testimony; (5) the witness's testimony can be contradicted by other witnesses or evidence.").

3. Ask the witness if she made that statement previously.

Trying to confuse the witness into contradicting herself, not having a prior statement that directly relates to the current testimony, and not referring opposing counsel to the source of the previous statements are the big objectionable factors.

h) Leading (611(c))[113]

The question on direct suggests an answer.

This is not an objection on cross.[114] Leading is allowed in some circumstances on direct. Leading questions are allowed on direct examination when the matter is preliminary and undisputed, leading is necessary to develop testimony, or the witness is hostile.[115]

3. Objections Based on the Content of Answer

As most jury instructions read, "nothing the attorneys say is evidence." For this reason, the content of the witnesses' answers is the most important at trial and is subject to the most important objections. Most of these objections can be made before the question is finished in order to keep the information from reaching the jury.

a) Improper Characterization (404-405)[116]

A question or an answer describes something that is highly prejudicial and not helpful to the jury.

A typical example is describing the defendant or her actions as "crazy." This is a charged word and has no real meaning unless the witness is a medical doctor who actually

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[113] FED. R. EVID. 611(c).
[114] MACCARTHY, *supra* note 8, at 82, 84-46 (citing Ohio v. Roberts, 448 U.S. 56, 71, 100 S. Ct. 2531, 2541 (1980) and H.L. v. Matheson, 450 U.S. 398, 401-02, 101 S.Ct. 1164, 1167 (1981)).
[115] FED. R. EVID. 611(c).
[116] FED. R. EVID. 404-405; *see, e.g.*, Rose, *supra* note 5, at 505 ("Example: 'He looked like

means "crazy."

It is not a very useful objection most of the time because the objection generally draws more attention to the word and thus cements the idea into the minds of the jurors. Consider a pre-trial motion or requesting a sidebar, if the competition allows.

b) Improper Expert Opinion (702)[117]

The testimony involves some degree of skill or expertise and the witness has not been entered as an expert in that area.

Daubert and *Frye* challenges (challenging the methodology of the expert) are also covered under this objection and these methodology challenges do not have to be lodged pre-trial. [118]

c) Improper Lay Opinion (701)[119]

The witness is giving testimony based on no special expertise of the witness and that does not assist the jury in its understanding of the case.

Lay opinion is allowed when the opinion is not based on scientific, technical, or other specialized knowledge and it is rationally based on the perception of the witness. For example, a police officer might have some experiences that would allow him to give an opinion or observation that is not scientific or technical as long as it is based on his prior experience. Mauet and Wolfson explain "a police office can describe the defendant's

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a crook.'").

[117] FED. R. EVID. 702; BEHAN, *supra* note 103, at 562 ("There are two necessary foundational elements that must be satisfied in order to introduce expert opinion testimony at trial. First, the witness must be qualified as an expert based on knowledge, skill, training, experience, or education. Second, the expert's opinion must satisfy the reliability criteria of Rule 702 and the *Daubert* line of cases.").

[118] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Frye v. United States, 293 F. 1013 (1923).

[119] FED. R. EVID. 701.

'suspicious' behavior observed at the site of a drug deal without being qualified as an expert."[120] This is distinguished from the officer explaining "the defendant's use of code words to describe drug quantities and prices" or testifying that "the defendant's conduct was consistent with that of a drug trafficker."[121] Those opinions would require a FED. R. EVID. 702 qualification and reliability determination.

d) Lack of Foundation (602; 901(a))[122]

The prerequisite evidence has not been entered that would make this evidence admissible. This could be proof that a confession has been made knowingly and voluntarily (predicate), that a witness is competent to testify to a fact, or that a document is admissible. It is also an appropriate objection when the required steps have not been followed to introduce an item into evidence.

This is a good objection to make when the evidence about to come in is objectionable in some way, but the foundation that proves how the evidence is admissible has not been introduced. It is also useful if the witness does not have personal knowledge of the evidence, but that has not been established yet through testimony. Attorneys may prefer making the underlying objection first or with this objection, but the underlying admissibility objection will require an offer of proof.

e) More Prejudicial Than Probative (401-403)[123]

This objection has "magic words" that support its assertion: "The evidence being introduced is highly prejudicial to my client and this prejudice far outweighs the limited

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[120] THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 59 (3rd ed. 2004).
121 *Id.*
[122] FED. R. EVID. 602, 901(a); ROSE, *supra* note 3, at 504 ("Ex: Offer of 'recorded recollection' without showing memory failure; similar to objection for lack of authentication or personal knowledge.").

probative value of the evidence."

This is not an objection of "This really hurts my case." All evidence by one side will hurt the other side's case. An objectionable piece of evidence is one that not only hurts the case but also is not relevant enough to the merits of your opponent's case to be admitted.

f) Non-responsive (611a)[124]

The witness is not answering the question asked.

Opinions differ, but generally the person asking the question is the one who uses this objection. It should only be used if the non-responsive answer is also inadmissible in some way. Some judges maintain that a person cannot object to "their own question" and therefore cannot object to the non-answer. A better strategy is to avoid questions on cross-examination that cannot be answered with a yes or no.

g) Relevance (401)[125]

The evidence being solicited does not relate to merits of the case or another admissible purpose such as foundation or permissible character evidence.

Be very careful with this exception, as it gives opposing counsel an opportunity for a "mini-closing" by telling the judge, but really the jury, the importance of this evidence to the case theory. If raising this objection, ask for a (constructive) sidebar. If faced this objection, start highlighting the team's case theory and witness's story for the jury.[126]

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[123] FED. R. EVID. 401-403.
[124] FED. R. EVID. 611(a); ROSE, *supra* note 3, at 505 ("NOTE: an objection based solely on this ground is generally deemed appropriate only if made by the examining attorney; thus opposing counsel should state some additional basis for the objection.").
[125] FED. R. EVID. 401.
[126] Ohlbaum, *supra* note 10, at 46 ([When an objection is made,] "counsel should accept the invitation to restate the case theory – attentive to the principles of persuasion – as it

h) Speculation (602; 701)[127]

The witness does not have first-hand knowledge of the fact to which she is testifying.

This could be what someone else thought or why someone did something. It could also include what would have happened had x occurred. This is not really an appropriate objection to make during cross when the cross-examination is seeking to discredit the competence or first-hand knowledge of the witness.

> *Q: You said on direct that you saw the defendant in the store?*
> *A: Yes.*
> *Q: But you don't know why he was there that day?*
> *Objection: Speculation. The witness doesn't know.*
> *Response: Exactly. Your honor, that's the point. This witness doesn't know the full story and has attempted to blame my client for the robbery. The jury is entitled to know exactly what this witness knows and what he doesn't know, what he saw and didn't see.*
> *Judge: Overruled.*
> *Q: So you don't know why he was in the store?*
> *A: No.*
> *Q: You don't know that he used to work there?*
> *A: No.*
> *Q: You don't know that he was there picking up his final paycheck?*
> *A: Well. No.*

So be careful when making this objection during cross examination as you may call even more attention to the fact that your witness did not have the entire story correct on direct.

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bears on the evidence under discussion. Regardless of whether the evidence is admitted or barred, juries will often assess the advocate and strength of the entire case based on the way in which the counsel objects.").

[127] FED. R. EVID. 602, 701.

i) Hearsay (802)[128]

A statement made out of this court offered in court to prove the truth of the matter asserted.

A statement is not hearsay when the fact that it was said is relevant, not the truth behind the statement.

Hearsay is one of the hardest rules for beginning students to master, and the exceptions to it warrant their own section below.

4. **Defining Hearsay (801)**[129]

a) Statement

Statement is defined as an oral or written assertion[130] or non-verbal conduct of a person, if the conduct is intended by the person to be an assertion.[131] Nodding, pointing, or even remaining silent can be a statement given the appropriate circumstance.

b) Out of Court

Any statement made by any person before the trial starts is an out of court statement.

Any statement made by the person on the witness stand when that person was not on the witness stand is still hearsay, when it is offered to prove the truth of the matter asserted. The witness's statement that "I told him [xyz] two months ago" is hearsay when used to prove that [xyz] is true.

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[128] FED. R. EVID. 802; BERGMAN, *supra* note 52, at 504 ("Question did not call for hearsay, but witness gave it anyway. Move to strike and ask judge to instruct that response be disregarded.").
[129] FED. R. EVID. 801.
[130] FED. R. EVID. 801(a)(1).
[131] FED. R. EVID. 801(a)(2).

c) Truth of the Matter Asserted

If it matters whether the statement is true or not, then the "truth of the matter asserted" is relevant. For example, a police officer telling the defendant in a recorded statement that there is an eyewitness to the killing is relevant to the murder charge against the defendant. "There is an eyewitness" is hearsay.

If the fact that the statement itself was made is relevant, and not if the statement itself is true, then it is not hearsay.

A statement is non-hearsay when *only the fact that the words were spoken* is relevant.[132] Ask yourself: "Do we care if the content of this statement is actually true? Or do we care that the words themselves were simply spoken?"

d) What is Not Hearsay and What is Hearsay but Admissible Anyway.

There are three main categories an out of court statement can fall into that make the statement admissible as proof of the truth of the matter asserted: 1. Statements that are not hearsay, most frequently admissions,[133] 2. Exceptions to the rule when the availability of the declarant is not applicable,[134] and 3. Exceptions to the rule when the declarant is unavailable to testify.[135] FED. R. EVID. 801(d)(2) should be read closely as it is used frequently in mock trial competitions. Simply put, admissions by party-opponents are admissible as they are exempt from the hearsay rules.

If the competition allows, remember the overriding Confrontation Clause argument

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[132] FED. R. EVID. 801.
[133] FED. R. EVID. 801(d).
[134] FED. R. EVID. 803.
[135] FED. R. EVID. 804.

to any out-of-court statement being admitted as evidence. If all else fails, quote Scalia.[136]

5. **Hearsay Exceptions: availability of the witness is immaterial (803)**[137]

Rule 803 defines statements which are hearsay but which are admissible despite being hearsay. The rule relies on the circumstances in which the hearsay statement was made to determine if the statement is reliable enough to be admitted.[138] There are 23 listed exceptions under this category. The following are the most common.

a) Present sense impression[139]

The statement describes or explains what the declarant perceives while the declarant perceives it or *immediately* after the declarant perceives it. The perception must be relevant.

b) Excited utterance[140]

The statement was uttered by the declarant immediately and because of a startling event or condition that the declarant perceives. The statement must generally provide proof itself that it was uttered excitedly.

c) Then existing mental, emotional, or physical condition[141]

A statement by the declarant that explains the declarant's current state (mental, emotional, or physical) and is relevant to that state. The statement cannot be used to prove the truth of the statement except in the dispute of the declarant's will.

d) Statements for the purposes of medical diagnosis or

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[136] *See generally,* Crawford v. Washington, 541 U.S. 36 (2004).
[137] FED. R. EVID. 803.
[138] *See* FED R. EVID. 803.
[139] FED. R. EVID. 803(1).
[140] FED. R. EVID. 803(2).
[141] FED. R. EVID. 803(3).

treatment[142]

A statement made to someone treating or diagnosing the declarant for the purpose of aiding that treatment or diagnosis.

e) Recorded recollection[143]

This exception is used to introduce the writing that was unsuccessfully used to refresh a witness's memory. The statement may be read into evidence. The document itself cannot be introduced as an exhibit by the party who called the witness to the stand. When the crossing attorney is the one who faces the forgetful witness, the attorney can introduce the document into evidence.

The writing is also subject to FED. R. EVID. 612, which provides a mechanism for redacting irrelevant potions of the document.

f) Business records[144]

(1) A record of an event, (2) made at the time of an event or shortly after , (3) by a person with knowledge of the event, (4) who as a regular practice keeps those kinds of records as a part of the business, (5) offered in evidence by a competent custodian of the record or by certificate.

g) Public records[145]

Reports and government findings are generally excluded from rules of hearsay because they are assumed to be trustworthy. A major exception is police reports in criminal cases.

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[142] FED. R. EVID. 803(4).
[143] FED. R. EVID. 803(5).
[144] FED. R. EVID. 803(6), (7).
[145] FED. R. EVID. 803(8).

h) Learned treatises[146]

Generally, scientific, historical, or medical statements relied on by a testifying expert. Admissibility changes depending on who is offering the evidence and whether it is direct- or cross- examination. Read the rule.

6. **Hearsay Exceptions where the witness is unavailable (804)**[147]

Rule 804 only relates to statements when the witness is unavailable to testify.[148]

Competitions may include a stipulation that witnesses not in the packet are unavailable. If the case packet does not stipulate to unavailability and the witness is not clearly unavailable, ask for a clarification from the organizers. Some judges will rule that witnesses not in the packet are unavailable without requiring such a stipulation, but some will find that there is a difference between a witness not called by a party and a witness who is unavailable.

There is a changing and heightened standard for when government witnesses will be said to be unavailable.[149]

If a witness is unavailable, three main exclusions may be used to introduce the out of court statement.

a) Former testimony

The statement is testimony given at a trial, hearing, or lawful deposition. The statement is only admissible if it is used against a party who had an opportunity to develop that testimony at the time it was given and whose motive when developing that testimony

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[146] FED. R. EVID. 803(18).
[147] FED. R. EVID. 804.
[148] *See* FED. R. EVID. 804.
[149] *See* United States v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009).

was similar to the motive it now has at trial. If the proponent of the statement has changed case theories since the statement was given, the opponent's motive to develop testimony may not be similar and so the statement may be inadmissible.

b) Statement under belief of impending death

The statement made by a declarant who believed he was dying about why he believed he was dying.

c) Statement against interest

The statement that at the time of its making so prejudiced the declarant that the simplest explanation is that the statement is true.

This is similar to the definitional hearsay exclusion under 801(d) but does not have to be made by a party-opponent.

7. **Residual Exception**

Federal law uses a residual exception for instances that do not fall under any hearsay exception or exclusion.[150] The use of this exception requires notice, so consider a motion in limine. Consider this exception only as a last resort. It can communicate to the judge that you really have not thought through all of the enumerated exceptions in 803 and 804.

VII. When witnesses don't stick to the script

Even though a student examination will never contain a question for which the answer is not known, sometimes a witness gives an answer that is different than the answer contained in the witness's prior statement. This can be because the witness does not remember the statement in the case packet, because the prior statement is internally

inconsistent, or because there is another document that is inconsistent with the statement.

A. Refreshing a Witness's Memory

Sometimes a witness will answer, "I don't know." Never plan to have a witness "not remember." It is dirty pool, and it usually is not believable. If the competition supplies the witnesses or if the opposing witness has been coached to say, "I can't remember," the witness may need her memory refreshed. This can happen on either direct or cross. There are requirements to establishing that a witness's memory must be refreshed by a prior statement, and if it isn't done correctly, a hearsay objection is appropriate.[151]

First, the witness has to say she doesn't remember a particular fact. In a competition, this fact must be contained in the witness's statement or in an exhibit that was created by the witness. Then, the witness has to say or agree that this previous transcript or document would refresh her memory. Next, the document must be shown to witness. After the witness has the document, she must read document silently, and that document must actually refresh the witness's memory. Finally, the document must be taken away and the witness must be able to testify as to what she remembers, not to what the document told her.

Here's a script for refreshing on direct:

> *A: I don't remember [that].*
>
> *Q: It's your testimony that you don't remember [that]; do you remember giving a statement on [date]?*
>
> *A: Yes.*
>
> *Q: Do you remember testifying about [that] when you gave*

[150] FED. R. EVID. 807.
[151] *See* ROSE, *supra* note 3, at 289-99.

the statement?

A: Yes.

Q: If I gave you a copy of the statement, would that help to refresh your memory?

A: Yes.

Q: Your honor, may I approach the witness with a copy of her [statement]?

Q: I'm showing you (the witness) a copy of the statement you made on [date]. I'm referring to [page]. Could you read [that part] silently and let me know when you're done?

A: Okay. (reads). Okay, I'm done.

Q: [take paper away] I have retrieved the witness statement. Does that refresh your memory?

A: Yes.

Then the lawyer re-asks the question about the refreshed fact, and the witness answers. If the witness does not remember, then the document becomes a Recorded Recollection under 803(5), and the prior statement may be read to the jury.

B. Impeaching a witness based on a prior inconsistent statement.[152]

The goal on cross is to impeach the witness on an important point. One way to impeach a witness is to show that he made a prior statement that is inconsistent with his testimony at trial.[153] To impeach:

1. Lock the witness into the current statement being made at trial. ("It's your testimony that . . .")

2. Credit witness's memory of making prior statement. ("You gave deposition on . . .")

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[152] FED. R. EVID. 607-609.
[153] *See* ROSE, *supra* note 3, at 266-70.

3. Tell the court and opposing counsel what document, page, and line number you are going to use to impeach the witness. ("I am referring to Statement given on 7-26-2013, page 4, line 3.")

4. Read the witness the prior statement. ("I asked you the question and you answered . . .")

If the witness admits making the statement, nothing else is necessary. If witness denies making the statement, the statement may be introduced into evidence subject to FED. R. EVID. 613. The above script has given the witness the opportunity to explain or deny the prior statement. The witness will be able to be asked about the statement during re-direct.

If the witness is properly impeached during trial, it is extremely important that you note this during your closing argument. For example, during your closing, you will likely have a portion dedicated to the credibility of the witnesses. As you're discussing credibility, remind the jury that the witness was caught in a lie on the stand and that he tried to explain it away. Otherwise, the impeachment loses its affect as the jury will have forgotten about it by the time closing arguments are complete. This is a great way to score points during both your cross and your closing.

C. Team Exercise: All Object Rule

Practicing objections is difficult. Opposing counsel should not make every possible objection, but the questioning attorney needs to be able to answer every possible objection. Beginning students are often hesitant to voice objections, even if they see evidence that is

inadmissible being presented.[154] Once students have gotten over the fear of objecting, they often object to every question and so must practice the tactical consideration of when to not object to otherwise inadmissible evidence. While students learn to limit objections to ones that advance the case theory, they lose the opportunity to practice answering all possible objections, even those their teammates would chose not to make. At trial, one can never be sure that the opposing team will make the same tactical choice.

Opposing counsel (the ones doing the objecting to the questioning of the current witness) needs to practice *not* objecting as much as she needs to practice objecting. The questioning counsel needs to practice responding to all possible objections. One way to balance these interests is by the All Object Rule.

The questioning of a witness is acted out as usual, but every team member who is not directly participating in the questioning (and coach, where needed) must object when an objection is warranted. The Opposing Counsel must state a correct reason for the objection, and the Questioning Attorney must answer the objection.[155]

VIII. Visual Aids

Jurors are at many disadvantages when it comes to understanding the volume of information that comes at them in a typical trial. They are asked to learn everything about a case in a day or two. Compare this to the months or years spent investigating a case and the years of experience attorneys and experts have in their fields. Mock trials further condense this time to a couple of hours, where student-attorneys are asked to explain a case to a judge who has his own cases to remember, and who may have never read the packet.

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[154] Hornstein & Deise, *supra* note 4, at 116.
[155] *See id.* (This is to ensure that the failure to object was for a tactical reason and not because the objecting counsel missed the need for an objection.).

Worse, he may remember the themes used in a previous round and think that those are facts of the packet, not theories of other students. Visual aids help emphasize what is fact and what should be remembered for both jurors and judges.[156]

In some cases the use of exhibits is practically mandatory, as documents are needed to prove elements of a case. Even when the team knows a piece of paper is going to be used at trial, they must decide how to get it into evidence, and what they are going to do with the document when it's in.

Many great trial attorneys emphasize the importance of using at least one enlarged exhibit for each important witness.[157] It's one thing to ask a juror to pay attention to a back-and-forth conversation between an attorney and a witness. It's another to give the jurors something to look at and something for the witness to use to show the jury what she means when she says, "It wasn't that far."

These exhibits can be marked by the witness and then used by subsequent witnesses who can highlight additional areas. Finally, exhibits should be used in closing arguments to pull together the witnesses and the case theory.[158]

There is another important reason to use enlarged exhibits ("blow-ups"). In mock trial, teams are playing for points. It is difficult for judges to distinguish between two student-attorneys who have the basics of evidence and trial procedure down. Professional, thought-out exhibits will distinguish one team from others who simply enlarged the given

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[156] *See* BERGMAN, *supra* note 52, at 393 ("Most fundamentally, tangible objects tend to be persuasive because most of us are *visual learners* . . . . You can also often use exhibits to emphasize important testimony by eliciting evidence twice, once verbally and a second time with reference to an exhibit.").

[157] *Id.* at 396 (The witness is known as a *sponsoring witness*. She is necessary to provide the testimony that will lay a foundation making the exhibit admissible.).

[158] *See* ROSE, *supra* note 3, at 365 ("Do whatever it takes to engage multiple senses of the

document at the last minute. Use of those exhibits throughout the trial will distinguish teams from the opposition who only uses each exhibit with one witness and then ignores it. Of course, this is a double-edged sword: fumbling with the easel position for an eternity or not being prepared to answer the inevitable objections about the documents will lower a team's score.

A. The Underlying Exhibit

Before a team considers how to show the jury an exhibit, it must determine how to get the exhibit into evidence. It's the document that proves the point and goes into the record for appeal. This means the team has to think about witness order if it plans to use the exhibit on more than one witness.

Why even use a document or other piece of physical evidence? Besides the obvious: "it proves the case," exhibits break up the monotony of testimony. Trials are based primarily on auditory information, but not all jurors learn using their ears. Documents and physical evidence allow jurors to visualize the case in a way that words cannot. Such evidence also lends credibility to witness statements, even if the witness himself created the document. For example, one scientific survey found that readers of a newspaper article on neuroscience gave more weight to the article if a picture of a brain accompanied it.[159] Trial exhibits are like pictures of the brain.

There are four main types of exhibits: 1. Real evidence—the gun, the stolen merchandise; 2. Documentary evidence—correspondence, the contract in question, a check

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jury during your argument.").

[159] *See* David P. McCabe & Alan D. Castel, *Seeing is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning*, 107 Cognition 343 (Apr. 2008), *available at* http://www.imed.jussieu.fr/en/enseignement/Dossier%2520articles/article4.pdf.

stub; 3. Demonstrative evidence—photographs of the scene, diagram of the scene prepared by an investigating officer; and 4. Demonstrative aids—diagrams prepared by lawyers, models of buildings, timelines.

Few case packets include real evidence, as the cost of reproduction is extremely high for physical items like a shovel or a gun. Some packets take this into account by including a stipulation that the picture of the gun is actually the gun. In that case, everyone involved pretends that the piece of paper is a gun, and it is treated like real evidence. Remember to announce this stipulation in housekeeping. The jury generally gets to view this evidence during deliberations.

Documentary evidence is the most common evidence in mock trials, as it can be included in the packet materials. Since entering evidence takes time, something which is in short supply during most timed competitions, a team should only enter in exhibits which are necessary to prove the case or are important enough to read in closing. One piece of paper looks almost identical to another as the lawyer is holding them in her hand, so be sure to cite, quote, and paraphrase the documents at least once with a witness and once in closing. If the documents are important enough to take the time to introduce them, they are important enough to use them throughout the trial.

Most of the time, a witness is necessary to introduce evidence into the record. The document must become relevant, and the direct or cross should be scripted so that the relevance of the document logically flows in the order of questioning before the document is used. The attorney shows the opposing counsel the exhibit, asks to approach the witness, and shows the witness the exhibit. The witness identifies, but does not read aloud or explain, the exhibit. The witness must attest that the exhibit has not been altered or make

some other attestation that conforms to the best evidence and authentication rules. Only then can the exhibit be offered, introduced, and entered into evidence. After the exhibit is entered, it may be published, or shown, to the jury.

B. Introducing real or documentary evidence[160]

What is it?
How do you know?
Has it been altered in any way?

Sometimes there is a stipulation of authenticity that will allow the attorney to enter in an exhibit without a witness, but most judges prefer witnesses to be used if possible. Plus, a witness is needed to use and/or explain the exhibit to the jury.[161] Don't introduce a new idea in closing if the team can introduce it beforehand and then repeat it in closing. Enter in the exhibit when it becomes relevant, and then use it often.

Use an original to lay the foundation and get the exhibit into evidence. Always make certain that the jury and the judge can see the exhibit, but only if the judge has given permission to show the exhibit to the jury.

Authentication and other formalities for entering in a document can be resolved using the script that follows:

1. *Mark the exhibit using the number scheme you have previously decided on (e.g. S-1; P-1; D-1;A.).*
2. *(to the judge, while showing the document to opposing counsel)"I am showing what has been marked for*

[160] For 21 wonderful examples of "Sample Foundations" that includes foundations of many common evidentiary offerings, see Rose, *supra* note 3, at 543-65.
[161] *See* BERGMAN, *supra* note 52, at 396 (This, again, relates back to the *sponsoring witness*. You will need this witness to lay the foundation making possible the admission of the exhibit.).

identification as [S-1], a [title of document or description of evidence], to opposing counsel."

3. *(to the judge - optional) "Would your honor wish to see [a copy or the item]?"*
4. *(to the judge) "May I approach the witness?"*
5. *(to the witness)"I am showing you what has been marked for identification as [S-1]. Do you recognize it?"*
6. *"What is it?"*
7. *"How do you recognize it?"/ "How do you know?"*
8. *Lay foundation for best evidence:*
9. *"Has it been altered in any way?" (real or documentary evidence) OR*
10. *"Is it in the same or substantially same condition as when you last saw it?" (real evidence) OR*
11. *"Does this . . . fairly and accurately depict . . . . " (demonstrative evidence).*
12. *(to the judge) "I now offer what has been marked for identification as Defendant's Exhibit A into evidence."*

The judge is going to ask if there are any objections. If she doesn't, opposing counsel will object here if an objection is warranted.

C. Objections to the introduction of evidence

An important part of preparing to enter a document is figuring out what the underlying objections are to the document and prepare an answer for them. Be prepared to handle any objections that arise without returning to the counsel table and referring to notes. Students should be able to anticipate most objections.

Objections to the document itself include improper authentication, best evidence, and lack of foundation. Check the stipulations in the case packet to see which of these objections is allowed. The authentication of documents is generally stipulated to.

The common objection to the contents of a document is hearsay. If the witness is not the one who created the document, lack of personal knowledge may be a viable objection. Any report may contain improper opinion[162] or an improper opinion on the ultimate issue in the case.[163] If offered against a defendant, any document containing testimonial statements would also be subject to a Confrontation Clause challenge.[164]

There are some general exceptions to the rule against admitting documents containing hearsay. Technically, an expert's report containing otherwise inadmissible hearsay can only be entered "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."[165] In practice, most judges will always admit the statements.

D. Publishing evidence to the Jury[166]

"Publishing" a piece of evidence means showing what was just entered into evidence to the jury. There are many ways to publish an item to the jury, and the best way to publish will depend on the type of evidence, its importance, and the physical restrictions of the particular courtroom.

Documents can be published by showing jury an enlarged version that has been shown to counsel pre-trial. In most competitions, the enlargements can contain no additional alterations from the packet document. Make sure the jury can read the enlargements. Most of the time, a full-page document cannot be enlarged enough so that it

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[162] FED. R. EVID. 701.
[163] FED. R. EVID. 704.
[164] *See* Melendez-Diaz v. Mass., 557 U.S. 305 (2009); Giles v. California, 128 S.Ct. 2678 (2008); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).
[165] FED. R. EVID. 703.

can be read by someone in the jury box ten feet away.

One can publish a document by having the witness read the exhibit or portions of it aloud. Use an enlarged exhibit if possible: have the witness stand to read from the enlargement to the jury. Enlargements can usually be made large enough for the witness to see the document while standing next to it. This method breaks up the monotony of a seated witness talking to the attorney and gives the witness a chance to gain credibility by taking control of the courtroom. It also ensures that the witness is reading to the jury and not into to a piece of paper.

Longer documents and detailed photographs can be published by submitting copies to the jury. The best practice, if possible, is to have a copy for each of the jurors. In competition, this will mean a copy for each judge. Do not publish exhibits in the middle of the direct or cross. The jury and judge will look at the piece of paper just handed them and not at the witness. They won't listen to what is happening on the stand, so the next part of the examination will be ignored. In an actual trial, the attorney has the option to wait for the jury to finish looking at the evidence before resuming the examination. In mock trial, the student does not have the time to waste waiting for the mock jury. If copies will be given to the jury, wait until after all questioning of the witness is finished and the clock stops before publishing the exhibits to the jury. If the jury is given exhibits after one examination, the opposing counsel should ask the court's permission to delay the next examination until the jury gets a chance to review the documents.

Real evidence, documents, and demonstratives may be published by using a projector or computer. Most competitions don't allow this, but some do. Do not assume

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[166] BERGMAN, *supra* note 52, at 402-04.

that anything requiring electricity will work correctly during the competition. Have a back-up plan if the technology doesn't work.

Though there is no court reporter in a mock trial, remember that in a real trial a written record must be created of the examination. It is the lawyer's job to clarify the witness's answers to make sure the answers will be clearly understood in the court transcript. A witness's testimony that, "the defendant went down this way and turned there" might be understood by everyone observing the witness' gestures on a map in court, but no one reading the record will understand the directions. In a mock trial, students should keep to the fiction and treat the trial as if it were real. Pretend that there is a court reporter. Use the opportunity restate the witness's answer in a more specific way: "Just to clarify for the record, the defendant proceeded south on Highland before turning East on South Stadium Drive."

There is one extra, optional, step when using enlargements in trial. Once a student is comfortable with marking evidence for identification, she can mark enlargements and other demonstratives for identification purposes only. The enlargement of Exhibit 1 is "1a for the record." A demonstrative made in court is marked as "2a for the record." The attorney must be clear to the judge and opposing counsel that she is marking the enlargement or demonstrative for purposes of the record only, not for the purpose of introducing the item into evidence. The "a" is to designate that the item is being numbered for the appellate record and that the item will not be available to the jury to view during deliberations.

E. Team Exercise: Practice Using Evidence and Exhibits

Even before the case packet is released by the competition, teams can start

practicing with evidence. If the case packet is available, use a piece of evidence from it. If not, pretend that an ink pen is relevant evidence and follow the steps to introduce it. The coach or more experienced team members can start with an example. After that, go around the room.

The first round, have the team and coaches sit in a circle, close enough to hand papers or other materials around the group. Team hierarchy or a children's game of not-it can determine who begins the exercise.

To start the exercise, the person who starts is the attorney entering the evidence ("Entering Counsel"); the person sitting to the immediate left of the "Entering Counsel" is the "Witness." The person to the immediate right of the "Entering Counsel" is the "Opposing Counsel." Everyone other than the "Entering Counsel" and the "Witness" must object to any errors. (This is another use of the All Object Rule. "Opposing Counsel" in this case is designated so that the "Entering Counsel" has someone to whom they can show the evidence.) The coach is the "judge."

"Entering Counsel" begins attempting to enter the item into evidence. If anyone sees an error, they shout "Objection" at the moment of the error but do not say why. If the coach or a majority of the team agrees there is an error, the turn ends. All roles rotate one to the left. The former "Entering Counsel" becomes "Opposing Counsel," etc. The new "Entering Counsel" begins to enter the evidence anew. If he cannot, the turn ends and the roles switch again one person to the left. Continue around until each team member is able to enter an item of evidence without meaningful objection.

At another practice, use a mock courtroom. "Entering Counsel," "Opposing Counsel," and "Witness" take their places in the appropriate areas. Everyone else should be

standing out of the way. This time anyone can object, but the "Opposing Counsel" must articulate the reason for the objection before the actors switch roles. Students must physically act out the introduction of evidence, moving to the appropriate areas, and making sure the jury can see (or not see) evidence and exhibits. Advanced students (then everyone, as warranted) should add in the introduction of enlargements and use of them with the witness.

IX. Presentation

All the law and facts in the world will do a party little good at trial if the presentation of the case is lacking. In a competition, the case packets are designed so that the favor of the law and the facts is distributed evenly between the parties. Presentation of the case becomes the most important part of the trial advocacy competition.

MacCarthy's suggestion for the three goals of cross examination provide valuable guidance for the presentation of all aspects of trial:

> *1. Look good;*
> *2. Tell a story;*
> *3. Use short statements.*[167]

Short statements are necessary on cross to limit the witness to yes or no answers. They are also an important tool throughout trial to aid juror understanding. Trial presentation is an aural art, and modern audiences are unaccustomed to long, complex sentences with multiple parts and dependent clauses. Instead of overwhelming the listener with the litany of reasons supporting the team's underlying thesis, break the facts up into

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[167] MACCARTHY, *supra* note 8, at 5.

digestible chunks.[168] Use simple sentences. Pause after every couple of phrases to allow the listener to process the information.[169]

The advocate must be an effective storyteller. Unfortunately, even students and attorneys who may be gifted storytellers in real life often lose the art when juggling the rules of evidence, witness control, and required elements of the case. Those looking for advanced lessons in storytelling would do well to avoid the advice of lawyers and go straight to other sources for writers and actors.[170] In the alternative, read more novels. Though a cruel thing to ask most law students to read more and to read for pleasure, a good trial lawyer cannot forget what it is like to experience the world as human, that non-existent "rational man" the jury instructions are based on.[171] Reading a novel exercises one's capacity for empathy that the lawyer would like to find in the jury as she asks the jurors to look at the case from the perspective of the client and understand why the client did what he did or how he suffered.

In the short term, the case theory and themes are most important parts of story. Used throughout trial, the repetition of one unifying theory and its supporting themes provides a framework through which the fact-finder can understand and appreciate the importance of the team's evidence. These theory and themes aid in understanding the characters of the story: the witnesses and other important players. They explain why the characters acted particular ways during the important scenes in the story: when the contract

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[168] *A Bit of Fry and Laurie – Concerning Language*, YOUTUBE (Dec. 2012), http://www.youtube.com/watch?v=MSyIhapMdI8.

[169] Most stump speeches by major national politicians provide good examples of persuasive technique using short sentences and well-timed pauses.

[170] *Kurt Vonnegut on the Shapes of Stories*, YOUTUBE (Oct. 2010) http://www.youtube.com/watch?v=oP3c1h8v2ZQ; KEITH JOHNSTONE, IMPRO FOR STORYTELLERS, (1999).

was faxed to the company, when the guide left his client on the top of the mountain, or when the young mother did all she could to save her child.

Finally, the attorney is commanded to look good. This does not just mean to come to court wearing the appropriate battledress. One looks good in the eyes of the jury by being prepared, establishing authority, and maintaining that authority throughout trial.

In a mock trial, the easiest way to look prepared is to use no notes during the presentation. This, of course, means that the student is practiced enough to not need notes. Usually, students are so well versed in the facts, themes, and theory of the case that the opening and direct examinations can be performed solely on memory. In practice, word-for-word scripts become crutches and become unnecessary long before most students feel they can be condensed or thrown away. During team practices, try to deliver the presentation without notes at least two weeks before the competition.[172] Even if students rely on an outline during the real trial, practicing without notes tests the student's understanding of why certain parts flow in sequence and her memory of the important themes.

The unwritten rule forbidding notes is unfortunate and in some competitions may be non-existent. There is always the possibility of one unlearned judge who, instead of holistically critiquing the performance of the student, relies on a checklist of do's and don'ts to assign points. Use of notes will be on this checklist. In reality, the use of notes is immaterial if without them the student still stands motionless behind a podium and looks down during the entire presentation. With or without notes, stand away from the podium.

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[171] *See generally,* JANE SMILEY, 13 WAYS OF LOOKING AT THE NOVEL (2005).
[172] Hornstein & Deise, *supra* note 4, at 94 (describing the experience of a student who was unexpectedly asked to deliver a closing argument without notes and her subsequent

Look into the eyes of the scoring judges. Move around the courtroom. An attorney must portray the confidence that the answers required by the fact-finder are within her, not on some piece of paper the jury does not get to see.

Confidence and authority is also conveyed in the way the attorney addresses the Court. When an attorney "asks" things of the Court, it's never really asking. The tone of her voice should be that of a declarative statement.

Most students are their own harshest critics. Even if that is the case, trial teams should use each other and outside observers to critique performances and develop a list of priorities that each student can work on to improve presentation. After delivery of a statement or questioning of a witness by one student, the coach or team leader should invite critique from the rest of the team.[173] In the beginning, it may be useful to invite discussion by asking students to identify one good thing done and one thing that can be improved upon. After the students offer opinions, the coach can provide additional instruction.

Some verbal ticks and presentation problems are best shown to the student instead of described. For at least one practice, aim to videotape the entire trial and ask the students to watch the tape before the next practice to critique their own performance.[174]

A. What Not to Wear

While students are not supposed to be judged on their appearances, judges do begin to form an opinion on the students' relative performances before anyone begins to speak in the round. Part of this performance is appropriate costume. The overarching rule in

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increase in confidence).

[173] MACCARTHY, *supra* note 8, at 1.

dressing for a mock trial competition is to wear nothing that will stand out in a bad way.

Though the rules of dress change with time, a well-made, well-fitting, interview-appropriate suit is also appropriate for competition. It sadly cannot go without saying that fluorescent hair, facial piercings, and visible tattoos are not appropriate. Fairly or not, women's clothing choices are the subject of critique from some judges in real life and in mock trial, and what would be appropriate in one region can be dismissed as garish in another.[175] Above all else, dress conservatively. Most competitions exist in a different world than the state courts with which most students are familiar. The judges come from all walks of life, and one should never offend if offense can be prevented. In a trial competition, dress the way a movie's star would be wardrobed if the character was a successful civil attorney. Less *My Cousin Vinny*, more *Michael Clayton* or *The Firm.*

X. Final Preparation

After the last practice, the (hopefully) last draft of the closing, and the last trip to the copy shop for enlargements, there is still a lot of work to be done. During preparations, the team should make a list of everything that will be used during the round. This includes copies of statements as well as easels, markers, or any other demonstrative aid. Use this checklist to make sure important items are not forgotten because everyone thought a different student was responsible for bringing the item to the competition.[176]

There are certain things that almost every team must do before the competition. Here is the standard checklist.

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[174] Hornstein & Deise, *supra* note 4, at 111-12.
[175]Maureen A. Howard, *Beyond a Reasonable Doubt: One Size Does Not Fit All When it Comes to Courtroom Attire for Women*, 45 Gonz. L. Rev. 209 (2010).
[176] ATUL GAWANDE, THE CHECKLIST MANIFESTO (2011).

A. To-Do (this has to be done before you leave)

- ✓ Re-time everything.
- ✓ Make clean copies of all exhibits.
- ✓ Make clean copies of all statements.
- ✓ Make clean, double-spaced copies of all questions, openings, closings, etc. Questions should have page and line numbers for all facts.
- ✓ Check with team members to make sure everyone is bringing appropriate trial clothing.
- ✓ Plan out which team member will bring easel, enlargements, copies, writing instruments, and other items needed in competition. Do not forget pens and legal pads.

XI. Conclusion

It may sometimes be lost in the stress of practices and competition, but trial advocacy is supposed to be fun. This does not mean that trial advocacy teams deserve less recognition or administrative support than other law school endeavors. It is important as trial advocacy gains that recognition and support that the spirit and joy in performance is not sucked out in the process. It has been said that all trial lawyers are failed actors, but this statement needs revision. Trial lawyers are actors with a purpose. Learn the basics of the script and use the rest of the time to make your client look good.