The Mock Trial Performance

Introduction

Mock trial is an exercise in which students exemplify the theory and skills of trial practice in a scored competition. There are many intellectual challenges and opportunities to build knowledge and skills. One need not be an attorney to coach such a team. Success is achievable, with diligence, research, and practice. However, because the law can be complex and nuanced, teams will likely find it advantageous to recruit an attorney to act as a technical advisor or second coach. Throughout the following material, there are examples in which student research will likely be helpful in planning and executing the team performance. An attorney advisor will be valuable to brainstorm, facilitate, focus, and support such research. One credible secondary source that provides clear legal definitions and explanations is sponsored by Cornell Law School (https://www.law.cornell.edu/wex), but there are many viable resources on the Internet.

Throughout this discussion, the competition is described as a "performance." This is not a trial competition such that the prosecution/plaintiff cannot win a round if the team does not meet its burden of proof (*see infra* Elements of Proof). And, similarly, the defense may win a round even if the prosecution/plaintiff does satisfy the burden of proof. The judging here is not about the outcome of the case (guilt, innocence, or liability). The team that does the best job in presenting its case and confronting its' opponent's case will prevail in the performance. Success in grasping and executing the process is the key to victory more so than prevailing in the trial. Obviously, there are elements of trial that will determine if a party wins a "verdict," but in mock trial the team that prevails will be the one who cumulatively scores the most points for their performance of the tasks necessary to prepare and present evidence and argument.

Scoring is very much discretionary. Therefore, the scoring judge's perspectives may be very different from one another. Teams should therefore be prepared for critique and comments from the judges, and take each as it is intended – positively. However, coaches should be persistent in reminding students that one judge's perceptions or perspectives are never the be-all or end-all analysis of effort, practice, or process.

Trial practice is seen by many as epitomizing the role of attorneys in American society. However, in truth, the vast majority of attorneys spend little time in courtrooms. The reality of the practice of law is far more inclined to the role of counselor and advisor. And, for those who do litigate, there is a marked tendency to settlement as a resolution, thus diminishing actual trials. Despite this, there are those who frequently try cases. Excellent examples are prosecutors and defense attorneys in the criminal practice.

It would be fair to say that likely less than 10% of attorneys are actively engaged in a litigation practice. Therein, in both criminal and civil proceedings, there are great pressures in favor of dispute resolution in lieu of trial. Those pressures may come from market effects (expense and cost/benefit analyses). Further, there are likely government pressures. This includes statutes that mandate alternative dispute resolution or empower the contractual enforcement of such alternatives. And, trial judges are inclined to diminish workload through referrals to pretrial intervention, diversion, and alternative dispute resolution programs. Each example decreases judicial involvement and alleviates court congestion.

It is fair for students interested in legal careers to understand that therefore courtroom practice may not be as prevalent as one is led to believe by various Hollywood interpretations of the profession. Despite that, the skills and accomplishments of mock trial can be of great value in a multitude of settings, occupations, and professions. Future lawyers will benefit from the technical training, the comprehension of rules, and gained appreciation for legal substance and process. Those skills may likewise translate into various other professions and occupations as well. In addition, all participants will gain confidence, poise, public speaking, writing, planning, and assessment skills. Participation in mock trial is an outstanding opportunity for personal growth and achievement and will help prepare any student for individual success and team dynamics.

The Mock Trial experience is somewhat different depending upon age groups, jurisdiction, and organization choices. The attempt here is to speak to competition in generalities. Careful attention to the actual program problem and its rules is critical. Programs exist for middle school, high school, and college competitions. In general, as a student progresses through these categories, s/he may expect to experience greater technical challenges, tactical decision-making demands, and responsibility. The parameters of any particular level will be described and defined in the scope of whatever problem students are provided for the competition. It is highly recommended that those in middle and high school involve a parent or guardian in the decision to participate in this activity, and to seek their guidance throughout. This is an outstanding opportunity for family participation in everything from research to presentation style, to word choices, practice, and more. It is challenging, engaging, and sometimes frustrating. Many a student has benefitted from the support of a family member, or older student, as they grew through this process.

What follows are bits of advice for the newcomer. It is imperative that any participant, coach, or parent realize and appreciate that this is not a cookbook. It is beyond impractical for one to script participation in such a program. There are no be-all and end-all rules of deportment and organization that can be memorized in order to assure success. Each experience is unique, and involves human nature, idiosyncrasies, biases, and preferences. What appeals to one juror may be appalling to another. What is seen as clever in one participant can be perceived as conniving in another. It is a challenge to "read the room," and to make calculated choices in decisions such as what questions to ask, what answers to give, whether to object, and more. One of the great benefits of participation is the appreciation gained regarding people, and our interactions with them. In the end, it is these jurors generally that score the competition. How their individual biases and predispositions play in the outcome will vary. A smirk may not affect one, but offend the juror in the next chair. This is hard to predict or plan. Similarly, participants may have predispositions that should be considered in choosing their role in argument (opening or closing), examination of witnesses, or performance as a witness. Despite such predisposition, it is often beneficial for a student to stretch her/his boundaries and try new roles and responsibilities in such competitions.

Thus, the real success to be achieved through participation in a mock trial program should be measured on an individual level. Students can expect to be challenged in various ways. Each will overcome the stage fright of speaking in front of an audience, often an older audience, often lawyer audience, frequently judicial audience. There are opportunities to engage reasoning, research, study, logic, empathy, patience, humor, decorum, oration, and other skills. Those skills will be of undeniable use to the student whether her/his path leads to the legal profession, litigation, the courtroom, or any other profession.

Students who participate in mock trial develop confidence, collegiality, teamwork, and discipline. It is a worthy and critical opportunity, made possible by an amazing array of volunteer parents, teacher coaches, attorney coaches, scoring judges, and presiding judges.

The Problem

Each Mock Trial performance will be based on a hypothetical case that involves a myriad of different facts and laws. The problems are usually designed with a participant age range in mind. Thus, the problem for a middle school competition will likely be less complex than one for a college program. There will likely be more choices to make regarding witnesses and evidence as you progress through the years.

There is some tendency to label problems, to categorize them ("this is a defense case"). This is unfortunate. There is every potential that a given problem will look particularly favorable to the prosecutor/plaintiff or to the defense. There have been jurors over the years that voiced a belief that a particular side of a case "can't win" or "can't be proven (rebutted)." One, somewhat infamously, once uttered that a case was "impossible" to prove, only to recant that statement after the team in that round did precisely that. It is critical to remember first that to prevail in Mock Trial you need to put on a great performance. Certainly, either side of the case may look more favorable or even easier. But, you are not after an acquittal or a conviction. The point remains that winning at Mock Trial is based on your performance not on whether you prove the case, on either side. Focus instead on the tasks at hand.

Every problem presents each side of the case with opportunities. There is conflicting testimony, disputed facts, and various documents. The task that you have taken on is in some parts persuasion. Witnesses have to practice in order to deliver their optimum performance as the character. They have to memorize the information in their own witness statement, affidavit, or other documents. They need to familiarize themselves with what is in other witnesses' materials as well. Where are the conflicts? What are the key issues? What credibility challenges might a particular witness face? The team needs to brainstorm about what each side needs to prove (disprove) in their case. How will those elements of proof be accomplished? Whose testimony will establish what? Which documents will need to be submitted as evidence? What testimony will support their admission over authenticity, hearsay, or other objections?

Know that what matters is the manner in which you go about identifying these issues, planning your efforts regarding each of them, and accomplishing the necessary tasks. That the law may seem to favor one side or the other, or that the facts seem to lean in one direction, is irrelevant to your job of presenting your case. It is critical that you keep the focus on the tasks at hand, and practice in pursuit of them. Do not become distracted by perceptions regarding which side is better than another. And, always remember, you are likely to perform each side in competition.

With all that said, it is likely that various participants will nonetheless prefer one side or the other; one may prefer the plaintiff's case, and another the defense. Be prepared in case you are afforded the chance to choose which side of the case you will present in a particular round. Which side do you think your team performs better? Based on your practice, other rounds, and team experience, which side of the case is the best fit for your team, your witnesses, your skills? Knowing that you will not often be given the choice of sides, know that you need to prepare both sides carefully, thoroughly, and enthusiastically. Notably, in one round where there was a choice, the team without the choice reacted excitedly when the choosing team selected. To this day, it is perhaps doubtful they were genuinely excited with their task. It is likely that non-choosing team was simply remaining enthusiastic and positive. Possibly, their enthusiasm caused some doubt and curiosity to the choosing team? They likely thought their opponents would react with disappointment and then spent at least a few wasted minutes striving to comprehend that unexpected reaction.

Selection of the Team

Much emphasis is devoted to the selection of team members. The question is often asked: “who are the best students” for Mock Trial? As in any other endeavor, there will be potential team members who possess more natural talent than others. Some will already perhaps be more confident about speaking before groups, more attuned to building logic paths, more receptive to critique, more receptive to puzzle solving, or more functional in a rule-driven processes. It is likely that each student brings some level of natural talent in some important aspect of the preparation and presentation of the performance. The challenge is identifying those who will bring hard work, persistent interest, and focus to what is a difficult, challenging, and rewarding process.

Additionally, however, coaches and sponsors must remain aware of the critical impact of desire and motivation. Those who may initially appear to lack natural ability may in fact be “shrinking violets” or may simply have never had the chance to demonstrate their ability in such a setting. Those with seemingly less natural ability may in fact be merely waiting for a chance. Others, may develop and excel through desire, good coaching, positive reinforcement, study, and dedication.

In the end, both ability and motivation are worthy of consideration. Every sponsor, coach, and teacher should remember that the students make the team, but participation in such a team may very well also help to make the student. Over the years, we have seen a great many young people grow, develop, and excel in these programs. Time and again students have expressed their gratitude for the opportunity, and conceded their fears and trepidations were overcome in the process. There are therefore many valid considerations in the selection of members and understudies, based on ability but also on potential, desire, and enthusiasm.

Dress and Decorum

Students must be aware of surroundings, traditions, and expectations. It is unfortunate that certain perceptions regarding attorneys and the law inspire much of what the media and entertainment industries portray. The vast majority of attorneys are focused, dedicated, thoughtful, and professional in fulfilling their responsibilities. In most mock trial competitions, the presiding judge and the "jurors" that score the round are attorneys. They are apt to look for, and reward, behavior that emulates the courtesy and professionalism of the practice of law. Thus, what is perceived in a movie or television may not be the best way to present a performance. What makes for good Hollywood drama may not play well in a real courtroom.

Society today is challenged both by evolution and change. That has always been true, but bears reiterating. Those who observe, preside, and score may potentially come from various generations. They may have individual or collective bias(es) or preconceptions. Those may or may not agree or align with the thoughts of participants, coaches, or sponsors. Though neither perspective is "right" or "wrong," participants should maintain focus upon competition rules and the overarching consideration of decorum. Some examples follow.

A courthouse is an often somber environment. Those who are accused of crimes, seeking redress, or defending themselves against claims are present for serious and challenging purposes. Participants should be aware of local rules such as drinks not being allowed in a courtroom. Participants should be cognizant of the appearance of behavior such as running in hallways, speaking loudly, and the use of profane language. The presentation occurs largely in the well of a courtroom, but attention to the serious nature of the proceedings can be of benefit throughout the process and practice that leads there. It is entirely possible that the nice lady you rode up with in the elevator or passed at the security check is the scoring juror for your case. Professionalism matters from beginning to end. Pay attention to competition rules regarding photography or video recording of teams and premises. Remain cognizant of behavioral rules of any venue that is used. Respect the people that are there to afford you the opportunity (the custodian that stays late to lock the building, the security staff that facilitates your use of a building, the volunteers, parents, coaches, and more that make it all possible). Those people believe in you as a student and are there because they want you to succeed (in mock trial and beyond).

Competitions are emulations of actual courtroom work. Professionalism is appropriate and expected. Teams entering a courtroom for a round should readily introduce

themselves to opponents, offering a handshake. Professionals treat each other cordially, and interactions are noticed by coaches and more. Following any round of competition, each participant should again offer a handshake to opponents and offer praise ("good round," "well done," "I enjoyed your closing remarks," etc.). A "thank you" to scoring and presiding judges is also a mark of professionalism and aplomb. In the real practice, it is not uncommon for attorneys to reach a frustration point and to decline such graciousness in the day-to-day of law practice, but in the competition setting it cannot reach that stage. No matter how one feels about an opponent, the end of the competition should include a handshake.

Competitions should not be about the formality of dress. All volunteers should remain cognizant that some participants may be unable to procure dress attire. In most communities, the potential exists to obtain at least a used dress shirt/blouse and tie with minimal expense. Any coach with a student struggling with such should contact the competition coordinator for advice. There are often community resources available to accommodate those who need assistance. Some of the very best performances are delivered by those who forego the expense of dressing up. Beyond style of dress, however, there is almost always merit in neatness, cleanliness, and comportment. Shirts should be tucked, shoes tied, and ties straight. Appearance does in fact matter, not in how much is spent on the outfit, but in that there is attention paid to this minor detail. The obvious exception to this caveat is when some appearance is intended for the role of a witness; always consult competition rules before making any costuming decisions, but a physician character that appears in a scrubs shirt, an accountant with a shirt pocket full of pens/pencils, or a farmer in a hat can be appealing to the judges. In one interesting performance, a witness that worked in a trade appeared with filthy hands, and the explanation was genuine and endearing ("sorry, I came straight from the shop").

Language should be formal if practical. Slang and other substitutes are discouraged. Remember the generational challenges; familiar slang to a 16-year-old may be incomprehensible to a 60-year-old judge. Profanity and overfamiliarity are likewise not appropriate. Students should resist profanity or anything that might be perceived as such (before, during, and after the competition). It is appropriate in the courtroom setting to use titles and last names. When referring to others in the competition, it is best to refer to the presiding judge as "your honor," other participants as "Ms." or "Mr." or "Mx." with the last name, or if referring to one of the non-witnesses the title "attorney" with the last name is usually appropriate (Mx. Jones, Attorney Jones, etc.). Formality will be noticed, and appreciated. It recognizes the seriousness of the task you have undertaken.

It is absolutely inappropriate to make light of, or even highlight, anyone because of appearance, ability, or performance. Participants should strive to treat all others with dignity and respect. Patience is also constantly appreciated. Each participant on any team should particularly strive to accommodate and respect all other participants as regards any special needs, physical or otherwise. There is a great deal that can be learned through accommodation of others, and appreciation for the many differences we all have. Teams have been rewarded for their treatment of opponents. In one instance, an opponent jumped up to retrieve a legal pad dropped by an opponent that was limping to the podium using a crutch. The scoring judges exalted the action during the critique portion of the program.

Witnesses may choose to assume accents or mannerisms for her/his "character," but should not do so in a way that could be interpreted as insulting or belittling of any group or person. Mocking or denigrating does not belong in the courtroom environment. The use of accents or stereotypes can be very dangerous in this regard. There are instances in which a well-practiced accent is effective. But, remain conscious of the potential for distraction or insult. In any case, participants may portray their perceptions of the problem material. For example, if a witness is described as having suffered an injury in the competition materials ("broke her left ankle"), there is no harm in the team member portraying that person adopting a limp. If a witness is described as potentially missing some detail due to (allegedly) not wearing eyeglasses, there is no reason the performer cannot squint at counsel. The affectations can be engaging. But, remain aware of the potential to offend. Never allow any affectation or representation to be mean, hurtful, or insulting. If that occurs, be ready and quick with an apology.

Patience is always a virtue. This bears reiteration in the mock trial performance setting. Various participants will bring different abilities, pace, and focus to any round. The impact of such variation must be respected and accepted by all involved. If a round does not move as rapidly or succinctly as one might wish, everyone must be accommodating and respectful nonetheless (though the time limits imposed by the competition rules may thus result in truncating various segments in the competition). It is disappointing to see a team's members impatient, disrespectful, or distracted when the pace seems too slow. In one instance, a lawyer struggled with a series of questions, frustrations over objections, and likely anxiety. One of the scoring jurors after that round noted that the opposing team was rolling eyes, exchanging looks, and generally being disrespectful behind that opponent's back. That was considered in the scoring.

Perennially, jurors (scoring judges) make note of facial expressions and reactions. There are often mentions made of eye-rolling, grimacing, and similar. While such affectations may be appropriate if intentionally included in someone's presentation of a character (witness), they are to be avoided by counsel while conducting an examination or while sitting at counsel table. Jurors may be influenced by the demeanor of team members who are in the midst of testimony or of members who are at counsel table and not participating actively at the moment. Team members should treat the entire presentation as part of the performance. Avoid being distracting, and persistently contribute to the team effort. In one instance, an exuberant team in victory began to voice its excitement; the coach interceded and reminded of graciousness and cordiality. The team likely displayed their excitement with each other later, elsewhere, and appropriately, but the courtroom was not the place for that celebration. Quiet confidence and cordiality in victory demonstrates professionalism. It is noticed.

Poise, Posture, Tone, Inflection

It is important to remember that mock trial is a performance. That is easy to imagine in the context of the moments spent on the witness stand, conducting inquiry, or delivering a statement to the jury. But, it is just as important when sitting in the audience or at counsel table. In each instance, it is advisable to be deliberate and consistent.

Many students do a fantastic job portraying a character during testimony. However, they then return to the audience and drop the persona. If a student's role is to play the plaintiff or defendant, she/he should spend the trial at the counsel table or on the stand. That student needs to appear actively interested in the whole trial, not just her/his testimony. If you were accused of a crime, seeking damages, or defending yourself, you would remain active and engaged throughout the process. You would be interested in the testimony of each witness. You would not necessarily speak constantly to your attorney(s), but you might well share notes with her/him/them. Each student should strive to stay in character throughout. Any student portraying a party (plaintiff or defendant) should strive to appear attentive to the testimony and actively engaged in the process.

Even witnesses that are not the plaintiff, victim, or defendant should remain engaged and interested throughout each round. As a member of the team, each can engage teammates with issues and thoughts. Often, it is the witnesses that know the various affidavits and proof in the trial problem most thoroughly; a student that notes a discrepancy or misstatement may communicate that to her/his team leadership and thereby perhaps assist with cross-examination or closing argument. In most competitions, the coach is not allowed to intervene and participate once the round starts, but the team members usually can. The collaboration and team dynamic of Mock Trial is one of the key learning opportunities, and a genuine strength of the best teams.

Be deliberate and pay attention to body language. Are you confident and poised? Witnesses need to convey confidence. Students should take the time to think about, perhaps even research, the impact that posture can have on credibility. Students should beware of slouching, reclining, and other postures that might negatively impact their believability. That is not to say slouching or reclining is always bad. It is to say that if that effect is appropriate, then slouch or recline because you have chosen to do so in portraying the character. Then, stick with that attitude, posture, and portray it consistently throughout the round. The point is to be purposeful in your presentation.

The same may be said of voice inflection, tone, and pace. The witnesses and attorneys should practice speaking with each other. The process of eliciting testimony is interactive, a conversation. If the jurors cannot hear the speaker, how can they learn from the person? It is never a bad idea to alert one's own team member (direct examination) that they are difficult to hear ("I'm sorry, but I am struggling to hear you, would you speak louder"). This is also an excellent and innocuous way to have a witness repeat the damaging testimony you are seeking. The opposite may be true on cross-examination in the instance of a witness providing testimony that is not supportive of the questioner's case (if the witness is saying things that do not help your case, and is difficult to hear, you may not wish to prompt them to speak up). However, the cross-examiner will want to make sure the jury hears the answers to the questions which benefit the cross-examiner and support her/his perspective on the case. Remain focused, alert, and responsive in the role of attorney.

Pace is critical. Everyone knows someone that excitedly tells stories too rapidly. We have all uttered the "slow down, you lost me." But, the jury and presiding judge are unlikely to speak up. The attorney and witness must monitor the listeners, watch for reaction, and strive to decide whether they have been afforded the time to understand and appreciate what is being said. Ask and answer questions deliberately and succinctly. Plan your time with a witness, practice asking the questions with a team member, family member, or friend. Be prepared for the witness to be different in trial than in practice. Your teammate may not testify exactly as practiced. Your opponent may raise objections you never anticipated. In short, the round can be rehearsed, but you must remain flexible. This is even more likely when you conduct cross-examination as it may be the first and last time you ever work with that witness. Know in advance that there are such challenges, remain focused on your goals with the witness, and proceed with confidence and persistence even when challenged. Plan your time conservatively. It is better to finish early and have a moment to consider an additional question than to run out of time and potentially be flustered or anxious as a result.

Roles and Responsibilities

Various contests have different rules. Coaches, sponsors, and students should be aware of requirements. In most competitions, teams are required to portray the roles of some fixed number of attorneys and witnesses. It is common for this to begin with an attorney member delivering an opening statement. Then team members are then individually called to the witness stand where a member of her/his own team elicits "direct examination" followed by a member of the opposing team conducting "cross-examination." More on the specifics of each is provided in the chapters that follow.

It is common for competition rules to delineate parameters of participation. For example, rules may require that each witness for a team must be portrayed by a different individual, and that each witness will be examined, direct or cross, by a different attorney member. This means that if the rules call for three witnesses to testify, three witness members and three attorney members are necessary to engage in the round. This enforces a true team effort. It is not uncommon for some members to be more attuned, prepared, or comfortable with the material and the process. These students may be role models for the other team members, and leaders. But, each member will likely have to contribute to the overall effort. However, a beginner might be assigned to portray or examine a witness that has less importance to a particular fact pattern, while a more experienced member is assigned the party to the case or the expert witness. While such participation requirements may exist, there may also sometimes be room for accommodation. There have been instances where illness rendered a team technically unable to proceed (missing an attorney or witness). Despite that, an agreement with the opposing team allowed the performance to proceed. This is beneficial to everyone in that the performance proceeds. Even if such a round is not "official" for the competition scoring, it is a benefit to all who participate, gain experience, and practice. Further, such an accommodation that allows a team to participate for practice is a sign of professionalism and sportsmanship.

These kinds of participation constraints are intended to assure participation. Each team member has a role and responsibilities. Each is an integral part of the team (*see further* Teamwork). Notably, however, each competition is likely to require any team to take both sides of a dispute in various rounds. Thus, a team may be prosecution/plaintiff in one round and defense in another. A team member may fill the role of an attorney when the team is in one mode (i.e. prosecution/plaintiff) and the role of a witness when the team is in another mode (i.e. defense). The decisions in this regard are up to students, coaches, and advisors. One important caveat is that the rules of evidence are challenging. If a student has mastered attorney skills and other aspects of the case

problem, it may not be efficient to have that student portraying a witness in any round. Furthermore, if a competition includes awards for “best attorney” or “best witness,” a team member that switches roles may be minimizing her or his chances for such recognition.

A student portraying only witnesses would have a persona to memorize on the plaintiff/prosecution side and a different persona to memorize on the defense side. That student really needs no knowledge of the evidence and other rules of the competition. However, a student portraying a witness only on one side and an attorney on the other would need to be thoroughly familiar her/his own witness knowledge and persona and with another witness in order to effectively cross-examine on the defense side, as well as all the attorney skills, rules, and more. Thus, there is a certain balance in students sticking to one role, but there is challenge and growth in attempting both. The decisions in this regard should be made with the help of coach, sponsor, and student. The challenges of direct and cross are covered more extensively in Direct Examination and Cross Examination.

In short, there are no easy roles/duties on the team. Each function requires significant study, practice, and critique. Coaches, teachers, and team members should be encouraged to openly and constructively critique each other during practices. Critique should be supportive and suggestive (“I think you might try to speak a bit louder,” “have you considered portraying this witness as a bit more difficult to get along with?”). Students should learn to take such criticism and suggestion in stride. The feedback process itself is a humbling and educational benefit of Mock Trial.

Additionally, two of the “attorney” team members will be challenged by the additional tasks of the opening statement and closing argument. The mechanics of these are described more fully in Opening Statement and Closing Argument. For the purposes of discussing roles, however, it is important that these students are cognizant of the added responsibility that these two roles entail. Each requires planning, practice, and patience. In particular with closing, the responsibility may be highly reactive, based upon what was heard during the trial round and what evidence did or did not get admitted. The opening and closing are critical elements and picking the best team member for the challenge may be difficult. As hard as that selection is, it is as important to have someone ready as an understudy for all roles just in case someone falls ill or otherwise cannot participate. That includes the opening/closing.

Finally, some student should be prepared to speak for the team in the event of questions from the opposing team, the competition coordinator, or the presiding judge (bench).

For lack of a better description, a team “captain” should know of her/his designation and be prepared regarding issues such as team rosters, introductions, and addressing any preliminary matters with the bench (*see* Preliminary Matters).

Teamwork and Support

There are a multitude of potential issues in any trial, mock or otherwise. Surprises occur regularly, despite exemplary preparation and planning. The successful team is advised to:

(1) Expect the unexpected
(2) Over-prepare for potential surprises
(3) Cross-train an extra teammate (understudy) if rules allow
(4) Bring multiple copies of the problem and proposed exhibits
(5) Confer with teammates regarding planned use of documents
(6) Ask each other hard questions ("what if they _____?")
(7) Communicate with each other during the round (*see* Objections)
(8) Provide constructive criticism/suggestions privately after each round.

When an attorney is conducting cross-examination, her/his witness is likely a stranger and from another school. While that witness' testimony may be highly predictable, it may not be identical in manner, scope, or content to the similar testimony of the same character as portrayed by that attorney's own team in other rounds. Thus, the cross-examiner may be able to foresee some challenges, but must be prepared to react if differences arise. The cross-examination process is dynamic and interactive. It is when reference to a witness' written statement(s) (provided in the problem) may be critical to refresh recollection, impeach recall or credibility, or reinforce the provided facts (*see* Cross Examination).

Thus, when a team member is conducting cross-examination, it is smart to have that statement in hand, or ready on counsel table. Despite such planning and preparation, it is not uncommon for an attorney to be nervous, distracted, or focused on the next question. Therefore, having a different attorney team member following the witness' answers while reading the statement affords redundancy and support for the examining attorney. Teamwork helps prevent missed opportunities for critical questions. The attorney conducting the cross-examination may always ask the presiding judge "may I have moment to consult with co-counsel," before concluding, then confirm with that co-counsel that the critical points were all covered. Only then would the cross-examiner announce "no further questions, your honor").

Some teams have one member responsible for all exhibits. Each case will have a burden of proof (usually on the prosecution or plaintiff, but in a case involving presumptions that might shift). To prove a case, there will be elements that must be demonstrated (*see* Elements of Proof). If it is critical that a drawing/map of the location

of this particular event (crime or accident) is in evidence, the attorney in charge should have copied and organized such exhibits. During the examination in which the document will be introduced (*see* Evidence), that attorney can (1) provide the document to her/his teammate who is doing the questioning, and (2) check that element of proof off of the trial checklist (*see* Elements of Proof). One trick for completeness is to have separate copies of those critical exhibits in a folder with post-it notes stating the witness that will be used to place it in evidence. Others use one folder for each witness. The key to the folder process is that the job is not done until the folder is empty (all documents admitted and published, *see infra*).

Knowing your Opponent, Counsel, Jury, Judge, and more.

Knowing about your opponent can be beneficial in planning to prosecute or defend. In any competition, it is possible that each team will face each opponent only once. In addition, a year can be a long time in terms of personal development and growth of team members. However, it behooves coaches, advisors, and team members to pay attention to strengths and weaknesses perceived on opposing teams. Other than a graduating senior, it is very likely a team will meet some of the same opposing members again and again as students participate year after year. How likely is some opposing team member to object? How will an opposing team member react to the unexpected? Trial, in many aspects, is a process of observation. Teams would do well to critique their own and their opponents' performance after each round in order to prepare for any future encounters. What can you learn from what you did well or could have done better? What can you learn from what you observed of your opponent? Discuss this among your team, quietly, and respectfully.

Knowing the jury (scoring judges) and presiding judge is harder in many instances. Often, a team learns the identity of these individuals only when they enter the competition room for a round. However, it is very likely that some degree of critique will be provided after each round during a competition. Teams, and particularly coaches and sponsors, should carefully listen to such comments. Even if a team does not draw the same judges in future rounds, the coach/sponsor can utilize such comments during future practices ("remember when attorney _____ said to never _____; we might have her/him or someone like her/him in this round, so let's avoid _____.").

Where will the competition be held? What is the layout of the room? Where will the scoring judges sit? What is the best path to the witness stand? Is there a podium? Can the podium be moved or is it fixed? How easy or hard is it to be heard (acoustics)? Is there sound equipment available (is it on)? How large are the counsel tables (three attorneys may be more than the building manager designed for)? Arrive early, peruse the room, and ask questions as needed. Familiarity with the surroundings will calm nerves and assist the team's focus on the real challenge, the performance. Sit in the chairs, sit in the witness box, stand at the podium, or decide where you will stand, address the jury box. Comfort comes from familiarity, acquaint yourself with the layout ahead of time whenever practical.

Elements of Proof

Legal claims have various requirements. These may be set forth in a statute or code, or may come from the "common law." Regardless of the source, the elements should be reasonably clear from the problem provided, in a statute that forbids some action or in a description of how some duty was allegedly not met. Additionally, this is an ideal portion of the performance with which to seek some attorney assistance. If a student encounters an unfamiliar word, know that such unfamiliarity happens to attorneys frequently. Look up the word; discuss it with teammates and coaches. This is a learning process, and learning is a lifelong task. Good attorneys and judges look up words all the time.

The primary function for the team that is prosecution/plaintiff is to prove the elements (requirements) of that law. For a plaintiff or prosecution to prevail in the real world, all elements must be proven. That is how a trial is won. In the Mock Trial setting, however, the point is to recognize those elements and do a credible and complete job of presenting evidence (testimony or documents or both) in support of each. While in a real trial it might be advisable to have more than one witness support a fact, in Mock Trial there may be only one witness for that. Thus, the task is to get that one witness to that particular fact(s). Establish it to the best extent possible under the circumstances the problem defines.

The defense job is a bit easier. The defense does not have to disprove every element of the burden in order to prevail in the real world. Instead, it must convince the trier of fact (jury usually) that the plaintiff/prosecution did not meet its burden as to one of those elements. As the world of trial is uncertain, the defense cannot count on any one line of inquiry being successful, and therefore will generally attack the foundation or proof as regards several or all elements of the plaintiff/prosecution's case. Thus, there is contest or competition on all of the elements. Every witness must testify, and cross-examination is a must. The plaintiff/prosecution must prevail on all and the defense need only prevail on one. But, in the Mock Trial competition, there is some expectation that the defense will strive earnestly on each.

For example, if the problem says that the plaintiff alleges entitlement to damages because of the negligence of the defendant, then it is wise to research the elements of negligence (existence of duty, breach of duty, damages, and causation that connects the breach to the damages). The plaintiff will need to prove all of these to prevail in the real world (and will likely explain that burden to the jury in the opening and closing

statements). Thus, the defendant will prevail if successful in convincing the jury that one of the four is missing or insufficiently proven; but, the defense will attack all four.

Similarly, if the problem says that defendant violated a statute or ordinance that makes it illegal to operate a vehicle while under the influence of alcohol, the prosecution will have to prove (1) the defendant was operating the vehicle, and (2) was under the influence. The defendant will prevail if she/he can convince the jury that either has not been sufficiently proven.

While it is not critical to know the "burden of proof" in minute detail, it is important to recognize what the title of the burden is and to acknowledge it in the opening and closing statements. The plaintiff/prosecution will generally tell the jury that it must prove the case (whatever elements from the problem) and by a (1) preponderance of the evidence (civil) or (2) beyond a reasonable doubt (criminal). The defense will similarly want to remind the jury that the burden lies with the plaintiff/prosecution and that the defendant need not prove anything. Acknowledging and understanding the burden is important, but explaining it to the jury is critical. Students too often trend toward large words and legalese here, but in the real world juries will likely respond better to simple explanations and descriptions.

In a criminal case problem, it is likely that students will find a code, statute, or ordinance (law) noted in the materials. It may say that a certain activity is required or forbidden. It may add requirements such as knowledge of the law, or of particular circumstances. The team must dissect the law into singular statements of required proof (as above). In a civil case problem, it is as likely that instead the problem will describe allegations that have legal meaning, such as "the defendant was negligent in causing injury to the plaintiff." In this instance, the students should research what "negligence" means (search the Internet for "elements of negligence.").

What does the law require? The individual parts must be identified and restated simply in planning the prosecution or the defense. Once those elements are identified, the team should scour the problem to identify which witnesses and documents would support (prove) each element the team must prove or prevent its opponent from proving. This is how the team will demonstrate (prove) the elements of the crime or the tort (such as negligence). Similarly, the defense will identify those elements and scour the materials for witnesses or documents that would cast doubt upon, or even disprove, those elements. Will everyone identify the identical things? No, this is a dynamic process. Thus, teams must remain flexible, expect the unexpected, and focus on their own case

(witnesses and exhibits) while responding to the opponent's case. This can be a challenge, but it is critical.

This is a process that should then be employed in preparation for each witness. What can the witness say that will help your team? What documents might be shown to the jury that would make the witness more believable? What other evidence is there (documents, other testimony) that could be used to confront that witness on cross-examination in an attempt to discredit the testimony? Sometimes it is best to highlight your own weaknesses, asking a witness to testify to those on direct so that you have deflated the ability to effectively use the weakness on cross-examination. Sometimes, it is best to ignore your weakness and hop the cross-examiner does not notice it or pursue it. These are difficult tactical choices that can be largely planned with the help of coaches and sponsors.

The prosecution/plaintiff will almost always have the burden of proof. If the prosecution/plaintiff fails to prove her/his/its case, it will not win a verdict. In the real world, at the close of the prosecution/plaintiff case, a lawyer might ask the judge to end the trial at that moment (before any defense is presented). This is not a trial, but a Mock Trial performance. There is no judicial ending. If the prosecution/plaintiff does not prove its case, the show must go on nonetheless. This means that if the defense proves nothing at all it might still win in a real trial. However, in Mock Trial it needs to put on its evidence effectively despite any perceptions that the prosecution/plaintiff has failed. One of the first steps in team planning, in conjunction with the scouring of the problem and construction of a plan, is to search the Internet or other resources to identify "burden of proof for civil (or criminal) case in _____(your jurisdiction)." *See* Evidence.

Problems will sometimes offer alternative paths to a verdict. In a criminal context, this may be with a statute, code, or ordinance that provides for more than one potential offense. For example if someone was killed. The problem might provide that if the defendant is shown to be responsible for the victim's death then it is "manslaughter." However, if it is proven that the defendant intended to kill the victim then it is "murder." Thus, there may be some elements that must be proven to prevail at all (death, causation) and other elements that might not be fundamentally critical (intent) while still winning a verdict. This rarely should mean that there is no attempt to prove an element (intent). Instead, this means that the explanation to the jury will need to be descriptive of two paths ("we showed this, and you should convict of murder," but "even if we did not show intent you must still convict of manslaughter.").

Similarly, in a tort case, it may be that violation of some ordinance, code, or statute has occurred. This violation may be sufficient in itself to prove some element(s) of the tort of negligence ("duty" and perhaps "breach"). This is referred to as "negligence *per se*," and is one of several similar legal concepts that might be suggested by the facts of a particular mock trial problem. But, a team might struggle to prove that statute breach. Again, explanation is critical ("we demonstrated that X violated the statute, and is negligent *per se*," but "if you conclude the statute was not violated, the evidence we presented still proves a duty, breach," etc.). As noted, in The Point of Mock Trial, having an attorney coach or advisor can be a tremendous help with such concepts and the research they may require.

Inspiring with a Theme

In the day-to-day trial practice, a theme is unlikely to be prioritized by attorneys. There are exceptions, and therefore examples in which some theme played out in a real trial or even the national media. A notable example involved a pair of gloves that were evidence in a criminal trial. The attorneys did not discuss the gloves at the outset of trial, but during the defendant's testimony they asked that he put the gloves on. He struggled with them and could not. The attorneys returned to that point in closing with the short line "if the gloves don't fit, you must acquit." That became a theme of that trial. Such a theme may resonate with jurors, be memorable, and effective. Students may want to research such quotes on the Internet.

In Mock Trial, however, it is more common for a team to have a theme. The teams each distill their plaintiff or defense main point(s) down to a short catch-phrase. As each team will perform each side of the case, it must have two themes. They may be similar in many factual instances. The theme encompasses some critical point that is important to their proof or an expected or perceived flaw in their opponent's. Of course, such a phrase may also alert their opponent to particular evidence and allow insight (which is why in the real-world example above the gloves were not mentioned in the opening statements)(*see* Opening Statement).

In one recent example a mock trial problem included an alleged use of a particular kind of fertilizer. The problem provided an ordinance that forbids the use of that fertilizer within 6 days of predicted "heavy rain." The defendant denied using "that" fertilizer at all, but also argued that if she/he had, it was used in accordance with the ordinance. In the opening statement, the attorney said something to the effect of:

> "even if the fertilizer was applied on June 1, 2021, that storm was predicted for June 7, 2021, that's 1, 2, 3, 4, 5, 6, 7, (while pointing as she raised each finger for the jurors (scoring judges), that's 7 days"

During that team's questioning of one of its witnesses the counsel asked whether that kind of fertilizer had been used, and was told it had not been. Then counsel asked when the last time fertilizer of any kind had been applied, and was told "June 1, 2021." She then asked how many days that was before the storm and the witness intoned

> that's 1, 2, 3, 4, 5, 6, 7, (while pointing as she raised each finger for the jurors (scoring judges), that's 7 days."

In the closing argument at the end of trial, the closing attorney argued that the ordinance was not violated as the last time any fertilizer was applied was June 1, 2021, and

> "as witness _____ told you, that's 1, 2, 3, 4, 5, 6, 7, (while pointing as the attorney similarly raised each finger for the jurors (scoring judges), that's 7 days"

Thus, the counting on fingers, the repetition of the 7 days, was the theme. It was woven into the opening, similarly phrased and stressed in the evidence, and then repeated in the closing.

This methodology is common in Mock Trial, and helps with juror comprehension and recollection. Some careful observer might see some challenges possible with that 7 days; is it possible to argue that perhaps it was only 6? This is something to be wary of with the theme. If all attention is persistently directed to one point, and that point is then clouded or discredited, it can be a devastating turn of events. (If you applied that fertilizer at 4:00 p.m. of June 1, then arguable "a day" is until 4:00 p.m. of June 2; What if it rained at 1:00 a.m. on June 7?).

Preliminary Matters

Prior to the opening statements in a round, it is common for the presiding judge to inquire regarding "preliminary matters." Teams should be prepared for such opportunities, and may wish to politely interject regarding such issues in the event the presiding judge does not ask. This is an excellent illustration of each team benefiting from a student leader (Roles and Responsibilities). Such issues might be introductions including team member names and roles, questions about process, and familiarization with details of the competition and courtroom etiquette.

It is appropriate for teams to introduce themselves. This should never include any reference to a team's school or even community (nor should any attire or costuming make any suggestion of school affiliation). In the event of any rounds being virtual, attention to identifying logos, names, etc. should be considered as regards wall hangings, profile pictures on applications, and more. Introductions should be solely an introduction of name and role.

> My name is _____, and today I will be delivering the opening statement, conducting direct examination of _____, and cross-examination of _____.

Or, perhaps

> My name is _____, and today I will be portraying _____, the plaintiff/defendant/expert in this case.

This is an excellent opportunity for the team to assure that its team roster has been provided to the presiding and scoring judges: "May we provide the jurors with our complete roster?" It is far easier to score a round and identify exemplary performances when first and last name are clearly identified in writing at the outset. Furthermore, offering such a roster is a courtesy that conveys preparedness and professionalism.

Other preliminary matters that may be worthy of addressing:

(1) Often rounds are presided over by sitting judges. It is often helpful to remind of items such as: all witnesses are already sworn, witnesses are presumed sequestered (except for parties), and that the rules of evidence are as set forth in the competition problem (of which the judge may not be aware).
(2) Teams are well advised to ask at the outset if they are free to move about the courtroom. Various presiding judges may have different preferences.

(3) If an evidentiary objection is sustained, may the team presume that any answer is likewise stricken, or should they ask each time?
(4) Any questions that are particular to a round should be raised. For example a participant may need an accommodation (sit in front of, rather than climbing up to, the witness stand due to some need; stand to testify due to some need, use an accommodation device due to some need. The team does not want to be distracted by such needs during the trial; address these needs in advance.

Often times, a team will provide its opponent with a composite of documents it intends to discuss with witnesses and perhaps move into evidence. Announcing that lends credibility to the team ("your honor, we have provided our team roster and a composite of potential evidentiary exhibits to our opponents, would you like a copy?"). The beginning of the performance is the best time to identify challenges and resolve questions. It conveys competence and preparedness.

The Process

Trial theory generally is about telling a story. It is divided in various fashions and participants in Mock Trial should understand the differences. Evidence is a label for facts that are established in the "record" of a case. In any case, there will be evidence that is "relevant" and evidence that is not. For each witness's testimony, there will be "direct" and "cross" examination. And, the attorneys will each draw out the facts (evidence) and comment about it to the jury (argument). In each Mock Trial problem there are likely to be witness statements or affidavits, maps or diagrams, emails or texts, medical or police records, and more. There are decisions to make regarding what to use and how best to use it.

The process of telling the story is up to each team. They must collaborate and cooperate in deciding the theory and theme that they intend to pursue both in seeking recovery (as plaintiff or prosecution) or in resisting recovery (defense). Each team must be prepared to perform each side of the case in various rounds of the competition (watch your opponent carefully, you may learn from their challenges or successes). The team should collaboratively determine how to establish the points that it perceives as critical for each side.

Smart lawyers (and Mock Trial teams) use checklists that include the documents they wish to admit into evidence and the testimony they intend to elicit. Someone at counsel table should have that list before her/him during each moment of the trial performance to notate each success. Which attorney has the list may change as the trial performance progresses (an attorney should not be in charge of that list while she/he is examining a witness). The attorney that is performing the closing argument may then use that list as verification that each point planned for inclusion in the closing has been established, or alternatively to point out to the jury that some critical point was missed. One does not want to stress some element ("we heard about the photographs of the scene from Officer Ready") if those photos were objected to and the judge did not allow them in evidence (sustained the objection). Build this list carefully, include facts and exhibits, and arrange by witness. For example:

Witness one
- Def. ran red light (Fact)
- Def. car hit street sign (Fact)
- Show picture of intersection, authenticate, admit (Exhibit)

Witness two . . . .

A sequential listing of the steps in the performance will be:

Preliminary matters for plaintiff/prosecution
Preliminary matters for defense

Plaintiff's opening
Defense opening
Direct examination of Plaintiff witness #1
Cross examination of Plaintiff witness #1
Redirect of Plaintiff witness #1

Direct examination of Plaintiff witness #2
Cross examination of Plaintiff witness #2
Redirect of Plaintiff witness #2

Direct examination of Plaintiff witness #3
Cross examination of Plaintiff witness #3
Redirect of Plaintiff witness #3

Plaintiff rests (when your team is finished, say this "Plaintiff (or Prosecution) rests your honor."

Direct examination of Defense witness #1
Cross examination of Defense witness #1
Redirect of Defense witness #1

Direct examination of Defense witness #2
Cross examination of Defense witness #2
Redirect of Defense witness #2

Direct examination of Defense witness #3
Cross examination of Defense witness #3
Redirect of Defense witness #3

Defense rests ("Defense rests your honor.")

Plaintiff/Prosecution closing
Defense closing
Plaintiff/Prosecution rebuttal (short, and time for this must usually be reserved before closing starts).

Teams are well served to think of logistics. Each team is in control of the sequencing of witnesses. “Witness #1” can be any of the three witnesses in the problem. This is of import both in terms of favorably influencing the jury and managing participant stress. In terms of influencing, many attorneys recommend a strong finish. That is, leaving the most interesting and compelling witness for the last (#3). This is finishing with a flourish, and leaving the jury with an impression of strength and compulsion.

Others advocating leading with the most compelling witness. They argue the jury’s attention is sharpest at the beginning. There are considerations about boredom; will one witness be drawn-out and time-consuming while another will be very brief? To some extent, your opponent will make that decision in regards to how involved their cross-examination is. Is there a person in your case whose personality, likeability, or presence will be particularly helpful or troubling? Consider that in deciding on order, on first and last impressions.

Another consideration in terms of influencing is the ever-present challenge of clock management. The rounds are usually timed, but there is significant leeway for the team to make choices about what and who to stress. If 20 minutes is afforded for all direct examination, a team could conceivably divide that in a vast variety of shares. One witness might testify for 18 minutes and the other two for a minute each. The team must decide what is important (and what witnesses are strong or weak). And, though the time spent arguing evidentiary objections may not be included in the allotted time, objections may nonetheless disrupt pace and planning and impact the effort at completing a witness’s testimony thoroughly and effectively. In most problems, there are multiple topics to discuss with any witness.

In regards to time management, it is important to be aware that witnesses who will be used to authenticate and admit documents into evidence may be likely to draw more evidentiary objections (usually time spent arguing objections is not included in the time constraints, but successful objections may lead to multiple attempts at establishing the foundation to admit a document). Particularly on direct, it is impractical to know how vociferous opposing counsel may or may not be about the testimony or documents you have planned, and thus time management is challenging and dynamic (while you stand there doing the questioning, you may not be watching the clock; a team member at counsel table should be doing that for you (before you say “no more questions,” or if you feel you are running long, ask “your honor, a moment to consult with co-counsel please”; “how much time do I have left?”). Teamwork is critical and positive.

The same is true on cross-examination, as regards the unknowns (the witnesses you have not seen yet when cross-examining the first witness). Spend too much time cross-examining the first witness, and you may find yourself limited regarding the available time for the next witness. You are performing, and thus should have some direct and cross-examination for each witness. However, for cross, your opponent is setting the course and calling its witnesses. While you may have much about which to cross the first witness, be focused, succinct, and mindful that cross-examination of later witnesses may be of more importance to your case and to the successful performance. If your opponent is saving the best witness for last, you may be uncomfortable to find yourself with little or no time for cross-examination because time was spent repeating or overemphasizing some minor issue with the first or second witness. There is a challenge here in being thorough enough and yet leaving yourself flexibility for later moments in trial. Be thoughtful and conscious of the challenge and accept that you cannot predict the future with certainty. You will make the best decisions you can in the moment.

Teams must be judicious and careful. Cross-examination must address the critical points. More detailed cross-examination, to further erode credibility, must be balanced with the need to effectively cross-examine all three witnesses. There is no set answer to planning or performing in this regard. To a large extent decisions regarding how much cross-examination are largely art, rather than science. Each opponent will be different, and so many such decisions need to be made in the moment (after you are already standing up and questioning). Fortunately, the questioning team member should be able to rely on co-counsel to keep track of time and to communicate that ("if my notebook is on the front of the table, you need to conclude and save time").

Finally, each team must be prepared for dealing with the unexpected. Certainly, a witness may make statements that are inconsistent with the information in the problem package. This may be because the witness student has misunderstood something, makes a simple misstatement, or is extrapolating inferences that are not in tune with the perceptions or intentions of the inquiring attorney. It is also possible that the witness is baiting the other team into debates and delays intentionally. Attorney participants must be prepared for these contingencies, and should know how to effectively both "impeach" and "rehabilitate."

An example is perhaps of use.

> A vehicle accident occurs in which a yellow sports car collides with a blue truck in an intersection. The driver of the yellow car is suing the

> driver of the blue truck. There are two people who claim to have seen the collision. One is a woman, Ms. Small, who was with her cousin at the time, and walking her dog, a schnauzer (Ralph) with an overbite and a bit of a weight problem. She says that she and her cousin were discussing Ralph's weight issues, and picking up his waste when she heard the collision. She insists the blue truck had the green light. The other witness is a man, Mr. Big, who was driving at the time but whom the investigating officer noted had only shaved half of his face (right half – an electric razor was also noted on the front seat of that vehicle). He told the investigating officer that the yellow car had the green light. The drivers of the car and the truck each claim to have had the green light and each alleges the other is at fault in the collision. The driver of the yellow car has been to a chiropractor in Tallahassee, Dr. Smith, has been diagnosed with a subluxation, and has been advised not to lift over 20 pounds, a permanent restriction. The defense had the yellow car's driver examined by a surgeon in Jacksonville, Dr. Jones, who also drives a sports car, and who has opined in a medical record that the driver of the yellow sports car has recovered fully and should have no restrictions. (as a twist, add in that the driver of the blue truck was cited for driving under the influence (DUI); with that, this same fact pattern could be the foundation for a criminal trial for DUI).

The person that has filed the lawsuit (yellow car) is the "plaintiff" (or in a criminal proceeding the "prosecution" is pursuing a criminal conviction on her/his behalf), and the other party (blue truck) is the "defendant." In a Mock Trial civil proceeding it is likely that the goal will be a monetary recovery for the plaintiff. In a criminal proceeding, the goal of the prosecution is to convict the defendant such that she/he is subjected to some fine or other punishment.

The plaintiff in this example will likely call the Tallahassee chiropractor, the driver of the yellow car (Plaintiff), and the man driving, Mr. Big (who had half a shaved face).

The defense would likely call the Jacksonville surgeon, the driver of the blue truck (defendant) and the lady that was walking her dog, Ms. Small.

Thus, three different students would portray these witnesses for each team. And, three different students would perform as attorneys in eliciting their testimony (evidence) and explaining to the jury what that evidence means (argument). Remember that one student may play Ms. Small on the defense and Mr. Big on the prosecution. The role of witnesses is challenging. The attorneys are tasked with establishing the facts in evidence that will support their client prevailing in the trial. They will be limited in

how they question the witnesses, and the witnesses may be limited in how each answers, according to the evidence rules (which should be included in the problem).

The Opening Statement

The opening statement is the opportunity for one attorney to explain to the jury what the case is about ("this is a civil case regarding a car collision" or "this is a criminal case about driving under the influence"). The opening statement is a chance to foreshadow what that attorney's team will prove. It is, largely, a sales presentation in which the customer (jury) is told what is important and what will be shown. It is important to sell the outcome that is sought ("we are going to ask you to find the defendant negligent and award damages" or "we are going to ask you to return a verdict of guilty"). It is also important to highlight the evidence that will support that ("we will demonstrate that the light was green when the yellow car entered the intersection" or "when the blue truck entered the intersection").

The opening may also address the potential or probable proof that the opposing party will present. However, it may be difficult for the plaintiff/prosecution to predict with certainty. In the example above, the plaintiff/prosecution might note points in favor or her position such as the light was green, the other driver disregarded the traffic signal and the partially-shaven witness' support for plaintiff having the right of way. But, a team might elect to stress other points instead.

In noting potential shortcomings in the defense case, plaintiff may wish to stick with generalities. She might say "yellow car had the green light and the defense will call no *credible* witness to refute that." If Plaintiff is more emphatic and specific about what the defense theory is or what defense witnesses will or will not say, that is somewhat gambling upon how the testimony will proceed, and what testimony will actually be elicited or allowed by the presiding judge (if objected to).

The defense has some advantage in the opening, because it proceeds only after hearing what plaintiff says it will demonstrate, what evidence it will provide. A powerful tool in the defense opening is filling-in missing points. For example, if the plaintiff/prosecution does not mention a key legal point (plaintiff has the burden of proof) or fact (the light was green), then the defense may want to emphasize that ("the prosecutions did not mention it, but it has the burden of proof, beyond a reasonable doubt, a difficult burden to be sure."). Therefore, while opening statements can be drafted and memorized by either side, the defense may need to change or adjust just before speaking.

Nonetheless, most successful openings are practiced and memorized. Shifting from a memorized presentation to mention some portion of plaintiff's opening may be a

difficult challenge for the student lawyer. In reality, such flexibility is often critical to defense of a case, but each team will have to decide how prepared it is for such adjustments and alterations on-the-fly. Everyone should remember that the point in Mock Trial is not to win a verdict, but to present a compelling performance. Thus, there is merit in being somewhat extemporaneous in reacting during the opening if that is practical and also merit in sticking to the practiced and memorized in order to maintain student confidence and deliver the best performance. The participants must be focused on their own strengths, their own best judgement, and their own decisions in these regards. Prepare thoroughly before the performance, ask questions of coaches and advisors, be confident and make your own best decisions in the performance.

If the team has elected to use a theme (Inspiring with a Theme), the opening should be leveraged with it. It is important for the participants, in planning and strategizing, to remember that the plaintiff and defense themes do not have to be the same or even similar. The theme for either is focused on what it believes is important in making its own case.

Direct Examination

The purpose of direct examination is to establish the facts that support a party's case. The witnesses that are called are the attorney's teammates. This testimony should be planned in advance, organized, memorized, and rehearsed. These teammates have ample opportunity to practice the questions, the responses, as well as the pace, tone, and inflection. There should be no surprises between the teammates on this direct examination. However, it is advisable to strive to not sound and appear too rehearsed (complacent or bored). Witnesses should strive not to anticipate questions or to ad lib in direct. In direct examination, it is appropriate to use non-leading questions (leading questions suggest the answer). Although it is always important to address the critical issues (who had the right of way – the green light, how badly someone is injured, etc.), each side also should strive to allow the jury to become acquainted with the witness, to allow the jury to identify with the witness on some level. So, the name of the dog is not critical to the case, but it may be endearing to ask anyway. It has been aptly said that direct examination is all about the witness. In direct examination, the lawyer's role is to guide the narrative by asking questions, but to largely allow the witness to tell the story she/he is there to tell. Succinctly put, the witness on direct is the star of the show and the lawyer is a facilitator.

Open-ended questions are appropriate on direct examination, and asking leading questions will likely draw an objection from the opposing team (remember, the lawyer that will perform the cross-examination is the only opponent that may voice an objection during direct examination; likewise, when that lawyer is conducting cross-examination only the lawyer that conducted the direct for that witness may object). Leading questions suggest the answer and are usually factual statements to which the inquirer seeks agreement. For example:

> Direct: "state your name please"
>
> Cross: "your name is James Big, isn't that correct?
>
> Or
>
> Direct: "what color was the traffic signal in your direction when you entered the intersection."
>
> Cross: "the traffic signal in your direction was red when you entered the intersection, correct?" (some prefer the "was it not" to the "correct," but

others find that distracting. This reminds that different people have different perspectives. Performers should remain aware of that potential).

The plan for direct examination should be a team effort. There should be an overall plan regarding what elements or critical facts the team intends to establish with various testimonies, including the admission of documents.

It is appropriate for some evidence to be redundant (ask the plaintiff what color the light was, then call the other witness, the half-shaved man, and ask him what color the light was. The consistency of the two witness' answers will support one another and support the credibility (believability) of each. However, repeatedly asking the same witness the same question (even if slightly rephrased) will likely lead to an objection of "asked and answered." Thus, while it may be beneficial to have a witness reiterate an answer ("it was green"), asking for that too many times may meet resistance through objection. Some crafty participants therefore will ask such an important question early in the witness' testimony, and then end the examination with that question again. Some even feign confusion in a self-deprecating way ("I cannot remember if I asked, but humor me, what color was the light for the _____ car at the time of the collision?) While an objection to a redundant question is allowed and perhaps even encouraged, performers should be careful about objecting too often, and may want to save objections for questions that are of paramount importance.

The audience for direct examination is the jury. They are scoring the round in competition and deciding the case in the real world. The attorneys should remain cognizant of the desire for the witness to look at, speak to, the jury. Remember, direct should be all about the witness. Therefore, during direct examination counsel will often stand next to the jury box to ask questions. This is acceptable (if the judge has allowed the freedom to move about the courtroom, *see* Preliminary Matters). Attorneys should remain aware of speech volume if this is elected. Microphones are usually located on podiums or at counsel tables. Therefore if an alternate location is chosen (by the jury box), counsel should likely speak louder to make up for the absence of microphone. Balance is required here as the volume must be sufficient for the witness to hear across the room, but you do not want to be too loud for the jurors who are much closer. This technique can be highly effective, but should be practiced.

It is appropriate to show documents to the jury (hand them to the jury) or to have a witness step down from the witness stand to hold a document while describing it to the jury. This is a very effective tool to both facilitate explanation and to build the rapport

between jury and witness. However, it should only be done with the presiding judge's permission (*see* Publishing).

When direct examination has been concluded, tell the judge that: "no further questions, your honor." In some Hollywood portrayals, this has been humorous: "I got no more use for this guy," *My Cousin Vinny*, 1992. Avoid the humor. State your "no further" conclusion succinctly and sit down.

Cross Examination

Cross-examination is the opposite of direct (*see* examples in Direct Examination). Questions should be leading whenever possible, and the attorney should strive to keep the answers succinct and direct. When necessary, counsel may wish to emphasize the desire for a direct answer, such as:

> "Mr. Big, yes or no, the light was not green when you entered the intersection"
>
> Counsel may need to interrupt: "thank you, but I only asked 'yes' or 'no,' there is no need for explanation."

It is unlikely that a witness on cross-examination will be directly contradictory to her/his testimony on direct (if he said it was green, you are not likely to get him to admit it was red; this happens, but it cannot be counted upon). If you get such an answer, an admission, it may be best to sit down and ask nothing further; asking more questions gives the jury the chance to forget it. If it is that compelling, consider whether to end there).

Because a change in story is unlikely, a frontal attack on the witness' narrative is unlikely to meet success. If the point is that the witness was distracted at the time of the accident, that question – "were you distracted" – may not bear fruit. Thus, a more peripheral attack may be more likely to impact the jury's perceptions of the witness, such as:

> "Mr. Big, yes or no, is it true you were half-shaven after the accident?"
>
> "you were shaving while you were driving, correct?"
>
> "you were doing at least two things at once, correct?"

Witnesses will sense the attorney's goal is to undermine them, or will have been trained to understand that. Asked a direct question, to which a "yes" or "no" answer would be sufficient, witnesses will often strive to narrate (to distract). Each has practiced for her/his role and knows the team's plan for establishing the various critical points in the case. You can count on the witness to be difficult on cross-examination, to narrate, and to strive to tell her/his/ver story and to focus when possible on the parts of that story that are best for the witness' team (even by answering what was not asked).

Attorneys often make the mistake of arguing with the witness on cross-examination. This is perilous for multiple reasons. First, such an argument over whether the witness was shaving or not will likely draw the objection “argumentative,” or “badgering the witness.” Second, the jury may take pity on the witness and form some dissatisfaction or even anger regarding the attorney. But, most importantly, such an exchange may confuse and undermine the point that the attorney is striving to make. Stick to the point and drive with pointed questions

> “Mr. Big, yes or no, is it true you were half-shaven after the accident?”
>
> yes
>
> “you were shaving while you were driving, correct?”
>
> No
>
> “so, you would agree with me that you intentionally shaved half your face earlier that day before the accident?”
>
> Or
>
> “so, you would agree with me that it is your habit to keep your razor with you in the car, but not to use it?”

Here, you are remaining in control and focusing the jury on the absurdity of the witnesses denial of shaving. Stress the facts that support your conclusion that he was shaving. This is more effective than arguing with the witness (“yes you were,” “no I wasn’t,” “oh, yes you were, come on,” “no I wasn’t,” etc.

It is admirable for the attorney to be thorough and persistent. Certainly, a question may be asked more than one way, and one time. However, when it becomes clear that a witness is resistant, uncooperative, or combative, the attorney should likely move on with other questions. Or, seek intervention from the presiding judge (“your honor I would ask that the witness be instructed to answer.”); each statement in cross can be responded to by the witness. It is difficult to get a witness to change such response. The time to argue about such a point is when the witness has left the stand and the closing argument is delivered (Closing Argument). At that time, when the witness can no longer argue, supplement, or explain, the attorney can urge the jury to conclude that:

> “Mr. Big twice denied that he might have been distracted; he insisted twice he was not shaving at the time of the accident. But, he was half

> shaven according to the police report and a razor was in his car. Perhaps he is just afraid to admit he was not paying attention and that is why he insists the light was green for the Blue truck; that is why he refuses to admit he was mistaken."

Cross-examination should be focused. It is a time for confronting the witness with evidence that undermines her/his conclusions. This can be done with documents in the competition problem, the testimony of the witness her/himself, or the testimony of other witnesses.

Cross-examination is about creating or focusing doubt about the witness' individual conclusions. In the above example, the shaving hypothesis is notable. But, other common sense factors might likewise be interjected:

> "it is possible that you were paying more attention to your own driving than to the color of the traffic light in front of the blue truck, isn't it?"

An attorney might question if Mr. Big noticed the two people walking a dog, and if Mr. Big admits to noticing then perhaps it is worth asking if he might have been distracted by the dog (witnesses may be eager to demonstrate their knowledge of the facts, and yet remembering much detail about the dog might support the conclusion that Mr. Big spent a lot of time looking at the dog instead of the road).

Cross-examination, some suggest, should be short. However, a better word is succinct. Attorneys should not cross-examine merely to do so, but should have a plan and make specific points. You are undermining the story the witness told on direct. It may be possible to make each and every point, but that may be impractical. Time may be limited. More importantly, the attorney must remember that the point is to sell the jury on an idea. Attorneys should focus on the theme and theory of the case.

For example, perhaps the plaintiff testifies that an accident occurred when an "azure truck" struck her car in an intersection. Clearly, from the example set forth above, the truck was "blue." One might waste much time in a detailed pursuit of the distinctions between "azure" and "blue," but it would add little to the case. Azure is a shade of blue, and spending a measure of time to establish that may afford the attorney a chance to be right, to look strong and confident, but will it change the outcome of the case? Or, might the jury conclude instead the lawyer is a bully? Might the jury conclude such questions are a waste of time? Rather than focusing on the word game of colors, perhaps it is better to shift the focus and in the follow-up question simply ask "you were struck by the defendant's truck, is that correct?" This avoids the pitfall of

quibbling over what shade of “blue” and gets on to the real point that a particular truck struck the plaintiff. And, notably, such a rephrasing allows you a second opportunity to reiterate that truck hit the plaintiff. Finally, it demonstrates to the jury that you are above the fray and simply striving to reach the truth.

Redirect Examination

Redirect is a second opportunity for the attorney that called a witness, and performed direct examination, to ask some further questions after cross-examination. The same caveats regarding time management apply to this questioning also, as the time limit for all "direct" examination generally apply to the redirect. In short, every minute spent on redirect is time that becomes unavailable for direct examination of another witness. Beware the temptation to "use all the remaining time" in asking questions of witness three that are not necessary, not useful or probative, and are asked simply because there is time left you feel a need to fill. Ask what is needed, and then move on with the trial. The jury will likely know if you are wandering just because you can.

Redirect should be very succinct and focused. This is for the same reasons that cross-examination should be focused. This is important in terms of perception. An attorney conducting an extensive redirect may be perceived as tacitly admitting that the cross-examination was successful and damaging (the cross-examiner did such a great job, I need to have the witness repeat everything that was said on direct again). A succinct and focused redirect sends the opposite message (the cross-examiner did not hurt us at all, but let me remind you of one or two critical points).

Redirect is important. It is important to remember that human memory is known to favor what a person hears first (primacy), most often (frequency), and last (recency). Thus, when an attorney declines the opportunity to redirect, she/he has allowed the cross-examining attorney to have the "last word" with that witness (yielding the "recency"), and has foregone the opportunity to reinforce the really critical point that the attorney is striving to have the jury remember (frequency). In any event, it is usually advisable to ask one to three questions on redirect in most situations. Choose them wisely, and ask them deliberately, patiently, and bring the jury back to the point(s) you were striving to make.

Thus, if the cross-examination has been withering or not, the attorney might rise on re-direct and refocus the jury with some short reminders:

> "Ms. Plaintiff, remind me what color the light was when you entered the intersection?"
>
> "Ms. Plaintiff, how have your injuries affected your daily living?"
>
> "Ms. Plaintiff, how many times did you have to visit the chiropractic physician for care after this collision?"

If the witness is an expert, a sound course on redirect might be as simple as:

> "Did any of the questions asked on cross-examination change your opinions?"
>
> "for clarity, what is your opinion as to _____?"

Critically, it is very likely that the "redirect" will be the last word with any witness. It is possible for a judge to allow "recross" thereafter, but it is rare. If the cross-examining attorney is surprised by something that is asked during re-direct, she/he may object to the new topic: "objection, your honor, this exceeds the scope of cross-examination" (this means that cross-examination was limited to the color of the traffic signal, but on re-direct the attorney begins a new line of questioning about a different topic, such as the number of visits to the doctor). The judge might not allow the new line of inquiry (sustain the objection), or might allow it (overrule the objection).

If the judge allows the new line of questioning, the cross-examining attorney might, when the redirect concludes, rise and ask the judge: "your honor, may I re-cross regarding this new line of inquiry regarding the frequency of medical visits." Whether to allow this or not is entirely up to the judge. If no objection was made during the redirect, it is very unlikely that re-cross will be allowed. Even then, it remains unlikely and if granted it should be very succinct, focused on the new topic, to the point, and short.

Impeachment and Rehabilitation

Often, a witness' testimony on the stand will be contradicted by other witness' testimony or by documents in the competition materials. This may be intentional (the witness is striving to be challenging or difficult). It may be honest confusion, in which the witness merely perceives or interprets the materials differently. It may also be merely a perceived contradiction, and unworthy of attention (*see supra:* "azure"). Students portraying attorneys will often have to think on her/his/ver feet to make sound decisions about inconsistent testimony.

Most program rules allow "fair extrapolation," in interpreting the provided materials. This might be by positive or negative inference. For example, in the car accident example there is no mention of bad weather influencing the situation. From that ambiguity, one might infer that weather played no role in the event (thinking that if bad weather were present, it would be mentioned). Less readily apparent, the mere occurrence of a traffic accident such as this might be interpreted as suggesting that one or both of the drivers was distracted. It is likely that an extrapolation question might therefore be allowed:

> Direct: "how was the weather that day?"
>
> or
>
> Direct: "were you distracted at the time of the collision?"

Such questions on Direct are likely to be intended as "preemption," and can be asked whether the facts are clearly in the competition materials or are being inferred. Asking these Direct questions is to preempt the issue (allow the witness to explain on Direct, with a "friendly" counsel). Such questions might instead be raised on cross-examination, more like:

> Cross: "the weather was clear that day, was it not?"
>
> or
>
> Cross: "wouldn't you agree with me that it is possible to be distracted while driving?"

On cross-examination, such questions are intended to undermine or "impeach" the credibility of the witness. One might similarly raise issues from the problem that were

not addressed on Direct. By asking what time the accident occurred, the cross-examiner is able to test the witness' overall grasp of the facts instead of the familiarity with what the witness has memorized. The cross questions are coming from an adversary attorney with whom the witness is far less familiar and comfortable. The questions may be an invitation down some irrelevant path for the sole purpose of suggesting the witness lacks knowledge, is easily confused, or is not trustworthy. This is "impeachment" testimony, again whether with facts in the materials or with inferences.

In the "real world," any such questions are potential problems. When asking questions to which you do not have ready and existing evidence may allow a witness to narrate and take control of the examination. Asking questions to which one does not know the answer is a potentially risky path. Thus, the inference questions are more perilous than asking unaddressed issues from the witness statement or other documents.

In the Mock Trial setting, that potential is likely enhanced. If the witness has no opinion on the weather (because there is nothing in the materials), that can be potentially challenging ("you mean you cannot remember what the weather was like?"). Such a question may be impossible for the Mock Trial witness to answer confidently and competently, beyond something like "there is nothing about bad weather in my statement, and I think I would have mentioned it." However, it is also possible the witness will answer in a way that is damaging to the cross-examining attorney, who will have no means to counter that answer.

An incomplete, vague, or unexpected answer may be difficult in the cross-examination setting. There may be confusion or questions created by such an answer. Thus, it may well be left to the witness' own attorney team member to focus on any such perceived deficiency on re-direct. That process is called "rehabilitation," and can be in this type of context or in any situation in which a line of questioning on cross-examination has left the situation confused or unfavorable. If the witness seemingly self-contradicted, or her/his answers for any other need for further explanation or illumination, counsel should address that on re-direct. Re-direct can also be critical if a witness has tried to explain some answer on cross, but been limited by the attorney or judge ("just answer yes or no"). In that event, rising on re-direct to ask "what were you trying to explain in response to the question about the traffic signal a moment ago" will afford the witness the chance to regain the story line and tell her/his/ver story. The direct attorney must pay careful attention during cross-examination to assure she/he/ve is ready to rehabilitate if the witness' testimony has been damaged by the cross.

Objections

One of the most confusing and confounding elements of Mock Trial is the evidentiary objection. The competition document (the problem) will usually include references to various rules of evidence that are applicable to the competition. These are an abbreviated replica version of the "Rules of Evidence" or "Evidence Code" that controls such issues in the courts of various jurisdictions. Knowing the rules is critical for a presiding judge; there is no harm in reminding a judge at the outset of a round that the applicable evidentiary rules are the ones in the problem (*see* Preliminary Matters).

Of critical importance is that teams focus on the evidentiary rules that are contained within the competition package. In the "real world," there are a multitude of evidence rules and processes. The most experienced of litigators (the 5% that are in the courtroom weekly) sometimes struggle with all of them and their various nuances. Thus, there may be many rules that are in your state's rules or code that may not be in the problem provided. Remain focused on the problem.

Students should accept that evidence can be complex (most law school graduates will have at least one full semester of class striving to comprehend the process, and it will not be sufficient in every regard). Students should recognize it is a tough subject, a broad subject, and should focus on the basics. The critical point is to understand that some documents and testimony are permitted by the rules, but not all. Understand what is not permitted, and be prepared to object to that. In that preparation, you are likewise ready for the converse, when someone on the other team objects. When responding to an objection, focus on the specific rule. Make your best argument in response. Be succinct and focused. Examples:

> "did Mr. Big say he did not have a razor?"
>
> "objection, hearsay"
>
> "may I respond? – your honor, we are not eliciting this for the truth of the matter, but as regards why this witness reacted in the manner she did" (if not submitted for the truth, it is not "hearsay."

If confounded, there is no harm in admitting it:

> "your honor, I don't know how to respond to that objection; this does not seem to be hearsay."

This may not be the best answer, but is better than no argument at all. There is also no harm in once asking “your honor may I have a moment to consult with counsel?” and getting (very) brief input from your team. And, be imaginative. There are many ways to rephrase questions that may avoid an objection. Rephrasing may satisfy your opponent, or she/he may stop objecting to avoid appearing obstructive. Persistence often prevails. There is no “best” response or tactic, and practice will provide experience with the challenges and nuances of objections. Remember that the competition rules may or may not emulate any particular state’s laws or rules. The package materials are critical; that is where the student lawyers should focus effort. Knowing those rules in the problem is critical.

Those competition rules will also likely dictate the when of objections. It is usual for such a package to forbid objections during opening statements and closing arguments. The educational foundation for that is sound, and allows students to focus upon their presentation without fear of interruption, distraction, and additional stress. However, some rules do allow commenting briefly after perceived objectionable content in such statements. Opposing counsel may be permitted, after a statement is concluded, to note:

> “your honor, for the record, though I was not permitted to object to counsel’s opening, if I were permitted, I would have objected to _____.”

This is an acknowledgement and an opportunity for the student to demonstrate breadth and depth of knowledge. It may impress or sway the jurors. However, it may also be viewed negatively by a juror if the objection is very technical or merely a minor point. This opportunity should be used sparingly and carefully.

An objection is a legal point that a party makes in order to prevent particular testimony or documents from becoming evidence in a case. They come in many forms. For example, suppose such a rule states that no witness may be asked more than one question at a time. The attorney examining the witness asks: “what time did you leave the house that day and where were you going?” The objection by the other attorney would be: “objection – compound question.” Simply stop, ask the judge “may I rephrase,” and then ask two questions separately.

In actual court proceedings, it is more common to hear simply “objection.” And, presiding judges often rule with little argument or explanation from either counsel. However, the Mock Trial is largely about students displaying what she/he/ve has learned, applying rules to a particular situation, and about explaining to or teaching the

judge. Thus, there is frequently more leeway for participants to be more specific in objections, such as “objection – compound question.” But, it is always best to ask before responding: “your honor may I be heard?”

After voicing an objection, counsel should pause and await response from the presiding judge (the bench). Witnesses should likewise pause, but often do not (in Mock Trial and elsewhere). The response from the bench in mock trial is likely to afford the two attorneys (the one who is conducting the examination and the one that has objected) the opportunity to explain her/his respective argument(s) regarding the question that has been posed. But, there are no guarantees, and if the judge simply rules without argument, then move on (if overruled, repeat the question for the witness, if sustained rephrase or ask a different question). If stymied, ask the judge if you may have a moment to consult with co-counsel.

The only member of the team that may object to a question is the one performing the direct or cross-examination of that particular witness. Therefore, each of the attorney performers on the team must know the evidence rules and make tactical decisions. It is also a good reason for the three lawyer performers to communicate with each other by passing a legal pad with notes back and forth (counsel should strive not to speak to one another at counsel table, even in whispers). In the aftermath of a round, the team should discuss the objections, the responses, and the rulings they remember. Learn from successes and challenges that each team encountered.

Once an objection is made, if the judge does not invite argument, it is appropriate to ask simply “your honor, may I be heard.” The judge’s response may be a simple affirmation (“please do” or “yes”), or at times more limited (“counsel how is this not hearsay,” or “yes, but please be brief”). Teams should be aware of time restrictions, and listen to the judge for such suggestions. In some competitions the time spent on such arguments does not count against overall time constraints, but teams should be aware of the potential for arguments to compromise planned time if that is not the case. It is also possible for the overall time for a round to run long because of such argument, and a presiding judge may simply be moving the competition along. Don’t be frustrated by not being allowed to respond in some situation, move on in light of the ruling.

Thus, there are absolutely appropriate legal reasons for evidentiary objections. They can protect the record and the jury from evidence or documents that would inappropriately influence a trial. They assure that parties’ rights to confrontation are protected. And, they strive to keep overly prejudicial evidence from the jury. Trial

lawyers that study evidence rules and codes can be very effective at presenting evidence and at intimidating opposing counsel.

It is worth noting that there are also purely strategic reasons for objecting (or not objecting). Student attorneys should be very wary of any inclination to object on purely strategic grounds, though professional litigators do so frequently. The point of a purely strategic objection is merely to divert the jury's attention from some point that is being made, to interrupt the other attorney's train of thought, or to allow your witness a moment to think and regroup if the examination is not going as well as hoped. It is an interruption and diversion through which the attorney not currently questioning a witness may strive to draw attention to her/himself and thus away from the questioning attorney or witness for a moment.

A primary point about objections is that only two attorneys will speak regarding any particular witness. For each witness, there will be an attorney (on that witness' own team) performing direct examination (*see* Direct Examination) and an attorney (from the opposing team) performing cross examination. Only these two attorneys may voice or respond to objections during that particular witness' testimony. This can be frustrating for any particular attorney (co-counsel) who is disappointed with or disagreeing with particular testimony and unable to object. The dynamics of this should be discussed in advance of the performance to minimize stress in the moment.

Often, other team members will perhaps notice objections. Notably, these other team members are able to view that portion of the trial from a more detached perspective, and are perhaps less focused on remembering the next question, the next point, etc. However, having noticed a basis for objecting, the team members not assigned to a particular witness cannot voice or respond to such an objection. The team member must communicate the objection perspective to the attorney responsible for direct or cross (*see* Teamwork and Support).

Whispering and conversations are not generally appropriate while testimony is underway. However, a quickly written note may be inconspicuously passed to alert a team member to such an issue. Many teams have a specific notepad present on counsel table for that purpose. An attorney may similarly always seek permission from the bench to glean help from her/his team ("your honor, may I have a moment to confer with co-counsel before responding?"). If given such an opportunity, counsel should strive to minimize any delay, and stick to the written note process if possible.

Exhibits and Demonstratives

Each competition packet contains some assortment of documents including things such as witness statements, reports, test results, text messages, emails, photographs, drawings, and more. It is helpful for an attorney to use these materials, both offensively (direct examination) and defensively (cross-examination). Often, with the appropriate questions and answers, the attorney will be permitted to show the documents to the jury. This may reinforce and fortify the testimony of a witness or to the contrary impeach her/him. Some rules may allow the use of enlarged versions of such documents, but others forbid that. Teams must understand what the rules permit.

It is critical to understand at the outset that in a "real world" trial, the documents admitted as evidence would be sent to the deliberation room for the jury to review in deciding the case. In the Mock Trial world, however, it is critically important to engage the jury and show them the exhibits during the trial performance. When the performance concludes, the jurors will be busy with scoring. Since they need not reach a verdict in the case, they are unlikely to take time to view the evidence documents later. To the jurors, those exhibits may be seen as props and they may focus entirely not upon the substance of the document but only upon the performance of the procedure for admitting something to evidence. Therefore, putting on a compelling performance is important. Even in the real world there is benefit in focusing the jury on an exhibit "in the moment."

Any document that an attorney wishes for the jury to see must first be admitted as evidence. Documents may be used in that manner, or may be merely relied upon during questioning. This might be for reminding someone of a fact or comment. So, if asked what the dog's name was, and getting a response of "I don't know," the attorney might ask "judge may I approach the witness" and showing the statement ask the witness to read (indicating) "here." Then, the attorney may ask again "what was the dog's name," and the witness can answer. Thus, the document has been used, but not admitted as evidence. However, if an attorney wishes for a document to be admitted, she/he will have to ask that it be admitted. She will have to ask questions about the document as a foundation for admitting it, and then:

> "your honor, I move what has been marked as exhibit "N" be admitted in evidence as (Plaintiff's/Prosecution's/Defense) exhibit "N" (N = number or letter)."

There are commonly objections to such an attempt (*see* Evidence). However, it is also common for the opposing team to raise no objection when such a document is "moved." Tactically, an attorney needs to decide whether to "lay a foundation" for the admission of a document before "moving" it into evidence. On one hand, the foundation (or "predicate") may not be needed if there is no objection, and the time is perhaps not well spent. However, if there is an objection the attorney's pace and cadence may be interrupted having to begin that process after an objection, causing distraction and stress. Keep in mind that this is a performance, and the scoring jurors will be most impressed with the attorney that efficiently and seamlessly lays that foundation and then moves the document into evidence.

Whether in anticipation of an objection, or response, the attorney will need to establish that the document is what it purports to be (authentic), and that it is either not "hearsay," or allowable hearsay because of some exception in the evidence rules. *See* Evidence. These are the foundations of the document being accepted as evidence.

Once an item of evidence is thus admitted, a hurdle has been cleared. It is in evidence, and there is some relief. But, the attorney should then be cognizant of the point of admitting it. In other words, "so what?" Why does it matter that it is in evidence? To provide purpose to the effort of admitting the document, the point is for the jury to see it and understand it. This can be accomplished in two ways. Which is elected in a given performance is up to the team, and there is no right or wrong way to make use of the document once it is admitted.

One option is to "publish" the document to the jury. When the judge announces "it is admitted," or perhaps "accepted as evidence," the attorney should seek permission to "publish to the jury." There are no magic words in this regard, and asking instead "may I show this to the jury" may be as effective as the more formal "may I publish this to the jury." In this method copies of what has been admitted (it is always wise to have multiple copies in preparation for a performance) may be handed to the jurors once the judge has given permission.

This puts the important information you have just worked hard to admit in their hands. After the document is published, then the attorney begins to ask substantive questions about it, and the witness responds. The jurors, having a copy(is) of the document, can follow along with the inquiry and the answers. They are engaged in the process of the trial and enabled because the attorney has engaged them. This is particularly effective with reports or similar written documents.

The alternative to “publishing” is to use the document as a tool for the witness (demonstrative). Once the document is admitted, rather than asking permission to “publish,” the attorney might instead ask “your honor, may the witness step down to demonstrate for the jury?” If the judge agrees, the witness may then stand in front of the jury box with the attorney. As the attorney asks questions about the exhibit, the witness can testify and point to various parts of the exhibit. In this manner, the attorney has engaged the jurors even more, has created some intimacy between juror and witness, and likely created some feeling of collaboration (without speaking it, the message is something like “we are all here, well at least just us, to get to the truth”). The demonstrative approach is particularly effective with a map or a diagram.

A team may be rightfully concerned about the time involved with stepping down from the witness stand, positioning in front of the jury box, and “walking” through a document, diagram, or picture. This is a potentially valid concern, and another instance in which a team leader may be of great service. Someone with responsibility to check in regarding remaining time, while keeping track of the team checklist, can be consulted by examining counsel before deciding to ask the presiding judge to proceed in this manner. Thus, the examining attorney is free to focus on the questions, answers, and overall progress with a witness, and then turn to the team leader for input on the demonstrative potential (“if my notebook is on the front of our table, you need to skip the demonstrative as time is short”).

Anytime that such a discussion occurs in front of the jury box, the opposing attorney (who will conduct cross-examination) should rise quietly and respond (“your honor, may I move to where I can observe the witness’ use of this exhibit?”). The cross-examining attorney who does not move to such a vantage point will be disadvantaged as she/he cannot see what the witness is referencing, and will therefore likely struggle to effectively cross-examine. Critically, it is up to the judge whether to allow the cross-examining counsel to move to such a vantage point, and cross-examining counsel should not be intrusive or interfere if permission is granted. The point is not to interfere, but to observe. Professional decorum is critical. When cross-examining, the focus should be on the attorney, not the witness. It is therefore usually best for the cross-examining attorney to ask the witness to return to the witness box and focus on impeachment questions rather than the document itself. In some instances, however, particularly if there has been a misstatement or error, crossing counsel may well wish to have the witness remain standing and focus on that error (“where you were pointing is where the car ended up, but the collision did not occur there did it?” “Please point to where the collision itself occurred”).

Finally, when evidence is in the hands of the jury, or a witness, the attorney arising next to conduct cross-examination should seek permission and retrieve the documents, unless they will be referenced in cross-examination. If the rules have allowed an enlarged version to be placed in front of the jury for the witness to reference, it should be moved from the jury's view if it will not be directly used. It was used on direct because it reinforces or supports that team's case. It is unlikely to benefit the team that is cross-examining. Those that will not be referenced can become a distraction, and the mindfulness of retrieving them may well be impressive to the scoring judges (jurors).

Evidence

This is not a primer on evidence, but some foray into the topic is unavoidable. Attorney team members are encouraged to perform further research on the terms that are italicized because of their probable importance in any mock trial performance.

The most common objection to the admission of any document is "objection, *hearsay*." That term may be specifically defined in the competition package. In general, hearsay is founded on the constitutional concept of "confrontation," which requires a party have the opportunity to confront any evidence used against her/him/it. The objection is often appropriate when some party is seeking to use (restate) some statement made outside of court, for the purpose of proving that the statement is true. This might be in terms of what someone said, or what is written in some document. For example:

> Direct: "what was the weather like the day of the collision?"
>
> Response: "Mr. Big told me the weather was clear."

The objection needs to come immediately upon hearing "told" or "said." To the extent possible, the lawyer wants to stop the answer before the jury hears it all, as in:

> Direct: "what was the weather like the day of the collision?"
>
> Response: "Mr. Big told
>
> Counsel: "objection, your honor, hearsay."

Practically speaking, it is very hard for the objecting attorney to stop the testimony. By objecting, the attorney may achieve the benefit of winning an argument, but may also draw the jury's attention to that testimony. The jury may perk up and be more interested as a result of the objection ("what is so important that Ms./Mr./Mx. Attorney does not want us to hear it?").

The first lesson from this is to hold the hearsay objections until they matter. Often, attorneys are baited into evidentiary debates about hearsay by their opponents. Thus, when examination starts, a crafty attorney may inappropriately ask *leading questions* ("your name is Mr. Big, is it not?"). When opposing counsel objects to leading, questioning counsel shrugs it off and simply asks "please state your name." If opposing counsel can be goaded into making objections when it really does not matter, the jurors will likely become bored with objections and it may draw the ire of the judge.

The same can be true of hearsay. Remember, that in a real trial the jury will know nothing of hearsay and other evidentiary rules. They may well view objections as merely "those lawyers arguing again," and they may become insulated from them. Thus, beginning an inquiry with "Mr. Big, what did the investigating officer ask you after the collision" may draw that *hearsay* objection. There is nothing in the example to suggest the officer in fact asked anything, and the question may be for the solitary purpose of goading the opposing counsel to an objection. In other words, it is a distraction.

Counsels are well advised to voice objections sparingly and earnestly. One does not want to be seen as argumentative by the jury. Before voicing an objection, counsel should consider how imperative it is, and how potentially distracting. If counsel is cautious and somewhat permissive to start, it may be advisable to signal to the jury that the objection(s) that were not voiced were nonetheless noticed: "your honor, I have been reluctant to object regarding this during the preliminary matters, but counsel is leading the witness," or "but these questions call for inadmissible hearsay."

In order for a document to be placed in evidence, it must be *authenticated*. When asking a witness about facts, the rules strive to prevent repetitiveness – *asked and answered*. When a witness' testimony is something with which counsel disagrees, there is a tendency to retort – "that is not true is it?" This is *argumentative*, and instead counsel should simply demonstrate that incongruity by asking another question or using a document (like that witness' affidavit or statement) to contradict the statement. The process should be a conversation of questions and answers. If the witness is telling a story while counsel stands and watches, this is a *narrative* answer.

Evidentiary objections will be necessary. Inappropriate questions or evidence is a near certainty. The scoring jurors want to see that counsel notices the reasons for objections. They want to hear argument and legal analysis. They do not, however, want to hear a barrage of incessant objections and distractions. Thus, the good lawyer is striving for the "Baby Bear" solution (*Goldilocks and the Three Bears*, Robert Southey 1837). They must object enough, but not too much. It should be "just right." Lawyers must maintain control, but not be overbearing. They must maintain focus, but not be seen as obstructionist. It is a careful and difficult balance that must be practiced.

The Closing Statement

After the defense rests, the plaintiff/prosecution will begin closing arguments. Teams should be wary of the rules in this regard. Most competitions allow the plaintiff/prosecution to have a rebuttal argument (the "last word"), but some rules require that this decision is made in advance and requested before the plaintiff/prosecutor closing is begun ("your honor, I would like to reserve one minute for rebuttal" is a common statement).

The closing is the opportunity to comment upon the evidence. The two attorneys that each deliver the opening and the closing are the "bookends" on the evidence. The opening tells the jury what the case is about, what to expect, and what result is sought. The closing should be somewhat repetitive of those points, reminding the jury of what has been proven (most of which the attorney can prepare for and even memorize; but, beware the potential for some expected testimony or document to not become evidence; in that case, closing counsel must be agile enough to remove that from the closing).

As importantly, the closing is the only opportunity to comment upon the evidence that the other team has presented or attempted. This is the opportunity to point out that one of the other side's witnesses was evasive, had memory issues, or was argumentative. The closing is the only opportunity to remind the jury of the team's theory of the case (why their side should prevail), and to assail the opposing party's case, documents, and witnesses. The closing attorney may not give opinions on things like the justness of causes or defenses. But, comment on the evidence is critical.

The attorney may not opine personally on the credibility of a witness ("I did not believe her/him"). It is improper for an attorney to opine that "this witness told the truth" or "that witness lied." If there is doubt about a witness, that doubt is what is appropriate rather than personally opining as to what is or is not. Instead of "I do not believe Dr. Green," counsel should point at the facts: "Dr. Green testified to X, but her/his records do not mention X," or "Dr. Green is being paid $X.xx to be here testifying today and Dr. Green testified that _____% of her/his testimony is on behalf of (the injured or the insurance companies)." The point is to highlight the evidence that can focus the jury on doubting Dr. Green, rather than opinion on how the lawyer feels about Dr. Green.

In commenting on the opposing party's evidence it may be permissible to point out any discrepancies ("he could not remember the _____"). Or, "today he remembers _____, but there is no mention of that in his statement made within hours of the

event; when would his memory be better?" Comment upon who had the better vantage to view an event, what might have compromised her/his line of sight. Focus upon the flaws, the questions, and the uncertainties. In commenting upon your own case and evidence, focus on the strong points. Reinforce that your client's testimony is not contradicted, or is consistent with what she told the physician, or "more consonant with logic and reason."

Comment upon the evidence and the trial itself. So, while one cannot comment on the justness of the cause, one can say "Ms. Yellow car told you how the accident happened; her doctor told you of the injuries that resulted and what that means to her future." One might add "this is supported by the testimony of Dr. Smith and Ms. Small." The case makes sense: "when you consider all the evidence, we think you will conclude that Mr. Blue Truck is responsible and that Ms. Yellow Car is entitled to damages.

Conclusion

The critical process points for participating in a successful Mock Trial are basic. Team members with willingness to work hard and contribute collaboratively must be recruited. Strengths and skills must be assessed as regards the most effective roles and responsibilities for each, in terms of witnesses and counsel. Issues must be identified and organized in a manner calculated to place in evidence the important facts supporting each side of the case problem. Those pillars will be the offense (Plaintiff or Prosecution) objective in each round. How they are demonstrated and supported? Then, how are they eroded and defeated, when on the defense? These must be outlined and understood from each perspective. There will be tasks for each team member from memorizing factual testimony to mastering evidence rules. Team members should likely watch Mock Trial competitions on video; many are on YouTube. The teams will require practice, feedback, and collaboration. A team may find it very effective to have three witness members and three attorney members, whose function remains regardless of plaintiff/prosecution or defense (witnesses are always witnesses and attorneys always attorneys). In this way, the witness members are situated to help coach/prepare the attorney members through either practice of direct or simulation of cross-examination. The team should have a student leader, teacher/sponsor coach, and if possible an attorney coach/collaborator. Everyone should remain focused on the outcome being a performance. In the end, the primary goal is to learn and grow through the experience. Students should focus on that improvement and development, recognizing that in every trial there must be a winner and a loser. Therefore, there will likely be disappointing days as well as victories. Thus, the benefit of skill development and growth are both attainable and beneficial.