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YMCA YOUTH & GOVERNMENT PROGRAM OVERVIEW

FOUNDED IN 1947, YMCA Youth & Government provides opportunities for teens statewide to find their voice on the issues facing society today. Offered in local YMCA’s, schools, and community groups, students are empowered to assume the role of leaders in their communities. By providing access to teens and encouraging their participation in the judicial, legislative and executive branches of our government, Y&G programs empower students to address concerns in their communities by understanding issues from multiple points of view.

MOCK TRIAL
Teens in the YMCA Mock Trial program acquire the leadership, team building and public speaking skills that lead to the development of active and engaged citizenship. Mock Trial provides an opportunity for students to participate in a competitive, high drama courtroom showdown between teams from around the state. Through researching case law, working with team members and arguing legal issues in front of real judges and lawyers, teens are provided hands-on learning opportunities that will assist in the development of the confidence, knowledge and skills needed to lead the next generation.

YOUTH LEGISLATURE
Students explore the meaning of civics and democracy in our nation by assuming the roles of various Washington State elected officials, researching and drafting creative policy solutions to community problems and engaging in service-oriented activities. Delegates learn and practice tolerance, understanding, and peer mentorship while putting to use real-world skills for a lifetime of civic involvement.
HISTORICAL REVIEW OF MOCK TRIAL
1987-2015

For many years, the YMCA Youth Legislature included an appellate court component that allowed students to write and present a legal brief before a model state Supreme Court. In 1989, in order to reach more students with a law related educational program, the Youth & Government Board of Directors decided to phase out the appellate court, and run a separate Mock Trial Competition.

The Mock Trial program was originally a bi-centennial project that was sponsored through local ESDs. In 1987, Youth & Government began to co-sponsor Mock Trial. The program had other sponsors and was supposed to be self-sustaining through fees and donations. Mock Trial suffered from continual funding problems and a high rate of coordinator turn over which made fundraising difficult. In 1990 the Board voted to bring the Mock Trial Program under the wing of the Board financially. The Board agreed to pick up the program’s deficit and raise the money to cover it. The Seattle YMCA graciously carried this deficit for us until we could raise the necessary funds. In 1994, after another funding and staffing crisis with Mock Trial, the Board took full responsibility for the program, placing the Mock Trial coordinator and the successful functioning and funding of the program under the Board and the Executive Director.

Mock Trial teams from high schools throughout the state work with a teacher-advisor and an attorney-coach to present a hypothetical legal case before a real judge in an actual courtroom. The vast majority of teams come from public and private high schools around the state, however there are occasionally other groups that form teams and become involved. An example of this is the Seattle Parks and Recreation team who began competing in the King County District Competition in 2006.

The case is written or selected by the Mock Trial Case Committee made up of attorneys and judges around the state. Judge William Downing has chaired this committee for the past several years and under his guidance the cases Washington students use in competition are some of the most well written and socially relevant mock trial cases in the nation. Our students are also known nationwide as effective oral advocates, skilled competitors, and polite and civilized opponents.

In 2000, Seattle’s Franklin High School represented Washington State well as they took first place at the national competition. Since then, Washington teams have repeatedly placed within the top 20 at each national championship.

Seattle Prep in 2014 became the second team in Washington State Mock Trial history to place first at the national competition by defeating South Carolina at the national tournament in Madison, WI.

Participants in the Mock Trial Program learn critical thinking and dispute resolution, practice oral advocacy, and experience planning and preparing a team effort. They develop a feel for the meaning of justice as they learn to sift truths from untruths and how to evaluate both sides of an issue before making a decision. The mock trial program adds a special dimension to citizenship education in our state, one that makes students aware of the importance of the law and it’s far reaching impact on our lives.
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<td>Civil</td>
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<td>State of Washington v. Mel Dobson</td>
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<td>Alex Williams, Marty Graves, and the Cedar County Board of Educ.</td>
<td>First Amendment and case for injunctive relief</td>
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<td>Crim</td>
<td>State v. Tag Montague</td>
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<td>Seattle Academy (16th at nationals) vs. Franklin (3rd at American Mock Trial Invitational)</td>
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<td>YMCA National Judicial Competition (NJC) Applications Due</td>
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<td>MAY 2017</td>
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REGISTRATION FEES AND REFUND POLICY

HIGH SCHOOL

DISTRICT REGISTRATION FEES

Registration: November 8-December 31
$50 per Student

Late Registration: January 1-January 10
$60 per Student

*NO registration accepted after January 10th

STATE FINALS REGISTRATION FEES

Registration: March 1-March 15
$100 per Student
$100 per Coach

*NO registration accepted after March 15th

MIDDLE SCHOOL DISTRICT REGISTRATION FEES

Registration: November 1-November 30
$30 per Student

Late Registration: December 1-December 15
$40 per Student

*NO registration accepted after December 15th

FINANCIAL ASSISTANCE APPLICATIONS

At the Y everyone is welcome. Financial Assistance is available through the state Youth & Government office and an application form can be found on our website. All individual Mock Trial participants are eligible to apply for financial assistance. Money is distributed based on family’s financial situation and special circumstances are taken into consideration when appropriate. If you have questions about this process please contact us at (360) 357-3475.

REFUND POLICY

There are no refunds or credits on District or State registration fees.

REGISTRATION COSTS

Student and coach registration fees may be shared between schools or obtained from student body associations, individual students, donations from local bar associations, service groups and fund-raising projects.
PROGRAM INFORMATION

STATE OFFICE

Sarah Clinton
Executive Director
sclinton@seattleymca.org

Brent Gaither
Program Director
bgaither@seattleymca.org
Program Support, recruitment, state and district events

Kendra Fredericks
Administrative Assistant
kfredericks@seattleymca.org
Registration, payments, financial aid

Phone: (360) 357-3475

Physical Address:
921 Lakeridge Way SW, Suite 201
Olympia, WA 98502

Mailing Address:
PO Box 193
Olympia, WA  98507

Youth & Government on the web:
www.youthandgovernment.org
# LIST OF CONVENERS

<table>
<thead>
<tr>
<th>County</th>
<th>Honorable Name</th>
<th>Contact Information</th>
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<tbody>
<tr>
<td>Clark</td>
<td>Robert Lewis</td>
<td>(360) 397-2226, <a href="mailto:robert.lewis@clark.wa.gov">robert.lewis@clark.wa.gov</a></td>
</tr>
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<td></td>
<td>Clark County Superior Court</td>
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<tr>
<td></td>
<td>PO Box 5000</td>
<td>Vancouver, WA 98666-5000</td>
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<tr>
<td>King</td>
<td>William Downing</td>
<td>(206) 296-9362, <a href="mailto:william.downing@kingcounty.gov">william.downing@kingcounty.gov</a></td>
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<td></td>
<td>516 3rd Ave, C-203</td>
<td>Seattle, WA 98104</td>
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<tr>
<td>Benton &amp;</td>
<td>Joseph Burrowes</td>
<td>(509) 735-8476 x3392, <a href="mailto:joseph.burrowes@co.wa.us">joseph.burrowes@co.wa.us</a></td>
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<tr>
<td>Franklin</td>
<td>Benton District Court</td>
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<tr>
<td></td>
<td>7122 W Okanogan, Place Bldg A</td>
<td>Kennewick, WA 99336</td>
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<tr>
<td>Kitsap</td>
<td>Jeffrey Jahns</td>
<td>(509) 360-337-7109, <a href="mailto:jjahns@co.kitsap.wa.us">jjahns@co.kitsap.wa.us</a></td>
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<tr>
<td></td>
<td>614 Division St., MS-25</td>
<td>Port Orchard, WA 98366</td>
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<tr>
<td>South King</td>
<td>David Larson</td>
<td>(253) 835-3012, <a href="mailto:david.larson@cityoffederalway.com">david.larson@cityoffederalway.com</a></td>
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<td>Federal Way Municipal Court</td>
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<tr>
<td></td>
<td>33325 8th Avenue South</td>
<td>Federal Way, WA 98063</td>
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<tr>
<td>Snohomish</td>
<td>Linda Krese</td>
<td>(425) 388-3954, <a href="mailto:linda.krese@co.snohomish.wa.us">linda.krese@co.snohomish.wa.us</a></td>
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<tr>
<td></td>
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<tr>
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<td>3000 Rockefeller MS 502</td>
<td>Everett, WA 98201</td>
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<tr>
<td>Spokane</td>
<td>Annette Plese</td>
<td>(509) 477-6362, <a href="mailto:aplese@spokanecounty.org">aplese@spokanecounty.org</a></td>
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<td>1116 West Broadway Avenue</td>
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<td>Whatcom</td>
<td>Charles Snyder</td>
<td>(360) 738-2457, <a href="mailto:csnyder@co.whatcom.wa.us">csnyder@co.whatcom.wa.us</a></td>
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YMCA YOUTH & GOVERNMENT
BOARD OF DIRECTORS

Dave Fisher | Chair
Fisher-Jurkovich Public Affairs

Joe Jenkins* | Chair-elect
Parametrix

Kevin Hamilton | Treasurer
Perkins Coie

Kelly Evans | Treasurer-elect
Soundview Strategies

Dan McGrady | Secretary
PEMCO

Catherine Brazil
University of Washington

Jeanne Cushman*
Attorney/Lobbyist

Mike Egan*
Microsoft

Erica Hallock
Council for a Strong America

Lucy Helm*
Starbucks Coffee Company

Blake Hirst
Youth Governor

Tom Hoemann
Secretary of the WA Senate, retired

Judge Robert Lewis
Clark County Superior Court

David Namura
CenturyLink

Al Ralston
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Sam Reed
Secretary of State Emeritus

Krystal Starwich*
Seattle Academy of Arts and Sciences

Neil Strege
Washington Roundtable

Marta Tolman
Business Management Consultant

Matt Wojcik
Bullivant Houser Bailey

TBD
Mock Trial Representative

*Alumni of Youth & Government
YMCA YOUTH & GOVERNMENT ADVISORY BOARD

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Lt. Governor Brad Owen
Secretary of State Kim Wyman
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Superintendent of Public Instruction Randy Dorn
Justice Debra Stephens
Solicitor General Noah Purcell
Senator Andy Billig
Senator Joe Fain
Representative Sam Hunt
Representative Hans Zeiger
Chief Clerk Barbara Baker
Secretary of the Senate Hunter Goodman
Christine Gregoire, Former Washington State Governor
Ralph Munro, Former Secretary of State
Scott Washburn, CEO YMCA of Snohomish County
Renee Radcliff Sinclair, President & CEO of TVW
MOCK TRIAL TESTIMONIALS

“It is Mock Trial’s ability to inspire passion that makes the program what it is. Whether it is a passion for the law, a passion for acting, or maybe just a passion for argument, you would be hard pressed to find a student in Mock Trial who isn’t passionate about something. It is this passion that makes the Mock Trial world so real. Without it, we would just be a bunch of kids talking about imaginary people allegedly doing imaginary things that may or may not be against the law.”

Scott Ferron, Seattle Prep student (2009)

“Mock trial is not just debate, it is not just theatre, and it is not just law. Mock Trial is a mental battle, fought in a court room, combining elements of theatre, law, debate, and speech. It is a melting pot of individuals, combining the legal community, with some of the brightest high school students in Washington; and it is the single best experience of my High School career.”

Louis Brotherton, Seattle Prep student (2007)

“The YMCA Mock Trial Program invigorates participants as well as their family and friends, basically our community, with knowledge of and passion for the justice system. Furthermore, participants learn fundamental social skills such as negotiation, public speaking, leadership, teamwork, critical thinking, creative problem solving, and civic involvement.”

Dubs Ari Tanner Herschlip, WSBA Young Lawyer Program Volunteer (2006)

“I help facilitate Mock Trial in our county because it is one of the most energizing things I can do. I am constantly amazed at the resourcefulness and competence of the students who participate and I think it teaches them so many skills that they won't get elsewhere.”

Honorable Charles Snyder, Whatcom County Superior Court District Convener (2006)

“The best thing about working with the YMCA Mock Trial program is the opportunity to observe so many talented high school students putting so much effort in to their presentations. All of the teams were impressive and, clearly, had spent many hours preparing for their trials.”

Honorable Linda Krese, Snohomish County Superior Court District Convener (2007)
ACKNOWLEDGEMENTS

Without the generous support of the following people and organizations the Mock Trial Program would cease to exist. Their continued support has allowed the program to flourish. A quality learning experience has been provided to over 14,830 past participants who have entered society with training and skills that will enhance any adult role they seek to fulfill.

First of all we would like to thank our Board of Directors. It is only because of their time, energy, vision, and passion that the Mock Trial Program continues to enhance the lives of Washington’s youth.

Many thanks also go to the staff at the Administrative Office of the Courts for their dedication and service to the Mock Trial Program.

We would also like to thank Program Chair, Judge Robert Lewis of the Clark County Superior Court for his time and dedication to the civic education of Washington’s youth.

Thanks also go out to case author Judge William Downing, King County Superior Court, for the time and creative energy he has given over the past year in creating Otto Blotto. His time and dedication, alongside the time and dedication of volunteers like them, continues to set Washington’s Mock Trial program apart from other programs around the nation who look to our state for some of the best mock cases in the country.

We are also grateful for the expertise and time of hundreds of volunteers from the legal community who serve as judges, court administrators, district conveners, audience raters, and attorney coaches; each year their collective volunteer hours number into the thousands. This contribution to the lives of young people is immeasurable.

And finally, thanks to the scores of teachers and volunteer coaches willing to embrace the mock trial concept and put forth the commitment to prepare mock trial teams for competition. They inspire excellence in their students and provide an experience in democracy they will remember for a lifetime.
VISION STATEMENT

New generations of ethical and informed, public-minded citizens

MISSION STATEMENT

Teach Democratic values and skills to youth through hands-on experiences

SPECIFIC PROGRAM GOALS:

- To foster the development of citizen responsibility
- To develop social competence, problem-solving ability, and communication skills
- To encourage self-reliance and a sense of purpose for youth
- To provide training and experience through active participation in the three branches of government: Legislative, Executive, and Judicial
- To stimulate careful deliberation of social issues and their possible resolutions
- To create opportunities to hear and respect varying viewpoints
- To inspire young people to be responsible & act with integrity
- To apply ethical values in making public policy
- To teach the YMCA core values of **Honesty, Caring, Respect**, and **Responsibility**

MOTTO

“Democracy must be learned by each generation.”
YMCA MOCK TRIAL PARTICIPANT CODE OF CONDUCT

PROGRAM PURPOSE
The purpose of Washington YMCA Mock Trial Program is to develop within youth a dedication to the values of democracy, informed advocacy, and character development. With this purpose in mind, the following ground rules have been established. Your cooperation in acting within these ground rules is expected, and will help to ensure continuation of the privileges we enjoy in using courthouse and other facilities.

PROGRAM GROUND RULES
No alcohol. No drugs. No sexual activity. No tobacco products. No offensive language, dress, or behavior. No violent behavior. Any violation of this code of conduct may result in immediate expulsion from the program, and the violator will be sent home at his or her own expense.

CONDUCT EXPECTATIONS AT COMPETITIONS
1. Students must follow school or sponsoring organization policies and procedures.
2. Students should place the highest value on excellent preparation and presentation and good sportsmanship. Students agree to exhibit the core values of the YMCA – honesty, caring, respect, and responsibility.
3. Students agree to exhibit the highest standards of conduct and fair play, showing respect for all participants in the competition and other Mock Trial volunteers and personnel in and out of the courtroom.
4. Students are professionally dressed while competing.
5. Students will not willfully participate in tactics known to be unfair, unsportsmanlike, or in violation of the Mock Trial rules.
6. Students will respect food and drink restriction in the courtrooms and agree to dispose of any trash appropriately inside and outside of the facility.

I agree to abide by the YMCA Mock Trial code of conduct. I understand that if I violate the rules, my parents and my school will be notified, and I may be sent home at my own expense.

Student Signature ___________________________ Team ___________________________
Print Name ___________________________ Date ___________________________

Parent Signature ___________________________
Print Name ___________________________ Date ___________________________

PHOTO, VIDEO, & INFORMATION RELEASE

Permission is granted for photographs and video of my child taken during his/her participation in the Youth & Government program as well as his/her information (including but not limited to name, grade and school) to be used for purposes that may include publicity. This information may be used without compensation.

Parent Signature ___________________________ Date ___________________________
YMCA MOCK TRIAL ADULT CODE OF CONDUCT

PROGRAM PURPOSE

The purpose of Washington YMCA Mock Trial Program is to develop within youth a dedication to the values of democracy, informed advocacy, and character development. With this purpose in mind, the following ground rules have been established. Your cooperation in acting within these ground rules is expected, and will help to ensure continuation of the privileges we enjoy in using courthouse and other facilities.

CONDUCT EXPECTATIONS AT COMPETITIONS

1. A ratio of 1 adult to 10 students should be maintained at all times.
2. All school or sponsoring organization rules regarding offsite events and activities apply during competitions. This includes policies regarding alcohol consumption, driving, student relationships, etc.
3. Adults should place the highest value on excellent preparation, presentation and good sportsmanship. Adults agree to exhibit the core values of the YMCA – honesty, caring, respect and responsibility.
4. Adults agree to exhibit the highest standards of conduct and fair play, showing respect for all participants in the competition and other Mock Trial volunteers and personnel.

I agree to abide by the YMCA Mock Trial code of conduct. I understand that if I violate the rules, my school or sponsoring organization will be notified, and it may result in expulsion from competition.

Signature ___________________________ Team ___________________________

Print Name ___________________________ Date ___________________________

PHOTO, VIDEO & INFORMATION RELEASE

Permission is granted for photographs and video of me taken during my participation in the Youth & Government program as well as my information (including but not limited to name organization) to be used for purposes that may include publicity. Further, this information may be used without compensation.

Signature ___________________________ Date ___________________________
ADVISOR LIABILITIES AND RESPONSIBILITIES
YMCA Youth & Government

Delegation/Team Name: ________________________________

CONTACT INFORMATION:

Sponsoring Organization: ________________________________

Lead Advisor:                                      Lead Advisor’s Supervisor:
Name: ________________________________          Name: ________________________________
Cell: ________________________________          Cell: ________________________________

Additional Advisors and Volunteers:
Name: ________________________________          Name: ________________________________
Cell: ________________________________          Cell: ________________________________
Name: ________________________________          Name: ________________________________
Cell: ________________________________          Cell: ________________________________

LIABILITY:

☐ The sponsoring organization listed above has conducted a Washington State criminal background check on all adult advisors and volunteers working with our local group within the past year.

☐ We have reviewed the Code of Conduct and Advisor Responsibilities with all Adult leaders and volunteers associated with our delegation.

☐ The lead advisor will have medical release and emergency medical information for all students and adults registered with this group during all local, regional, and statewide Youth & Government events.

☐ We have an emergency communication plan in place that includes communication to parents/families, Youth & Government staff, and our sponsoring organization in the event of any emergency during a Youth & Government activity or event.

Lead Advisor Signature: ________________________________ Date: ________
Supervisors Signature: ________________________________ Date: ________
PROGRAM POLICIES/BOARD EXPECTATIONS

Washington YMCA Youth & Government is governed by a Board of Directors. The following are guidelines and policies adopted by the Board:

Adult Leadership Policy
All phases of the Mock Trial program include adult responsibilities. To ensure adequate supervision and leadership for students, adult leaders function in the following capacities:

- As advisors and facilitators assisting students
- As a responsible adult acting on behalf of the students’ parents, the local YMCA or high school, and the statewide organization of YMCA Youth & Government

All adult coaches and program volunteers are expected to maintain appropriate relationships with their students. Personal relationships with individual students are strictly prohibited.

Drug, Alcohol & Tobacco Policy
The YMCA commitment to a healthy spirit, mind and body requires consistent enforcement of the Youth & Government drug, alcohol, & tobacco policy as follows:

- There will be no tolerance of drug, alcohol or tobacco use in any form during Youth & Government events and activities.
- Failure to comply with this policy could result in immediate expulsion from the program. Delegates may be sent home at their own expense.
COACHING RESPONSIBILITIES

Coaching Requirements

A ratio of one adult to every ten participants (1:10) is to be in place at all Youth & Government activities on the local, district, and state level. At least half of the coaches from each team must be at least 21 years of age. Program alumni are required to be at least two years out of high school to volunteer as a team coach. Alumni interested in volunteering who are less than two years out of the program should contact the state Youth & Government office to learn about additional opportunities.

Each delegation must have one “Lead Coach” for their group. This individual will be the main point of contact for the state office and be responsible for providing leadership and direction for the team at all levels of the program. It is also the responsibility of this individual to ensure that the following responsibilities are taken care of (either by themselves or by another advisor in the group).

It is the coach’s role to provide appropriate adult leadership and direction for high school age delegates. Please be clear with your students about your role as a coach and that you maintain a professional manner in dealing with them and their parents.
# Budgeting 101

When creating a program budget there are two main things to consider. **Expenses** are things that will cost money, and **revenue** is money being brought in. In the end your expenses and revenue should balance – or your revenue should be just a little more than your expenses so you come out positive. The following tables outline some things you will need to consider in terms of expenses and revenue when creating your budget for Youth Legislature or Mock Trial.

## Expenses:

| **Staffing** | In high schools this may take the form of a teacher stipend. In YMCA’s it may be a percentage of an employee’s total salary (based on the amount of time spent running the Y&G program. It may also include a small portion of an administrative person or supervisor’s salary. |
| **Training** | Both Youth Legislature and Mock Trial advisors/coaches are encouraged to attend annual training/orientation events. The fees for these trainings are listed in your program materials. |
| **Volunteer support** | Account for any thank you gifts or meals for volunteers during Y&G events, trainings or meetings. |
| **Transportation** | Account for the cost of gas or mileage reimbursement or the amount to rent a school or charter bus when planning for statewide events. District events may also require a transportation budget if students are not able to transport themselves to events. |
| **Lodging** | Some things to keep in mind when shopping for hotels:  
  - # of students per room (usually 4 is OK for students)  
  - # of adults per room (usually 1-2)  
  - Is the hotel in walking distance to event  
  - Is breakfast included (decreasing $ needed for meals) |
| **Food** | Know in advance what meals you will provide during events and what students will be responsible for. Make sure students can get at least one nutritious meal each day (something other than fast food or pizza is good). Also make sure to budget some snack money for meetings – this is a great way to make sure kids show up! |
| **Program Materials** | If you will print handbooks for your students, team/delegation t-shirts or bags; if you’re going to do a fundraiser make sure to include the cost of materials needed |
| **State Program Fees** | These are listed in your program materials |
| **District Program Fees** | Check with your district coordinator or convener to see if there are additional fees to pay for facilities/food/materials at district events. |

## Revenue:

| **Program fees** | It’s important for students to pay at least a small amount of the cost of the program. |
| **Fundraisers** | Make sure to get student input before planning fundraisers. Having students set their own goals for fundraising is usually a great way to start. |
| **Sponsorships / donations** | Have students write letters to local business people about supporting your program. Invite sponsors to attend an “open house” with your team/delegation. |
| **Grant/foundation support** | If applying for a grant keep in mind that all applications are not successful and many applications may take 6-8 months for a foundation to process. |
| **Y&G Scholarships** | All students are encouraged to apply for financial assistance. Forms are available online. |
| **ASB funding** | If your program is set up through a school there may be ASB or other funds available. |
| **Local YMCA support** | Whether or not your program is set up through a local YMCA, local Y’s may be interested in offering support in the form of scholarships, staffing, facilities, fundraising opportunities or a donation. |
Fundraising Ideas

Fundraising is a large job for many delegations. It is important to start early and have a clear goal in mind. It also works well to find a fundraiser that works well for your delegation and stick with it year after year. People will begin to expect and plan for it, and prepare to support you in your endeavors.

Listed below are several fundraising ideas that have worked for local delegations:

- **YMCA Kids Night Out:** Kids night out is an opportunity for parents to drop off their youngsters at the YMCA for an evening of fun and games. Several Y&G delegations around that state plan and staff these events and take in the profit that is made. Planning a Kid’s Night Out takes time and commitment form students and Advisors alike, but has been shown to work well for several groups from around Washington.

- **New Year’s Eve Overnight:** A popular night for a Kids Night Out is New Year’s Eve. Parents all want to go out and need trustworthy individuals to watch their children.

- **Concessions:** During big events at Y’s or school’s delegations can run the concession stand. You can also create your own by making snacks and bringing soda to sell at the door. At many places there is a sign up process and groups must get on the list to do this so make sure to follow proper procedure.

- **Snack Bar:** One day/week turn off the vending machines in your YMCA/school and sell concessions instead.

- **Letter writing:** Local community groups such as the Lions Club and Rotary have money that they want to give away to worthy local programs. Have students write a letter to these groups explaining your program and outlining the costs and benefits involved (a sample letter can be found in this section of your handbook). Most groups will then want you to bring your students to present on the program at one of their meetings.

- **Community Night:** Invite parents and community members to one of your delegation meetings. Provide snacks/drinks, and encourage them to participate in debate. During the evening have a raffle or simply ask for donations.

- **Raffles:** At any of your events you can sell raffle tickets and solicit local vendors for prizes. This is great because it is at no cost to you! Make sure to check with your organizations to make sure you’re following all state and local regulations regarding gambling when organizing a raffle.

- **Teen Phone Night:** Compile a list of past program supporters, Y members, parents, etc. to solicit for donations. Prepare a script for students and have them practice a few times. Set them up on phones spend the evening calling individuals and asking for donations. Make sure you approve your call list so that it does not conflict with other fund raising campaigns going on in your organization.

- **Personal Ads:** Sell advertisements in your school newspaper or YMCA bulletin.
Sample Fundraising Letter

Tips on writing a fundraising letter:
- make it personal by telling your story
- make a contact and let them know to expect a letter from you student
- students should write letters, not advisors
- follow up the letter with a phone call 3-5 days later
- research the giving organization to find out what is important to them and incorporate that into your letter
- let them know what you are going to do with the money they give you

Dear Hawks Prairie Rotary,

I am a delegate in the Washington State YMCA Youth & Government Program and a member of the local delegation here at the South Sound Family YMCA. For the past 3 years I have been learning about how our state government works by actually participating in it.

After spending the week as a page in the House, watching debate and meeting individuals from around the state, I was hooked. Since then I have sponsored 4 bills ranging in topic from cancer research to requirements for building in planned communities. Last year I attended Leadership Training and lead debate at the state event as a Committee Chair. I learned from that experience how much I truly love parliamentary procedure and the process of sending an idea through the legislature.

In order to continue my participation in this program I need your help. I ask that you support me in my efforts by donating $200 to cover my program fees for the year. In addition to these funds, I am also responsible for my transportation costs, district fees, meals, and campaign costs over the course of the next year.

This year I am taking the next step and running for Lieutenant Governor. I want to take every opportunity that I can to give students new to the program the encouragement that I received as a young delegate. Through my involvement in Youth Legislature I have realized the importance of our legislative branch and gained a respect for my democracy that I could not have achieved without actually being part of it.

I would like to ask you to help support me in my efforts to bring a love of the democratic process to my peers around our state. As I move along in my journey through the Youth & Government Program I am realizing that with more opportunities come more costs.

Throughout the year I will be traveling around the state to campaign as well as to support delegates in their efforts to get their voice heard.

I thank you for your time.

Sincerely,

Joan Schmoe
Words of Wisdom from Successful Coaches...

- After you get the kit, set aside a block of time to read the kit materials and the case thoroughly. Recruiting an attorney to advise you and your students is really helpful. Many teachers who don’t know much about law have coached teams. They learn along with their students. Having an attorney to help assists the teacher as much as the students!

- Competitive Mock Trial takes commitment. Two other important attributes are responsibility and teamwork. It takes hours of preparation and good organizational skills. Students must attend practice and spend outside time preparing their witness or attorney roles. Lay out your expectations from the get-go and have students commit. If students don’t show up they let their team down, whittle away team morale, and decrease their chances of success and fun at this endeavor.

- Start early enough or if you plan to start January 1st, have a grueling schedule planned with students who’ve already been recruited and have parts that they’ve studied over the holidays. After the case is analyzed and memorized, plan to spend a month working on oratory and presentation style. Don’t give this process short shrift – it makes all the difference when attorneys score the teams in competition. Get the speech teacher as well as the attorney to advise you and the students at this level.

- Don’t let the temptation to help the students override the purpose of the program – their learning and their accomplishment. If you write the material or even work it over a lot, it becomes less their product and more yours. Don’t allow students to adopt another team’s material – it is unethical. We are teaching teen how to honest, civic-minded leaders in Youth & Government programming.

- Assign alternates in case a member drops out. If an attorney has to be replaced, it will usually be with someone familiar with the case – most likely a witness. Move the witness into the attorney role and fill the witness position with an alternate.

- Mock Trial is not drama. It has elements of drama in the portrayal of witnesses, but too much melodrama will hurt your team. Witnesses must know the facts of the case very well. Well-rehearsed answers will look stale and overwrought demonstrations of emotion will backfire. Subtle characterizations can still be very effective – a tilt of the head, a shuffle to the walk, a slight accent, a mannerism that’s unique, a stutter...

- Don’t over-practice. The trial will unfold with its share of surprises – a team should be wary of becoming complacent with their version of the case. Mock
trial’s best teams know how to think their way out of a tough situation or when the trial takes a direction they didn’t expect.

- Instruct your students to observe courtroom decorum – never chew gum or eat during the trial. Attorneys should wear conservative clothing – dark sport coats or dresses or a jacket and skirt. Wear small jewelry or none at all. While attorneys need to dress more formally, witnesses should dress appropriately for their role without obvious costuming. Do not move furniture or disturb courtroom equipment, approach the witness, or touch exhibits or papers without permission from the judge. Observers of the trial should be quiet and attentive. No side-talking.

- Instruct students to control their facial expressions and body language. They can put on a calm and poised face even if they’re feeling a range of emotions or even turmoil inside. A composed and unruffled team will impress the judge and the attorney raters. Never treat a member of a team or the judge with bias as to gender, age or race – i.e. don’t be condescending or over-bearing or interrupt or over-object. Never raise your voice or argue with the judge. A rush of whispers among team members will make you look bad. Do not display a negative facial or vocal reaction to a judge’s decision. Create practice scenarios where you learn to stay composed under pressure.

- Organize your cases and prepared questions in plastic. Laminate the objections and keep them nearby for reference unless they are committed to memory. Each attorney should have a notepad. Closing and opening statements should be memorized. Visuals (within the rules) can help to focus attention to the key points.
# Mock Trial Frequently Asked Questions

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tbody>
<tr>
<td><strong>What is a mock trial?</strong></td>
<td>High school students portray a part in a cast of courtroom characters. Much of mock trial’s fascination lies in its dramatic role-play possibilities. Students can become, for a time, a fiery prosecutor or a dedicated defense attorney, a righteous defendant or an elusive witness. Each year students study a new hypothetical case relevant to today’s issues. They receive guidance from volunteer attorneys in courtroom procedure, oratory, and trial preparation.</td>
</tr>
<tr>
<td><strong>Where do I get the case for the year?</strong></td>
<td>The Mock Trial Kit (includes the case and supporting materials) is provided by the Mock Trial Program in mid-October. No other materials other than those provided may be used. This places the emphasis on interpreting and formatting information into a convincing case rather than researching obscure legal precedents.</td>
</tr>
<tr>
<td><strong>Who organizes and pays for the Mock Trial Program?</strong></td>
<td>The YMCA Youth and Government program funds a Professional Staff to administer the Mock Trial Program. Our operating costs come from donations, grants, and volunteer support. Participant fees make up the additional costs it takes to make this program possible. Public and private high school teachers and attorneys take on the task of preparing students for competition. They may receive a stipend from their individual schools.</td>
</tr>
<tr>
<td><strong>Who can form a mock trial team?</strong></td>
<td>A teacher at any high school, public or private and/or an attorney volunteer can be a coach. All participants (grades 9–12) must be enrolled at the same school district, preferably in the same high school, or the same private high school, or be a pre-existing member of a youth group in existence for a minimum of 3 years with a constitution or bylaws. Home school and other youth groups may also participate. With the approval of the state coordinator, exceptions can be made to help new teams get started.</td>
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<tr>
<td><strong>What happens during the trial?</strong></td>
<td>Teams present their case in a two-hour trial before a real judge in a real courtroom. At district competition, each team gets at least two opportunities to argue the case. At State finals each team</td>
</tr>
</tbody>
</table>
goes to trial four times (twice to prosecution, twice for the defense, if possible). During the trial, each side presents the pre-trial motion. Next, they give their opening statements. Later, each of the four witnesses for both the prosecution (or in a civil case, the plaintiff*) and the defense are questioned by both sides on direct and cross-examination. Then the attorneys make their final case in closing arguments. At least two practicing attorneys critique and score student performances in each trial. Volunteer judges preside over the trial, and volunteer raters score the teams and comment on their performances.

* Any future references to prosecution should read plaintiff in a civil case.

**When are the competitions?**

In February, teams of attorneys and witnesses meet at county courthouses all over the state to argue their cases. On the last weekend in March, the winners of their respective districts meet at the state competition for two days to compete with other teams from all over the state. The state champion represents our state at Nationals held in May.

**What does it cost to participate?**

The District Competition cost is $50 per student and $15 per coach. The State Finals cost is $75 per student and $75 per coach, plus lodging and transportation.

**How do teams finance their competition fees?**

ASB funds, local bars and/or legal firm donations. Our program has a small scholarship fund for teams and individuals. Most teams do additional fundraising. Scholarship forms and fundraising ideas are included in the kit.

**How is mock trial taught?**

There are a lot of successful formulas. Advisors may run mock trial as an extracurricular club meeting regularly October through February (for Districts) and until the end of March if they go to State. Other advisors run mock trial during first semester class then organize into an extracurricular club until the season is over. A few recruit and select mock trial members from their classes and hit the case really hard in January through Districts in February. This plan would be difficult for a new or inexperienced team.
When does the mock trial season start and end?

The year’s case is available in October, on the date set by the Mock Trial Program Chair. Districts occur mid to late February. State is usually the last weekend of March. Nationals are held at the beginning of May in a different city each year. The competition season fits into the winter sports season and ends before spring vacation. The District Convener determines the district competition date in February. State Finals are often held the same weekend as State Knowledge Bowl but usually don’t conflict with Debate events. Many teams spend the fall learning legal terminology and trial techniques. During this time, many practice on other mock trial cases and may organize informal competitions with nearby schools.

How much time does it take to prepare a team for mock trial?

For extracurricular arrangements, most teams will meet one to three times a week from October through January. Usually teams meet 3–5 times a week during February to prepare for Districts. Attorney coach time commitments vary. In February and March they may spend up to several sessions a week preparing for District and State competitions. A session may be one-half hour to four hours long during lunch, class, before or after school. When offered through a first semester class, students have the benefit of more frequent instruction depending on other curriculum demands. For classroom situations, extra time will be required outside of class in February and March. Students often spend some vacations learning their parts.
How does a team get an attorney to help out?

Many teams will recruit a parent who practices law to volunteer. You can call or e-mail your District Convener for suggestions. This is the organizer for your region – often a judge or a member of the legal community. The Mock Trial Kit contains a list of District Conveners. The state director may also be able to provide a few names of attorneys in your area who have expressed interest. More than one attorney may help a team. Volunteer attorneys don’t receive compensation or continuing legal education credits for their time, but they do it because it’s rewarding. Students must attend practice sessions with attorneys or they should be removed from the team. A $100- $200 per hour attorney won’t continue to volunteer time if students don’t show up. Younger attorneys with fewer family commitments will do it as a way to give to their community. Established attorneys may be busier, but may want to volunteer during their own children’s high school years. Finding an attorney coach is really a big help! Often they will find other attorneys to assist them once they’re hooked on mock trial!

How many students does it take to participate?

It takes 7–15 kids and a school may field more than one team. A full team would have fifteen students with three student attorneys and four witnesses for both the prosecution and defense. Under this scenario, seven students learn the prosecution’s case and seven learn the defense case. The fifteenth student fills the role of bailiff. For teams with fewer students, it is possible for students to double up on roles with a set of six students learning and arguing both sides. One of the attorneys for each side would also present the pre-trial motion in addition to an opening or closing statement and witness examinations. When doubling up, a student may be a witness for the prosecution’s case (for instance) and an attorney for the defense. They cannot play both witness and attorney for the same side. The team that competes at Nationals is limited to eight members.

How are team members recruited?

Start by recruiting from students in business law, civics, U.S. government classes and from debate, drama or speech clubs. Post flyers around the school and hold an informational meeting. Write a short article for the school and local newspaper to inform students of upcoming auditions or meetings.

How is a team created?

Again there are many ways to do this. Some teachers recruit specifically from competitive Debate, Speech, and Drama teams for their experience. Others allow anyone who commits the time to
participate. Some teachers conduct auditions for witness and attorney roles; others select their students and assign them a role.

**How does a team get to compete?**

Any team that pays the registration fee by the deadline is allowed at Districts. The size of the district will determine how many teams from each District Competition will attend the State Event in late March.

**What’s involved in preparing for Competition?**

- Educate students on elements of a trial and legal terminology.
- Recruit an attorney to help you.
- Take a tour of the local courthouse.
- Make copies of witness statements.
- Conduct auditions or otherwise assign roles.
- Read the case and work on a case analysis.
- Break down each witness statement into statements of fact.
- Weed out irrelevant details that have no bearing on the case.
- Separate the facts that are good/bad for the prosecution and for the defense.
- Create a timeline of events in the case.
- Choose a theme to each side of the case.
- Practice how to phrase questions that cannot be successfully objected to.
- Write questions for each witness’s examination and cross-examination.
- Help the witnesses rehearse their answers to the above questions.
- Have attorneys start writing their opening and closing statements.
- Review and practice how to make effective objections.
- Show attorneys how to submit exhibits and how to introduce their team.
- Train students in proper courtroom decorum, dress and demeanor.
- Predict the opponent’s possible objections and how you’ll respond.
- Teach and practice elements of effective oratory and presentation.
- Conduct practice scrimmages. Ask a judge to come in to critique.
LESSON PLAN 1
INTRODUCTION TO DISPUTE RESOLUTION AND THE TRIAL PROCESS
(One to two fifty-minute periods; more, if trip to court is undertaken)

OBJECTIVES:
As a result of the activities in this lesson, the students will be able to:
- Explain the purpose of the trial process.
- Describe at least one alternative to the trial process.
- List and explain the major steps in the trial.
- Name the parties to a case in both a civil and a criminal trial.
- Explain the roles of attorneys, judge and jury in the trial process.

ACTIVITIES:
1. Reading Assignment: Either for homework or in class, the students should read “The Trial Process” section (immediately following these lesson plans) in this manual.
2. Vocabulary Exercise: The teacher might ask students to list at least five new words in “The Trial Process” section for vocabulary building. Alternatively, the teacher might begin a class discussion by listing key words and phrases on the board, e.g. “adversary system,” “prosecution,” “defendant,” “evidence,” etc., and eliciting definitions from the class. (10 min.)
3. Small-Group Discussion Exercise: Divide the class into groups of 3-5. Ask them to develop at least two examples of non-criminal disputes that might wind up in a trial. Ask them to discuss alternative methods of dispute resolution (such as those listed in “The Trial Process”) for each case, and to identify when a trial might be the only solution. (20 min.)
4. Discussion Exercise and Homework Assignment: Ask students to bring in an article from the local newspaper concerning an incident that might result in a trial. In class, discuss why the disputes arose. Identify a possible way to settle the cases out of court. Ask the students: If the parties go to court, what would they hope to accomplish? (20 min.)
5. Field Trip to Court: (A half-day or one full day)
   a. Make arrangements through the clerk of the local court or an attorney for a visit by the class. Different courts handle student trips differently, but good communication with the staff at the local courthouse usually will ensure a worthwhile visit. You will need to find out what phase of a trial the students are likely to be observing, and whether it will be a civil or a criminal proceeding. If your mock trial will be a civil case, you may prefer to observe a civil trial.
b. If the clerk can give you specific information about the case or cases the class will be observing, spend some time in class the day before reviewing the characteristics of the civil or criminal process as appropriate.

c. As a homework assignment immediately after the field trip, direct the students to write several paragraphs answering these questions:
   - What kind of trial was observed, and what portion?
   - Who were the most important people in the courtroom, and what did they do?
   - What facts did the class learn during their observation?
   - What do you think happened after the class left?
   - Did this process seem like a good way to deal with the particular problem involved? What alternatives would you recommend?
   (You may wish to design a form for students to fill in for this purpose.)

d. Discuss the field trip, based on the homework responses, in large or small groups during the next class.

6. **Guest Speakers:** Having an attorney or a judge visit in class is a good alternative or in addition to a field trip to court. In arranging for such a speaker, be sure that person is adequately briefed regarding (a) the grade level, age and prior legal knowledge of the class; (b) your objectives for the speaker’s visit; (c) particular subject areas the class desires to discuss; (d) details of any activity you plan to conduct while the speaker is present. The better you handle preparation with the guest speaker, the better that class period will turn out. (One class period.)

7. **Distribute Mock Trial Materials and Assign Reading:** At this point, the mock trial case and related materials can be distributed and assigned for homework reading.
LESSON PLAN 2
STEPS IN A TRIAL

OBJECTIVES:
As a result of the activities in this lesson, the students will be able to:
• List and explain the major steps in the trial.

ACTIVITIES:

a. Have students state the order of events in a trial and list them on the blackboard or give large sheets of paper to small groups and ask them to develop their own lists of trial procedure. After full class discussion, discuss ways in which the class’s ideas about trial procedure match or vary from the actual procedure. Which is better? Why? (15 min.)

b. Homework assignment: Direct students to make personal charts of the trial process. Ask students to clip articles about a trial currently in the news and to identify what particular steps in a trial are referred to in the articles.

c. Quiz.- See Review #1, duplicate and pass out the quiz. The correct answers are:
1. C     6. I
2. N     7. B
3. J     8. A
5. K     10. F

Main Steps In A Trial:

1. Opening statement by prosecution.
2. Opening statement by defendant.
3. Direct examination of prosecution’s witnesses.
5. Direct examination of defendant’s witnesses.
7. Closing statement (argument) by prosecution.
8. Closing statement (argument) by defendant.
LESSON PLAN 3
INTRODUCTION TO THE CASE
(One to Two Class Periods)

OBJECTIVES:
As a result of the activities in this lesson, the student will be able to:
• Identify the type of case, court, and division of the court.
• Identify the parties to the case.
• Describe what each party to the case wants.
• Describe the stipulated facts on a timeline.
• Write one paragraph summarizing the facts of the case and the legal issues involved.

ACTIVITIES:
1. **Reading Assignment:** The case packets should be distributed to be read for homework in advance of the first class. On the first day of class discussion of the case, the teacher should ask a student to read aloud the introduction to the case and the Statement of Facts. (15 min.)
2. **Factual Summary Timeline:** Draw a line across the board as shown below. As in the example below, put important dates from the case on the timeline. Ask the class a series of questions, e.g.
   - What happened on each date given?
   - What happened during the intervening periods?
   - What information is missing?
   - How does the missing information affect the case?
   - Where can that information be found?
   The timeline may be used as a means of review and as a quiz. On each day of trial preparation, until the students know the facts thoroughly, a student could be called to the board to fill in the events on the timeline. A timeline could also be distributed as a quiz, with instructions to the students to fill it in as indicated. (30 min.)
3. **Initial Case Analysis:** With the whole class, elicit facts favorable to the prosecution and facts favorable to the defendant, and list them on the board in columns. (30 min.)
4. **Homework:** Ask students to write a paragraph summarizing the facts and legal issues. Alternatively, ask students to make two lists, one indicating facts favorable to the prosecution, and other facts for the defense.
LESSON PLAN 4
STRATEGY AND CASE ANALYSIS: OPENING STATEMENTS
(One Class Period)

OBJECTIVES:
As a result of the activities in this lesson plan, the students will be able to:
- Describe the main arguments in favor of each side of the case.
- Identify the facts that support or weaken each major argument.
- Summarize the evidence that will be presented on each side of the case.
- Write an opening statement for one side of the case.

ACTIVITIES:
1. **Assignment to Sides of the Case:** Once the preliminary factual analysis has been completed, the time is appropriate to assign students to prosecution or defense teams. The specific role assignments (e.g. attorney, witness) need not be given yet. However, having a particular point of view will help the students begin to engage in strategic analysis of the case.

   Once students are divided into prosecution and defense teams, the teacher might also find it advantageous to designate team captains. (Appoint or elect, perhaps two for each side, as appropriate for the class.) These students can then be made responsible for leading the small group discussions and later on, directing the team’s specific case preparation. (This is optional; some teachers prefer not to have student leaders.) (10 min.)

2. **Strategic Analysis by Teams:** Split the class into the two main groups (prosecution and defendant). Each team is directed to discuss the following points: (15 min.)
   - What does our side want to achieve in this case?
   - How will we accomplish this goal?
   - What evidence do we have to help us? ...Hurts us?
   - What can we claim we will prove in the opening statement?

3. **Team Brainstorming for Opening Statement:** After about fifteen minutes of the discussion described in #2, the students can set about the task of brainstorming the general framework for their opening statements. For this exercise, it might be useful to have the students gather their teams at the blackboard or to equip them with butcher paper. (25 min.) Discussion should focus on:
   - What are the most important facts we want to tell the judge in our opening statement?
   - What evidence will we present that we should stress?
   - What kind of ruling do we want from the judge?
o How will we ask for that?

4. **Homework Assignment:** Once the students have had sufficient time to strategize and brainstorm, they will be ready to write individual opening statements for homework. On the day the assignment is due, each student should get a chance to read the prepared statement to the team, and the team should decide which statement is best, or which portions of various statements might be used in combination.
LESSON PLAN 5
PREPARATION OF PROSECUTION AND DEFENSE CASES: WITNESS EXAMINATIONS AND CLOSING ARGUMENTS
(Two to Three Class Periods)

OBJECTIVES:
As a result of the activities described in this lesson plan, the students will be able to:

- As examining attorneys, write a logical sequence of direct or cross-examination questions (depending upon student assignments) designed to achieve the purpose of the witness examination.
- As attorneys assigned to the closing arguments, outline the high points of the ideal closing argument for their respective sides.
- As witnesses, recall from memory the important points made in the witness affidavit, and respond correctly to possible direct and cross-examination questions.

ACTIVITIES:
1. **Role Assignments:** Prior to the lesson, the teacher should assign students to specific roles. These are the available roles for the trials in this packet:
   - **Witnesses** - Each side has two witnesses, alternates should be appointed for each role.
   - **Attorneys** - Each side may use up to six attorneys to take each available speaking part; however, teachers may find it advantageous to use only three of four attorneys for each side, assigning more than one speaking part to each. Note that during the trial each side gets to carry out direct examination of its own witnesses and to cross-examine the opposing witnesses.

2. **Reading Assignment:** Once the roles are assigned, students should be instructed to read the case materials again and study the particular parts of the case materials applicable to their specific roles.

ROLE ASSIGNMENT CHECKLIST

**Witnesses:**
Witness #1 ____________________  ____________________
(Alternate)  ____________________  ____________________
Witness #2 ____________________  ____________________
(Alternate)  ____________________  ____________________

**Attorneys:**
3. **Small Group Preparation #1:** (One Class Period) Separate the class into prosecution and defense teams. Divide each team into three working groups as follows

<table>
<thead>
<tr>
<th>PROSECUTION TEAM</th>
<th>DEFENSE TEAM</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1 Witnesses and Alternates</td>
<td>D1 Witnesses and Alternates</td>
</tr>
<tr>
<td>P2 Examining Attorneys</td>
<td>D2 Examining Attorneys</td>
</tr>
<tr>
<td>P3 Attorneys assigned to make opening and closing statements</td>
<td>D3 Attorneys assigned to make opening and closing statements</td>
</tr>
</tbody>
</table>

**INSTRUCTIONS FOR THE GROUPS**

(First Drill) Witness Groups (P1 and D1):

The purpose of this session is to drill the witness and alternates on their knowledge of the facts and their witness statements. Through taking turns drilling each other, students will begin to acquire information about all other witness statements.

Witness #1 is the first to be drilled. Starting with “State your name, please” and proceeding through the witness statement, witness #1 is asked every conceivable question by the other students in the group. Witness #2 and then the alternates follow suit.

The questioning drill continues around the circle until each student can answer the questions without looking at his or her statement.

Once the initial knowledge is acquired, the Witness Group should focus on style and characterization. Going around the circle again, the students should help each other try to develop a specific type of character and responses to fit their roles.

**EXAMINING ATTORNEY GROUPS**

(P2 and D2)

During this session, the attorneys conducting each direct examination begin designing the questioning strategy for each witness in consultation with the other attorneys in the group. The group should start with Witness #1, and,
as a group, outline the basic series of direct exam questions needed for that witness. They then do the same for Witness #2. Attorneys should write out the examination questions for homework.

**ATTORNEY GROUP FOR STATEMENTS**
*(P3 and D3)*

The purpose of this group is to brainstorm the principal points to be included in opening statements and closing arguments. After the outlines are planned together, the students then work independently to write the statements. (They can also be drafted for homework.) Once the statements are written, the students reconvene to hear and critique each other’s statements.

4. **Small Group Preparation #2:** (One Class Period) This phase of class preparation for the mock trial helps students to rehearse and refine their case presentation. Reorganize the team groups as follows:

<table>
<thead>
<tr>
<th>PROSECUTION TEAM</th>
<th>DEFENSE TEAM</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1 Opening and Closing Attorneys</td>
<td>D1 Opening and Closing Attorneys</td>
</tr>
<tr>
<td>P2 Witness &amp; Direct Exam Attorneys</td>
<td>D2 Witness &amp; Direct Exam Attorneys</td>
</tr>
<tr>
<td>P3 Cross-examination Attorneys</td>
<td>D3 Cross-examination Attorneys</td>
</tr>
</tbody>
</table>

**INSTRUCTIONS FOR THE GROUPS**
*(Second Drill)*

**OPENING AND CLOSING ATTORNEYS** *(P1 and D1)*
Each attorney delivers the prepared statement. The others in the group critique.

**WITNESSES AND DIRECT EXAMINATION ATTORNEYS** *(P2 and D2)*
Using the direct examination questions developed earlier, the attorneys rehearse the examination with the witnesses and make changes as necessary.

**CROSS-EXAMINATION ATTORNEYS** *(P3 and D3)*
The attorneys responsible for cross-examination for each side can assist each other in trying to project what testimony might be given on direct exam, thus showing what material might be appropriate for cross-examination. Attorneys can plot out a series of possible cross-examination questions and ask each other the questions to see how they will work. (These students do need to remember that they will have to alter their prepared material, to some extent, based on what happens in the direct examination.)
LESSON PLAN 6
THE RULES OF EVIDENCE AND PROCEDURE
(Two to Three Class Periods)

Depending upon the complexity of the trial and the amount of time available, teachers may choose to reduce the scope of this lesson plan. So that students will understand the relationship between these rules and the evidence they plan to present, teachers should use this lesson plan only after teams are well involved with the case preparation.

OBJECTIVES:
As a result of the activities described in this lesson plan, the students will be able to:
- Explain the purpose of the rules of evidence.
- Recognize leading questions, hearsay, irrelevant testimony, and opinions.
- Make proper objections to violations of the rule of evidence.
- Know how to respond to an objection.
- Correctly introduce a piece of evidence.
- Explain the concept of "impeachment."
- Give an example of impeachment.

ACTIVITIES:
1. **Reading Assignment:** Teacher may choose to assign students to read the rules of evidence for homework, or have them read aloud in class. (15 min.)
2. **General Discussion:** What is the purpose of the rules of evidence? What might happen without them? What situations have students encountered in their lives that had specified rules of procedure? What would have happened without these rules? Are there situations from their everyday lives where these rules come up? (e.g. would a parent punish a child who said, "I think my sister did it?") (20 min.)
3. **Discussion of Examples:** Taking each rule of evidence, teacher repeats what the rule is. Teacher asks for an example of a rule violation, other than one given in the text. What harm would come if the particular rule did not exist? Is this a useful rule? Are the rules given sufficient to make the trial fair? What rules would the class add? (30 min.)
4. **Team Drill:** Return the class to prosecution and defense teams. Ask one attorney to start direct questioning of a witness in the case you are preparing. All others in the group listen for violations of rules of evidence, and make objections as appropriate. (20 min.)
5. **Individual Drill:** On the board, write steps for introduction of physical evidence. Drill each attorney individually. (20 min.)

6. **Discussion of Impeachment:** Ask the class for their understanding of the concept of impeachment. Explain how the concept is applied in a trial to shake the credibility of a witness. (e.g., an attorney on cross-examination might show a witness a prior statement which contradicts testimony just made on direct examination.) For homework, ask each attorney/witness team to develop one example of possible impeachment for that witness. Demonstrate the examples in the next class. (20 min.)

7. **Review #2(a): Evidence Exercise:**

Hand hypothetical Review Exercise 2(a) (look ahead five pages) to students and discuss. (15 min.) Answers are as follows:

a) This is allowed as a statement by a party (the defendant here) as an exception to the general rule against hearsay. The defendant is present and can of course deny having made the statement.

b) This is a leading question as it has the answer the attorney wants in the question and cannot be asked on direct examination. (It could be asked on cross-examination.)

c) Yes, this is not leading.

d) No, this is not relevant to the contract issue.

e) Yes, this may be relevant to issues in a divorce case.

f) Yes, if the witness could not remember he may be shown a written statement to refresh his recollection. The attorney does not have to introduce the statement into evidence.

g) Yes, this is proper, to impeach the credibility of a witness.

h) No, on cross-examination an attorney may only bring up issues raised on direct examination, this is called a question outside the scope of the direct examination.

i) Yes, if Herb is first certified as an expert witness through being questioned about his prior training and experience.

j) No, not as an expert, but he can testify to the fact that the victim appeared to be in pain or to other facts from his direct observation.

k) No, one can testify only to things one knows from direct knowledge.

8. **Review #2(b): Evidence Drill.**

This review exercise (five pages from this one) will help the students recognize improper questioning in a trial. They will also understand better the rationale for evidentiary rules and will get valuable practice in conducting
proper introductions of evidence. Attorneys could be asked to come in to help with this exercise.

To prepare for this exercise, the teacher will need to do the following:

1. Read over the Evidence Cases. Teacher will need to decide how to assign witness and attorney roles for each case. (There will be eleven witnesses and eleven attorneys. If the class is smaller than 22 students, some can get more than one assignment.)
2. Duplicate the Evidence Case pages at least twice (more, if needed.)
3. Cut the cases apart. For the eleven students who will act as witnesses, black out or cut off the lower part of the slip that describes the lawyer’s job. (Otherwise, the witness will have advance knowledge of what the lawyer is going to try.) Only each lawyer gets the entire slip.
4. Hand out the slips as appropriate. Tell students not to disclose their roles to the other students.
5. Teacher calls out the case number at random and reads the facts portion to the entire class. Student who has that case performs the lawyer’s role as instructed on the slip. The witness responds appropriately. (Teacher should see that this exchange is kept brief so as not to have too much material for the class to react to.)
6. Teacher instructs the other students to observe each lawyer’s action, and to make appropriate objections, if warranted. The student who volunteers an objection must explain the objection. For example, he or she should not merely call out “hearsay” but should indicate “hearsay, because...” Also, when making objections, students should practice using the proper form of address. For example, “Your Honor, I object to (type of objection) (because)” or “Your Honor, objection! The attorney is (type of objection) (reason). “
7. If the questioning can be done differently to avoid the evidence problem, the student playing the lawyer should rephrase the question properly.
8. Repeat as necessary with the remaining cases.
9. Debrief each case, encouraging discussion of the rationale for each kind of objection. (Amount of time for drill above will vary.)
LESSON PLAN 7
THE MOCK TRIAL
(One to Two Class Periods)

OBJECTIVES:
As a result of the activities described in this plan, the students will be able to:

• Conduct a mock trial, correctly following the sequence of steps in a trial and employing good technique for each role.
• Make complex prepared oral presentations as attorneys and witnesses.
• Demonstrate skill in listening, rapid critical analysis, and extemporaneous speech.
• Demonstrate knowledge of the rules of evidence and procedure.
• Demonstrate knowledge of the law applicable to the case.

ACTIVITIES:
Conduct the Mock Trial. Prior to the date of the Mock Trial, the teacher should be sure to have accomplished most of the tasks described in the “Mock Trial Administrative Checklist.” Be sure each formal observer has a copy of the Mock Trial Observation sheet at the start of the trial. Follow the steps in a trial listed in the Students' Guide: Section B.

BAILIFF’S DIRECTIONS:
A student should be selected to serve as the court bailiff (referred to as the “clerk” in many courts). This student should announce the opening of the court by stating “all rise” as the judge enters and then stating “please be seated” when the judge is seated. The bailiff then calls the name of the case, e.g. “Your honor, our case for today is St. Clair vs. St. Clair.”

As witnesses are called the bailiff requests them to raise their right hands and asks, “Do you swear or affirm that the testimony you are about to give is the truth and nothing but the truth?” Witness responds: “I do.” “Please be seated and state your name for the court, and spell your last name.” When attorneys have documents (such as an affidavit or another piece of evidence), they should first hand them to the bailiff who marks it “Prosecution’s Exhibit A, B, C. etc.” and Defendant’s Exhibit A, B, C etc.” depending on which attorney is presenting it.

Further details about the bailiffs handling of items for identification can be found under “Special Procedures” in the “Simplified Rules of Evidence” section of the Students' Guide.
LESSON PLAN 8
DEBRIEFING AFTER THE MOCK TRIAL
(One Class Period or Less)

OBJECTIVES:
As a result of the activities described in the lesson plan, the students will be able to:
  • Analyze the strong and weak points of each case presented in the trial.
  • Identify the person or persons whose performance in the trial made a difference in the case.
  • Critique the trial from the standpoint of its success in achieving justice.

ACTIVITIES:
1. Observers: Any student who was designated as an observer for the trial should have completed an Observation Sheet. After the trial is completed, the observers make reports of their observations to the class.
2. Teams: After hearing the reports of the observers, or in lieu of observer reports, prosecution and defense teams should re-form as small groups to discuss these questions:
   What were the strong points in our presentation?
   What were our weak points? How could they have been avoided?
   Were our attorneys prepared correctly?
   Did we make good objections?
   Was the trial conducted in a fair manner?
   Did we achieve our goal? Why or why not?
   Even if we achieved our goal, could we have accomplished it in a different manner?
3. Large-Group Discussion: After the small groups have completed this discussion, summaries of their responses to these questions should be given to the whole class, with any appropriate additional discussion led by the teacher or an attorney, if one was present at the trial. An attorney (or judge) can be especially effective in debriefing a mock trial by comparing what went on to what usually occurs in real courts.
4. Written Assignment: In class or as homework, have students write a brief essay telling whether or not the trial was a sensible way to achieve justice in this particular case, and whether justice was in fact, achieved.
## REVIEW #1
(from Lessons 1 and 2)

### TRIAL PROCESS AND STEPS IN A TRIAL

From Column B place in the blank the letter for the word or phrase that most closely matches the definition in Column A.

<table>
<thead>
<tr>
<th>COLUMN A</th>
<th>COLUMN B</th>
</tr>
</thead>
<tbody>
<tr>
<td>___ 1. Trier of fact</td>
<td>a. prosecutor</td>
</tr>
<tr>
<td>___ 2. The burden of proof in a civil case</td>
<td>b. closing argument</td>
</tr>
<tr>
<td>___ 3. Process of sharing information before trial</td>
<td>c. jury</td>
</tr>
<tr>
<td>___ 4. Adversary process</td>
<td>d. evidence</td>
</tr>
<tr>
<td>___ 5. Written statement made by witness examination</td>
<td>e. direct</td>
</tr>
<tr>
<td>___ 6. One type of defense in a criminal case</td>
<td>f. negotiation</td>
</tr>
<tr>
<td>___ 7. Final step in the trial before the judge’s decision</td>
<td>g. prosecution</td>
</tr>
<tr>
<td>___ 8. Person who represents the government in criminal cases</td>
<td>h. civil cases</td>
</tr>
<tr>
<td>___ 9. What each party needs to present to prove their facts</td>
<td>i. alibi</td>
</tr>
<tr>
<td>___ 10. One way to settle a dispute without going to trial</td>
<td>j. discovery</td>
</tr>
<tr>
<td></td>
<td>k. affidavit</td>
</tr>
<tr>
<td></td>
<td>l. defendant</td>
</tr>
<tr>
<td></td>
<td>m. trial</td>
</tr>
<tr>
<td></td>
<td>n. preponderance of evidence</td>
</tr>
</tbody>
</table>

**LIST IN ORDER THE MAIN STEPS IN A TRIAL:**

1. _____________________________  5. _____________________________
2. _____________________________  6. _____________________________
3. _____________________________  7. _____________________________
4. _____________________________  8. _____________________________
**MOCK TRIAL OBSERVATION SHEET**

Please note comments about each presentation; include things that could have been done differently or improved upon.

Observer’s Name:  

<table>
<thead>
<tr>
<th>PROSECUTION TEAM</th>
<th>DEFENSE TEAM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Trial Motion</td>
<td>Pre-Trial Motion</td>
</tr>
<tr>
<td>Opening Statements</td>
<td>Opening Statements</td>
</tr>
<tr>
<td>Direct Exam of First Prosecution Witness</td>
<td>Direct Exam of First Defense Witness</td>
</tr>
<tr>
<td>Direct Exam of Second Prosecution Witness</td>
<td>Direct Exam of Second Defense Witness</td>
</tr>
<tr>
<td>Cross Exam of First Defense Witness</td>
<td>Cross Exam of First Prosecution Witness</td>
</tr>
<tr>
<td>Cross Exam of Second Defense Witness</td>
<td>Cross Exam of Second Prosecution Witness</td>
</tr>
<tr>
<td>Objections</td>
<td>Objections</td>
</tr>
<tr>
<td>Procedures for Using Documents</td>
<td>Procedures for Using Documents</td>
</tr>
<tr>
<td>Closing Arguments</td>
<td>Closing Arguments</td>
</tr>
</tbody>
</table>
REVIEW #2(A)
RULES OF EVIDENCE – HYPOTHETICAL SITUATIONS

a. Doug told me he killed his brother and Doug is on trial for the murder. Should I be able to testify to what he told me?

b. During direct examination, the attorney wants to show that the witness, David, was at school on November 30. Can he ask, “You were at school on November 30, isn’t that correct?”

c. Same situation as in b. Can the attorney ask David, “Where were you on November 30?”

d. Harry’s being sued in a civil trial for breach of contract. Can the prosecution introduce evidence that Harry has been unfaithful to his wife?

e. Can Harry’s unfaithfulness be introduced in a contested divorce case?

f. John made a sworn statement two days after the automobile accident that he had witnessed. When the case finally comes to trial and he is called as a witness, John cannot remember what happened. Can his attorney show John the statement that may help him remember? Must the attorney introduce the statement into evidence?

g. Same situation as in f, only John does remember and testifies on direct examination. However, his testimony contradicts his earlier sworn statement. On cross-examination, can the other attorney bring up the inconsistencies?

h. Mary is in a car accident and she sues the other driver. On her direct examination, damage to the car is never mentioned. Can the defense, on cross-examination, ask about the repair costs of the car?

i. Herb is a doctor. The attorney has Herb testify to this when Herb is on the stand. Can Herb testify that in his expert opinion, the victim was suffering from a fracture of the right leg?

j. Can Joe, a plumber who worked with the victim, testify that the victim was suffering from a fracture of the right leg?

k. Kevin has never seen Amy with her baby. Can Kevin testify that Amy is a terrible mother?
REVIEW #2(B)
THE EVIDENCE CASES

1. **The case:** A delinquency proceeding in juvenile court resulting from serious assault on a student on a school playground.  
   **The witness on the stand:** The mother of the victim.  
   **Your job as an ineffective lawyer:** Ask the witness a HEARSAY question.

2. **The case:** A dispute over the amount of money owed under a written contract.  
   **The witness on the stand:** One of the parties to the contract.  
   **Your job as an effective lawyer:** You want to have the written contract introduced into evidence as an EXHIBIT. Ask the witness questions to identify the contract and move the exhibit into evidence.

3. **The case:** A lawsuit brought by a women who fell on spilled pickle juice at 9:30 p.m. in a grocery store.  
   **The witness on the stand:** The prosecution (the woman who fell).  
   **Your job as an ineffective lawyer:** Ask the witness an IRRELEVANT question.

4. **The case:** A medical malpractice suit. A doctor prescribed medicine for a pregnant woman and the baby was born retarded.  
   **The witness on the stand:** The father of the child.  
   **Your job as an ineffective lawyer:** Ask the witness an objectionable OPINION question.

5. **The case:** A contested marital dissolution (divorce) in which the wife is accused of being a chronic alcoholic.  
   **The witness on the stand:** The wife.  
   **Your job as an ineffective lawyer:** BADGER the witness with questions.

6. **The case:** A dispute over the custody of two children.  
   **The witness on the stand:** The mother of the children. (She is being questioned by her lawyer.)  
   **Your job as an ineffective lawyer:** Ask your client on the stand a LEADING question.

7. **The case:** A department store sues a customer for failing to pay the bill.  
   **The witness on the stand:** The customer.  
   **Your job as an ineffective lawyer:** Ask the witness an objectionable question about his CHARACTER.
8. **The case:** Criminal trial for purse snatching.
   **The witness on the stand:** An eyewitness testifying for the defense; she just testified that the defendant looks like the person who committed the crime.
   **Your job as an effective lawyer:** IMPEACH (destroy the credibility of) your witness.

9. **The case:** A criminal trial for burglary, the defendant claims he was in Florida on the day of the crime.
   **The witness on the stand:** The defendant.
   **Your job as an ineffective lawyer:** Ask the witness an objectionable CHARACTER question.

10. **The case:** A suit for emotional distress suffered by a man who found a dead mouse in his soda.
    **The witness on the stand:** The man who found the mouse.
    **Your job as an ineffective lawyer:** Ask the witness BADGERING questions.

11. **The case:** A dispute between a customer and a TV seller resulting from the failure of the seller to repair the set.
    **The witness on the stand:** The consumer.
    **Your job as an ineffective lawyer:** Ask the witness a HEARSAY question.
THE TRIAL PROCESS

THE PURPOSE

“Equal Justice Under Law” are the words carved deep into the stone above the entrance to the Supreme Court of the United States. This statement reflects the primary purpose of law in the United States: to ensure that every person in this country has the freedom and security to enjoy the benefits of life in a democratic society.

According to the democratic principles on which American society is built, every person should have a free and equal opportunity to pursue individual goals and desires. However, so that one individual’s pursuit of happiness does not infringe upon another’s, the citizens of this country, through the electoral and legislative processes, agree upon certain guidelines for their behavior. These guidelines comprise our system of law.

However, at times individuals come into conflict with one another, in spite of the system of laws. The reasons for conflict are varied. Laws do not cover every possible situation. Often individuals involved do not know or understand the law. In certain cases an individual deliberately chooses to break the law.

Whenever a dispute arises between individuals or between an individual and the government, or whenever an individual offends the general will of the people by breaking the law, a solution must be found that is in harmony with the principles of our society.

Several solutions might be considered:
1. a clarification of the rights of the parties;
2. a determination of right and wrong, or guilt and innocence;
3. a direction to one individual to take certain actions to make up for harming another’s rights; or
4. even a fine and/or a sentence as punishment for breaking the law.

A trial is a widely recognized means for settling such disputes. However, going to court usually should be the last resort in seeking a solution. People should try to work out their problems first in one-to-one communication or with a third person.

Three common ways of settling disputes without going to court are:
1. negotiation, in which the parties talk face-to-face;
2. mediation, in which the parties talk through a third person called a “mediator” who helps them find a common ground on which they can agree to a solution; and
3. arbitration, a process less formal than a trial, in which a third party hears the complaints and makes a decision that the parties have agreed in advance to abide by.
However, when these methods fail, parties to the dispute sometimes go to a trial to find a solution. A trial is an “adversary process.” This means that two or more persons who are in conflict present their arguments and their evidence before a third party not involved in the dispute who then renders a decision. The “impartial” third party that renders the decision can be a judge or a jury. The judge or jury functions as the “Trier of fact.”

THE PARTIES

A trial revolves around an argument involving two or more people. The people who bring their argument to the trial are called the “parties” to the case.

A civil trial involves one person complaining about something another person did or failed to do. The person who does the complaining is called the “prosecution,” and the person who is the object of the complaint is the “defendant.”

In a criminal trial, a person is accused of a particular act that the law calls a crime, such as murder, robbery, or fraud. The person who does the accusing is the “prosecutor.” The prosecutor speaks on behalf of the government, which in turn represents the people of the state or nation. The person who is accused of the crime is the “defendant.”

Except in a few special circumstances (most notably small claims court cases in which lawyers frequently are not involved), both parties will hire and instruct lawyers to prepare their respective cases and to make their arguments in court.

THE FACTS OF THE CASE

Long before a trial actually takes place, some argument or incident occurs. Perhaps there is a traffic accident; a husband and wife decide they can no longer live together; someone is robbed at gunpoint. The argument or incident involves many facts, which together make up the “case” Persons on opposite sides of a case often will view the facts quite differently. This disagreement over the facts of an incident forms the basis for a trial.

In a trial, the parties present their differing versions of the facts before an impartial “trier of fact,” a judge or a jury. The job of the trier of fact is to decide which facts are correct.

THE EVIDENCE

While the description of the facts of the argument or incident as presented by each party is important, the trier of fact usually needs a lot more information in order to make a decision. The version of the facts given by the parties may be incomplete, or affected by their emotional state at the time of the incident. Or, in a few cases, parties might even give false versions of the facts.
For all of these reasons, the trier of fact needs more information than just the stories of each party. In a trial, the attorneys for each side present all of the factual information they can gather to support their side of the case. This information is called “evidence.”

Evidence may take several forms including:
1. **Testimony:** a person, called a “witness,” tells the court what he or she saw, heard, did, or experienced in relation to the incident in question.
2. **Documents:** letters, notes, deeds, bills, receipts, etc., that provide information about the case.
3. **Physical Evidence:** articles such as weapons, drugs, clothing that can provide clues to the facts.
4. **Expert Testimony:** a professional person, someone not involved in the incident, who can give medical, scientific, or similar expert instruction to help the trier of fact decide the importance of the evidence presented.

**THE BURDEN OF PROOF**

To guarantee that the trial process is fair to everyone involved, certain legal principles govern the way parties present their evidence, and the way the judge or jury considers the evidence and makes a decision. One of the most important rules concerns which party must prove his or her version of the facts, and how convincing he or she must be. This rule is called the “burden of proof.”

In a civil case, the person who brings the case to court and does the complaining (the prosecution) has the burden of proof. Prosecutions must convince the judge or jury that these facts are correct “by a preponderance of the evidence,” meaning that their evidence is slightly more convincing than the defendants’ evidence. Some refer to this as meaning that 51 percent or more of the evidence supports prosecutions' side.

In a criminal case, the burden of proof is considered to be much stricter, because the defendant may go to prison if the prosecutor proves the state’s case. Therefore, the prosecutor must convince the judge or jury “beyond a reasonable doubt” that the accused committed the crime. Some state that “beyond a reasonable doubt” means that the trier of fact (judge or jury) must be at least 95 percent sure that the prosecutor is correct.

**THE DEFENSE**

As described above, the complaining or accusing parties usually have the burden of proving their particular version of the facts. The job of the defense team is to present evidence which prevents the prosecution or prosecutor from meeting the burden of proof. Defense evidence should explain, disprove, or discredit the evidence presented by the other party. For example, in a traffic accident case, suppose the prosecution presents a witness who testifies that the defendant was speeding just prior to hitting the prosecution’s car in an intersection. The defense could then present a witness who tells the court that the prosecution, who was hit
while making a left turn, failed to signal before making the turn. The defense could also try to show that the defendant was not speeding at all. This defense testimony weakens the prosecution’s case by presenting an alternative explanation for the accident.

In criminal cases, defendants try to discredit the evidence presented by the prosecutor in a variety of ways:

1. presenting evidence to show that the defendant was not present at the scene of the crime (called an “alibi”);
2. showing that the defendant was acting to protect him/herself (self-defense);
and
3. Presenting medical evidence showing that the defendant was mentally deranged at the time of the crime (insanity defense).

**PREPARATION FOR TRIAL**

Attorneys are responsible for collecting all of the evidence that supports the side of the case they are representing and for deciding how to present that evidence at the trial. It is the attorney’s job, therefore to work out a strategy for the trial.

In general, there should not be any surprises at the trial (contrary to popular belief) if the attorneys are well prepared. This lack of surprises is also due to the fact that the attorneys for the opposing sides must let each other know what evidence they have collected. This advance sharing of information is called “discovery.” Discovery enables both sides to prepare their cases as well as possible, to ensure that the trial is fair.

Before the trial, witnesses might make “affidavits,” which are written statements of the facts, made voluntarily and sworn to, usually in the presence of a notary or other person authorized to administer oaths. Witnesses might also be required to give a “deposition,” which is testimony given out of court. At a deposition, attorneys for both sides are present to question the witness, while a stenographer records the testimony for later use in court.

During this period before the trial, attorneys must also spend time preparing for what they will actually say and do at each step in the trial. These steps and suggestions for attorney preparation are contained in the next section.
STEPS IN A TRIAL

Note to Students: For a civil case, substitute the word “plaintiff” for the word “prosecution”.

A number of events occur during a trial, and most must happen according to a particular sequence. (The sequence may vary slightly based on state or local rules or practice.)

1. The following is the basic sequence in the trial process:
2. Judge enters and takes the Bench
3. Bailiff calls the case.
4. Prosecution (Prosecutor in criminal case) makes an opening statement.
6. Prosecution presents case:
7. Prosecution calls first witness and conducts direct examination.
8. Defense cross-examines the witness.
9. Prosecution conducts redirect examination, if desired.
10. Steps a, b, and c completed for each of the prosecutions other witnesses.
11. Prosecution rests case.
12. Defense presents case in same manner as Prosecution in #5 above, with Prosecution cross-examining each witness.
16. Prosecution offers any rebuttal argument.
17. Jury instructions (if jury trial).
18. Jury and judge deliberations.
20. Order (civil trial); Sentence (if found guilty in a criminal trial).

The main steps in this trial sequence, before the judge or jury start deliberating, can be summarized as: (Note how the sides take turns.)

1. opening statement by prosecution;
2. opening statement by defense;
3. direct examination of prosecution’s witnesses,
4. cross-examination of prosecution’s witnesses;
5. direct examination of defense witnesses;
6. cross-examination of defense witnesses;
7. closing statement (argument) by prosecution; and
8. closing statement by defense.

In the following sections on the next four pages, the four most critical stages of the trial are highlighted.
THE OPENING STATEMENT

OBJECTIVE: To acquaint the judge with the case and outline what you are going to prove through the witness’ testimony and the admission of evidence.

DESCRIPTION: The opening statement is the introduction to the case. This first impression is critical to the trial since it’s the first time the attorneys for each side get to tell the judge and jury about what happened to their clients. It “paints a picture” of the case. Your direct and cross-examinations work to reveal the picture’s details in the best possible light.

In the opening statement the attorney should:
1. Identify themselves, co-counsel and their client,
2. Summarize the case in less than 30 words using key facts according to your party’s case,
3. Summarize the evidence that will be presented at the trial,
4. Identify who has the burden of proof (the amount of evidence needed to prove a fact).
5. Tell the court what decision you want them to come to at the end of the trial.

STYLE POINTS:
1. **Prosecution’s Attorney:** Since this attorney speaks first, it is very important for the prosecution’s opening statement to include a good summary of the facts, presented in a light most favorable to the prosecution. If the opening statement presents a very convincing picture of the prosecution’s case, the defense team will have a much harder time changing the minds of the judge and jury.

2. **Defense Attorney:** The defense team has the task of showing that the prosecution’s version of the facts is not correct. The defense attorney prepares by predicting how much detail and what kind of emphasis the prosecution’s attorney will make in his/her opening statement. The defense attorney should be ready to make adjustments in his or her prepared statement while the prosecution’s attorney speaks. The defense attorney should highlight the facts that are in dispute and emphasize the kinds of evidence the defense will present to show that the prosecution is wrong.

3. **Hot Tips:**
   a. Know your case, inside and out. You will then appear confident in your case.
   b. Attorneys should make eye-to-eye contact with raters while speaking.
   c. Do not read your statement. The use of notes is discouraged and your score may reflect it. If necessary, however, do not read all the way through and look up as often as possible at the judge.
   d. Use the future tense in describing what you will do, for instance ‘The facts will show...’.
   e. Don’t emphasize evidence that might not get admitted. Never promise to prove something you can’t.
   f. Call your client by name, but refer to your opponent as plaintiff or defendant.
g. Don’t be wordy – use concise and specific language to cast your case in the most positive light.

h. Use an analogy, a phrase or word, or create some memorable image that you refer to in your closing.

THE DIRECT EXAMINATION

OBJECTIVE: To obtain information from favorable witnesses to prove the facts of your case.

DESCRIPTION:
After the opening statements, the process of witness examination begins – a chance for witnesses to tell their story. First, the prosecution’s team presents its witnesses, then the defense team. Each time a witness is called to the stand, the attorney who called the witness asks a series of questions called the direct examination. These questions reveal what the witness saw, heard, experienced or knew.

The questions must ask only for facts, not for opinions (unless the witness has been declared to be an ‘expert’ in a particular subject, such as a doctor or a police detective). When the direct examination is completed, an attorney for the other side then asks questions to show weaknesses in the witness’ testimony, a process called ‘cross-examination.’

STYLE POINTS:
1. Attorney Conducting Direct Examination:
   a. Before the trial decide the details each of your witnesses know that will help you prove the main points of your case. Then ask sequence questions in a logical manner that will reveal these details.
   b. The direct examination’s aim is to protect your witness.
   c. Avoid lengthy or complicated questions. Ask who, what, when, what, where, how questions.
   d. Leading questions cannot be used on direct examination. (See Rules of Evidence section.)
   e. Be prepared to rephrase questions in case the witness does not understand a question or fails to remember facts accurately, or in case the other side objects to a question. (Grounds for objections are discussed in the Rule of Evidence section.)

Be sure to have all documents marked for identification before you refer to them at a trial. Then refer to them as Exhibit A, etc. After you have finished using an exhibit, if it at all helps your case, ask the judge to admit it as evidence.

2. Opposing Attorney:
   a. Listen carefully to the questions and answers since cross-examination must be limited to subjects discussed in the direct examination.
   b. Listen for violations of the Rules of Evidence.
c. Be prepared to make good objections. It’s often more beneficial to you to take up ‘objectionable’ issues during cross-examination, rather than objecting too much. You don’t want to alienate the raters.

3. Witness:
   a. Know the questions that your side’s attorney will ask and prepare clear and convincing answers that contain the information that the attorney is trying to elicit from your testimony.
   b. The most important factor in the trial is the believability (often called “credibility”) of the witnesses.
   c. Witnesses should tell their stories clearly with as little hesitation as possible.
   d. It's important for witnesses to know the facts thoroughly.
   e. **NOTE**: The attorney who conducted the direct examination may do a ‘redirect’ at the close of cross-examination (see next section). A redirect examination follows the same rules as direct. However, the questions are limited to subjects discussed in the cross-examination. **Ask that time you don’t use in your direct be reserved for redirect.**

4. Hot Tips:
   a. **Attorney**:
      i. Focus the attention on the witness not on yourself.
      ii. Allow your witness to explain some facts that may be detrimental to your case. This will minimize the opposing counsel’s attempt to ‘sting’ you with it in cross-examination
      iii. Think quickly if the witness gives you an unexpected answer. Add a short follow-up to be sure you obtain the testimony you wanted and needed.
      iv. Do not make any statements about the facts, even if the witness says something wrong.
      v. If you need a moment to think, ask the judge if you can discuss a point with your co-counsel for a moment
   b. **Witness**:
      c. Know what your witness doesn’t know. Be very familiar with the facts.
      d. Direct your eye contact to the audience raters. They’re the ones you have to convince.
      e. Use gestures sparingly and strategically to emphasize key moments in your testimony.
      f. Don't panic if the attorney or judge asks you a question you haven't rehearsed.
      g. Don’t argue with the attorney.
THE CROSS-EXAMINATION

OBJECTIVE: To make the other side’s witnesses less believable.

DESCRIPTION: The purpose of the cross-examination is to show the judge and jury that a given witness should not be believed. The attorney will try to cast doubt on the evidence and witness credibility. They’ll work to prove that the witness:
1. cannot remember facts;
2. did not give all of the facts in the direct examination;
3. told a different story at some other time;
4. has a reputation for lying;
5. has a special relationship to one of the parties (maybe a relative or close friend) or bears a grudge.

QUESTIONS TO ASK:
1. Witness credibility: Show that he has given a contrary statement at another time
   a. Example: The witness testifies to the exact opposite of what he testified to during the pre-trial hearing). Ask the witness, “Did you make this statement on June 1st?” Then read it or show a signed statement to the witness and ask, “Is this your statement?” Then ask the witness to read part of it aloud or read it to the witness yourself and ask, “Did you say that?”
2. Witness competence or qualifications: Show that an expert witness or even a lay witness who has testified to an opinion lacks training or experience.
   a. Example: A psychiatrist testifying to the defendant’s need for dental work, or a high school graduate testifying that in his opinion the defendant suffers from a chronic blood disease.
3. Witness is lying: Show the contradiction.
   a. Example: The witness first testifies to not being at the scene of the accident and soon after admits to being there.
4. Witness is prejudiced or biased: Show the place in testimony where the witness showed bias.
   a. Example: The witness testifies that he has hated the defendant since childhood.
5. Witness opinion is questionable: This could be because of poor eyesight, hearing etc.
   a. Example: The witness with poor eyesight claims to have observed all the details of a fight that took place 500 feet away in a crowded bar.

STYLE POINTS:
1. Attorney Conducting Cross-examinations:
   a. This attorney must know precisely what kind of weaknesses he or she wants to show in the witness.
   b. Ask short, “leading” questions (discussed in the Rules of Evidence). For example, “Isn’t it true...?”
   c. Be brief. Don't ask so many questions that well-made points are lost.
d. Pin down a witness by asking a question requiring a yes or no. Tactfully interject on an explanation which may hurt your case. Say “You may stop there, thank you,” or “That's enough, thank you.”
e. Questions must be limited to subjects discussed in the direct examination or they can be objected to as “outside the scope of direct examination.”
f. Always listen to the witness’s answer.
g. Don't give the witness the opportunity to re-emphasize the strong points made during the direct exam.
h. Don't harass or intimidate or argue with the witness through your questions.

2. **Opposing Attorney:**
   a. Listen carefully for violations of the Rules of Evidence and be prepared to make objections.
   b. Listen carefully for the kind of attack the cross-examiner is making; decide if the attack is successful and what to do about it if it was damaging to your case.
   c. After the cross-examination, the opposing attorney may conduct a “redirect” examination, to give the witness a chance to explain or correct some points made in the cross-examination.
   d. Be relaxed and ready to adapt your prepared questions to the testimony that is actually heard during the direct examination.

3. **Witness:**
   a. Witnesses should try to give explanations whenever possible.
   b. Witnesses must pay close attention during cross-examination. The attorney may try to confuse them.
   c. Memorize the facts and make sure that any digression from your testimony is consistent with the facts.
   d. Be natural and in character emotionally and in your mannerisms and speech.
   e. Prior to the trial, isolate all possible weaknesses, inconsistencies, problems in your testimony, and be prepared to explain them.
   f. Be as relaxed and in control as possible. An appearance of confidence and truthfulness is important.
   g. Don't read or recite your witness statement word for word.

4. **Hot Tips:**
   a. **For attorneys:**
      i. Phrase your questions so you know how the witness will answer them. Ask the question in a different way if you don’t get the answer you were seeking.
      ii. Be quick to spell out to the raters through your questioning the times when the witness shows bias, contradicts their testimony, is lying or being uncooperative.
      iii. Make your presence so compelling that attention is focused on you rather than on witness’ answers.
      iv. Make sure you have the gender of the witnesses in mind when you refer to them as him or her.
v. Never ask the witness “How,” “Why” or “Could you explain” questions.

b. **For witnesses:**
   i. Know what your witness doesn’t know.
   ii. Direct your eye contact to the audience raters. Use gestures naturally and strategically for emphasis.
   iii. Don’t argue with the attorney. Cross-examination can be tough, so don’t get flustered.
   iv. Predict the opposing party’s cross-examination questions. You’ll know what to say and this will help you keep your composure under pressure.

**OBJECTIONS**

The purpose of objections is to protect your witness. You want to keep the court record clean of information that is out of bounds. When an attorney hears a question that is out of bounds, she/he stands and says, “I object, your honor.” Then the attorney must state what she/he is objecting to and the Rules of Evidence it violates (if they know it). The judge will often allow the opposing attorney to respond to the objection, before making a ruling.

**The Judge can say:**
- Objection Sustained – The question is thrown out. The attorney can rephrase the question or move on.
- Objection Overruled – The question does prevail. The questioning attorney can repeat the question to get back on track.
- Your Objection is Noted – The judge will listen to the answer, but take the objection into account.
- Objection Overruled as Made – The judge is overruling because the objection was made incorrectly. The objecting attorney should try to restate the objection correctly.

**Hot Tips:**
- Keep your objections impersonal. Try to resist clashing with your opponent.
- Some trials can get messy with lots of objections and even antagonism. This will pointlessly draw both teams away from the focus of the trial. Resist getting drawn into this type of engagement.
- It’s best to hide emotions based on the ruling of the judge. Never disagree with the judge.
- After the judge has made his/her decision, move on. When the judge overrules an objection, don’t lose heart and stop objecting. Just choose your objections carefully.
- Plan your strategy with your co-counsel. Predict opinion and hearsay objections. Plan what you’ll say when the opposing team makes a legitimate objection.
THE CLOSING ARGUMENTS

OBJECTIVE: Make your final case about what evidence is credible or not and which witnesses should be believed or not. Summarize the application of the law to your case and ask that your case prevail.

DESCRIPTION:
The purpose of the closing argument is to convince the trier of fact (judge or jury) that the evidence presented is sufficient to win the case for whichever side the attorney is representing.
The closing argument should include:
1. a summary of the evidence presented that is favorable to the presenting attorney’s side,
2. a summary of the case, an
3. a legal argument showing how the law requires the judge or jury to interpret the facts, and why that law requires them to rule in favor of the side for which the attorney is arguing.

STYLE POINTS:
1. Prosecution Attorney:
   a. The prosecution has the burden of proving the facts in a civil case by a preponderance of the evidence. Tell the jury how you met that burden. Your compelling summary of the favorable evidence presented is extremely important.
   b. Be sure to avoid claiming evidence that was not, in fact, presented; similarly, do not emphasize evidence that the defense successfully attacked, except to give a firm response to such an attack.
   c. Cite the law clearly and correctly and make a clear argument regarding how the law requires the judge or jury to rule in the prosecution’s favor.

2. Defense Attorney:
   a. Summarize all of the evidence presented to weaken the prosecution’s case.
   b. Emphasize the inability of the prosecution to meet the burden of proof and stress that such inability must clearly lead to a decision in favor of the defendant.

3. Both Attorneys:
   a. Thank the judge and raters for their time and attention.
   b. Isolate the issues and describe briefly how your presentation resolved these issues.
   c. Review the witness testimony. Outline the strengths of your side’s witnesses and also the weaknesses of the other side’s witnesses. (Remember to adapt your statement at the end of the trial to reflect what the witnesses actually said as opposed to the anticipated weaknesses of the other side.)
d. Review the physical evidence. Outline the strengths of your evidence and the anticipated weaknesses of the other side’s evidence. (This section must be adapted at trial.)

e. State the applicable statutes and any cases to show it supports your side.

4. **Hot Tips:**
   a. Tie your opening and closing thematically together.
   b. Show adaptability/flexibility. If the opposing counsel successfully used an analogy, visual, or a turn of a phrase that can be twisted or adopted in your favor, do so in your closing.
   c. Don’t forget to request the verdict/remedy you desire.
TIPS FOR PREPARING
WITNESSES AND ATTORNEYS

This section outlines various areas of study essential to a team that enters competition.

PRACTICE, PRACTICE, PRACTICE:
- Deciding on which are the most important points to prove their side of the case and to make sure that proof takes place.
- Following the formality of court, e.g., standing up when the judge enters; or when addressing the judge, to call the judge “Your Honor,” etc.
- Telling clearly what you intend to prove in an opening statement and to argue effectively in your closing argument that the facts and evidence presented have proven their case.
- Phrasing questions on direct examination that are not leading (carefully review the rules of evidence and watch for this type of questioning in practice sessions).
- Not asking so many questions on cross-examination that well-made points are lost. When a witness has been contradicted or otherwise discredited, student attorneys tend to ask additional questions that often lessen the impact of points previously made.
- Recognizing what questions are likely to require answers from the witness that will make good points.
- Learning to avoid pointless questions!
- Thinking quickly on their feet when a witness gives an unexpected answer, an attorney asks unexpected questions, or a judge throws questions at the attorney or witness. (Practice sessions will help prepare for this.)
COURTROOM DECORUM

- Always be courteous to witnesses, attorneys, audience raters and the judge.
- Always stand when talking in court and when the judge enters or leaves the room.
- Dress appropriately. (If it's a formal competition trial, this may mean coat and tie for males and dresses or equivalent for females.)
- Prior to opening statements, ask the judge if you may present stipulations you would like him/her to consider.
- Do not stand in the view of the opposing counsel when you are examining a witness.
- Always say “Yes, Your Honor,” or “No, Your Honor,” when answering a question from the judge.
- Attorneys should try to make objections in a manner which allows the judge to hear the full question being asked, but not the responsive testimony.
- Judges and raters don't like attorneys who constantly make objections or attorneys who make objections without being able to explain the reason for the objections.
- Learn how to introduce evidence. Mark the evidence first. Show the evidence to the witness. Ask the witness to identify the evidence as authentic. Ask the judge that the evidence be admitted. The bailiff will give the evidence to the judge.
- If the judge rules against your objection, take the defeat gracefully and without showing emotion.
- Gum chewing is prohibited.
- The members of your team watching from the audience should not be talking during the proceedings.
- Coaches should not be talking to their team members sitting in the audience boxes.
CASE PREPARATION TIPS FOR ATTORNEY COACHES AND TEACHERS

- Teachers should duplicate and distribute to appropriate individuals, all student materials included in this manual.

- Case preparation can begin in class and move outside of class when the competition team is selected. Attorney coaches should try to attend 2-3 in-class sessions during initial preparation.

- Attorneys can be of assistance to the teacher in discussions of the following:
  - procedures in trials;
  - burden of proof;
  - rules of evidence (explain only simplified rules of evidence included in this manual);
  - the roles of each participant, i.e., attorney, witness;
  - law relevant to the competition case given in this manual.

- Brainstorming is a good teaching technique to use for case preparation. Attorneys should avoid lectures. Attorneys and the teacher should elicit ideas from students rather than spoon-feed them. Use this technique in reviewing steps of a trial, identifying important issues, developing arguments, deciding what should be included in opening and closing statements, questioning techniques.

- During group work, attorneys can take one group and the teacher the other.

- Teachers and attorneys must be thoroughly familiar with the rules of evidence and rules of competition.

- It is important to de-emphasize the competitive aspects of the experience and stress the educational benefits and enjoyment.

- Attorneys should be available to attend preparation sessions before the District Competitions.

- Attorneys and teachers can help students prepare their statements, but should avoid the temptation to help too much. Students should be encouraged to do as much of the writing as possible.
KEY POINTS TO REMEMBER

1. All participants should speak loudly and clearly. Practice this by having each student attorney stand at the far end of the room while questioning the student witness.

2. As soon as possible, student attorneys should begin formulating questions for use in examination of witnesses, and student witnesses should rehearse their testimony. Student preparation will progress more rapidly by simulating actual conduct of the trial than by merely conducting general classroom discussion of the steps in the trial.

3. Leading questions are not allowed on direct examination, but can and should be asked on cross-examination.

4. Courtroom etiquette and decorum should be stressed at practice and observed at trial (e.g., standing when addressing the court, calling the judge “Your Honor”).

5. Cross-examination should be short and to the point: questions on cross-examination are designed to elicit a particular response from the witness, asking open-ended questions which call for a narrative or explanation (e.g., “How,” “Why,” or “Could”) may result in testimony which is unexpected and harmful to the cross-examiner’s case.

6. Each attorney should be prepared to state the reasons for overruling an objection raised by the opposing counsel during questioning of the witnesses.

7. The witness statements should not be read verbatim in the trial. Witnesses will not be permitted to take their statements to the stand. They serve merely as a point of departure for oral testimony. However, testimony must not be inconsistent with facts set forth in the witness statements.

8. Credibility of witnesses is very important and therefore, students acting as witnesses should be encouraged to get into the roles and to attempt to think and dress like the person they are playing. These students should read over the statements many times and have other people ask them questions about the facts until they know them “cold.”

9. The witnesses’ performance will be taken into consideration when evaluating the team’s performance during the competition.

10. Witnesses are not permitted to refer to their statements during the trial, except to refresh recollection (direct) or impeach (cross).

11. Even though the class is representing one side during the first round of competition, during practice sessions students on the competition team should be assigned to play all witnesses. Use case preparation materials completed during classroom work so that your competing students have two sets of trial materials to work from.

12. During the practice rounds, you may wish to get students from another class to constitute the jury. The jury should not be allowed to read the statement of facts or witness statements prior to the trial in order to avoid predisposition, to simulate more precisely an actual trial and to more adequately determine your team’s effectiveness.

13. Opening statements and closing arguments should be written by students. Attorney and teacher coaches can assist with editing, but not the actual
writing of arguments. Coaches should not tell students to incorporate language the students do not understand. Closing arguments should not be totally composed before trial as they are supposed to highlight the important developments for the prosecution and defense that occurred during the trial.

14. It should be made clear to students that material or relevant facts cannot be changed from their witness statement. If they contradict this statement on the witness stand, the opposing attorney may use it to impeach the witness. Students also may not “invent” relevant medial facts or incidents that not in the statements. However, when an attorney on cross-examination asks a question the answer to which is not included in the statement of facts, the witness will be forced to respond with an answer consistent with his character and the facts. This should be a warning to cross-examiners to avoid asking questions which are not included in the statement of facts or witness statements, as the response will be accepted (see rules of competition).

15. Always conduct a debriefing session after a practice round in order to identify and correct possible deficiencies. Include questions such as:
   A. Was the opening statement an accurate picture of what the trial actually produced?
   B. Did the examining attorneys elicit all the necessary facts from the witnesses?
   C. Were the witnesses convincing and adequately prepared?
   D. Did the closing arguments effectively summarize the main points the witnesses made? Did they identify deficiencies of the opposing side’s case?

16. Some of the things most difficult to learn are:
   A. To phrase questions on direct examination that are not leading;
   B. To introduce documentary or physical evidence;
   C. To follow the formality of court;
   D. Not to ask so many questions on cross-examination that well-made points are lost. When they have contradicted a witness or made him/her otherwise look bad, student attorneys tend to ask additional questions which often lessens the impact of points previously made. Students should be encouraged to recognize what answers make good points so that they know when to stop;
   E. To tell what they intend to prove in an opening statement and, in the closing argument, to argue that the facts and evidence presented have proved their case.

17. Teams must be prepared to present both sides of the case, as attorneys for the prosecution or defendant.

18. In order to deter unfair extrapolations on redirect examination, re-cross examination is allowed, so long as the questioning is strictly within the scope of the redirect.
AWARDS AND RECOGNITION

DISTRICT COMPETITION

- Certificates will be sent to District Conveners for distribution to each participant following district events.
- Conveners may choose to award certificates for outstanding witness and attorneys for their local event.

STATE FINALS COMPETITION

- Certificates will be sent to teachers for distribution for each student who participates in the State Finals.
- Each participating team will receive an award.
- Trophies will be awarded to the State Final Champion and second through third place teams.
- Awards will be presented to the individual outstanding witness and student attorney for the both the competition overall and the Championship Round.
TRIAL PROCEDURES

Before participating in a mock trial, it is important to be familiar with the physical setting of the courtroom, the events that generally take place during a trial, and the order in which they occur. This section outlines the usual steps in trial.

COURTROOM LAYOUT

*Note: Jury box should always be on the same side of the courtroom as the witness stand. Unless otherwise directed by the judge, the plaintiff’s attorneys sit at the table closest to the jury (raters) box.

PARTICIPANTS:

The Judge

The Attorneys

Prosecutor - Defendant (Criminal Case) or
Plaintiff - Defendant (Civil Case)

The Witness

Prosecution - Defendant (Criminal Case) or
Plaintiff - Defendant (Civil Case)
TRIAL SEQUENCE & INFORMATION
FOR STUDENT PARTICIPANTS

As is true in any trial, this case presents a host of problems for team members. When to call a witness, what the witness should say, and how to cross-examine are just some of the issues that will be encountered. This outline should clarify the issues and solve some of those problems by placing the entire case in an understandable perspective for student attorneys and witnesses. Some of the material discussed in the outline below is described in more detail in the Simplified Rules of Evidence and Procedure section. Students should be familiar with all such material.

The trial is divided into three sections: (1) Opening Statements; (2) Examination of witnesses; and (3) Closing Arguments.

TRIAL SEQUENCE

1. **Opening Statement:** These are brief presentations to the judge/jury that are made by the attorneys. (5 minutes per side.)
   a. A Plaintiff Attorney will outline the case by briefly telling the judge (and jury) the facts of a case in a light which is favorable to his or her side. The legal points expected to be raised during the trial, and a statement of the result that he or she will seek at the close of the case. Note: The application of the law to the facts shall not be argued in the opening statement.
   b. The Defendant's Attorney will do the same, highlighting those facts which will support his or her theory of the case. Opening may not be reserved.

2. **Examination of Witnesses:** (Each team will have 24 minutes for all their direct and redirect examinations and 20 minutes for all their cross and re-cross examinations.)
   a. Direct: The purpose of this segment of the trial is to allow your witnesses to tell their side of the story in a narrative manner. Witnesses should know their statements “cold.” Attorneys should be sure to listen to their witness's response so that if he or she forgets anything, you can make sure it gets into the record by asking the question again or rephrasing the question to elicit the response desired.
   b. Cross: At the close of every direct examination, the opposing counsel will cross examine that same witness before the next witness is called. The purpose of the cross-examination is to impeach the witness's credibility (believability); that is, to make him/her look bad in the eyes of the judge/jury. This can be done by showing the witness is biased or
prejudice, the witness doesn't remember just exactly what happened, or the witness did not actually see what happened.

Another purpose of cross-examination is to bring out any facts in the witness’s statement that are helpful to the opposing side. The attorney should focus on these specific points by asking the witness leading questions.

c. Redirect: the attorney who called the witness may ask follow-up questions about issues raised in the cross-examination.

d. Re-cross: Questions must fall within the scope of redirect. An attorney will normally use re-cross examination only when unfair extrapolations have been made during redirect examination.

3. Closing Arguments: These are concluding arguments made to the judge/jury by each side. (Each side has 6 minutes to make closing arguments. The Plaintiff has an additional 2 minutes for a rebuttal argument.)

It is always proper in final argument to refer to a witness’s interest in the outcome of the case, his appearance and conduct while testifying, and the character and credibility of parties and witnesses when the remarks are based on facts in evidence.

The closing argument should tie the whole case together, as if the attorney is closing a circle. The attorney should point out the most favorable things brought out in the trial in his/her favor and suggest weaknesses in the opponent’s case. Attorneys should not refer to facts which were not testified to by a witness during the trial.

a. The plaintiff, who always has the burden of proof, has the right to have the first closing argument. The attorney should always ask for a judgment or ruling in his/her client’s favor.

b. The defendant’s attorney then has an opportunity to argue his/her case. The attorney should urge the judge/jury to find that the plaintiff has not met its burden of proof, and should point out any facts which would lead the judge/jury to that conclusion. The attorney should always ask for a judgment or ruling for his or her client.

c. Because the plaintiff has the burden of proof, its attorney is allowed the last word in rebuttal argument. Rebuttal should respond to issues raised during the defense closing argument, and should suggest why those points should not prevent a favorable ruling for the plaintiff.
BAILIFF/CLERK RESPONSIBILITIES

Note: Laminate this and keep it with you during each trial. Your job is vital to the conduct of this mock trial. You are in charge of the following duties: announcing the opening of the trial; keeping time to make sure that each part of the trial is within the time limits set and swearing in of witnesses.

Before the trial begins, introduce yourself to the judge and explain that you will help as the bailiff. The team that plays the plaintiff should supply the bailiff for each trial and shall be designated as the timekeeper during the trial. The defense team shall provide their bailiff to serve as courtroom host; this bailiff may also assist the defense team with keeping track of their time.

1. When the judge is about to enter the courtroom for the trial, stand up and announce: “All rise, the Superior Court for (name) County, State of Washington is now in session, the Honorable (name) presiding.” Everyone remains standing until the judge enters and is seated. After the judge has taken a seat, announce: “Please be seated.”

2. The judge will hear the pretrial motion first, not to exceed 6 minutes for each side.

3. The opening statements are next, not to exceed 5 minutes for each side.

4. After opening statements, the judge will ask that all 8 witnesses in the case stand to be sworn. The bailiff then says “Please raise your right hand. Do you swear or affirm that the testimony you are about to give is the truth and nothing but the truth?” The witnesses should respond “I do.” The bailiff then says “Please be seated.”

5. Next are the witness examinations. Please keep track of the time the attorney uses for examination (direct, cross, redirect and re-cross) on the Time Tracking Form as provided in this kit. The Time Tracking Form is only used during the round; you are not required to turn it in to the judge after the trial is over. The judge has the discretion to extend the allotted time for direct and cross examinations, and to stop the clock during examination in certain circumstances.

6. The bailiff must keep accurate time. The bailiff brings a watch with a timer or a stopwatch and his/her own time cards as provided in the kit. (Be sure to practice with it and know how to use the watch before coming to the trials.) Using the pages supplied in this kit, laminate a set of 7 time cards. For each part of the trial that is timed, hold up the appropriate cards and be sure they are visible to the judge and the questioning attorney to let them know how much time is left.

7. Announce recesses and adjournment of the trial. For example, if at the end of closing arguments, the judge says, “I’m going to call a recess while I consider the case and will have a decision in a few minutes,” the bailiff should stand and says, “Court will be in recess: all rise.” When the judge re-enters following a recess, announce “all rise,” then “be seated” when the judge is seated.

8. The closing arguments are the final presentations by the attorneys. Arguments are limited to 6 minutes for each side. The plaintiff is allowed an
additional 2 minutes to make a rebuttal argument. When closing arguments are over, the judge will recess.

9. Time is measured in whole second increments.

10. During the testimony of witnesses, bailiffs should not stop the clock for objections unless otherwise instructed to do so by the presiding judge. Some judges may advise the bailiff to automatically stop and start the clock when certain events occur (for example, when the judge asks for a response to an objection). Other judges may instruct the bailiff to start and stop the clock during specific questions or objections. And other judges may add examination time upon request, instead of starting and stopping the clock. The bailiff should meet with the judge at the beginning of the trial to discuss these procedures, and the attorneys should be advised of the judge’s practice.

11. During the argument of pre-trial motions, the judge may interrupt the attorneys to ask clarifying questions. The clock should be stopped at the beginning of the judge’s question, and should restart once the attorney’s answer to the question has been completed.
BAILIFF’S TIME CARD NUMBERS*

Please duplicate these cards onto four 8 ½” x 11” sheets (one for each number) and display them during attorney arguments and statements. This helps them manage their time allocations.
15
TIME GUIDELINES FOR MOCK TRIALS

These time guidelines should be used by all classes and teams in preparing their cases for trial. The team that plays the plaintiff should supply the bailiff for each trial and shall be designated as the timekeeper during the trial. The defense team shall provide their bailiff to serve as courtroom host and secondary time keeper during the trial. Judges will be notified of these time guidelines, and may choose to hold the students to them strictly. Whether or not these time limitations are strictly enforced, the students' ability to remain within these confines will be used as a scoring criterion on the score sheets.

The Time Tracking Form on the next page should be copied by the bailiff and brought to each trial so as to keep track of time used by each person in the trial. (A sample has been provided as an example of what a form would look like when used.)

(All times listed are for EACH team EXCEPT rebuttal argument)

**PRETRIAL MOTION** 6 minutes

**OPENING STATEMENT** 5 minutes

**DIRECT EXAMINATION** 24 total minutes for all witnesses, used as teams see fit. (Includes Redirect)

**CROSS-EXAMINATION** 20 total minutes for all witnesses, used as teams see fit.

**CLOSING ARGUMENT** 6 minutes

**REBUTTAL ARGUMENT (PLAINTIFF ONLY)** 2 minutes

**AUDIENCE RATER CRITIQUES** (Suggested time for each is under five minutes, at the judge’s discretion to lengthen if necessary.)

With these guidelines, trials (including critiques) should be concluded in approximately two hours. Because the trials may be scheduled back-to-back, and due to the scoring evaluations, every effort should be made to adhere to these guidelines.
### SAMPLE BAILIFF TIME TRACKING FORM

<table>
<thead>
<tr>
<th>Round</th>
<th>Courtroom</th>
<th>Judge</th>
<th>Rater</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bailiff</td>
<td></td>
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<tr>
<td>Plaintiff Team Letter</td>
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<tr>
<td>Defense Team Letter</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Pretrial Motion (Record time used)</th>
<th>Pretrial Motion (Record time used)</th>
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</thead>
<tbody>
<tr>
<td>_____ Plaintiff argument (4 minutes)</td>
<td>_____ Defense argument (4 minutes)</td>
</tr>
<tr>
<td>_____ Plaintiff rebuttal (2 minutes)</td>
<td>_____ Defense rebuttal (2 minutes)</td>
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<table>
<thead>
<tr>
<th>Plaintiff’s Case in Chief</th>
<th>Defense’s Case in Chief</th>
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</thead>
<tbody>
<tr>
<td><strong>Plaintiff Opening</strong> (5 minutes)</td>
<td><strong>Defense Opening</strong> (5 minutes)</td>
</tr>
<tr>
<td>Plaintiff Witnesses (24 minutes)</td>
<td>Defense Witnesses (24 minutes)</td>
</tr>
<tr>
<td>Defense Cross (20 minutes)</td>
<td>Plaintiff Cross (20 minutes)</td>
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<tr>
<th>Direct</th>
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<th>Cross</th>
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<tbody>
<tr>
<td>_____</td>
<td>Witness</td>
<td>_____</td>
<td>Cross</td>
</tr>
<tr>
<td>Redirect</td>
<td>_____</td>
<td>_____</td>
<td>Re-cross</td>
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<th>Cross</th>
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<td>_____</td>
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<td>Cross</td>
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<tr>
<td>Redirect</td>
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<td>Re-cross</td>
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<th>Cross</th>
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<td>_____</td>
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<td>Cross</td>
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<tr>
<td>Redirect</td>
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<td>Re-cross</td>
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<th>Cross</th>
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<tbody>
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<tr>
<td>Redirect</td>
<td>_____</td>
<td>_____</td>
<td>Re-cross</td>
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<th>Cross</th>
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<tr>
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<td>Re-cross</td>
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<tr>
<td>Redirect</td>
<td>_____</td>
<td>_____</td>
<td>Re-cross</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Plaintiff Closing</th>
<th>Defense Closing</th>
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<tbody>
<tr>
<td>(6 minute argument; 2 minute rebuttal)</td>
<td>(6 minutes)</td>
</tr>
<tr>
<td>Closing</td>
<td>Closing</td>
</tr>
</tbody>
</table>

|_____ Closing | _____ Rebuttal | _____ Closing | (no rebuttal allowed) |
TEAMS HELPING TEAMS
Ensuring a Smooth Competition Round

Mock trial in the state of Washington is known for its spirit of respectfulness and collegiality. In order to continue this tradition, and to ensure that trials proceed smoothly, teams should take care of the following items of business when they arrive in the courtroom:

_____ Teams should double check that they are seated at the right tables—prosecution sits closest to the jury.

_____ Competitors introduce themselves to the other side, shake hands, and exchange rosters.

_____ Teams show each other their exhibits and demonstratives. If there are any disputes, try to resolve them.

_____ Confirm that when teams are introducing themselves to the judge and raters, the prosecution team goes first.

_____ Confirm time limits with bailiff; especially note that time stops during pretrial when the judge asks a question.
COURTROOM HOST RESPONSIBILITIES

Each team is expected to provide a courtroom host for their courtroom. At the end of the trial, the two hosts double check the room and are responsible for its final cleanliness. Their job is really easy if they are vigilant on the following items.

Any room that is not left clean will result in sanctions against each team, which may include loss of points for the round.

- Maintain respectful behavior of courtroom spectators. Quietly warn those who are loud. If they must communicate in some way, they may quietly and very discreetly pass notes to a person sitting next to them (not across the room, for instance). If the disruption continues, ask them to take their conversation outside the courtroom, before the judge asks them!

- Do not allow any food or drink (this includes pop cans and cups of coffee) to be brought into the courtroom.

- Fill the water jugs from a fountain in the hall. Water and cups will be made available to the courtroom host. As a courtesy, fill the water jug if less than half full after your trial for next trial.

- Be responsible for locating the Mock Trial Director or designated staff member at the judge’s request for dispute resolutions during the trial. Go to the Mock Trial Competition Information Table, and the convener will be found to help you.

- Do not allow anyone to move any courtroom furniture or furniture from the halls. Each room has seating allowable by law and fire codes. Courthouse staff get really upset when they find the rooms are not as they were left and then have to rearrange them in order to resume trials on the Monday after our event. Respect of their environment ensures their continued support of our event.

- Remove all used paper cups from defense and prosecution tables. Remove paper from the wastebasket in the courtroom. Place litter in the large trash container located in the hallway.

- Stand by the courtroom door and monitor it to ensure quiet exits and entrances into the courtroom during the trial.
SAMPLE PICTURE ROSTER
Please create picture rosters similar to the example below. You need a separate picture roster for plaintiff and defense. Be sure your school name IS NOT included on the rosters. Bring at least 5 copies of the picture roster to each trial.

Defense/Plaintiff Roster

<table>
<thead>
<tr>
<th>Attorney</th>
<th>Attorney</th>
<th>Attorney</th>
</tr>
</thead>
<tbody>
<tr>
<td>(name)</td>
<td>(name)</td>
<td>(name)</td>
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</table>

<table>
<thead>
<tr>
<th>Witness #1</th>
<th>Witness #2</th>
<th>Witness #3</th>
<th>Witness #4</th>
</tr>
</thead>
<tbody>
<tr>
<td>(name)</td>
<td>(name)</td>
<td>(name)</td>
<td>(name)</td>
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</table>
GUIDELINES FOR ATTORNEY COACHES

Students and teachers benefit immensely from attorney practical experience and expertise. The involvement of trial attorneys in the mock trial program raises the bar of performance for teams. As role models to impressionable students, their involvement also improves the chances that students will form a positive opinion of legal professionals and the legal system.

Attorney coaches are asked to observe these guidelines in order to serve the students and teacher advisors in the most effective manner possible. As much as attorneys may want to help the students, they need to remember that students will develop a better understanding of the case and learn more from the experience if the attorney coaches do not dominate the student’s preparation for the mock trial. Attorney coaches should point students in the right direction, but allow them to do the research. The preparation phase of the contest is intended to be a cooperative effort of the students, teacher and attorney coaches.

The attorney coach is best described as the constructive observer listening, suggesting, guiding, and demonstrating techniques to the team. Sessions with the mock trial team should be devoted to the following:

- Answering questions that students may have concerning general trial practices.
- Explaining the reasons for the sequence of events/procedures found in a trial.
- Listening to the students’ approach to the assigned case, then provide guidance.
- Emphasizing key points, such as the elements to be proved, and the relevance and importance of available legal authority.
- Demonstrating proper questioning techniques by the student attorneys.
- Demonstrating the delivery of sound testimony by the witnesses.
- Encouraging students to do as much of their own preparation as possible. Attorney coaches should not prepare opening statements, closing statements or questions for the students.
- Explaining complicated legal terms and procedures if necessary.
GUIDELINES FOR JUDGES

1. Judges are asked to decide the pretrial motion. The judge may also comment on the merits of the case, i.e. how the facts and applicable law might be decided in an actual bench trial. The audience raters decide which team made the best overall team presentation. When the trial is over, the judge may wish to recess briefly in order to consider these decisions.

2. When commenting on the merits of the case, the judge should consider only the evidence presented, the statutes or case authority provided in the fact pattern, the stipulated facts, and the legal arguments of the attorneys. No other cases, statutes, etc., may be referred to by counsel during the trial. After the trial, the judge may explain what facts and legal principles he or she would consider particularly important in making a decision.

3. It is important to be familiar with the general summary of the case to be presented by the parties. This will assist you in making decisions on relevance objections. You should not, however, rule on whether a witness has testified consistently with a particular statement in a declaration.

4. The witness statements contained in the packet should be viewed as signed affidavits. Witnesses can be impeached if they contradict the material contained in their witness affidavits. This rule is designed to limit, not eliminate, the need for reasonable inference by providing a familiar courtroom procedure.

5. Use only the Mock Trial Simplified Rules of Evidence and Competition Rules. The judge should encourage the attorneys to demonstrate their knowledge of the rules by allowing argument on objections when appropriate.

6. The judge may not interrupt an attorney's opening statement or closing argument to ask questions. The judge may not question the witnesses.

7. At the conclusion of the trial, the judge may comment on the case and its merits, then begins the comments, critiques and suggestions for improvements to the teams, including appropriate praise. Ask raters to make brief comments. At the district competition, comments should be limited to 5 minutes per rater. At the state level, total oral comments, by judge and raters, is limited to 10 minutes, and is timed by the bailiff. Students need time between rounds to relax and prepare.

Please keep your comments short, positive and constructive. Detailed suggestions for change in a team’s presentation are not helpful at the state competition. Positive reinforcement of both sides helps ensure a beneficial educational experience for everyone.

8. If it is necessary to call a recess during the trial, please be sure to remind all participants that they are not to communicate with anyone who is not a member of their own team. Attorneys and teachers may not be consulted.

9. During the trial, the judge may be asked to stop the clock during examination of witnesses, or to add to a team’s total examination time.
Generally, the judge should keep the trial within the prescribed time limits; this encourages teams to be prepared and efficient in their use of time. However, the judge should consider whether to stop the clock/add time when (a) ruling on an objection calls for a response and extended argument, or (b) it appears that a witness or attorney is deliberately attempting, through evasiveness or stalling tactics, to waste another team’s examination time. The bailiff and judge will review how to handle time issues, and advise the teams before trial begins.

**ORDER OF PRE-TRIAL MOTION EVENTS**

1. The judge asks the moving party to summarize the arguments made in favor of the motion. The moving party has four minutes.

2. The judge asks the non-moving party to summarize arguments made in opposition to the motion. The non-moving party has four minutes.

3. The judge offers the moving party two minutes of rebuttal time. This time is used to counter the opponent’s arguments. It is not to be used to raise new issues. The same attorney presents both the initial argument in favor of the motion and rebuttal.

4. The judge offers the non-moving party two minutes of rebuttal time. This time is used to counter the opponent’s arguments. It is not to be used to raise new issues. The same attorney presents both the initial argument in opposition to the motion and rebuttal.

5. The judge may interrupt any presentation, to ask an attorney clarifying questions. The time from the beginning of a judge’s question to the end of the attorney’s answer to the question is not part of the time limit for the attorney’s presentation.

6. At the end of the oral arguments, the judge will rule on the motion.
CONDUCTING THE TRIAL

1. Normal courtroom procedure and decorum should be followed during the trial. If a mistake does occur, the judge should usually not interrupt the trial to explain the proper procedure if this can wait until the end of the trial. Judges should realize, however, that inexperience is usually the cause of student errors.

2. Judges should feel free to interrupt attorneys as they would in their own courtroom. Judges may not, however, interrupt opening statement or closing argument to ask questions, or question witnesses. Some students, however, will become more nervous when faced with a direct question from the judge. Further, interruptions from judges should be considered when deciding whether to give the students more time.

3. Students have been taught the Simplified Rules of Evidence and are expected to make some objections. Judges should encourage the attorneys to demonstrate their knowledge of the rules, by allowing argument on objections when appropriate. Judges may immediately explain their rulings on objections, or may wait until the conclusion of trial.

4. The trial should last at most between two and two and a half hours; therefore, the judge should help it proceed efficiently. Guidelines for the length of each segment of the trial are provided. Barring an unusual number of objections or lengthy arguments on them, the time limits set forth should be sufficient to allow for objections. The time limits are purposely short. This is because part of the purpose of the mock trial competition is to get the students to focus upon the salient facts and issues. Teams should have rehearsed sufficiently to make their presentations within the allotted time. Judges may, in their discretion, occasionally add time when a team has deliberately used obstructive tactics to waste another team’s time for examination of witnesses. Otherwise, judges should hold students to the time guidelines provided.

5. Any Statement of Facts and Stipulations in the case are agreed to by both sides. Each witness has been provided an affidavit which both sides have. These affidavits may be used to impeach during cross-examination.

6. Only one attorney may question each witness, and only the attorney questioning that witness may raise objections.

7. The same attorney may NOT make both the opening statement and the closing argument for his or her side of the case.
SUGGESTIONS FOR JUDGES AND AUDIENCE RATERS

General Parameters:

The trial should last two to two and a half hours. At the district level, oral critiques should be limited to 5 minutes per rater. At the state level, total time for oral comments by raters will be limited to 10 minutes, and will be timed by the bailiff. The close timing of competition rounds does not allow for deviations from these rules. One late trial can hold up the entire schedule. Judges should discourage excessive objections and limit recesses.

Pre-Trial Conference:

- Ask each team if it is ready for trial. Ensure they’ve supplied a Team Roster to each audience rater and the judge (a total of four copies). Teams are to be identified by team letter only.

- If video recorders are present, ask an attorney from each team to consult their team of any objection they would have to the trial being videotaped. If a team objects, the videotape may not be made.

- Remind all present that observers connected to other teams in competition are not allowed to view the proceedings in this courtroom. Only observers connected to the teams in this round are permitted to observe the trial.

- Remind all present that the mock trial rules prohibit any communication between team members and observers, teachers, or coaches from this point to the end of the trial. This includes any recesses that may be called. Also, no team member should leave the courtroom without the permission of the court.

Before the Round:

- At the orientation meeting prior to the trial, score sheets and pens will be provided for each rater. Please use the pen provided and write legibly.

- Before the trial, raters should write the round number and team letters (for example, T vs. Q) on the top right corner of all comment sheets. Raters need to fill in the score sheets with names provided on the Team Rosters, and sign their name to each sheet. Make any written comments on the separate sheet provided, not on the score sheet.

During the Round:

- Keep up with scoring; it’s impossible to do it all at the end of the trial. Raters must also vote for best witness and attorney. Raters are asked to penalize attorneys who are obviously over-objecting or using unfair extrapolations. Raters should also reduce the score of any witness who is successfully
impeached, or shown to have gone beyond the scope of the case or their written statement. See Explanation of Scoring System under Witnesses for details on this process.

- Score sheets will be collected immediately after the trial by mock trial staff. Do not distribute comment sheets directly to the teams. We reproduce these for distribution to teams after the competition.

- Scoring, rater critiques, and the judge’s ruling/comments should take no more than 20 minutes at the district level, and ten minutes at the state competition. Raters are encouraged to be available to students after the formal critique period to provide individual comments, and to make written comments on the form provided. Please remember that students may need to rest and prepare before the next round, and that the courtroom may be needed for other trials.

- The judge should decide whether to stop the clock, or to add time, using the guidelines discussed the in the mock trial rules. If the bailiff is told that the clock should be stopped during portions of the trial, then the judge should make sure the bailiff is stopping and restarting the clock correctly. Please remember the time limits are purposely short, so students will focus on salient facts and rounds will run on time.

**Post-Trial Comments:**

When the trial is over, the judge may announce any decision on the merits of the case and begin the critique session while the raters are completing their score sheets. Once those have been collected, the judge should turn the critiquing over to the raters.

At the district level, provide about five minutes each for comment from each rater, and from the judge. At the state level, provide about 2-3 minutes each. The raters may assign areas of the trial to which each can focus their oral critique; another approach could be to assign one rater to the attorney critiques and another rater to witness critiques. Or raters can agree to cover everyone in the trial, knowing they’ll pick up different aspects in their comments. In either case, each score sheet needs to be completely filled out by each individual rater, including a vote for the best witness and best attorney in the trial. The bailiff will time rater comments, to assure that raters stay within the allotted time.

For many students, critiques are the most valuable part of the competition. Brief general comments are a good way to preface the critique. Students may see comments that are too general as unhelpful or simplistic; so keep most comments specific and follow them with suggestion(s) on how to improve. Highly competent teams will expect specific comments and insightful observations; whereas, less experienced or less polished teams may require gentler handling. Humor is often helpful as a tension reliever when used appropriately. Please remember that detailed suggestions for changes in a team’s presentation are not helpful at the state competition.
One of most difficult concepts to teach students is the proper use of leading versus open-ended questions. (In contrast, the presentation of opening statements and closing arguments is much like debate and playing a witness role is much like drama.) It is not surprising therefore that many possible “form of the question” objections are missed. In order to make the scoring as uniform as possible, scorers should evaluate form of the question issues. Thus, a direct team consisting largely of leading questions should be marked down even if no objections are made, because the questioner has not demonstrated knowledge of the rules, similarly, in such a case, the opposing team should be marked down because they failed to object.

After Each Trial/Round:

- **Important!** A mock trial score runner will pick up the score sheets right after the trial. Be sure to fill out all areas on the score sheet including opening and closing statements and best witness and best attorney votes. Also be sure to vote on which team did the best - plaintiff or defense. The runners will leave with just the score sheets, so you must take the comment sheets to the orientation room unless otherwise designated. Be sure to mark you name, the team letters and the trial on each comment sheet. Thanks!

- Raters must turn in comment sheets **to the orientation room** after using them to provide feedback to each team in the round.

- Raters and judges are requested to fill out the evaluation form on their mock trial experience and turn it in before they leave to the orientation room in the box provided. We use your feedback to improve future competitions.
EXPLANATION OF THE SCORING SYSTEM
FOR AUDIENCE RATERs

RATING SCALE:

- Individual participants are rated on a scale of 1 – 10.
- The audience rater scores individual and team performances.

**Scoring of the presentations should be independent of the case’s legal merits.**

Scores should not be based on the judge’s comments about how the case might be decided in a real trial.

**Please note:** After score sheets are turned in, the points awarded for the pre-trial motion and closing arguments will be tripled and the points awarded for the opening statement will be doubled. This is in recognition of the extra work that goes into these important phases of the trial.

SCORING:

- Please **do not** award fractional points, a range of points or a score of “0”.
- Make sure to score all phases of the trial, including the pretrial motion, opening statements and closing arguments. the pretrial and opening statements near the top left of the score sheet and the closing statement in the bottom corner.
- Be sure to vote on best attorney and best witness in the trial. Please identify the student by name and team letter, rather than character name.
- When a witness has been successfully impeached with a prior inconsistent statement, the witness' overall score should be reduced, and the cross-examiner’s score should be increased.
- Scores from 1 to 4 are extremely rare. Assume each student starts at a 7 and stays there or works his/her way up or down. Students earning a seven or more are doing a lot of things right. 8 and 9 denote great performances and 10 is for outstanding performances. Review and use the two rubrics included in your rater packet to guide your scoring process.
- **Important!** When awarding points, please **do not artificially lower points** to a team in “fairness” to a weaker opponent **OR artificially raise points** to a team in “fairness” to a stronger opponent. The points play a very important role in the competition. You may inadvertently affect a team’s placement by doing so.
INTRODUCTIONS: Teams often introduce themselves to the judge and raters, and make clarifying motions and comments to the judge before the trial begins. Except for the mandatory pre-trial motion, these events are not part of the trial, and should NOT influence your scoring decisions.

THE OPENING AND CLOSING STATEMENTS should provide a clear and concise case description and summarize the important points in an organized and well-reasoned fashion.

DIRECT EXAMINATION should use questions requiring straightforward answers. Questions should be properly phrased, exhibit an understanding of trial procedure, and elicit key info.

CROSS EXAMINATION should elicit any helpful information for the cross-examiner’s theory of the case. When appropriate, questioning should bring out any contradictions in the witness’ testimony, by highlighting material assertions which are inconsistent with or which are not included in the witness’ sworn statement. Cross examination should demonstrate an attorney’s ability to adapt to the needs presented by the tone and content of the witness’ testimony. Attorneys should demonstrate their knowledge of the rules of evidence and trial procedures by making appropriate objections during the examination of witnesses, or by appropriately responding to opposing counsel’s objections. Objections and responses should be timely, properly phrased, and should succinctly state their legal basis. An attorney’s score during an examination should include his or her performance concerning objections. [Note: Objections are not permitted during opening statements and closing arguments].

WITNESSES should present believable characterizations and convincing testimony. They should also demonstrate careful preparation on direct examination and the ability to field questions on cross-examination with poise. A witness should not be unrealistically evasive on cross-examination or seem to be deliberately causing delay. If a witness has engaged in “unfair extrapolation” for tactical advantage, the cross-examiner’s remedy is to impeach with the prior inconsistent statement or omission. Both the attorney and witness’ scores should reflect a successful impeachment, either by demonstrating a significant express contradiction or by establishing that the witness has added material facts not in the sworn statement.
# Rubric for Scoring Attorney Performance

<table>
<thead>
<tr>
<th>Point(s)</th>
<th>Performance</th>
<th>Criteria For Evaluating Student Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – 2</td>
<td>Not effective</td>
<td>Unsure of self, illogical, uninformed, not prepared, speaks incoherently, definitely ineffective in communication.</td>
</tr>
<tr>
<td>3 – 4</td>
<td>Fair</td>
<td>Minimally informed and prepared. Performance is just passable, but lacks depth, knowledge, logical thinking and understanding of case materials. Communication lacks clarity and conviction.</td>
</tr>
<tr>
<td>5 – 6</td>
<td>Good</td>
<td>Solid performance, but still lacking. Can perform outside the script but with less confidence. Logic and organization adequate. Grasps major aspects of the case, but without mastery. Communication is clear and understandable. Speaking is clear and understandable, but could be more fluent and persuasive. Logical thought is lacking at times. Doesn’t use time as effectively as possible.</td>
</tr>
<tr>
<td></td>
<td></td>
<td><em>Assume each student starts at a 7 and works his/her way up or down. Students earning a seven or more are doing a lot of things right.</em></td>
</tr>
<tr>
<td>7 – 8</td>
<td>Excellent</td>
<td>Generally fluent, persuasive, clear, and understandable. Shows skill in organizing materials and thoughts and exhibits knowledge of the case and materials. Works well under predictable circumstances, but may become flustered or lose train of thought when confronted with the unexpected, but shows ability to recover. Uses time effectively and demonstrates logical thinking most of the time. Makes and responds to objections appropriately.</td>
</tr>
<tr>
<td>9 - 10</td>
<td>Outstanding</td>
<td>Superior qualities – articulate, poised, confident. Follows through on weak points of the opposing team. Thinks well on feet, demonstrates logical thinking, maintains poise under duress and questioning by judge. Sorts out essential from the non-essential and uses time effectively. Demonstrates unique ability to utilize all resources to emphasize vital points of the trial. Displays a personal style that supports the role rather than detracts from the trial. Makes and responds to objections skillfully.</td>
</tr>
</tbody>
</table>
# RUBRIC FOR SCORING WITNESS PERFORMANCE

<table>
<thead>
<tr>
<th>Point(s)</th>
<th>Performance</th>
<th>Criteria For Evaluating Student Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – 2</td>
<td>Not effective</td>
<td>Unsure of self, illogical, uninformed, not prepared, speaks incoherently, definitely ineffective in communication. Steps out of role numerous times. Unable to respond to some questions due to lack of preparation or knowledge.</td>
</tr>
<tr>
<td>3 – 4</td>
<td>Fair</td>
<td>Minimally informed and prepared. Performance is passable, but the role lacks depth. Communication lacks clarity and conviction. May step out of role or act at times in a way inconsistent with their role. Unprepared resulting in an inability to answer a question.</td>
</tr>
<tr>
<td>5 – 6</td>
<td>Good</td>
<td>Fairly solid testimony and shows a near complete mastery of the role. Can perform outside the script but does so with less confidence. Answers are adequate, but seem stilted with little or no hint of character development. Clear communication isn’t a problem, but could be more fluent and persuasive. Shows confusion or is at a loss for words when confronted with an unexpected question.</td>
</tr>
<tr>
<td></td>
<td>*Assume each student starts at a 7 and works his/her way up or down. Students earning a seven or more are doing a lot of things right.</td>
<td></td>
</tr>
<tr>
<td>7 – 8</td>
<td>Excellent</td>
<td>Fits believably into the role and is persuasive. Communication is clear and understandable. Has creatively developed and mastered the role. Most elements of testimony are well done. May become temporarily flustered when confronted with an unexpected question, but shows an ability to recover. Performs well outside the script. May appear too well-prepared, so that the words seem memorized or too automatic. Believable witness with potential.</td>
</tr>
<tr>
<td>9 – 10</td>
<td>Outstanding</td>
<td>Possesses superior qualities that set this character apart from the rest. It may be pizazz, a total immersion in the character, or a sense that this person’s skill under testimony could alter the course of the trial. Character is totally believable and persuasive. Answers questions convincingly without a ‘canned feel’. Thinks well on feet and maintains poise under duress. Never is unsure of details during testimony or is caught in an inaccuracy.</td>
</tr>
</tbody>
</table>
AN EXPLANATION OF SCORING
By Judge Robert Lewis, Program Chair

1. During a trial, each rater completes a ballot, scoring a team member’s performance on individual events (for example, opening statement). The rater also provides a tie-breaker, expressing his or her opinion of which team overall performed best during the trial. The rater does not add the scores.

2. The tournament’s scoring staff doubles the score provided by the rater for opening statement, and triples the scores provided by the rater for the pre-trial motion and for closing argument. The tournament staff then totals the scores for each team on that individual ballot.

3. A team wins a rater’s ballot during a trial by receiving a higher total score on that ballot than the opposing team’s score on that ballot. If the teams have identical point totals on the ballot, then the tie breaker on that ballot is used to determine the winner. If the scores are not identical, then the tie breaker is not considered.

4. A team wins a trial by winning the majority of the rater ballots for that trial. Typically, when there are three raters for a trial, a team wins the trial by taking 2 or 3 of the ballots.

5. At the conclusion of the competition, the teams are first ranked according to their record of trial wins and losses. For example, if each team competed in four trials, then a team with a 4-0 trial win-loss record would rank above any team that had a 3-1 trial win-loss record. This would be true even if a lower ranked team had more total ballots, or more total points.

6. If there are two or more teams with identical trial win-loss records, then these teams are next ranked according to the total number of rater ballots they won in the competition. A team with a 3-1 trial win-loss record and 9 total ballots in the tournament would rank ahead of a 3-1 team with 8 ballots. This would be true even if the lower ranked team had more total points.

7. Finally, if two or more teams have identical trial win-loss records, and have taken an identical number of rater ballots overall, then these teams are next ranked according to their total point score in the tournament. A 3-1 team with 8 ballots and a total point score of 800 would rank ahead of a 3-1 team with 8 ballots and 799 total points.
Washington State YMCA Mock Trial Scoresheet

Date: ____________  Round (circle): 1 2 3 4 F
Plaintiff Team: _____________  Defense Team: _______________
Rater’s Name: __________________

Rate each category on a scale of 1-10, with 10 being the highest, in the score spaces provided below (only whole numbers, no half scores please). Additional space is provided for attorney and witness names.

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Score</th>
<th>Defense</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pretrial Motion</td>
<td>(______) x3</td>
<td>Pretrial Motion</td>
<td>(______) x3</td>
</tr>
<tr>
<td>Opening Statement</td>
<td>(______) x2</td>
<td>Opening Statement</td>
<td>(______) x2</td>
</tr>
<tr>
<td>Direct Examination 1</td>
<td>(______)</td>
<td>Cross Examination 1</td>
<td>(______)</td>
</tr>
<tr>
<td>P Witness 1</td>
<td>(______)</td>
<td>P Witness 2</td>
<td>(______)</td>
</tr>
<tr>
<td>Role: ________________</td>
<td></td>
<td>Role: ________________</td>
<td></td>
</tr>
<tr>
<td>Direct Examination 2</td>
<td>(______)</td>
<td>Cross Examination 2</td>
<td>(______)</td>
</tr>
<tr>
<td>P Witness 2</td>
<td>(______)</td>
<td>P Witness 3</td>
<td>(______)</td>
</tr>
<tr>
<td>Role: ________________</td>
<td></td>
<td>Role: ________________</td>
<td></td>
</tr>
<tr>
<td>Direct Examination 3</td>
<td>(______)</td>
<td>Cross Examination 3</td>
<td>(______)</td>
</tr>
<tr>
<td>P Witness 3</td>
<td>(______)</td>
<td>P Witness 4</td>
<td>(______)</td>
</tr>
<tr>
<td>Role: ________________</td>
<td></td>
<td>Role: ________________</td>
<td></td>
</tr>
<tr>
<td>Direct Examination 4</td>
<td>(______)</td>
<td>Cross Examination 4</td>
<td>(______)</td>
</tr>
<tr>
<td>P Witness 4</td>
<td>(______)</td>
<td>D Witness 1</td>
<td>(______)</td>
</tr>
<tr>
<td>Role: ________________</td>
<td></td>
<td>Role: ________________</td>
<td></td>
</tr>
<tr>
<td>Cross Examination 1</td>
<td>(______)</td>
<td>D Witness 2</td>
<td>(______)</td>
</tr>
<tr>
<td>Cross Examination 2</td>
<td>(______)</td>
<td>D Witness 3</td>
<td>(______)</td>
</tr>
<tr>
<td>Cross Examination 3</td>
<td>(______)</td>
<td>D Witness 4</td>
<td>(______)</td>
</tr>
<tr>
<td>Cross Examination 4</td>
<td>(______)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Closing Argument</td>
<td>(______) x3</td>
<td>Closing Argument</td>
<td>(______) x3</td>
</tr>
</tbody>
</table>

Do NOT tally or multiply scores. All tabulation will be performed by tournament staff.

Tiebreaker (best overall team; one MUST be circled):  Plaintiff  Defense

Best Attorney: ________________________  Best Witness (student’s name): ________________________
The annual Mock Trial Competition is governed by the rules set forth below. These rules are designed to ensure excellence in presentation and fairness in scoring all trials and tournaments.

These rules are supplemented by any specific stipulations and comments provided in the current case. These rules are also supplemented by the Simplified Rules of Evidence and the following sections of the “Preparing for Competition” section of the kit: (a) Trial Procedures; (b) Trial Sequence and Information for Student Participants; (c) Bailiff/Clerk Responsibilities; (d) Time Guidelines for Mock Trials; (e) Guidelines for Judges; (f) Order of Pre-Trial Motions; (g) Conducting the Trial; (h) Suggestions for Judges and Audience Raters; and (i) Explanation of the Scoring Systems for Audience Raters (with scoring rubrics and score sheet).

These materials should be interpreted to be consistent with one another. In the event of an actual conflict between different sections of the Mock Trial materials, the following order of precedence should be used: (1) current case stipulations and comments; (2) Simplified Rules of Evidence; (3) Mock Trial Competition Rules; (4) Preparing for Competition – Guidelines/Responsibilities sections; and (5) Preparing for Competition - Suggestions/Information sections.

**TEAM COMPOSITION**

1. All teams must consist of students currently enrolled in grades 9-12.

2. All students on a team must be enrolled in the same school district. If a school district has more than one high school involved with the mock trial program, students are expected to be enrolled with the team from their primary high school. Teams may also be formed from students enrolled at the same private high school. A team may also be formed from pre-existing members of a youth group. The youth group must have been in existence for a minimum of three years and have a constitution or bylaws. Home school participants and other community groups may also participate and should contact the state office.

   Deviations from these requirements may be made on a case-by-case basis. For example, new teams from different schools trying to field enough students may request to join forces for a period of time. In considering whether to make an exception, the state office will consider both the short term interest of students in participation, and the long term development of teams.

3. Teams will be composed of a minimum of 7 students and a maximum of 15 students.
The following roles are defined as:

- 2 attorneys for pre-trial motion (Can be doubled up as a plaintiff or defense attorney)
- 2 attorneys for plaintiff
- 2 attorneys for defendant
- 4 witnesses for plaintiff
- 4 witnesses for defendant
- 1 court bailiff (If the bailiff is doubled up in a witness role, s/he may not play a witness for the plaintiff side, because s/he is needed as bailiff.)

Each team must use a minimum of two and a maximum of three attorneys in each trial. Four different students must be used to play the four witnesses. Each team should try to designate an alternate for each position. Schools may enter more than one team in the competition. However, if a school enters more than one team, the teams must have no members in common.

4. Teams are expected to be prepared to present both sides of the case (Plaintiff and Defense), and will present each side at least once during the competition. The side that each team will represent will be determined at the trial site just prior to the beginning of the trial.

5. All student attorneys must participate with case presentation as follows:
   a. Each attorney must take part in the direct examination of at least one witness and the cross-examination of at least one witness. However, on a team with three attorneys representing a side (plaintiff or defense), an attorney on that side may be allowed to participate solely in the pre-trial motion and is not obligated to participate in the rest of the trial. This exception is made only for the pre-trial motion. The attorney may participate in the rest of the trial, but then must adhere to the rule of examining one witness per side.
   b. The attorney giving the opening statement will not be allowed to give the closing argument.
   c. Objections will be permitted by the direct or cross-examining attorney only.

6. Each party must call all witnesses included in the kit for its side of the case.

**TRIAL PREPARATION – GENERAL CONSIDERATIONS**

7. All participants are expected to display proper courtroom decorum, good sports-man-like conduct and appearance appropriate for the part they are to play during the trial.

8. Students may read other cases, materials, articles, etc., in preparation for the mock trial. They may, however, only cite the materials given in this official Mock Trial Manual.

9. A student portraying a witness may dress in appropriate court attire consistent with the character being portrayed. However, no uniforms or props are allowed. Witness roles can be played by either males or females regardless of the name of the character in the case materials.
10. During the trial, witnesses may not be permitted to use notes or read from any writing unless questioned or cross-examined about a witness statement.

11. Attorneys may use notes in presenting their cases. However, their scores may be lowered if they
   a. Mostly read their opening statement or closing argument and/or
   b. Use impeached statements in their closing argument.

**TRIAL PREPARATION -- MATERIALS**

12. Each witness statement in the case must be considered a sworn affidavit or declaration of that witness. To the extent any statements conflict, that may be brought out in closing argument or on cross-examination.

13. Witness Testimony
   a. Each witness is bound by the facts as contained in that witness' statement(s) and any related documentation. A witness is not bound by the facts as contained in the statements of other witnesses.
   b. On direct examination, a witness may testify to limited additional facts provided the new information is merely incidental and is supported by reasonable inference from the witness' statement.
   c. On cross-examination, if an attorney asks for previously unstated information, the witness may testify to limited additional facts provided (a) the answer is directly responsive to the question, (b) any new facts are consistent with the witness' statement, and (c) the new facts do not materially affect the witness' testimony.
   d. If a witness testifies to facts contrary to those contained in his or her statement, the sole remedy is for the cross-examiner to impeach that witness' credibility by questioning the witness regarding the contradiction.

14. Exhibits
   a. The only exhibits which may be introduced into evidence during the trial are the original exhibits provided in this official Mock Trial manual.
   b. The exhibits provided with the case, or portions of an exhibit, may be enlarged and displayed on white poster board. The poster board should be of a standard type, readily available at an office supply store, and should be approximately 24” by 30” or less. The enlargements may only be in black and white, even if the original exhibit is in color. Exhibits may be enlarged either by direct copying or, if the exhibit is a written document, by retyping the enlarged section of the exhibit in a similar black font.
   c. Except as allowed by other sections of this rule, no exhibits or visual aids other than those provided with the case may be brought to court. With the judge’s permission, the original exhibits may be published to
the jury during a witness’ testimony. Otherwise, materials and copies of materials may not be handed to the jury.

d. While testifying, witnesses are allowed to make sketches or diagrams, consistent with their statements, to illustrate their testimony. These materials are not to be marked and do not become exhibits.

e. Simple charts outlining evidence or law may be used for closing arguments or, in the discretion of the judge, opening statements.

f. In general, exhibits, charts and visual aids may not be used during the pre-trial motion. If the pre-trial motion requests the suppression of an exhibit or a portion of the statement of a witness, then those materials may be presented to the judge, in original form, during argument of the motion.

g. The use of any electronic devices during any portion of the trial is prohibited.

15. Each problem includes a pre-trial motion. No other motions shall be made during the course of the mock trial.

16. Unless otherwise provided for in the case materials, stipulations may be presented through the testimony of any witness.

PRETRIAL

17. Teams are expected to be present in their assigned courtroom fifteen minutes before the scheduled starting time of their trial. Teams coming from a prior trial that went overtime will not be penalized.

18. Whenever possible, the starting time of any trial should not be delayed for longer than 5 minutes. Incomplete teams will have to begin without their other members or with alternates. Teams without a sufficient number of participants to start the trial will forfeit the match. Teams coming from a prior trial that went overtime will not be penalized.

19. Teams will meet with the judges and attorney-coaches five minutes prior to the trial to ensure rules of evidence and procedures are uniformly interpreted. In addition, the side each team will represent will be confirmed. The decisions of the judge with regard to pre-trial matters are final.

20. Team members may briefly introduce themselves to the judge and raters, indicating a member’s name and the witness part he or she will play, without further description of the character. An attorney team member should not describe the specific parts of the trial they will present. Introductions and clarifying questions and comments should be kept short, are not part of the trial, and should not be considered in scoring decisions.

21. Unless otherwise directed by the judge, the teams should follow the courtroom layout described in the kit materials. The plaintiff’s attorneys sit at the table closest to the jury (raters) box.
22. The presentation of the pre-trial motion contained in the case materials is governed by “Preparing for Competition – Order of Pre-Trial Motion Events.”

**TRIAL RULES**

23. The trial proceedings are governed by the Mock Trial Simplified Rules of Evidence. Other, more complex rules or objections may not be raised in the trial. Objections to opening statements and closing arguments are not permitted. Attorneys **may not** make “offers of proof”, stating objections that would have been made, after opening statements and closing arguments.

24. During the trial presentation, teacher/advisers, attorney/coaches and all other observers may **not** talk to, signal, or otherwise communicate with, or in any way coach, their teams. This rule applies to any recesses during the trial.

25. Witnesses are not excluded from the courtroom, either physically or constructively, during the mock trial. Judges may not order that witnesses should be considered sequestered or excluded by trial participants.

26. Spectators, including coaches, advisors, parents and non-competing team members, shall not be permitted to sit in the jury box with the raters. The judge may allow the bailiff to sit in the jury box during opening statement and closing argument, to allow the attorneys to see the time remaining. Tournament staff may observe from the jury box with permission of the judge.

27. Witnesses should not be “tendered” or “proffered” as expert witnesses. Attorneys should ask questions designed to demonstrate the training and experience that qualifies the witness to give expert opinions. Opposing counsel may object that particular opinions are outside the scope of the expertise of a witness, or make other objections allowed by the case materials and the Simplified Rules of Evidence.

28. Attorneys are not allowed to question (voir dire) witnesses in aid of objections.

29. To permit judges to hear and see better, attorneys should stand during opening and closing statements, direct and cross-examinations and all objections. Without permission, attorneys shall not leave the podium or other areas designated by the judge for presentation.

30. In order to deter unfair extrapolations on redirect examination, re-cross examination is permitted. The questioning must be within the scope of the redirect. Re-cross time is included in a team’s total cross-examination time.

31. Attorneys may request bench conferences with the judge to clear up or protest a significant procedural, mock trial rule violation or factual questions. It is the responsibility of the attorney to state the page and rule number in question. One representative from each team should be present for all bench conferences. All disputes must be given to the judge **before the trial’s end** and before the judge and raters recess to discuss the trial. The decision of the judge is final. Students are advised not to overuse this procedure.

32. Both opening statements shall be presented immediately after the pretrial motion. The defense may not reserve opening statement until the beginning of the defense presentation of witnesses.
33. The time limits for various portions of the trial are described in “Trial Sequence and Information for Student Participants,” “Order of Pre-Trial Motions” and “Time Guidelines for Mock Trial.” These limits are also listed on the scoresheets provided to the raters. Teams should make every effort to prepare their presentations to fit within these time limits.

34. All witnesses must be presented for both direct and cross-examination. If a team has used the entire 24 minutes allocated for direct examination, or the 20 minutes allocated for cross-examination, and has not examined a witness, the judge will authorize the team to exceed the allotted time by 2 minutes per unexamined witness. Raters shall take this mismanagement of time into account by lowering the score of the attorney conducting this additional examination. (The examination of the witness by the opposing team is not affected by the use of this rule).

35. Mock trial participants who are not competing in a particular round may observe ongoing trials. However, scouting of other teams is prohibited. Coaches and advisors are responsible for ensuring that participants do not watch trials when observing could result in a competitive advantage. All courtroom observers are expected to maintain proper courtroom decorum, to respect the desire of family members and friends of the participating teams to observe and to display good, sportsmanlike conduct.

JUDGES

36. Presiding judges for mock trials may include sitting or retired trial and appellate judges, and members of the Washington State Bar Association.

37. All judges will receive the Guidelines for Judges, the Simplified Rules of Evidence and Procedure, a summary of the factual background, and any legal materials provided to students to argue the pretrial motion. Judges will not necessarily receive the witness affidavits and documentary evidence.

38. Presiding judges are asked to conduct the trial according to mock trial procedures and to make a decision on the merits of the pre-trial motion. The judge may also comment on the factual and legal merits of the case at the conclusion of the trial.

39. A judge may not interrupt an attorney’s opening statement or closing argument to ask questions. The judge may not question the witnesses.

40. The decisions of the judge with regard to rules, challenges and all other matters are final. However, judges are not involved with, and may not rule upon, scoring decisions. If a judge is also separately serving as a member of the scoring panel, he/she should not announce scoring decisions, or attempt to influence the decisions of other panel members.

RATERS AND SCORING

41. The decision on team scores is made by a scoring panel consisting of at least two, and preferably three, raters who are attorney members of the Washington
State Bar. If only two raters are available, the trial judge may be asked to serve as the third member of the rating panel.

42. Raters score individual and team performances. Each rater fills out an individual ballot, and raters should not consult with one another during this process. The judge is not involved in performance scoring decisions. Teams should not ask judges to rule that an event during the trial should be assigned a particular score on rater ballots.

43. The criteria for scoring is discussed in Preparing for Competition -- Explanation of the Scoring Systems for Audience Raters (with scoring rubrics and score sheet). Raters should be careful to distinguish between rulings on the merits of the case and judging of the presentations. It is to be expected that there will be some differences among judges as to rulings on motions or objections. Such differences merely reflect reality and should not affect scoring, which is intended to measure how the students respond to a ruling, not what ruling was obtained. The rules, scoring rubrics, and score sheets are designed to further that goal.

44. **NO COMPLETED SCORING SHEETS ARE TO BE VIEWED BY ANY TEAM MEMBER OR ANY OTHER PERSON DURING THE COMPETITION**, in compliance with the educational goals of the Mock Trial program. These are to be returned to the tournament staff after the round has been concluded and the winning team recorded. Score and comment sheets for a team will be copied and distributed to that team’s coach after the competition is completed.

**DISTRICT AND STATE TOURNAMENT PROCEDURES**

45. Tournament staff will check rater ballots for complete scoring and for improper scores. Whenever possible, raters will be asked to make any necessary corrections. When a rater cannot be located, or other circumstances prevent timely consultation with the rater concerning the ballot, the district or state convener or designated scorer will correct improper entries before the ballot is totaled, or take other appropriate action.

46. Unless otherwise directed by the tournament convener, the following scoring and ranking rules apply:

   a. A team wins a rater’s ballot by receiving a higher point total on that ballot than the opposing team. If the teams have identical point totals on a rater’s ballot, then the tie breaker on that ballot will be used to determine the winner.

   b. A team wins a trial by winning the majority of the rater ballots for that trial.

   c. At the conclusion of the competition, teams will first be ranked according to their record of trial wins and losses. Teams with identical win-loss records will next be ranked based upon the total number of ballots the team received in the competition. Teams with identical win-loss records, and identical records for total number of ballots received, will
next be ranked based upon the total point score they received in the competition.

47. The tournament convener’s decisions concerning the rules and procedures to be followed during that tournament are final.

48. The team’s advisers and coaches are responsible for enforcing mock trial rules and supervising their students at all times i.e. during formal mock trial events, free time, at the hotel (from the time the team leaves to travel to the mock trials until their return).

49. Violations of the student conduct agreement must be reported to tournament staff (preferably at the time of the violation and at the state finals, no later than 1 and a half-hour before the beginning of the second day of the competitions).

50. During a championship round, the tournament convener shall determine the sides to be presented by each team. This will normally be determined by a coin flip, or by a reaching a consensus with the coaches of the affected teams. If the teams have previously competed against each other in the same tournament event, then each team shall present the opposite side of the case from the side that team presented in the previous trial.

51. Teams will be assigned to district events after registration is closed and the total number of participants has been determined. Whenever possible, a team will compete at an event in or near its home county. After initial placement, team assignments may be adjusted by state staff, after consultation with district conveners and affected teams.

52. After the completion of district events, the program chair and state staff will consult with district conveners regarding the results of each event, and the participating teams and programs. Coaches, advisors and other individuals with knowledge of the events may also be consulted. Invitations to the state tournament will then be extended by state staff to eligible teams. In determining which teams will be invited to participate, the following factors may be considered:

   a. The team’s performance at a district event, including their ranking at the event, win/loss record, numbers of ballots, and total points.
   b. The number of teams and programs participating in each district event.
   c. The number of district events.
   d. The total number of teams and programs participating statewide.
   e. The need to promote geographic diversity, to ensure that mock trial remains a program that benefits students in all regions of Washington State.
   f. The need to promote program diversity, to ensure that students in multiple schools and programs benefit from the experience of participating in the state tournament. Except in unusual circumstances, no more than two teams will be invited from a single school or program.
g. The need to encourage the growth of mock trial, both through creation of new programs and the establishment of new district events.

If a team declines an invitation, state staff will promptly extend an invitation to another team, after considering the factors described above.

In regard to student conduct violations: Before competitions are started on the second Day of finals, a panel will meet and each side (the person reporting the violation and the person being accused of making a violation) will have 3 minutes to make a presentation to a panel. The panel will make a decision on the violation and the consequence for any violations. Suggested consequences are stated in a policy developed by the Mock Trial Program Committee. The decisions of the panel are final. Serious violations may result in a team being eliminated from the competition.
WASHINGTON MOCK TRIAL
RULES OF EVIDENCE

Introduction

In American trials, complex rules are used to govern the admission of proof (i.e. oral or physical evidence). These rules are designed to ensure that all parties receive a fair hearing and to exclude evidence deemed incompetent, irrelevant, untrustworthy, unfairly prejudicial, or otherwise improper.

If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the judge will probably admit the evidence.

The burden is on the mock trial team to know the Rules of Evidence and to be able to use them to protect or advance their cases and fairly limit the actions of opposing counsel and their witnesses.

For purposes of mock trial competition, the Rules of Evidence have been modified and simplified. These evidence rules are based on the National High School Mock Trial Rules of Evidence, which in turn are based on the Federal Rules of Evidence, and its numbering system. Where Federal rule numbers or letters are skipped, those rules were deemed not applicable to mock trial procedure.

Not all judges will interpret the Rules of Evidence (or procedure) the same way, and mock trial attorneys should be prepared to point out specific rules (quoting them, if necessary) and to argue persuasively for the interpretation and application of the rule they think appropriate.

The Mock Trial Competition Rules and these Rules of Evidence govern high school mock trial competitions in Washington State.

The commentary sections are primarily based on commentary that has long been part of the Washington mock trial kit. The commentary was revised in the summer of 2004 to reflect Washington’s adoption of the National rules. These comments are not comprehensive, authoritative, or intended to address all applications of the evidence rules to mock trial fact patterns.

Sources for additional commentary include the Advisory Committee’s Notes for the Federal Rules of Evidence, the Emanuel’s Evidence Outline, and Lubet’s Modern Trial Advocacy (2d ed., NITA, 1997).
Objections and Proper Question Form

During the course of a trial, it is the right and the duty of an attorney to make objections to regulate the procedure for, and the admissibility of, evidence in accordance with the rules of evidence. Upon receiving an objection, the judge will immediately decide whether the objection is accepted or rejected. If the judge agrees with the objection, he or she will “sustain” it. If the judge disagrees with the objection, he or she will “overrule” it. An attorney may ask to be heard on the point. Some judges then allow brief argument for and against the admissibility of the challenged evidence. The attorneys are bound by the trial court’s rulings on objections. (In actual legal practice, evidentiary rulings may form the basis for a later appeal.)

Trial judges expect lawyers in their courtrooms to follow both the evidence rules and the customs of the trial courts. Attorneys must know how to phrase questions on direct examination and cross-examination. They must also know both when to object and how to object. Improperly phrased questions are objectionable.

(A) Leading Questions Forbidden on Direct Examination. Leading questions are not permitted during the direct examination of a witness except as may be permitted by the court to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Comment: A leading question is one that suggests to the witness the answer desired by the examiner, and often suggests a “yes” or “no” answer. On direct examination, questions should be open ended and phrased to elicit facts from the witness. Courts will allow leading questions on direct examination of children, the elderly, and handicapped persons. Leading questions may be permitted to elicit background information which is not objectionable or to which no objection is made. Such questions save time and seek to elicit information that is not objectionable in most cases.

A proper direct question might be phrased, “Describe the defendant’s physical appearance just before midnight the night of the party.” An improper leading question might be phrased: “Did the defendant appear glassy-eyed and unsteady just before midnight the night of the party?”

(B) Compound Questions Forbidden. A question which is composed of two or more separate questions within the question is not permitted.

Comment: A compound question asks two or more questions at once. For example, “What time did you arrive at the party, whom did you go with and what did you do there?” is a compound question. Such questions are not permitted, primarily because they do not permit opposing counsel to interpose appropriate objections before the witness launches into what could be an improper response to one or more parts of the question. Another difficulty with compound questions is that if
the witness says “yes” (or “no”) in response, it is not clear if the witness is responding to all of the question or only part of it. Questions should be phrased to elicit one fact at a time, unless the subject matter under examination is not objectionable for any reason, such as very general background information.

(C) Narrative Responses Forbidden. Questions which call for long narrative responses are not permitted if they prevent opposing counsel from interposing timely objections.

Comment: While the purpose of direct examination is to get the witness to tell a story, the questions must not be so broadly framed that the witness is allowed to ramble or “narrate” a whole story. Narrative questions are objectionable. Opposing counsel must be permitted to interpose objections to improper questions and responses. Timely objections are prevented by the use of narrative questions and responses.

An example of a question which calls for a narrative response is: “Start at the beginning and tell me what happened the night of the party.” A proper objection to this question might be phrased: “Objection, the question calls for a narrative response.”

When a witness launches into a long narrative answer to an otherwise proper question, a proper objection should be made quickly and might be phrased as follows: “Objection, the response is beyond the scope of the question.”

(D) Argumentative Questions Forbidden. An attorney shall not ask argumentative questions.

Comment: An argumentative question typically occurs on cross-examination when the attorney asks the witness to agree to a particular interpretation or characterization of the evidence, as opposed to a particular fact. Attorneys learn the difference between proper aggressive cross-examination and improper argumentative questions.

(E) Questions Assuming Facts Not in Evidence Forbidden. Attorneys may not ask a question that assumes unproved facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by evidence (sometimes called a “hypothetical question”).

Comment: The hackneyed example of the question that assumes facts not in evidence is, “Are you still beating your wife?” The question is improper because the questioner has not established that the witness ever beat his wife.

(F) Proper Foundation Required. Attorneys shall lay a proper foundation for testimony and prior to offering exhibits into evidence. After the exhibit has been offered into evidence, the exhibit may still be objected to on other grounds.
Comment: The “foundation” requirement for evidence provides the jury the basis for the evidence being offered. Evidence that is premature or not adequately supported by prior testimony is said to “lack foundation.”

In mock trial, the parties usually stipulate to the authenticity of exhibits before trial, and the court’s ruling on the pretrial motion determines the admissibility of contested exhibits. Nevertheless, the attorney should establish that the witness has previously seen the item and can identify it before offering it into evidence. (See Introduction of Exhibits below.)

When an attorney objects for lack of foundation, he or she is using legal “shorthand” to complain to the judge that the question asks for testimony which is premature, i.e., which is not admissible yet because some other fact or facts must be elicited before this question can be asked. For example, before a witness can be asked to identify the defendant as the perpetrator of a crime, the witness must first testify that he was at the scene of the crime or has some other first-hand basis for identifying the defendant as the perpetrator. Similarly, before a witness to an intersection accident can testify to the collision itself, the attorney should ask questions establishing her presence at the scene and her opportunity to observe events as they occurred.

Before an expert witness can render professional opinions, he must first testify as to his qualifications and be accepted by the court as an expert in the field or specialty area in question. Thus, before a ballistics expert can offer an opinion as to whether a particular gun fired a particular bullet, the attorney should ask questions establishing the witness’s expertise, training, examination of the items, etc.

In either case, an opposing attorney would simply object to the lack of foundation as a way of saying the evidence might be admissible later but it surely is not admissible now. This objection may be overcome by asking more questions and eliciting more information about the bases for the witness’s testimony.

(G) Non-responsive Answers Objectionable. A witness's answer is objectionable if it fails to respond to the question asked.

Comment: An attorney faced with an evasive hostile witness may move to strike the witness’s answer as “non-responsive.” Precise, narrowly phrased cross-examination questions reduce the witness’s opportunity to be evasive. Skilled attorneys develop various “witness control” techniques to keep a witness in line during cross-examination. In closing argument, some attorneys will draw attention to a witness’s evasiveness to attack the witness’s credibility.

(H) Repetitive Questions Objectionable. Questions designed to elicit the same testimony or evidence previously presented in its entirety are improper if merely offered as a repetition of the same testimony or evidence from the same or similar source.
Comment: This objection is often phrased, “ Asked and answered.” Note also that Rule 403 may be invoked to block the presentation of cumulative evidence.

(I) **Timeliness Required.** Objections must be made in a timely manner or they are deemed to be waived.

Comment: Attorneys should strive to make their objections after the opposing attorney asks the objectionable question but before the witness gives an answer. This way, the judge will have an opportunity to rule on the objection before the jury hears or sees the objectionable evidence. If an attorney is slow in making an objection, a favorable ruling made after the jury has already been exposed to the tainted evidence could be useless. It does little good to close the gate after the cows have escaped.

Sometimes, the basis for an objection does not become clear until after the witness starts to respond. For example, a witness may give an answer which is not responsive to an otherwise proper question. In those cases, the attorney should make the objection as soon as it becomes evident that a basis for objection exists, regardless of whether the jury has been exposed to the evidence. If the objection is sustained, the attorney who made the objection should follow up with a motion to strike the non-responsive testimony from the record of the trial. If no objection is made, the evidence will be deemed admissible and will be treated as any other evidence admitted at trial.

(J) **“Opening the Door” to Inadmissible Evidence.** By voluntarily raising a subject on direct examination, a party may waive any objection to cross-examination or rebuttal on that subject even though such cross-examination would not otherwise be permitted under the rules of evidence.

Comment: If an attorney examines a witness during direct examination on a subject that would be forbidden if the subject were first raised on cross-examination, the attorney is said to have “opened the door” to the subject and will not be permitted to object when the opposing party delves into the subject deeper on cross-examination. For example, the rules of evidence provide that in a criminal case only certain prior convictions may be introduced by the prosecution during cross-examination of the defendant to attack his or her character. However, if during direct examination the defendant testifies that he or she has led an exemplary life and would never think of shoplifting a leather jacket, the defense has opened the door to permit the prosecution to explore the defendant's criminal history far beyond the scope that would have been permitted if the defendant had not reported his exemplary record for good citizenship. It should be noted, however, that the court will always exercise its discretion to limit the scope of examination in such collateral matters so that the trial does not stray from its principal issues.

(K) **Scope of Direct, Redirect and Cross-Examination.** Direct and cross-examination may cover all facts relevant to the case of which the witness has first hand knowledge or has special training and knowledge sufficient to permit the
witness to offer an opinion, and any other matter permitted by these Rules of Evidence. Cross-examination is not limited to the scope of direct examination. Redirect examination is limited to the scope of the cross-examination. Recross examination is limited to the scope of redirect examination.

(L) Specificity Required. An objection must be specific.

Comment: Whenever possible, an attorney making an objection must state the specific basis for the objection by citing the rule of evidence or law which supports the objection, or by stating the basis in the form of a word or phrase which informs the judge of the basis. (See examples listed below.)

If a party's objection does not include a statement of the legal reason supporting it, e.g., when an attorney simply says, “Objection,” without telling the court why the objection was made, it is termed a “general objection.” General objections are not prohibited per se, but the court may, in its discretion, refuse to sustain an objection which is not specific. On the other hand, when general objections are made to questions which are obviously objectionable, the court will usually rule on them even without a statement of the specific basis. For example, the judge may not need to be informed of the specific basis to rule on a question which is obviously leading (“Would you say the car was going around 50 miles per hour?”) or one which obviously calls for a hearsay response (“What did Ms. Jones say to the police officer?”).

Objections to the “form of the question” and “lack of foundation” are acceptable specific objections. When an attorney objects to the form of the question, he or she may be complaining that the question calls for a narrative response, is compound, is too broad, is too complex, is argumentative, or is defective in some other general way. The purpose of the objection is to ask the court to require the examining attorney to ask a better, i.e. less objectionable, question.

Sample Objections

Following are examples of acceptable ways to make common objections. Objections are not precise formulas or magic words. Objections should be clear, succinct, and well-founded. They should state the legal basis for the objection. They should not be used as a ploy to bring impermissible material to the attention of the jury.

Irrelevant Evidence. “Objection, relevance.” Or, “I object, Your Honor. This testimony is irrelevant to the facts [issues] of this case.”

Leading Questions. “Objection. Counsel is leading the witness.” (Remember, this is only objectionable when done on direct examination.)

Narrative Question and/or Response. “Objection. Counsel's question calls for a narrative.” Or, “Objection. The witness is giving a narrative response.”
Improper Character Testimony. “Objection. The witness's character or reputation has not been put in issue.” Or, “Improper character evidence under rule 404.”

Beyond the Scope of Cross-examination. “Objection. Counsel's question goes beyond the scope of the cross-examination.”

Hearsay. “Objection. Counsel's question calls for a hearsay response” (witness is about to testify to an objectionable out-of-court statement). Or, “Objection. The witness's answer is based on hearsay” (for example, witness is about to testify to facts in a newspaper article as if she had personal knowledge of them). (If the witness makes a hearsay statement, the attorney should also say, “and I ask that the statement be stricken from the record.”)

Improper opinion. “Objection, a lay witness may not testify as an expert.” Or, “Improper lay opinion.” (This objection is appropriate when the question calls for a response in the form of an opinion which the witness is not qualified to give.)

Lack of Personal Knowledge. “Objection. The witness has no personal knowledge that would enable him/her to answer this question.” Or, “Objection. Lack of foundation.” (This latter objection presupposes that the subject matter of the testimony could be admissible if the examiner first establishes through proper questioning that the witness has the requisite personal knowledge.)

Badgering/Argumentative. “Objection. Counsel is badgering the witness.” Or, “Objection. Counsel is arguing with the witness.”

Motion to Strike. If inadmissible evidence has been introduced before an objection can be timely made and the court sustains the objection, a follow-up motion should always be made to purge the record of the tainted evidence. “Your Honor, I move to strike the [nonresponsive] [inadmissible] portion of the witness's testimony from the record,” or, “Your Honor, I ask that the jury be instructed to disregard the witness’s last statement.”

Note: Teams are not precluded from raising additional objections which are available under the Washington Mock Trial Rules of Evidence.

Introduction of Exhibits

There is a formal procedure for introducing exhibits, e.g., documents, pictures, guns, etc., during an actual trial. The exhibit must be relevant to the case, and the attorney must be prepared to defend its use on that basis.

In mock trial, exhibits are usually pre-marked for identification, and the parties stipulate to their authenticity. In State competition, teams often use enlarged copies of the exhibits, but enlargements are normally not allowed under the National rules.
Below are the basic steps to use in mock trial when introducing a physical object or document for identification and/or use as evidence.

- Take the item, without showing it to the jury, and show it to opposing counsel. Then ask the court for permission to approach the witness.
- Hand the marked exhibit to the witness while stating, “I am now handing you [a document] [an item] previously marked for identification as Exhibit 1.” Ask the witness whether he or she knows or recognizes the exhibit, and then ask the witness what it is in order to identify it and establish its relevance.
- After laying this foundation, offer the exhibit into evidence. “Your Honor, I offer Exhibit 1.”

Opposing counsel will either object to the offering of the exhibit or say, “No objection.” If opposing counsel makes a specific objection as to why the exhibit is not admissible, the attorney offering the exhibit will be given an opportunity to respond. In many cases opposing counsel will simply object for lack of foundation, meaning that the attorney offering the exhibit has not asked enough questions to establish the witness’s personal knowledge of the exhibit, its identity, and its relevance.

If the court overrules the objection and permits the exhibit to be admitted, counsel may now hand it back to the witness and commence examination of the witness on matters related to the exhibit. If the court sustains an objection for lack of foundation, additional questions should be asked of the witness to identify the exhibit or establish its relevance.

The exhibit should not be displayed to the jury until it has been admitted into evidence.

National Mock Trial Competition Rule 4.20 offers a similar series of steps by way of example.
RULES OF EVIDENCE

Note -- All of following articles of the Federal rules have been omitted as inapplicable: Article II (Judicial Notice), Article III (Presumptions Civil Actions and Proceedings), Article IX (Authentication and Identification), and Article X (Contents of Writing, Recordings and Photographs).

Article I. General Provisions

Rule 101. Scope
These Rules of Evidence govern the trial proceedings of high school mock trial competitions in Washington State.

Rule 102. Purpose and Construction
These Rules are intended to secure fairness in administration of the trials, eliminate unjust delay, and promote the laws of evidence so that the truth may be ascertained.

Article IV. Relevancy and its Limits

Rule 401. DEFINITION OF "RELEVANT EVIDENCE"
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE: IRRELEVANT EVIDENCE INADMISSIBLE
All relevant evidence is admissible, except as otherwise provided in these Rules. Irrelevant evidence is not admissible.

Comment: The rule creates a very minimal threshold of admissibility. “Any evidence which has a tendency” to establish a fact is relevant and therefore admissible. In a case based primarily on circumstantial evidence, the relevance of a particularly small circumstance may not be readily apparent when viewed in isolation, but if it is “of consequence” to the outcome of the action it will be admissible. It is the duty of an attorney to persuade the court of the relevance of evidence.

Rule 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, if it confuses the issues, if it is misleading, or if it causes undue delay, wastes time, or is a needless presentation of cumulative evidence.

Comment: This rule applies with equal force to direct examination and cross-examination and is to be applied in an evenhanded manner by the court to ensure
fairness. The rule is intended to exclude only evidence which creates “unfair” prejudice. After all, all evidence is prejudicial in the sense that it is offered to persuade the jury to believe more strongly in the case of the party offering it.

However, since it is considered to be an extraordinary remedy when the court excludes relevant evidence, the party seeking to have the evidence excluded bears a heavy burden of persuasion to convince the court that the probative value of the relevant evidence “is substantially outweighed by the danger of unfair prejudice.” Judges will rule very cautiously on such motions to exclude relevant evidence. (Note: the National rules do not include the word substantially, but most judges will apply that standard because substantially outweighed is the phrase in the Federal rules.)

Rule 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES
(a) Character Evidence. -- Evidence of a person's character or character trait, is not admissible to prove action regarding a particular occasion, except:
   (1) Character of accused. -- Evidence of a pertinent character trait offered by an accused, or by the prosecution to rebut same;
   (2) Character of victim. -- Evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor;
   (3) Character of witness. -- Evidence of the character of a witness as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. -- Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show an action conforms to character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Comment: The term “character” as used in the rules of evidence refers to a person's general tendencies with respect to honesty, peacefulness, temperance, truthfulness, and similar traits. This rule is concerned only with preventing a party from attempting to introduce a character trait as substantive evidence. For example, this rule would exclude evidence that a person was an alcoholic if it were being offered as substantive evidence to prove that the person was intoxicated when he was involved in an accident on a particular date. This rule should not be confused with the rules pertaining to impeachment.

The 404(a)(1) exception permits an accused in a criminal case to offer evidence in his defense pertaining to his character if the character trait is relevant to his defense. For example, an accused may offer testimony concerning his good record for honesty at work where he handles large sums of money in a case where he is accused of theft. On the other hand, his record for honesty would not be relevant in a case where he was charged with assault or indecent exposure.
If the defendant opens up the subject of his character, the prosecution will be permitted to cross-examine him on the subject and introduce independent evidence which rebuts the defendant's testimony concerning his good character. For example, if a businessman defendant testifies about his wealth in an effort to persuade the jury that he has no need to steal money from his clients, the prosecution will be permitted to inquire about the defendant's income tax returns. However, just because a criminal defendant chooses to testify does not open up the issue of his or her character. The subject is opened up only when the accused voluntarily puts his or her character at issue by claiming to be a person of exemplary behavior.

The 404(a)(2) exception permits the accused to offer evidence of the victim’s violent character in murder and assault cases in order to show that the victim was the first aggressor and the accused acted in self defense.

Rule 404(b) is based on the concept that the defendant is being tried for crimes alleged to have been committed in the present, not crimes or wrongdoing committed in the past. It is intended to prevent the prosecution from arguing that since the defendant has committed offenses in the past, he or she is more likely to have committed the offense with which he or she is currently charged, i.e., that the defendant is obviously a criminal or a “bad person.” The danger of unfair prejudice from the admission of such evidence far outweighs its relevance.

However, this evidence may be admissible for some other purpose. For example, evidence that the defendant and the deceased engaged in physical combat on several occasions in the past could prove that the defendant was hostile toward the deceased and, therefore, had a motive to commit murder.

Evidence which is admissible under this rule will often be ruled inadmissible under Rule 403 because the danger of unfair prejudice far outweighs its probative value. When the decision to admit or exclude evidence concerning prior wrongdoing is in doubt, judges usually rule in favor of excluding the evidence.

Rule 405. METHODS OF PROVING CHARACTER
(a) Reputation or opinion. -- In all cases where evidence of character or a character trait is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, questions may be asked regarding relevant, specific conduct.

(b) Specific instances of conduct. -- In cases where character or a character trait is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

Comment: Rule 405(a) allows a defendant to offer reputation or opinion evidence of his good character, but character witnesses for the defendant cannot testify as to specific incidents demonstrating the defendant’s good character. If the defendant
opens the door to his character, the prosecution may rebut the defendant’s claim of
good character through reputation or opinion evidence from other witnesses.

In addition, the prosecution may cross-examine the defendant’s character
witnesses about “relevant, specific conduct,” if the prosecution has a good faith
basis for believing that such conduct occurred. For example, if defendant is a bank
teller accused of embezzlement and puts a neighbor on the stand to testify that the
defendant has a reputation in the community as an honest person, the prosecution
may cross-examine by asking, “Would defendant’s reputation be different if it were
known that the IRS is investigating him for tax fraud?”

Rule 405(b) governs situations where character is an “essential element” of the
claim or defense. For instance, in a defamation suit, the plaintiff puts his character
and good reputation at issue by claiming that defendant damaged his reputation.
The defendant may offer prior “specific instances” of the plaintiff’s bad conduct to
show that plaintiff previously had a bad reputation.

Rule 406. HABIT; ROUTINE PRACTICE
Evidence of the habit of a person or the routine practice of an organization, whether
corroborated or not and regardless of the presence of eye-witnesses, is relevant to
prove that the conduct of the person or organization, on a particular occasion, was
in conformity with the habit or routine practice.

Comment: “Habit” refers to a person’s regular response to a repeated situation. It
is distinct from “character,” which is a general description of a person’s disposition.
For instance, assume an apartment building burns down and the cause of the fire is
in dispute. Landlord claims tenant caused the fire by leaving a coffeepot on. Tenant can testify that it is his habit to always turn off and unplug the coffeepot
before leaving the apartment. This testimony would be admissible to support
tenant’s claim that he did not cause the fire.

Rule 407. SUBSEQUENT REMEDIAL MEASURES
When measures are taken after an event which, if taken before, would have made
the event less likely to occur; evidence of the subsequent measures is not
admissible to prove negligence or culpable conduct in connection with the event.
This rule does not require the exclusion of evidence of subsequent measures when
offered for another purpose; such as proving ownership, control, or feasibility of
precautionary measures, if controverted, or impeachment.

Comment: This rule serves public policy by encouraging property owners and
manufacturers to take corrective action after an accident occurs, without fear that
plaintiff will unfairly exploit that corrective action by claiming that the correction
shows that the defendant was at fault. For instance, if tenant slips on landlord’s
staircase, the landlord should then be able to install a safety tread on the staircase
(a “subsequent remedial measure”) without tenant being able to point to the
absence of a tread to support tenant’s claim that landlord had negligently
maintained the stairs when tenant slipped on them.
The second sentence of the rule allows introduction of subsequent remedial measures for other purposes. In the example above, if defendant-landlord denied owning the apartment building, tenant could offer evidence that landlord installed the safety tread after the accident to support tenant’s claim that landlord owned or controlled the building.

Rule 408. **COMPROMISE AND OFFERS TO COMPROMISE**
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct investigation or prosecution.

Comment: This rule serves public policy by encouraging parties to attempt to settle disputes and to be candid in settlement discussions. Statements made in settlement negotiations cannot be used to prove the weakness of an opposing party’s claim or defense. But the rule allows admission of such statements “for another purpose,” such as proving a witness’s bias or prejudice.

Rule 409. **PAYMENT OF MEDICAL OR SIMILAR EXPENSES**
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Comment: Rule 409 is similar to Rule 408. It prevents the injured party from using payment of his medical expenses as a basis for showing that the defendant was at fault. For instance, a motorist who injures a pedestrian might offer to pay the pedestrian’s medical expenses, but the pedestrian cannot use the offer to argue that the motorist is liable for his injuries.

Rule 410. **INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS**
Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against a defendant who made the plea or was a participant in the plea discussions:
1. a plea of guilty which was later withdrawn;
2. a plea of nolo contendere;
3. any statement made in the course of any proceeding under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
4. any statement made in the course of plea discussions made in the course of plea discussions with an attorney for the prosecuting authority
which do not result in a plea of guilty or which result in a plea of guilty which is later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought, in fairness, be considered with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Comment: Rule 410 applies the rationale of Rule 408 to plea negotiations. For instance, in plea negotiations with the prosecutor, a criminal defendant might admit to pulling the trigger and offer to plead guilty to manslaughter. If the prosecutor rejects the offer and tries defendant for murder, the prosecution cannot use defendant’s admission in plea negotiations against him. (A nolo contendere plea is a plea of “no contest.” Rule 11 of the Federal Rules of Criminal Procedure deals with types of pleas and the manner in which they may be made.)

Rule 411. LIABILITY INSURANCE
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Comment: This rule is designed to prevent a plaintiff from arguing that because defendant was insured, defendant had less reason to be careful. It is usually improper to refer to defendant’s insurance (or lack of it) in a personal injury case, as the jury might be affected by the argument that a “deep pocket” is available to compensate plaintiff for her injuries.

As in Rule 407, however, evidence of insurance may be admitted for another purpose, such as showing defendant’s control of a premises or vehicle.

Article V. Privileges

Rule 501. GENERAL RULE
There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are confidential communications between:

1. husband and wife;
2. attorney and client;
3. physician and patient; and
4. priest and penitent.

Comment: Privileges exempt a witness from testifying about certain types of subject matter. Maintaining candor and privacy in certain types of relationships (spouses, doctor-patient, attorney-client, etc.) or situations (among grand jurors, state secrets, self-incrimination, etc.) is deemed to be so important that the courts will forgo testimony concerning statements made in a privileged context. The holder of the privilege may choose to waive it. Testimonial privileges, because
contrary to the judicial power to compel production of evidence, are strictly construed. (The wording of National Mock Trial Rule 501 differs slightly.)

**Article VI. Witnesses**

**Rule 601. GENERAL RULE OF COMPETENCY**
Every person is competent to be a witness.

**Rule 602. LACK OF PERSONAL KNOWLEDGE**
A witness may not testify to a matter unless the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703, related to opinion testimony by expert witnesses.

Comment: A witness must testify only on the basis of facts which the witness has seen, heard or otherwise perceived through his or her senses unless the witness is qualified as an expert witness. (See also Rule 701.) For example, a witness could testify from personal knowledge that she saw the defendant drink 12 bottles of beer at the party, but she would not be permitted to testify, “Everyone at the party knew Joey was drunk.” Without laying a foundation to establish the basis for her knowledge about the thoughts of others, the witness has no first-hand knowledge about what all the other partygoers knew. Laypersons may give testimony in the form of opinions if the matters on which the testimony is based are matters of common experience and if the witness has first-hand knowledge of such matters. For example, a witness is entitled to give an opinion as to whether or not the defendant was intoxicated based on the witness's experience observing intoxicated persons.

In the mock trial context, this rule should be read in conjunction with Competition Rule 13a.

**Rule 607. WHO MAY IMPEACH**
The credibility of a witness may be attacked by any party, including the party calling the witness.

Comment: If a mock trial problem includes an adverse witness who must be called in a party’s case-in-chief, that party could attack the witness's credibility. Furthermore, that party could conduct the direct examination as a cross-examination, if the court makes a finding that the witness is a hostile witness.

**Rule 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence, or otherwise.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be asked on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination with respect to matters related only to credibility.

Comment: Rule 608 allows opinion or reputation evidence of a witness's character for truthfulness or untruthfulness, with certain restrictions. For example, if Ms. X observes an accident and testifies for plaintiff that the stoplight was red, the defense could offer testimony under 608(a)(1) from Ms. Y, her neighbor, that Ms. X is known to be a liar. Rule 608(a)(2) would then allow the plaintiff to call Ms. Z, another neighbor, to testify as to Ms. X's truthful character.

Rule 608(b) is designed to avoid mini-trials on specific instances of a witness's truthfulness or untruthfulness. Thus, the details of a prior dispute between Ms. X and Ms. Y, in which Ms. X allegedly lied, are inadmissible "extrinsic" evidence. Similarly, if Mr. Q witnessed the accident, testified for plaintiff, and falsely claimed he was walking home from church at the time, defendant could not call the card dealer at the casino to testify that Mr. Q had actually been at the casino, not at church. Such attacks on the credibility of nonparty witnesses are of marginal relevance and consume too much time. Note, however, that on cross-examination of Mr. Q, the defense attorney could ask, "Isn't it true that you were walking home from the casino?"

Rule 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME; TIME LIMITS
(a) For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness had been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting the evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the
adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation -- Evidence of a conviction is not admissible if (1) the conviction has been the subject of a pardon or other equivalent procedure based on a finding of the rehabilitation of the person convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Comment: This rule governs the admissibility of prior convictions to attack a witness’s credibility. Some convictions are considered relevant to whether the witness’s testimony is believable. Felonies and all crimes of dishonesty are admissible, subject to the time limits in 609(b). For felonies, the judge must balance the conviction’s probative value against its prejudicial effect. But any crime involving “dishonesty or false statement” is admissible to attack credibility, even if it is a misdemeanor. Crimes of dishonesty or false statement include perjury, criminal fraud, embezzlement, counterfeiting, forgery, and filing false tax returns. Most crimes of violence (murder, assault, etc.) and many nonviolent crimes (drug offenses, prostitution) do not fall into this category. Courts disagree on whether theft, shoplifting, and the like are crimes of dishonesty. For instance, one federal decision calls bank robbery “a crime of violent, not deceitful, taking,” and therefore not covered by 609(a)(2).

Rule 609(b) reflects the view that the older a conviction is, the less probative value it has. The ten year period usually begins running when the individual is released from prison. The party seeking to attack the witness’s credibility must convince the judge that the relevance of the prior crime’s “specific facts and circumstances” substantially outweighs the conviction’s prejudicial effect. The party must also provide advance written notice to the other side.

Rule 610. RELIGIOUS BELIEFS OR OPINIONS
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Comment: This rule bars inquiry into the religious beliefs or opinions of a witness to show that the witness is (or is not) credible. It is impermissible to elicit testimony that the witness is an atheist in order to argue that the witness is not
credible. Similarly, it is impermissible to argue that if the nun, the minister, and the rabbi all claim the light was green, it must have been green because people in the religious life are more credible than others.

**Rule 611. **MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court -- The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to (1) make the questioning and presentation effective for ascertaining the truth, (2) to avoid needless use of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross examination -- The scope of cross examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness' statement, including all reasonable inferences that can be drawn from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.

(c) Leading questions -- Leading questions should not be used on direct examination of a witness (except as may be necessary to develop the witness' testimony). Ordinarily, leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions may be used.

(d) Redirect/Recross -- After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on recross, but such questions must be limited to matters raised on redirect examination and should avoid repetition.

Comment: This rule gives the judge broad authority to control the manner in which testimony comes into evidence. See the “General Comment – Objections and Proper Form of Questions” for guidance on this rule in a mock trial setting.

**Rule 612. **WRITING USED TO REFRESH MEMORY

If a written statement is used to refresh the memory of a witness either while or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for inspection. The adverse party may cross-examine the witness on the material and introduce into evidence those portions which relate to the testimony of the witness.

Comment: This basic rule of fairness ensures that if the examining attorney shows the witness a document to refresh the witness’s recollection, the other side is entitled to see the document and cross-examine the witness on it. When the witness’s memory is refreshed with a document on direct examination, the proponent of the witness’s testimony cannot offer statements in the document for their truth. The document is not received into evidence. But the rule allows the adverse party to cross-examine the witness about the document and introduce
portions into evidence. (Compare Rule 803(5), the hearsay exception dealing with past recollection recorded.)

Rule 613. PRIOR STATEMENTS OF WITNESSES
In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same, and the opposite party is afforded an opportunity to interrogate.

Comment: This rule allows a cross-examining attorney to question a witness about the witness’s prior statement without showing the statement to the witness. The cross-examiner must show the statement to opposing counsel on request. Usually the cross-examiner seeks to attack the witness’s credibility by showing an inconsistency between the trial testimony and the prior statement. If “extrinsic evidence” of the prior statement is relevant and admissible (e.g. another witness’s testimony that the first witness made the prior inconsistent statement), the first witness must be provided an opportunity to “explain or deny” the statement. If the inconsistent statement concerns a “collateral matter,” the cross-examiner must take the witness’s answer; the cross-examiner may not introduce “extrinsic evidence” to discredit the witness. (See comment to 608(b) for an example of extrinsic evidence on a collateral matter.)

Article VII. Opinions and Expert Testimony

Rule 701. OPINION TESTIMONY BY LAY WITNESS
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Comment: As a general rule, the testimony of lay witnesses is restricted to a recitation of facts, and their opinions are not permitted. However, there is no clear demarcation between fact and opinion in some instances. Sometimes a fact sounds like an opinion and an opinion sounds like a fact. For example, when a lay witness testifies to prior experience observing intoxicated persons, then testifies that the defendant was “drunk” at the time of the accident, is this a statement of fact or an opinion? It is both. Therefore, this rule of evidence does not prohibit per se opinions offered by lay witnesses but simply expresses a preference for factual testimony. Lay witnesses are permitted to offer certain opinions concerning matters which are based on their own common experience, provided adequate foundation is laid. For example, a witness is generally permitted to offer an opinion about the value of his home or about the average miles per gallon achieved by his car.
**Rule 702. TESTIMONY BY EXPERTS**
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

Comment: No expert opinion is permitted to be introduced in evidence until it is shown that the expert possesses the requisite skill, knowledge, experience, or education to be qualified to offer the opinion. Before any expert opinion is elicited from a witness, a foundation is laid by asking the expert witness questions that are intended to establish his or her expert qualifications. Expert witnesses come from all trades and professions, and there is no qualitative distinction between an expert who is a journeyman carpenter with 25 years of practical experience and an aerospace engineer who has had 19 years of formal education. Both are experts in their own areas of specialty.

In addition to the requirement that a proper foundation be laid to establish the qualifications of the expert witness, an expert opinion still may not be admissible unless the judge rules that the subject matter of the opinion is beyond the common knowledge and experience of the jurors, that the opinion “will assist the trier of fact” to understand the evidence or determine a fact at issue, and that the opinion does not exceed the recognized limits of the science or art involved. The trier of fact does not need the assistance of an expert to draw inferences and conclusions from facts that are of common knowledge and experience.

The current mock trial rule reflects the law before the U.S. Supreme Court’s decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In response to *Daubert*, Federal Rule 702 was amended in 2000 to affirm the trial court’s role of gatekeeper and provide some general standards that the trial court must use to assess the reliability and helpfulness of the proffered expert testimony. The 2000 amendment added three factors to guide the judge’s decision: An expert “may” offer an opinion “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Proponents of expert testimony should be prepared to demonstrate the reliability of scientific expert testimony, to the extent possible in a mock trial format. Rejection of expert testimony is the exception, not the rule. Vigorous cross-examination and presentation of contrary evidence are traditional and appropriate means of attacking shaky but admissible expert evidence.

**Rule 703. BASES OF OPINION TESTIMONY BY EXPERTS**
The facts or data upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the field in forming opinions or inferences, the facts or data need not be admissible in evidence.
Comment: This rule simply clarifies that the underlying facts and data used by the expert witness to form an expert opinion need not be admissible as evidence. If the expert customarily relies on such information, the information itself need not be admissible. The key to admissibility is the customary reliance by the expert on the information, not its independent admissibility. For example, to form an opinion concerning the weather on a certain date in March 2000, a meteorologist may rely on weather service maps which might be objectionable hearsay evidence if admitted at trial by themselves. Yet the information may form the basis for the expert’s opinion.

Rule 704. OPINION ON ULTIMATE ISSUE
(a) Opinion or inference testimony otherwise admissible is not objectionable because it embraces an issue to be decided by the trier of fact.

(b) In a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

Comment: Rule 704(a) allows lay and expert witnesses to offer opinions on issues to be decided by the jury. For example, in a medical malpractice case, an expert physician testifying for the plaintiff can opine that the treating physician’s conduct fell below professional standard of care. However, witnesses cannot offer opinions on how the case should be decided, nor can they offer opinions on questions of law. Rule 704(b) specifically bars opinion testimony on the mental state of criminal defendants.

Rule 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION
The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Comment: Because Rule 703 allows the expert to base her opinion on otherwise inadmissible facts (if of the type reasonably relied on by other experts in the field), Rule 705 allows the expert to offer an opinion without disclosing the underlying facts or data. But the court has discretion to require disclosure on direct examination, and the opposing party can compel disclosure on cross-examination.

Article VIII. Hearsay

General comment: Rule 801 defines a “hearsay” statement as (1) an out-of-court statement, (2) made by someone other than the witness who is testifying to the contents of the statement, and (3) which is offered to prove the truth of the matters asserted in the statement. The easiest way to explain the rule is by example. If a witness testifies that he heard a man say, “I am Alexander the Great,” the testimony concerning the statement would be hearsay if it was being offered to prove the truth of matters contained in the statement, i.e., that the person making the statement was in fact Alexander the Great. On the other hand, if the statement was being offered in evidence to prove that the person making the
A key to understanding hearsay is to focus on the purpose for which an out-of-court statement is being offered. The same statement can be hearsay or nonhearsay, depending on its purpose. For instance, assume X observes a traffic accident. Y comes to the scene a few minutes later. X tells Y, “The light was red.” Y’s testimony, “X said that the light was red” is hearsay, if offered to show the light was red. Suppose, however, that the issue was (1) whether X was blind, or (2) whether the traffic light was functioning at all. In those two situations, Y’s testimony, “X said the light was red” is not hearsay. The statement is offered to show (1) that X could see, or (2) that the traffic light was working. Therefore “the truth of the statement” (whether the light was indeed red) is not at issue, and the statement is not hearsay.

Hearsay is inadmissible because it relies on the credibility of the person who made the statement, and that person is not on the witness stand. Such evidence is deemed to be less credible and less reliable than evidence elicited through firsthand testimony from the person who actually made the statement.

Keep in mind that a nonparty witness’s own out-of-court statement can be hearsay, even when the witness testifies. Thus, in the traffic light example above, if X testifies, “I told Y that the light was red,” the statement is hearsay if offered to show the light was red. Of course, X can testify, “I was there and I saw that the light was red,” because X is testifying as to her own observations. Furthermore, out-of-court statements by witnesses who are parties to the case (or “speaking agents” of parties) are normally admissible under the 801(d)(2) exceptions.

Conduct can be a “statement” under the hearsay rule if it is intended to be an assertion. For example, if a person is asked, “Did Joe kill the bartender?” and the person nods his head in an affirmative response to the question, the nod is an assertion, and it would be hearsay for a witness to testify that he saw the person nod his head in response to the question just as it would be hearsay for the witness to testify that he heard the person say, “Yes, Joe killed the bartender.” Another example of conduct as hearsay is when one person points at another person as a means of identifying that other person when asked, “Who killed the bartender?” An example of conduct which is not hearsay is when a person shakes with fright when confronted by a police officer. The involuntary shaking is not intended to be a statement.

Unless the statement being testified to meets the definition of hearsay, the statement is not hearsay and is not inadmissible on that basis. The rules of evidence also contain many exceptions to the rule that hearsay is inadmissible. The exceptions to the hearsay rule which apply in mock trial are set forth below. Attorneys in mock trial should learn the differences between statements which are inadmissible as hearsay, statements which are admissible because they are not
hearsay, and statements which are hearsay but which are nevertheless admissible because they are recognized exceptions to the hearsay rule.

Rule 801. DEFINITIONS
The following definitions apply under this article:
(a) Statement -- A "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant -- A "declarant" is a person who makes a statement.
(c) Hearsay. -- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay -- A statement is not hearsay if:
(1) Prior statement by witness -- The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:
(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
(C) one of identification of a person made after perceiving the person; or

(2) Admission by a party-opponent -- The statement is offered against a party and is:
(A) the party's own statement in either an individual or a representative capacity, or
(B) a statement of which the party has manifested an adoption or belief in its truth, or
(C) a statement by a person authorized by the party to make a statement concerning the subject, or
(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Comment: Technically all of the 801(d) statements are “nonhearsay,” as a matter of definition; they are not hearsay “exceptions” (see 803 and 804). Conceptually, the 801(d) statements function much like hearsay exceptions. Note also that the 801(d)(2) statements must be offered “against a party,” not by a party on his own behalf.
Example, 801(d)(1)(A), (prior inconsistent statement under oath): In a declaration (sworn statement) given to the insurance investigator after an automobile accident, the driver said the light was green. At trial, the driver testifies that the light was yellow. Under this rule, the driver's prior statement is admissible.

Example, 801(d)(1)(B), (prior consistent statement offered to rebut a charge of recent fabrication): Three men are charged with theft. One of them makes a deal with the prosecutor and pleads guilty to a minor offense in exchange for his testimony against the other two defendants. During the trial, the defense attorneys for the other two men make allegations against the witness that the prosecution “bought his testimony.” In this situation, the prosecution would be entitled to use the witness's prior consistent statement to prove that he did not change his story after making the plea bargain deal.

Example, 801(d)(1)(C), (prior statement of identification): Just after a bank robbery the police put the suspect in a lineup and ask a witness if she can identify the robber. The witness identifies the suspect. At trial, the witness's out-of-court statement identifying the suspect is admissible.

Comment and example, 801(d)(2)(A), (admission by a party-opponent): Admissions made out-of-court by a party to the lawsuit are admissible. During a telephone conversation with the police, the defendant admitted being at the scene of a burglary. The statement is admissible. Similarly, the driver’s statement, “I didn’t see you in the crosswalk” is an admission in the pedestrian’s suit against the driver.

Comment 801(d)(2)(B), (adoptive admission): This rule most commonly deals with situations where X (the party) is present when Y makes a statement. If X agrees or acquiesces in Y’s statement, X may be deemed to have adopted Y’s statement. In that situation, Y’s statement is admissible as an admission against X.

Comment, 801(d)(2)(C), (authorized statement): Admissions made by a spokesperson are admissible. Admissions by a lawyer on the client’s behalf can be admissible against the lawyer’s client.

Comment and example, 801(d)(2)(D), (statement by a speaking agent): Assume a gas station pump explodes while plaintiff is filling her car. If the cashier tells injured plaintiff, “We’ve been meaning to get that pump fixed, but the corporate headquarters told stations across the country not to waste money on maintenance,” is that statement about the corporate policy admissible against the corporate defendant as an admission by a “speaking agent”? On those facts, probably not, because broad corporate policies are not “a matter within the scope of [the cashier’s] agency or employment.”

Comment, 801(d)(2)(E), (statement by a co-conspirator): Statements made by one co-conspirator are admissible against other co-conspirators, as long as the statement was made during the course of the conspiracy and in furtherance of it. The threshold question of the existence of the conspiracy is decided by the judge,
based on a preponderance of the evidence. The judge may admit a statement provisionally, based on a representation that the prosecution will “connect it up” later by laying further foundation that a conspiracy existed.

Rule 802. HEARSAY RULE
Hearsay is not admissible, except as provided by these rules.

Rule 803. HEARSAY EXCEPTIONS, AVAILABILITY OF DECLARANT IMMATERIAL
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance -- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical conditions -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment

(5) Recorded Recollection -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(18) Learned treatises -- To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject
of history, medicine, or other science or art, established as a reliable authority by
the testimony or admission of the witness or by other expert testimony or by
judicial notice.

(21) Reputation as to character -- Reputation of a person's character among
associates or in the community.

(22) Judgment of previous conviction -- Evidence of a judgment finding a person
guilty of a crime punishable by death or imprisonment in excess of one year, to
prove any fact essential to sustain the judgment, but not including, when offered by
the government in a criminal prosecution for purposes other than impeachment,
judgments against persons other than the accused.

Comment and example, 803(1), (present sense impression): This exception is
commonly called the “present sense impression” exception. The rule presumes that
a spontaneous statement, i.e. one made before the declarant has had a chance to
think about the event he or she describes, reduces some of the risk of
misrepresentation. When the person who was just involved in a car accident says
to a witness, “Why didn't I put on my seat belt?” the statement is undoubtedly a
spontaneous utterance and is not objectionable as hearsay.

Comment and example, 803(2), (excited utterance): This exception is called the
“excited utterance” exception. A victim's telephone call to the police describing how
the defendant raped her and left her along the road several hours before the call
would probably be admissible as an “excited utterance.” The key to admissibility is
whether the declarant was still under the influence of the event (i.e., emotionally
charged from the effects of the event) at the time the statement was made. The
belief is that a statement made while the declarant is still under the influence of or
affected by the event is more reliable and less likely to be fabricated than one made
after the declarant has calmed down and taken the opportunity to think about the
event.

Comment and example, 803(3), (state of mind): Statements which describe the
declarant's then-existing state of mind fall within this exception. A statement of the
declarant’s intent or plan also falls within this exception when offered to prove that
the intent or plan was later carried out by the declarant. However, the exception
does not apply to statements that describe past states of mind. A witness will be
permitted to testify that the victim of a spousal assault told her, “I fear my
husband” because it was a statement of the victim’s state of mind at the time the
statement was made. On the other hand, the witness will not be allowed to testify
that the victim told her a week before the assault, “My husband threatened me and
I thought he was going to hurt me” because that is a statement concerning a state
of mind which existed in the past when the threat was made. In other words, the
“state of mind” exception to the hearsay rule does not apply to statements of
memory or belief about past actions or events. But the state of mind exception
does apply to statements concerning the present status of a person's health or
physical condition. In a prosecution for murder by poison, the victim’s statement,
“My stomach hurts a lot” would be admissible.
Comment and example, 803(4), (medical diagnosis): A doctor will be permitted to testify that his patient complained of a sore knee during an office visit. One issue that arises frequently is whether the patient’s description of the cause of the injury is admissible through the testimony of the physician or thorough the physician’s chart note. Under this exception, a patient’s statement that he was struck by a car might be admissible, but probably not his statement, “The other guy hit me when he ran the red light.”

Comment and example, 803(5), (past recollection recorded): A witness may make notes or a record of an observation, but then have forgotten it when called to testify months or years later. Rule 803(5) allows the witness’s statements of “recorded recollection” to be admitted for their truth, if the proponent lays proper foundation. A typical line of foundation questions will establish (1) that the witness once had personal knowledge of the event; (2) the witness has forgotten the event to some extent; (3) the witness previously made an accurate record of the event; and (4) the event was fresh in the witness’s memory when the witness made the record. In many situations, the past recollection recorded exception is similar to the business records exception (803(6)). But the past recollection recorded exception normally requires the maker of the actual record to testify, whereas the business record exception simply requires a “qualified witness” with knowledge of the enterprise’s general practices.

The past recollection recorded hearsay exception is sometimes confused with the practice of refreshing a witness’s “present recollection” under Rule 612. Rule 612 applies when a document, object, or picture will trigger a memory that had been forgotten; the item itself is an aid to memory and is not received into evidence. The witness testifies from her “refreshed recollection.” In contrast, Rule 803(5) applies when the witness cannot trigger a memory of the event, but did “record” the event when it occurred.

Comment and example, 803(6), (business records): Most records kept in the ordinary course of business are hearsay if offered to prove that their contents are true. For instance, entries in a bank’s loan register would be hearsay if offered to show the loan was not repaid on time. Records of any “regularly conducted activity” fall within this hearsay exception if proper foundation is laid. A typical line of foundation questions will establish that the record (1) was made at or near the time of the event; (2) was made by a person with knowledge; (3) was kept in the regular course of business; (4) was made as a part of the business’s regular practice. Note that the opposing party may be able to challenge admissibility of the business record on the grounds of “lack of trustworthiness.”

Comment and example, 803(18), (learned treatises): Statements in a treatise or other scholarly publication are admissible for their truth, if the proponent lays foundation that the publication is a reliable authority in the field. For instance, in a medical malpractice case, either side’s expert may read portions of a standard textbook in the field to establish that the treating doctor did (or did not) meet the applicable standard of care.
Comment and example, 803(21), (reputation in the community): Statements concerning a person's reputation in the community are not objectionable hearsay, so long as the statements do not exceed the scope of permissible character testimony and are elicited in the manner prescribed by Rule 405.

Comment and example, 803(22), (prior judgments): This rule allows admission of prior felony convictions in certain situations, even though the prior conviction would technically be hearsay. For instance, if D is convicted of murder, then Victim's family brings a wrongful death civil suit on the same set of facts, D's conviction is admissible for its truth, i.e. to show that D did indeed kill Victim. Victim's family does not need to re-litigate the issue of whether D really did it.

Rule 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE
(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that the declarant's death was imminent, and concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment: All the hearsay exceptions under Rule 803 apply whether or not the declarant is “available” to testify in person. But another group of hearsay exceptions set forth under Rule 804 require that the declarant must be “unavailable” before the hearsay statement is admitted. Rule 804(a) defines situations in which a declarant is considered “unavailable.” Physical unavailability such as death or absence from the jurisdiction is not required. The unavailability requirement is also satisfied if the witness invokes a privilege, or refuses to testify in contempt of court.

Comment, 804(b)(1). Rule 804(b)(1) creates a hearsay exception for an unavailable person’s prior sworn statements.

Comment, 804(b)(2). Rule 804(b)(2) is the “dying declaration” hearsay exception. It creates a hearsay exception when the victim of a homicide says, “D shot me,” before victim expires.

Comment, 804(b)(3). This rule sets forth the “declaration against interest” hearsay exception. It rests on the notion that a person is unlikely to make a statement that
would get the person in trouble, unless the statement is true. The last sentence of
the rule places a “corroboration” requirement on statements by an unavailable
declarant that are offered to prove the innocence of a criminal defendant. For
instance, if D is charged with murder, and D’s brother Q is dying of cancer, Q might
make a false deathbed “confession” to exonerate D. If D wants to admit Q’s
“confession” into evidence through a nurse who heard it, the corroboration
requirement would have to be met.

Comment, 804(b)(4). Since one typically does not truly have “personal knowledge”
of his or her birth, parents’ marriage, ages of older siblings, etc., this rule creates a
hearsay exception to allow witnesses to testify facts of family history.

Comment, 804(b)(6). The “forfeiture by wrongdoing” exception would include
situations where a witness by a criminal case is unavailable because the defendant
made arrangements for the witness to “sleep with the fishes.” Because defendant’s
wrongdoing brought about the witness’s unavailability, hearsay testimony from
other witnesses about the unavailable witness’s statements are admissible against
the defendant.

Rule 805. HEARSAY WITHIN HEARSAY
Hearsay included within hearsay is not excluded under the hearsay rule if each part
of the combined statement conforms with an exception to the hearsay rule provided
in these rules.

Comment: This rule governs so-called double hearsay and multiple hearsay
situations. These situations pose challenging analytical problems. Generally the
proponent must show that every link in the chain of statements is admissible.
Arguments for admissibility may include the fact that one or more of the
statements is not offered for its truth, or comes in under a hearsay exception, or is
defined as non-hearsay, etc.

ARTICLE XI – Miscellaneous Rules

Rule 1103. TITLE
These rules may be known and cited as the Washington Mock Trial Rules of
Evidence
OTTO BLOTTO

Washington State’s
YMCA Youth & Government
2017 Mock Trial Case

By: Hon. William L. Downing
INTRODUCTION

It is a fairly common misconception that “Frankenstein” is the name of a terrifying monster. In fact, Mary Shelley’s book of that title (conceived on the night of June 16, 1816) concerned a well-meaning scientist named Victor Frankenstein who ended up creating in his lab a “wretch” or “demon” that was never given any name. This prototype came off the production line with, shall we say, certain flaws – like a tendency to tear humans apart. But that’s on Victor and not on the wretch, isn’t it?

One thriving entity that humans have successfully created is the corporation and our laws have long conferred “personhood” status on corporations. So today, if it were a corporation that produced its own new life form, whether a wretch, a genetically modified species or a mechanical apparatus endowed with artificial intelligence, that corporation should, under the law, be the person standing behind the product if things were to go horribly wrong.

In this 21st Century, we like to say that certain attributes are “hardwired” in a person’s nature. It was a centerpiece of Jeremy Bentham’s influential moral philosophy that each individual is “governed by two sovereign masters: pain and pleasure.” Extrapolating from that, his utilitarianism held that the good of society – made up of all such persons – lay in maximizing the collective pleasure and minimizing collective pain. Today, our laws, governing the conduct of both individual and corporate persons, are intended to structure society with that goal in mind.

Dr. Frankenstein’s creation – intended to be a person but falling short of that mark – went haywire in being impervious to conventional pain while growing increasingly desperate in pursuit of the pleasure of being loved. Today, it is entirely possible that a corporate person may similarly find itself on a collision course as it seeks pleasure in the form of a return on its shareholders’ investments while being insufficiently deterred by any prospect of pain.

Just such a collision, along with clashing approaches to inevitable societal and technological changes, are themes we hope to explore in this year’s mock trial case.

The author would like to thank Connie Butler one more time for her brilliant cover art and also to express appreciation to YMCA Youth & Government for giving him the opportunity to create this his tenth and final mock trial case. In that spirit, as Daedalus may have said to the young Icarus: “Go fly; use your wings but also use your head!”

--W.L.D., August 2016
CASE WITNESSES:

For the plaintiff:

Off. M.J. O’Sullivan: Cedar County Sheriff’s Deputy
Bliss Bruder: simple farmer
Crann Lee: former Ithacus employee
Terry Terhune: accident reconstructionist

For the defense:

Victa Funk: mosquito breeder
Dory Dadalos: Director of Auto-Auto Project
Edison Cortado: barista
Hathaway Hunt: Professor of Philosophy

TRIAL EXHIBITS:

Exhibit 1: scene diagram
Exhibit 2: tool
Exhibit 3: Isaac “Ike” Arias
Exhibit 4: Auto-Auto
Exhibit 5: discarded sign

STIPULATIONS:

All statements of the witnesses were given under oath and certified as being true and accurate to the best of that witness’ knowledge and memory.

The cause of Isaac Arias’ death on June 16, 2016 was the severing of the carotid artery on the left side of his neck resulting from a laceration just below the left ear.

In a pretrial ruling, it was determined that Dory Dadalos was and is a speaking agent of the defendant. Also, expert testimony of Prof. Hunt has been ruled to be admissible on the issue of whether the defendant acted with the requisite mental state to constitute an offense.

Due to their confusion resulting from their flight from the mosquitoes and their trauma from witnessing the flight of the mule, the student and teacher witnesses were found to have no testimony of value.
PLEADINGS
STATE OF WASHINGTON,  

Plaintiff,  

v.  

ITHACUS SOLUTIONS, INC., a  
Washington corporation and its  
Subsidiary Auto-Auto Division;  

Defendant.  

I, Maude Templin, Prosecuting Attorney of Cedar County, acting in the name and by the authority of the state of Washington, do hereby accuse the above-named defendant ITHACUS SOLUTIONS, Inc. and its subsidiary Auto-Auto Division (hereinafter Ithacus Solutions) of the crime of Manslaughter in the First Degree, committed as follows:

That the defendant, ITHACUS SOLUTIONS, in Cedar County, Washington, during a period between the 1st of January and the 16th day of June 2016, did recklessly cause the death of Isaac Arias, a human being;
Contrary to R.C.W. 9A.32.060 and 9A.08.030(2), and against the peace and dignity of the state of Washington.

IN THE ALTERNATIVE, it is further alleged that the above described death of Isaac Arias was caused by the defendant with criminal negligence, thus constituting the crime of Manslaughter in the Second Degree;

Contrary to R.C.W. 9A.32.070 and 9A.08.030(2), and against the peace and dignity of the state of Washington.

Respectfully submitted,

Maude Templin

_____________________________
Cedar County Prosecuting Attorney
JURY INSTRUCTIONS
Standard Jury Instructions:

Burden of proof: The defendant has entered a plea of not guilty. That plea puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

Presumption of innocence: A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

Proof beyond a reasonable doubt: A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

Unanimity requirement: All twelve of you must agree in order to reach a verdict.

Direct and circumstantial: Evidence may be either direct or circumstantial. Both types are valuable and entitled to be given significant weight. Direct evidence refers to something stated by a witness who has directly seen or otherwise perceived something that is at issue in the case. Circumstantial evidence refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in the case.

Special jury instructions for State v. Ithacus Solutions:

Instruction No. 1

Under Washington law, the term “person” includes, where relevant, a corporation.

A corporation is guilty of an offense when the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or tolerated by a high managerial agent acting within the scope of his or her employment and on behalf of the corporation.

Instruction No. 2

The law treats all parties equally whether they are individuals, corporations or governmental entities. This means that all parties are to be treated in just the same fair and unprejudiced manner. A corporate entity, such as defendant Ithacus Solutions, Inc., acts through its officers and employees. Therefore, any act or omission of an officer or employee of that entity is deemed the act or omission of the defendant.
**Instruction No. 3**

The defendant is charged, alternatively, with manslaughter in the first and second degrees. A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person.

A person commits the crime of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person.

**Instruction No. 4**

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a death may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk a death may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When recklessness or negligence as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result.

**Instruction No. 5**

To convict the defendant of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That during a period between January 1 and June 16, 2016, the defendant engaged in reckless conduct;
2. That Isaac Arias died as a result of defendant's reckless acts; and
3. That these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
**Instruction No. 6**

In the alternative, to convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That during a period between January 1 and June 16, 2016, the defendant engaged in criminally negligent conduct;

2. That Isaac Arias died as a result of defendant's negligent acts; and

3. That these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

**Instruction No. 7**

In determining whether recklessness or negligence has been established, you may give consideration to the duty that the law imposes upon all product manufacturers. That is a duty to design products that are reasonably safe as designed. Applying this test involves a balancing of whether at the time of manufacture

the likelihood that the product would cause injury of the type experienced plus the seriousness of such injury

outweighed

the burden on the manufacturer to design a product that would have prevented the injury and any adverse effects of a practical and feasible alternative design.

**Instruction No. 8**

To constitute manslaughter, there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant’s acts or omissions were a proximate cause of the resulting death.

The term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened. There may be more than one proximate cause of a death.
Instruction No. 9

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's reckless or negligent conduct and a death.

If you find that the defendant was reckless or negligent but that the sole proximate cause of the death was a later independent intervening cause that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any recklessness or negligence of the defendant is superseded and the defendant's conduct was not a proximate cause of the death. If, however, you find that the defendant was reckless or negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening cause, then that cause does not supersede defendant's original conduct and you may find that the defendant's conduct was a proximate cause of the death.

It is not necessary that the precise sequence of events or the particular resultant event be foreseeable. It is only necessary that the resultant event fall within the general field of danger which the defendant should reasonably have anticipated.
WITNESS STATEMENTS
STATEMENT OF M. J. O’SULLIVAN

Since 2008, I have been a Deputy with the Cedar County Sheriff’s Office. We have law enforcement jurisdiction throughout our county although we defer to the Columbus Police Department for matters occurring within the city limits. For the most part, I have worked patrol, cruising the more rural areas of the county responding to criminal complaints, initiating traffic stops and responding to the scene of motor vehicle collisions. I drive a one-person car, a Ford Crown Victoria, and I have to say I love my car. It does all I ask of it. It may not have some of the features of the new Interceptors like the Columbus P.D. officers drive but I prefer to stick with the tried and true. Why change a good thing?

On June 16, 2016 at 10:25 a.m., I responded to the scene of an unusual traffic collision out on Route 17, commonly known as the River Road. I had been on routine patrol nearby and arrived at the location within just a few minutes of the call coming in. I say it was unusual partly because it involved a fatality – and, thankfully, we don’t have too many of them in Cedar County – but it was also unusual to find a quite peculiar little car, a seriously injured quadruped (donkey? mule? burro?), a missing person, wooden poles scattered like pick-up-sticks and a thick swarm of mosquitoes at the scene.

I can set that scene for you. Exhibit 1 is my scene diagram which is not drawn to scale but that accurately depicts how things looked upon my arrival. County Route 17 runs generally in an east-west direction as it winds along the north side of the Meenos River. It is a two lane blacktop road, well paved and well marked. At this location, it has a solid stripe at the centerline and solid fog lines on the outside of each lane. On the south side, there is less than a full shoulder and about an eight foot drop down to the river at that time of year with no guardrail or fence. The posted speed limit was 45 MPH.

CCSO forms use the terminology “vehicle # 1” and “vehicle # 2” and I’ll use those labels even though I’m not altogether certain whether a donkey cart is a vehicle but let’s say it is and I’ll call that vehicle # 2. The automobile involved, vehicle # 1, was a small green vehicle with the words “AUTO-AUTO” written on both sides and, in fact, the registered owner of the vehicle was listed with DMV as Auto-Auto, LLC, a wholly owned subsidiary of the Ithacus Solutions Corporation, a well-known local software outfit. The vehicle bore no other brand markings and it was not a familiar model to me. I’m a film buff and it reminded me of an Isetta, like you might see in some old Italian movie.

On my arrival, this vehicle was upright and in proper alignment in the middle of the eastbound lane of traffic with its four way flashers activated. It showed little damage other than scrape marks along the small hood and roof and the absence of the fixed window just to the rear of the door window on the left side (I’m hesitant to call it the
The sole occupant of vehicle #1, later identified as Isaac Arias was covered in blood. He was slumped forward in a seat that was positioned perpendicular to the alignment of the vehicle, facing toward the right side. There was apparently nothing the medics, who arrived shortly after me, could do for him and he was pronounced dead at the scene. A major artery in his neck had evidently been pierced or severed by impact with one or more of the farm and/or garden implements being transported on vehicle #2 at the time of the collision. One of these tools (shown in the photograph that is marked Exhibit 2) was, on my arrival, extending from the window of the Arias’ vehicle with the bloodied sharp end inside. In seeking to access the patient, the aid crew removed the tool and placed it on the pavement which is where I subsequently photographed it.

By the way, I have no recollection of the pavement being wet although it appears that I neglected to note one way or the other in my report. Ex. 2 would seem to confirm that the pavement was dry.

Let’s move on to vehicle #2. As I say, it was a wagon being pulled by a donkey or mule. Said animal was lying on the ground – in evident pain – on the roadway to the right and slightly behind vehicle #1. It was no longer hitched to the wagon which was located in the roadway immediately to the left of vehicle #1, although not in physical contact with it. Much of what was believed to have been the previous contents of the wagon – the aforementioned wooden handled farm and garden implements – were strewn about the roadway with one of them, as previously described, protruding inside vehicle #1 having entered through the missing side window.

At the time of my arrival, there was no one occupying or associated with the wagon. From watching westerns or from some other deep recess of my mind, I want to call the wagon a “buckboard.” And so I will. It had an exposed seat at the front of it and there was no one there. There was no blood on the seat and no indication of any damage. I was unable to identify anyone at the scene who was associated with the buckboard wagon. I am familiar with the Bruder Community living on farmland upriver from Columbus in rural Cedar County and I assumed the wagon had come from there and it would not be difficult to trace it. The Bruders are allowed to operate such wagons on county roads and they do not need to be licensed and registered but they do need to have general permits to operate “slow moving farm equipment” and the wagons must carry red triangular cautionary markings on the rear. The only witness I spoke with at the scene, Victa Funk, advised that the operator of the buckboard had fled on foot.
The draft animal was in bad shape and Animal Control was summoned to the scene and it is my understanding that the animal had to be put down. For reasons unknown to me at the time, there was a thick swarm of mosquitoes swirling around, unusual for June. I had no idea what, if anything, this had to do with the accident or if it was just an unfortunate coincidence.

Getting into my air-conditioned patrol car had the side benefit of allowing me to escape the mosquitoes as I proceeded to make telephone contact with the registered owner of vehicle #1. I needed to advise them of what had occurred and needed confirmation that the individual operating the vehicle had the owner’s permission. I eventually spoke with Dory Dadalos who self-identified as the managing director of Auto-Auto. Before disclosing what had happened, I described the involved vehicle and inquired about who it was that had custody and control of the vehicle. I thought it a bit odd when Dadalos responded that there were actually two answers to that question, explaining “Isaac Arias may have custody of the vehicle as its passenger but I am in control of it.” I was soon to learn that this particular vehicle was a prototype of a driverless car being developed by Ithacus Solutions and this was all being done with the blessing of the state and county. Why I hadn’t been advised of this dangerous experiment, I couldn’t begin to say.

Anyway, Dadalos proudly claimed to be solely in charge of this project and responsible for all their accomplishments. When I told Dadalos the vehicle had been involved in a collision, I was put on hold for a few minutes so that some computer readout could be checked. I’d been so distracted by what I was learning, I realized I hadn’t yet mentioned the fatality. Dadalos came back on the line and said, “Yes, it appears the vehicle struck a horse.” And then added, with a distinct note of pride, “I must say, it performed exactly as I programmed it to.” Shocked at hearing this, I responded “First of all, it was a donkey not a horse and, second of all, there was a person right behind that donkey who could’ve been killed just as your man Arias was.”

Dadalos seemed taken aback by this and could only stammer something I couldn’t understand about many lives being saved. Then, politely but emphatically, Dadalos requested the opportunity to consult with the company’s attorney before continuing any discussion with law enforcement. That’s a right we need to honor so that was the end of our talk. I have to say this all had been a real head-scratcher for me and didn’t seem to be getting any clearer.

I had investigated many motor vehicle accident scenes before this and have since but, quite frankly, I found myself perplexed about what direction this investigation
should take. I know the Rules of the Road. The point of car-donkey impact was in the
car's lane of travel. The buckboard wagon was across the centerline and in the lane of
oncoming traffic and that's a no-no. So, that would seem at first blush to be the at-fault
vehicle. However, another fundamental rule is that every driver is expected to see what
is there to be seen and to take actions to avoid a collision that can be avoided. That
donkey cart was not exactly speeding like a cruise missile and the operator of the car
should have had plenty of opportunity to avoid the crash. Why it didn't do so was a
mystery to me.

So, question one: which was the at-fault vehicle – the buckboard or the car? If
the buckboard, who was the responsible party – the jackass or some unidentified ranch
hand who had chosen to vamoose? If the Auto-Auto was the at-fault vehicle, was the
responsible party the dead guy ("passenger?") or the person who claimed to be
controlling the vehicle? I had no idea how the motor vehicle code would answer any of
these questions. That's way above my pay grade.

So, I sent the case up the chain of command in the department. I guess the
higher-ups found it as puzzling as I did because no traffic citations or criminal charges
were immediately brought and I was given no further instructions.

One thing that did not clamp the brakes on our investigation was tracking down
the person who'd been operating the dray. Although others sometimes did so, it was
Farmer Bliss who most often came into town with that rig. Just as soon as I cleared the
accident scene, I headed out to the Bruder compound in search of Bliss. Sure enough,
there was Bliss having gathered up fresh tack and about to bring another animal back to
retrieve the wagon.

Bliss, who was apologetic about panicking and leaving the scene, told me right
away about how the animal had reacted to the skeeters and I had no doubt it was true.
Why? Simple. Because Bliss wouldn't know how to lie.

A couple weeks later – maybe around the 4th of July – I received a call from
Crann Lee, a relative of the deceased, and we met to discuss the case. Some new
information came from this, information about the funny little green car and about Arias
but it didn't seem like enough to build a case around. Lee hadn't been involved with the
Auto-Auto people for several months and didn't have knowledge of recent events. I
suggested getting back to us if additional information should come to light. Evidently
that is what happened and, probably like you, I learned from the newspaper when the
prosecutor decided to bring a manslaughter charge against Ithacus. (I say "newspaper"
but, of course, I'm referring to the online edition.)
STATEMENT OF BLISS BRUDER

I am a proud member of the Bruder Community, living in rural Cedar County. We are devout believers in simplicity in all aspects of life and this is an important manifestation of our faith. For more than 45 years, our people have lived on our farm about 12 miles northeast of Columbus, along the banks of the Meenos River. There, on about 100 acres in what we like to call “the valley of love and delight,” we grow organic fruit and vegetables and raise livestock. Most of what we produce is for our own sustenance but, in recent years, with hard work and skilled husbandry, we have been blessed with a surplus that has allowed us to sell some of our crop at our farmstand and even supply a few markets in town.

In the manner of the generations that have come before us, we strive to work in earnest while the sun is shining clear and to slacken not our hands till the fruitage doth appear. We know that it is not the person who possesses too little but the one with an unhealthy craving for more who is poor. We are not poor. For ourselves, we desire only contentment and believe it can be better found by looking to the past than to the future. The world may well change but the meaning of life never does.

We eschew modernity in all its forms, particularly technology and crass commercialism. We clothe ourselves in simple, utilitarian apparel, of dark hue, with no designs or ornamentations. We certainly do not, as I have seen done by almost all the young people in town, wear clothing bearing advertisements for private commercial interests like Applecrumble and Facing North. We have no televisions, no telephones, no computers, no public electricity (although we do use batteries) and certainly no automobiles.

Our community is a serious community and we look at much of today’s world as a frivolous distraction from the truly important essence of existence. Worldliness is a snare and a delusion. Heeding the elders’ warnings, there were few among us who were willing to take on the assignment I did and that is the delivery of our product to market. There is much unwanted risk involved and I am thinking of much more than the risk of getting struck down by a mechanized vehicle. I do not fear temptation. I respect the danger it represents but I do not fear it. A job needed to be done and, for the community, I took it on.

I was willing to assume all that came along with my duties and, as the community’s deliverer of goods twice each week, I would do just that as I made my run transporting our commodities into Columbus. In addition to our agricultural work, overseen by Abundance Bruder, we have a fabrication shop with Artisan Bruder in charge. There, we hand make high quality educational wooden toys for children and
garden implements for their parents. These utilitarian objects have achieved some popularity in the local world and, perhaps, beyond. In town, I have become known as Farmer Bliss. People call out my name and wave as I go by but it is my practice to always keep my gaze rigidly straight ahead, resisting the seduction of personal attention.

My conveyance is a simple wagon. I have heard it said that I drive a donkey cart. That is incorrect. My wagon is pulled by my mule Sal. A mule is not a donkey. A mule is the product of breeding a female horse and a male donkey and it is a better animal than either parent. A mule is tougher than a horse, lives longer and is less of a finicky eater. A mule is not a racehorse, of course, but it moves at its own contemplative, comfortable pace. Back when the world was known to be flat, a mule-drawn wagon is all anyone needed to get around and if it was good enough then, it is good enough now.

All right, I was not serious a moment ago when I said that about the world once being flat. I included it to demonstrate that I am not totally humorless. Mostly, maybe, but not totally. I know the world has not changed. It is now as it hath ever been and evermore shall be.

On the morning of June 16, 2016, Sal I were headed into town with a load of wares. On the wagon behind me were six crates of potatoes, three bushels of fresh greens, one case of preserves, a box of seed packets, two two-and-a-half gallon containers of cider covered with cheesecloth, assorted blocks of cheese and a dozen or so of our rakes, hoes and long pole pruners strapped on top. Just before my departure, when the wagon had already been loaded, Artisan asked me to deliver the tools. It may be that I did not tuck them in or lash them down as well as I could have. Ordinarily, I would have placed them lower in the load and not on top. I did carefully place netting over the top and rear of the load to prevent anything from falling off as we travelled down the road.

It was a clement morning and, though it had rained the night before, the air felt fresh and clean. We were traveling on the Meenos River Road heading into Columbus from the northeast. I always drive the wagon very close to the right side of the road so that impatient drivers don’t feel they need to honk their horns at us or pass by too closely. Sal and I are both spooked by sudden horn blasts and by the proximity of speeding hulks of metal.

All of a sudden, I could hear a loud buzzing sound and saw there was a thick swarm of mosquitoes engulfing Sal’s head. I could see they were getting into her eyes, nose and ears. You think a mule has thick skin but they can actually be stung by
mosquitoes and I believe Sal was already being stung. The swarm was coming from a
field on the right hand side of the road and Sal reacted by pulling us sharply to the left.
This was not good.

I shouted “Gee!  Gee!  Gee!” Usually Sal will respond to that command by
immediately turning toward her right. That’s always been the language of mules and
muleskinners in the United States. “Gee” means go to the right. “Haw” means go to the
left. I’ve been told that in England it’s the other way around but I’ve never been to
England and neither had Sal. I know the mules aren’t different, they are just trained
differently, yet there she was turning left at my “Gee” as if she were a British mule.

I really don’t know why Sal did not respond appropriately to my command this
time. She seemed to be controlled by some powerful instinct. She may have been
moving away from what she thought was the source of her torment or she may have
been heading for the river where submersion would be a way to escape the insects. I
just don’t know. What I do know is that we were suddenly crossways in the oncoming
lane of travel.

Turning my head for the first time, I could see a small green car approaching us
at a high speed. Well, I should acknowledge that I’ve ridden on and been pulled by
horses, of course, but never traveled in a motorized conveyance like that so anything
faster than a mule cart seems fast to me. Since I could see this vehicle, I assumed its
driver could also see us and he would either stop or go around us. There was no other
traffic I could see and it seemed like there was plenty of time and room to avoid striking
us.

That is not what happened though. The car slowed a bit but drove right straight
into Sal. You might be surprised to learn that a roadworthy wagon actually has a very
good braking system. When I pull the lever, an oaken brake beam moves metal brake
blocks with wooden shoes into contact with each of the wheels. I brought the wagon to
a quick stop and, with the car slowed by its impact with Sal, the wagon and car never
contacted each other. Of course Sal’s light breaststrap harness broke immediately.
The poor creature’s body rode up onto the roof of the automobile and then fell off
behind it.

With my sudden stop, my load was pitched asunder. The cider was spilt and the
tools flew hither and yon. I heard some of them striking the car. The long pole pruner
shown in Exhibit 2 is one of the tools that flew forward when I braked the wagon,
although I cannot say specifically where it went.
I knew at once that Sal and the man in the car were both seriously hurt and I knew that medical help was needed. But that, I'm sorry to say, was the extent of my knowledge. Although I'd been home schooled with an inward focus on our own community, I'd done a bit of outside reading so I was aware that a telephone is how people routinely summon the kind of help that was needed. I even knew – from reading not experience – the number 9-1-1. Of course I had no telephone with me and wouldn't have known how to use it if I'd found one in the car. I saw no one else around and no one seemed to be driving by.

Although I could have waited, I didn't. In a panic, I started running back toward the community which I'd reckon was a little over a mile behind me. I guess I was the one acting on instinct now. It wasn't out of self-preservation but a combination of confusion and a desire to get help. Cutting across fields, I made it back to the community shortly before Officer O'Sullivan arrived looking for me. From that point on, I affirm that I have been as cooperative as I could be.
STATEMENT OF CRANN LEE

Sure I have regrets. After all, if I hadn’t cast a lure in the direction of old Ike Arias, he wouldn’t have fallen hook, line and sinker for the false promise that brought him crashing to an early death. He would be where he should be and I would be right there with him, likely on the banks of the Meenos. Although I may stand to gain financially if Ithacus is held responsible for Ike’s death, I wish to heaven this had all turned out otherwise.

I grew up in Columbus, Washington but left to go to technical design school in Los Angeles, California when I was 18. With the experience and training I received there, I went on to become involved in the automotive industry, working for several different car companies in Michigan where I lived for a number of years. My area of expertise was in designing vehicle interiors – consoles, dashboard layout, trim, etc.

There is no way you would know this but you are probably familiar with some of the various cup holder design innovations that I came up with. I was successful in this field but found myself tiring of life in the Detroit area and longing for a return to Cedar County. So I was pleased when a professional recruiter named Cazador LaCabeza sought me out and enticed me to come home to Columbus and go to work for Ithacus Solutions.

This happened several years back when Ithacus, previously just a computer software company, was first planning to get involved in developing a driverless car. The company legend is that Telemeka Tennyson, the founder, CEO, president and head guru at Ithacus had lost a beloved sister Millicent in a car-bicycle collision that could and should have been avoided. Rather than brooding or wallowing in counter-productive depression about Millie’s death, Telemeka Tennyson decided to pour much of Ithacus’ accumulated wealth into this program that they said would save thousands of lives on the streets and highways each year. An astute judge of the techno-future, Telemeka saw this project not only as a fitting tribute to “Menacin’ Millie” but also as a sound business venture.

So, when I was brought in, Ithacus was pulling out all the stops in its determination to get our society moving along toward what was seen as the inevitable future with driverless vehicles replacing our standard Fords, Chevies and Toyotas. The “Auto-Auto” Division of Ithacus was started up and some of the best minds in the auto industry and the computer industry were assembled into a brand new team. I was proud to be one of them, although I was far from up to the speed of the computer geeks involved and I don’t know that I was ever 100% sold on the shared vision of the future. Nevertheless, I was in attendance at all the planning and development meetings and I was aware of the thinking that went into all the decisions that had to be made. Division
Manager Dory Dadalos chaired all of our meetings and Dory was, for want of a better word, driven.

I recall attending meetings at which there were high level, fast paced discussions with the team members talking in computerese about matters that were way over my head. What I generally recall the computer folks talking about is how their goal was to have the car’s computer mimic human thought and, eventually, improve upon it as it rationally made the hundreds of split-second decisions that are necessary to have any vehicle safely travel down the road. Of course these decisions wouldn’t be made by any driver’s reflex, hunch or instinct but according to the algorithms programmed into its computer. I had just enough human intelligence to know they were talking about artificial intelligence. In that tech-y way of theirs, I recall them saying “The quality of AI is directly dependent on the size of the data set.” Everyone agreed it would take a fair amount of time to gather and synthesize that data and organize it in a way that could be quickly processed and be utilized to make immediate alterations in the vehicle’s speed or direction.

It was just fine by me that they would take their sweet time in perfecting this key component of the project. That would allow plenty of time for me, in leisurely fashion, to do what I had to do and do it right. My role was to head up the design team creating an interior that would be functional, comfortable and stylish. I had some cool ideas I was excited about but I never saw myself as on a crusade to change the world like some of the people around me. I’m entirely OK with just making the world a little bit better place one cup holder at a time. A lot of those computer people seemed on a mission and happy to work 24/7 but, me, I’d just as soon clock out and head off to do some fishing.

The truth is that sometimes at our meetings I would find myself only halfway paying attention. Of course I was right in the thick of things on those relatively rare occasions when the subject at hand was within my ambit but, too often, my mind would drift off to fishing the Meenos River which, frankly, is where I’d hoped to be spending more of my time.

One of those days a couple years into the project, my mind definitely perked up when the discussion turned to the need to get our prototype out on the street to start racking up some miles. It was time, they all said, to start gathering some real world experience in real time and also to make a bold public demonstration of our progress. Apparently, Ithacus and Telemeka had become major political donors and had developed some friendly contacts in the state legislature. They had managed to get a bill quickly passed that allowed our prototype out on the public roads so long as there was a person on board who could intervene if and when the need arose. Someone was
needed to fill this role and, although the terms “guinea pig” or “lab rat” were not used, that is just how I’ve come to see it in hindsight.

You might wonder why a present Ithacus employee wasn’t simply given this car to use to get to and from work each day. Two reasons, I guess. First, Ithacus people almost all commute to work in one of the company’s fleet of shuttle vans. These vans have incredibly fast wi-fi connections and Ithacus folks insist on concentrating on their work and their play while they’re commuting. It would be too boring for one of them to have to be the vehicle monitor as the Auto-Auto did exactly what they had every confidence it would do flawlessly. The second reason is that the Division really wanted someone to be in the Auto-Auto essentially all day long every day in order to really capitalize on this opportunity.

Anyway, this discussion caught my attention because it made me think immediately of Ike Arias – “Isaac” to the rest of the world but “Ike” to family and friends. Ike was my Mom’s second cousin once removed (I think I have that right) and, although we had never met before, I looked him up soon after I arrived in Detroit. Unexpectedly, we bonded right away. He helped me find a place to stay in his neighborhood and, totally out of the blue, I found a new passion when he insisted on taking me out fishing with him. We spent a lot of quality time together fishing for walleyes on the Detroit River and smallmouth bass in Lake St. Clair. In the quiet moments - and fishing gives you a lot of quiet moments - he used to talk wistfully about getting out of the Motor City and maybe moving out to Washington some day. Ike had been bouncing around in his premature retirement for a number of years and he knew something was missing from his life.

Ike had worked on the automotive assembly lines all his life as had his father before him. When the auto industry modernized and downsized, he was like a dinosaur and there was no longer any place for him. He got laid off (“replaced by a healthier, happier robot” is how he told it) when he was just over fifty. His pension was not quite enough to live on and he was virtually unemployable, particularly in the midwest job market. Far from ready to be put out to pasture but with no real options, Ike was dying a little every day and although he was stoic (on the outside, at least) his situation bothered the heck out of me. Since he was all alone, with no other family but me, I hated leaving him behind when I moved back to Columbus. We’d grown so close that when it came time to make my decision chart for the move, leaving Ike was the only entry on the minus side of the sheet.

I’d been giving a lot of thought to getting him out to the Northwest and I guess he’d been thinking along the same lines. So, when I brought up this opportunity at
Ithacus on the phone, it was pretty easy for me to talk him into giving it a try. I told him he would be like a test pilot or one of the early astronauts and I assured him he was made of “the right stuff.” Ike had been a drag racer back in the day so he liked this. Besides, it paid well. Within a month, he’d pulled up all stakes in Detroit and headed west. I helped him find a room at Mrs. Twinkleton’s rooming house and he settled right in. This was late in 2015.

As far as the job was concerned, Ike quickly declared himself to be “in hog heaven.” Each morning he’d show up at the Ithacus shop, get in the Auto-Auto and it would take him on its preset route that varied each day as it “expanded its database” with new roads, new conditions and new events. As I understood and explained the job to Ike, it was a great opportunity for him to get acquainted with his new state; all he had to do was pay attention and stay alert for any dangerous situations in which case he would have to take control. Of course, he was very soon getting a different message in his other ear.

Ike had no individual direct supervisor. He worked for all of us on Dory’s team. It concerned me a lot when others on the team seemed to downplay his test pilot role but Ike was so happy with the job, I didn’t want to bring him down. Team members seemed to be encouraging Ike to view himself as nothing more than a passenger on a bus or airplane. They encouraged him to be reading or working on his laptop in order to demonstrate the smoothness of the ride and they spoke of “operator intervention” as if it were a bad thing, something to be avoided.

For instance, I distinctly recall one time hearing Dory Dadalos, the head of the division, saying good-naturedly to Ike “It must be nice having a job where you can sleep or play video games all day and get paid for it.” I heard plenty other comments like this from everyone on the team: “Don’t sweat it” “Kick back and enjoy yourself.” “Don’t worry about a thing; you’re in good hands.” As time went on, I began to have major doubts about the situation Ike was being placed in. Everyone knew that the whole team (from Dory on down) held stock and stock options in the company and it was apparent to me that they were eager to maximize that value by beating the hot competition in the potential driverless car market. There had developed a rush-rush mood that was at odds with the more cautious way we had begun the project.

For my interior design work, I had been developing two prototype stages: one would have a full set of controls in front of the occupant of the vehicle and the second stage design would be for when the vehicle was being operated in fully autonomous mode. In the first stage, it was important that the occupant have ready access to the controls; in the second, the focus would essentially be on providing a comfortable
workspace. The image repeatedly presented to me was that of the typical Ithacus employee in his or her own little world while commuting to work on one of the company shuttles. The legislation had given us the green light for stage one’s “monitored testing” but nothing beyond that.

Once the new law was enacted, Ithacus had gone into a rush to get the prototype out on the road. Much of my careful planning seemed to go out the window. I felt more time was needed to get the operator-override controls just right but the decision makers like Dory and Telemea pushed for more aspects of the stage two design to be incorporated at once. While the appearance of operator control was maintained, it was clear to me that occupant safety was being compromised in the interests of occupant comfort and productivity. Access to the braking and steering controls was far more cumbersome than I felt it should be on this stage one prototype. With just a little more time, I know I could have improved it.

My design for the first phase had the seat in a locked position facing forward and fully upright. For later stages, it would be able to swivel 90 degrees to face the working/eating/playing table but in the early testing stage, it was essential that the occupant’s attention be on the road ahead. Although I didn’t think we were close to phase two and there was no need to rush into production of the swivel-seat system, I was forced to complete the designs for it immediately and, unbeknownst to me, this is apparently what was fabricated and installed in the vehicle Ike would be spending his days riding around in. And, by the way, these geeks who may have been experts when it comes to computer chips had no business wielding cutting and welding torches without the automotive engineers in charge. They absolutely butchered the car installing their sensors all over the place.

And this rush-rush approach didn’t just impact my area of work. No one would admit it of course but I could tell it was the same with the operating system side. Oh, those people were brimming with confidence and eager to prove themselves but I know the timetable that had been projected a couple years earlier and the progress benchmarks they’d envisioned and we just weren’t there yet. We weren’t even close. It was far too dangerous to unleash that beast.

As I got more and more insistent with Ike about the need for him to be vigilant and not lulled into complacency, the more he seemed to move in the opposite direction. He was buying into the rest of the team’s inflated confidence that the Auto-Auto could do no wrong. It was like they had gotten him to share their pride in the vehicle development that they said was so far ahead of schedule. While that may be true, the system was far from infallible. To me, it seemed they had put Ike in a position where he had to continue
to show he was a part of the team by being totally blasé about trusting it with his life. Ike was accustomed to working hard all his life for his meager paycheck and I think he also had himself convinced that this – easy money and an easy life – was his reward.

It says a lot about Ike’s generous spirit that my becoming such a nag with him didn’t strain our relationship. When I got tired of bugging him, one time I asked our print shop to make up a reminder sign and put it in the car. I think he knew I had his interests at heart but he just wasn’t willing or able to change his approach. He would wave off my concerns by saying he knew he could count on Dory and the crew to look out for him and I would respond by saying he should only count on his fingers and his fingers should be tight on the steering wheel. He’d laugh and say the one he really counted on was his good friend Otto. He called the Auto-Auto by the name Otto Bot-o and he’d been led to believe he could trust his “robot chauffeur” with his life.

About this time, I began to feel deeply distressed at discussions I was hearing at our team meetings. Things were moving way too fast. At a meeting in March of 2016, I was shocked to hear for the first time detached and even jokey talk of programming the car for scenarios in which it would deliberately cause “n deaths” where this might avoid causing “n+1 deaths.” I couldn’t follow all this, of course, but it was like they were writing code for a video game and nothing more real.

For some time, the focus of what was going on had clearly been shifting from the cautious testing I felt was appropriate to “demo-ing the user experience.” I was outraged to learn at that same meeting that they had replaced the side windows behind the doors with something that looked like plain glass but was really an interactive transparent holographic projection screen. Movies, games, advertisements, really anything at all could appear there and this area – larger than a computer screen – would grab the attention of the so-called “user” who would no longer bear any resemblance to a “driver.” To me, this was clearly an interior issue that required consultation with me but, correctly thinking I’d disapprove, the rest of the team had bypassed me and gotten Dory’s go-ahead. I stormed out in a huff and I never went back to the company.

On the morning of June 16, Ike called me from work on his cell phone. Apparently he was doing an online crossword puzzle which is something he would do even though I’d begged him not to. He knew I did the New York Times puzzle each morning with my coffee and he’d call me for help. I remember what he said that day perfectly because I’d just finished the puzzle myself and because they ended up being his last words. He said “What’s ‘Like technophobe Ned?’ Seven letters, starts with L?” I was in the middle of saying “Ike, you gotta pay attention!” when I heard the awful thud
and then silence. There was no screeching of brakes or swerving tires – just that
sudden thud. Poor Ike never knew what hit him.

I put in a call to the Auto-Auto team at Ithacus but no one would take my call. I
would have gone in search of Ike but I had no idea where to look. After an agonizing
couple hours, I heard a radio traffic report on the fatality on the River Road and I was
filled with a sense of foreboding. I was devastated then and from the earliest moments
up to the present, I have been balancing my strong emotional reactions of guilt and
anger.

After Ike’s death, I got the impression that Ithacus and Dory Dadalos simply
viewed the crash as another bit of data collection that would lead them to commercial
success on their project. Rather than taking a step back to re-think their goals and
methods, they coldly saw the utility in the experience and were using it to charge ahead
into the future.

Since the County Sheriff didn’t seem to be going anywhere with their
investigation, I retained Terry Terhune to help me get to the bottom of things. We met
up at the same little coffee stand where Ike and I had met for coffee before but I believe
it was a different person working there that day. I remember the other worker’s hair had
us joking about a certain dry fly you might use for rainbow trout. In any case, I don’t
recall speaking with either barista other than placing my order. When I met with
Terhune, I was mainly in listening mode. I don’t believe I expressed any opinions of my
own. From Terhune I learned that Dadalos had actually bragged about the Auto-Auto
deliberately blotting out Ike’s life. To me, it is unconscionable that Ike would not have
been advised of this programming and given the ability to make his own informed
decisions. That was his right and it was taken from him.

I’m telling you, that Ike was a great guy and he was only 67 when he died. That’s
him in Ex. 3. I really wish my Mom was still around and could help me out with the
family history and maybe tracking down some other relatives. It may be that I’m his only
living relative and that I’m the sole beneficiary of his estate, I just don’t know but if there
is no other relative, I’ll definitely be instituting a wrongful death lawsuit against
Ithacus. It’s important to me that Ithacus be held responsible, either criminally or civilly,
just as a testament to Ike whose life shouldn’t have ended like this. He was an
autonomous human being and I feel that his right to make his own decisions was taken
away from him by subtle means. It’s on me that he took his seat in that car in the first
place but it was others that turned him away from safety and then, as I now understand
it, actually steered him to his death. I will have a very hard time forgiving that.
STATEMENT OF TERRY TERHUNE

In late July of 2016, I was contacted by one Crann Lee of Columbus, Washington and asked if I could provide assistance in connection with a motor vehicle collision then under investigation. I was happy to oblige. The situation, as outlined for me, was both unusual and interesting and, although my knowledge may come up a little short in certain respects, I felt I could definitely provide some helpful insights. My professional work is as an independent traffic accident reconstructionist; I maintain my office and lab in Missoula, a short Montana drive (about 120 miles) from the ranch where I grew up.

In my field, we conduct in-depth investigations and analyses using all available evidence concerning a vehicular collision and, based upon that, we formulate and convey our conclusions as to causation and contributing factors. All this involves a combination of the laws of physics and engineering principles as well as what is called “human factors” analysis and, on top of all, application of common sense and life experience.

The physics and engineering I picked up in getting my B.S. from the University of Montana. Human factors training has been the special focus of several advanced programs I have attended at the Northwestern University Traffic Institute in Evanston, Illinois – following my successful completion of their intensive six-week Crash Investigations course. As for life experience, well, I’ve driven millions of miles under the Big Sky and I also spent four great years as a Sheriff’s Explorer, helping with (and learning about) traffic enforcement and investigation. After a brief apprenticeship with a national forensics firm, I became nationally certified by ACTAR – the Accreditation Commission for Traffic Accident Reconstruction. I have testified in court as an expert witness on dozens of occasions and I am compensated for my time (analysis, writing and testimony) at a rate of $450 per hour.

When I was retained by Crann Lee to investigate this incident, we met up at some outdoor coffee shop in Columbus to go over the accident report and preliminary investigation. I was told that there was an anticipated civil lawsuit claiming wrongful death of Isaac Arias (and I do recall Crann was mighty hot to go after Ithacus) but also that Crann had not entirely given up on convincing the prosecutor to bring criminal charges. I guess that is what has happened and now I suppose my expertise will be utilized in both proceedings. In whatever context I testify, my opinions are the same.

I was not at the scene and so must rely upon police investigators for their initial descriptions, their observations and their measurements. Officer O’Sullivan did a reasonable job, I guess, of collecting available data at the scene – locations, distances, etc. I did supplement this just a bit with information I collected on my scene visit such
as a coefficient of friction for the pavement surface. Where I do find fault with the initial
investigation is in the failure to push harder to glean a fuller understanding of the inner
workings of the vehicle in question. Of course, my own lack of experience in the
emerging world of self-driving cars leaves me in a position where I can’t be too critical.
To conduct a good investigation, one must first know enough to know what to ask and
then must have the confidence to keep pressing until there’s a clear answer.

Evidently the “Auto-Auto” (as they called it) was equipped with some sort of a
“black box” or “event data recorder.” Such a device can provide valuable diagnostic
information but, in this case, I was not provided with any such data. Apparently the
vehicle’s owner asserted that making it public would reveal proprietary trade secrets in
which they’d heavily invested and they were unwilling to let that cat out of the bag.
Their unwillingness could be measured by the army of high-powered and high-priced
lawyers they put to work building that particular wall. In any case, they also said that if
the box were seized with a search warrant, it and any data it contained would be utterly
incomprehensible to anyone but an elite few and those few would not be cooperative.
The decision was made not to push this issue (like that encrypted iPhone case in San
Bernadino, California, I guess) and that was that. I don’t know if Crann Lee’s lawyers
will try to take this further as part of discovery in the civil case (I hope so) but, for now, I
believe I have all the information I need to offer my conclusions, all of which I hold to a
reasonable degree of scientific certainty.

Longstanding national regulations for standardization in motor vehicles define a
“driver” as “the occupant of a motor vehicle seated immediately behind the steering
control system.” That would make Isaac Arias the driver of the Auto-Auto on June 16
and he would be the one solely responsible for its safe operation. It is also true that in
2013, the National Highway Traffic Safety Administration (“NHTSA”, pronounced NIT-
zhah) adopted a “Preliminary Statement of Policy Concerning Automated Vehicles.”
Applying the terms of that policy statement, it has since declared that, in a self-driving
vehicle (“SDV”), the self-driving system (“SDS”) may be considered to be the “driver.”
However, this would only apply to automated vehicles that are being lawfully operated
at “Level Four,” and neither the technology nor the law has gotten there yet.

That 2013 Statement defined a Level Four vehicle as one that is

“…designed to perform all safety-critical driving functions and
monitor roadway conditions for an entire trip. Such a design anticipates
that the driver will provide destination or navigation input, but is not
expected to be available for control at any time during the trip. This
includes both occupied and unoccupied vehicles. By design, safe
operation rests solely on the automated driving system.”
Ithacus Solutions, however, did not have authorization for the operation of a full Level Four vehicle. The laws permitting them to test the Auto-Auto were only for Level Three and with precise conditions. At that level, the “driver can fully cede control of all safety-critical functions in certain conditions.” In Ithacus’ case, those conditions for the full ceding of control were limited to travel on four lane divided highways. On a two lane road, such as River Road where this incident occurred, there was to be a human driver overseeing the operation of the vehicle. The SDS was OK controlling the steering and braking (“safety-critical functions”) but this was subject to the requirement of continual human oversight. This was an absolute, ironclad, mandatory requirement both under the law and as a matter of regard for personal and public safety.

Now, I am decidedly what you might call a Level Zero kind of person. At that level, the “driver completely controls the vehicle at all times.” I can live with some of Level One like automatic braking systems and electronic stability controls but beyond that, I’ll admit I would be very, very nervous. I like to be in control. This Arias fellow, I gather, was cut from a different cloth and was considerably more lax about ceding control. To the extent that, on the one hand, he deliberately struck the animal or, on the other hand, he knowingly went along with the SDS deliberately crashing, I suppose this is on him but I believe there is more to it. From what I know through Crann, I believe Arias was manipulatively kept in the dark and given misleading information about the dangerous vehicle in which he was being placed. This is confirmed by my own human factors training according to which I can say that avoiding this collision and saving his own life would have been the overwhelmingly standard response of a driver in the situation in which he found himself.

OK, let’s climb back onto the firmer ground upon which I’m accustomed to standing and can do so with confidence. That is the area of roadway and vehicle conditions and the probable response to be expected of a reasonably attentive and prudent driver to a given situation.

At the location of the accident, River Road is a two-lane, two-way asphalt road in good repair. The surface is smooth and it provides a level of friction that meets or exceeds federal highway standards. It was designed and built with a slight convex camber to assist with drainage. The roadway has no overhanging trees at this location.

As is routinely done in my field, I have researched publicly accessible records of the National Weather Service. On June 16, 2016, between the hours of midnight and 0600, precisely .12 of an inch of precipitation was measured at the Columbus Municipal Airport, six miles from the accident location. There was no further precipitation recorded
that day. The sun rose at 5:15 a.m. and shone through broken clouds all that morning.
By late morning on that date, I see no evidence supporting a conclusion that the
pavement would have been wet and/or slick.

I am, of course, familiar with the principle known as “split friction” — a situation
that occurs when there is a significantly different coefficient of friction between the left
and right wheelpath of a vehicle. In such a situation, hard braking will cause the vehicle
to rotate in the direction of the side having the superior grip. So, for instance, if the tires
on the right side were traveling on compact snow and ice while the left side tires were
on clear and dry road, slamming on the brakes would result in the right side of the
vehicle swinging out ahead of the left side and carrying the whole mass in a leftward
direction. I saw no evidence to support a conclusion that this was a factor in this
collision.

From the police, aid crew and medical examiner reports, I can reconstruct the
mechanics of Mr. Arias’ death. It is noteworthy that what we would usually call the
“driver’s seat” of his automobile was found to be locked into a transverse position. That
is to say that rather than facing forward, the occupant of that seat would be facing
directly toward the right side of the vehicle rather than in the direction of travel. Directly
in front of that seat (i.e., where a passenger seat would ordinarily be located), there was
a fold-down table such as one might see in an airplane cabin or the galley of a boat. It
was also noted that the adjustable steering wheel had been raised and placed in a
position that would be less accessible to, but provide greater elbow room for, the
occupant of that right-facing seat. The accelerator and brake pedals were in their
standard positions but, of course, would not have been at the feet of Mr. Arias.

Recognizing the obvious that neither this car nor this driver may have been
typical, it is my conclusion that a typical driver of a typical vehicle could have and would
have easily avoided this collision. From the various witnesses’ testimony, I believe
there was no other traffic in the vicinity. Besides the ample space, in light of the good
visibility, there was also ample time. I don’t have possession of any hard facts
supporting a conclusion that anyone else would have been endangered by Arias taking
evasive action. I do not believe that anyone can speculate about what might have
happened.

Given the point of impact and assuming the high end of the speed range of a
mule, I conclude the Bruder “vehicle” was in the oncoming lane of travel for a minimum
of five seconds prior to impact. From the point the Arias vehicle rounded the preceding
curve, there would have been roughly 200 feet in which the obstruction ahead was
clearly visible. I would apply a fairly standard two second period as perception-
response time. That is the time it takes for the image to hit the retina, the brain to
process the information and send directions to the hands and feet, those appendages to
take action and then the brake fluid beginning to move the brake calipers or the steering
gear beginning to turn the front wheels. During this time, of course, the vehicle
continues moving forward and at 40 MPH it would travel 58.667 feet per second. From
a speed of 40 MPH, hard braking would have brought the vehicle to a stop in 80 feet. I
am confident in saying that a reasonably attentive and prudent driver would have
responded in such a way and would have either gone around this obstruction or
stopped short of striking it.

Finally, I'd like to look at how Arias' death was the direct product of this vehicle's
modifications.

Looking at any vehicle from the side, the vertical members that support the roof,
are called “pillars” and they are traditionally labeled A, B and C going from front to rear.
On this vehicle, the A pillar is that between the windshield and the side window; it
supports the roof at the front. Along the side, there is a vertical piece of trim that is not
structural but merely served to separate the side window (which went up and down
conventionally) from the small, fixed window behind it. The B pillar on this vehicle is
actually at the rear corner of the vehicle. It is most definitely intended to be structural
and generally is. In its original construction, it is quite robust but on this modified
vehicle, it was not.

And this is why what would have been a minor collision, if not avoided altogether,
became a fatality. In this vehicle the B pillar had been modified apparently in order to
mount various sensory devices. The cuts and re-welds on the pillar weakened it to a
degree that it did not do its job adequately. I'm not saying that it wasn't strong enough
to withstand a rollover, protecting the occupant. What I'm saying is that it flexed to a
degree that, under the circumstances, was unacceptable and this deformation had
devastating consequences.

The car never rolled over, of course, but there was a significant blunt force
impact to the roof when the car struck the animal and the animal rode up and over the
car. This impact caused the weakened B pillar to buckle just enough to pop the small
side window loose. That the window popped outward demonstrates that it was not
struck by any outside object pushing it inward.

Among the purposes of a car window is the protection of the occupant –
protection from wind, rain and foreign objects. In this case, an intact window would
have prevented any foreign object from entering into the cabin. This particular foreign
object that entered was an exceedingly sharp implement that fatally severed a carotid artery in the neck of Isaac Arias.

From all of my investigation and analysis, I have reached the conclusion that Ithacus Solutions is responsible for this death for multiple reasons. The death of Isaac Arias was directly caused by the design and construction of the vehicle and by the extremely vulnerable position in which Mr. Arias was unwittingly placed.
STATEMENT OF VICTA FUNK

I am proud of my Masters degree in molecular biology but here are a couple things I didn’t need graduate school to teach me: stagnant water and a stagnant society are both unhealthy environments. One provides a breeding ground for disease-carrying mosquitoes and one breeds lassitude and indolence and, ultimately, a second rate nation. Innovation is what made America great. We cannot afford to sit idle and let that spirit of innovation peter out. Whether you’re talking about the cotton gin, macadam roads, the Model T, plastics, electric guitars, the Flavr Savr™ tomato or the steadily improving salmon, we’re talking about manmade progress. New Frontiers. Manifest destiny. Better living through science.

The field I work in, I call species development and improvement. It is no different from designing a better mousetrap, building a more powerful microprocessor or putting a man on the moon. Instead of splicing wires with pliers, we work with genes. Some folks get squeamish that we are tinkering with life forms and not just gizmos and contraptions but that is a detail of no significance. The goal of human advancement requires that we explore the contemporary outer limits of what’s known and that we not timidly back away from whatever is there to be accomplished. If we right-thinking Americans don’t do it, then it is certain someone else will. If something is a bad idea, or it’s approached in a wrong fashion, then it will be left by the wayside through natural selection – a principle that applies to ideas as well as to dodos and other living things. As I once read in an important book “the labours of those of genius, however erroneously directed, scarcely ever fail in ultimately turning to the solid advantage of mankind.”

In late 2015 - early 2016, the challenge that popped up and demanded a solution was the emergence of the Zika virus that seemed suddenly to be the cause of birth defects and paralyzing nerve disorders – starting out in Brazil and then working its way through the Caribbean and into North America. It also appeared evident that the virus was being carried from person to person by mosquitoes as they first bit an infected person and then a healthy one. Since I had been doing some research work with mosquitoes already, it fell to me (among others) to get cracking on finding that solution.

Why was I messing with mosquitoes? Well, I’ll tell you, I’m not really an entomologist by training but these little guys are a pretty interesting study. Did you know they have been around for over 100 million years and recently they have gotten tougher to control because of growing resistance to insecticides? I was also interested because the little buggers invite the thought that nobody at all would miss them if they were to disappear entirely from the scene. We’ve all felt the torment of their stings and,
with the pain, itchiness and swelling, that is not a pleasant experience. Beyond that, though, they are champions of disease transmission: malaria, yellow fever, more recently dengue and now Zika – mosquitoes are vectors for all. Sure, they form a small part of the diet for bats and salamanders and they do a small amount of pollinating, but they really play no meaningful role in the ecosystem. Nobody loves them and nobody is dependent upon them.

I had been working on a project to map the mosquito genome and I had been giving considerable theoretical thought to the notion of eradicating mosquitoes through genetic modification. I know a lot of people get uncomfortable when talk turns to modifying a life form or removing a species from the planet – and I’m talking about doing both! Frankly, I don’t give a snowy owl’s hoot about those who whine that it’s morally wrong or that it’s “playing God.” If we don’t stand up for our own species, tell me who will? Mosquitoes should be afraid of humans; we should not be afraid of them.

On the other hand, it does get my attention when scientists make the pragmatic argument that wiping out all mosquitoes would result in a dramatic increase in the human population beyond what the earth can sustain. In short, one of the few beneficial things done by mosquitoes may be to keep the human population in check and thus alleviate the strain on global resources. Apparently there is some utility in keeping them around.

Here’s my practical solution. We’ve effectively eliminated malaria in the United States already but we’re now worried about dengue fever and the Zika virus. Malaria is transmitted by the *Anopheles gambiae*, a species endemic to sub-Saharan Africa where 95% of malaria deaths occur. So, we give these little guys a reprieve and aim our guns at *Aedes aegypti*, the species that carries viral diseases like dengue and Zika and that are directly threatening us Americans. If they want to go back to Egypt, that’s OK by me but let’s at least render them extinct in our own backyard.

In the spring of 2016, my Cedar County lab was continuing with its gene mapping efforts but we started really gearing up to practice some exciting new “synthetic biology” on the mosquito population. Instead of altering their genetic code to make them bigger, stronger or more flavorful, our goal with this species was to program it in the direction of its own extinction. We do this by rewriting the genetic code of these mosquitoes to include a lethal gene. This synthetic gene is implanted in the males in their larva stage and they are then released into the wild to mate normally with females encountered there. The females, then, proceed to have offspring that will not survive to their own mating stage. Since the life span of this species is only a few days, within one season we would hope to decimate, if not eradicate, the mosquito population. Actually,
decimate is the wrong word since I now recall that it literally means to remove one-tenth. I expect that we could remove nine-tenths if we didn’t achieve total eradication.

Of course, we were not yet authorized to release our “hot males” into the wild. Facing some uninformed but stubborn public opposition, we were still waiting on the regulators’ approval. We were, however, going full throttle on our research and development. At our North Columbus facility, we were breeding, hatching and experimenting with literally millions of *Aedes aegypti*. They were at various stages of development and modification as I, with the help of my two assistants, oversaw the project. Although there was certainly a risk of inadvertent release into the environment, our plan was to conduct carefully controlled field trials.

With a view to generating community support for the work we were doing, we were making a big effort to be open and transparent. On the morning of June 16, 2016, I was hosting a group of 5th graders on a science class field trip and they had just arrived. I would say there were about 20 kids, one science teacher and two parent chaperones. It was a little bit larger group than ideal since the youth of our species tend to gravitate toward mischief and, sure enough, these kids proceeded to find some.

We were all standing around outside the main breeding shed – a greenhouse-like affair in which the mature mosquitoes were being held. As I was explaining some things to the teacher, I heard a violent crash. Evidently one of the kids had thrown a hard object and it had gone through one of the three-foot square glass panels. Thousands of the mosquitoes immediately escaped into the warm sunshine and fresh air. Like just-released convicts, you could see they were eager to taste their freedom.

A handful of kids were in their path as they exited the shed and the kids took off running – swarming, themselves – back in the direction of the road. The biomass of mosquitoes was swirling around them at first but then moved on toward an animal that was pulling some kind of cart in the Columbus-bound lane of the River Road. I could see right where they were headed. It is well documented that mosquitoes are attracted by people wearing dark clothing and I could see the person on the wagon was dressed all in dark clothing. But the main attraction for mosquitoes is moisture. I later saw the tubs of liquid (smelling like cider) that had been sloshing around and that could always have drawn the mosquitoes’ attention.

Most likely, though, in my opinion they were drawn to that sweating animal exhaling fresh blasts of carbon dioxide. (By the way, it is very common for mosquito swarms to attack caribou in Alaska and, here, in the lower 48, we have had documented cases of mules contracting the West Nile Virus by transmission through mosquito bites.)
Of course, the irony is there were mainly male mosquitoes in this swarm and it is only the females who bite. These buzzing pestering dudes weren’t about to draw blood from either the biped or the quadruped. Still, there were probably several thousand of them forming a cloud that was dark, loud and certainly an attention-grabber.

Anyway, the poor beast of burden panicked and went into sort of a clumsy trot, jerking the cart wildly across the road and right into the path of an oncoming vehicle. Meanwhile, the kids had stopped at the northwestern edge of the road, within about 10 meters of the animal at the time it was struck.

At first, I thought the vehicle – a smallish green car – would either stop or easily go around the cart but it did not. Instead, it crashed hard into the animal and the animal flew up over its roof. The cart then either gently made contact or stopped just short of hitting the car. It was a wildly chaotic scene. The kids were screaming, the mosquitoes were buzzing and the poor beast was ever more faintly braying.

And the pious-looking person on the cart seemed briefly to be praying. I doubt it was according to divine guidance but the person then got down, said a quick consoling word to the animal and then took off running back in the direction from which they’d come. I don’t think the person ever saw me or anyone else at the scene.

As I started going over to the carnage, I guess the teacher had managed to get the kids gathered up and calmed to a whimper and it started to seem eerily quiet. Adding to the eeriness was that there was a lot of pooled blood around – both from the animal in the road and the man inside the car which had a busted out window and some sort of pole reaching into it – and the mosquitoes were getting stuck in the gooey mess.

I was not about to touch anything or go inside the car. I called 9-1-1 and it wasn’t long before the medics and police arrived. I gave a statement to the officer but the fact is I really couldn’t give any opinion on what options the driver had and how he’d handled the situation. What I could say and did say is that I felt awful about the role my skeeters played in all of it and about the lack of supervision of the kids that gave the skeeters the opportunity to play that role.
STATEMENT OF DORY DADALOS

Ithacus Solutions is one of the largest employers in Cedar County and certainly the most progressive company based here. I say that both in reference to the product line we offer now and are developing for future launch and also to the enlightened treatment of our employees. I am proud to have been one of those employees ever since CEO Telemeka Tennyson brought me here in 2006 to spearhead the new Artificial Intelligence Research & Development Team. I am currently a Vice President of Ithacus and I hold a not-insignificant ownership interest in the company. Since its inception, I have been the Managing Director of the Autonomous Automobile Project or “Auto-Auto” as we call it.

Ithacus has long been at the forefront of the software industry. This is attributable to Telemeka’s vision and that vision is exemplified by the way in which our AI team was not given any fixed goal or application to lock in on. Initially, we were basically just fooling around with board games and card games and, oddly enough, some work with facial emotional cues and wardrobe selection models. We were learning quite a lot although none of it was especially practical or easily monetized.

Everything changed in August of 2009 when Telemeka’s sister Millicent was run over by some madman driving a Cadillac Escalade. Telemeka immediately steered us onto a course of developing the software to be the brains of an autonomous vehicle or driverless car. Bold, determined, intense, uncompromising – these are some of the words used to describe Telemeka’s manner in general and these characteristics were all especially evident with this project. “Let’s get it done” was the message and everyone hearing it knew that that’s the way it was going to be. No half steps; the mission we were given was to “re-format the entire mobility experience.” Auto-Auto was given “committed project” status and, internally at least, our anticipated release date was ambitiously set for 2019 – 10 short years down the road.

Just as the horse-and-buggy era came to an abrupt end with the arrival of the automobile, we are now fast approaching the end of the era of the automobile as we have known it. We at Ithacus were about to take charge of this transition. Removing human failures from the operation of vehicles would be the new game-changer. As our roads are gradually turned over to autonomous vehicles, this is going to save many thousands of lives each year. Human drivers are distracted by so many things – putting a CD in the player, texting, taking a phone call, eating a hamburger, quarreling, staring at an attractive pedestrian, etc. The list is as long as our attention spans are short. The computer operating a vehicle is subject to none of these distractions that impair driving. And in this new age we are entering, the human getting transported will be free to enjoy
that hamburger, get lost in that movie or text or do whatever he or she chooses to do with that time that we would be gifting back to them.

OK, let's just look at just one more safety example. Think about the drivers whose concentration, judgment, reaction time and motor control are impaired by alcohol or some other substance in their blood. These drivers alone are responsible for around 10,000 traffic deaths each year in the United States. A fully autonomous car would have gotten each one of them home unhurt and without having hurt anyone else.

So that was our mission - to create a substitute for a driver's eyes, brains, hands, and feet. There were certainly going to be mechanical or functional aspects to rigging up all of this but partnering with someone else was seen as only likely to slow us down so we took the hardware responsibilities in-house as well. It would have been nice to go fully cutting edge with an electric vehicle but we wanted to minimize the number of unknowns. So we acquired a little three-cylinder, rear engine SMART Passion that was capable of being adapted relatively easily for our purposes. I was amused to note that the cop thought our car was an Isetta. While that might have been cool, the bumper height on the Isetta could never have been modified to comply with current US standards and, as I would emphasize, safety issues are very important concerns for us.

We did have to bring in a handful of auto industry folks to help us pair the software with the hardware. I'd be lying if I said there wasn't sometimes a little friction between the two camps but we generally got along OK and Telemeka was great about always supporting me as having the final say on any project decisions. If everybody is in charge, they say, nobody is in charge. With Auto-Auto, I am in charge.

Take color. I had heard that the writer James Joyce once said you could have a red rose and you could have a white rose but you could never have a green rose. Well, guess what? Joyce was wrong. Now you can. Life marches on and science marches right along with it – maybe sometimes a step ahead. Anyway, to honor Joyce's misjudgment, I directed that the color of our Auto-Auto would be known as "rose green".

By late 2015, we were up and running and the Auto-Auto was ready to start racking up some test miles and showing the world what it could do. I hired Isaac Arias as our tester – out of Chicago, I think, a big Cubs fan. We were going to take in a game sometime, I loved the guy. It's terrible what happened to Isaac but it's completely understandable how it happened.

First of all, you have to understand Isaac's job. Isaac understood it, I have no doubt of that. His job was to monitor performance of the test vehicle, to give feedback
to our engineering team and to protect company property from either being harmed or
causing harm. In his training and thereafter, Isaac was told he had to keep paying
attention even though he was disengaged from the task of driving. Even if it never once
became necessary for him to intervene, and that would most likely be the case, he had
to be able to report back to the team on situations the Auto-Auto handled particularly
well or not so well. Yes, all of us had our confidence levels growing higher and higher
all the time and we would all joke with Isaac about his easy job but Isaac was never told
not to pay attention. At some point, someone on the team even made a dashboard sign
to go in the vehicle to remind him to stay attentive. At that time, Crann Lee was in
charge of interior fittings and that’s probably who did it. Before inexplicably flipping out
and quitting on us, I have to say Crann was a good employee.

You know, I was struck by Terry Terhune’s mention of being “a level zero kind of
person.” Maybe I was that 10 or 15 years ago but now I have to say my concern for
public safety makes me fully a level four person. Frankly, anything less is a statement
that we’re comfortable with the present rate of loss of life caused by traffic accidents.
Since we possess the technological capability to create something that handles
personal mobility functions better than humans do, it is irresponsible for us not to
implement this as quickly as possible.

Studies show that 94% of all motor vehicle accidents are caused by human error
and fully autonomous cars will eliminate the vast majority of these. It’s not that I don’t
trust people but, I’ll tell you, cars are simply more safe when humans are altogether
removed from the equation. I would love to promise that we could be wreck-less with
our technology but that’s not realistic. Some crashes of autonomous vehicles are
inevitable – like that level three Tesla that hit a tractor-trailer in Florida last May. As
time goes on, these will be exceedingly rare and there will be a tremendous overall
reduction in the incidence of bad events. In the meantime, there will be setbacks but we
need to stay confident that we are climbing that learning curve.

To my mind, Ford and Volvo are taking the right approach. They are hard at
work on development of fully autonomous vehicles and aren’t about to mess around at
the dangerous semi-autonomous level three. In our case, we were given the
opportunity to do some testing under real-life conditions but with the requirement that
we do it in a way that could actually create more danger than there might be otherwise.
In a testing situation, there is a risk that a “standby driver” could be lulled into a false
sense of self-importance and intervene disastrously. We honored our commitments to
the state. Even though our technology was fully safe to be operated at level four, we
made sure that Mr. Arias fully understood his responsibility to remain vigilant at all
times.
The truth of the matter is, the Auto-Auto was just fine – probably better off – without him paying attention. What happened on June 16 is a perfect example. A human driver would have seen the animal, reflexively slammed on the brakes and skidded right into that group of schoolkids taking out probably four or five of them. Better to have what happened happen.

Our Auto-Auto was equipped with our unique application of lidar technology. Lidar means light detection and ranging, a big step beyond radar which is radio detection and ranging. Wanting to be sure we had too much information rather than too little, we cut and drilled that car’s body like Swiss cheese and installed sensors everywhere we possibly could. By sending out constant laser pulses in all directions and timing their return, the system creates a precision 3-D map of the vehicle’s surroundings. This produces something like a video stream that is analyzed by object recognition algorithms. With this information instantly processed, the car’s brain then determines and executes the wisest course of action based on all of the circumstances.

It is true our recognition program hadn’t yet logged enough real world experience to be perfect but I’d put it at about 97%. Given the far less than total level of attention by the typical human driver, I think the Auto-Auto was many points ahead. Sure our technology still has flaws but we’re nowhere near as flawed as most all drivers.

I’ve had a chance to examine the confidential, proprietary information from the Auto-Auto’s “black box” data recorder in order to recreate its thinking out on River Road on June 16. The system clearly detected the presence of a large animal moving into the car’s path. It can easily distinguish between a small animal like a squirrel, dog, cat or raccoon and a large animal like a deer or a horse. It hadn’t been “taught” and didn’t have the experience yet to allow it to make finer species distinctions than this but really it wouldn’t need to. It was readily apparent that the object in its lane was not a car, truck, bus or human but something with four legs and a large upper body mass, i.e., a large animal likely a horse.

The Auto-Auto made instant calculations. Assuming the horse was of average weight (roughly 1500 pounds), striking it at a speed of 45 MPH would involve a 90% chance of killing the horse and a 60% likelihood of killing or seriously injuring the vehicle occupant or any person who happened to be on the horse. Light braking, for which there was a very brief opportunity, would shave a bit off the vehicle’s speed and a bit off the mortality odds but not an appreciable amount. Ergo, hitting the horse is something we don’t want to do. So, the Auto-Auto looks at the options – the exact same options available to a driver or to the Auto-Auto.
The option of steering to the right was not one that was considered because of far too many unknowns in that direction. From the car’s vantage point, the river was not in the line of sight for the lidar and it would have been impossible to have the algorithm programmed with precise river conditions at all times and locations – information such as depth, current, submerged rocks, water temperature, etc. A human driver would never choose to go in there and neither would the Auto-Auto.

The remaining choice was to brake hard. However, the moisture sensors built into the tires read the road conditions, particularly on the right hand side, as “wet and slick” and hard braking (the only kind of braking that could have had a chance of avoiding the horse) would have resulted in locking up the brakes and putting the car into a skid. Just before the impact, the vehicle was negotiating a right hand bend. With its anti-lock brakes and the car’s forward momentum, that skid would have put it on a path that took it across the westbound lane and onto the opposite shoulder.

There was no oncoming traffic and there was sufficient flat space, including the adjoining parking lot, within which to bring the vehicle to a stop. However, the Auto-Auto also detected the presence of a number of children (also discernible by their size and shape) within the probable path of the skidding vehicle. The odds of causing the death of two or more of these children was pegged by the Auto-Auto’s onboard computer at roughly 75%. The deliberate extinguishing of those young lives is a result that we would all wish to avoid.

It is true that the brain of the Auto-Auto (its onboard computer) selected a course of action that involved a more-probable-than-not outcome of death of its occupant. Circumstances, however, made this the less tragic of the potential outcomes and, therefore, the Auto-Auto selected it as the most desirable one. Understand, I am not saying this was my analysis or my decision on June 16. It was the analysis and decision of the Auto-Auto taking into account all of the dynamic factors discernible to it. Although quickly done, this was done with full powers of concentration and a rigorous regard for all the attendant risks and benefits. In other words, it did better than a human like Isaac would have done.

We knew there would come a time, sooner or later, that a choice would have to be made between two undesirable outcomes. A quick decision is what was needed and that is what the Auto-Auto delivered. It is certainly unfortunate what happened to Isaac but the Auto-Auto performed as programmed and did nothing wrong. Nor, if I may say so, did I. Maybe a super-vigilant, super-cautious, super-quick witted driver might have seen some way to avoid a collision but I strongly, strongly doubt it.
It may be true that the roof flexed but it had the strength to hold and do its job. Ike suffered no crush injury and, with his seat belt fastened as it was, he was protected even if the car had rolled over. As it was, although banged around quite a bit, he would have had a decent chance of surviving if it hadn’t been for the freak occurrence of those sharp instruments unexpectedly flying around in the cab of his vehicle.

There is no disputing that Isaac was a nice old guy – and I use that description advisedly. I understand that his death evokes sympathy but I’d much prefer to be subject to this prosecution and the expected damages lawsuit than to be battling with the families of several children who had been squashed like mosquitoes.

Sad though it is, we couldn’t afford to pause. We had to learn from the experience and move on. You must understand that we are in the final laps of a very intense race to get this product developed and launched in the market. We can’t give up any advantage we may currently hold over our competition. If those competitors were to learn of the unique method we have for processing the lidar data into our algorithms, they would be enabled to leap forward in their own development and potentially to pass us by in the race to market. That is why I feel I must insist that, if it should become necessary at trial to go into any specifics of our confidential and proprietary technology, the courtroom be cleared of spectators and press and that all who remain be made subject to a strict gag order.
STATEMENT OF EDISON CORTADO

“CHANGE IS GOOD!” That’s what the cardboard sign next to my tip jar says and I wholeheartedly subscribe to that wise philosophy.

It used to was that people would be content just to stir some coffee grounds into a pot of water boiling over a wood fire and drink it up out of a tin cup. Then, later, folks’d saunter into a greasy spoon diner and order themselves a “cup of joe” for something like a quarter with free refills. Everything changed and nowadays they’ll swing by my drive-thru coffee stand and plunk down three, four or five bucks for a latte, mocha or Americano. My favorite order is a double tall mocha for which the customer hands me a crisp five spot, $4.25 of which goes into the till and the rest, more often than not, lands in the tip jar. Like I say, change is good.

I’m giving you the long view here but I don’t want you to get the impression I’m some sort of backwards-looking history buff. I’m not. In fact, I’d call myself hip and au courant and even a “tropophile” (if that’s a word that means the opposite of someone suffering from tropophobia). Take my hair. Well, I mean, don’t take my hair but consider my hair. Its color and style change on a regular basis. I’ve probably been through about 12 different looks since Babalu hired me to run this stand back in 2015.

I’d been working in Babalu’s Blue Line Coffee Shop while taking classes at Cedar Community College and when Babalu offered me this spot, it seemed like an opportunity with a good upside so I leapt at it. The location was great, just down the road from Ithacus’ HQ where a lot of people pull down hefty paychecks. As a group, I suppose they may not be particularly generous tippers but a lot of them do seem to have their minds elsewhere as they drive off without taking their change.

Somewhere in the spring of 2016, I first served this nice old dude in a tiny green car. He didn’t use the drive-thru lane like most customers but parked in our small lot and came up to the window on foot. I remember that on that first day, as on all his later visits, he ordered a drip coffee, paid with a five and waved off the $2.85 I tried to hand him back. He said he didn’t like change. Also as on all of his visits, he was wearing a Detroit Tigers cap, a scruffy beard and a twinkle in his eye – just like in Ex. 3.

When he got back to his car with his drink, I noticed he didn’t drive off right away. Instead, he spent about 10 minutes sipping his coffee and picking at something on his dashboard, something he eventually succeeded in peeling off and that he then balled up inside his coffee cup which, after walking back across the lot, he tossed in my trashcan. Funny, I thought, but that’s all.
Well, the very next morning he comes back again and reenacts the entire scene to a T. OK… When it all played out the same way on a third day, this time my curiosity got the better of me and as soon as he was gone, I fished his cup out of the trash to see what was inside it. When I unstuck it from itself and smoothed it out, I saw it was a little sign with black letters on a shiny yellow background. On the wall of the coffee stand I keep a collection of picture postcards that customers send me from their vacations. This sign was just a bit bigger than a postcard and I stuck it up on the wall with them. Now it’s here as Exhibit No. 5.

So, the next day when he parks his little green car and walks up to my window, I don’t know why but I hit him with “You must be Ike.” He responded with something like “So my reputation precedes me; it usually gets lost far behind.” I explained about my inquisitive nature and how I’d been curious about his driving around every day all alone and in no hurry and about the business with the sign. He laughed and said he wasn’t alone but was with his “trusted friend” who I thought he said was named “Otto Blotto.” This puzzled me because I’d never seen him with anyone. He asked if I wanted to meet Otto and I said sure.

Since it was quiet, I walked with him over to the car which he introduced to me as Otto. When he explained to me about his job testing out a self-driving car, that’s when the light came on for me and I realized he hadn’t said Blotto but Bot-o meaning that the car was really being driven by some kind of robot. “Otto” was definitely cute and cozy but one of the first things that caught my eye was the fresh “IKE” sign on the dash. He had just the slightest flash of anger as he said that when he was playing on his computer, the morning sun would bounce off that shiny surface and put a “goldurned awful glare” in his eyes and on the screen. That’s why he had to peel them off every time someone put a new one on.

I liked Ike. He and I didn’t become close personal friends or anything and that day may have been the longest conversation we ever had but he continued to come by for his morning coffee and it always brightened my day. He was always upbeat and almost always alone. Come to think of it, there really was only one occasion when he came by in the company of someone else.

On the day I’m thinking of – I believe it was a nice May morning – Ike parked as usual but then stayed in his car until another car pulled in and parked behind Otto. The driver of this car (I assume it was a conventional car!) got out and the two of them came up to the window. Ike introduced this other person to me as “Cranberry” and they both ordered drinks. Cranberry (who I now know to be Crann Lee) paid for both, handing over a $5 bill and one thin dime to exactly cover the tab.
Right near my window, there stands an old industrial cable spool that is intended to serve as a kind of bar or table in case anyone wants to use it. Hardly anyone ever does but these two stood there on this fine morning as they enjoyed their drinks and conversation. It actually wasn’t that relaxed a conversation, at least not on the part of Cranberry who seemed to be lecturing Ike. It was really over-the-top stuff, telling Ike he was like a lab animal being used for fragrance testing which reminded me of this crazy Clacksila kid in high school who was always going on about stuff like that. I knew this all had to do with Ike’s job but that’s really all I knew. As for Ike, he stayed cool and was trying to give reassurance that he knew exactly what he was doing. I recall him stressing that he saw himself as playing an important role and that he was entirely comfortable with whatever it lead to.

In late June, I realized that Ike and Otto were no longer coming by. Of course, I initially fretted that Ike was buying his coffee elsewhere but I quickly decided that couldn’t be the case. Then I started getting truly worried that some ill had befallen him. Every day I missed seeing Ike and this change in routine was one change I did not appreciate. I was on the verge of trying to contact someone at Ithacus to see what I could find out when the answer revealed itself to me.

One busy day in the late summer, several minutes after I’d served them, I looked up and noticed two people huddled over drinks at the spool and it dawned on me that one of them was Ike’s associate Cranberry. They were going over some papers I couldn’t see and talking generally in hushed tones. I really could only overhear one thing and that was when Cranberry suddenly got animated and all but shouted: “We have got to nail Ithacus!” To this, the other person nodded in agreement. I got up my nerve then to inquire after Ike and Cranberry somberly told me Ike was deceased and added that “Ithacus killed him.” I was shaken and asked nothing more.

A few days later, my curiosity led me to call Ithacus and, after being transferred a couple times, I ended up speaking to Dory Dadalos who had apparently been Ike’s boss. Dory – who turned out to be a kind and caring person – informed me of the tragic accident. As we talked, I explained about the sticker removal that had oddly brought us together and Dory seemed quite interested in this. In fact, we shared such a bond in our feelings for Ike that Dory offered that when I came in to deliver the IKE sticker I had and to give their lawyers a written statement about what I knew, I could also provide some info regarding the coffee stand and it would be actively promoted in the Ithacus’ employee newsletter. Dory made good on that promise and I’ve had a big increase in my Ithacus customer base – including one who has been driving what looks to be a new version of Otto.
It is good and right that I am here today to share my opinions with you. My presence serves both the public interest (in that I will be providing views that will assist in the achievement of justice) and also my own personal interest (since I am compensated for my time at a rate of $400 per hour). Indeed, these circumstances well illustrate the principles of utilitarianism since – both on the micro and macro levels – there are only positive consequences and no negatives.

When I was studying at the University of St. Andrews in Scotland, I first became enamored of moral philosophy and, in particular, the teachings of Jeremy Bentham and John Stuart Mill. Even before I had attained my doctorate in philosophy, I realized a law degree might have more utility but I had to stick with what inspired me. Moved by Joseph Campbell’s advice to “Follow your bliss,” that is what I did. I currently teach in the Department of Philosophy at Sewanee: The University of the South.

I know it sounds ivory tower-ish and impractical but if you’ll bear with me for a few minutes, I think I can demonstrate how some dusty old theories can help us deal with contemporary problems. It was Jeremy Bentham, the philosopher and legal reformer of the late 18th and early 19th centuries, who most persuasively articulated the principles of utilitarianism. This philosophy is one that, to this day, continues to influence leaders in the worlds of public policy, economics and business.

This school of thought, which focuses on consequences, holds that a moral action is an action that maximizes utility. By “utility,” Bentham is referring to whatever will promote pleasure or happiness and will reduce pain or suffering. Every individual must regularly choose between actions that will either augment or diminish his or her own happiness. Since, as we are programmed by nature, the former choice will typically be made, that is the expected and proper behavior for that individual to engage in.

It is just the same with the choices and actions taken by governments. Bentham theorized that a just society is one that strives to maximize the collective welfare. That is to say that it must support and encourage correct behavior that produces the greatest happiness – and the least pain – for the greatest number. Our laws and our institutions should be set up and applied in a way that supports the furtherance of these goals.

A good example of all this in a contemporary setting involves the question of the use of torture in the interrogation of suspected terrorists. Obviously we don’t approve of torture as a general rule but if the purpose is to learn the location of a ticking time bomb
in order to defuse it before it kills a thousand people, then the pain inflicted on one
individual is amply justified.

From my independent research as well as what I have learned from Dory Dadalos, I can say with certainty that once fully autonomous vehicles have taken over as our means of personal transportation, traffic fatalities will plummet. Countless lives will be saved. Society will benefit immeasurably and the greater public good will be served. The sooner this situation can be achieved, the better off will be our society. Working to hastily bring about that day is unquestionably a highly moral action.

Even with the saving of thousands of lives per year, there will yet remain what are considered “ethical dilemma crashes.” Situations inevitably arise in which one must make a choice between two undesirable outcomes. This can happen at a chessboard, in a school cafeteria or in a voting booth. It can also happen on our streets and highways. I don’t mean to sound cold and heartless but, if this was the choice confronting the Auto-Auto on June 18, then utilitarianism would hold that it was preferable to kill off one old man and/or the hippie than five young people.

This principle is reflected in legal determinations of liability for the causing of a wrongful death. The likely damages award in either instance is a reflection of societal values. The price tag would be astronomical for the one responsible for ending the lives of the children and much, much lower with the others. I mention this not so much as a practical consideration for a company (though, of course, it would be) but rather as an indication that society places greater value on the lives of the young people. In a utilitarian analysis, the number of potential deaths is central but this value-added factor solidifies the conclusion that the Auto-Auto followed the correct course of action.

It is my understanding that skidding into the kids would likely have saved Mr. Arias’ life. Although there is understandably no data to bear this out, there can be no doubt that a significant percentage of human drivers may have chosen this course. However, that would not have been the optimal ethical decision.

One could make an argument based on after-acquired information that the children bore responsibility for the incident by breaking the glass that freed the mosquitoes that sent the mule fatefully veering into the car’s path and that maybe this would lower their value relative to the wholly innocent cart and car drivers. But that was not information available to any contemporaneous analyzer, either human or computer. The issue remains one of numbers (five potential victims versus one) and of utility versus freedom.
I acknowledge that there are those who would criticize utilitarianism as failing to respect individual freedoms. It was J.S. Mill who came along and added a libertarian overlay to Bentham’s utilitarianism although he still considered himself a Benthamite. Mill held that recognizing individual liberty was a key part of the path to making society happier in the long run. He wrote: “The human faculties of perception, discriminative feeling, mental activity and even moral preference, are exercised only in making a choice. The mental and moral, like the muscular powers, are improved only by being used. He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. One whose desires and impulses are not his own, has no character, no more than a steam engine has character.”

To the argument that the Auto-Auto has somehow usurped the inalienable right of Isaac Arias to make his own decisions, I have two responses. First, there is no basis for thinking he could have been in any better position to gather and process information and make a better choice than the Auto-Auto. And just why should anyone have the right to make decisions that are bad for society? Second, under the facts here, it appears it would actually be a denial of Isaac’s own autonomy to ignore his quite obvious decision to place his trust in the engineering of the Auto-Auto. One does not need to go so far as the extreme libertarian view that he should have the right to auction off his surplus organs or to engage in consensual cannibalism to conclude that this was an informed decision he was capable of making and entitled to make.

I do have to throw in one further comment prompted by Mill’s reference to the “character” of a steam engine. Certainly Mill was not envisioning this two hundred years ago but we are now inching our way closer to the time when the contemporary version of a steam engine has the capacity to process information in such a way that it is making independent moral judgments. In academic circles, “personhood” has generally been a status reserved for those that possess “sentience.” This refers to a level of consciousness with the capacity to feel, perceive or experience subjectively and is a quality that goes beyond mere thought or reasoning. Sentience and sapience are two different things, not to be confused, and the possession of both has historically been considered the exclusive territory of humans. Rightly or wrongly, the other species have not been felt to meet this test and nor, up to now, have steam engines or their evolutionary descendants.

It could be that “Big Tech” will continue on its present path and there may come a day when we must seriously confront the question of whether something functioning as a person has sufficient characteristics of a person such that it should bear the responsibility of a person. We aren’t there yet. Of course the Auto-Auto is not
responsible for its decisions. The programmers at Ithacus bear that responsibility. They are the ones who selected the algorithms to optimize output according to parameters selected by the company. In my view, they did this well.

I do understand the limited purpose of my being here to share my views. My opinion as to the right and wrong of any decision that was made is of no account. What is important is that you understand that a great deal of thinking went into how the Auto-Auto would choose its course. The good people at Ithacus did not disregard any risks or fail to be aware of any risks; quite the contrary, they gave the recognized risks their full and careful consideration.
EXHIBITS
Exhibit 2
INTELLIGENT DRIVERS

KEEP HANDS ON THE WHEEL &

YES ON THE ROAD
PRETRIAL MOTION
STATE OF WASHINGTON, )
Plaintiff, )

v. )
ITHACUS SOLUTIONS, INC., a )
Washington corporation and its )
Subsidiary Auto-Auto Division; )

Defendant. )

Based on the information and views expressed in the sworn statement of Dory Dadalos, the defense hereby moves the Court for issuance of an Order as follows:

Prior to commencement of trial, each juror shall be required to sign under penalty of perjury a statement substantially in this form: “I do hereby swear or affirm that I will maintain the court-ordered confidentiality of any Ithacus Solutions proprietary technology that I may learn in the course of these proceedings and that I will never discuss or disclose such matters other than with my fellow jurors during our jury deliberations.”

Respectfully submitted,

/s/

Attorney for Defendant
The state respectfully opposes the defense motion based upon (1) the long tradition of openly administered courts, (2) the jurors’ individual rights to free speech, and (3) a belief that the public interest will be served and not harmed by allowing access to the information at issue.

Respectfully submitted,

/s/

Attorney for Plaintiff
Unless the context clearly requires otherwise, the definitions set forth in this section apply throughout this chapter.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Society as a whole greatly benefits from technological improvements. Without some means of protection to assure that valuable developments or improvements are exclusively those of the employer, the businessman could not afford to subsidize research or improve current methods. In addition, it must be recognized that modern economic growth and development has pushed the business venture beyond the size of the one-man firm, forcing the businessman to a much greater degree to entrust confidential business information relating to technological development to appropriate employees. While recognizing the utility in the dispersion of responsibilities in larger firms, the optimum amount of ‘entrusting’ will not occur unless the risk of loss to the businessman through a breach of trust can be held to a minimum.

The policy reasons for affording protection to these commercial intangibles are to prevent exploitation by reprehensible business methods and to encourage innovation. If a trade secret is protected, the competitive advantage realized by the owner of the secret will enable him to recoup his development costs, hopefully before his competitors can ‘reverse-engineer’ the product and duplicate it.
"Seven Reasons Why Trade Secrets are Increasingly Important"

Trade secrets matter more than ever because trade secrets, like all IP, are increasingly valuable and play an expanding role in the American economy. Describing IP generally, one team of economists concluded: “Extensive economic research and analysis have established that economically-powerful forms of intellectual property, embodied in innovations, are the largest single factor driving economic growth and development ..."

The Congressional Research Service found this trend specifically applicable to trade secrets: “As the United States continues its shift to a knowledge- and service-based economy, the strength and competitiveness of domestic firms increasingly depends upon their know-how and intangible assets. Trade secrets are the form of intellectual property that protects this sort of confidential information.” Our current information-based economy represents a shift from the previous economy, which was based on physical assets such as natural resources and capital goods. Obvious examples of the nation’s new direction are the dozens of modern industries that rely extensively on intellectual property for their value. These include the software industry, entertainment industries such as music and movies, Internet-based industries, and life science industries such as genetics, proteomics, and pharmaceuticals.

Statistics on trade secrets are hard to come by and even harder to rely upon. Still, those that exist do help in grasping the significance of trade secrets to companies. Consider the total value of the 500 companies, most of them publicly held, that constitute the S&P 500. Cornerstone Research has found that in 1975, 17 percent of the total value of the S&P 500 consisted of intangible assets, which encompasses trade secrets and other forms of IP; by 2009, the value had grown to 81 percent. Similarly, Forrester Research estimates that trade secrets account for two-thirds of the value of most firms’ information portfolios.

As further evidence of the rising importance of trade secrets, consider the growing number of laws that criminalize trade secret misappropriation. In explaining why it passed the Economic Espionage Act, both the House and Senate Reports stated that Congress was reacting to the “growing importance of proprietary economic information,” which, Congress prophesized, “will only continue to grow” as the “nation moves into the high-technology, information age.”

Washington is not only putting more emphasis on legal remedies for trade secret misappropriation, but also dedicating more resources to the enforcement of those laws. In 2010, the Department of Justice announced the Task Force on Intellectual Property and the appointment of 15 new federal prosecutors and 20 new FBI agents to combat IP crime. The stream of high-profile cases authorities have brought and settled is evidence of this dedication.

A final way to measure value is to analyze the cost of trade secret misappropriation. Estimates vary widely, but they often involve stratospheric numbers. ASIS International, a professional association of security managers, placed the cost of trade secret misappropriation in the United States in 2006 at $300 billion. Using different metrics, McAfee, the computer security giant, estimated that in 2008 data leaks cost companies around the globe more than $1 trillion.
“Protecting our Trade Secrets is Vital to Economic Growth”
by Peter C. Pappas in The Hill.com/blog, 2016

A trade secret is an essential form of intellectual property whose economic value is contingent upon remaining secret. The formula for Coca-Cola is a highly recognized trade secret, but virtually all American businesses rely on their unique and often invisible trade secrets -- manufacturing processes, technologies, formulas, prototypes, computer codes, techniques and other proprietary innovations. A majority of startups and small businesses are built from the ground up on their trade secrets.

And these businesses must take great pains to keep this information secret, because its value is lost if it is disclosed either inadvertently or through misappropriation. Trade secret theft undermines investment in research and development, and puts American jobs at risk. Providing adequate federal protection for this form of intellectual property is therefore critical to the viability of small and large businesses -- as well as to the economic security and global competitiveness of the United States.

Unlike other forms of IP – like patents or trademarks – trade secrets are afforded very limited protection under federal law. The bulk of companies’ IP assets consist of trade secrets, and yet there is no federal civil remedy when their trade secrets are stolen. And, current trade secret law, a patch quilt of the federal Economic Espionage Act and state law adaptations of the Uniform Trade Secrets Act, was enacted at a time when theft was still accomplished by physical means. Today, digital technology has enabled theft on a mass scale -- by foreign governments, competitors and others. According to a February 2013 White House report, “the pace of economic espionage and trade secret theft against U.S. corporations is accelerating” and the report cites several recent cyberattacks by foreign entities and governments.

The impact of trade secret theft on our economy is enormous, and it is a growing threat to America’s competitive edge. Trade secrets protect U.S. assets worth an estimated 5 trillion dollars, and it is estimated that $300 billion dollars’ worth of trade secret assets are stolen every year, often electronically and across borders, according to a U.S. Chamber of Commerce study. Requiring victims to seek relief in state courts in the face of this global pandemic is rather weak tea, and the Justice Department only has the resources to pursue a limited number of criminal cases of interstate trade secret theft each year. Therefore, businesses desperately need to be given the same civil remedies to protect their trade secrets at the federal level that the law accords to other forms of IP.

The Defend Trade Secrets Act of 2015 (DTSA) would establish a federal civil remedy for the first time, giving American companies the tools they need to combat the borderless theft of their most valuable assets. And it would create a consistent, harmonized legal framework that would build upon the Economic Espionage Act to create a uniform standard and federal civil cause of action to stem the tide of revenue and job loss that goes hand in hand with the theft of trade secrets. This important legislation would give innovators the ability to seek injunctions against use or disclosure, to petition for the seizure of stolen assets, and to seek an award of damages from entities that have stolen their property. In doing so, it would significantly mitigate the harm to American businesses and workers, while safeguarding employee mobility and adopting other explicit protections against potential abuse of these civil remedies.

The DTSA, which was introduced in both houses of Congress this past July, has broad bipartisan support with 22 Senate and 107 House co-sponsors to date. It also enjoys
widespread support from companies and organizations representing all sectors of the innovation economy, including manufacturing, services, medical devices, software, agriculture, pharmaceutical, biotech, automotive and clean technologies.

Congress is to be commended for the care it has taken to address concerns about potential misuse of the legislation’s provisions, and as a consequence the bill’s original sponsors have been able to continue to build and deepen support for the legislation among all industry groups and other interested parties. This legislation has been carefully drafted and negotiated and is now ready to move to markup by the Judiciary Committee as a first step toward passage. Congress should seize this opportunity to put a win on the board for America’s innovators, whose core intellectual property assets are under constant threat. By doing so, Congress would also be taking an important step toward protecting one of the key drivers of economic growth and job creation.

Pappas is president of Innovation Strategies LLC. He is a former chief of staff of the U.S. Patent and Trademark Office, where he served from 2009 to 2013.

Stamicarbon, NV v. American Cyanamid Co., 506 F. 2d 532 (2nd Cir., 1974)

James Madison probably did not suppose, on suggesting to the House of Representatives its inclusion in the Bill of Rights, that the right to a public trial would one day conflict with someone’s interest in concealing a method for producing a triamino derivative of symmetrical triazine. It is not surprising then, that he gave no advice on how properly to resolve the controversy with which we are now presented. Stamicarbon, N.V. [Stamicarbon], a Netherlands corporation, appeals to us from an order denying its motion for a preliminary injunction to prevent disclosure of its trade secrets by American Cyanamid Co. [Cyanamid], the defendant in a criminal contempt proceeding which has been continued by Judge Brieant pending this appeal. We affirm.

Although the right to a public trial has been recognized in this country at least since 1677, and has governed criminal proceedings in the federal courts since ratification of the Bill of Rights in 1791, we have only recently begun to probe the outer limits of its force and purpose. Unlike the right to a trial by jury, or the privilege against self-incrimination, strict enforcement of the accused’s demand for public proceedings can occasionally infringe upon other important interests. Some, of course, are personal to the defendant. In such cases the strong policy against curtailment of publicity will yield to his paramount concern. On occasions, however, attendance at criminal trials by the general public will be barred even against the wishes of the accused, in order to implement policies whose importance outweighs the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy. This court recently recognized, for example, that the public interest in maintaining the confidentiality of airline "skyjack profiles" may justify the exclusion not only of the public, but of the defendant himself from a limited portion of a suppression hearing. It is said that the public also has an interest, which may conflict with that of the accused, in assuring that criminal trials proceed without interruption or improper influence. Effectuation of this concern has at times
required the exclusion of the public or of a defendant's friends from the courtroom when they were thought to pose a threat to orderly proceedings.

It is interesting that the right to a public trial has also been limited on occasion to favor an interest held, not by the defendant or by the public at large, but by a private individual. It has long been recognized, for example, that the need to protect young complaining witnesses in rape cases against embarrassment, harassment and loss of reputation will suffice to invoke the shelter of limited privacy upon criminal proceedings. Moreover, disclosure of a witness's name, address and employment has been made in camera when physical danger to the witness could have resulted from revelation of this vital information in open court.

We think that this case would present an equally convincing justification for limited in camera procedures if, in the course of the contempt trial, the district judge should find that Stamicarbon was likely to suffer irreparable injury, and that protection of its secrets could be achieved with minimal disruption of the criminal proceedings. Stamicarbon asserts, and its estimate is undisputed, that the value of its trade secrets exceeds $1,000,000. It is, of course, impossible to establish a monetary value for the right to a public trial. We do not, however, think it irrelevant to our consideration that the Government here, at most, seeks only a fine against Cyanamid. The precarious balance between private claims and the constitutional right to a public trial may be struck more easily when the accused is not faced with loss of liberty.

Even if the monetary loss likely to be suffered by a private party clearly outweighed the fine to be imposed upon a defendant, however, we would be unwilling without more to test the limits of a right whose observance the constitution commands. In this case, though, we find that the interests served by the right to a public trial could be secured to Cyanamid while still protecting Stamicarbon’s secrets. Perhaps the most frequently cited service rendered by the right of public trial in the restraint on possible abuse of judicial power born of "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion ...." But it would be possible in this case to permit the introduction of public light adequate to avert any possibility of infection in the proceedings. If the district court could not selectively exclude only those who had some interest in appropriating Stamicarbon's secrets—a possibility which we do not discount—Cyanamid could be permitted to have as many witnesses of its own choice attend as could be accommodated. Putting those attending under oath to keep confidential only the most precise details of ingredients and the compounding process should occasion little chance of prejudice to Cyanamid. Moreover, it must be emphasized that only those portions of the trial which the district court should find likely to destroy the confidentiality of Stamicarbon's trade secrets would be subject to even this limited restriction. The likelihood that a judge—who must on request make special findings of fact in a trial where all testimony is recorded—will during those brief periods seize the opportunity to abuse his power is not great.

We wish to emphasize the limited nature of the suggestion which we here make. To ignore the undeniable benefits rendered by the assistance of press and public at criminal proceedings would indicate an unawareness of history as well as legal precedent. In almost all cases the interests which would suffer from publicity will merit less attention than the very real concern that the accused might be prejudiced by restricted attendance. It is only under the most exceptional circumstances that limited portions of a criminal trial may be even partially closed.

The historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. Bentham, Rationale of Judicial Evidence 524 (1827).

Rufer v. Abbott Labs, 154 Wn. 2d 530 (2005)

The Rufers sued UWMC for malpractice and Abbott for product liability, alleging in part that Abbott failed to warn physicians of the known history of false positives resulting in unnecessary treatment for misdiagnosed GTD.

Before trial commenced, Abbott moved for an order protecting confidential proprietary information produced during discovery. The motion was granted pursuant to CR 26(c). After summary judgment motions were filed, the Rufers asked the court to make public all pleadings filed in connection with the pending summary judgment motions. Judge William L. Downing denied the motion, but stated:

"Documents containing information designated as “confidential” in accordance with the provisions of the prior Order may continue to be filed under seal per the authority of that Order until such time as a jury is sworn to try this cause. Thereafter, all documents filed and exhibits utilized in these proceedings will be accorded the usual presumption of openness. A heavy burden will be placed on any party seeking to deny public access to the facts and allegations upon which this case is being adjudicated."

Following an extensive trial, the jury rendered a verdict awarding $16 million to the Rufers and allocating 50 percent fault each to UWMC and Abbott.

At the close of trial, Abbott moved the court to seal one trial exhibit (Exhibit 168), several pretrial and deposition exhibits, and selected portions of deposition testimony. Abbott relied heavily on the affidavit of Dr. Beth Schodin (an Abbott employee) in its motion to seal which identified
portions of depositions published at trial, deposition exhibits, and a trial exhibit as containing “highly sensitive, trade secret and proprietary information.”

In reviewing these motions, Judge Downing recognized three categories of records the parties were asking the court to seal or open:

“In the involved law offices, judicial chambers and clerk's storage areas, there now exists a great deal of information contained in a staggering volume of documents. Each of these documents, access to which is now the issue before the Court, fits into one or more of three sets.”

“[1] An uncommonly large set of evidence was put before the jury during the testimony of the 51 witnesses with the accompanying presentation of hundreds of trial exhibits. [2] An additional body of evidence, some appearing in the trial record and some not, was contained in the similarly large set of documents put before the Court in connection with the various trial and pretrial motions. [3] Finally, the largest set of all would presumably be that constituting the discovery materials that were exchanged in counsel's preparation of the case for trial.”

The court took the liberty of reformulating the issues the parties presented in their respective motions as the following:

1. Should certain documents considered by the Court and discussed openly during these proceedings (both trial and pretrial) be permitted to be filed under seal?
2. Should the depositions, limited portions of which were utilized at trial, and which were technically “published” at that time, be permitted to be filed partially under seal?
3. Should the Court now dissolve the Protective Order that governed the parties' exchange of documents and information during the discovery phase of these proceedings?

Judge Downing answered the first two questions by ordering that all exhibits, briefs, and memoranda filed with the court be made open and available for public inspection because the “sealing of court records can only be done under compelling circumstances where justice so requires.” Judge Downing could not “find there to be a sufficient demonstration of circumstances that would override the public interest and compel denial of access,” noting

“There is nothing before the Court to support any reasonable conclusion that an Abbott competitor stands poised to gain unfair economic advantage through such access. Nor is there any showing of foreseeable misuse of the documents compelling the Court to such denial. The fact that a party might consider information as 'confidential' or even 'proprietary' and prefer that documents not become public is too obviously insufficient to merit discussion.”

In determining whether court records may be sealed from public disclosure, we start with the presumption of openness. Our state constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, §10. But while we presume court records will be made open and available for public inspection, court records may be sealed “to protect other significant and fundamental rights.” The party wishing to keep a record sealed usually has the burden of demonstrating the need to do so.
Trial proceedings and records attached to dispositive motions, on the other hand, are presumptively open absent an ‘overriding interest.’ The open administration of justice is more than just assuring that a court achieved the “right” result in any given case: “We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.” As Judge Downing declared, “[w]hether the Court fairly and appropriately dealt with the parties and the issues that came before it are the matters of public interest that dictate the openness of judicial proceedings. Everything that passes before this Court, whether or not ultimately held to be admissible at trial or supportive of a viable claim, has relevance to that inquiry.”

The trial court determined that no compelling interest justified the continued sealing of any court record in the present matter and, thus, ordered all records filed with the court to be made open and available for public inspection.

It appears that the trial court used the proper standard for most of the records it unsealed (the compelling interest test for all records filed with the court). The one exception would be any deposition transcripts published but not used in trial or as an attachment to any motion. Both parties concede that these documents should remain sealed for good cause. Here, the trial court properly applied the compelling interest test to most of the records at issue and provided a sufficient rationale for its decision. The court noted Abbott's arguments that Abbott's proprietary information was at risk for misuse or unfair economic advantage of its competitors, but essentially it found that Abbott failed to actually support its claims.

Because the trial court properly applied the compelling interest standard to all records filed with the court, we mostly affirm the trial court and remand only to reseal any depositions that were not used in trial or used as support for any motion.
"Juror Journalism"
by Marcy Strauss, Yale Law & Policy Review, 1994

The conflict between freedom of speech and the right to a fair trial is hardly new. Hundreds of articles have been written attempting to reconcile the constitutional demand that the defendant receives a fair trial with First Amendment issues posed by pretrial publicity, cameras in the courtroom, or the gagging of lawyers who attempt to try their cases in public. In recent years, however, a new face to the conflict has appeared, having to do not with lawyers or the news media, but with the jury. Increasingly, individuals have tried to capitalize on their jury service by selling their perspective on the trial. This practice of "juror journalism" has been criticized by numerous academics and even lambasted by many journalists as threatening the integrity and fairness of the trial. The fear is that the profit motive may affect the juror's ability to fairly, openly, and without bias deliberate and render a just verdict.

The incredible amount of checkbook journalism which occurred during the pretrial phase of the O.J. Simpson trial prompted Superior Court Judge Lance Ito to adopt measures that went beyond any existing statutory provision in restricting jurors' speech. In a court order dated September 23, 1994, he declared that every juror and alternate juror had to agree "not to request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning this trial for a period of 180 days from the return of a verdict or the termination of the case, whichever is earlier." Such statutes and judicial orders raise an important question: Can juror speech be silenced or even restricted consistent with the First Amendment's guarantee of freedom of expression and freedom of the press?

III. AGAINST RESTRICTIONS: THE VALUE OF JUROR SPEECH

Given these potential-if not necessarily real-harms, why not ban or restrict juror speech? This section explores that question by considering the value of freedom of expression in the context of juror journalism. Should society care about protecting juror speech? Is it the kind of expression that should be valued under the First Amendment?

Juror speech fosters many important values in society-values recognized as compelling by the First Amendment. A core value of the First Amendment is ensuring speech that facilitates democracy and self-government. Because the people are sovereign, they must have access to information allowing them to evaluate governmental processes, including the court system. As the Supreme Court recently noted, "[t]he judicial system, and in particular our criminal justice courts, play a vital part in a democratic state and the public has a legitimate interest in their operations." Simply stated, "the public has a right to know about the operations of the judicial branch, an agency of democratic government." Indeed, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted..."

Speech that explores, criticizes, or merely reveals information about the judiciary falls squarely within this protected area of speech. Juror speech, in other words, serves an essential function in a democracy by revealing flaws, inconsistencies, or unfairness in the judicial process. Juror speech may illuminate incompetence, inefficiency, and corruption in the court system. Moreover, the mere knowledge that jurors can speak freely about the trial and its participants may help to ensure a fair process. "The knowledge that every criminal trial is subject to..."
contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account."

Besides exposing possible flaws in the system or deterring potential abuses, juror speech is also valuable even when revealing what is good about the system. Explanations of how the deliberations progressed could reinforce notions that the jury system does work and thus increase public confidence that justice was served. A juror's description of how a particular verdict was reached may help justify a verdict that appeared to the public to be grossly unfair, and therefore preserve the integrity of the judicial system generally and the role of the jury specifically. Consider, for example, the effect of the jurors speaking out after the acquittals of the four police officers accused in a state proceeding of using unreasonable force against Rodney King. Although many still disagreed with the verdict, the explanations at least may have assured some members of the public that the verdict was based on a certain interpretation of the evidence and could not simply be dismissed as the result of blatant racism.

Finally, juror speech aids lawyers, scholars, and laypersons in understanding the judicial process. As such, it plays an essential role in any attempt to better the justice system. Lawyers frequently request access to jurors after the verdict in order to learn more about their own shortcomings at trial. Scholars may question jurors to assess the effect of various legal tactics, to determine the juries' interpretation of judicial instructions, and to better understand the dynamics of the deliberation process. Jurors' discussions about their trial experience educate the public about their own duties and obligation of jury service. In sum, even when juror journalism is pedantic, it still serves an essential informational function about the justice system.

Besides facilitating democracy and self-government, juror speech is valuable because it enhances the personal growth and self-fulfillment of the speaker. "[T]he freedom to speak one's mind is . . . an aspect of individual liberty-and thus a good unto itself .... " In expressing our own thoughts and ideas, we grow as individuals; revealing our inner feelings can serve as a catharsis. Juror speech serves these objectives. As jury expert Hans Zeisel has noted, the urge to talk about the experience of jury duty is a strong one, in part to release the pent-up emotional pressure inherent in the role of juror." Especially when unpopular verdicts are reached, jurors often feel compelled to publicly defend themselves against charges of bias and incompetence.
“YES, JURORS HAVE A RIGHT TO FREEDOM OF SPEECH TOO! ... WELL, MAYBE. JUROR MISCONDUCT AND SOCIAL NETWORKS”

As with other types of speech, there is value in juror speech. For example, juror speech allows insight into some aspects of the judicial system and allows jurors to explain and give opinions on what they may view as flaws in the system. Listening to what jurors have to say can also reveal insight to the inner workings of the judicial system, which, if it suggests that justice has been served, can help to instill faith in the institution itself. Revealing how legal decisions are reached and whether or not they were made fairly and legally may also help to preserve the integrity of the system. Juror speech can also provide the public with essential information about the duty of the jury. Experience seems to be the best teacher, and so others may learn through the experiences of those who have served as a juror. Thus, any standard that is applied to juror speech needs to take the value of such speech into consideration.

Concern about juror speech, however, is not a new issue. Jurors' First Amendment rights and the impact of exercising those rights on the fairness of a trial on which jurors serve can be traced back to the concern over jury journalism, where jury members attempt to profit by giving their account of what happened during a trial. The concern over juror journalism is that jurors will be motivated by the potential profit they may gain, and in turn would be incapable of rendering a fair and unbiased verdict.

Juror journalism began to become popular in the 1990s in the wake of several high profile cases, most notably with the murder trial of O.J. Simpson, and jurors have since sold their stories to newspapers and even written books about their experiences of serving on a jury. For example, when juror journalism was on the rise, a juror in the trial of Bernard Goetz (accused of shooting several people who tried to mug him in a subway in New York) recorded his daily impressions of the case on a tape recorder to keep track of them. He kept this record because he “had a reasonable belief that it might be worth something.” He ended up selling his story to the New York Post for close to $5,000. In 2009, jurors who sat on the trial of Scott Peterson (convicted for the murder of his wife and unborn son) wrote a book about their experiences entitled We, The Jury.

The Supreme Court has continually described a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” In order to restrict such political speech, the restrictions must pass strict scrutiny. Under the strict scrutiny standard, a regulation will only be upheld if it serves a compelling government interest and is narrowly tailored to serve that interest.

The argument is that since courts are a part of the judicial branch of government, anything involved in the judicial process should be considered government action. If court proceedings are considered to be government actions, then “[a]ny speech about a judge or a judge’s rulings” should be governed by a strict scrutiny standard. Under this standard, the government has the burden of proving that the action was “necessary to achieve a compelling purpose” and that the action is narrowly tailored to achieve that interest. One problem with this standard, however, is that it may only protect speech related to the court system itself and officers in their official capacity. As the Court speaks of “debate on public issues,” there is a question as to whether jurors' [other] discussions rise to the level of political speech to warrant strict scrutiny review.
In re: Hearst Newspaper Partnership, L.P., 241 SW 3rd 190 (Texas 2007)

By petition for writ of mandamus, relators, Hearst Newspapers Partnership, L.P. (“Hearst News”) and Galveston County Daily News, challenge the trial court's order prohibiting discharged jurors from speaking to the press, media, or others about the evidence and what their votes would have been after the trial ended in a settlement. The relators contend the order is an unconstitutional prior restraint on their right to gather news under both the Texas Constitution and the First Amendment. We conditionally grant the petition for writ of mandamus.

Background

After an explosion at BP's Texas City plant in March 2005, about 4,000 individuals filed cases against BP and others. The explosion and the cases received much publicity on the local and national levels. Among other things, this publicity included news reports, television interviews, mailings sent to local residents, town hall meetings with BP employees, and Chamber of Commerce meetings.

In August 2007, a group of plaintiffs was called to trial. Due to the pretrial publicity, the trial court called over 1200 people to report to jury duty to ensure that a jury and several alternates could be empaneled. This jury heard ten days' evidence from the plaintiffs before the trial court announced that the parties had reached a settlement. After the trial ended, the trial court permitted the lawyers for each side to meet with the jurors, who had some positive things to tell each side's lawyers. However, with approximately 1200 cases still pending, the trial court was concerned about additional pretrial publicity interfering with the parties' rights to a fair trial by making the task of selecting future juries even more difficult, particularly because the jurors had not heard all the evidence. Therefore, the trial court admonished the jurors, “I am going to forbid you from speaking to anybody in the media or anybody other than myself or the lawyers or their employees until after all cases have settled.”

Two days later, Hearst News, on behalf of the Houston Chronicle, intervened, requesting the trial court to reconsider and rescind the gag order on the jurors. Soon thereafter, the Galveston County Daily News also intervened. Hearst News argued that the order was an unconstitutional prior restraint under both article I, section 8 of the Texas Constitution and the First Amendment. The trial court promptly held a hearing, affording all parties and the newspapers an opportunity to be heard. No evidence was adduced at this hearing. However, the trial court described the unusual nature of the litigation, including the large number of parties and the extensive pretrial publicity.

In addition to the newspaper media, we have had to deal with the web site issue, the internet issue, mailing things to jurors, word on the street, talks being given at Chamber of Commerce. We have had hours and hours of hearings about how much is out there. [We] have talked to hundreds and hundreds and hundreds of jurors in these past two voir dire panels to try to find out how many people were affected by the publicity. The first time we called in a panel we called in I think 12 or 13 hundred to get the 12. It costs a tremendous amount of money to the taxpayer to bring in the kind of panel you have to get down to just twelve impartial people in this case.

The trial court declined to rescind the gag order, but instead signed a written order limiting the time period of the restriction on the jurors' speech.
In the order, the trial court found that (1) no final judgment or nonsuit was reached in the subject trial and that numerous other claims in the consolidated litigation remained outstanding; (2) media coverage of the discharged jurors' impressions about the evidence, trial, or disclosure of what their votes would have been, based upon the incomplete trial record, posed a threat to the administration of justice in the remaining, pending cases; and (3) the temporary restriction on discharged jurors' speech was the least restrictive means available to prevent the potential harm. The trial court, therefore, ordered that "discharged jurors are under an instruction not to speak or disclose to the press, media, or others about their views of the evidence and/or their impressions of what their vote would have been if the evidence had concluded on the day that the jurors were discharged until on or after January 2, 2008 unless such order is extended upon motion of any party for good cause shown."

Restrictions on Discharged Jurors' Speech

Restrictions on juror speech have rarely been found to be constitutionally permissible; the restrictions have been limited to situations, such as protecting the secrecy of juror deliberations, protecting the privacy of jurors, and preserving a defendant's sixth amendment right to a fair trial in criminal cases. See U.S. v. Cleveland, (upholding restriction on juror interviews to protect secrecy of jury deliberations); Haeberle v. Tex. Int'l Airlines, (upholding restriction on juror interviews to protect juror privacy when interviews sought by litigant's attorney); U.S. v. Williams, (upholding restriction on juror interviews to protect secrecy of jury deliberations); State v. Neulander, (upholding restriction on juror interviews after mistrial in capital murder case to prevent the State from gaining unfair advantage on retrial).

We conclude that the right to gather news generally includes the right of the press to interview willing, discharged jurors, except when outweighed by a compelling government interest, such as the need to protect the sanctity of jury deliberations, a juror's right to privacy and to be free from harassment, or a defendant's Sixth Amendment right to a fair trial.

The record does not show that interviews of the discharged jurors would preclude the selection of an impartial jury or that measures less restrictive than a gag order would be ineffective. Other than the claimed difficulty in selecting a jury, there are no other claimed harms that may result from allowing the jurors to talk. The trial court was not concerned about the media harassing the jurors. There exists no concern about protecting the secrecy of juror deliberations because the trial ended before the conclusion of the plaintiffs' case, without any jury deliberations. We conclude that the gag order in this case is unconstitutional.

Conclusion

We conditionally grant the writ of mandamus and direct the trial court to vacate the September 18, 2007 and September 24, 2007 orders prohibiting the jurors from speaking to the press and others.