TURNING COURTROOMS INTO CLASSROOMS

Washington YMCA Mock Trial 2019 – 2020 Kit and Case

Kitsap County Courthouse—1943
Photo Source: https://www.kitsapgov.com/clerk/Pages/Courthouse-History.aspx
# 2019-2020 Mock Trial Kit and Case

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SECTION 1

Program Information
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
1987-2019

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.

Since our inception, Washington’s YMCA Mock Trial teams have consistently placed in the top 20 at Mock Trial Nationals. Our state has produced three National Championships from two of our schools: Franklin High School (2000, 2018) and Seattle Prep (2014).

For several years, YMCA Mock Trial students from across the state have come together to participate in the YMCA National Judicial Competition in Chicago. In 2017, students from Wenatchee High School, The River Academy, and The Bush school came together to form two teams for the competition. One of our teams finished 1st overall for our state’s first victory in the NJC competition.

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.
## CASE AND COMPETITION HISTORY

<table>
<thead>
<tr>
<th>Year</th>
<th>Type</th>
<th>Case</th>
<th>Case Subject</th>
<th>Teams At State</th>
<th>Championship Round (winner in bold)</th>
<th>Presiding Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>Civil</td>
<td>Robinson et. al v. Adams School District</td>
<td>High school drug testing policy</td>
<td>8</td>
<td>Franklin vs. Port Angeles</td>
<td>Supreme Court Justice Charles Smith</td>
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<td>1993</td>
<td>Civil</td>
<td>State v. Kruse</td>
<td>Malicious harassment</td>
<td>16</td>
<td>Ft. Vancouver vs. University Prep</td>
<td>Elaine Houghton and Steven DeForest</td>
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<td>1995</td>
<td>Crim</td>
<td>State of Washington v. Mel Dobson</td>
<td>2nd degree burglary and malicious mischief</td>
<td>15</td>
<td>Ft. Vancouver vs. Walla Walla</td>
<td>Supreme Court Justice Charles Smith</td>
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<tr>
<td>1997</td>
<td>Crim</td>
<td>State of Washington v. Haines</td>
<td>Self defense or murder</td>
<td>16</td>
<td>Franklin vs. University Prep</td>
<td>Supreme Court Justice Richard B. Sanders</td>
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<tr>
<td>1998</td>
<td>Crim</td>
<td>State v. Jones</td>
<td>Domestic violence</td>
<td>18</td>
<td>Franklin vs. Ridgefield</td>
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<td>1999</td>
<td>Civil</td>
<td>Noble v. Katiesburg School District</td>
<td>Sexual harassment in schools</td>
<td>22</td>
<td>Franklin vs. University Prep</td>
<td>Supreme Court Justice Barbara Madsen</td>
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<td>2000</td>
<td>Civil</td>
<td>Alex Williams, Marty Graves, and the Cedar County Board of Educ.</td>
<td>First Amendment and case for injunctive relief</td>
<td>20</td>
<td>Franklin (National Champions) vs. University Prep</td>
<td>Supreme Court Justice Gerry Alexander</td>
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<td>2001</td>
<td>Crim</td>
<td>State v. Tag Montague</td>
<td>Free Speech and Graffiti</td>
<td>20</td>
<td>Franklin (3rd at Nationals) vs. Franklin</td>
<td>Supreme Court Justice Tom Chambers</td>
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<tr>
<td>2002</td>
<td>Crim</td>
<td>State v. Ogden Browne</td>
<td>Vehicular Homicide</td>
<td>20</td>
<td>Franklin (6th at Nationals) vs. University Prep</td>
<td>Supreme Court Justice Susan Owens</td>
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<tr>
<td>Year</td>
<td>Type</td>
<td>Case</td>
<td>Case Subject</td>
<td>Teams At State</td>
<td>Championship Round (winner in bold)</td>
<td>Presiding Judge</td>
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<td>2003</td>
<td>Crim</td>
<td>State v. Taylor Garrison</td>
<td>Sports Assault</td>
<td>20</td>
<td><strong>Seattle Prep (6th at Nationals)</strong> vs. Franklin</td>
<td>Supreme Court Justice Susan Owens</td>
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<tr>
<td>2005</td>
<td>Crim</td>
<td>State of Washington v. Whislea Dwight</td>
<td>Accomplice liability/felony murder</td>
<td>20</td>
<td><strong>University Prep (10th at nationals)</strong> vs. Fort Vancouver</td>
<td>Supreme Court Justice Jim Johnson</td>
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<td>2006</td>
<td>Crim</td>
<td>State of Washington v. Lin Pauling</td>
<td>Controlled substance homicide</td>
<td>19</td>
<td><strong>Seattle Academy (16th at nationals)</strong> vs. Franklin (3rd at American Mock Trial Invitational)</td>
<td>Supreme Court Justice Susan Owens</td>
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<tr>
<td>2007</td>
<td>Civil</td>
<td>Cisco Narcissus v. J.P. &quot;Weegee&quot; Zenger</td>
<td>Invasion of Privacy</td>
<td>20</td>
<td><strong>Seattle Prep (16th at nationals)</strong> vs. University Prep (2nd at AMTI)</td>
<td>Supreme Court Justice Jim Johnson</td>
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<td>2008</td>
<td>Crim</td>
<td>State of Washington v. Jesse Herring</td>
<td>Homicide/ Circumstantial evidence</td>
<td>20</td>
<td><strong>Seattle Prep (8th at nationals)</strong> vs. Seattle Prep JV</td>
<td>Supreme Court Justice Mary Fairhurst</td>
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<td>2009</td>
<td>Civil</td>
<td>Tisby Hark v. Cedar County School District</td>
<td>Employment Law</td>
<td>20</td>
<td><strong>Seattle Prep (3rd at nationals)</strong> vs. University Prep (9th at AMTI)</td>
<td>Supreme Court Justice Jim Johnson</td>
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<td>2010</td>
<td>Crim</td>
<td>USA v. Cuyahoga Rivers</td>
<td>Eco Terrorism</td>
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<td><strong>Seattle Prep (5th at nationals)</strong> vs. Franklin High School</td>
<td>Supreme Court Justice Barbara Madsen</td>
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<td>2011</td>
<td>Crim</td>
<td>State of WA v. Kenley Kadich</td>
<td>Manslaughter by a Police Officer</td>
<td>22</td>
<td><strong>Seattle Prep (10th at Nationals)</strong> vs Seattle Prep JV</td>
<td>Supreme Court Justice Debra Stephens</td>
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<td>2012</td>
<td>Civil</td>
<td>Evening star life &amp; casualty insurance company, INC. v. Ithacus solutions</td>
<td>Insurance Claim</td>
<td>22</td>
<td><strong>Seattle Prep (6th at Nationals)</strong> vs. Franklin</td>
<td>Supreme Court Justice Susan Owens</td>
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<td>2013</td>
<td>Crim</td>
<td>The Last Ferry</td>
<td>Domestic Terrorism</td>
<td>22</td>
<td><strong>Seattle Prep (6th at Nationals)</strong> vs. Kings High School</td>
<td>District Court Judge Robert Lasnik</td>
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<td>2014</td>
<td>Crim</td>
<td>That ‘Drood’ Dude</td>
<td>Rendering Criminal Assistance</td>
<td>20</td>
<td><strong>Seattle Prep (National Champions)</strong> vs. Archbishop Murphy High School</td>
<td>Supreme Court Justice Debra Stephens</td>
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<td>2015</td>
<td>Crim</td>
<td>Cedar Confidential</td>
<td>Computer Trespass</td>
<td>24</td>
<td><strong>Seattle Prep (15th at Nationals)</strong> vs. Franklin High School</td>
<td>Supreme Court Justice Mary Yu</td>
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<td>2016</td>
<td>Civil</td>
<td>Ex-Con Oration</td>
<td>Wrongful Conviction/Compensation</td>
<td>24</td>
<td><strong>Seattle Prep (10th at Nationals)</strong> vs. Franklin High School</td>
<td>Supreme Court Justice Mary Yu</td>
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<tr>
<td>Year</td>
<td>Type</td>
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<td>2017</td>
<td>Crim</td>
<td>Otto Blotto</td>
<td>Manslaughter by Unmanned Vehicle</td>
<td>24</td>
<td>Seattle Prep (12th at Nationals) vs. Franklin High School</td>
<td>Supreme Court Justice Sheryl Gordon McCloud</td>
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<td>2018</td>
<td>Crim</td>
<td>Won’t Back Down</td>
<td>Stand Your Ground</td>
<td>24</td>
<td>Franklin High School (National Champions) vs. Seattle Prep</td>
<td>Supreme Court Justice Steve Gonzalez</td>
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<td>2019</td>
<td>Civil</td>
<td>Flyspecking</td>
<td>Land Use/Nuisance</td>
<td>24</td>
<td>Franklin High School (3rd at Nationals) vs. Seattle Prep</td>
<td>Supreme Court Justice Mary Yu</td>
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<tr>
<td>2020</td>
<td>Crim</td>
<td>Who Are You?</td>
<td>Identity Theft</td>
<td>24</td>
<td>TBD</td>
<td>TBD</td>
</tr>
</tbody>
</table>
PROGRAM INFORMATION

STATE OFFICE

Executive Director - TBD

Erin FitzGerald
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efitzgerald@seattleymca.org

Ryann Woods
Business Administrator
rwoods@seattleymca.org

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**Physical Address:**
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Olympia, WA  98502

**Mailing Address:**
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Olympia, WA  98507

Youth & Government on the web:
www.youthandgovernment.org
YMCA YOUTH & GOVERNMENT
BOARD OF DIRECTORS

Sam Reed | Chair
Secretary of State Emeritus

Kelly Evans | Treasurer
Soundview Strategies

Krystal Starwich* | Secretary
WA State Charter School Commission

Marty Brown
State Board for Community and Technical Colleges, retired

Holly Chisa
Lobbyist

Jeanne Cushman*
Attorney/Lobbyist

Mike Egan*
Microsoft

Maddie Ellis
73rd Youth Governor

David Fisher
Fisher-Jurkovich Public Affairs

Kevin Hamilton
Perkins Coie

Lucy Helm*
Starbucks Coffee Company

Tom Hoemann
Secretary of the WA Senate, retired

Judge Robert Lewis
Clark County Superior Court

Dan McGrady
PEMCO

Gloria Ochoa-Bruck
City of Spokane, Director of Multi-Cultural Affairs

Neil Strege
Washington Roundtable

Sung Yang*
Pacific Public Affairs

*Alumni of Youth & Government
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, student

“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, student

“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

“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

“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
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. He has also been kind enough for donating his time and creative energy over the past year in creating Who Are You?, this year’s criminal case. His time and dedication, alongside the time and dedication of volunteers like him, 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.”
SECTION 2

Coaches Handbook
# YMCA YOUTH & GOVERNMENT
## 2019-2020 PROGRAM CALENDAR
### MOCK TRIAL

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<tr>
<th>Month</th>
<th>Date</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>October</td>
<td>10</td>
<td>Case Released</td>
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<tr>
<td></td>
<td>12</td>
<td>Advisor Training – Sammamish, WA</td>
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<td></td>
<td>27</td>
<td>Registration Forms Due to State Office</td>
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<td>November</td>
<td>30</td>
<td>Middle School Registration Due</td>
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<tr>
<td>December</td>
<td>2</td>
<td>Case Clarification Question Form Released</td>
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<td>15</td>
<td>Case Clarification Question Form Closes</td>
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<td>January</td>
<td>10</td>
<td>Case Questions Answered</td>
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<td>24</td>
<td>All Registration Forms due to State Office</td>
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<td></td>
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<td>Forms will be emailed out closer to the deadline</td>
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<td>29-30</td>
<td>Middle School Mock Trial – Clark County</td>
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<td>31</td>
<td>CONA Application Opens</td>
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<tr>
<td>February</td>
<td>7-8</td>
<td>King County (Redmond) and Chelan County Tournaments</td>
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<td></td>
<td>19-20</td>
<td>Clark County Tournament</td>
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<td></td>
<td>21-22</td>
<td>Snohomish and Kitsap Tournaments</td>
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<tr>
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<td>22,25, 27,2</td>
<td>King County (Seattle) Tournament</td>
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<tr>
<td></td>
<td>28</td>
<td>CONA Application Closes</td>
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<tr>
<td></td>
<td>TBD</td>
<td>King County (Kent) and Benton Tournaments</td>
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<tr>
<td>March</td>
<td>2-13</td>
<td>State Tournament Registration and Payment Due</td>
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<td></td>
<td>20-22</td>
<td>Mock Trial State Competition – Olympia, WA</td>
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<tr>
<td>May</td>
<td>6-9</td>
<td>National Mock Trial Competition – Evansville, IN</td>
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REGISTRATION FEES AND REFUND POLICY

HIGH SCHOOL

DISTRICT REGISTRATION FEES

Registration: October 27
$800 per Team

Late Registration Fee:
$50 per Team

STATE FINALS REGISTRATION FEES

Registration: March 2-March 13
$125 per Student
$125 per Coach

*NO registration accepted after March 13th

MIDDLE SCHOOL DISTRICT REGISTRATION FEES

Registration: November 1-November 30
$30 per Student
$15 per Coach

Late Registration: December 1-December 15
$40 per Student
$20 per Coach

*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 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.
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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</thead>
<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>
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<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>
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<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>
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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 $800 per team. The State Finals cost is $125 per student and $125 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 7–16 kids and a school may field more than one team. A full team would have sixteen 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.
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.

<table>
<thead>
<tr>
<th>Expenses:</th>
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<tbody>
<tr>
<td><strong>Staffing</strong></td>
</tr>
<tr>
<td><strong>Training</strong></td>
</tr>
<tr>
<td><strong>Volunteer support</strong></td>
</tr>
<tr>
<td><strong>Transportation</strong></td>
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| **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! |
| **Facilities** | $ needed for meeting/practice facilities |
| **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. |

<table>
<thead>
<tr>
<th>Revenue:</th>
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<tbody>
<tr>
<td><strong>Program fees</strong></td>
</tr>
<tr>
<td><strong>Fundraisers</strong></td>
</tr>
<tr>
<td><strong>Sponsorships / donations</strong></td>
</tr>
<tr>
<td><strong>Grant/foundation support</strong></td>
</tr>
<tr>
<td><strong>Y&amp;G Scholarships</strong></td>
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<tr>
<td><strong>ASB funding</strong></td>
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<tr>
<td><strong>Local YMCA support</strong></td>
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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
SAMPLE MONTHLY PLANNER

September
Advisors recruit students, conduct auditions, and select team members
Formation & Group Building
  o Topics to cover:
    ▪ U.S. Constitution
    ▪ Democracy

October
Release and distribution of Mock Trial Kit & Case
Work out student practice schedule in addition to meetings with attorney coach
Advisors and attorney coaches begin to study the case and prepare for trials
  o Topics to cover:
    ▪ The Common Good vs. Individual Interest
    ▪ The Responsibilities of Citizenship
    ▪ Courtroom procedure and legal terminology
    ▪ Servant Leadership

November
District Conveners set date and start planning for district competitions
Submit request for purchase order or check for district competition
Submit district scholarship application form(s) if needed
  o Topics to cover:
    ▪ The Trial Process
    ▪ Steps in a Trial
    ▪ Introduction to the Case
    ▪ Fund Raising Project Planning (if needed)

December
Arrange for transportation to district competition
  o Topics to Cover:
    ▪ Strategy and Case Analysis
    ▪ Witness Examinations and Closing Arguments
    ▪ Rules of Evidence
    ▪ Service Project

January
Begin collecting signed student consent forms and complete registration for districts
Submit required district materials by deadline to State Office
Fine tune case and work on oratory and presentation skills
Plan and hold practice mock trials with neighboring schools

February
District events
Submit state scholarship application form(s) if needed
Submit required state materials by deadline to State Office
Arrange for transportation to state competition

March
Guest speaker/Field trip to close year or prepare for state competition
Host a Community Night
TEACHING MOCK TRIALS

The following materials may provide some ideas that advisors can use in teaching students and youth group members about short mock courtroom trials. They may be adapted to best suit your local educational goals.

These materials were written for use with brief classroom mock trials involving all students in the classroom, which is different than the mock trial described in the latter pages of this kit. The case presented in this kit includes a longer, more involved mock trial with up to three attorneys per side, four witnesses, and no jury.

However, these materials can be used with an entire class, from which the competition team can then be formed. When the in-class activities are completed, the competition team can practice outside of class. This mock trial program can also be used with extra-curricular groups such as school debate teams or youth groups including scout troops, YMCA Youth & Government groups, teen church groups, homeschoolers etc. Students on each team must be from the same high school or a pre-existing member of the same youth group.

Much of the material in these lesson plans was developed by what was formerly the National Institute for Citizen Education in the Law.

EDUCATIONAL BENEFITS OF THE MOCK TRIAL PROGRAM

Participation in this educational opportunity demands quite a bit of time from teachers and attorneys, but the benefits will make it worthwhile.

Some of the educational benefits for students are:

- Knowledge of practical law and trial procedure and education about the legal profession.
- Increase in student motivation to excel and participate fully.
- Development of research, organization, planning and preparation skills.
- Development of oral advocacy skills.
- Enhancement of communication skills -- speaking, listening, writing.
- Enhancement of reasoning, critical thinking and analytical skills.
- Development of self-confidence and self-esteem.
- Knowledge of strategies for conflict resolution.
- Experience in team effort.
- Substantive knowledge about the issues presented in the case.
INTRODUCTION – TRIALS AND AMERICAN SOCIETY

Whether the issue is teaching evolution in school, the kidnapping of the baby of a famous couple, or a Hollywood lovers' fatal quarrel, Americans have long relished the spectacle of the courtroom trial.

In the past fifty years, crowds have strained against police barriers, hoping to get into courtrooms where presidential counselors were being tried as part of the Watergate conspiracy. They have packed the courtroom where a school mistress was on trial for the murder of her lover, a famous physician. They have sat watching while the psyches of a would-be presidential assassin or the most private details of a famous athlete charged with murder were exposed to the world. In some recent cases, courtrooms have been replaced by highly public hearings by special counsels on the doings of a President and his friends and the Department of Justice itself. The names of the parties to cases like these move into American legal and popular history: John Ehrlichman and Robert Haldeman, Michael Jackson, John Hinckley, O.J. Simpson, Bill Clinton and Waco.

Then, too, the names of the most prominent role-players among the judges and attorneys edge into daily conversation, at least for a time: John Sirica, Barrington Parker, F. Lee Bailey, E. Bennett Williams. Scores of reporters, and, in recent years, miles of videotape - even inside some courtrooms - feed this public fascination. Perhaps the media’s role in heightening the public’s contact with the trial process is most clearly underscored by the fact that many of the nation’s most well-known trial celebrities are Hollywood creations or more recently, judges turned into public icons like Judge Judy!

Media hype aside, there are important reasons for the public attraction to the trial process, and these are undoubtedly inherent in the nature of our government and legal system. Perhaps the most basic of these reasons is the public’s perception of the trial as one of society’s principal vehicles for the achievement of justice for all citizens, a belief which is the cornerstone of our American legal system. In these times, apparent widespread distrust of the trial process surfaces whenever members of the public loudly protest a verdict, as happened in the John Hinckley and O.J. Simpson cases. Yet, all in all, Americans still cling to the belief that each citizen should have his or her own “day in court.” Statistics on the rising number of case filings in civil court underscore the exercise of this right of access to the courts.

Some of the public fascination with trials also flows from the nature of a trial as great human drama. In the common view, few secrets can remain cloaked in a trial, or few emotions remain unraveled under the intensity of skillful examination of witnesses.
MOCK TRIAL – “THE ULTIMATE ROLE-PLAY”
Many teachers have discovered that American society's attraction to the trial process can be used to an educational advantage. More and more courts are implementing formal visitation programs for students. Bar associations, individuals attorneys, and judges willingly lend their time to teachers and students. Significantly, during the past twenty years the use of mock trials has taken root in schools’ curriculum.

Two main reasons can be cited for this teaching phenomenon. One is the great public popularity of trials, already mentioned. The second (more significant educationally) is the recognition of the mock trial as a versatile, multi-dimensional teaching device. Because of the number of students a mock trial can involve in working toward the achievement of a wide variety of skills objectives, the mock trial as a teaching device might well earn a reputation for being the “ultimate role-play.”
PLANNING FOR A MOCK TRIAL

CONDUCTING MOCK TRIALS
A teacher new to the use of mock trials may hesitate to undertake a trial for reasons of time and complexity. Trial simulation is actually a flexible device, capable of being compacted into one or two classroom periods or expanded into a full unit several weeks in length. On a competitive level, attorneys statewide volunteer each year providing legal advice and training to mock trial teams and their advisors.

Mock trials may be based on historical events, cases of contemporary interest, school situations, or hypothetical fact patterns. The format of the mock trial can be formal or informal, depending on the objectives of the class and the skills and sophistication of the students. Most mock trials use some general rules of evidence and procedure, an explanation of the basic facts, and a brief statements for each witness.

There is a range of mock trial formats. Freewheeling activities can be done where rules are created by the student participants (sometimes on the spot) and no scripts are used. Or more serious attempts to simulate the trial process can be based on simplified rules of evidence and procedure. They also can be used to re-enact dramatic historical trials in which scripts are relied upon heavily.

Usually, however, scripts are not used. Instead, the students are given a statement of facts and legal issues. They may also be given a set of witness statements, which are not scripts, but affidavits on which the witnesses and attorneys build their witness examination questions and answers. Relevant documentary evidence (e.g. a contract) might also be included in the packet of trial materials. Analysis of the packet of materials and strategic design of each step in the trial represent the most important parts of the student learning experience in the mock trial. For this reason, teachers should avoid scripting the material or doing most of the question and statement preparation for the students.

Simplicity in approaching a mock trial is critical, particularly for a teacher who has not used the device previously. The skills-building objectives should always be in the forefront of the teacher’s activities in the mock trial. While real-life simulation is certainly desirable to a point, teachers should be aware that too much legalizing over the issues, too much jargon, too much emphasis on the rules of evidence and procedure tend to diminish the learning value of the mock trial by stifling student interest and making the process too cumbersome for all involved.

TIME FACTORS
A successful mock trial can be a largely impromptu event taking place right in the classroom and occupying one or two class periods at most. It can also be an intricately planned event with class preparation taking a full week or even more and trial presentation requiring two or more complete class periods.
Both types of mock trials, and many variations on them, have demonstrated their value as strategies for learning in the high school classroom. Each teacher needs to exercise discretion in selecting which approach to use. A key criterion is the amount of time available for this activity. Another is the specific learning objectives the teacher is aiming for at that particular point.

The lesson plans provided in this manual are built around the time sequences for each activity that have proven realistic on the basis of experience with hundreds of mock trials of all kinds. Throughout, the references to class periods assume 50-minute lengths of time.

A natural prelude to or follow-up activity for the mock trial are trips to local courts to observe real attorneys, witnesses and judges in action. In addition, many attorneys, law students and judges are happy to volunteer to come into classrooms to help students prepare, act as judges and/or debrief the trial.

STUDENT INVOLVEMENT
A mock trial project should involve every student in the class for the entire unit. Careful planning is essential to achieve this goal of total involvement. Students not assigned specific, active roles quickly lose interest. However, not every student in a large class can play an attorney or a witness. Realistically, then, in classes larger than fifteen or twenty, how can every student be actively involved? To a large extent, the answer depends on the individual teacher and the classroom situation.

Suggestions to aid teachers in arranging total involvement include:

a. Number of Attorney and Witness Roles
   In each mock trial case, each side uses two witness roles and six possible attorney roles. In sum, there are sixteen principal roles.

b. Alternates
   Alternate witnesses are essential to safeguard against last-minute absences. Since attorneys can usually cover for each other, teachers can also assign alternate attorneys. With alternates for each attorney and witness role, as many as thirty-two students could be assigned roles.

c. Teams *
   Cooperative learning is one of the important objectives of the mock trial process. The team and small group activities essential to mock trial preparation provide the vehicles for cooperative learning.

d. Role Assignments
   Note that specific role assignments for attorneys and witnesses are not mentioned until Lesson Plan #4. Unless the mock trial is to be a fairly short, informal classroom event, there is no need to rush into role assignments. The longer every student remains a candidate for any role, the higher the level of student interest in the mock trial preparations will be.

*Lesson Plan #3 provides instructions for dividing the class into teams. For the purposes of active involvement in trial preparation, every student
should be assigned to one team or the other, and should then be expected to participate fully in the small group discussions and team strategy sessions. The lesson plans call for small groups at certain points and also indicate which principal roles are involved at each stage. The principal role players and alternates, as well as other students to assist them, should all be assigned to small groups and participate in them.

e. Juries
In large classes it may be preferable to include all unassigned students on the jury. (Note, however, possible other roles, under f.) Using a jury is a good way to keep all students actively involved during the actual trial. However, during the trial preparation stage, students who will be serving on the jury should be assigned to work with the teams. Even though real life jury members start a trial impartially with no prior knowledge of the case, the educational value of having jury members assist with case preparation outweighs the need to simulate reality.

Activities designed to demonstrate the importance of an impartial jury are valuable. (One way is to conduct a role-play of a “voir dire” exercise--this is when lawyers or the judge ask prospective jurors questions to gauge their impartiality. A lawyer could help us with this.) If the class strongly desires a truly impartial jury for their trial, another class can be invited to sit as the jury.

f. Other Roles
The trial itself has room for roles other than attorneys and witnesses. These roles include:

1. Judge or Judges
2. Formal Observers
3. Court Artist
4. Clerk or Bailiff
5. Members of the Jury
6. Reporters from the media

Again, the goal is to involve every student. All students in the class, whatever their eventual role in the trial, should participate on trial preparation teams.

PREPARATION OF MATERIALS FOR STUDENTS

The student materials in this manual include an Introduction to the Trial Process, Steps in a Trial, Simplified Rules of Evidence, and Case Materials. Before starting the mock trial unit, teachers need to determine which materials to give the class and when. The teacher may copy and distribute the entire packet at once or give out only sections at a time. A few suggestions that can help with this decision:

a) **The Trial Process** is a general introduction for students who have not previously studied trials in detail, or for those needing refresher reading. It is a good first handout.

b) **Steps in a Trial** is a guide designed to assist students with their preparation for mock trial roles.
c) **Simplified Rules of Evidence** is recommended for distribution only to classes in which the teacher plans to devote a substantial amount of time to trial preparation. For the sake of time and simplicity, teachers may prefer not to use these rules for short, informal mock trials.

d) **Case Materials** are separate packets with the facts and pieces of evidence for the specific trial the class will conduct. All students should receive a copy of this material.

**LEGAL ASSISTANCE**
The mock trials presented in the cases include hypothetical laws appropriate for use in any classroom. However, teachers may prefer to use a law actually on the books in the jurisdiction where the school is located.

To obtain information about an appropriate law that would work for a mock trial, teachers should consult with a local attorney or attorneys. The Bar Association in the area can often assist teachers in identifying attorneys who could help out.

Attorneys and law students are also valuable resources to assist students in the actual preparation for a mock trial. When using attorneys or law students as class presenters, team advisers, or judges, the teacher must take the time to brief them so that they understand the educational objectives of the program and recognize that the class will necessarily be using simplified procedures and rules of evidence.

**JUDGING**

Two important early decisions for the teacher are who will judge the trial and whether to use a jury. These decisions are influenced by time and learning objectives, as well as by class size. A few suggestions might help with this decision:

a) If the judge is to be a student, he/she should be able to learn the trial process well, have the capacity to be decisive, and be able to give directions to other students.

b) The teacher may choose to serve as the judge in situations where substantial control over the actual process is important. Such situations may apply with the very first trial, where everyone is a novice; where time is unusually tight; or where the teacher wants to have a free hand in interrupting to explain or drill witnesses during the trial.

c) An attorney, law student (preferably beyond first year), or local judge may be invited to act as the judge. This arrangement is most appropriate for the more formal trial where the class has spent much time preparing. As with other situations using an outside resource person, the teacher should make arrangements well in advance. A full week is minimal. The resource person
agreeing to take the judge’s role will need to know the date, time, and place. Equally important, the judge needs to gain a thorough familiarity with the educational objectives of the class and with the simplified procedures that will be used in the mock trial. It is also advisable to pass the actual trial facts and statements onto the judge prior to the trial date.

d) With a large class, the teacher may wish to place the students who are not participants in the trial on a “jury.” The jury then has the task of deciding the outcome of the case. When the time comes for jury deliberations, the teacher may find it advantageous not to have the jury go out but have it deliberate fishbowl style right in the classroom. This gives non-jurors the opportunity to observe the decision-making process, but of course they may not participate in the juror’s discussion.

CLASSROOM ARRANGEMENT

For the actual trial, the room should be arranged as follows:

If the trial will attract a sizable group of spectators, a teacher might wish to hold the proceedings in a larger room or auditorium. Such larger rooms will usually require microphones at the attorney’s lectern, judge’s bench, and the witness box. All such details should be firm several days before the trial, and audio equipment should be tested and adjusted before the trial.

SELECTING AND INSTRUCTING THE BAILIFF

Every trial should have a bailiff (often called a clerk) who takes care of announcing the entrance of the judge, calling the case, keeping time, marking evidence, and swearing in witnesses. The teacher should instruct the student selected at least one day before the actual trial. A section entitled “Clerk’s Directions” is included as part of Lesson Plan #7: The Mock Trial. See Bailiff/Courtroom Host explanation in the Competition Procedures section of this kit.

PREPARING THE OBSERVERS

Because there may be more students that can have attorneys and witness roles, or that can assume such other roles as bailiff, the teacher may wish to designate overseers. This is not just a “catchall” role. The observers will be valuable in debriefing the trial. They will have the job of observing the trial as it unfolds, of looking for good points and errors and deficiencies, and of making notes that can be referred to afterwards when it comes time to analyze the event.

Lesson Plan #6 reminds the teacher to hand out the Mock Trial Observation Sheet to each observer before the trial begins.
MOCK TRIAL ADMINISTRATIVE CHECKLIST

These are tasks the teacher should check off as accomplished. Some are noted as “optional” – all others are necessary for successful trials.

_____ Trial Selected
_____ Time-frame Determined (dates for each lesson and trial itself)
_____ Lesson Plans Adapted
_____ Materials Selected for Students
_____ Materials Copied for Students
_____ Student’s Preparation Begun
_____ Court Field Trip Date Set (optional)
_____ Attorneys (or Law Students) Identified to Help (optional)
_____ Attorneys Invited (optional)
_____ Attorneys Briefed (optional)
_____ Judge Identified
_____ Judge Invited (actual judge, attorney, teacher, or students)
_____ Judge Briefed and Provided Materials
_____ Room Selected
_____ Microphones ordered (for larger rooms only)
_____ Invitations (other classes, administrators, parents, etc.) (optional)
_____ Observation Sheets Copied and Handed Out (optional)
_____ Jury Selected/Instructed (optional)
_____ Clerk Selected/Instructed
_____ Judge’s Robe obtained (an academic gown will suffice)
_____ Gavel, etc. obtained (optional)
_____ Students’ Preparation Completed
_____ Trial Conducted
_____ Trial Debriefed
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.
   o What happened on each date given?
   o What happened during the intervening periods?
   o What information is missing?
   o How does the missing information affect the case?
   o 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><strong>P1</strong> Witnesses and Alternates</td>
<td><strong>D1</strong> Witnesses and Alternates</td>
</tr>
<tr>
<td><strong>P2</strong> Examining Attorneys</td>
<td><strong>D2</strong> Examining Attorneys</td>
</tr>
<tr>
<td><strong>P3</strong> Attorneys assigned to make opening and closing statements</td>
<td><strong>D3</strong> 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>
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<td>n. preponderance of evidence</td>
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**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.

<table>
<thead>
<tr>
<th>PROSECUTION TEAM</th>
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<td>Direct Exam of First Prosecution Witness</td>
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<tr>
<td>Closing Arguments</td>
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</table>
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 woman 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.
SECTION 3

Rules
INTRODUCTION

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 Trial Guidelines sections of the kit.

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) Trial Guidelines.

The Washington State Mock Trial Competition is sanctioned and governed by YMCA Youth & Government, and the Competition Rules set forth here. These rules are established in consultation with the YMCA Youth & Government Board of Directors, the Mock Trial Program Chair, and the Mock Trial Program Committee. They are designed to ensure excellence in presentation and fairness in scoring all trials and tournaments.

All participants are expected to display proper courtroom decorum, professional conduct, and appearance appropriate for the part they are to play during the trial.
PART 1. GENERAL TRIAL PROCEDURES

Rule 1.01 – Order of Events
In general, a mock trial round should follow this order of events:

a) Before the round, teams confer and distribute rosters (see Rules 1.3 and 1.4)
b) Teams introduce themselves (see Rule 1.5)
c) Teams ask the judge to clarify any preliminary matters (see Rule 1.6)
d) Pretrial motion
e) Opening statements
f) The timekeeper swears in all witnesses (see Rule 1.7)
g) Examination of Plaintiff/Prosecution witnesses
h) Examination of Defense witnesses
i) Closing arguments
j) Raters submit scores
k) Raters and judge make brief comments

Rule 1.02 – Courtroom Setting
The Plaintiff/Prosecution team sits at the table closest to the jury box. The jury box should be on the same side of the courtroom as the witness stand. The first row of benches behind each counsel table are reserved for witnesses for that side. The student portraying the defendant may sit at counsel table with their attorneys.

Rule 1.03 – Teams Conferring Before Trial
Outside of extenuating circumstances, teams should arrive in their assigned courtroom fifteen minutes before the scheduled starting time of the trial. Opposing teams should meet before the trial begins to discuss the order that witnesses will be called, the preferred gender pronouns to be used for each witness, and any other matters that can be resolved ahead of time. Each team should show the other side any enlargements of exhibits or visual aids that may be used during trial to ensure there is agreement that they conform to Rule 5.4. Teams should confirm with the timekeepers that both sides understand when to stop and start time under Rule 2.2. Students may ask the judge to participate in this conference.

Rule 1.04 – Team Rosters
Before trial begins, teams should provide copies of their roster to the judge, the opposing team, and each of the raters. Rosters must include the team’s letter code, the side the team will present, the names of each student competing during the round, and the role each student will play during the trial. Unless prohibited by a team’s school or sponsoring organization, rosters should include photographs of each student to aid the raters identify who is who. Rosters should not include any words or pictures that could allow a rater or judge to infer the team’s school. An example of a team roster is included in the case materials.

Rule 1.05 – Team Introductions and Identification of Conflicts
At the beginning of the trial, teams may briefly introduce themselves to the judge and the raters. Teams should identify themselves by the side of the case they will present and not indicate their school or team name. Witnesses should indicate both their real name and the part they will play during the trial. Attorneys should not describe the specific parts of the trial they will present. These introduction should be kept as short as practicable. Following introductions, the judge should ask the raters and students whether they know of any potential conflict between the teams and the raters that could appear to bias the scoring. If a conflict is identified, the judge should immediately alert the tournament convener.
Rule 1.06 – Preliminary Matters
Following introductions, an attorney from each team may ask the court to note, clarify, or resolve any procedural issues before the trial gets underway.

Rule 1.07 – Swearing of Witnesses
The timekeeper provided by the Plaintiff/Prosecution team should swear in all witnesses before examinations. The following oath should be used: “Please stand and raise your right hand, as you are able. Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?”

Rule 1.08 – Stipulations
Stipulations are considered a part of the record and already admitted into evidence. Unless otherwise provided in the case materials, stipulations may be presented through the testimony of any witness.

Rule 1.09 – Motions Prohibited
The only motions permissible are the pre-trial motion included in the case materials and a motion requesting the judge to strike testimony following a successful objection to its admission.

Rule 1.10 – Bench Conferences
In exceptional circumstances an attorney may request a bench conference with the judge to clear up or protest a significant and urgent procedural issue, Competition Rule violation, or factual question. One representative from each team must be present for all bench conferences. It is the responsibility of the attorney requesting the bench conference to provide the page and number of any rule in question. Students are advised not to overuse this procedure.

Rule 1.11 – Outside Materials
Students are encouraged to read other cases, laws, materials, articles, etc., in preparation for the mock trial competition, but they may only cite to the materials given as part of the official mock trial problem, the Competition Rules, or the High School Mock Trial Rules of Evidence.

Rule 1.12 – Cell Phones and Electronics
No student competing in a round of mock trial may use or have in their possession a cell phone, computer, or any other device that can connect to the Internet. Teams may ask the judge to make an exception for medical necessity. Any exceptions made to this rule should be disclosed to the opposing team and the raters.
PART 2. TIMEKEEPING

Rule 2.01 – Time Limits
Subject to the time-stopping provisions in Rule 2.2, the following time limits apply to each part of the mock trial round:

a) Pretrial Motion:
   1. Moving party’s motion 4 minutes
   2. Non-moving party’s response 4 minutes
   3. Moving party’s rebuttal 2 minutes
   4. Non-moving party’s surrebuttal 2 minutes

b) Opening Statement:
   1. Plaintiff/Prosecution statement 5 minutes
   2. Defense statement 5 minutes

c) Witness Examinations:
   1. Plaintiff/Pros. direct examination 24 minutes total for all witnesses
   2. Defense cross examination 20 minutes total for all witnesses
   3. Defense direct examination 24 minutes total for all witnesses
   4. Plaintiff/Pros. cross examination 20 minutes total for all witnesses

d) Closing Argument:
   1. Plaintiff/Prosecution argument 6 minutes
   2. Defense argument 6 minutes
   3. Plaintiff/Prosecution rebuttal 2 minutes

Attorneys are not required to use the entire time allotted to each part of the trial. Time remaining in one part of the trial may not be transferred to another part of the trial. Time spent on redirect and recross examinations counts against that team’s direct and cross examinations, respectively. Rater and judge comments after the trial should not exceed 5 minutes per person or 15 minutes total.

Rule 2.02 – Clock Stoppage
The following times do not count against the limits in Rule 2.1:

a) During the pretrial motion, the clock stops when the judge asks a question and does not resume until the attorney has finished answering that question. If the attorney has spent more than a minute answering a single question, the timekeepers should agree to restart the clock.

b) Objections and Witness Impeachments
   1. Objections: During witness examinations, the clock stops when the opposing party makes an objection and does not resume until the examining attorney asks their next question. The clock does not stop if the examining attorney makes the objection, unless the opposing party responds.
   2. Witness Impeachments: The clock does not stop for witness impeachments during direct or cross examinations.

c) The judge may add additional time at the expiration of total direct or cross examination for inappropriate time wasting by the opposing team, including improper responses to impeachment, upon the request of the affected team. The ruling of the judge on this request is final.

d) The clock stops for any other interruptions to the trial until the proceedings can resume. This includes any questions raised by the judge and the attorney’s answer. While objections and judge’s questions are not permitted during opening statements and closing arguments, any such interruptions should still stop the clock.
Rule 2.03 – Two Timekeepers

a) Each side must provide a timekeeper who is a student on the competing team and not playing any other role on that side of the case. Timekeepers should sit together near the judge, where they are visible to the raters. Timekeepers may move to the jury box during opening statements and closing arguments so that attorneys may better gauge the amount of time remaining. Timekeepers must attend the timekeeper training.

Rule 2.04 – Timekeeper Materials
Timekeepers are responsible for bringing:

a) At least two silent devices (preferably not cell phones) that can track time to the second;

b) A set of the time cards included in the case materials;

c) A form to keep track of the time spent on each portion of the trial;

d) A copy of these timekeeping rules; and

e) Something to write with.

Rule 2.05 – Timekeeper Duties
During the trial, timekeepers should act as a neutral entity to fairly and accurately track the time spent on each portion of the trial, stopping the clock for the reasons listed in Rule 2.02. The timekeepers must write down the time spent on each part of the trial, keeping track of each witness’s examinations separately. Time starts for an examination when the examining attorney asks their first question. When there is 15, 10, 5, 2, 1, ½, or 0 minutes left in a part of the trial (including raters’ comments after the trial), the Plaintiff/Prosecution timekeeper must hold up the corresponding time cards so that the attorney, judge, and raters have an opportunity to see it. The Plaintiff/Prosecution timekeeper keeps holding up the 0 time card until that part of the trial ends.

Rule 2.06 – Timekeeping Discrepancies
When two timekeepers are in use, the timekeepers should confer with each other throughout the trial to ensure there is no substantial difference between their times. Timekeepers should raise any differences of more than 15 seconds with the judge during a break in the proceedings (e.g., after an examination or speech is finished and the clock has stopped). The judge will determine how to resolve any discrepancies and the timekeepers should synchronize their stopwatches accordingly before the trial continues.

Rule 2.07 – Objections for Exceeding Time Limits
When the timekeeper raises the 0 time card during an examination, the witness should be allowed to finish their answer to the attorney’s final question. If raised during a speech, the attorney should be allowed to finish their sentence without objection. If the attorney starts a new question or sentence after the 0 card is raised, the opposing team may object that the attorney is out of time. The attorney must stop or request additional time from the judge.

Rule 2.08 – Time Extensions
If a team has less than two minutes left when starting the examination of a witness (either direct or cross examination), the judge must grant additional time so that the team receives at least two minutes for the examination of the witness. In all other cases, the judge has the sole discretion to grant time extensions. If the judge determines that a witness has given non-responsive, evasive, or unnecessarily long answers during cross examination, the judge should grant additional time to the cross examining attorney.
PART 3. PRETRIAL MOTIONS, OPENINGS, AND CLOSINGS

Rule 3.01 – Rebuttal and Surrebuttal
During the pretrial motion, both the moving party and the non-moving party receive a two-minute rebuttal and surrebuttal, respectively. During the closing argument, only the Plaintiff/Prosecution receives a two-minute rebuttal. There are no rebuttals during opening statements. The attorney who presents the initial argument must be the same attorney who presents any rebuttal or surrebuttal.

Rule 3.02 – No Objections
Objections are not allowed during the pretrial motion, opening statements, or closing arguments, except if the attorney starts a new sentence after exceeding their time limit as provided by Rule 2.07. Attorneys may not make “offers of proof” (stating objections that would have been made after opening statements and closing arguments).

Rule 3.03 – Division of Attorney Roles
The attorney who gives the opening statement is not allowed to also give the closing argument. Any attorney that examines witnesses must also present the pretrial motion, the opening statement, or the closing argument. Any attorney that presents either the opening statement or the closing argument must examine witnesses as provided for in Rule 4.13. An attorney is permitted to present only the pretrial motion and not conduct the examination of any witnesses.

Rule 3.04 – Timing of Opening Statements
Opening statements must be given by both sides at the beginning of the trial, before witness examinations.

Rule 3.05 – Use of Exhibits or Visual Aids
In general, exhibits or visual aids may not be used during the pretrial motion, but the attorney arguing the pretrial motion may give the judge a copy of any exhibits or witness testimony that the motion requests be excluded or suppressed, or that forms the factual basis of the motion. Admitted exhibits (or enlargements of admitted exhibits as provided by Rule 5.4) may be used during closing arguments. Simple charts outlining evidence or law may be used on closing argument or, in the discretion of the judge, opening statements; any such charts must conform to the format restrictions in Rule 5.4 and be shown to the opposing team before trial. No props are allowed during the pretrial motion, opening statements, or closing arguments.

Rule 3.06 – Position in Courtroom
To permit judges and raters to hear and see better, attorneys presenting the pretrial motion, opening statement, or closing argument should stand, as they are able. Attorneys should not leave counsel table or the podium without the judge’s permission.

Rule 3.07 – Scope of Closing Arguments
Closing arguments should be based upon the actual evidence and testimony presented during the trial.
PART 4. EXAMINATION OF WITNESSES

Rule 4.01 – Calling Witnesses
During trial, teams must call all witnesses included for their side of the case. All witness for the Plaintiff/Prosecution must be called before any Defense witnesses are called. Witnesses may not be recalled by either side. Direct and cross examination for every witness is required, while redirect and recross examination is at the discretion of the attorney pursuant to Rule 4.2.

Rule 4.02 – Redirect and Recross Examination
Redirect and recross examinations are permitted. The scope of redirect examination questions are limited to issues raised on cross examination. The scope of recross examination questions are limited to any information introduced on redirect examination, including any testimony on redirect examination that contradicts or is not included in the witness’s sworn affidavit.

Rule 4.03 – Witness Roles
Any student may play any witness, regardless of the character’s name, gender, or background as described by the case materials. Questions on cross examination attacking the credibility of a witness for any perceived inconsistencies between their portrayal and the physical description or ethnic origin of the character in the case materials are not allowed.

Rule 4.04 – Witness Attire
A student portraying a witness may dress in appropriate court attire consistent with how the character being portrayed would dress in a courtroom. However, no uniforms, costumes, or props are allowed.

Rule 4.05 – Witnesses Bound by Statements
Each witness statement in the case must be considered a sworn affidavit or declaration of that witness, made under penalty of perjury and intended by the witness to be accurate and complete. Each witness is bound by the facts contained in that witness’s own statement and any related documentation relevant to their testimony. A witness is not bound by facts contained in other witness statements. Conflicts between different witness statements may be brought out on cross examination or closing argument.

Rule 4.06 – Fair Extrapolations
Witnesses may use their own words to paraphrase or explain the facts in their statement, but they are bound by those facts.

a) A witness may also testify to limited additional facts, provided that the new information does not contradict anything in their own witness statement, that the new information is supported by a reasonable inference from a witness statement, and that the new information does not materially affect the witness’s testimony.

b) On cross examination, the witness may only testify to the additional facts in part (a) of this rule when directly responding to a question that asks for information not included in their witness statement.

Rule 4.07 – Unfair Extrapolations and Impeachment
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.
Rule 4.08. – Objections
Only the attorney conducting the direct or cross examination of a witness may make or respond to objections while that witness is on the stand. Trial proceedings are governed by the High School Mock Trial Rules of Evidence. Other, more complex rules or objections may not be raised during trial.

Rule 4.09 – No Sequestration
Witnesses are not to be excluded from the courtroom, either physically or constructively, during the trial. Judges may not order that witnesses should be considered sequestered or excluded by trial participants.

Rule 4.10 – Notes
Witnesses are not allowed to have notes or read from any writing while testifying, unless questioned or cross-examined about a witness statement or an exhibit. Attorneys may use notes when examining witnesses, but the use of notes may impact their scores at the discretion of the raters. Attorneys may confer with each other at counsel table either verbally or through written notes.

Rule 4.11 – Expert Witnesses
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 under Evidence Rule 702. Opposing counsel may object that particular opinions are outside the scope of the witness’s expertise.

Rule 4.12 – Voir Dire Not Allowed
Attorneys are not allowed to question (“voir dire”) witnesses when making or responding to objections. The judge may not ask witnesses any questions.

Rule 4.13 – Attorney Roles Examining Witnesses
Only one attorney per side may conduct the examination of each witness. Each attorney must conduct the direct examination of at least one witness and the cross examination of at least one witness, unless the attorney is solely participating in the pretrial motion as permitted by Rule 3.3, in which case the attorney must not conduct the examination of any witnesses.
PART 5. EXHIBITS

Rule 5.01 – Admissible Exhibits
The only exhibits which may be introduced into evidence during the trial are the original exhibits provided in the official case materials.

Rule 5.02 – Writing or Marking on Exhibits
Original exhibits cannot be marked on or otherwise modified before or during trial. During direct and cross examination, however, attorneys and witnesses may mark on copies of exhibits that have been entered into evidence. If a team wishes to add markings to an admitted exhibit, it must provide its own clean copy of that exhibit for this purpose before any markings are made. Such marked copies may be used as demonstrative aids during witness examinations and during closing arguments, but are not entered into evidence as exhibits. Any marked copy of an exhibit should be made available to the opposing side for reference during cross examination.

Rule 5.03 – Publishing Exhibits to the Jury
With the judge’s permission, an attorney may publish an original admitted exhibit to the jury or distribute clean copies of an admitted exhibit to the jury. No other materials may be handed to the jury.

Rule 5.04 – Enlargements of Exhibits
The exhibits provided in the case materials, or portions of an exhibit, may be enlarged and displayed on white poster board. The poster board should be of a standard type available at office supply stores. The poster board should be approximately 24 inches by 30 inches or less. 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. All enlargements should be shown to opposing counsel before trial starts. Lamination of enlargements is permissible for preservation of exhibits. However, teams may not write on enlarged exhibits.

Rule 5.05 – Diagrams and Visual Aids
No diagrams or visual aids other than those provided in the case materials may be prepared before trial and brought to court, other than simple charts outlining law or evidence as permitted by Rule 3.5. While testifying, witnesses are allowed to draw diagrams, consistent with their sworn statements, in order to illustrate their testimony. Such diagrams may be used as demonstrative aids during witness examinations and during closing arguments, but are not entered into evidence as exhibits.
PART 6. SPECTATORS

Rule 6.01 – Spectators
Spectators include coaches, teachers, family, friends, teammates not competing in the current round, and any other observers of a trial. Spectators do not include the judge, the raters, the timekeepers, or the attorneys and witnesses competing in the current round.

Rule 6.02 – No Communication with Spectators
Spectators may not talk to, signal, communicate with, or coach any student competing during trial. This rule remains in force during any regular or emergency recess that may occur. Spectators must remain outside the bar and cannot sit in the jury box without the special permission of the mock trial tournament staff and the judge. Team members competing in the current round may, among themselves, communicate during the trial and during recess; however, no disruptive communication is allowed.

Rule 6.03 – Viewing a Trial
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.

Rule 6.04 – Videotaping and Recording
Videotaping or tape recording during competition is not allowed without the express permission of the competitors being filmed or recorded. Ideally, coaches should confer before trial to address requests for permission. This rule does not apply to the championship round at the State Competition, which will be filmed and broadcast. In all cases, any permitted videotaping, recording, or photography should be silent and not disrupt the competition.
PART 7. JUDGES AND RATERS

Rule 7.01 – Judge’s Decisions
The decisions of the judge with regard to evidentiary rules, objections, and procedural matters are final. If the judge is unclear about the Competition Rules, the judge should consult with the timekeepers for assistance.

Rule 7.02 – Judge’s Questions and Interruptions
The judge may interrupt the pretrial motion to ask the attorney questions. The judge may not interrupt the opening statement or the closing argument unless the attorney is out of time, and an objection is raised. The judge may not interrupt witness examinations or ask the witness any questions.

Rule 7.03 – Judge’s Rulings on the Pretrial Motion
The judge should announce a decision on the merits of the pretrial motion after hearing the surrebuttal by the non-moving party, but before opening arguments.

Rule 7.04 – Judge’s Role in Scoring
The judge should avoid influencing the scoring decisions of the raters. The judge should not comment on the merits of the case or the performance of individuals until all scoring sheets have been collected from the raters by tournament staff. The judge should not participate in scoring the round unless there are only two raters and the judge is asked to serve as the third member of the rating panel at the beginning of the trial.

Rule 7.05 – Scoring Ballots
Raters score their ballots individually and should not consult with one another or the judge during this process. Raters should follow the scoring guidelines provided for the mock trial competition. The judge cannot rule that a particular score or penalty be assigned to a rater’s ballot.

Rule 7.06 – Ballot Secrecy
Scored ballots should be collected by tournament staff as soon as possible and not shown to any team member or any other person during the competition. Copies of the original ballots and rater comment sheets for each team will be distributed to the team’s coach after the competition is completed.
PART 8. TEAM COMPOSITION AND ROLES

Rule 8.01 – Grades
All teams must consist of students currently enrolled in grades 9-12.

Rule 8.02 – Approved Teams
a) 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, or YMCA branch. 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. Schools, approved youth clubs, and YMCA branches may enter more than one team in the competition, but a student cannot compete on more than one team.

b) Exceptions to this rule may be permitted at the discretion of the Youth & Government State Office.

Rule 8.03 – Roles
a) Teams will be composed of a minimum of 7 students and a maximum of 16 students.

b) 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
   1-2 court bailiff(s) (If the bailiff is doubled up in a witness role, s/he may not play a witness and serve as plaintiff during the same round.)

c) 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.

Rule 8.04 – Preparation
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.

Rule 8.05 – Participation
a) All student attorneys must participate with case presentation as follows:
   1. 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.
   2. The attorney giving the opening statement will not be allowed to give the closing argument.
   3. Objections will be permitted by the direct or cross-examining attorney only.

Rule 8.06 – Witnesses
Each party must call all witnesses included in the kit for its side of the case.
PART 9. DISPUTE RESOLUTION

Rule 9.01 – Objections Based on Evidence Rules

Objections on any matters of law or rules of evidence should be made according to the Competition Rules and are within the sole discretion of the judge. The judge’s decisions in these matters is final.

Rule 9.02 – Allegations of Competition Rule Violations

a) Only 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.

b) 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 (see rule 10.01-a), he/she should not announce scoring decisions, or attempt to influence the decisions of other panel members.

Rule 9.03 – State Championship Dispute Resolution

a) At the State Championship, dispute resolutions will adhere to the rules outlined in Part 9 above.
PART 10. TOURNAMENT ADMINISTRATION

Rule 10.01 – Raters and Scoring
a) Team scores are determined by a 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.
b) 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.
c) The criteria for scoring is discussed in separate documents titled “Guidelines for Raters” and “Guidelines for Presiding Judges.” These documents follow this document, and should be considered an extension of the rules.
d) 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.
e) 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 conveners or designated scorer will correct improper entries before the ballot is totaled, or take other appropriate action.
f) A rater’s decisions regarding scoring are final and cannot be appealed.

Rule 10.02 – District and State Tournament Procedures
a) The team’s advisers and coaches are responsible for enforcing mock trial rules, codes of conduct, and supervising their students at all times i.e. during formal mock trial events, free time, at the hotel (from when they leave to travel to the mock trials until their return).
b) Violations of the student and adult conduct agreements 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).
c) Unless otherwise directed by the tournament conveners or YMCA Youth & Government State Office, the following scoring and ranking rules apply at district competitions:
   1. 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.
   2. A team wins a trial by winning the majority of the rater ballots for that trial.
   3. At the conclusion of the competition, teams will first be ranked according to their record of trial wins. Teams with identical win totals will next be ranked based upon the total number of ballots won in the competition. Teams with identical win totals, and total number of ballots won, will be ranked total point scored in the competition.

   d) Conveners are encouraged to consult with the YMCA Youth & Government State Office to select a matching system that best fits their district needs. The tournament conveners’ decisions concerning the round by round matching, and interpretation of the competition rules, procedures, and final rankings during that competition are final.

e) When applicable, for a championship round, the tournament conveners shall determine the sides to be presented by each team. This will normally be determined by a coin flip, or by 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.
Rule 10.03 – Individual Awards
Each scoresheet for each trial includes one nomination for Outstanding Attorney and one nomination for Outstanding Witness. At the conclusion of the tournament, any student nominated as an Outstanding Attorney or Witness should be recognized by the tournament conveners. Conveners may decide further to recognize the competition’s Most Outstanding Attorney, and Most Outstanding Witness.

Rule 10.04 – Team Selections for District and State Competitions
a) Teams will be assigned to district events after registration is closed and the total number of participants has been determined. Geographic location, district capacity, and numbers of teams fielded by a respective school, youth group, or YMCA branch will be considered when making district placement decisions. Whenever possible, a team will compete at an event in or near its home county. After initial placement, team assignments may be adjusted by YMCA Youth & Government State Office, after consultation with district conveners and affected teams.

b) After the completion of district events, the program chair and YMCA Youth & Government State Office 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 the State Office to eligible teams. In determining which teams will be invited to participate, the following factors may be considered:
   1. The team’s performance at a district event, including their ranking at the event, win/loss record, numbers of ballots, and total points.
   2. The number of teams and programs participating in each district event.
   3. The number of district events.
   4. The total number of teams and programs participating statewide.
   5. The need to promote geographic diversity, to ensure that mock trial remains a program that benefits students in all regions of Washington State.
   6. 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.
   7. The need to encourage the growth of mock trial, both through creation of new programs and the establishment of new district events.

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

Rule 10.05 – Publishing Results
a) At the end of every competition, the convener must promptly forward the following information to the Youth & Government State Office:
   1. All scoring ballots for each trial. This can be the originals, or copies as long as the copies are legible.
   2. A list of all participating team’s competition data in the following categories: total trial wins, total ballots won, and total points.

b) The Youth & Government State Office will audit the competition results, organize the data in a commonly branded format, and distribute that format to each team in that competition:
   1. Copies of the original scoresheets from each round for their team(s).
   2. Final rankings from the district competition that includes each team’s total trial wins, total ballots won, and total points scored.

c) At the conclusion of all district competitions, the Youth & Government State Office will publish the district results on the YMCA Youth & Government Website, along with a list of teams invited to that year’s YMCA Mock Trial State Championship Competition.
Rule 10.06 – State Championship Tournament Procedures

a) Due to the differing nature in size/scope of the State Championship Competition, and in an effort to increase transparency, a new articulation of the state tournament procedures is currently under consideration, and may be implemented for the 2020 State Championship Competition. The new language under consideration is designed to inform teams of the unique match-making procedures used to seed the respective rounds of the competition and should not impact how teams prepare for districts and/or the state competition during the season. **If a new written articulation is adopted for State, it will be distributed to all teams no later than January 17, 2020.**

b) In the event a new articulation of state tournament procedures is not adopted this year, the competition will be administered the same as 2019 in adherence to the rules outlined in Part 10 above.
RULES OF EVIDENCE
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, negativing 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.
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
statement suffered from delusions, the statement would not be hearsay because it was not offered to prove the truth of matters contained in the statement.

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 first-hand 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. \textit{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.

\textbf{ARTICLE XI – Miscellaneous Rules}

Rule 1103. \textit{TITLE}

These rules may be known and cited as the Washington Mock Trial Rules of
Evidence
SECTION 4

Trial Guidelines
TRIAL GUIDELINES

Included in this Section:

Guidelines for Presiding Judges

Guidelines for Raters

Guidelines for Teams
BEFORE THE COMPETITION:
- Read these guidelines thoroughly. There are several important differences between real trials and high school mock trial. Being aware of these differences will prevent confusion and help the students get the most out of the experience.
- Become familiar with the general summary of the case and the other materials provided to you. This will help you rule on relevance objections and the pretrial motion.

KEY DIFFERENCES BETWEEN REAL TRIAL AND MOCK TRIAL:
- There are Competition Rules that everyone must follow. If there is a dispute between the teams about the Competition Rules, hold a private bench conference with a student attorney representative from each team. Refer to Part 9 of the Competition Rules for how to handle a dispute.
- You should allow and encourage argument on objections in open court so that the attorneys can demonstrate their knowledge of the rules of evidence to the raters.
- Students use the Mock Trial Simplified Rules of Evidence, which do NOT include every rule in the federal or state Rules of Evidence. Do not permit objections or arguments based on any rules excluded from this simplified set.
- In general, do NOT interrupt the trial if possible. You may not interrupt opening statements or closing arguments to ask questions. You may not question the witnesses yourself.
- You MAY (and ARE ENCOURAGED to) ask attorneys questions during the pretrial motion.
- Both sides receive a two-minute rebuttal during the pretrial motion. Only the plaintiff/prosecution receives a two-minute rebuttal during closing arguments.
- Both sides have time limits, which will be tracked by the two bailiffs. See the Competition Rules on time limits for more guidance on enforcement and granting extensions.
- Teams may request a brief recess after each side rests. Recesses should not exceed five minutes. Before the recess, remind all participants that they should not communicate with teachers, attorney coaches, family, or anyone else not competing in the round.

BEFORE TRIAL STARTS (SET UP):
- Introduce yourself to the bailiff(s). It is mandated that the plaintiff/prosecution side of the case supply a bailiff/timekeeper, but it has been encouraged that each side provide a bailiff/timekeeper if possible. Coordinate who will announce that trial is in session and who will swear in the witnesses (and when). Confer with the team captains before trial if you have any questions about the Competition Rules.
- Make sure there are three raters in the jury box before starting.
GUIDELINES FOR PRESIDING JUDGES

● Ask each team if it is ready for trial. Ensure that they have supplied photo rosters to you and to each rater. Teams should be identified by team letter only, not their school.
● After the bailiff has called the court to order, ask the teams to make brief introductions to the court and raters (plaintiff/prosecution first).
● After introductions from both sides, check whether there are any conflicts of interest. For example:

"Members of the jury, do any of you have reason to believe there may be a potential conflict of interest that could call into question your ability to rate this trial impartially? For example, are any of you associated with either of these teams, now or in the past?"

If a rater or a team identifies a potential conflict of interest, notify tournament staff immediately.
● Remind the spectators that:
  o Video or audio recordings are not allowed without the express permission of both teams. If anyone plans to record any part of the trial, they should speak up now and ask for permission.
  o There should be no communication between any spectator and a competitor until the end of the trial. This includes during any recesses.
● Ask both teams whether there are any other administrative or preliminary matters that should be addressed before the pretrial motion.

PRETRIAL MOTION:

● Ask whether one of the parties has a pretrial motion (students may or may not recognize the term “motion in limine”).
● The pretrial motion has four parts:
  1. The moving party has 4 minutes to make their initial motion.
  2. The non-moving party has 4 minutes for their initial response.
  3. The moving party (same attorney) has 2 minutes for a rebuttal.
  4. The non-moving party (same attorney) has 2 minutes for a surrebuttal.
● You are encouraged to ask the attorneys questions during their arguments. You may ask these questions at the end or during their presentation. Your questions (and their answers) do not count against their time.
● While you can interrupt the attorneys, please remember that the raters may not have read the pretrial motion materials at all. Before interrupting, please allow the attorney to at least explain what the motion is about and outline their argument for the raters’ benefit.
● Please limit your questions to the materials provided to the students; do not try to embarrass students by testing their knowledge of legal matters that were not included in their materials. They have not in fact gone to law school.
● Attorneys may make their motion from counsel table, at the podium, or in front of the bench.
● The best judges ask tough questions with a kind demeanor. Test their ability to think on their feet, not their ability to withstand public humiliation.
GUIDELINES FOR PRESIDING JUDGES

- You should rule on the motion at the end of oral arguments. Provide any clarification the teams need to proceed.

OPENING STATEMENTS
- Both sides have 5 minutes for their opening statements.
- No objections or interruptions are allowed unless the attorney starts a new sentence after their time is up.
- Both sides must give their opening statements at the beginning of trial (i.e., the defense CANNOT defer until after the plaintiff/prosecution’s witnesses).
- Please allow one (or both) of the bailiffs to move to the jury box for opening statements so that the attorneys may better gauge how much time remains.

WITNESS EXAMINATIONS
- The witness statements in the case materials should be viewed as signed affidavits made under penalty of perjury.
- Witnesses may be impeached during cross examination if they contradict or unfairly go beyond the facts in their written statement. You should NOT rule whether the witness testified consistently with their statement. That is for the raters to determine.
- The case often includes statements of fact and stipulations that have been agreed to by both parties and may be introduced by any witness.
- Only one attorney per side may question each witness.
- Witnesses are allowed to use black and white enlargements of admitted exhibits and in-court drawings to illustrate their testimony.
- In mock trial, attorneys generally receive permission to move about the well.

OBJECTIONS
- Only the attorney questioning the witness may make or respond to objections.
- Remember to allow arguments on objections if asked so that the attorneys can demonstrate their knowledge of the rules of evidence to the raters.
- Please see Rule 2.02 regarding clock stoppage procedures for objections.

CLOSING ARGUMENTS
- The attorney who delivered the opening statement may NOT also make the closing argument.
- Both sides have 6 minutes for their closing argument; the plaintiff/prosecution also receives an additional 2 minute rebuttal.
- No objections or interruptions are allowed unless the attorney starts a new sentence after their time is up.
- Please allow one (or both) of the bailiffs to move to the jury box for closing arguments so that the attorneys may better gauge how much time remains.

END OF TRIAL
- The raters’ scored ballots should be collected immediately after the trial by tournament staff.
YMCA MOCK TRIAL
GUIDELINES FOR PRESIDING JUDGES

- Do NOT comment on the students’ performances or the merits of the case until AFTER the raters have finished scoring and have submitted their ballots to tournament staff. Generalized praise for both teams is fine.
- AFTER raters have turned in their ballots, you and the raters may give the students comments, praise, and constructive critiques. You may also announce any verdict you would have reached or explain any rulings you made during the trial. The students may have questions about certain decisions.
- Time between trial rounds is limited, please ensure all post-trial comments must be limited to 15 minutes TOTAL (and 5 minutes per rater). Comments should be timed by one of the bailiffs.
- Remember to keep comments constructive and focused on trial advocacy techniques. Do NOT make comments about a student’s appearance or other traits not related to their skill. Please model professional behavior for the students.
- If you have written comments you’d like to share with the teams, either give them to the team’s coach after the trial or return them to the orientation room. They will be distributed to the teams after the competition is over. Make sure that you have labeled the comment sheets with the team’s letter code.
- Judges are requested to fill out the evaluation form on their mock trial experience and return it to the orientation room before they leave. We use your feedback to improve future competitions.
BEFORE TRIAL:
Make sure you have the score sheet, scratch paper for comments, and a pen. Fill out the team letters (for example, T v. Q) in the top corner of the ballot and any comment sheets. Before trial begins, teams should introduce themselves and distribute photo rosters. This is not part of the trial and should NOT influence your scoring decisions. Please do not engage in conversation with teams until after the trial is over and score sheets have been turned in. Inform the judge immediately if you have a conflict of interest (e.g., if you are associated with one of the teams or schools).

SCORING DURING TRIAL:
- Use a pen and PLEASE WRITE LEGIBLY. If you need to change a score, cross out the old score and write the new score next to it. Do NOT write over the old score with a new score - this will not be legible on the carbon copy of your ballot.
- Score each part of the trial on a scale of 1 to 10 (no fractions, ranges of points, or zeros). Score students based on the skill they demonstrate, not the underlying legal merits of the case facts. See the scoring rubric for details on skills.
- Assume each student starts at a 5 and works their way up or down from there. Avoid giving scores only in a narrow range (e.g., if every student gets a 7 or 8, it is very difficult to determine the relative strength of each team).
- Do not artificially lower points of a good team because they have a weaker opponent (or artificially award higher scores in “fairness” for having a stronger opponent). Try to use the scale above as objectively as possible.
- Teams should be able to present their case within established time limits. You should deduct points if a student does not appropriately manage their own time. You should deduct points if a student appears to be intentionally wasting their opponent's time by giving unnecessarily long, evasive, or non-responsive answers.
- You should increase the score of a cross-examining attorney that successfully shows a witness has testified to material facts that contradict or are not included in the witness’s sworn affidavit. Decrease the witness’s score if they are successfully impeached with a prior inconsistent statement.
- Note that attorney’s speeches are worth more points (your score for the opening statement will be multiplied by 2, while the pretrial motion and closing argument scores will be multiplied by 3). These parts of the trial are weighted to reflect the additional effort required to prepare them.
- Keep up with scoring during the trial; it will be impossible to do it all at the end. Use a scratch ballot if you do not want to mark up the official ballot until the end.
END OF TRIAL:
● Do NOT confer with the other raters or the judge about how to score the trial.
● Double check to make sure you have legible scores for every part of the trial.
● Make sure to circle which team you thought won in the bottom-left corner of the ballot (remember: winning should be based on skill, NOT the legal merits).
● Make sure to write the names of the best attorney and the best witness (in your individual opinion) in the bottom-right corner of the ballot.
● Score sheet should be collected immediately after the trial by tournament staff. Keep your notes and comment sheets for the post-trial comments to the team.

POST-TRIAL COMMENTS:
● After score sheets have been turned in, raters have the opportunity to give comments and critiques to the teams. Comments should not exceed 5 minutes per rater or 15 minutes total. A timekeeper will inform you when your time is up.
● Remember to keep comments constructive and focused on trial advocacy techniques. Do NOT make comments about a student’s appearance or other traits not related to their skill. Please model professional behavior for the students.
● For many students, critiques are a very valuable part of the competition. Brief general comments are a good way to preface critiques. Students may see comments that are too general as unhelpful or simplistic, so keep most comments specific and follow them with suggestions on how to improve.
● Remember that teams might not have an opportunity to incorporate any suggestions before their next trial, so suggestions for major changes might be more demoralizing than helpful, especially at the state competition. Make sure comments are consistent with competition rules and the constraints of a closed-universe case packet.
● Give your comment sheets to a team’s coach after the trial or return your comment sheets to the orientation room and they will be distributed to the teams after the competition is over. Make sure that you have labeled the comment sheets with the team’s letter code.
● Raters are requested to fill out the evaluation form on their mock trial experience and return it to the orientation room before they leave. We use your feedback to improve future competitions.
SCORING RUBRIC FOR RATERS

While confidence, poise, and elocution are essential to making a persuasive case, your scoring should reflect the **substance** of each student’s performance, not just their style. Listen carefully to what the students are saying and think critically about how well it helps their case. Here are some things to consider in your evaluation:

**Pretrial Motion:**
- Clearly articulates what is being asked of the judge
- Develops arguments that logically support the motion
- Makes points that are well-organized and easy to follow
- Supports their argument with legal precedent
- Demonstrates knowledge about relevant case law
- Maintains focus following judge’s questions and interruptions
- Thinks on their feet; able to discuss issues beyond scripted argument
- Effectively points out flaws in opposing counsel’s arguments

**Opening Statements:**
- Introduces the side’s theme and theory of the case
- Tells a clear story of the facts from the side’s point of view
- Provides a road map through the case with appropriate references to expected witness testimony and key exhibits
- Outlines the burden of proof and the requested relief
- Outlines evidence without drawing conclusions (non-argumentative)

**Direct Examination:**

<table>
<thead>
<tr>
<th><strong>Attorney</strong></th>
<th><strong>Witness</strong></th>
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<tr>
<td>- Asks open-ended questions that allow witness to explain facts</td>
<td>- Thoroughly knows and understands their character’s testimony</td>
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<td>- Orders questions to lay foundation and introduce facts effectively</td>
<td>- Communicates key facts clearly</td>
</tr>
<tr>
<td>- Avoids asking about irrelevant facts</td>
<td>- Presents an interesting, engaging, and credible character</td>
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<tr>
<td>- Follows proper protocol for introducing and using exhibits</td>
<td>- Does not invent material facts that contradict the written affidavit</td>
</tr>
<tr>
<td>- Demonstrates understanding of the rules of evidence</td>
<td>- Properly uses any available exhibits to illustrate their testimony</td>
</tr>
<tr>
<td>- Adjusts according to judge’s rulings</td>
<td>- Adjusts according to judge’s rulings</td>
</tr>
<tr>
<td>- Properly objects to cross-examiner’s questions and defends objection</td>
<td>-</td>
</tr>
</tbody>
</table>
SCORING RUBRIC FOR Raters, cont.

Cross Examination:

<table>
<thead>
<tr>
<th>Attorney</th>
<th>Witness</th>
</tr>
</thead>
<tbody>
<tr>
<td>● Properly objects on direct examination and defends objection</td>
<td>● Maintains consistent character and credibility under cross examination</td>
</tr>
<tr>
<td>● Uses objections appropriately and not just to throw other side off</td>
<td>● Does not merely “roll over” in response to cross examination questions</td>
</tr>
<tr>
<td>● Adjusts according to judge’s rulings</td>
<td>● Does not give unnecessarily long, evasive, or non-responsive answers</td>
</tr>
<tr>
<td>● Asks leading questions to elicit helpful facts or undermine harmful facts</td>
<td>● Responds to questions, but does not contradict their written affidavit</td>
</tr>
<tr>
<td>● Organizes questions logically so they are easy to follow</td>
<td></td>
</tr>
<tr>
<td>● Listens to the witness’s responses and follows up as warranted</td>
<td></td>
</tr>
</tbody>
</table>

Closing Argument:

|● Carries theme through from opening |
|● Summarizes and highlights key evidence |
|● Refers to jury instructions to outline law |
|● Applies facts of case to the law |
|● Only uses evidence admitted during trial |
|● States conclusion that follows logically from argument |
|● Explains the burden of proof |
|● Asks for a specific verdict or remedy from the jury |
|● Effectively answers and rebuts opponent’s strongest arguments (by rule, plaintiff/prosecution receives 2 minutes of rebuttal time) |

For all parts of the trial, attorneys should be able to present without overly relying on written notes. When determining your score for a student’s part of the trial, you should take into account attorneys who fail to engage with the witnesses or the jury and simply read off a piece of paper.
Rate each category on a scale of 1–10, with 10 being the highest, in the score spaces provided below. Use only whole numbers; no decimals or fractions. Additional space is provided for attorney and witness names.

<table>
<thead>
<tr>
<th>PLAINTIFF / PROSECUTION</th>
<th>SCORE</th>
<th>DEFENSE</th>
<th>SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pretrial Motion</td>
<td>(_______) ___×3</td>
<td>Pretrial Motion</td>
<td>(_______) ___×3</td>
</tr>
<tr>
<td>Opening Statement</td>
<td>(_______) __×2</td>
<td>Opening Statement</td>
<td>(_______) __×2</td>
</tr>
<tr>
<td>Pl./Pros. Witness 1:</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Direct Examination</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Witness Performance</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Pl./Pros. Witness 2:</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Direct Examination</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Witness Performance</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Pl./Pros. Witness 3:</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Direct Examination</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Witness Performance</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Pl./Pros. Witness 4:</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Direct Examination</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Witness Performance</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Cross-Examination</td>
<td>(_______) ___</td>
<td>Cross-Examination</td>
<td>(_______) ___</td>
</tr>
<tr>
<td>Closing Argument</td>
<td>(_______) ___×3</td>
<td>Closing Argument</td>
<td>(_______) ___×3</td>
</tr>
</tbody>
</table>

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

**Tiebreaker:** (Best overall team; one must circle one)

**Trial’s Best Attorney:**

**Trial’s Best Witness**: *Student’s Name*
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
- Plaintiff

The Witness
- Prosecution
- Plaintiff
TRIAL SEQUENCE & INFORMATION

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. 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.
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)

<table>
<thead>
<tr>
<th>PRETRIAL MOTION</th>
<th>6 minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>OPENING STATEMENT</td>
<td>5 minutes</td>
</tr>
<tr>
<td>DIRECT EXAMINATION</td>
<td>24 total minutes for all witnesses, used as teams see fit. (Includes Redirect)</td>
</tr>
<tr>
<td>CROSS-EXAMINATION</td>
<td>20 total minutes for all witnesses, used as teams see fit.</td>
</tr>
<tr>
<td>CLOSING ARGUMENT</td>
<td>6 minutes</td>
</tr>
<tr>
<td>REBUTTAL ARGUMENT</td>
<td>2 minutes</td>
</tr>
<tr>
<td>(PLAINTIFF ONLY)</td>
<td></td>
</tr>
<tr>
<td>AUDIENCE RATER CRITIQUES</td>
<td>(Suggested time for each is under five minutes, at the judge’s discretion to lengthen if necessary.)</td>
</tr>
</tbody>
</table>

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 _______ Courtroom ____________</th>
<th>Judge _____________________________</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bailiff _____________________________</td>
<td>Rater ______________________________</td>
</tr>
<tr>
<td>Plaintiff Team Letter ______________</td>
<td>Rater ______________________________</td>
</tr>
<tr>
<td>Defense Team Letter _________________</td>
<td>Rater ______________________________</td>
</tr>
</tbody>
</table>

#### Pretrial Motion (Record time used)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</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>
</tr>
</tbody>
</table>

#### Plaintiff’s Case in Chief

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff Opening (5 minutes)</td>
<td>Defense Opening (5 minutes)</td>
</tr>
</tbody>
</table>

#### Plaintiff Witnesses (24 minutes)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct ______</td>
<td>Direct ______</td>
</tr>
<tr>
<td>Witness</td>
<td>Witness</td>
</tr>
<tr>
<td>Redirect ______</td>
<td>Redirect ______</td>
</tr>
<tr>
<td>Re-cross</td>
<td>Re-cross</td>
</tr>
</tbody>
</table>

#### Defense Cross (20 minutes)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct ______</td>
<td>Direct ______</td>
</tr>
<tr>
<td>Witness</td>
<td>Witness</td>
</tr>
<tr>
<td>Redirect ______</td>
<td>Redirect ______</td>
</tr>
<tr>
<td>Re-cross</td>
<td>Re-cross</td>
</tr>
</tbody>
</table>

#### Plaintiff Cross (20 minutes)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct ______</td>
<td>Direct ______</td>
</tr>
<tr>
<td>Witness</td>
<td>Witness</td>
</tr>
<tr>
<td>Redirect ______</td>
<td>Redirect ______</td>
</tr>
<tr>
<td>Re-cross</td>
<td>Re-cross</td>
</tr>
</tbody>
</table>

#### Plaintiff Closing (6 minute argument; 2 minute rebuttal)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff Closing</td>
<td></td>
</tr>
<tr>
<td>Rebuttal</td>
<td></td>
</tr>
</tbody>
</table>

#### Defense Closing (6 minutes)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>______ Closing</td>
<td></td>
</tr>
<tr>
<td>(no rebuttal allowed)</td>
<td></td>
</tr>
</tbody>
</table>
# BAILIFF’S TIMECARDS

Please print the cards on next seven pages onto four 8 ½” x 11” sheets (one for each number) and laminate them for use during competition. One bailiff should display them during the trial so that the attorneys can manage their time allocations.

If your timekeeping device does not have a countdown function, you may use the following table as a reference for when to display each number. When your clock equals the number in left column, display the timecard with the number in the right column.

<table>
<thead>
<tr>
<th>Pretrial (initial motion)</th>
<th>Rebuttal (Pretrial/Closing)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2:00</td>
<td>1:00</td>
</tr>
<tr>
<td>3:00</td>
<td>1:30</td>
</tr>
<tr>
<td>3:30</td>
<td>2:00</td>
</tr>
<tr>
<td>4:00</td>
<td>0</td>
</tr>
<tr>
<td>1:00</td>
<td>½</td>
</tr>
<tr>
<td>1:30</td>
<td>0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Opening</th>
<th>Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>3:00</td>
<td>1:00</td>
</tr>
<tr>
<td>4:00</td>
<td>4:00</td>
</tr>
<tr>
<td>4:30</td>
<td>5:00</td>
</tr>
<tr>
<td>5:00</td>
<td>5:30</td>
</tr>
<tr>
<td>2:00</td>
<td>6:00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Directs (total per side)</th>
<th>Crosses (total per side)</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00</td>
<td>5:00</td>
</tr>
<tr>
<td>14:00</td>
<td>10:00</td>
</tr>
<tr>
<td>19:00</td>
<td>15:00</td>
</tr>
<tr>
<td>22:00</td>
<td>18:00</td>
</tr>
<tr>
<td>23:00</td>
<td>19:00</td>
</tr>
<tr>
<td>23:30</td>
<td>19:30</td>
</tr>
<tr>
<td>24:00</td>
<td>20:00</td>
</tr>
<tr>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>½</td>
<td>½</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>
1/2
10
15
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.
GUIDELINES FOR TEAMS

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>
</tr>
</tbody>
</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>
</tr>
</tbody>
</table>
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.
SECTION 5

Case
WHO ARE YOU?

2019 2020 MOCK TRIAL
Case Author: Judge Robert Lewis
Clark County Superior Court

YMCA YOUTH & GOVERNMENT
INTRODUCTION

Every attorney who practices criminal law quickly learns two basic approaches for defending a client who insists that someone else committed the crime charged – in other words, that the authorities have misidentified the culprit. The first technique is the shotgun method. Blast as many little holes in the prosecution’s case as you can, criticize the thoroughness of the police investigation and point out the multitude of other, equally likely suspects. After all, why should a jury have only one reasonable doubt when so many are available?

The second technique involves a laser beam. Pick another suspect and constantly emphasize to the jury that this alternative has just as good (or better) a motive, opportunity and ability to commit the crime as the innocent defendant. Focus all of the attention where it belongs, on suspect number two. This may create only one reason to doubt, but it’s a really big one.

Both methods have their advantages and disadvantages. The shotgun approach allows the State to cry nit-picking and flyspecking, that the defense is attempting to distract from the “real” issues through red herrings and straw men. On the other hand, focusing on a single alternative suspect gives the prosecution a chance to put the defense theory on trial, to poke their own tiny holes into the other side’s circumstantial evidence.

The attorneys for this year’s defendant, Sydney Carden, will need to face these options head-on, fitting the evidence into a persuasive explanation of why the defendant has been wrongfully accused. And the State’s attorneys must be flexible, prepared to meet and thoroughly discredit whichever approach the defendant may choose. Our story is fictional, but its factual skeleton is a real store burglary trial from a few years ago. Identity is the main issue in both cases and I hope students enjoy working through the complexity here to discover, if they can, who done it.

Two author’s notes: First, I have attempted to present current problems in identity theft, using references to recent technology. However, as anyone who knows me can attest, I am always hopelessly behind the times. The kids (and now the grandkids) have to program things for me. So if any character sounds more “dial up” than “5G”, please accept this advance apology.

Second, coaches and advisors may recognize the name of Professor Sage Lofftiss’s mentor. Dr. Wesleyan Roberts was the memorable expert on the perils of eyewitness testimony created by Mike Lang in the 2009-10 Burning Rivers case. It was a pleasure to review that declaration and to recall all of the great mock trial cases edited by Judge William Downing. Hopefully, Professor Lofftiss updates the research and brings this important issue to the attention of a new generation of students.

The author would like to thank Brent Gaither and Erin FitzGerald for their assistance, especially with the cover art. We’ll miss you, Brent. Good luck to everyone! —Robert Lewis
Plaintiff's Witnesses

Carey Cash, Local Reality Star
Sam Drucker, Manager, LivGud4Less Department Store
Payton Bailee, Customer Relations Specialist, Sunshine Federal Credit Union
Detective Raz Gerard, Alki City Police Department

Defendant's Witnesses

Sydney Carden, Defendant
Professor Sage Lofftiss, Sand Desert University
Kahuna Thornhill, Publisher, The Truth Behind LivGud4Less website
Avery Ataro, MuvR Driver

Exhibit List

Exhibit 1 - Store Diagram
Exhibit 2 - Security Report
Exhibit 3 - ATM Printout
Exhibit 4 - Photograph -- Umbrella
Exhibit 5 - MuvR Receipt
Exhibit 6 - Screen Shot

STIPULATIONS:

The relative heights of the witnesses and any characters they describe are accurately stated in the declarations, irrespective of the heights of the real-life individuals assigned to play these roles.

The parties do not dispute the dates and purchase amounts of the credit card charges made on Carey Cash’s accounts between August 23 and August 27, 2019 and Carey Cash and Detective Raz Gerard may testify about these charges.
A representative of the security company has verified the information contained in Exhibit 2 and any witness may testify concerning the contents of that report.

Because the video footage from the surveillance cameras was inadvertently destroyed, a description by any witness who viewed this footage of its contents is admissible and the weight to be given this testimony, if any, shall be determined by the jury.

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

The exhibits have been authenticated and are admissible.
Pleadings
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PINE

STATE OF WASHINGTON, )
( ) Plaintiff, ) NO. 19-1-01101010
( )

vs. ) INFORMATION
( )

SYDNEY CARDEN, )
( ) Defendant. )

COMES NOW the Prosecuting Attorney for Pine County, Washington, and does by this inform the Court that the above-named defendant is guilty of:

COUNT 1 – IDENTITY THEFT, FIRST DEGREE

That SYDNEY CARDEN, in the County of Pine, State of Washington, on or about August 22-27, 2019, knowing obtained, possessed or used a means of identification or financial information of another person, with the intent to commit, aid or abet any crime and thereby obtained credit, money, goods or services in excess of $1,500 in value, a violation of RCW 9.35.020 (1)-(3).

COUNT 2 – POSSESSION OF STOLEN PROPERTY SECOND DEGREE

That SYDNEY CARDEN, in the County of Pine, State of Washington, on or about August 22-27, 2019, knowing received, retained or possessed a stolen access device, with knowledge that this property had been stolen, and appropriated the property to the use of someone other than the true owner or person entitled thereto, a violation of RCW 9A.56.160 (1)(c).

DATED OCTOBER 10, 2019.

STATE OF WASHINGTON
PINE COUNTY

BY: /s/ ______________________________
   Deputy Prosecuting Attorney
Instruction No. 1

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime 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.

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.

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.

Instruction No. 2

All jurors must agree in order to return a verdict.

Instruction No. 3

Evidence may be direct or circumstantial. 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. Both types of evidence are valuable and entitled to be given significant weight.

Instruction No. 4

You are the sole judges of the credibility of each witness and the value or weight to be given to his or her testimony. In considering a witness’s testimony, you may consider these things: the opportunity of the witness to know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory; the manner of the witness while testifying; any personal interest that the witness might have in the case; any bias or prejudice shown by the witness; and the reasonableness of the witness's statements, considering all of the other evidence.

Instruction No. 5

A witness who has special training or experience may be allowed to express an opinion in addition to testifying about facts. You are not required to accept his or her opinion. To evaluate opinion evidence, you may consider the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information.
Instruction No. 6

In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given to you for evaluating any witness's testimony, you may consider other factors that may bear on the accuracy of the identification, including:
(1) The witness's capacity for observation and recall;
(2) The opportunity of the witness to observe the perpetrator;
(3) The emotional state of the witness at the time of the observation;
(4) The witness's ability, after observing the perpetrator, to provide a description; and
(5) The extent to which outside influences may have affected the witness’s identification.

Instruction No. 7

To convict the defendant of the crime of identity theft, first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
(1) That on or about August 22-27, 2019, the defendant knowingly obtained, possessed or used a means of identification or financial information of another person;
(2) That the defendant did so with the intent to commit, aid or abet any crime;
(3) That the defendant knew that the means of identification or financial information belonged to another person;
(4) That the defendant obtained credit, money, goods or services in excess of $1,500 in value from the acts described in element (1); and
(5) That any of 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 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. 8

To convict the defendant of the crime of possession of stolen property, second degree, each of the following elements must be proved beyond a reasonable doubt:
(1) That on or about August 22-27, 2019, the defendant knowingly received, retained or possessed stolen property;
(2) That the defendant acted with knowledge that the property had been stolen;
(3) That the defendant appropriated the property to the use of someone other than the true owner;
(4) That the stolen property was an access device; and
(5) That any of 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 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. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Instruction No. 10

A person knows or acts knowingly with respect to a fact or circumstance when he or she is aware of that fact or circumstance.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

Instruction No. 11

Means of identification means information or an item that does not describe finances or credit, but is personal to or identifiable with an individual including: (a) a current or former name, telephone number, electronic address, or other identifier of the individual; (b) a social security, driver's license, or tax identification number of the individual; and (c) other information that could be used to identify the individual.

Instruction No. 12

Financial information means information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit, including (a) account numbers and balances; (b) transactional information concerning an account; and (c) codes, passwords, social security numbers, tax identification numbers and other information held for the purpose of account access or transaction initiation.

Instruction No. 13

Access device means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

The phrase “can be used” refers to the status of the access device when it was last in possession of its lawful owner, regardless of its status at a later time.

Instruction No. 14

Stolen means obtained by theft. Theft means to wrongfully obtain or exert unauthorized control over the property of another, or to appropriate lost or misdelivered property of another, with intent to deprive that person of such property or services.
Witness Statements
STATEMENT OF CAREY CASH

Wouldn’t it be awesome to be born with a name like Carey Cash? It shows that your parents are really thinking ahead, trying to give you a moniker that grabs attention and puts their progeny in the spotlight. Unfortunately, my folks did not have any imagination, either in baby names or really anything else in life. To protect my family from the paparazzi, and the paparazzi from my boring relatives, I won’t divulge my given name here. Rest assured, it was legally changed years ago, as soon as I hit the age of eighteen. I chose it myself, just as I have spent most of my adult life taking charge, doing the things I needed to do to get the recognition I deserve.

Perhaps you’ve heard of me? No? Really? You have apparently been living inside a law book or under a rock for too long. I’ve been a celebrity here in Alki City for a while now and I have a number of real folks – not robots, we have ways to check – who follow my daily exploits on social media of various types.

If you’d seen me in high school, you would never have guessed that I would become such a big deal. Outside my very small circle of friends, I was unknown and unappreciated. Although the rest of my grades were so-so, I did have a real talent for computer programming and video production. Unfortunately, a lot of young people are interested in those areas these days and an aptitude for the technical aspects of computers, however lucrative, seldom gets you the kind of attention I craved. So I shifted my focus to the other side of the webcam and started my career as a content creator.

Actually, I started on both sides of the camera, producing my own webumentaries on Youtube and other platforms. First, I focused on joining stunts that other people were also doing on the internet, like Selfies in Serious Places (I went to a local cemetery during a military funeral). But most of these trendy things were either boring or dangerous.

Then it occurred to me – why not film myself watching the things other people were doing and comment on how really boring or dangerous they were? The supply of stupid things other people were filming was endless, so I could fill all the air time I needed. In addition to commentary, I practiced a number of shocked and disgusted gestures and facial expressions and curated a bunch of sarcastic catch phrases, including my signature “WOWWZZA!” Soon my own channel, Stop That!! with Carey Cash – was born and my pieces regularly went viral.

Before long, everyone was copying my idea, watching videos and reacting to them for all to see. That’s the nature of the content business, very cutthroat and competitive. Fortunately,
I was noticed by a local television affiliate that wanted to create programs based on local media stars, both to bolster its dwindling broadcast ratings and to create a streaming presence. So I was offered the opportunity to be one of the original contestants in a reality show called *Faker’s Dozen.*

The concept was simple – eight contestants (see, we weren’t even a real dozen) were placed in situations where we tried to trick someone into doing something with us – join a fraternity at the local college, row with a dragon boat team, and so on. Hidden cameras picked up the action and we usually convinced the mark to go along. At the end of each episode, the person tricked would be told of the hoax and asked to name the person they were most suspicious of during the ruse. That person would be eliminated until only the most persuasive faker was left. Guess who won?

It was a great gig, and the *Behind the Scenes at Faker’s Dozen* specials were even more popular. All that backbiting and deception between contestants made for riveting TV. I was raking in royalties and ad revenues from *Stop That!!* I even made money with my one-on-one podcast “*Would I Lie to You?*” where I would read another local personality a “news article” and he or she would try to guess if it was fictitious.

But in my business, you constantly come up with something new, or the customers move on to the next fad. A couple of years ago, when my career was ebbing, I made a decision that I will always regret. I hired a couple of guys to rough me up and steal my pocketbook on the sidewalk near a downtown business with exterior security cameras. I hoped to generate some publicity and a little sympathy.

This was the most complex production I had ever attempted and I designed it right down to the last detail – fight choreography, where the lighting was best to obscure the faces of everyone (except me) so that my assistants wouldn’t get in trouble later. I knew the police wouldn’t fall for wound make-up, so we worked out how to do some damage to my face, hands and arms without going overboard.

At first, it worked like a charm and I received a very sympathetic reaction. But my devotion to detail ultimately ruined my plans. Store security noticed that the cameras had recorded me outside the store on a number of days prior to the incident, sometimes in the company of my “assailants”. As more details came out, my assistants panicked and contacted the local authorities. At first, the city attorney was going to make an example of me by charging me with false reporting. But those charges were dropped once the press lost interest in the story.
The negative publicity has haunted me ever since and for a while I was shunned as a content source by most of the people I wanted to work with in the business. I quietly worked the production side and humbly tried to show everyone that they could trust me again. I turned down a chance to appear on *Dancing With The Rats*, a sensational rip-off series that featured infamous people ballroom dancing with upstanding dance instructors. That was not the kind of image I wanted to build.

Recently, I sold a local station on the concept of a camera crew following me around, filming my reformed lifestyle of honest fun with my loyal entourage (yes, I still have one), my efforts to help others get started in the content production business and my heartwarming interactions with my two rescue ferrets. I thought the ferrets were a unique touch – everyone rescues dogs and cats, but who helps these high-strung weasels? The audience is even going to get to name them as part of their interaction with the show.

*Cash Gets It Now* is the working title, but production hasn’t started on the first season. Although the affiliate remains very interested and there was even a possibility of regional syndication, no one has been willing to fund my local production company. I guess I can’t blame them with my past, but I was really disappointed that we could not be ready for this fall. I am desperately trying to arrange funding, so we can slot in as a midwinter replacement.

As bad as my finances have been, things got even worse after August 22, 2019. My posse and I had been out comparison shopping around town, looking for the best deal on a new, more durable habitat for my ferrets. People don’t realize this (I certainly didn’t), but these mischievous creatures can be very destructive. The two of them completely chewed through their original plastic cage in less than a week.

These kinds of pet structures are often sitting in the back storerooms of stores, so it pays to drive around and not rely on the online offerings. We must have gone to 10 stores in the area – we even had the MuvR driver take us out to Barryton. One of the last places we looked was LivGud4Less. I’ve been in there many times before, especially in the last couple of years, because the store features a lot of discount stuff. I thought there was a pet section in the back, but I guess not. I didn’t notice that I dropped my pocketbook there, since this was the last stop before I went home and I didn’t end up making any purchases.

On August 23, I stayed home and brainstormed ideas for the show – reality doesn’t just happen. On August 24th, I spent most of the day with my entourage at a local watering hole, watching sports. They drove and paid that day, so I didn’t even look for my pocketbook. To tell you the truth, I don’t remember what I did on Sunday – probably laid in bed all day. I noticed
my phone was flashing and buzzing with missed calls and messages, but I didn’t feel like talking
to anyone except my crew. I didn’t check my messages until late afternoon on the 26th. That’s
when I received the messages from Detective Gerard and the store manager and realized that I
was in trouble.

The next day, I notified my credit card companies, my credit union and IDSALVE, the
company I pay to protect me from identity theft and to compensate me if my credit reputation
is harmed. I’ve submitted a claim for $100,000, because this situation has made it even harder
for me to get production financing. IDSALVE hasn’t ruled on my claim or paid anything to me
yet.

My pocketbook contained three credit cards, including the Magnesium Deluxe, where
most of the charges were incurred. There were charges on the other two cards as well, though
those losses were not as great. In four days, there were more than 75 unauthorized charges,
many of them to sites and businesses where I shop. That makes the misuse of my credit even
more onerous – now those places won’t do business with me at all, until I either reimburse
them for their losses, or jump through a bunch of humiliating hoops to verify purchase of even
the smallest item. Grand total of credit card losses was over $7,500 before I could stop use of
the accounts.

My Sunshine Federal Credit Union debit card was also lost in the theft. You need a pin
number to make withdrawals with that card, but I had trouble remembering the long numbers
and the CU required you to reset the thing every six months. So my latest passcode was
written on a slip of paper inside the pocketbook and the thieves must have figured out what it
was. $12,000 was cleaned out of my account in just one day.

The worst thing about this nightmare is how many people are not willing to believe that
I am the victim of a very real series of crimes. The police don’t have time to deal with all of
hardships this is causing me, so I have to do it myself. Each charge has to be separately
disputed, either through my own efforts or by providing statements and documents to
IDSALVE. Every voice on the phone – when you finally reach someone - seems to be suggesting
that I am making this all up and sometimes he or she expressly makes that accusation. And
every news story about this real crime had to dredge up the staged robbery and my history as a
celebrity “faker”.

All I want is justice for the losses I have suffered and to be seen for what I am – the
victim of a crime. I don’t have bruises this time, but I have pain. WOWWZZA!
STATEMENT OF SAM DRUCKER

For three years, I have served as the store manager of the LivGud4Less department store in Alki City, Washington. LGL, as it is known to most of the employees, has been a nationwide chain of retail outlets since 1970. Even after our recent acquisition by a larger competitor, we are proud to be strong and semi-independent, offering a vast selection of quality merchandise at discount prices.

LGL has been downsizing its brick and mortar locations in recent years, as corporate struggles to keep up with the aggressive turn of many consumers to etail shopping. The Alki City location is actually the third “box” that I’ve managed – the other two stores each closed a few months after I arrived to lead them. Contrary to my nickname among the employees, the Grim Reaper, I am not sent to stores to oversee their demise. I have no reason to believe that Alki City LGL is about to disappear. On the contrary, sales have increased under my watch, thanks to new, eye-catching displays and some timely promotional events.

LGL is the anchor store of South Central Plaza, a small strip mall on the outskirts of downtown, just off Highway 990. The layout of the store is typical for a ranch (one-floor) department store, with an open feel created by high ceilings, wide aisles and a blending of one department into another through interconnected displays of merchandise.

Exhibit 1 is an overall diagram of the store. The front doors, the only customer entrance, are located in the center of the store. There are two sets of entry doors, with a cart and basket corral in the foyer. After you walk through the second set of automatic doors, there are queuing lines for purchasers created by movable posts and separation strips on the right and then the main bank of registers. The men’s department is in the right hand corner behind the registers. If you follow the perimeter aisles around the store, you pass various departments, such as shoes, home appliances, pet supplies, linens and children’s wear and finally come back to the front through women’s clothing.

In the upper left hand corner of the store diagram, you’ll find our cashier’s office and the loss prevention office, which has a bank of video monitors linked to the security cameras. During the day, security employees sit in this office and watch for shoplifters. The office is empty at night, but the cameras still monitor and automatically record if any movement detected. I’ll describe this in more detail when I discuss the security features. Also in this corner of the store is my office, bathrooms, a layaway and receiving area and other services like the optometrist. There are emergency doors at each corner in the back of the store. Most of
these areas are marked with their purpose, except the offices and the receiving areas, which are marked “Employees Only.”

Throughout the store there are panels and partial walls, which divide some of the departments. As a result, you cannot see completely through the store, front to back. For example, shortly after you enter, a panel shields a collection of outdoor wear – boots, gloves, knit caps, that sort of thing – from the main aisle. In the middle of this outdoor area is a kiosk of umbrellas, which is not visible from the front door. Its location is marked on Exhibit 1. You have to wind through a couple of short aisles to reach a location where this kiosk is visible.

The cashier’s room, which is also marked on Exhibit 1, is actually two separate rooms with a locked door between them. When you enter the room from the store, you come into what we call the countdown room. This is where the cashiers count the money from their tills, making sure they balance. This is always done in the presence of a manager or assistant manager. After this task is completed, the tills are handed through a slot in a window into the auditor’s room. The auditor is the chief cashier for the shift, assigned to go into the room periodically to receive and secure money, tills and lost items. The auditor is in the room at the end of a shift, at closing and whenever an employee asks that something be secured. Except for the manager and the assistant managers, only the auditor has access to that room, through a key that can be checked out from the shift manager. The auditor also has to sign the key back in with the shift manager, before placing it on a hook in the manager’s office.

The auditor loads most of the money into bank pouches, which are taken at closing each day to our local bank’s night drop. Only a few hundred dollars are left in the auditor’s office, to refresh the tills in the morning. Almost everyone uses credit and debit cards these days, so we don’t hold over a lot of cash. This “seed money” is locked in a large metal box, along with any other valuables that might be in the lost and found – for example, a credit card someone left behind. Although we call the box the “safe” because it has a combination lock on the front, I’ve never really worried about securing it, because it is already behind several locked doors. The combination is still set at the original default – 123456 – and we usually leave it set on those numbers, so you can open and close the box without the combination.

The store’s security features are primarily designed to prevent shoplifting, a big problem in any open shelf facility. We have a bunch of monitoring cameras, most of them located near the ceiling, pointing at a series of fixed locations. The cameras cannot move – if someone that security wants to watch goes to a different part of the store, they just look at the monitor for the camera pointed at the new location. Two cameras are pointed at the exterior of the front doors and one camera is set on each emergency door.
These cameras are spaced periodically and pointed down so the entire store interior is covered by at least one camera. A few are zoomed in on locations where thieves are a special concern. Sure, you can see the cameras if you look for them, although you wouldn’t necessarily know which area a camera was monitoring, or whether there were other cameras watching you from behind a number of dark panels mounted on the upper walls – no comment on whether there are extra cameras behind any of these little windows.

Each camera is hooked to a monitor and a recording device. While the store is open, the cameras record on a continuous basis. After hours, a camera will automatically record if an attached sensor detects motion. This recording will continue until five minutes after the sensor stops detecting motion. Because of the large volume of digital data that is recorded each day, the recordings are not kept in our system for more than 72 hours. Unless a particular recording is specifically preserved during that time, the devices record over these images. Staff can watch recordings, and can also preserve “freeze frames” images from the cameras.

The store is also protected by an alarm system at night. The person with management responsibilities at closing makes sure the emergency doors are locked and that all employees and customers have exited the front of the building. The last employee and the shift manager leave together through the front doors, and the manager sets the alarm from a panel in the foyer. After the alarm is set, the outer door is locked. To enter the building after that, someone has to unlock the exterior doors with a key, enter the foyer and enter a code to disable the alarm. Disabling the alarm automatically activates the automatic doors and turns on the store lights.

On August 23, 2019, only four people had a set of keys that opened all of the doors to the store and an assigned code to disable the alarm. Besides myself, these three employees were the assistant managers -- Sydney Carden, Kahuna Thornhill and Chas Darney. Two of these assistants are no longer with the store, for obvious reasons, and their keys have been assigned to my new assistants, who were both employees promoted from within the store. I’ve had three other assistant managers during my tenure at the store and each of them had keys and codes while they were there. But I personally checked their keys back in when they left employment with LGL, just as I did when I fired Sydney and Kahuna.

The keys are standard metal and do not have biometric or electronic gizmos in them, so I suppose any person could use them. The keys for the assistant managers were cut from my master keys by a local hardware store, but that couldn’t happen with the duplicates. Each of
those keys has “Do Not Duplicate” stamped on them in big letters. So a key cutter would be in big trouble if they ignored that warning.

Each assistant manager is provided with an individual code for the alarm panel. That way, corporate knows who set and disabled the alarm every time. I assigned each code, by calling in to security with the individual assistant and orally providing authorization and my master code. We would have to follow the same procedure to change the code. I like to keep things simple, so the five digit codes I assigned were similar, based on my birthday, with only one or two different numbers. They weren’t in sequence and I don’t have to worry about someone trying multiple guesses to disable the alarm. After three tries, the system would lock up and security would be notified that someone was tampering with the panel.

As store manager, I work most of the day, contrary to what Kahuna may try to tell you. I have an assistant opening and closing manager each day, with varying shifts so that each of them knows how to perform all of the duties. On August 23, Sydney was the opening assistant. My shift started around 11:00am and I stayed until closing. Kahuna was the closing assistant that evening. That overlap is not unusual, since closing is a bigger job and you are making sure everything is secure.

All three of us were on duty around 3:00pm that day, because there is a short overlap between the shifts of the assistant managers. Kahuna came into the manager’s office to clock in while I was talking to Sydney – again - about the need to be punctual. When I first hired Sydney in March 2019, you couldn’t have asked for a more conscientious employee. But during the summer, Sydney was gone more often than present for a shift and was habitually late. The excuse was always something medical, like a cold or migraine headaches. Personally, I think it was “summer flu” especially after Sydney and Frankie Baker started hanging out together. I had to constantly remind Sydney of the need to show up on time, especially to open, so the other employees could be ready to go by store opening at 8:00am.

Kahuna was a few minutes late that day, so I had to lecture both of them, so it didn’t look like I was playing favorites. Kahuna gave me some lip, as usual, then started out towards the store to make opening rounds. Almost as an afterthought, Kahuna reached into the hooded sweatshirt that Thornhill always wears, even in the summer. Kahuna pulled out a leather pocketbook and dropped it on my desk. “I found this near the entry doors” was the only explanation I received as to where the pocketbook had been located.

I checked the pocketbook for identification and found a driver’s license for Carey Cash. When I read the name out loud, Sydney’s eyes bugged out and there was an audible gasp,
followed by at least a dozen “OMG! Carey Cash! OMG!” I had never heard of this person, but
Sydney finally explained that Cash was some sort of local celebrity. Carden watched while I
inventoried the pocketbook – no cash, three credit cards, a debit card and a couple of pictures
and business cards. As is my practice, I wrote down all of the card numbers and put them in a
file in my office, in case the police needed them later. Then I took the pocketbook over to the
auditor’s room and placed it in the safe.

Cash didn’t come back that day, so the pocketbook was still in the safe when I closed the
auditor’s room. No one else had left any credit cards or valuables that day, so the only other
item in the safe that night was the seed money for the tills, $400 in bills and some coins. We
went through the standard closing routine that night and I watched Kahuna set the alarm. If
Thornhill tells you any differently, then Thornhill is lying, pure and simple. Afterwards, I went to
my home, which is about a 30 minute drive from the store.

Around 3:30 that morning, I received a call from Kahuna that the store was broken into
and the police were on the scene. When dispatch checked with security, their records
indicated that someone had disabled the alarm about an hour earlier. Kahuna was already
there, although I don’t know why security would have called an assistant manager. I pulled on
my clothes and drove down to check on what was missing.

Nothing was taken from the aisles that I could see. I was later told that one of our
backpacks was stolen and that an umbrella was stuck in the back door. I later saw the umbrella
in the store’s video, being held by the thief. It was one of those flimsy, almost sheer fabric
umbrellas, the kind the wind easily rips apart. It looked like the umbrella shown in Exhibit 4,
although I only saw it on the video.

Both doors of the cashier’s room were wide open and the safe was empty. I told the
officers about the cash that was missing, but I forgot about Carey Cash’s pocketbook, which
was also gone. A couple of days later, I suddenly recalled this oversight and remembered the
inventory of items and card numbers. I immediately called and provided that list to the police.
I’m sorry about the delay in reporting, but it was an honest mistake.

Gerard asked about the cameras that night and we watched the footage from the break
in together. I don’t believe that Thornhill was in the loss prevention office with us. I noticed
two things as we followed the burglar through the store. First, the person who entered was
definitely shorter than the security stanchions at the front doors. Those are the plastic towers
that scan for security tags and sound an alarm if people try to leave without paying for

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merchandise. Even taking into account that the cameras are pointed down at an angle, you could see a gap of several inches between the top of the stanchion and the burglar’s head.

Second, the person obviously had intimate knowledge of the store and its layout. This person was always positioned so that the face was never exposed to a camera. He or she went directly to the umbrellas and knew the shortest route to the kiosk. The umbrella is then held to keep the face covered even when a camera is zoomed in or a new one takes over. That’s true even in the cashier’s room. Only someone who has been in that room, and watched the monitors in the loss prevention office, would know how to position the umbrella.

At one point, a camera picks up a distinct silhouette on the umbrella, when the thief turns to take down a backpack from a display. I’ve seen Sidney’s profile a number of times in the last six months, and the profile I saw was remarkably similar. The nose, the chin, the forehead – it was all the same. Of course, no one can make a positive identification off a view like that, but I was pretty sure and told Detective Gerard that night.

Naturally, the detective wanted the recording preserved and I told Thornhill to take care of it. When the police came back to collect the video evidence on August 28, I discovered that Kahuna had forgotten to notify security and all the footage from that night had all been written over. That was the last straw in a bale of incompetence, and I fired Kahuna on the spot. No, I haven’t looked at the website that slacker is now curating, but I’ve been told what is on it and it is all a pack of fantasies and lies.

Even though I wish it wasn’t true, I know that the defendant was responsible for taking Cash’s pocketbook. Sydney was the only member of my management team who was significantly shorter than the security stanchions. The person who pulled this job had the keys and intimate knowledge of the store, its offices and its cameras. And the thief used Carden’s secret alarm code. I really wanted to confront Sydney that night, but no one could reach the defendant by phone. And when Sydney’s next shift rolled around three days later, guess what? The defendant didn’t show up for work or call in sick. The police gave Sydney’s keys back to me and I had to issue new alarm codes to everyone on the management team.
STATEMENT OF PAYTON BAILEE

Good morning! My name is Payton Bailee, customer relations specialist with the South Central branch of the Sunshine Federal Credit Union. We don’t really use the term bank teller anymore – but you may if you like. How can I assist you in understanding the events of August 24, 2019?

First, let me tell you a little bit about myself. I’ve only been in the financial industry for a few years, but I’m already a senior specialist here at Sunshine. Actually, this is my first full-time job after I graduated from high school and received my Teller Training Certificate (I don’t why the school still uses that antiquated term) from Alki Community College. I started out working only a few days a week on a part-time basis. Other specialists have come and gone, but I’m still here and my senior status means longer shifts, some benefits and supervisory authority over two other employees.

Here at Sunshine CU, we want to “see you in the Sunshine”. With all of the magical ways to bank on-line and by smartphone these days, why waste your time coming directly into a stuffy old lobby and waiting for a place at the counter? We encourage you to use our state-of-the-art technology and very secure website to “bank on the go and avoid the slow.” Most of our customers follow that advice and I rarely get a chance to interact with them after initial account setup. In fact, some of them set up their accounts on line and I never lay eyes on them.

However, some folks just aren’t comfortable changing with the times and using those handy electronic devices. And that’s okay – we want our customers to be happy! So here at South Central Sunshine, we have several ways to accomplish your in-branch banking, and most of them don’t even involve any additional fee. Of course, you can always walk in and join the crowd that likes to deal with a CR specialist face to face. That’s my favorite type of banking too – chatting with you about your day, punching in a few numbers and giving you a paper receipt or a few bills. You can even have a cookie and some coffee while you wait.

For those customers who don’t want to climb out of their cars, we have two drive-up stations, where you can request withdrawals and make deposits through pneumatic tubes. One of us will communicate with you through an intercom system and make sure we know exactly what you need to accomplish. This may take a little longer, since there is usually only one specialist on duty at a time, but I promise we will get with you just as soon as we can.

Finally, if a customer just wants to withdraw some cash or deposit a few checks, he or she can use the automated teller machine in the lobby. The ATM serves both our credit union
and several other financial institutions, so that makes for convenient remote banking with
several accounts at a time. And if the ATM runs out of money, don’t worry – just let me know
and I’ll replenish it as soon as I finish with my in-person and drive-in customers.

Things can get pretty hectic down here, with three different ways for customers to need
assistance from a single specialist. The ATM should require the least human interaction, but
that is not always the case. Lots of things can go wrong with that contraption – paper jams in
the receipt printer, accidental unplugs, oily finger build-up on the touchscreen. Some
customers think it’s a pinball machine and whack it when it doesn’t perform to their
expectations. Then – TILT! Finally, depending on the volume of use, the cash receptacle may
need to be refilled several times a day. Sometimes, a rover for all of our branches comes
around and does this as a matter of routine. But if it runs out between the rover’s visits, then
that is another one of the many duties of a CR specialist.

The main counter in our branch is on the west side of the building, right next to the
window that looks out onto the drive-through stations. The safe is behind the south end of this
counter, at the end of a row of three payout windows that are configured for safe interaction
with our customers and their funds. A specialist can come out into the lobby from behind the
counter through a secure door on the north end. But you can’t get back in behind the counter
without the secret code. The lobby has marked waiting lines for each payout window (cartoon
feet on the floor), some chairs near the coffee/cookie table and a waiting area for the ATM,
which is against the eastern wall. I’d estimate the machine is about 12 feet from the payout
windows, although I’ve never had any reason to measure it.

It could get cramped behind that counter if all three of the payout windows were in use
at the same time. Luckily, Sunshine has downsized its workforce over the years, as it nudges its
customers to bank electronically. So usually there is only one CR specialist on duty at a time, to
handle the counter, cover the drive-through window and maintain the lobby and the ATM.
Overcrowding behind the counter is never a concern.

I worked by myself all day on August 24. Our regular hours are from 9 am to 5 pm,
although we routinely close for an hour at noon, so whoever is there can get some lunch. I
sometimes skip lunch, even though that is against company policy. Since so many customers
think credit unions should be open during lunch, closing just results in a big, grumpy line at
1pm. When I stay open, I snack on the cookies (also a company no-no) and drink lots of coffee.
It sure makes you look forward to dinnertime.
That was a busy Saturday, for sure and I kept the CU open through lunch. There was a steady stream of customers at all our banking modalities, including the ATM. That crazy thing had been malfunctioning all week, ever since the rover removed a skimmer device someone had snuck into the card slot a few days before. Even though maintenance gave it the once over on Tuesday or Wednesday, there were more receipt jams and error codes than usual. And security still hadn’t repaired the ATM’s internal camera, which is supposed to take a picture of every client involved in a transaction. I guess they figured the sign advising people that they were on camera was enough of a deterrent, like when you buy a Beware of Dog sign even though you don’t own a dog.

On a day like Saturday, I wouldn’t normally notice any particular customer at the ATM, but one did draw my attention on August 24. This client was in three times, and the visits were spaced about two hours apart. That isn’t unusual, but each time I had to remind the customer to “lower the hood”. For security reasons, we require our clients not to wear masks, hoods or any items that obscure their faces while inside the building. One reminder per customer is enough most of the time. This customer was wearing a hooded sweatshirt and each time I had to call out to him or her – I wasn’t sure which at first – asking to take down the hood. Each time the hood came down, but I noticed the customer was wearing a stocking cap under the hood. Since the cap didn’t obscure the face, I let it go. The customer turned from me and looked away from both the counter and the ATM during each withdrawal.

All of this ATM user’s transactions were withdrawals from one of our accounts, as shown by the printout I provided to the police, and that I recognize as Exhibit 3. A lot of cash came out each time. Our settings allow you to withdraw up to $4000 at a time, but that almost never happens. Each time this customer was finished with a withdrawal, I had to refill the cash receptacle within a few minutes. Odd, I thought, but the machine hadn’t sounded any security alerts or displayed any error codes, so I went on about my business.

The third transaction created more concern, which was just a little irritating because I was backed up both at the counter and the drive-through. After complying with my third request to drop the hood, the customer complained that the ATM would not return a debit card. That was the third time this shift that particular jam had happened and I was getting ready to unplug the machine and call for maintenance. However, I went over and turned a special key in the side of the card reader, which almost always works to make the card come out. After a few seconds a striped card, which didn’t look like our standard issue, popped loose from the slot. The customer took the cash out of the bin and headed for the door. As if on cue, the ATM asked for a currency refill. I yanked its cord out of the wall and told the next person in line that I would need to help them at the counter.
During this third transaction, I was beside the ATM user for 15-20 seconds. I had a good opportunity to observe facial features, were rather drawn and nervous. The customer kept looking away from me and the ATM, so my view was mainly of the side. But I can say without a doubt in mind that the person at the ATM on August 24 was the defendant, Sydney Carden. I’ve been told that Carden is a customer at our North Central branch and has used our ATM and drive-through stations in the past – we keep records of each type of use -- but I do not recall ever seeing the defendant before that day.

On August 29, Detective Gerard asked me about the incident and told me why it was important. Unfortunately, the counter cameras did not pick up a good view of Carden. The officer had several pictures in a folder and told me I was going to view them “to see if you can pick out the suspect.” When the folder was opened, the defendant’s photograph was the first one visible. I said, “You don’t have to show me anything else – that’s the person with the hood at the ATM.” Gerard said, “Are you sure? You know the suspect may not even be in these photos”. I looked again and I was definite: “That’s your thief, no doubt in my mind.” I’m just glad I was able to help resolve this for Carey Cash, who apparently also uses the ATM here on a regular basis, although I don’t recall seeing that name or that person before this incident.
STATEMENT OF DETECTIVE RAZ GERARD

My name is Raz Gerard and I am a detective with the Alki City Police Department. I am currently assigned to the department’s property crimes division and I am the only detective in our newly created electronic crimes subdivision. With the growth of criminal activity and fraud on the internet, however, I shouldn’t be alone in this unit for long.

I am the lead investigator in this case and an expert in the methods criminals use to steal the identities of ordinary citizens. This stolen information is used to obtain billions of dollars each year from bank accounts, credit card companies, private firms and government agencies at all levels. The area of crime detection is constantly evolving – as soon as tech companies fill one of the cracks used to breach a computer system, the crooks find another.

I am a commissioned law enforcement officer in the State of Washington and have been employed by the Alki City Police Department for more than four years. Prior to working for ACPD, I was a property crimes investigator with the Fir County Sheriff’s Department, and performed basically the same duties I have now. In addition to completing the basic law enforcement academy, I have taken a number of general refresher courses over the years.

My most valuable experience, however, comes from the private sector. After high school, I spent over ten years working for several tech firms, who hired me as an ethical hacker. As a kid, I was always fascinated with computers and the exotic places you could travel to on the web. Like too many young people, I fell in with some folks who convinced me that it was fun to break into company databases, just to see what we could find. During the intrusion, we would leave some calling card, like a crude picture, so everyone would know we were there. To finance new equipment and software for our activities, some of my hacker friends would take what they found and sell it on the “dark web” where others would use the information to steal from and exploit the company. I didn’t personally do this, but I’m ashamed to say that I did cheerlead, praising some of my group who engaged in these activities.

Fortunately, I got away from that gang and decided to use my knowledge to assist companies, and for my own financial benefit. So what is ethical hacking? Simply put, this type of hacking is performed by a company or individual to help identify potential threats on a computer or network. An ethical hacker attempts to bypass system security and search for any weak points that could be exploited by the malicious hackers. This information is then used by the organization to improve the system security, to minimize or eliminate any potential attacks.
For hacking to be deemed ethical, the hacker must have express permission from a company to probe their network, preferably in writing. You have to respect individual and company privacy, no matter what you find (you’d be surprised what people do on company computers). And you have to close out your work and immediately report vulnerabilities that you find, so you and others cannot exploit them later.

Although most of my skills in this area are the result of self-study, practice and innate talent, I have attended numerous courses and seminars to keep up with the latest software and technology. At first, these courses were part of the renewal of my license as a Certified Ethical Hacker (yes, it is a real thing). Later courses offered through the police academy included courses in Fraud Ethics and Case Study training, Online Investigations with an emphasis on Craigslist and Elder Fraud and Exploitation Recognition. All of these courses allow me to maintain a current certification as a Fraud Investigator. Finally, in my work as an officer, I have actually investigated thousands of suspected fraud and theft cases, many of them involving electronic exploitation.

Why did I leave the private sector for a career in law enforcement? I wanted to do more than make money plugging holes in the leaky security systems of big corporations. I could see that these crimes were having a huge impact on real people, ruining their credit and draining their resources. I wanted to help those victims and to bring these shadowy criminals to justice. In the electronic crimes unit, my primary role is to investigate fraud through banking, loan, credit card and money transfers.

I use a variety of electronic media to assist in tracking down suspects, including social media, bank and retail surveillance cameras, credit card transactions, bank statements, email and account information. My work often requires me to cooperate with other jurisdictions and companies throughout the country and the world. The evidence associated with these frauds and thefts is not held in paper form in one location – it covers many different jurisdictions and the transactions are often purposely routed through multiple computers, in an effort to cover the perpetrator’s tracks.

Let me give you a couple of examples of how identity thieves can misuse financial information. A common scheme is to identify an active credit card number belonging to an unsuspecting victim. The suspect will then encode the number on the magnetic strip of a generic gift card. The newly encoded gift card is used like a credit card, to purchase merchandise or more gift cards, since store clerks usually don’t examine cards that closely. Purchased gift cards are first used to buy real things and are often subsequently encoded with stolen credit or debit information. In this way, multiple purchases can be made at numerous locations before the account is finally shut down after the illegal activity is reported.

A thief does not need the original credit card to pull off this kind of crime, although that is the easiest and quickest way to get the information. All you need is the number, which can be purchased on the dark web from anonymous crooks who obtain these numbers through a variety of methods. Some suspects use the first 12 digits of a valid stolen credit card and then
guess different combinations of the last four numbers in order to find another valid card number to perpetuate their scheme.

Another common technique to obtain information is phishing. The Federal Trade Commission defines phishing as “a scammer uses fraudulent emails or texts, or copycat websites to get you to share personal information – such as account numbers, Social Security numbers, or your login IDs and passwords. Phishing scammers lure their targets into a false sense of security by spoofing the familiar, trusted logos of established, legitimate companies. Or they pretend to be a friend or family member.”

Finally, skimmer devices can be installed in gas pumps, ATMs and retail bank card readers. After the skimmer is installed, a victim will swipe his or her bank card and the device will read and retain the number from the card’s magnetic strip. The devices are periodically removed and the numbers are downloaded to a laptop. Actually, newer skimmers use Bluetooth technology, so the data can be retrieved without removing the device.

Debit card numbers are harder to use, because you need identifying information or a passcode. Unfortunately, victims often write down this information and store it with the debit card, or use easily guessed passcode information. In this case, for example, Cash wrote down all the information someone would need to exploit the stolen Sunshine FCU debit card and left this information in the pocketbook. That’s the kind of thing that makes me grind my teeth.

Because my division investigates routine property crimes like burglaries, I often get called out to assist with these types of cases. On August 23, 2019, at about 3:35 am, I was dispatched with other officers to a cold burglary at the LivGud4Less, located in the shopping center at the intersection of Highway 990 and Tajana Drive. Initially, nothing suggested that this crime would involve identity theft or fraud. The only item listed as missing by the store’s manager was a bundle of United States currency from the office safe, in the amount of $480. A backpack and umbrella had been moved during the crime, but were still in the store when we arrived.

After talking to the store’s manager and assistant manager, and viewing the video footage of the event, it was clear to me that this was an inside job. Because of the failure of the employees of the store to preserve the video, it is not available for the jury to view. Fortunately, I watched parts of the recordings several times that night and took notes, including times and specific cameras where the suspect was observed. I planned to use these notes to find things on the preserved recordings later on, but these notes refresh my recollection of what I observed.

The entire break-in took 12 minutes from entry to exit and the suspect obviously had intimate knowledge of the store’s layout. The exterior cameras show the perpetrator using a key to unlock the front doors and I confirmed that there was no sign of forced entry or damage to this door. The suspect then moves directly to the alarm panel in the foyer and spends about
a minute fumbling around there. After punching at the panel's keyboard a few times,, the lights suddenly come on in the foyer and the second set of doors automatically slides open.

The suspect walks through the security stanchions immediately adjacent to the front door. These are the devices that sound an alarm if someone attempts to walk out with an item that has an attached security tag. While we were watching the video together, the manager pointed out that the suspect was a “runt – way shorter than the stanchions.” I could see that this was true, although it took me a couple of viewings to notice the gap between the stanchions and the hood on the suspect's head. But it was definitely there, a couple of inches difference.

During all of the recorded events, the suspect is making an effort to keep his or her face away from the camera. This indicates that each camera location and angle is known to the perpetrator. Next, the suspect walks to the left, around a panel and through a couple of short aisles to reach a free-standing rack of umbrellas, which are not visible from the front door. The suspect selects and opens an umbrella and uses the umbrella through the rest of the event to obscure the head and upper portions of the body from view.

The perp then walks to the back of the store, selects a backpack from a display and moves directly toward the store’s offices. Still obscured by the umbrella, he or she then uses a key to open the cashier’s room. Once inside, I assume the same key is used to unlock the interior office – I can’t say that positively, because the umbrella blocked my view. Once inside the second office, the safe box is opened somehow – again, out of my sight – and then left empty on the office floor. The thief abandons the backpack – apparently, he or she was hoping for a bigger haul. Whatever was taken must have been concealed in the front or pockets of the hooded sweatshirt the suspect was wearing, because I couldn’t see anything being carried in the bare hands visible at several points in the videos.

The suspect exits the offices and leaves the store through the emergency doors in the back. The umbrella gets stuck in the door, so this is the only time the face is exposed, but only for a split second. The thief breaks into a dead run and is out into the dark and away from the camera almost immediately.

I took a couple of still screen shots from the videos that night, but they were so blurry and pixelated that they were worthless. One of them is Exhibit 6, entered into evidence for the defense. But that photo is deceptive, because it appears to that the suspect is taller than the security stanchion. However, in my opinion that is the result of their relative positions – at better camera angles the height difference was clearly visible. I also took the photograph of the umbrella, Exhibit 4. I did not check for fingerprints or DNA on the umbrella, or anything else, because this was an inside job. You would expect to find employee fingerprints and DNA everywhere.

Drucker provided me with a list of store personnel with alarm codes and access keys. Sam advised me that the Sydney Carden was the only person in that group who was shorter
than the stanchions and the manager also stated that the defendant had been absent from work a lot and had mentioned some financial difficulties to the others. Carden was not present at the time, so I took statements and measurements of the managers who were present — Drucker, Kahuna Thornhill and Chas Darney — and cleared the scene.

I contacted the security company and obtained the electronic record of the activation and deactivation of the store alarm system on August 21-23, 2019. That record is Exhibit 2, and shows the codes for each member of the management team. The alarm was activated that night at store closing by Kahuna Thornhill. It was deactivated at 2:28 am by someone who entered invalid codes on two occasions. These codes were both off by one number from the code that eventually deactivated the alarm, which was assigned to Sydney Carden. I guess the defendant was nervous while entering the store.

On the morning of August 25, the store’s manager advised me that Carey Cash’s pocketbook and financial information was also in the safe and had been taken during the break-in. I immediately tried to contact Cash, but was unable to reach the victim until late afternoon on August 26. I advised Cash to immediately contact all of the credit card companies and banks involved. Unfortunately, the financial information in the pocketbook had already been used to make multiple credit card purchases at various on-line sites and in several local stores and restaurants. The use of the information for local purchases, in my opinion, points to the original thief rather than a purchaser from the dark web. None of the stores had security cameras that captured the transaction, and I assume that the thief’s knowledge of Cash’s personal information would make the transactions routine. The total bill for all of these credit card transactions was $7,558.43.

I had better luck with the victim’s debit card, which was used at an ATM within 4 miles of the defendant’s home to drain Cash’s bank account. The money was taken on three separate occasions on the same day, for a grand total of $12,000. Immediate use and access to the password again points to the original thief as the ATM use, and away from a re-purchaser of the information. The on-duty teller, Payton Bailee, remembered the person who made the transactions, because that person foolishly asked for assistance on the last occasion. Bailee had a hard time describing the suspect, except for the clothing. I showed Bailee a photograph that I had obtained of the defendant. I was going to show the witness pictures of all the store managers in a laydown, but Bailee immediately stated that Carden was the person at the ATM machine that day and was very sure in the identification. So I didn’t see the need to keep going through the other photographs.

After a week of trying to reach Sydney Carden, I finally went to the defendant’s apartment. Carden was very upset about something – teary eyed, face red, that sort of thing. The defendant denied any involvement in the burglary or theft, but admitted to paying off a lot of bills with cash in the week following the crime, totaling over $10,000. The explanation was a sudden infusion of cash from slot machine winnings. How convenient - a one-armed bandit spits out the cash needed to pay all your bills. I placed the defendant under arrest and turned the matter over to the Pine County prosecutor’s office for felony charges.
STATEMENT OF SYDNEY CARDEN

After twenty years in retail management, I cannot believe that my reputation and livelihood have been ruined by LivGud4Less and the Pine County Prosecutor. Despite my extensive education and experience in this field, no one will hire me to any position that requires trust or the handling of financial information. Currently, I work as a telephone solicitor for a local non-profit organization, raising money for struggling widows and orphans. Even in this job, I am not allowed to actually take financial information over the phone – I have to transfer the donor to another person. Still, it is important work for the community, a far, far better job to hold than I have ever held before – at a far, far lesser rate of pay.

I certainly didn’t expect to be in this position when I graduated from Mid-Central Washington Regional College with a Bachelor’s degree in Business Administration. I worked summer jobs and interned at various retail stores in the area and so I had several connections to the business community when I finished my education. I was immediately hired as an associate manager for a big-box electronics store in Yakima and quickly moved up the ladder to manager and regional director for that company.

Throughout the years, my willingness to accept new challenges and to move around has led me to a number of positions in retail management, with most of the big chains you could name. At first, I was always advancing, taking positions with more and more responsibility. Unfortunately, and through no fault of my own, those opportunities began to disappear as these chains downsized their physical stores or completely collapsed. More and more people were competing with me for the same scarce jobs. I had to accept lesser positions in my field, even though I was clearly overqualified for some of the work. It was frustrating for someone with my experience and I have been contemplating returning to school, to get some training in the digital sales world. I don’t know much about that part of our industry -- anyone will tell you that I am bad with computers.

My last job in retail was a low point, because I was basically forced to return to the same position level that I had coming out of college. In March, 2019, I was hired as the assistant store manager for LivGud4Less in Alki City. I had managed an LGL earlier in my career, but I left the company for a decidedly more progressive and responsible position. Still, I hadn’t worked for several months and my unemployment was running out, so I was grateful when Sam Drucker decided to take me on.

Gratitude only goes so far. I quickly discovered that working at LGL was not very “Gud,” exactly what I remembered from my last stint with the company. For one thing, the chain is
constantly looking for the cheapest way to do things, even if the customers are left hanging. That is not the way I want to treat people and I tried to let corporate know that this approach is counterproductive in the long run.

In addition, LGL is constantly downsizing and all of the employees are stressed by the idea of losing their jobs. Sam’s appearance as manager apparently didn’t help, because the other two stores Sam had managed closed quickly. Sam has a lot less managerial experience than I do and had never managed a store for more than a year at a time. I tried to make suggestions for improvements and ways to increase customer and employee satisfaction, but I think Sam resented an underling trying to lead, however good an idea that would have been.

Morale was low throughout the employee base and that was reflected in the lax way folks did their jobs. Shoplifting was a continual problem and yet no one seemed interested in improving security or watching the aisles. Sam did institute some rigorous requirements for auditing the cash registers, which did improve the balance rate on the tills at the end of the day. Otherwise, I guess Sam really trusted the employees, because everyone seemed to know the alarm codes, or could figure them out by a couple of guesses based on Sam’s birthday.

After a couple of months on the job, the stress really started to get to me. I had always been periodically plagued by migraine headaches, but they started to become more frequent as the pressures of the job worsened. I would be laid up for a morning, sometimes longer, and I could not predict when these headaches would occur. Sam kept lecturing me about the need to be punctual and not let the team down, but that just made things worse. I tried to explain that stress only aggravated the problem, so laying a guilt trip on me would not help. We went over this issue several times, but Sam never seemed to get the point.

I soldiered on as best I could, and things weren’t bad every day. The management team – Sam, Kahuna, Chas and I – would sometimes meet after work and commiserate together at a local watering hole. By the way, I admit that I am the shortest of that group, but not by that much. I would say Chas is probably the closest to me in height – we are very similar in appearance – but none of us is scraping the ceiling.

We all had similar problems – less money than we used to be able to earn, more bills, higher rent. I had been drawing on my savings to cover expenses for several months and my landlord was bugging me to get current or else. She didn’t really want to evict me from my apartment, but she said she couldn’t hold the property owner off much longer.
I should say that all of this was nothing new. Retail goes up and down with the general economy. I have been out of work and on short wages before. Despite that, my reputation for honesty and fair dealing at work has never been questioned. I have never been discharged from a job for impropriety and I have received employee or manager of the month at several companies, including in June 2019 at LivGud4Less. And my record is spotless, not even a traffic ticket or an arrest.

The first part of the summer was a real challenge at work. I was asked to do an extensive report on the adequacy of the camera placements in the building, on top of my regular duties. Then all of my recommendations were promptly ignored. Drucker didn’t agree with hiding the cameras behind some of the black panels that were already there, while leaving others blank. Instead, Sam wanted the cameras to be more visible, reasoning that their obvious presence was more of a deterrent to shoplifters than whether they actually worked! So several weeks of my time was basically wasted for nothing.

The only bright spot during this period was my new significant other, Frankie Baker. We had a lot of good times at first, which took some of the sting out of my nowhere job and my mounting bills. Looking back now, I can see that Frankie was a big part of those bills, but that didn’t concern me at the time. Although I really did have headaches, I’ll admit that Frankie convinced me to play hooky on a few occasions.

Although I occasionally did closing, my primary duties in August were to open the store and run things until Sam and the afternoon crew arrived. I would get there before everyone else, unlock the door and disable the alarm. Then I would go to the auditor’s room and unlock the safe, or just open the box if it had been left on the default combination. I recommended several times that this combination, and other numerical codes, be reset periodically. Of course, those suggestions were also ignored.

As each cashier came in, I would hand them a till with the seed money, after counting it out in front of the employee. Once the store was open at 8:00 am, I would monitor the floor employees, assist with purchaser problems and check with security if there was a concern that someone was shoplifting. Sam would usually wander in around 11 am and either Kahuna or Chas would relieve me around 2-3 pm.

Nothing unusual happened on the morning of August 22nd. I was dealing with a return and getting ready to handle the end of shift audit and rounds when Sam called me into the office. Drucker proceeded to read me the riot act again about daring to have a headache on company time and leaving work early a couple of days before. Because I was getting tired of
explaining the same thing over and over, I just listened this time and was thankful when Kahuna came in to provide a distraction. The two of them got into it about Kahuna’s tardiness and some other issues which apparently had been simmering between them. On the way out to start the end of shift rounds, Kahuna threw a pocketbook on the desk and said something like, “Here, I found this.”

And what a find! I couldn’t believe that Carey Cash had been in the store and I had somehow missed it. I’m one of Carey’s biggest fans and have watched, listened to and read everything in Cash Universe. I could hardly control myself as I watched Drucker inventory the pocketbook. I remember a picture of Carey and his ferrets, several cards and a wad of cash, which turned out to be one twenty dollar bill wrapped around a bunch of ones.

Following the inventory, I caught up with Kahuna and completed the end of shift rounds. I asked Thornhill to show me where the wallet was found, so I could see whether the cameras would have picked up Carey’s visit. Unfortunately, Kahuna was a little vague on the exact details, pointing at an area out in the parking lot.

After I finished my shift that Thursday I went home, glad that I did not have to be back at work until Tuesday evening. The other assistant manager, Darnay, had asked to cover some extra shifts, since Chas was in pretty desperate financial straits at the time. When I arrived at home, I was greeted by a new eviction notice on my door, demanding full payment of about $5000 in back rent by Monday – or else. That was a bummer, but she wasn’t in the office when I went down to talk to her. So I puttered around my apartment the rest of the day and went to bed early with a headache.

Early Saturday evening, Frankie showed up on my doorstep and wanted to head out on a spontaneous trip to the big gaming casino and hotel that just opened, about two hours driving time from my apartment. Frankie said the whole thing was arranged and it wouldn’t cost me a dime. So I didn’t ask any questions, just threw a few things in a bag and hopped into the MuvR Frankie had hired. We spent the next couple of days watching the shows, eating buffet and in Frankie’s case, gambling. Since I didn’t have money for my rent, I didn’t think it was right that I would gamble, so I didn’t even sign up for a player’s card.

Wouldn’t you know, Baker hit it big – a $25,000 jackpot on a progressive slot machine. Frankie gave me half, I guess expecting that I would jump in on the gambling binge. No way – I put that money away and it came home with me, even though most of Frankie’s share did not. As soon as I got back, I paid my landlord in full, paid down my credit card bills and had about $3,000 left over. I was so excited that I decided that this was a sign, proof that things were
turning around for me. So I did a stupid thing, the type of impulsive decision I have never made before. I decided to ghost my job – just quit and not come back, disappear from that bad scene and look for something new. I didn’t show up for or call into work on Tuesday or Wednesday and left my phone turned off so that I wouldn’t have to hear Drucker’s lectures on responsibility.

Frankie came over Wednesday night and what a change, now that the big jackpot was gone. Baker was mad that I had kept the money instead of reinvesting it in the slots. We had a huge fight and then that louse grabbed the rest of the money out of my hand and disappeared. I haven’t seen Frankie or the cash since that time and my lawyers haven’t been able to find that ferret to corroborate my story. Since the trip and the gambling proceeds were all in Baker’s name, there is nothing in writing to show the source of the money. But that is exactly what happened.

By Thursday, I had decided that the best thing to do was to head down to LGL and beg Drucker for my job back. I was pretty angry and upset about the idea. Before I got the chance, however, Detective Gerard came to my apartment and arrested me. That police contact was my first inkling that something had been stolen from the store or that I was suspected of being involved.

I am innocent of these charges. I did not enter the LGL on August 23rd and I did not steal anything. Just one look at Exhibit 6 will show you that someone who appears to be much taller than I am actually entered the store. I was not at the Sunshine Federal Credit Union that Saturday, no matter what Payton Bailee says. I would never, ever do something like this – especially not to Carey!
STATEMENT OF PROFESSOR SAGE LOFTTISS

Thank you for giving me the opportunity to return to the beautiful Pacific Northwest to provide this statement, and to give testimony in this important case. My name is Sage Lofftiss and I am a professor of psychology at Sand Desert University in southeastern California. I have been an instructor and researcher at SDU since 2013, where I specialize in social psychology. This professorship is my first tenured position, which I accepted immediately after the completion of my doctorate in general psychology at Washington Technical University. While at Wash Tech, I had the honor of serving as an intern and teaching assistant with Dr. Wesleyan Roberts, an acknowledged leader in the study of the psychological effects of various stimuli on memory and eyewitness identification. I also obtained my undergraduate degree, in the related field of sociology, from that prestigious university.

Social psychology is a specialized field of psychology that focuses on how people perceive and interpret one another’s behavior in actual social interactions of various types. Research in this area relies upon both field studies of recurring events and experiments with human subjects, who are subjected to various stimuli and then tested in different ways to measure any effects on, among other things, their ability to perceive and recall events. Like my mentor, my research focus is on the accuracy of eyewitness testimony and how a person’s memory and ability to observe can be enhanced or corrupted by known factors.

I have testified as an expert witness in 40 cases in seven western states, including Washington. The subject has always been eyewitness identification and I was a witness for the defendant in all but one of those cases. I have also provided sworn affidavits about general principles of misidentification in support of numerous personal restraint petitions, where a defendant is challenging a wrongful conviction based on improper eyewitness testimony. These affidavits are always given for defendants, for obvious reasons – prosecutors rarely challenge wrongful convictions.

My fees for services in cases of this type are set by and paid to my employer, SDU. The charges include $500 per hour for consultation and preparation and $750 per hour for trial testimony, plus travel and other expenses. The funds are used by the university to support the psychology department and its activities, including my research projects.

Testimony of this type is necessary because jurors often attribute a great deal of weight to eyewitness identification evidence, despite numerous studies that have demonstrated that it can be notoriously unreliable when certain factors are present. The consequences of this reliance can be devastating, with an untold number of wrongful convictions, ruined lives and
separated families. Of the 333 post-conviction DNA exonerations in the United States through
2015, more than 70% of them involved eyewitness misidentification. According to the
Innocence Project, inaccurate eyewitness testimony accounts for more wrongful convictions
than false confessions, problems with informants and defective or fraudulent science
combined. And these are just the known cases of wrongful conviction; other instances of
injustice may never come to light.

Eyewitnesses are rarely lying when they testify that they are sure that a defendant is the
person they saw committing a crime. And sometimes they are correct; studies do show that
humans can accurately perceive others with a high degree of reliability, given the right
circumstances. But too often these witnesses (and the juries they testify before) are unaware
of the factors that can result in a mistaken identification.

Eyewitness identification can be broken down into three discreet processes: (1)
acquisition of a memory, by perceiving an event while it is happening; (2) retaining the details
of the event in one’s mind; and (3) retrieving that memory in an uncorrupted form when asked
to recall it at a later time. Different factors can affect each of these processes and a
combination of factors can work against retaining an accurate memory of something as subtle
as the distinctive characteristics of a human face.

Many people assume that memory works like a video recording device. The mind
records everything that goes on around us and these memories remain fixed in our brain until
we pull them back out. But everyone knows that we do not acquire a memory of all the many
stimuli that bombard us every day. Acquisition problems arise from perceptual selectivity,
stress and the conditions of the observation. The proportion of information around us that is
actually perceived is very small. The details of a crime may completely bypass the perception
of a witness, particularly if he or she is unaware that the event is significant and will need to be
recalled later on.

In general, the longer we have the ability to perceive something, the better we are able
to recall its details later. Subjects who are shown a photograph of a human face for 20 seconds
are better able to recall details of the face than subjects who are only allowed to view the
photograph for 5 seconds. However, presentation of the need for attention is also important.
A group told to really pay attention to the face in a picture will be more likely to recall
accurately than a group told to study other parts of the picture, or not given any instructions
about what is important. The face-attentive group will have better recall even if provided a
significantly smaller viewing window than the other test subjects.
In this case, for example, Payton Bailee appears to have had no reason to pay particular attention to the face of the ATM customer observed on August 24. The bank teller helped numerous customers that day, and the need to remember a particular person involved in a routine withdrawal (at least, routine as perceived) would diminish the likelihood that particular details should be perceived or retained. Bailee did have an opportunity to view the person on several occasions, but the facial features were not prominently displayed during most of that time.

Another environmental factor that can either improve or inhibit perception is stress. According to the American Psychological Association, stress is “the pattern of specific and nonspecific responses an organism makes to stimulus events that disturb its equilibrium and tax or exceed its ability to cope.” Stress is a mental or physical reaction to a stimulus, a form of being aroused by the things we perceive. Stress is a vague, broad term in psychology because something that causes a reaction in one person may not evoke a similar, or any, reaction in someone else.

Generally, research shows that small amounts of arousal from stress can increase our ability to perceive. If some outside object causes us to feel fear, curiosity, anger or irritation toward it, we will usually pay more attention to that object and can recall it better at a later time. However, at some point these arousal levels can go past an optimal point and performance on perception tests will decrease. A good example is having a gun pointed in your face – an arousing event, but one that may make it difficult for you to focus on perceiving or recalling anything else around you, even the person holding the gun.

Studies involving stress normally involve weapons or violent activity and no stimulus of this type was involved in this case. However, the combination of dealing with multiple customers at the bank counter, the drive-up and the ATM simultaneously possibly raised the teller’s stress level to a point where perception of any particular stimulus was distorted. Let me stress that this is a hypothetical example of how stress can effect perception. I have never met Bailee and I have no objective method of evaluating this particular teller’s stress level, on this or any other occasion. I also have no way of measuring whether the stress had a positive or negative effect on Bailee’s perceptions, although split-stimulus arousals almost always result in decreased accuracy of memory in experimental studies.

I would also note that the conditions of an observation can affect the ability to perceive – another common sense observation that is borne out in the research. The closer you are to an event, the clearer your view and the fewer obstructions, the more accurate will be your later recall of the details.
The retention or storage process of identification is primarily affected by the passage of time. Although some of us have an excellent long-term memory of some significant events, our recall of detail will generally diminish the longer someone waits to ask us about those details. Test groups asked to recall facial details within a few minutes of observing photographs could do so with 98% accuracy; after a few weeks, their accuracy rate to recall the same details was reduced to 57%. The passage of time also makes subjects more vulnerable to suggestion and distortion by others, unless recall concerns their most important memories.

Suggestibility can play a significant role in memory distortion, during both the retention and recall process. Sometimes, these suggestions are generated internally. Eyewitnesses can experience what is called unconscious transference – they will misidentify a person they do not realize is familiar to them as a perpetrator of a crime. For example, in 1988, a Los Angeles judge picked a subject out of a police photobook as the person who had attacked her while jogging. The judge had sentenced the subject four years earlier for a similar crime, a fact she did not recall until it was brought to her attention. Because the subject did not remotely resemble the judge’s original detailed description of her attacker, the case was eventually dismissed. This is just one of many anecdotes that illustrate this phenomenon, which remarkably has not been the focus of any detailed scientific study.

Another good example of internal suggestion in this case is the testimony of witnesses about the height of the shadowy figure in the videos. After looking at a still shot produced from the video, Exhibit 6, it does not appear that anyone could accurately judge this figure’s height from these images. Yet those witnesses who believe in the defendant’s guilt and who viewed this video report a stunted individual, while the defense witnesses see someone who towers over the nearby stanchions. Suggestion begets misperception. This example is based only upon the screen shot that I was provided. I have not seen the original videos or other photographs, so those may provide better evidence of relative height.

Law enforcement investigators can also greatly influence what a witness “remembers” about a crime. Showing photographs of potential suspects to eyewitnesses is fraught with peril, even when multiple pictures are displayed. In a standard photo montage, the officer knows who the suspect is and may provide unintentional cues to the eyewitness, through leading or suggestive questions. A montage procedure may cause a witness to exercise relative judgment – he or she will unconsciously assume that a picture of the perpetrator is present and select the photo which most resembles the person remembered. Even worse in terms of suggestibility is a photo “show-up” where only one picture is displayed.
One factor that does not appear to be statistically related to accuracy is a person’s subjective belief that he or she has picked the correct individual. Witness confidence in the accuracy of identification is not strongly correlated with objective accuracy. There are a few studies that show a weak correlation between the two, but from a scientific perspective it is too small to have practical application. So Bailee’s strong belief that the identification of Carden is correct doesn’t mean much to a psychologist.

As mentioned before, I am not expressing an opinion on the accuracy of any individual’s identification of someone else in this case, because that would not be appropriate. I have not met or tested anyone involved in the case. Such tests would have little meaning with regard to an event that has already occurred, especially when the identification after that event occurred without controlling for variables such as the display of photographs and the officer’s method of asking for identification. But the jury should consider the science I have described in deciding whether the identification in this case convinces them beyond a reasonable doubt.
STATEMENT OF KAHUNA THORNHILL

If, as George Santayana observed, wisdom comes by disillusionment, then I am one of the smartest people around. My name is Kahuna Thornhill and until my unjust dismissal, I was the top assistant manager at the Alki City LivGud4Less. I started my employment there with high hopes, both for the job and for the enrichment it would bring to my later work. After just 9 months, I found myself out of a job, waist-deep in debt and disenchanted in every sense of the word.

My career goal is to become a writer and I have the training to be successful in that pursuit. After earning a general studies degree at the Hesse Institute, an outstanding liberal arts college, I took out a loan and went straight into the master of fine arts program at the University of Alaska in Fairbanks. The isolation and the long, dark winters produced the perfect mood for the type of literature I wanted to create, deep, cutting edge explorations of the soul. I returned to Washington after graduation, ready to make a real contribution to human understanding.

However, after years in academia, I decided that I needed to spend some time with real people, out in their everyday, mundane world. Besides that, I was low on cash and the student loans were coming due. So I applied for various jobs in retail, where I could interact face-to-face with the common folk. The first position I landed, as a clerk on the graveyard shift of a local convenience store, was certainly gritty enough. But almost no one came in during my shift, except for delivery people and a clump of coffee seekers at sunrise.

The floor clerk position at LivGud4Less looked much more promising, a real chance to observe potential characters for my future novel. And no toilets to clean! I really enjoyed the work and I was good at it, if I do say so myself. The company thought so too and after only three months, I received a raise and was promoted to assistant manager.

In retrospect, moving to management was a mistake. The focus shifted from meeting with a broad range of customers to dealing with the niggling concerns of floor clerks and the petty preferences of the rest of the management team. It didn't help that the store's manager, Sam Drucker, turned out to be a self-aggrandizing jerk, quick to take credit for any improvement in sales and just as ready to bellow blame for every little thing that went wrong. Drucker focused mostly on Sydney Carden and the constant absences, but all of us received a regular blast of "constructive criticism".
No matter what Drucker claims, my dismissal was the direct result of my complaints to the regional office about various violations of store policies, which resulted in improper loss to consumers and unjust enrichment of store management. For example, Sam encouraged employees to raid lost and found for any items they would like to use. The policy for how quickly a lost coat or watch became abandoned property was very liberally construed when Sam wanted that item.

Another violation of company standards involved clocking in and then leaving before the shift was over. Drucker allowed employees to clock each other out when things were slow and I even took advantage of this a couple of times, until my conscience started to bother me. Here again, the manager was the biggest beneficiary. Sam usually left early and asked Chas and Sydney to, as we called it, dual punch the card. I wouldn’t do it, so Drucker quit asking me. To cover this bad behavior, Sam repeatedly gave out the “secret” alarm code the manager was assigned so it would look like Drucker was closing the store. The codes were a joke anyway—everyone knew Sam’s simple system for assigning these numbers and other employees were often standing around when the codes were programmed into the system.

All of this misbehavior was reported to the regional manager. As a whistleblower, I thought that corporate would protect my identity and take appropriate action. But it turned out that I was just whistling in the dark. Nothing changed, except Sam’s attitude towards me. I’m convinced Drucker found out that I was making the complaints, although I don’t have any proof of that. I do know that management started looking for any excuse to fire me, and they found one on August 28, 2019.

When I entered the store on August 22, to start a regularly scheduled shift as the closing assistant, something lying under the outside canopy caught my eye. Sitting on the lower edge of one of the pillars was a pocketbook, neatly folded and so plainly visible that I don’t see how anyone could have missed it there. It was almost as if someone deliberately placed it on the pillar—maybe a passerby who saw it on the ground, anticipating the owner’s return. The pocketbook was one of those unisex types meant to carry a few personal items. Inside, I found what appeared to be a wad of cash, some credit cards, scraps of paper and identification for someone named Cash.

We’re supposed to hand over found valuables to either loss prevention or the manager on duty. When I checked in at the office, Carden and Drucker were there and I showed the pocketbook to them. Sydney’s eyes nearly popped out when I mentioned Carey Cash, although the name was not familiar to me. Store policy requires the finder and whoever receives a found container to inventory it together and double sign off on the contents. But Drucker
chewed me out about being late (five minutes, to be exact) and abruptly told me to start my opening shift rounds. I was suspicious that Sam didn’t want me to see what happened to the pocketbook, but I did as I was told.

In closing the store that night, I followed the usual routine. First, I did a walk-through and made sure that there were no customers in the aisles or still using the bathrooms. I locked the emergency exits and assembled the remaining associates. I was going to select Jenny to help with the audit, but Jason told me that Sam had asked him to audit and help with closing, and had given him an alarm pass code so he could lock up if I had to leave early. That was when I noticed that the store manager had again left early without bothering to let me know.

Everyone else left, and I locked the front doors. Jason and I did the audit, counting the seed money for the tills and confirming the amount in the night deposit. I put the seed money in the safe box and noticed that the pocketbook was still there, although it looked thinner than when I had turned it in. I closed the safe and locked and checked each office door.

Jason and I walked the building one more time, to make sure everything was in order and everyone was out. In the foyer, I unlocked the front doors and then activated the alarm with my code – unlike some people, I take this responsibility seriously. I told Jason the code he had been given would be reset by tomorrow morning, although I knew that was a lie. We walked out, I locked the outer doors and I told Jason I would see him on Monday, his next shift.

After I left the store, I drove to the bank and made the night deposit. I then drove home, which is about 5 blocks from the store and went straight into my apartment. Given the time it normally takes to do these things, I would guess it was about 10:25 pm, although I really wasn’t paying attention. I can’t fall asleep right after a night shift, so I stayed up a while, either reading or playing a video game with others online. So I was still up and dressed when I received a call from security at the store.

The security dispatcher told me that the lights were on throughout the store and their records showed that the alarm was disabled by a code entered at 2:28 am. I glanced at my phone, which keeps fairly accurate time, and noted that it was 2:53 am. Great security, I thought, but I asked them to call the police as soon as possible. I hopped in the car and headed to the store, arriving just before 3 am. The police arrived less than fifteen minutes later.

Just as security indicated, the lights were all on and the exterior door was unlocked. When I entered the foyer, the sliding doors inside opened, indicating the night alarm was disabled. I waited for the police to show up before I went inside. After the officers did a brief
search and didn’t find anyone inside, I walked around with them to see if anything was missing or damaged. There was an umbrella stuck between the emergency doors in the back, like someone had tried to leave with it open and wasn’t fast enough. I picked the umbrella up by the handle and laid it in the layaway wall, so I could close the emergency doors. I don’t know if an officer saw me with the umbrella, but no one told me not to close the doors.

After about twenty minutes, I called Drucker and gave a report on what was happening. Sam didn’t seem that interested in coming down, but I figured the store manager should be there. When Sam arrived, I didn’t see any surprise or shock displayed, which I thought was suspicious. Sam went to the video room with Detective Gerard and I watched with them for a few minutes. You really couldn’t see anything, just a blob moving around in the store. No chance anyone could make out height or other features. The shadow figure in Exhibit 6 is typical of what you could observe when the footage was moving. That figure looks taller than Carden, closer to Sam and me (and I know it’s not me). But who can tell?

After a while I left to check the merchandise displays with the officers. Everything was the same as when I left, except for a couple of backpacks on the floor near their display, as if someone had brushed them or pulled one of them off the rack. The umbrella shown in Exhibit 4 was the only other store property that was out of place.

I can tell you that there is no way anyone could have made out a distinct silhouette through the umbrella I picked up. The umbrella was one of those heavier canvas types, designed and built for the Northwest. Besides, other than Alfred Hitchcock, who could you identify from their darkened profile? The officers left the umbrella where I had placed it by the door and we eventually closed it up, marked it on clearance and sold it on our discount table.

Since Drucker was handling things with the police, I went home and didn’t have anything more to do with the investigation after that night. Sam did not ask me to review or preserve any video recordings and I wouldn’t have known what Detective Gerard wanted preserved in any event. But once the videos were overwritten, suddenly it was my responsibility to make sure that didn’t happen. Like I said, the little despot was looking for an excuse to can me, and I was discharged three days later.

I’m not taking this lying down. I contemplate bringing legal action against Drucker and LGL, as soon as I get out from under my bills and can hire an attorney. In the meantime, you can read all about my story on my well written website, The Truth Behind LivGud4Less and hear the latest about their corrupt activities during my regular podcasts. To help advance the cause of openness and justice, please patronize the advertisers supporting these sites.
STATEMENT OF AVERY ATARO

Need a lift? Then use the MuvR app on your mobile device and you might be lucky enough to experience the deluxe ride service I provide to all of my customers in my spotless Subaru. Heck, you can even ask for me by name – Avery Ataro – if you can schedule your travel far enough in advance.

I’ve been driving for a living, in one form or another, for almost 30 years. I started with the Mustard Cab Company, back when taxis were the only game in town. After a few years, I decided to quit moving people and try the more lucrative occupation of hauling freight. I was a long-haul trucker for 15 years, which did pay a lot better. But my back started to give me fits and I got tired of being away from home all the time. Since 2015, I’ve set my own flexible schedule here in town, as an independent contractor with the ride-sharing service MuvR. The income is a lot less, but I can choose when to work and what and who to drive.

My all-wheel drive lets me get around town in any weather and I can take a party of four and their luggage anywhere they want to go, as long as one of them doesn’t mind sitting in front. There are two types of riders, those who want to be left alone and those who want to talk your ear off. For the record (and the tip), I can do either one of them for you and I only take the scenic route if that is your choice – otherwise, I know the shortest, most economical route to your destination. That’s why I’m proud to say that I have nothing but four and five star reviews (except for those posted by obviously jealous competitors).

When you see as many people as I have over the years, very few of them stand out in my mind. Someone would have to be a really interesting character, or a frightening bore, for me to remember that person without any kind of prompting, even if he or she rode with me just last week. To refresh my recollection of particularly good (and bad) fares, I maintain a journal about each of my runs, with names, destinations, tip amounts and any comments or information I might need when I’m deciding whether to pick that person up again.

I’ve been asked to testify about two runs that I made in August, 2019. The first trip was more of what you might call a meander; it took up almost my entire day. Around 10:30 am on August 22nd, I was asked to contact somebody named Carey Cash about driving and waiting at several local stores while this person and “the posse” went on a shopping trip. The posse was Cash’s term, not mine. I just know that three other folks were along for the ride.

I didn’t have any other scheduled trips that day and the customer didn’t have a bad rating (we drivers keep track of things like whether you stiff us, either MuvR or for any other
local ride-share company and we share that information). So I agreed to take the business, so long as the trip would be done by 6:00 pm.

That was one of the weirdest shopping trips I have ever been on, let me tell you. First, Carey and the posse talked to each other non-stop about every goofy thing you could imagine. Some of it was about two weasels they had rescued, all the cute things these critters did and all the damage they had caused to Cash’s house. Most of it was about story arcs and podcasts and montages and special effects. And also what sorts of new, exciting things Carey could do to gain publicity. Something about dropping the book or making book or booking it – it was a lot of gobbledy gook, if you ask me. They were loud, but not rowdy, so I let it pass and focused on the road.

We went to department stores, pet stores, the local humane society – eight or nine different places. They must have been looking for something specific, because they never spent more than 20 minutes at any of the places we stopped. And nobody bought a thing the entire time we were out, except for some cheese covered chips, which I told them they could not eat in the car, period. Finally, the posse – I didn’t note any of their names – got out at a downtown restaurant and Cash told me to drive back to the original pick-up location.

As we passed the LivGud4Less, a store that was pretty close to where this whole drive started, Cash asked me to pull in to the parking lot. I complied (the meter runs until you arrive at the final destination) and Carey headed for the front doors. I figured on settling in for another 20 minutes of waiting, but Cash came back out in less than 3 minutes. Must have been told at the front register that the store didn’t have whatever Carey was looking for, because a person could barely get in and out the door in that time. Cash stood by the front entrance pillars for a minute, deciding where to go next, I thought. Then Carey moved over to the Subaru, got in and told me to drive to the house.

When we arrived, I pulled out my credit/debit card reader and told Cash the fare. To my surprise, Carey claimed the oldest trick in the bum rider’s book – pocketbook was missing or home or something like that. I was just about to mention the police. But Cash said I could just punch in the debit card number and password and then recited both of them for me from memory. That worked, and Carey included a very substantial tip, so I changed my mental “rider rating” to a “will definitely pick up again.”

The second ride I have been asked to discuss took place two days late, on the evening of August 24th. After reviewing my journal, I remember this one as well, but for a decidedly different reason. This was an out of town trip, from an address within a couple of miles of the
Cash residence. My fare was a Frankie Baker and I was to deliver two passengers and their bags to that new hotel and casino. You know the one, with that huge display fountain, about 70 miles north of downtown.

The casino is called the Klalhalah Resort, which I’m guessing has a distinctive Native American pronunciation. I will always call it the KA-LA-LAY. That’s because Baker, or as I referred to Frankie in my journal, the “Loudmouthed Jerk,” must have said that at least sixty times during the trip. “Whoo-hoo! Going to KA-LA-LAY! Yeah, baby!” and comments of that nature, over and over again. Baker mainly seemed to be talking to the air, although some of the comments were directed into the other passenger’s ear, at very close range. Even I got a couple of these blasts in my direction, accompanied by gratuitous and unwelcome shoulder slaps.

The passenger looked a lot like the defendant, Sydney Carden. I couldn’t say that for positive, but you have to understand that I was trying to avoid eye contact with the back seat. When I did glance back there, the other passenger looked pretty shaken and embarrassed. I couldn’t say that I blamed that individual and I didn’t want to make matters worse. So I took the most direct route to the casino that I could, even did a little speeding. Finally, the two of them got out and Baker paid the quoted fare.

Exhibit 5 is a copy of the receipt I provided to Baker that night. It shows the date and time of arrival. The card reader has its own internal clock and calendar, and I don’t have anything to do with setting that thing. I assume it is pretty accurate. The amount on the receipt is accurate – including the fact that Loudmouthed Jerk left no tip.

This same Frankie Baker requested a ride back from the casino for two people on the morning of August 27. After stiffing me on the tip, Loudmouth had the nerve to ask for me specifically – must have liked the low price. I declined the request and put the name and the address on my “will not pick up” list. I never heard from Baker again and have not had any further direct contact with Frankie or the other passenger.
Exhibits
A - Alarm Panel
C - Cashier’s Room
LP - Loss Prevention
U - Umbrella Kiosk

EXHIBIT 1 – STORE DIAGRAM
EXHIBIT 2 – SECURITY REPORT  
AUGUST 21-23, 2019

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CODES

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<tr>
<td>10225</td>
<td>Sydney Carden</td>
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<tr>
<td>10227</td>
<td>Kahuna Thornhill</td>
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<td>Chas Darney</td>
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<td>00911</td>
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ATM Withdrawals/Attempted Withdrawals – Machine # 441808 (South Central Branch)

Account No. XXXX-XXXXXX-X01121   August 1-31, 2019

Account Owner: Carey Cash

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* Transaction Completed with Teller Assistance

**Error Codes**

6   Card Not Recognized and/or Not Readable by Machine

11  Card, Currency and/or Paper Receipt Jam

EXHIBIT 3 – ATM PRINTOUT
EXHIBIT 5

8/24/2019       20:13:45

Card No:   XXXX-XXX-9999
Name:        Baker

Amount:            $  124.12
TIP: ______________
Total:             ______________
Ref No:     56000000000343

THANK YOU!
Pretrial Motions
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PINE

STATE OF WASHINGTON, )
) NO. 19-1-01101010
) )
Plaintiff, ) STATE’S MOTION TO EXCLUDE )
vs. ) EVIDENCE OF WRONGFUL ACT )
) OF WITNESS CAREY CASH )
SYDNEY CARDEN, )
) Defendant.
)

COMES NOW the State of Washington, by and through its deputy
prosecuting attorney, and moves the court for an order excluding all evidence of
and reference to allegations that a State’s witness, Carey Cash, staged an assault
on his person in 2017, and then falsely reported this staged crime to the police.

The evidence is inadmissible under the provisions of ER 404(b) and ER
608. Further, the details of this incident have little or no relevance to the issues in
this case and would confuse and distract the jury. The evidence is therefore
inadmissible under ER 401 and should be excluded pursuant to ER 403.

DATED this 1st day of December, 2019.

STATE OF WASHINGTON
PINE COUNTY

BY /s/ __________________________
Deputy Prosecuting Attorney
AUTHORITY FOR PRETRIAL MOTION

ER 401:

“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.

ER 402:

All relevant evidence is admissible, except as otherwise provided in these Rules. Irrelevant evidence is not admissible.

ER 403:

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.

ER 404:

(a) Character Evidence – Evidence of a person’s character or character trait is not admissible to prove action regarding a particular occasion, except: . . . (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, . . . (3) Character of witness. – Evidence of the character of a witness as provided in ER 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.

ER 608:

(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 or truthfulness or untruthfulness be asked on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness . . .
State v. Barker, 75 Wn. App. 236 (Court of Appeals, Division 1, 1994)

Barker was charged with first degree robbery and second degree assault.

At trial, Duane Roessel testified that on November 4, 1992, he was walking home when a truck pulled up next to him. Barker, the driver, offered him a ride. . . . Roessel asked to be dropped off at a Texaco gas station near his home. When they approached the station, Barker did not stop, stating that he wanted to drop one of his other passengers off first. When they reached a nearby trailer park, Barker robbed and stabbed Roessel. Roessel eventually got away and called the police, who arrested Barker later that night.

[Barker was convicted of robbery and acquitted of assault. The Court of Appeals ordered a new trial, based upon a self-representation issue. However, the appellate court upheld the trial court on an evidentiary issue]:

Barker claims the court should have permitted him to introduce evidence that Roessel had been convicted of a DWI and that as a condition of his probation he was not to have any alcohol or illegal drugs, to support Barker’s defense that Roessel fabricated the robbery allegations to cover up his use of alcohol and/or drugs that evening. Barker asserts that the fight was a fight over drugs or alcohol.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a person acted in conformity with the character trait evidenced by that prior bad act. ER 404(b). However, the trial court, in its discretion, may admit such evidence if it determines, first, that the evidence is logically relevant to and necessary to prove an essential element of the crime charged, such as motive or intent. Next, the court must determine whether the probative value of the evidence outweighs its potential prejudice under ER 403.

The admission or refusal of evidence lies largely within the discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. Whether evidence of prior "bad acts" is admissible under ER 404(b) is largely within the discretion of the trial court.

We find that the court correctly denied the admission of the DWI evidence. The court found that the evidence was not relevant to prove the essential element of motive under ER 404(b), stating that "I don't see that the existence of a conviction or the fact that he was under a probation condition makes it any greater or more likely that if he doesn't want to be discovered that he's under the influence of drugs. That motive is there regardless of the existence of a DWI conviction or not." We agree. Had Roessel waited to report the incident, giving himself time to recover from the effects of any alcohol and/or drugs, Barker's theory of fabrication might make sense. However, Roessel reported the incident immediately after it occurred. Further, admitting the evidence that Roessel was on probation for a DWI and would be subjected to penalties beyond the average citizen for illegal drug activity gives Roessel even less incentive to lie about being robbed. Even if Roessel had not been on probation, any illegal drug use would subject him to potential criminal prosecution.
Bradley Young appeals his conviction of two counts of vehicular homicide. He contends the court erred by (1) refusing to admit prior instances of misconduct pursuant to ER 404(a), (b) . . . We reverse.

In the early morning hours of April 17, 1985, a pickup truck owned and driven by Mr. Young went out of control near Bremerton and left the road, injuring Mr. Young and killing the two passengers, Vince Setzer and Curt Pelham. As a result, Mr. Young was charged with two counts of vehicular homicide pursuant to RCW 46.61.520.

At trial Mr. Young testified that earlier that evening he had met a friend with whom he had two drinks. Afterward he encountered Mr. Setzer and Mr. Pelham at a Poulsbo tavern where they played pool. Mr. Young had two bottles of beer while at the tavern. . . . Mr. Young testified that on the way home Mr. Setzer, who was seated next to him, reached over and grabbed the steering wheel. Mr. Young jerked it back, turning it to the left which headed them in the direction of the bank on the other side of the road. He stated he corrected it again, this time to the right, and applied his brakes as the truck traveled sideways. The truck hit the guardrail, became airborne, and landed on its side. . . . He made an offer of proof that three witnesses would testify Mr. Setzer, as a passenger, had on four prior occasions within the last year and a half grabbed the steering wheel away from the driver. One of the witnesses, a friend of Mr. Setzer, would testify that Mr. Setzer had grabbed the steering wheel of his vehicle twice in the 30 days prior to the accident. . . . The offer was rejected, the court finding the evidence, although relevant, was outweighed by a danger of prejudice, confusion of issues, and misleading the jury pursuant to ER 403. . . .

Generally, any circumstance is admissible which reasonably tends to establish the theory of the party offering it, to explain, qualify or disprove the testimony of his adversary. The admission or refusal of evidence lies largely within the discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. . . .

Mr. Young first argues Mr. Setzer's prior acts of intentional interference with other drivers' control of their vehicles is admissible under ER 404(a)(2) to prove a chronic trait of recklessness. We disagree. Generally, a person's prior conduct is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. ER 404(a). . . . It may, however, be admitted when it is relevant and material under ER 404(a)(2). . . . Evidence of a victim's character is relevant in cases where the defense to a charge of homicide is suicide, or self-defense, Admissibility [under 404(a)(2)] is confined almost always to these two situations. 5 K. Tegland, Wash. Prac., Evidence § 111 (2d ed. 1982). . . .

Character is defined in E. Cleary, McCormick on Evidence § 195, at 574 (3d ed. 1984), as a "generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." (Footnote omitted.) Mr. Setzer's acts on only four prior occasions are insufficient to constitute a trait of chronic recklessness. We find no error. . . .

Mr. Young further argues the evidence should have been admitted pursuant to ER 404(b) to prove identity, control, absence of mistake and modus operandi.
The admission of other acts under ER 404(b) has been used primarily where the prosecution offers the evidence to prove an essential element of the crime or rebut a defense of mistake.

Mr. Young argues the rule is not limited to use by the prosecution and should be equally available to a defendant when used to prove his theory of defense. We agree. Here, Mr. Setzer's prior acts of conduct were relevant for the purpose of proving (1) the identity of the person responsible for the accident was Mr. Setzer, (2) it was he, not Mr. Young, who was in control of the vehicle at the time of the accident, and (3) Mr. Setzer's intentional interference with Mr. Young's steering was the proximate cause of the accident.

The court excluded the proffered evidence on the basis of ER 403. Weighing the probative value of evidence under ER 403 against the dangers of confusion or prejudice, the general rule requires the balance be struck in favor of admissibility. ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense. Here, evidence of Mr. Setzer's conduct on the night of the accident was highly probative and crucial to Mr. Young's theory of defense, that it was Mr. Setzer and not he that caused the accident. Nor is its probative value "substantially outweighed" by the dangers enumerated in ER 403. The balance should have been struck in favor of admissibility. Under these circumstances the court's failure to do so was an abuse of discretion.

* * * *

State v Chapman, 679 P. 2d 1210 (Montana Supreme Court, 1984)

Defendant, George Chapman, appeals from a Silver Bow County District Court judgment entered on a jury verdict finding him guilty of criminal sale of dangerous drugs. The charges stem from an alleged sale of drugs to an undercover police agent in Butte, Montana. We reverse and order a new trial.

For a period of approximately a month and a half before the alleged sale, an undercover, paid State informant made repeated contacts with the defendant, asking defendant to obtain drugs for the informant. Out of this contact defendant relied on... [the defense of entrapment].

And to also present his entrapment defense, defendant attempted to present the testimony of a witness who, according to the defendant, experienced or witnessed the same kind of harassment by the informant that defendant experienced. At the trial, defendant again attempted to question Diane Surman to establish that informant's method of operation was to persist in his requests for drugs and to wear down one's resistance to sell drugs. The court again denied defendant the opportunity to question the witness, and again ruled that her testimony was irrelevant and immaterial to defendant's defense of entrapment.

We believe the trial court should have permitted defendant to present evidence of informant's methods in setting up drug sales, even though the sales were with people other than defendant. We analogize to Rule 404, Mont.R.Evid., which, in certain circumstances, allows the State to introduce evidence of other crimes committed by a defendant to prove, among other things, plan, motive or intent of the defendant. The principle behind the rule must be equally available to a defendant who, as a part of his defense, seeks to show a plan or method of operation of the State's informant. The trial court, therefore, should have permitted defendant a chance to prove through the testimony of a witness, that the informant used harassing techniques as part of his method of operation in setting up drug buys. Fundamental fairness requires this result.
Nothing in the text of Rule 404(b) limits its application to prior misconduct of a party. Postrule authority makes it clear that the rule may be invoked in appropriate instances to either bar or admit evidence of prior misconduct by a nonparty.

For example, Rule 404(b) governs the issue of admissibility when a defendant seeks to offer evidence of misconduct by a third party to show that it was the third party, and not the defendant, who committed the crime charged. The evidence is inadmissible to show that the third party is simply a “criminal type,” but the evidence is admissible if it connects the third party with the crime charged in some other, more tangible way. The trial court has considerable discretion in determining whether the evidence is specific and tangible enough to be admissible. . . . In this context, the admissibility of the third party’s misconduct is not governed solely by Rule 404(b). To be relevant, the evidence must also satisfy more general requirements [of Rule 401].

* * * *

State v Donald, 178 Wn. App. 250 (Court of Appeals, Division 1, 2013)

As a matter of apparent first impression, we consider whether the exclusion of evidence of any person’s other crimes, wrongs, or acts to show that he acted consistent with his character on a particular occasion, as required by ER 404(b), violates an accused's constitutional right to present a defense. Because ER 404(b) is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve, we reject the constitutional challenge to it.

Harold Donald and Lorenzo Leon assaulted Gordon McWhirter one night as McWhirter stepped outside his apartment to smoke a cigarette. A neighbor called 911. When police responded, they found McWhirter lying in the grass, naked and bloody. His injuries included a lacerated spleen, several fractured ribs and facial bones, a fractured toe, and a serious head wound. . . .

Leon pleaded guilty to one count of attempted robbery in the first degree. . . . The State tried Donald on charges of assault in the first degree, attempted robbery in the first degree, and possession of a stolen vehicle. Donald presented an alternate suspect defense, arguing that Leon alone committed the crimes. The court refused to allow Donald to present evidence of Leon’s criminal history and limited the mental health history he sought to present to support this defense. Specifically, the court refused to allow evidence of Leon's prior convictions for violent crimes. It admitted some mental health evidence showing that Leon faked his mental illness but excluded evidence that Leon experienced "command hallucinations," in which a voice ordered him to hurt or kill people. A jury convicted Donald of assault and attempted robbery [and he appeals]. . . .

The plain language of ER 404(a) prohibits the use of character evidence to show circumstantially that a person acted on a particular occasion consistently with his character, with two exceptions that apply only in criminal cases. ER 404(a)(1) and (2) address character evidence of the defendant and the victim. Neither exception applies in this case. ER 404(a)(3) addresses character evidence relating to a witness by reference to ER 607, 608, and 609. Those three rules authorize only the admission of character evidence, in limited circumstances, to attack or support a witness's credibility. Thus, consistent with the general rule,
Washington courts reject the use of evidence of a witness's character to show that the witness acted consistently with that character on a particular occasion.

Consistent with ER 404(a)'s general rule, ER 404(b) excludes a specific category of evidence--any person's other crimes, wrongs, or acts--to prove that person's character to provide circumstantial evidence that he acted consistently with that character on a particular occasion. The second sentence of ER 404(b) preserves the admissibility of this evidence of earlier misconduct to prove other matters, including those described in the rule.

Thus, ER 404(b) expressly prohibits admission of Leon's criminal history to prove his character for the purpose of proving that Leon acted consistently with that history the day he assaulted McWhirter. Furthermore, if ER 404(b) does not apply, the general rule found in ER 404(a)'s first sentence prohibits the admission of any evidence of Leon's character for this purpose.

Donald . . . argues that his constitutional right to present a defense and the policy behind ER 404(b) should cause us to construe the plain language of ER 404(b) prohibiting propensity evidence inapplicable when a defendant offers this evidence to support his defense. . . .

. . . Excluding Leon's criminal history did not significantly undermine any fundamental element of Donald's defense. It did not exclude any witness with knowledge of any fact of the alleged crimes or any part of that witness's testimony. It did not exclude any testimony from Donald. He still could present all of the facts relevant to Leon's involvement in the assault upon McWhirter. ER 404(b) prevented him only from presenting propensity evidence the common law generally excludes because it is distracting, time consuming, and likely to influence a fact finder far beyond its legitimate probative value. Exclusion of propensity evidence furthers two [reasonable] goals . . . It ensures the reliability of evidence introduced at trial and avoids litigation collateral to the primary purpose of the trial. . . .[T]he per se exclusion of propensity evidence to prove how a person acted on a particular occasion is not disproportionate to the ends it is designed to serve.

*   *   *   *
Robert Johnson appeals his convictions of felon in possession of a firearm, first degree assault, and second degree assault. We find that the cumulative effect of the following erroneous rulings denied Johnson a fair trial: [including] allowing the State to use a probation violation to impeach a defense witness. Thus, we reverse.

The defense produced two witnesses to support its theory that Johnson did not shoot Purcell. Bates, Johnson’s 17-year-old brother, provided an alibi, testifying that Johnson was sleeping at their home at the time of the shooting. And Martin, Johnson’s girl friend, said that when Purcell came to her house at 6:45 A.M., he was arguing about money with another man whom she had never seen before and that Johnson was not present. In its cross-examination of Martin, the State impeached her with a 1993 probation violation and her past use of aliases. . . .

IV. Impeachment of Defense Witness

Johnson argues that the trial court improperly allowed the impeachment of Martin with her past uses of aliases. We disagree.

We find no Washington cases deciding whether it is proper to impeach a witness by showing her uses of aliases. ER 608(b) provides that, for purposes of attacking a witness's credibility, specific instances of conduct may, in the discretion of the court, be inquired into on cross-examination if probative of truthfulness or untruthfulness. ER 608(b). The cross-examiner must have a good faith basis for the inquiry.

The use of an alias is a specific instance of conduct that may, depending upon circumstances, be probative of truthfulness or untruthfulness. Conduct involving fraud or deception is indicative of the witness's general disposition with regard to truthfulness.

Here, police records indicate that Martin had used four different aliases in the past. When a person gives multiple false names to the police, the use of those names indicates an intent to deceive and bears directly on that person's general disposition with regard to truthfulness. Thus, the trial court did not abuse its discretion when it allowed the State to cross-examine Martin with respect to her past use of aliases.

This conclusion is consistent with People v. Walker, 83 N.Y.2d 455, 461-62, 633 N.E.2d 472, 611 N.Y.S.2d 118 (1994), in which the court stated:

Manifestly, a [subject's] use of a false name or other inaccurate pedigree information is an indication of dishonesty that goes to the very heart of the question of that individual's testimonial credibility. Giving false pedigree information in situations where one is called upon to be truthful is, by definition, an act of prevarication . . . . Accordingly, such evidence is generally "both relevant and material to the credibility, veracity, and honesty" of the witness and is therefore a proper subject for cross-examination.

Johnson also argues that the State improperly impeached Martin with her failure to comply with a probation order. We agree. [Finding error under ER 609(a)(2)—and finding error on several other grounds]
State v Harper, 35 Wn. App. 855 (Court of Appeals, Division 2, 1983)

By jury verdict, Dencil Rudolph Harper was convicted of the crime of indecent liberties . . . He contends on appeal, primarily, that he was denied a constitutionally guaranteed fair trial by reason of a series of trial court errors which resulted from the prosecution's successful presentation of improper evidence and the denial of his right to present proper evidence. We agree and, accordingly, reverse and remand for new trial. . . . [But the trial court was upheld for its ER 608 decision]:

Finally, we consider defendant's proposal to attack the child victim's veracity by presenting evidence of her previous check forgeries, for which, however, she had never been charged or convicted. Here, again, the court must be guided by ER 608(b). Specific instances of the witness' misconduct may not be proved by extrinsic evidence. Nevertheless, the rule provides that specific instances of the witness' conduct may, however, in the discretion of the court, if probative of untruthfulness, be inquired into on cross examination of the witness concerning her character for untruthfulness. Evidence of previous forgeries attacks the witness' reputation for honesty; it does not attack her veracity. Accordingly, evidence of these previous acts of misconduct should not be admitted.

* * * *

State v Wilson, 60 Wn. App. 887 (Court of Appeals, Division 2, 1991)

In 1989, Joseph Wilson was convicted of one count of statutory rape in the second degree and one count of indecent liberties. On appeal, he argues that the trial court erred in admitting evidence that he physically assaulted the victim and that a witness, Billie Wilson, made a prior false statement under oath, which was at variance with her trial testimony. We affirm. . . .

Evidence of Specific Bad Acts

Next, Wilson contends that the trial court erred under ER 404(b) and ER 608(b) in allowing the State to impeach the defendant's wife, Billie Wilson, by asking her about a prior false statement made under oath. Billie Wilson testified for the defense that she was unaware of any incident of abuse; that Wilson resided in her household at the time of the alleged sexual abuse and, therefore, she would have known had such abuse occurred. The State impeached Billie Wilson by eliciting her admission that she had previously stated under oath, on Department of Social and Health Services financial assistance forms, that her husband was not a member of her household at the time in question.

ER 404(b) applies only to prior misconduct offered as substantive evidence. See 5A K. Tegland, Wash. Prac., Evidence § 114 (3d ed. 1989). Wilson's residency was not at issue. Therefore, admissibility is governed by ER 608(b) because the prior misconduct (an admittedly false statement under oath inconsistent with trial testimony) was offered for the limited purpose of impeachment. See 5A K. Tegland, Wash. Prac., Evidence § 114 (3d ed. 1989). . . .

This rule is identical to Fed. R. Evid. 608(b) and appears to change the prior Washington case law that made acts of misconduct not the subject of a prior conviction inadmissible for impeachment purposes. See Comment, ER 608(b); State v. Emmanuel, 42 Wn.2d 1, 13, 253 P.2d 386 (1953).
The federal courts allow cross examination into specific instances of conduct bearing on the credibility of the witness. See, e.g., United States v. Terry, 702 F.2d 299, 316 (2d Cir.) (trial court did not err in allowing the government to cross-examine the defendant's voice expert about prior occasions when the expert's testimony in other cases had been criticized by the court as unworthy of belief; proof that witness had "guessed under oath" was probative of the weight to be accorded his testimony), cert. denied sub nom. Guippone v. United States, 464 U.S. 992, 78 L. Ed. 2d 680, 104 S. Ct. 482 (1983); United States v. Reid, 634 F.2d 469, 473 (9th Cir. 1980) (defendant placed his credibility at issue when he took the witness stand; cross examination of defendant concerning his own false statements in a letter was "entirely proper to impeach appellant's general credibility" under rule 608(b)), cert. denied, 454 U.S. 829, 70 L. Ed. 2d 105, 102 S. Ct. 123 (1981); United States v. Bright, 630 F.2d 804, 817 (5th Cir. 1980) (no abuse of discretion in permitting cross examination concerning pending state fraud charge against witness).

However, there are limits to this rule. The instances must be probative of truthfulness and not remote in time; further, the court should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury)

Washington case law allows cross examination under ER 608(b) to specific instances that are relevant to veracity. See State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545, review denied, 106 Wn.2d 1017 (1986). "Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue." State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

Here, evidence of Mrs. Wilson's prior false statement under oath was relevant to veracity. It was also germane to the issue of sexual abuse because Billie Wilson testified that Wilson could not have committed sexual abuse. Further, her credibility was important because her testimony corroborated that of the defendant. The prior false statement fit within the parameters of ER 608(b) and its admission was well within the trial court's discretion.

Wilson also argues that even if the testimony was admissible, the court erred in allowing the State to ask its questions in such detail. The State asked Billie Wilson many questions about the Department of Social and Health Services forms, showing that she filled out the documents under penalty of perjury, that she failed to list Wilson as a member of her household, that she never filled out a "change of circumstances" form, and that she affirmatively misrepresented Wilson as her baby-sitter. The probative value of these questions outweighs any cumulative or prejudicial effect since they demonstrate the extent to which Billie Wilson could be untruthful. The trial court did not abuse its discretion in admitting the evidence.

* * * *

State v LeClair, 730 P. 2d 609 (Oregon Court of Appeals,1986)

Evidence of prior false accusations by a complainant is certainly probative on the issue of credibility. Courts have uniformly stated that, when a complainant has recanted prior accusations or they are otherwise demonstrably false, the trial court must allow the defendant to cross-examine the complaining witness regarding them.

* * * *
Karl Tegland, Washington Practice Series, Volume 5A, Evidence, Section 608.6 (2016)

When the defendant is accused of a sexual offense but believes that the alleged victim has made false accusations of sexual abuse in the past, the question arises whether the victim may be cross-examined about the false accusations. Although false accusations arguably fall within the cross-examination allowed by Rule 608, such cross-examination has been prohibited by the trial court and affirmed on appeal in a number of Washington cases. None of the cases, however, held that cross-examination about false accusations was forbidden as a matter of law. The cases held only that the trial court acted within its discretion in forbidding the cross-examination because the defendant had insufficient evidence that the accusations were false.

* * * *

State v Lee, 188 Wn. 2d 473 (Washington Supreme Court, 2017)

Donald Ormand Lee was convicted on two counts of third degree rape of a child. Before trial, Lee moved to cross-examine the victim, J.W., about a prior false rape accusation she had made against another person. The trial court permitted Lee to ask J.W. if she had made a false accusation to police about another person, but it prevented Lee from specifying that the prior accusation was a rape accusation. Lee claims this violated his confrontation clause rights. [Convictions affirmed] . . . .

a. The excluded evidence had minimal probative value

First, though relevant, J.W.’s prior false rape accusation had minimal probative value because it did not directly relate to an issue in the case. Rather than demonstrate a specific bias or motive to lie, which would be highly probative, the evidence invited the jury to infer that J.W. is lying because she had lied in the past.

Generally, evidence is relevant to attack a witness’ credibility or to show bias or prejudice. Credibility evidence is particularly relevant when the witness is central to the prosecution’s case. See Darden, 145 Wn.2d at 619 (“the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters”). Relevant credibility evidence may include specific instances of lying, though “their admission is highly discretionary under ER 608(b).” . . . .

But evidence of a witness’ prior false statement is not always relevant, particularly when that evidence is unrelated to the issues in the case. The confrontation clause primarily protects “cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” . . . Evidence intended to paint the witness as a liar is less probative than evidence demonstrating a witness’ bias or motive to lie in a specific case. . . . Here, Lee did not offer the prior false accusation evidence to demonstrate that J.W. was biased or that she had a motive to lodge a false accusation against him. Instead, he invited the jury to infer that because J.W. made a false rape accusation in the past, her accusation here must also be false. Indeed, defense counsel made this argument during closing remarks. . . .

J.W.’s prior false rape allegation bears no analogous relationship to the issues in this case. It did not demonstrate she had a motive to lie, nor did it explain other evidence in the case or cast doubt on her
ability to perceive events. Though we cannot say Lee’s proffered evidence is entirely irrelevant, it has only minimal probative value.

b. The evidence was prejudicial

Like evidence of prior bad acts, evidence of a false rape accusation asks the jury to make the improper inference that because a complaining witness lied before, she must also be lying now. Our Evidence Rules are designed to prevent juries from making this inference specifically because of its potentially prejudicial effect. See ER 404(b). “Rule 404(b) is based upon the belief that such evidence is too prejudicial—that despite its probative value, the evidence is likely to be overvalued by the jury, and the jury is too likely to jump to a conclusion of guilt without considering other evidence presented at trial.”

c. The State's interests outweigh Lee's need for the information sought

Finally, “the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.” The State's compelling interest in encouraging rape victims to report and cooperate in prosecuting these crimes outweighs Lee's need to specify that J.W.'s prior false accusation was a rape accusation.