CHAPTER SIX

Preparing Student Attorneys

PREPARING STUDENT ATTORNEYS

This section provides the basic introductory information that your students will need in order to successfully present a mock trial as attorneys. It covers the trial components, such as opening statements, direct and cross-examinations, and closing statements. Also covered is information about objections, questioning tactics and rules of evidence.

The purpose of this section is to assist teacher and attorney coaches in the preparation of your students as attorneys; **however, this section is not intended to be the "be all, end all" of information. The rules of evidence and competition outlined in the Colorado High School Mock Trial case materials override any information provided within this document. When preparing your student attorneys, be sure that you, as well as your students, become familiar and understand the Colorado program's rules of evidence and competition. Information contained within this document is provided as teaching information and an educational guide only and does not take precedent over the Colorado program rules of evidence and competition.**

Finally, there are instructional quizzes and activity suggestions, and student handouts that may be copied for distribution to students (see sections titled *Teacher Attachments and Student Attachments*). We recommend educating your students on these trial components before the case problem is released (November 1). In doing so, your students will be positioned to focus on their trial strategies for presenting both sides of the mock trial case.

Understanding and Teaching the Trial Components

While selected students will have differing roles and responsibilities on the team, in the spirit of this educational program we strongly encourage that ALL students be involved in the introduction of the mock trial components. Some references will be made regarding the Rules of Evidence and Procedures. Please be sure to direct students to this section of their case materials for references as related to a given trial component.

By incorporating all team members in each of these trial component discussions, you broaden their understanding of all facets of the trial process rather than limiting them to their one assigned task. Additionally, you will want to consider assigning understudies or alternates for team members who can "understudy" in the event a primary team member becomes unavailable. Together, the primary player and the alternates/understudies can work together on their task assignments, and all members, including witnesses benefit from a greater understanding of what's happening in the courtroom during their trial rounds.

The below information is for attorney and teacher coach information use, and includes questions for discussion to facilitate the learning process via dialogue, and strategies for working on each component. Student information handouts each of these trial components are also available in the ***Student Attachments*** section of this packet. Since the mock trial case problem isn't released until November 1, teaching the students about these trial components in the preceding weeks will create a solid foundation to understanding what they will be doing. Also, working with other sample mock trial problems (available through the Colorado Bar Association) in advance will assist you in identifying those students who'll serve as strong attorneys and witnesses, and in making trial assignments.

Opening Statements

(See Student Attachment #4)

The opening statement is the introduction to the case, the very first time the attorneys for each side tell the judge and jury about what happened to their clients. The first impression is very important; it “paints a picture” of the case that will be presented for each side. Opening statements should include:

1) a summary of the facts according to each party;
2) a summary of the evidence that will be presented at the trial; and
3) a statement regarding what the party hopes to get out of the trial.

A test of a good opening statement is this: If the jurors heard the opening statement and nothing else, would they understand what the case is about and would they want to decide in your favor?

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

General Purpose:

Prosecution/Prosecution (P/P)—

- explaining the steps in a civil/criminal trial and the jury’s role therein
- outlining the charge or complaint against the defendant, which may include reading the indictment
- outlining the case to be presented, not overstating a case or claiming to prove what cannot be proven
- creating a positive first impression on the judge/jury
- acquainting the jury with something personal about the case favorable to your side (i.e., sympathy for the victim/plaintiff; paint the victim/plaintiff as a "good person," or the “wronged person”; impersonalize the defendant by referring to that person as "the defendant")
- downplaying the "burden of proof"

Defense (D)—

- casting the jury’s role in the trial in terms involving the fundamental principles of American justice:
    - indictment is NOT evidence
    - presumption of innocence; stress the "burden of proof"
    - rule of reasonable doubt
    - effect of circumstantial evidence
    - character of defendant
- outlining the case to be presented, not overstating a case or claiming to prove what cannot be proven
- creating a positive first impression on the judge/jury
- acquainting the jury with something personal about the case favorable to your side (i.e., sympathy for the defendant; paint the defendant as a "good person"; stress the defendant’s belief in the American system of justice to acquit him in open court—

"But for the grace of God," any juror could be in the defendant's shoes; refer to the defendant by name)

Key Rules of Opening Statements:

Remember the proper decorum for court behavior:

- stand to address the court
- refer to the judge as "Your Honor"
- never talk directly to the opposing attorney
- direct your comments to the jury only in opening and closing statements

In all statements and questioning:

- "paint a clear picture"
- "keep it simple"
- "never promise what you can't prove"

Advice in Preparing: *What should be included*?

- Short summary of the facts
- Mention of the burden of proof (the amount of evidence needed to prove a fact), and who has it in this case
- The applicable law
- A clear and concise overview of the witnesses and physical evidence you will present and how each will contribute to proving your case

Other Suggestions:

- Frequently, attorneys introduce themselves and their colleagues by saying, *"Your Honor, my name is _________________. My colleagues are _________________."* Or *"Your Honor, Ladies and Gentlemen of the Jury, my name is _______ and along with my co-councils, _______ and ________ we represent ________."* Consult with the attorney coach working with your team to determine what type of introduction your team should use.
- Learn your case thoroughly (facts, law, burdens, etc.)

Advice in Presenting:

- Know your case inside and out.
- It is essential that you appear confident in your case.
- Eye contact with the judge is recommended.
- Use the future tense in describing what you will do (e.g., "the facts will show," "our witnesses' testimony will prove," etc.)
- Some teams memorize their opening statements, others use note cards; if using note cards, do not read statement all the way through. Look up occasionally at the judge. Avoid reading if at all possible.
- Use proper phrasing, including:
    - the evidence will indicate...
    - the facts will show...
    - witnesses will present evidence to show...
    - witness A will testify on the state's/plaintiffs behalf that...
    - witness B will tell you...

DO's AND DON'Ts OF AN OPENING STATEMENT

DO	DON'T
1. Paint a clear picture of the facts of the case as your side interprets them	1. Don't talk directly to the opposing council
2. Keep it simple	2. Don't promise what you can't prove
3. Stand to address the Court	3. Don't use argument in your opening statement

A. Style Points

- **P/P's Attorney:** Since this attorney speaks first, it is very important for the plaintiff's opening statement to include a good summary of facts, presented in a light most favorable to the P/P. If the opening statement presents a very convincing picture of the P/P's case, the defense team will have a much harder time changing the minds of the judge and jury. It's the opportunity to make the strongest first impression!
- **D's Attorney:** The defense team always has the task of showing that the P/P's version of the facts is not correct. In preparing an opening statement, the defense attorney will have to guess how much detail and what kind of emphasis the P/P's attorney will make in the P/P's opening statement. The defense attorney should be ready to make adjustments in his or her prepared statement while the P/P'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 P/P is wrong.
- Both attorneys should practice making eye-to-eye contact with the judge and jury while speaking.

B. What To Include

- The opening statement on behalf of the P/P may include:

  1) An introduction of yourself and your client;

  > **Example**: *"May it please the court, ladies and gentlemen of the jury, my name is ____________, counsel for _____________, the plaintiff/prosecution in this action."*

  2) A cohesive summary or outline of what your evidence will be presented in chronological order or any other orderly sequence of events;

  > **Example**: *"The evidence will indicate that . . . . ."* or *"The facts will show. . . ",* or *Witness X will be brought to testify that. . . "* or *Witness Y will be called to tell you that . . . "*

3) An acknowledgement that the burden of proof rests with you and the degree of that burden.

4) The P/P's opening statement should not include any references to evidence whose admissibility is doubtful or to anticipated defense evidence.

- The opening statement on behalf of the defendant may include:

1) an introduction of yourself and your client;

2) a reminder that opening statements are not evidence;

3) a cohesive (but non-argumentative) reference to anticipated deficiencies in your opponent's evidence, plus a summary of what your evidence will be; and

4) a reminder that the burden of proof rests with your opponent, and a conclusion which indicates that in closing you will return and request the jury to find in favor of the defendant.

5) The defendant's opening statement should not include references to evidence whose admissibility is doubtful.

TEACHER/ATTORNEY COACH DISCUSSION QUESTIONS

1. How is an opening statement similar to a road map?

The opening statement is like a road map in that it outlines for the jury the facts as each side wishes the jury to perceive them. It gives the listener an idea of what each side believes the evidence will show.

2. How can an attorney attempt to get the attention of the jurors at the beginning of his/her opening statement?

Answers will vary. Examples might include using a pertinent quote from the case itself (witness affidavits), a well-known quote citing its originator, tone of voice, compelling opening sentence, etc.

3. How might you outline the facts and issues in your own words?

Answers will vary.

STRATEGIES FOR TEACHING ABOUT OPENING STATEMENTS

1) Ask students to articulate the purpose of the opening statement, then brainstorm with the students how they think it differs from a closing argument. (We suggest reviewing and teaching them together so they understand the subtle differences between the two components.)

2) The best way to teach the purpose and format of opening statements is for each student to prepare one and present it to the class. Preparation of an opening statement is an exercise in writing, critical thinking, and oral skills at the same time, and since this activity requires familiarity with the case (i.e., a full review of the fact and witness' statements and an understanding of the "theory" of the case), it is a very useful introductory assignment in a mock trial unit.

The are a variety of excellent mock trials cases of varying lengths available from the Colorado Bar Association, as well as materials available from the internet. For a nominal fee, the CBA can duplicate and mail a copy of the case from previous years.

- Choose one of these to use as an exercise in writing opening statements.
- Have the students read the trial materials for homework, then divide the class in half; one side will be attorneys for the P/P and the other side will represent the defendant in the case.
- Students should each write a brief opening statement for their side and practice them in class with their fellow students and at home with their family or friends.
- The following class period should be spent with students presenting their statements aloud. Alternate between P/P and Defendant so that the rest of the class hears and compares the statement from the point of view of the court.
- After the presentations, ask students which presentations they thought were the best and why.
    - What things, from the court's perspective, stood out the most in their minds?
    - What was the most interesting, informative, and/or persuasive?
    - What are some of the problems with the opening statements?
    - What are some advantages of strong opening statements?

Direct Examinations

(See Student Attachment #5)

After the opening statements, the process of "witness examination" begins. First, the P/P'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 are designed to get the witness to tell a story, reciting what he or she saw, heard, experienced or knew about the case. 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). In addition, the attorney may only ask questions and may not make any statement about the facts, even if the witness says something wrong. 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."

Objective: To obtain information from favorable witnesses you call in order to prove the facts of your case.

- Before you write your questions for direct examination, list the objectives you wish to obtain from each of your witnesses
- You should make at least one major point for your case from each witness during direct examination.
- The purpose of the direct examination is to have your witness give testimony relating directly to what he perceived through the use of his senses.
- The witness may not give opinions, conclusions, or speculations. Only a qualified expert may offer opinions and conclusions where the subject of the testimony is in his/her area of expertise.
- Procedural restrictions upon methods of receiving testimony are designed to insure that the jury does not receive objectionable material. (See *Teaching the Rules of Evidence and Procedures* section of this packet.)
- If physical evidence is to be produced, it must have a witness to identify it and testify to its relevancy.
- Physical evidence is introduced during the course of regular testimony and is subject to the judge's approval as to its admissibility.

Advice in Preparing: What should be included?

- Isolate exactly what information each witness can contribute to proving your case and prepare a series of questions designed to obtain that information
- Be sure all items you need to prove your case will be presented through your witnesses.

Other Suggestions:

- Avoid asking leading questions. (There are, of course, a few generally accepted exceptions to this rule; i.e. questioning on matters such as name, address, occupation.) See *Teaching the Rules of Evidence and Procedures* section of this packet.
- Practice with your witnesses.
- Don't ask questions requiring opinion testimony, unless witness has been certified as an expert by the court.

Advice in Presenting

- Try to keep to the questions you've practiced with your witnesses and ask a limited number.
- Be able to think quickly if the witness gives you an unexpected answer and add a short follow-up to be sure you obtain the testimony you wanted.
- Be relaxed and clear in the presentation of your questions.
- Listen to answers.
- If you need a moment to think, ask the judge if you may have a moment to refer to your notes, or to discuss a point with your co-counsel for a moment. NOTE: Time does not stop. See Rule #?? In your case materials for more information.
- If you can, memorize your questions so you're not referring constantly to notes.
- Watch where you stand: Don't position yourself between the witness and the jury, or the witness and opposing counsel.

Forming Questions for Witnesses:

- You must "establish" your witness – who s/he is, background, etc.; "qualify" any experts.
- Establish a "foundation" – the court does not know anything; start from scratch.
- Questions should be "open-ended" – allow the witness to make your case. DO NOT LEAD.
- Questions should follow a logical order and build on one another. (Ex: Before you ask a witness what s/he saw, you must establish s/he was on the scene.) This is similar to second item above.
- Make a "train" of questions to prove each issue/point you are making.
- Listen to your witness and make sure s/he is answering the questions. Be flexible. Be able to ask extra questions if necessary.

DOs AND DON'Ts OF DIRECT EXAMINATION

DO	DON'T
1. Identify exactly what information each witness can contribute to your case.	1. Don't use leading questions.
2. Prepare a series of questions to obtain the information you need from the witness you will examine.	2. Don't use questions that call for an opinion from the witness, unless the court has recognized the witness as an expert.
3. Be relaxed and clear in the presentation of your questions.	3. Don't use questions that require the witness to draw a conclusion or speculate.
4. Listen to the answers to your questions.	4. Don't testify yourself, through your questions or in your objection responses – just ask the questions.
5. Practice with your witnesses.	

A. Style Points

- **Attorney Conducting Direct Examination**: Questions should be designed to get the witness to tell the story in a logical manner. Avoid lengthy or complicated questions. Leading questions cannot be used on direct examination. (See *Teaching the Rules of Evidence & Procedure* section.) Uncontrolled narrative questions are also not permissible – the attorney may not set her/his witness on "automatic pilot" with a narrative question and let the witness fly alone. Multiple and repetitious questions are objectionable, too. A well-conducted direct examination must be carefully prepared in advance by the attorney and practiced with the witness. The direct examination is most effective when questions are put to the witness in plain language, rather than legal or technical jargon that may seem unduly long, stilted or unnatural. 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 *Teaching the Rules of Evidence* section.)

- **Opposing Attorney**: Listen carefully to the questions and the answers, since cross-examination must be limited to subjects discussed in the direct examination. Listen for violations of the Rules of Evidence, and be prepared to make good objections.

- **Witnesses**: The most important factor is the believability (often called "credibility") of the witnesses. Witnesses should tell their stories clearly with as little hesitation as possible. It's important for witnesses to know the facts thoroughly.

NOTE: At the close of the cross-examination, the attorney who conducted the direct exam may do a "redirect" at the discretion of the presiding judge. (See below.) A redirect examination follows the same rules as direct. However, the questions are limited to subjects discussed in the cross-examination.

What to Include: The following is a list of the sorts of questions that might be asked on direct examination:

- "What happened then?" or "What did you see?"
- "How long have you worked for Ms. Smith?"
- "What happened after you saw the yellow car?"
- "How far away was the other car when you first saw it?"
- "How long did you stand there?"

Redirect Examination: If the witness' credibility or reputation for truthfulness has been attached on cross-examination, the attorney whose witness has been damaged may wish to ask a few more questions with permission from and at the discretion of the presiding judge. These questions should be limited to the damage the attorney thinks was done by the opposing attorney on cross-examination, and should be phrased so as to try to save or "rehabilitate" the witness' credibility. If the redirect examination is permitted, the cross-examining attorney will also be allowed to conduct a re-cross of the witness.

TEACHER/ATTORNEY COACH DISCUSSION QUESTIONS

1. Why is it important that leading questions be prohibited in direct examination?

Leading questions should be avoided on direct examination because in the interest of justice, the court does not want the attorney to put words into the mouth of his own witness. The court wants to know what the witness remembers – not what the attorney wants him to say.

2. What essential elements would the P/P want to establish when s/he asks the questions for each P/P witness of this year's case problem? The Defendant when s/he asks the questions for each Defendant witness?

Answers will vary based on case problem. *This discussion can be the beginning stages of brainstorming the team's case strategy.*

3. What would be examples of proper direct examination questions for the witness ___________________. (For this exercise, pick any one or more witness affidavits to work on and write questions on black board or flipchart for students to see. Discuss why or why not these would be appropriate.)

Answers will vary.

STRATEGIES FOR TEACHING DIRECT EXAMINATIONS

1) Ask students to articulate the purpose of direct examination, then brainstorm with the class how it differs from cross-examination and list their responses on the board. (We suggest reviewing and teaching them together so they understand the subtle differences between the two components.)

2) To help them prepare direct (and later, cross) examination questions, students should set up a "question and answer checklist".

- Draw a line down the center of a sheet of paper and head the two columns "questions" and "desired answers".
- Then, after reading through the facts and witness statements of the mock trial problem, list the information they want to get out of a particular witness in the direct examination on the "desired answers" side of the sheet. (Remember, the witness answers should be relatively brief and very clear.)
- Once they have planned the testimony, sentence-by-sentence, that they want to elicit from the witness, the "questions" side of the sheet should be filled out.

This exercise illustrates the need for a careful and understandable delivery of the relevant facts to the jury via the attorney's controlled questioning. In addition, it allows students to develop their analytical and writing skills.

3) Again, the best strategy for teaching students the purpose and format of direct examination is to let them try it themselves. Teachers could use the sample mock trials they selected for the opening statement exercise or choose another one for this activity.

- Divide the class in half and assign them sides of the case.
- You may wish to further divide each half of the class, asking each group of a few students to prepare direct examination of one the witnesses for their side.
- Collect and comment on all of their papers and select one student from each group to conduct his or her direct examination in front of the class (with another student acting as the witness).
- The rest of the class could act as opposing attorneys and make objections to any improper questions or answers. (Refer to the section on objections in *Teaching the Rules of Evidence and Procedures*.)

CROSS EXAMINATIONS

(See Student Attachment #6)

The purpose of the cross examination is to show the judge and jury that a given witness should not be believed because that witness:

1) can not remember the 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
6) bears a grudge toward one of the parties.

The cross-examination questions are designed to bring out one or more of the above factors.

Objective: To make the other side's witnesses less believable in the eyes of the trier of fact.

- Attempt to establish that a witness is lying (or at least, not telling the "whole truth").
- Attempt to show prejudice on the part of the witness.
- Attempt to show that the testimony was improbable.
- Get the witness to admit certain prejudicial facts.
- Show that the witness gave questionable opinions because of inability to see, hear, etc.
- Show the incompetence of expert witness.
- Attempt to uncover contrary statements that may have been made.

Notes on Conduct

- Use the natural fear of the witness as an ally.
- Be fair to the witness
- Hold the eye of the witness (study his/her gestures for any clues)
- Roll with the punches (keep your composure!)
- Do not "beat a dead horse" (this will arouse sympathy for the witness)
- Make sure the jury keeps up with your questions
- Don't resort to making unnecessary objections when the cross examination of your witness is going poorly.

Advice (for Attorneys) on Preparing:

Types of Questions to Ask:

- Questions that establish that the witness is lying on important points (e.g., the witness first testifies to not being at the scene of the accident and soon after admits to being there.)
- Questions that show the witness is prejudiced or biased (e.g., the witness testifies that he has hated the defendant since childhood.)
- Questions that weaken the testimony of the witness by showing his opinion is questionable because of poor lighting (e.g., 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.)
- Questions that show that an expert witness or even a lay witness who has testified to an opinion is not competent or unqualified due to lack of training or experience (e.g., 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.)
- Questions that reflect on the witness' credibility by showing that he has given a contrary statement at another time. (e.g., the witness testifies to the exact opposite of what he testified to during the pre-trial hearing. This may be done by asking 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?" Finally, ask the witness to read part of it aloud or read it to the witness yourself and ask, "Did you say that?")

Other Suggestions:

- Anticipate each witness' testimony and write your cross-examining questions accordingly. Be ready to adapt your questions at trial depending on the actual testimony.
- Never ask anything but a leading question (questions that suggest the answers and normally only require a "yes" or "no" answer.)
- Be brief. Don't ask so many questions that well-made points are lost.
- Prepare short questions using easily understood language.
- Ask only questions to which you already knew the answer.

Advice in Presenting:

- Be relaxed and ready to adapt your prepared questions to the testimony that is actually heard during the direct examination.
- Always listen to the witness' answer.
- Don't give the witness the opportunity to re-emphasize the strong points made during direct examination.
- Don't quarrel with the witness.
- Never try to allow the witness to explain anything. Keep to the lies or "no" answer whenever possible. Try to stop the witness if his/her answer or explanation is going on and hurting your case by saying, "You may stop there, thank you," or "You answered the question, thank you."
- Don't harass or intimidate the witness by the questions you ask them.

Forming Questions for Witnesses:

- Questions should be "closed." Never ask open-ended questions and limit your witness to "yes" and "no" responses as much as possible.
- You control what is said. LEAD the witness where YOU want through your questions.
- Have a question ready for each response possible: have a "flow chart" of questions for either a "yes" or "no" response for each of your questions.

  Example: QUESTION

  If "*yes*": Question 2a If "*no*": Question 2b

  If "*yes*": Q 3a If "no": Q 3b If "*yes*": Q 3c If "no": Q 3d
- HOWEVER, BE FLEXIBLE! If a witness gives you an unexpected answer which helps your case, go with it and create new "yes" or "no" questions.
- Know the witness' statement/record and be able to impeach the witness when s/he contradicts that statement.

  Example: *"Do you recall making an affidavit in this case?"*

  "Your Honor, may I approach the witness?"

  Show affidavit; ask if it is the witness' signature and for the witness to identify the document.

  "Didn't you say in your affidavit . . ?" OR "Could you please read from . . . to . . . .?"
- Always make sure your line of questioning impeaches the witness or proves the issues of your case.

DOs AND DON'Ts OF A CROSS EXAMINATION

DO	DON'T
1. Prepare short questions using easily understandable language.	1. Don't ask so many questions that well-made points are lost.
2. Make sure questions are relevant to the case.	2. Don't ask questions that call for a narrative answer.
3. Ask only questions to which you already know the answer.	3. Don't beat a dead horse – once you've made your point, move on.
4. Ask only leading questions.	4. Don't resort to frivolous objections if the cross of your witness is going poorly for your side.
5. Listen to the answers.	

Styling Points:

- **Attorney Conducting Cross Examinations**: This attorney must know precisely what kind of weaknesses he or she wants to show in the witness, and then design the questions to point them out. Questions should be short; "leading" questions (see *Teaching the Rules of Evidence and Procedures* section) are allowed (for example the attorney may use questions with phrases like, "Isn't it true that. . .?") Questions should not be long or argumentative, nor should they ask the witness "How," "Why," or "Could you explain." Questions are best that call for a simple "yes" or "no" answer. Questions that give the witness a chance to make an explanation will usually not help the cross examiner's case.

- **Opposing Attorney**: Listen carefully for violations of the Rules of Evidence, and be prepared to make objections. Listen carefully to the kind of attack the cross examiner is making; decide whether the attack is successful. 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.

- **Witness**: Witnesses should try to give explanations whenever possible. Witnesses must pay close attention during the cross examination, since the attorney may try to confuse the witness. They should try to stick to the facts they recited on direct examination.

NOTE: Redirect and re-cross examinations are at the discretion of the presiding judge. If permitted, at the close of the redirect examination, the same cross-examining attorney may do a re-cross. The purpose is to reiterate a point made during cross examination following the opposing counsel's efforts to "rehabilitate" its witness. A re-cross examination follows the same rules as the cross; however, the questions are limited to the subjects discussed on redirect.

What to Include:

- Cross-examination is not limited and may cover the subject matter of the direct examination, matters affecting the credibility of the witness and additional matters, otherwise admissible, that were not covered on direct examination. A firm idea of your objectives at this point in the trial is just as important to an effective cross-examination as an understanding of the laws and rules of evidence.

Impeachment Sequence

Produced by Marlene and Carson Melvin, teacher coaches (retired)
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Step	Action	Dialogue
1	Get a commitment from the witness on his/her present testimony	*"You testified on direct examination that ______, isn't that correct?"*
2	Get an admission that s/he made the earlier testimony or statement	*"You testified on this case before the Grand Jury (in a deposition; in a statement to police, etc.) on [date], correct?"*
3	Confirm that the statement was under oath.	*"And that statement was made under oath, wasn't it?"*
4	Show the statement to opposing counsel.	*"Your honor, I request that the record reflect that I am showing what has been marked as exhibit ___ to the opposing counsel.*
5	Ask permission to approach the witness.	*"Your honor, may I approach the witness?"*
6	Have the witness identify the statement	*"This is a copy of the statement you made on [date], isn't that correct?*
7	"Close the door".	*"I direct your attention to line number ___; it says there _____, isn't that correct?*
8	Drop it and move on.	*"Thank you."*

Attorney/Teacher Coach Discussion Questions

1. Why do attorneys use leading questions when they cross-examine a witness?

Leading questions are allowed on cross-examination to enable the attorney to conduct a thorough and sifting examination of the testimony of the witness.

2. What other techniques would an attorney use to create an effective cross?

Answers may vary. Responses may include:
Attorney could get the witness to admit certain prejudicial facts
Attorney could memorized questions and not depend solely on notes
Attorney could move about the courtroom, with permission of the court, and never in a manner that blocks opposing counsel or jury's view.
Attorney could ask succinct questions that got well made points across.

3. What are three major points that the defense attorney could make in this year's case problem against the P/P's case? The P/P against the defendant's case?

Answers will vary. Use this time to brainstorm among the group.

STRATEGIES FOR TEACHING ABOUT CROSS-EXAMINATION

1) Ask the students to articulate the purposes of cross examination and how it differs from direct, then list their responses on the board or flip chart.

2) Repeat activities contained in the direct examination strategies section.

CLOSING ARGUMENTS

(See Student Exhibit #7)

Lawsuits are usually won during the course of the trial, not at the conclusion. They are won by witnesses, exhibits and the manner in which the attorney paces, spaces and handles them. Sometimes, however, lawsuits have been lost by fumbling, stumbling and incoherent closing arguments. This is not intended to minimize the importance of closing arguments, but rather to emphasize its proper position as a summation of the evidence and a relation of that evidence to the issues in the case. (Brown and Seckinger, *Problems in Trial Advocacy*, 1977). 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 s representing.

Objective: To provide a clear and persuasive summary of: 1) the evidence you presented to prove the case and 2) the weaknesses of the other side's case.

- Outline your summation first; you should not presume that the testimony has stuck in the minds of the jury.
- Show appreciation to the jury for listening to the presentation of facts and evidence, but do not be too flowery.
- Review previous representations: review facts where no discord concerning them makes it possible for you to say the evidence has established facts you said you would prove.
- Issues – P/P should narrow down the issues completely; Defense should create as many issues as possible so that the jury will tend to feel that the P/P failed to prove them all.
- Cover the law in as favorable a manner as possible for your case.
- Look at any special problems (any poison) in your case and try to cover them up (i.e., your client has a horrible personality); remind the jury of the *voir dire* promises they made.
- Look at problems in your opponent's case, especially a failure to produce a key witness or present key evidence (both of which are usually controlled in mock trial cases, but still worthy of mention).
- Should be natural and convincing; dramatics should be within the range of the attorney's ability to perform convincingly and effectively and not look silly.

Advice on Preparing: What should be included?

- Thank the judge or jury for its time and attention.
- Isolate the issues and describe briefly how your presentation resolved these issues.
- 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 argument at the end of the trial to reflect what the witnesses actually said as opposed to the anticipated weaknesses of the other side.)
- Review the physical evidence. Outline the strengths of your evidence and also outline the anticipated weakness of the other side's evidence. (This section too must be adapted at trial.)
- State the applicable statutes and any cases to show it supports your side.
- Remind the judge or jury of the required burden of proof (the amount of evidence needed to prove a fact). If you are the P/P lawyer, you must tell and convince the court that you have met that burden. If you are the attorney for the defense, you must inform and convince the Court that the other side has failed to meet its burden.
- Argue your case by stating how the law applies to the facts as you have proven them.
- Don't forget to request the verdict/remedy you desire.

Other Suggestions:

- Be sure your closing argument is well organized.
- Rehearse as much as possible.

Advice on Presenting:

- You must always be flexible. Adjust your closing argument to the weakness, contradictions, etc., in other side's case that actually come out at trial. You cannot anticipate everything perfectly before the actual presentation of the case.
- Argue your side but do not appear to be vindictive. Fairness is important.
- Be relaxed and ready for interruptions by certain judges that like to ask questions during closing arguments. (Not typical for Colorado program.)
- Do not make objections during the other side's closing argument.
- Do not read all the way through your closing argument. Use notes as needed but deliver closing argument without dependency of notes and with confidence.
- Keep eye contact with jury or at least look up occasionally.

Style Points

- **P/P's Attorney**: Remember, the P/P has the burden of proving the facts in the civil case by a preponderance of the evidence. Therefore, the P/P's summary of the favorable evidence presented is extremely important. 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. Cite the law clearly and correctly, and make a clear argument regarding how the law requires the judge or jury to rule in the P/P's favor.
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- **Defense Attorney**: Summarize all of the evidence presented to weaken the P/Ps case. Emphasize the inability of the P/P to meet the burden of proof, and stress that such inability must clearly lead to a decision in favor of the defendant.

What to Include:

- A summary of the evidence presented that is favorable to the presenting attorney's side;
- A summary of the case;
- 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 (an "argument" telling the judge or jury why all of the evidence dictates a decision in your favor, i.e., tell what the verdict should be and why).
- New information MAY NOT be introduced in the closing argument.

Objections to Closing Arguments

Taken from Student Materials
Produced by Claude Y. Paquin, Esq., Fayetteville

Colorado Mock Trial Rule 6.6.2 states that no objections may be raised during closing arguments but that, afterwards, one of the opposing attorneys may rise to present objections that would have been made during the arguments if that had been allowed. The purpose of this note is to help you know what to watch out for.

Arguing matter outside the record. This is common in mock trials. Quite often the attorney has prepared closing arguments in advance on the basis of what s/he expected to be presented at the trial, but as it turned out some things did not get presented at trial. Make a note of these points and object.

Evidence misstated. Attorneys who write up their closing arguments in advance will again have assumed that the evidence would come up a certain way, when in fact it developed some other way. You need to bring them back to reality with an objection.

Misstating or introducing new law. The law is as presented in the case problem each year. Some attorneys do not read the case law before they prepare their closing arguments and often times come up with their own screwed up version of the law. Watch for this because sometimes their version might favor your client, but that's seldom the case. Also, attorneys are bound by the case problem to use the case law presented within the problem. On occasion, attorneys may introduce law that is outside of the scope of the case problem.

Appeal to prejudice. That may not come up often in mock trials. Beware of arguments that may inject prejudice through reference to race, religion, ethnicity, place of origin or wealth. Wealth is the most likely to come up, but whether the P/P or defendant is rich or poor ought not to matter when doing justice and thus should generally not be commented on.

Counsel's personal opinion or attack. An attorney may not express a personal opinion on who or what to believe. Nor may he engage in personal attacks against opposing counsel or a party or witness.

The Golden Rule. Asking the jurors to put themselves in the place of the P/P or defendant (and to do unto them as they would have done unto themselves, which is the Golden Rule) is improper.

This is not an exhaustive checklist of objections, but it will give you a very good start. Put it in front of you as you listen to the other side's closing arguments, and take notes.

ATTORNEY/TEACHER COACH DISCUSSION QUESTIONS

1. Why are attorneys not allowed to address issues in closing arguments that were not covered during the trial?

Attorneys are not allowed to address issues in closing argument that were not covered during the trial because there is no chance for the other side to present its own evidence on the issue.

2. What are the main elements of an effective closing argument?

a. *Thank the judge or jury for their time.*
b. *Highlight the strengths of your evidence and the weaknesses of the opponent's evidence.*
c. *If you are the P/P, remind the jury you have met the burden of proof. If you are the defendant, point out that the burden of proof has not been met.*
d. *Explain how the law applies to the facts you have proved.*
e. *Request a verdict in your favor.*

3. Why is it important for student attorneys not to memorize a set closing argument?

Students should not memorize closing arguments, for they may need to address issues brought up by opposing counsel, which were not anticipated beforehand.

STRATEGIES FOR TEACHING ABOUT CLOSING ARGUMENTS

1) Ask students to articulate how they differ from opening statements in purpose and style, and list their responses on the board.

2) As described in the strategies section for opening statements, have each student prepare a closing argument and present it to the class.

CONGRATULATIONS! You have gone through all the components of the trial, responsibilities that your student attorneys will take on as a member of the mock trial team.

ATTORNEY/TEACHER COACHES: When coaching your team, some of your students will face challenges as they prepare for their roles as attorneys. Below are some of the things most difficult for team members to learn or do are:

- To decide which are the most important points to prove their side of the case and to make sure such proof takes place.
- To tell clearly what they intend to prove in an opening statement and to argue effectively in their closing statement that the facts and evidence presented have proven their case.
- To follow the formality of court (e.g., standing up when the judge enters; or when addressing the judge, to call the judge "Your Honor", etc.)
- To phrase 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 to ask 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, which often lessen the impact of points previously made. (Stop. Recognize what questions are likely to require answers that will make good points for your side. Rely on the use of these questions. Avoid pointless questions!)
- To think 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.)

Being mindful of these challenges will help you as an attorney and/or a teacher in coaching students out of and away from these pitfalls. REMEMBER! The students need to do the work; your role is to coach them through these challenges while helping them understand their roles and responsibilities on the team.

IMPORTANT! Not to be forgotten, and as important components of the mock trial performances are your student witnesses! Please see the next section on how attorney/teacher coaches can prepare them for their roles.