



CHAPTER EIGHT

TEACHING THE RULES OF EVIDENCE AND PROCEDURES

TEACHING STUDENTS RULES OF EVIDENCE AND PROCEDURE

This section is designed to give an overview of common mock trial rules of evidence and procedures. It is not, in any way, a comprehensive overview. The mock trial case problem includes an outline of the Rules of Evidence for the Colorado program and should be followed as the guideline for conducting your team's mock trial performance.

This section of this packet is not to be solely relied upon when teaching students the Rules of Evidence! The purpose of this section is to assist teacher and attorney coaches in teaching students the basics of the rules of evidence; **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 teams, be sure that you, as well as 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 case materials.

Students need to familiarize themselves with all the Rules of Evidence in order to be fully prepared for performance of their roles and their case. Please refer to the ***Tournament Information, Judging and Competition Rules*** section of your Colorado Mock Trial case materials.

Please see the *Teacher Attachment* section of this packet for team discussion exercises for these topics.

Please also refer to **Student Attachments #8-#15** for use as student handouts during your discussions.

RULES OF EVIDENCE

In a trial the party who initiates the lawsuit has the “burden of proof” of his or her case; that is, he or she must convince the judge or jury that facts exist justifying the imposition of legal liability. If the party bringing the case is unable to carry that burden of proof, the defendant wins. In a criminal case, that burden is much heavier; the prosecution must convince the judge or jury “beyond a reasonable doubt” that the defendant violated the law. In a civil case, on the other hand, the plaintiff must only convince the fact finder by a “preponderance of evidence” that it is more likely than not that the defendant acted in ways that subjected him or her to legal liability.

Elaborate rules are used to regulate the admission of proof (i.e. oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy, or unduly prejudicial. 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 rules have been violated and whether the evidence must be excluded from the record of the trial.

Formal rules of evidence are quite complicated, and differ depending on the court where the trial occurs. For purposes of mock trial programs, the rules of evidence have been modified and simplified. They have been summarized below, but students competing in the mock trial competition should learn the rules by the numbers assigned to them in the Colorado’s case problem’s Rules of Evidence section, and in the form in which they appear in the mock trial packet so that they may cite the rules with specificity in the competition.

Student Attachment #8 may be used to as a student informational handout.

A. WITNESS EXAMINATION

1. **Direct Examination** (attorneys call and question their own witnesses)
 - a. **Form of questions:** Generally, witnesses may not be asked leading questions by the attorney who calls them. A leading question is one that suggests to the witness the answer desired by the examiner, and often suggests a “yes” and “no” answer. However, the witnesses should not be allowed to give long, uncontrolled and narrative responses to direct questions.

Examples of direct questions:

- *Mr. Bryant, when did you first meet Amanda?*
- *Mr. Bryant, how long have you been employed by the factory?*
- *Directing your attention to Saturday, October 25, could you please tell the court what you observed?*

Examples of leading questions:

- *Mr. Hayes, isn't it true that you dislike Daryl Bryant?*
- *You were not in the building that day, were you?*
- *Mr. Hayes, didn't you see Jack put the money into the briefcase?*

- b. **Evidence about the character of a party to the case:** Evidence about the character of a party may not be introduced unless that person's character is an issue in the case.

Example: In a civil divorce trial, whether one spouse has been unfaithful to another may be a relevant issue, but it is not an issue in a criminal trial for theft. Similarly, a person's violent temperament may be relevant in a criminal trial for battery, but it is not an issue in a civil trial for breach of contract.

- c. **Refreshing a witness' recollection:** If, during direct examination, a witness cannot recall a statement that he or she made in an earlier affidavit or even pre-trial notes, the attorney may help the witness to remember. The attorney must first mark and identify the statement as an "exhibit" and show the opposing counsel a copy; however, the statement need not actually be admitted into evidence in this situation.

Example: A witness sees a purse snatching, offers to testify and gives a statement of events to the attorney. At trial, the witness has trouble remembering the events he or she saw. The attorney may help the witness remember by showing him or her the statement.

2. **Cross Examination** (questioning the other side's witnesses)

- a. **Form of questions:** Attorneys should ask leading questions when cross-examining the opponent's witnesses (i.e. questions should be phrased to evoke a "yes" or "no" answer, rather than a narrative one).

Examples of leading questions:

- *Ms. Bryant, you considered marrying George Hayes, didn't you?*
- *Isn't it true that you are hard of hearing, Ms. Short?*
- *Mr. Jones, don't you generally prefer to avoid loud, crowded taverns?*

- b. **What questions may be asked:** 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 the direct examination.

- c. **Impeachment:** On cross-examination, the attorney may want to show that the witness should be believed. This is called impeaching the witness. It can be done by asking the witness questions about
- Prior bad conduct that makes his or her credibility (trustworthiness) seem doubtful and shows that the witness should not be believed;
 - Prior criminal convictions of the witness, if within the past ten years for a felony or a crime involving moral turpitude, and the court determines that the value of this evidence outweighs its prejudicial affect;
 - Prior statements made by the witness which contradict his or her testimony at trial and point out the inconsistencies in his or her story;
 - The bias or prejudice of the witness, that is, showing that the witness has reason to favor or disfavor one side of the case; or,
 - The accuracy of his or her sensory perceptions, which is the witness' ability to see, hear or smell, or the accuracy of the witness' memory.

Examples:

- Prior bad conduct: *"Isn't it true that you have had your credit cards revoked for failure to pay your bills?" or "Isn't it true that you often exaggerate events?"*
- Past conviction: *"Isn't it true that you were recently convicted of armed robbery?"*
- Prior inconsistent statement: Bill Jones testifies at trial that Joe's car was traveling 90 mph. The opposing attorney asks, *"Isn't it a fact that before this trial you gave a statement to the police saying that Joe's car was only traveling 50 mph?"*
- Bias or prejudice: Ms. Young is the mother of the defendant. The prosecuting attorney points this out and asks, *"Ms. Young, you don't want to see your son go to jail, do you?"*
- Inaccurate sensory perception: Ms. Block testifies that she saw Sam, who was a block away, take a bag of marijuana from his briefcase and hand it to Joe. On cross examination, the attorney asks Ms. Block, *"Isn't it a fact that you didn't have your glasses on when you claim to have seen Sam and Joe?"*

3. **Redirect Examination:** If the witness' credibility or reputation for truthfulness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to ask a few more questions. 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.

B. HEARSAY EVIDENCE

NOTE: Any out of court statement that is offered to prove the truth of the contents of the statement is hearsay. These statements are generally inadmissible in a trial.

Examples:

- Joe is being tried for murdering Henry. The witness may not testify, “*Ellen was there, and she told me that Joe killed Henry.*” The underlined statement is hearsay and not admissible.
- In a civil trial arising from an automobile accident, a witness may not testify, “*I heard a bystander say that Joe ran the red light.*”
- Sand says, “*I’ve heard that Jack has a criminal record.*”

Exceptions to the Hearsay Rule: Although hearsay is not usually allowed at a trial, a judge may permit it if:

1. the statement (called an admission against interest) was made by a party in the case and it contains evidence which goes against his or her side (e.g., in a murder case, the defendant told someone that he or she committed the murder.);
2. the statement describes the then-existing state of mind of a person in the case, and that the person’s state of mind is an important part of the case;
3. the statement is a regularly-kept record of a business or other association, recorded by someone with personal knowledge near the time the matters recorded occurred, or,
4. the statement is a present sense impression, describing an event or condition while the witness was perceiving it, or immediately afterwards.

Examples:

- Joe is being tried for murdering Henry. The witness may testify, “*Joe told me that he killed Henry.*”
- In the same case, the witness may testify, “*I once heard Joe say, I’m going to get even with Henry if it’s the last thing I do.*”
- In the same case, an accounts receivable ledger is kept by Henry, Joe’s wholesaler, is admissible to show the size of Joe’s debts to Henry.
- In the same case, an eyewitness to the murder may testify, “*I heard Joe say, ‘Oh! I’ve killed him.’*”

Please refer students to **Student Attachments #9, #10 & #11** for more information about hearsay.

C. OPINION TESTIMONY

As a general rule, witnesses may not give opinions, but “experts” who have special knowledge or qualifications may.

An expert must first be “qualified” by the attorney who calls him or her. This means that before an expert may be asked to give an opinion, the questioning attorney must bring out the expert’s qualifications and experience.

All witnesses may give opinions about what they saw or heard at a particular time, if such opinions are relevant to the facts at issue and are helpful in explaining their stories. A witness may not, however, testify to any matter of which he or she has no personal knowledge.

Examples:

- The witness may say, “*Roy had slurred speech; he staggered and smelled of alcohol.*” The witness may not add, “*Roy was incapable of driving a car.*”
- A psychiatrist could testify that, “*Roy has severe eating problems,*” but only after the attorney had qualified the psychiatrist as an expert through a series of questions about his or her background and experience in a particular field.
- The witness works with the defendant but has never been to the defendant’s home or seen the defendant with his or her children. The witness may not testify that the defendant has a bad relationship with his or her children or that he or she is a bad parent, because the witness has no personal knowledge of this.

D. RELEVANCE OF EVIDENCE

Generally, only relevant evidence may be presented. Relevant evidence is any evidence that helps to prove or disprove the facts at issue in the case. However, if the evidence is relevant but also unfairly prejudicial, potentially confusing to the jury, or a waste of time, it may be excluded by the court.

Examples:

- On cross-examination the defense asks Ms. Stone, “*How old are you?*” This question would be permitted only if Ms. Stone’s age is relevant to the case.
- The defendant is charged with running a red light. Evidence that the defendant owns a dog is not relevant and may not be presented.

INTRODUCTION OF PHYSICAL EVIDENCE

There is a special procedure for introducing evidence during a trial. Below are the basic steps to use when introducing a physical object or document into evidence in a court.

NOTE: In Colorado's mock trial program, mock trial case exhibits are pre-marked.

1. *"Your Honor, I ask that this letter be marked for identification as Plaintiff's Exhibit 1."* After the presiding judge marks it, ask for permission to approach the witness.
2. Show the letter to the opposing attorney.
3. Show the letter to the witness whom you are questioning. *"Mr. King, do you recognize this document, which is marked Plaintiff's Exhibit 1 for identification?"* The witness then explains what it is (e.g., "yes, this is the letter I received from the defendant, Marilyn Smith.")
4. *"Your Honor, I offer this letter, marked Plaintiff's Exhibit 1 for identification, into evidence."* Offer the letter to the judge for his/her inspection.
5. After opposing counsel has an opportunity to object (presiding judge will ask), the judge rules on whether or not the letter may be admitted into evidence.

Example: Suppose this is a personal injury case in which the tenant claims she was injured when she tripped on a loose step in the apartment building. A neighbor who lives in the same building is testifying:

- Q. *Ms. Spak, are you familiar with the condition the stairs were in the day before the accident?*
A. Yes.
Q. *At this time, Your Honor, I ask that this photograph be marked as Defendant's Exhibit 1 for identification.*

Judge: *This will be Defendant's Exhibit 1 for identification.*

Counsel now shows the exhibit to opposing counsel.

- Q. *Now, Ms. Spak, I show you what has been marked as Defendant's Exhibit 1 for identification. Please examine it and tell us what it is.*
A. *It's a picture of the back stairs of my apartment building.*
Q. *Ms. Spak, turning your attention once again to those stairs as they were the day before the accident, can you tell us whether this picture is an accurate and complete picture of the stairs as they looked at the time?*
A. *Yes, I would say it is.*
Q. *Thank you. Your Honor, (handing the exhibit to the judge), we offer what has been marked as Defendant's Exhibit 1 into evidence.*

Refer students to **Student Attachment #12 & #13** for an outline of the procedure.

ATTORNEY/TEACHER COACH DISCUSSION QUESTIONS
INTRODUCTION OF PHYSICAL EVIDENCE

1. List the four steps the attorney goes through in introducing physical evidence in a trial?

The four steps for introducing physical evidence:

- a. *Ask permission to approach the judge to show him pre-marked evidence*
 - b. *Show the evidence to the opposing attorney*
 - c. *Ask permission of the judge to approach the witness*
 - d. *Show the evidence to the witness and ask the witness if s/he can identify it.*
2. Is it better trial procedure for the attorney to “tell” the witness what s/he is handing him or to ask him if he can identify it himself?

It is better procedure for the attorney to ask the witness what she is handing him.

Objections

Objections can be made whenever an attorney or witness has violated rules of evidence. The attorney wishing to object should stand up and do so at the time of the violation; that is, the objection should be made as soon as the improper question is asked by the other attorney, and before the witness answers, whenever possible.

When an objection is made, the judge will ask the objecting attorney the reason. Then the judge will ask the other attorney who asked the question under objection to give to respond. The judge may allow a response from the objecting attorney. (Some judges may not request a response; however, the objecting attorney may politely request, *“Your Honor, may I respond?”* then do so only after the judge grants permission.) The judge will then rule on the objection, deciding whether an attorney’s question or witness’ answer must be disregarded (“objection sustained”), or whether to allow the question or answer to remain on the trial record (“objection overruled”).

The following are standard mock trial objections:

Type of Objection	How to phrase the Objection
Relevancy	<i>“Objection, Your Honor. This testimony is not relevant to the facts of this case.”</i>
Leading question on direct examination	<i>“Objection, Your Honor. Counsel is leading the witness.”</i>
Improper character testimony	<i>“Objection, Your Honor. Counsel is eliciting improper character evidence.”</i>
Hearsay	<i>“Objection, Your Honor. Counsel’s question (or the witness answer) is based on hearsay”.</i>
Opinion Testimony	<i>“Objection, Your Honor. Counsel is asking the witness to give an improper opinion.”</i>
No Personal Knowledge	<i>“Objection, Your Honor. The witness has no personal knowledge to answer the question.”</i>

STRATEGIES FOR TEACHING THE RULES OF EVIDENCE

1. Distribute **Student Attachment #8** and Colorado Mock Trial Rules of Evidence and Procedure (if available). Review the rules in class, answering any questions that arise.
2. **Teacher Attachment #3A** is hypothetical scenarios designed to test and reinforce student understanding of the rules of evidence. (**Teacher Attachment #3B** provides the activity answers.) These handouts can be used in a variety of ways, such as pre- and post-tests for evaluation purposes, in-class activities, or homework assignments.
3. **Teacher Attachment #4A** are hypothetical scenarios designed to test and reinforce student understanding of objections. (**Teacher Attachment #4B** provides the activity answers.) Teacher/Attorney Coaches can ask the students to stand and formally present any objections that they have to the hypothetical scenarios. The teacher or a law student or attorney could act as judge and rule on the objections. **Student Attachments #14 & #15** will also help students with this exercise.
4. Students should practice admitting physical evidence. **Teacher Attachment #5A** gives fact patterns students may use as starting points to develop questions to get physical evidence admitted. (**Teacher Attachment #5B** provides the activity answers.) Do these in class with students acting as attorneys and witnesses, and the teacher acting as judge. **Student Attachment #13** will be helpful to the students during this exercise.
5. Students should practice refreshing witness' recollection. Break the students into groups of two and have each group prepare a brief fact pattern and the statement of one would-be witness to the case. Each team should then perform its scene in front of the class. Start by quickly summarizing the case, then have the student attorney in each group direct some questions to the witness. After a few questions, the witness should "blank out" and be unable to recall the rest of the facts. The attorney should then use the statements that they wrote to refresh the witness's recollection.
6. Students should practice qualifying a witness as an expert. First, brainstorm with students what facts would be best to establish that a person is an expert (e.g., place and degree of education, years of experience and/or employment in some field, and anything the person has researched and written about.) Next, list on the board the questions an attorney might ask to qualify the following people as experts in their fields:

Ballistics expert	Scientist	Doctor
Waiter	Ski Instructor	Veterinarian

Break students into pairs and let them create a "character summary" of some expert witness, then develop appropriate questions to qualify that witness as an expert. Each team should qualify its expert in front of the class, followed by a short discussion of whether the attorney's questions and witness' answers made the witness appear to be an expert in the eyes of the other students.

7. Use **Teacher Attachment #6A** as an overview discussion exercise. (**Teacher Attachments #6B** provide the activity answers.)