

HIGH SCHOOL MOCK TRIAL TRAINING MANUAL

By Prof. Fred Moss (2/19)

1. Planning your case

a. Before you do anything: read the case 3 times

- i. First time, to understand what the case is about and who the parties and the witnesses are.
 1. Read the jury instructions carefully - focus on who has the burden of proof and what facts that party must prove to win
- ii. Second time, read it as plaintiff's/prosecution counsel; identify critical facts that help or hurt your case; write them down.
- iii. Third, read it as defense counsel; identify & list critical facts.
- iv. For each witness, write a list of "good plaintiff/prosecution facts" and "good defense facts" gotten from that witness.
- v. Ask if these facts are admissible under the rules of evidence.
 1. What objections should you make to the bad facts they are going to introduce?
 2. What objections might they make to your good facts?
- vi. Ask what other facts in the witnesses' statements & exhibits...
 1. Support your "good facts" or
 2. Make your witnesses more believable, or
 3. Undermine the other side's "good facts" or make their witnesses less believable?
- vii. For each witness you will question – on direct or cross – have on one sheet.
 1. All the facts you must get from that witness
 2. What exhibits you will introduce through that witness or the witnesses should testify about
- viii. Write your closing statement for both sides.
 1. Have a factual theory, a legal theory, & an emotional theme = your blueprint for what you must get from your witnesses
 - a. Factual theory = your version of what happened and why;
 - b. Legal theory = how your factual theory means that you win under the law (see the jury instructions);

- c. Emotional theme = why it is right & just for you to win; why the jury will be proud to award your side with their verdict (example: “this case is about making a person keep his promises,” “this case is about how a desire for revenge drove the defendant to [commit the crime],” “this case is about a person who wasn’t paying attention to her driving, caused an accident and injury, and now is trying to escape her responsibility for the harm she caused.”)
 - 2. Everyone on the trial team must use this closing statement to know what they must get from the witnesses they question.
 - ix. Then, write the opening statement for both sides.
 - 1. This statement must preview the factual, legal and emotional themes/theories of the closing statement.
 - x. Work with the witnesses on what they must say and what is important to emphasize.
 - b. Practice, practice, practice!!
- 2. Courtroom decorum
 - a. Wear proper attire (what your mom makes you wear to church).
 - b. Always, always stand when speaking to the court, even if only saying yes or no.
 - c. Always start everything (openings, closings, witness examinations) with “may it please the court?”
 - d. Always address the judge as “your honor.”
 - e. Ask the judge’s permission to move around the courtroom.
 - i. Think of it as a “*mother, may I*” game and the judge is ‘mother’
 - f. Don’t speak directly to opposing counsel when making or responding to an objection – speak to the court.
- 3. Tips for winning the judges’ votes
 - a. Speak up!! Be confident! Assert control of the courtroom.
 - b. Don’t read a script.
 - c. Know the problem’s facts, stipulations, and law, cold!
 - d. Have a game plan.
 - e. Have the entire team working off the same game plan.
 - f. Know proper court procedure.

g. Know the evidence rules.

4. Evidence Rules – What is Hearsay?

a. Someone before trial made a statement of fact.

i. Not everything said is a statement of fact. Examples:

1. Exclamations: “Ouch!” “Watch out!” Crying, laughing.
2. Questions: “Where did you go?”
3. Commands: “Put on your shoes.”

ii. Ask: did the person intend to state a fact? If so, it could be hearsay, depending on why it is offered as evidence.

b. It is hearsay if: a trial witness is repeating the statement of fact that someone said before trial, and

c. The party offering the statement is relying on the truthfulness of the statement to prove that fact happened or was true.

i. Example: witness testifies, “Madison told me that John was at the party.” If offered to prove that John was at the party = hearsay.

d. The defense to most hearsay objections: it’s not hearsay because it’s not offered for the truth of what is said but only to prove it was said (regardless of its truth) and the fact it was said is relevant to prove or disprove a relevant fact.

i. Example: that X said “John is a horrible person,” is offered not to prove John is a horrible person but as evidence that X did not like John and, therefore, would not have given John his car the next day, as John claims = not hearsay.

e. Hearsay exceptions = Yes, it’s hearsay, but it is reliable enough that we’ll admit it at trial anyway. For example:

i. Any statement by your opposing plaintiff or defendant is admissible for its truth as a “party admission” -- period. No ifs, ands, or buts. If the opposing party said it, it is not hearsay.

ii. Present sense impression = “My head hurts;” “I smell smoke;” “I see John with a gun”

iii. Excited utterances: “OMG! Someone just crashed into John’s car!”

iv. Existing mental or emotional condition or intent: “I hate John.” “I’m afraid of Julie.” “I love Sam,” “I’m going to the store” (intention).

v. Business records: with the proper foundation; see the rule.

5. Opening Statement

- a. Tell a story: “This case is about.....”; start with a dramatic statement of what some witness will say or your theme;
 - i. Example: the defendant promised *[reading]*: “to keep your car safe and secure from any danger.” Defendant made that promise to G when s/he parked in defendant’s lot. We will prove defendant broke that promise and did not keep G’s classic car ‘safe and secure’ from any danger. Ladies and gentlemen, my name is..... And I, along with my co-counsel ... we are proud to represent G in this law suit.”
- b. Plaintiff – tell the jury who is suing whom, for what, and why?
- c. Prosecutor – tell the jury what crimes the defendant is charged with committing.
- d. Defense: emphasize that the other side has the burden of proof and how they will not be able to prove their case.
- e. Introduce your factual, legal and emotional themes.
- f. Tell what evidence you will produce will prove your case, or will rebut the plaintiff’s/prosecution’s story, or what legal elements the plaintiff/prosecution will fail to prove.
- g. Personalize your client; de-personalize the opposing party.
 - i. Refer to your client by name, not as “the plaintiff” or “my client”.
 - ii. But do it to the opposing party (“the government,” “the defendant,” “the car company,” etc.).

6. Direct Examination

- a. Avoid leading.
 - i. Leading is telling the witness to agree with what counsel just said: “you trusted the defendant’s parking attendant to protect your precious antique car, didn’t you?”
 - ii. To avoid leading: ask questions that can’t be answered with “yes” or “no” - start with: who, what, where, when, how, why, describe, explain?
- b. Get from each witness the facts needed for your side’s closing argument:
 - i. Facts that help you.
 - ii. Facts that hurt the other side.
 - iii. Ignore everything else.
- c. Try not to read your questions, if possible. Look at the witness when asking a question.
- d. Time is short -- be efficient – be prepared.

7. Exhibits

- a. Weave them into your examination of your witnesses.
- b. Think of 3 reasons the exhibit is relevant (why the jury should hear/see this evidence to help them decide a disputed fact).
- c. Be ready to respond to any objections.
- d. Use proper procedure.
 - i. Always refer to each exhibit by its exhibit number.
 - ii. Ask to approach the witness.
 - iii. On the way to the witness stand, show the exhibit to the other side.
 - iv. Show it to the witness.
 - v. Ask the witness if s/he recognizes "exhibit [x]".
 - vi. Ask if it is what you claim it to be. (Examples: the parking ticket the witness received; a photo of what the witness saw.)
 - vii. Ask if it is in the same condition as when the witness saw it or if it "fairly and accurately shows" what the witness saw.
 - viii. Offer it into evidence.
 1. Other side; if you have objections, make them now.
 - ix. Ask the court for permission to "publish" the exhibit (show it to the jury).
 - x. Have the witness testify about it.
 - xi. Always & forever after refer to it by its exhibit number.

8. Cross-Examination

- a. Ask only leading questions
 - i. Tell the witness a fact and ask the witness to accept it or reject it, "...isn't that true?", "...yes?", "...correct?", "...didn't you?", "...didn't she?", "...weren't you?", "Your nickname is Sammy (with a rising vocal inflection)?"
 - ii. Avoid asking non-leading, open-ended questions unless you know the answer can't hurt you.
 - iii. Never ask "why?" on cross-examination.
 - iv. Proceed in tiny steps: ask about one fact at a time. ("It was 3:00 p.m. when you arrived there? True?" "And John and Mary were there? Right?"— Not, "It was 3 p.m. when you arrived and John and Mary were there having an argument in the living room? Right?")

- v. Get only what you need and then stop.
- b. Ask only questions based on what the witness said in his/her statement or what can be readily inferred from it. Example:
 - i. Cross of Madison (the quotes are words Madison actually used in his/her statement or addendum):
 1. You are a *"fashion student,"* yes?
 2. You are *"intensely interested"* in *"all things fashion"*?
 3. When G arrived at your lot that day, you were *"reading the latest issue of vogue"*?
 4. In fact, you weren't just reading vogue, you were *"studying"* it?
 5. To you, this was *"very important research"*?
 6. And, you directed G to row 13, correct?
 7. He didn't pick that spot himself, did he?
 8. Important: do not ask, "In your statement, you said, 'then x happened', correct?"
Save this for impeachment. Ask what happened: "Next, x happened, correct?"
 - c. Impeachment
 - i. If the witness said "x" in his/her statement and denies that "x" happened or that "x" is true, or says "y" instead, then impeach with his/her statement:
 1. "You just stated "x" did not happen, correct?"
 2. "You gave a sworn statement about this case before trial, correct?"
 3. [ask to approach]
 4. [show statement and specific lines to opposing counsel]
 5. [show the statement to the witness and ask], "This is your sworn statement, correct?"
 6. "That is your signature at the end of it. Right?"
 7. "Looking at page 2, beginning on line 13, you say in your statement, 'x happened.' Correct?"
 8. [Then go on to your next set of questions. Don't ask: "Were you lying then or are you lying now?"]
 9. Do not ask for or let the witness explain the inconsistency.
 - a. That is for re-direct examination.

d. Dealing with the evasive witness

i. First, try to deal with the problem yourself:

1. Be sure to ask a short question, asking the witness to confirm or deny one simple fact: "You were not at home at 4 p.m. that day, correct?"
2. Re-ask your question ("Thank you, but you did not answer my question, which was, you were not home.....[etc.]")
3. If the witness is still evasive, try "Sir/Madame, you still have not answered my question which can be answered with a simple "yes" or "no." Again, [repeat the question]."

ii. If the witness still will not answer the question, ask the court to order the witness to answer it. (*"Your honor, would you please instruct the witness to answer my question?"*)

9. Advice to witnesses

- a. Don't be too "hammy" - be notable, memorable, and as authentic as possible, but do not shoot for being totally outrageous. The trial is not about you.
- b. Stay in role throughout the trial. Before and after testifying, don't goof off in the courtroom.
- c. Read your statement 2-3x a day; have it memorized; know every word.
- d. Get a list of the questions you're going to be asked on direct.
- e. Practice your direct examination with counsel who will ask the questions.
- f. Have the person who will cross your character practice his/her cross with you so you can anticipate the questions and work on the best answers.
- g. Stick to your statement; do not contradict it even if it hurts your side's case; don't give the other side a golden opportunity to impeach you and gain points.
- h. What is "unfair extrapolation"?
 - i. = filling holes in the statement with new facts that are very helpful to your case/harmful to the other side's case
 - ii. Ask, can I give good reasons for what I'm saying based upon what is in my statement and the statement of others?

10. Responding to unfair extrapolation

- a. Impeach the witness with his/her statement if what the witness said is not in the statement (point out that the witness had an opportunity to make additions and changes to it in the addendum but left out what s/he just said on the stand).

- b. Explore the motive of the witness to be unfair – how the witness is biased in favor of the party helped or prejudiced against the party hurt by the extrapolation.

11. Objections

- a. How to object
 - i. Stand up & say, “Objection, your honor,” or “I object.”
 - ii. Tell the court why the evidence or question is objectionable. Be brief: “The question calls for hearsay.”
 - iii. Be ready to explain your objection more fully if the court asks.
- b. How to respond to an objection.
 - i. Stand up.
 - ii. If, after hearing the objection, the court looks at you, explain why the evidence/question is not objectionable under the rules of evidence.
 - iii. If the court does not look at you, say, “May I be heard, you honor?” If the court says yes, then state the ground(s) of your objection.
- c. Many students fail to object to:
 - i. Hearsay,
 - ii. Personal opinions/“speculation”/guessing/reading another’s mind (one can’t know another’s intentions/reasons/motives),
 - 1. Always object to “I guess...”, “I think....” “In my opinion...” testimony.
 - iii. Leading questions on direct and (especially) on re-direct examination,
 - iv. Not being shown what the opponent is showing the witness,
 - v. “Asked and answered” = repetitious questions by the same counsel to the same witness (but, you can’t object to a question on cross just because you asked it on direct),
 - vi. Evidence not relevant to any contested fact.

12. Closing argument

- a. Paint the picture of what you say happened with the testimony of the witnesses.
 - i. Return to your legal & factual theories (what happened and why), and your emotional theme (“This case is about.....”)/
 - ii. Organize the closing using the factual elements that plaintiff/ prosecution must prove to win (see the jury instructions):

1. Plaintiff/prosecutor: tell the jury how you proved each element of your claim/charges;
 2. Defendant: tell the jury how plaintiff/prosecutor failed to prove one or more elements of its claim/charges and, therefore, under the law, must lose.
- iii. Tell the jury why they should believe what your witnesses said and not the other side's witnesses.
- b. Be flexible
 - i. If a fact you intended to use did not come out at trial, don't argue it.
 - ii. If a good fact you did not anticipate came out at trial, use it!!
 - c. Thank the jury for their time and attention and express confidence that after considering all the facts and law they will return a verdict for your client.

13. **Have fun!!**