

# Carolina Center for Civic Education

## 2012 Fall Training Sessions

### I. Foundation

- Sue Johnson, CCCE Program Coordinator; my role to oversee program and support schools and teams, help give you tools to succeed
- MT program in 21<sup>st</sup> year; dozens of attorneys advise teams each year; ~ 350 legal professionals volunteer at competitions as jurors and judges.

### II. Preview of Key Messages: 3 parts

- Program overview: team composition/roles, trial logistics, preparing your case
- Witnesses: demeanor/presentation, types of witnesses, important rules
- Attorneys: demeanor/presentation, DX/CX tips, Objections and Rules of Evidence

### III. Program Overview: Team Composition and Roles [p.2 of Teacher manual; Rules 3.7, 3.8]

- 7-8 students; any grade; 2 alternates
- 7 roles on plaintiff (3W, 3A, B); 6 roles on defense (3W, 3A)
- Can only play one role per side; attorney either opening or closing (or neither)
- Bailiff: neutral timekeeper; shows cards to judges, witness, attorneys [Rules pp 41-6]
- Teacher-coach: primary contact w/ CCCE [p. 6–10 of TM; Rule 1.3]
  - supervise practices, guide students
  - handle logistics of forms/fees; p. 7 of Rules book gives deadlines (1/11: forms, fee)
  - transportation to Regionals, communicate with observers
  - **Rule 1.3: Code of Conduct**: applies to students, coaches, observers. Primary purpose is educational; seek to instill ideals of justice, equality, truth above winning.
- Attorney advisor: [Appendix A of Teacher manual]
  - help students with legal issues, courtroom decorum
  - proper form of openings/closings, DX, CX
  - arrange practice session in local courtroom if possible

### IV. Program Overview: Trial Logistics [pp. 3-4 in Teacher's manual; pp. 49-51 in Rules]

- **Have they watched DVD? Observations?**
- **List steps in trial**: “All rise” when judges enter courtroom, for introductions; π opening, Δ opening; π case-in-chief; Δ case-in-chief; π closing; Δ closing; π rebuttal (if any; “all remaining”; max 2.5 min.; no new material, only what Δ covered)
- **O**: 4 min., **DX**: 20 min. total; **CX**: 15 min. total; **C**: 5 min. Not transferrable.
- Time stops for objections and calling/dismissing witnesses; NOT for exhibits
- Have timekeeper practice before Regionals; make sure meet time requirements
- Tabbed team notebook for trial: clean affidavits, exhibits to enter; plastic protectors; copies of roster, list of objections, important rules, post-it notes, legal pads

- Regionals: Sat., Feb. 9, 2013; in courthouses [Rules p 51].
- Everyone: 2 prelim rounds; rounds last ~ 90 min.
- First round: random draw; letter A, B, etc.; observers get same letter; no scouting
- Attorney/judge to preside; 3 attorneys serve as scoring jurors; score independently
- NOT scored on verdict; scored on performance [Rule 5.3: Scoring/Ballots; Rules p. 47]
- Scores 1 – 10; High score wins ballot; 2 – 3 ballots win round
- Second round: power matching [Rules 5.6 – 5.7]. Break bracket to ensure change sides, meet different opponent
- Awards ceremony; Best Witness/Attorney for all rounds; top two teams → final round
- Review Rules pp 9 – 25 prior to competition re observers, scoring, disputes

**V. Program Overview: Preparing Your Case [Competition Case; Rules pp. 52-53]**

- Suggestion sheets/resources on web and in Rules book/Teacher manual
- Limited to case materials for facts; cannot use own research on concussions, etc.
- Civil v. Criminal: **ask: who knows difference? What is this year's case?**
- Burden of proof: [p. 4 in TM]; this year: preponderance of evidence (50% + feather)
- **Ask: type of case?** [tort; negligence]; **elements?** [duty, breach, cause, damages]
- Use law (statutes, case law, complaint, answer) to understand elements. **How prove?**
- Prove with facts from affidavits (sworn witness statements) and exhibits; [TM pp. 8-10]
- Charts: write all facts proving/disproving elements in each affidavit; then simplify; which are key? “Theory of the case.”
- Select facts to bring in under each witness; decide order that best tells story to jury
- Theme: frames story for jury. Use in O/C; carry through DX/CX. “You reap what you sow” “Risk and responsibility” “Sword of Damocles”
- Exhibits: can be introduced on DX or CX. Good to introduce at least one on case in chief. Must establish foundation [**HO: exhibits; practice**]

**VI. Student Witnesses: Performance/Demeanor [TM p. 37, Appendix C; Rules pp. 55-56]**

- “Always on”; judges/jurors watch from time enter courtroom, until leave; believable
- Proper courtroom attire; no costumes [Rule 4.11]; accents are fine!
- Cannot use notes in competition [Rule 4.20]
- Want to sound “natural”; read and reread affidavits and documents familiar with
- **Only** know info in own affidavit and listed exhibits; not other affidavits/exhibits
- Work with attorney to develop DX; anticipate likely CX questions, prepare ahead
- **DX**: Focus is on witness; speak to jury; no narrative answers
- Good eye contact, conversational pacing, speak clearly and confidently
- **CX**: maintain character; don’t fight with crossing attorney; calm and collected

**VII. Student Witnesses: Two Types of Witnesses [Rules 602, 701-705]**

- Lay witnesses: personal knowledge [Rule 602]; limited opinion testimony [Rule 701]
- Use appropriate vocabulary/emotion for the witness’ character; **Examples from case**

- Expert witnesses: must be qualified as such before opinion testimony; [**HO: qualify as expert**]; can testify to conclusions/opinions based on area of expertise
- Want to seem credible, no bias; be careful on **CX** not to come across as biased

#### VIII. Student Witnesses: Important Rules [Rules 2.2 and 2.3]

- **Rule 2.3: Improper Invention. IMPORTANT CHANGE!** No more “Unfair extrapolation” [Rules pp. 11-12]
- DX: [Rule 2.3, 2.3.a, 2.3.b “**read along silently while I read aloud**”; discuss] NO invention of *contradictory* fact on CX or DX; NO invention of “material fact” on DX;
- “Material”: is of consequence in determining the action; it affects the merits or outcome of the case [Rule 2.3.b.i.]; is relevant. **Ask: would it be relevant if Mia had told Shannon Dempsey she was dizzy at halftime of the college showcase game?**
- CX: [Rule 2.3.c] answer must be responsive to question; if witness is asked a question that requires info outside of affidavit, is not a violation to invent reasonable fact
- If commit Improper Invention of fact, can be impeached; harms credibility because was caught in a lie; don't have to stop testifying

#### IX. Student Attorneys: Performance/demeanor

- Dress professionally/conservatively; skirt length; consignment shop/thrift store
- Atty. stand for objections, opening and closing (ask permission for O/C) [Rule 4.16]
- Seated for DX/CX at Regionals (as NC practice); standing at State Finals
- Respectful demeanor; speak to judge, not opposing counsel
- Can use notes; want to minimize, not read off of paper
- Conversational; pauses; eye contact; speak clearly and confidently
- Openings can pre-write and memorize [TM p. 12]; intro/theme (30 sec); tell story from your side’s perspective (90 sec); burden and elements (30 sec); intro witnesses and forecast facts certain to come in (60 sec) [“evidence will show,” “you will hear,” no argument]; conclusion/theme (30 sec)
- Closings: outline, cannot pre-write in case evidence does not come in; Intro/big picture/theme; burden of proof; roadmap elements of law; review evidence and explain what the facts mean [argument] and how they relate to elements of law; conclusion/theme; ask jury for desired verdict [TM p. 19-20]. NO new info in a rebuttal.

#### X. Student Attorneys: DX/CX [TM p. 13 – 15, Appendices B, D; Rules p. 12]

- DX: 20 minutes total; save time for last witness; don't run over (ask permission to briefly conclude, and be brief). Redirect is allowed; must address items on CX
- open-ended questions: who, what, when, where, why, how; tell a story; no narrative
- “looping”: responding to witness’ answer as lead-in to next question – take piece of info and ask to expand/explain; sounds more natural
- Pause to let info sink in; conversational; inflection to emphasize important point
- Focus should be more on the witness in DX

- **CX**: 15 minutes. Faster pace to maintain control, but do not interrupt
- Leading, not open-ended, questions: suggest the answer; not just yes/no. **Why?**
- **Don't**: try to get opposing witness to admit to something you can't force to admit; ask questions to which you don't know answer. [my team in 2010: on CX, asked defendant why she didn't ask car passenger to send text. She said passenger didn't know how. Absurd in "real world" but perfectly good answer!]
- Know when to stop. Often make a good point, lose impact if keep going. End strong! Never end on a question that lost an objection; have a "back up" question in case.
- **ACTIVITY**: **HO**: sample **DX/CX** questions; **Do 5 – 6 aloud together**; they do rest later.
- Controlling unruly witness: "Returning to **my** question . . ." "Thank you, but that's not what I asked. My question is . . ." "So the simple answer to my question is yes/no." Finally can object as non-responsive, move to strike if upheld
- Impeaching witness: Impeachment by contradiction or omission [read Rule 2.3.d] No objection! Use affidavit to impeach on CX. **HO: impeachment; practice.**

## XI. Student Attorneys: Rules of Evidence and Objections [Rules pp. 26-35, Rule 4.18]

- Who: only the attorney who is conducting DX/CX on that witness
- Can work as team, write notes, ask to confer with co-counsel
- How: stand and say, "Objection, your Honor" at time of violation; give reason. Speak only to the judge. Be calm, respectful. Opposing attorney also stand to respond.
- Is it important to keep the information out? Well-argued objections can impress jurors, but don't overdo it or abuse it just to throw off opponent. [Rule 1.3; fair play]
- Categories/common objections [**HO TM p. 17-18; review**] Attorney advisors help ID
- **Ask: What happens if objection is sustained? Overruled?** Know how to proceed.
- Hearsay: [Rule 801, pp. 32; turn to page, read and discuss all parts a - d].
  - Example: "Sky is blue." Hearsay if for truth; not hearsay if shows declarant can see
  - Example: witness states, "Frank yelled "you're a fat pig" at Oliver before Frank punched Oliver in the face. Not hearsay because it is not offered to prove the truth of the statement – that Oliver is a fat pig [offered for "existing emotional state"].
  - Example: the witness states "Bob said that Cathy swerved across the yellow line 'for fun' the last time he rode with her." *Hearsay*: IF being offered to prove that Cathy did drive dangerously on that occasion. But same statement is NOT hearsay: if the witness recounts the statement to show why she turned down an offer by Cathy to drive her home yesterday [statement offered for "effect on the listener"].
- NOT Hearsay: [Rule 801.d.2] admission by party-opponent
- Exceptions: [Rules 803-805] Read carefully; attorney advisor can help apply them.

## XII. Review of Key Messages:

- Program overview: team composition/roles, trial logistics, preparing your case
- Witnesses: demeanor/presentation, types of witnesses, important rules
- Attorneys: demeanor/presentation, DX/CX tips, Objections and Rules of Evidence

## **Carolina Center for Civic Education**

### **Establishing Foundation for Exhibits**

Before questioning a witness about an exhibit or entering an exhibit into evidence, the attorney must first establish that the witness is familiar with the exhibit. One possible way to do this is as follows:

1. Ask for permission to approach the witness. “Your Honor, may I approach the witness with what has been marked for identification purposes as Exhibit Number \_\_?”
  
2. Show the exhibit to opposing counsel, then walk over to show the exhibit to the witness.
  
3. Ask the witness to identify the exhibit. “I now hand you what has been marked for identification purposes as Exhibit Number \_\_. Would you identify it, please?” Witness answers with identification only: “It is the report I wrote when I conducted my investigation.” “It is the high school information sheet which must be signed by all parents before their student can try out for school sports.”
  
4. Ask the witness a series of questions that are offered for proof of the admissibility of the exhibit. These questions lay foundation for admissibility, including questions to demonstrate relevance and materiality of the exhibit.  
Q: “How are you familiar with this exhibit?” A: “I give it to all of the students before tryouts to take home and get it signed. I do this at the start of every school sports season.”  
Q: “What is the purpose of this form?” A: “It makes sure that the parent and student are familiar with concussion symptoms, and it tells them to report all such symptoms to the coach.”

By a series of similar questions, the student attorney can demonstrate both that the witness is familiar with the document and why the document is relevant to the case.

It may be better to ask some of these questions before showing the witness the exhibit. For example, if the exhibit is referencing a report written by an expert after conducting an investigation, it might be better to ask about the steps in the investigation **before** showing the report to the witness to enter it into evidence, thereby laying foundation for the exhibit.

5. After appropriate foundation has been laid, offer the exhibit into evidence: “Your Honor, we offer Exhibit Number \_\_ into evidence at this time. Its authenticity has been stipulated.” See **Rule 4.19** for objections, etc. Opposing counsel can object if s/he believes that sufficient foundation has not been laid, and the attorney attempting to enter the exhibit may be required by the judge to lay further foundation if the judge agrees with the objection.

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### **Establishing Credentials for an Expert Witness**

According to **Rule 602**, “lay” witnesses (non-experts) generally are limited to testifying to matters about which they have personal knowledge – events they have actually witnessed themselves. Think of their testimony as including events they perceived with their “five senses”: seeing, hearing, smelling, tasting, or touching. In general, lay witnesses are NOT allowed to give opinion testimony. For instance, they cannot proclaim that the defendant was drunk; but they can say that they saw the defendant drink four beers in one hour, stumble across the room and fall down, speak with slurred speech, etc. Such testimony will tell the jury what the witness actually observed and will allow the jury to draw their own conclusions.

According to **Rule 701** of the Rules of Evidence, a **lay** witness can only offer opinion testimony IF the testimony is rationally based on the witness’s perception, helpful to understanding the witness’s testimony or determining a fact in issue, and NOT based on specialized knowledge within the scope of Rule 702. For example, “I thought the engineer exaggerated the dangers of my zoo tram so he could make money if I hired him to fix the so-called problems.”

According to **Rule 702**, an **expert** witness CAN give opinion testimony in his/her area of expertise without having personal knowledge of an event, IF the witness is first “qualified as an expert by knowledge, skill, experience, training, or education.” The directing attorney should use a series of questions to establish the expert’s qualifications before asking the judge to admit him/her as an expert in a particular, specified field of expertise. The team is limited to the information in the affidavit and/or exhibits; the witness cannot invent additional qualifications in order to be qualified as an expert. One way to do this is as follows:

1. Establish the expert’s educational background: “Could you please tell us about your education in this field?” “Have you written any scholarly papers on the subject?” “Have you gotten any additional training after obtaining your degree?”
2. Establish the expert’s experience: “Please tell the jury about your work experience.”
3. Establish that s/he used reliable methods to reach his/her expert conclusions: “Did you have sufficient facts and data to reach a conclusion in this case?” “Did you use reliable methods to reach those conclusions?” “Did you apply those reliable methods to the facts in this case?”

At this point, you have established sufficient foundation to ask the judge to qualify the witness as an expert in a specific field (it must be supported by the training and experience; a psychiatrist is not qualified to talk about the design safety of a building, for instance).

“Your Honor, at this time we ask that [witness] be admitted as an expert in the field of [field].” If admitted, the expert may now give his opinion about an event s/he did not observe. “The unsafe design of the zoo tram allowed the gorilla to reach and harm Ms. Malcolm. If the tram had been rebuilt as I had suggested, Ms. Malcolm could not have been injured in this way.”

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**Activity: DX or CX?**

Look at the following questions which a student attorney might ask of a witness during a mock trial. Decide whether each question would be more appropriate as a Direct Examination or Cross-Examination question. Give your reasoning to support your decision. (These questions were taken from actual DX/CX questions asked by my team during the 2010-2011 *Malcolm v. Utopia Zoo* NC mock trial case).

1. Why did you decide to purchase the Utopia Zoo?
2. You designed the Zoo's safety standards, correct?
3. You had no experience in designing safety standards for a zoo, did you?
4. Did you make any changes to the zoo after you purchased it?
5. Mr. Grant said the safari ride was unsafe as designed, didn't he?
6. What type of safety precautions does this brochure describe to visitors?
7. The warning signs did not address the fact that the tram doors and automated track were low enough for gorillas to reach the safari guests, did they?
8. Were all of these safety precautions present when you purchased the Utopia Zoo?
9. What is your educational background, Dr. Goodall?
10. How did you evaluate the gorillas at Utopia Zoo?
11. Joe, the gorilla which attacked Ms. Malcolm, faced unusual stresses because he was the younger adult male gorilla, isn't that true?
12. In the wild, Joe would have left the group in order to find a mate, wouldn't he?
13. But Joe could not leave the closed zoo environment, could he?
14. Miss Malcolm, could you briefly describe the layout of the safari ride?
15. You like to show off, don't you, Miss Malcolm?
16. Miss Malcolm, how long did it take you to recover from your injuries?
17. Before you started making gorilla calls, the male gorillas were not close to the tram at all, were they?
18. Ms. Thomas, were you able to speak with any zoo employees during your investigation?
19. Ms. Thomas, you were fired from your job the day after your story was published, correct?
20. What did you observe about the safari guide's behavior on the tram ride?

## **Carolina Center for Civic Education**

### **Impeaching a Witness**

If the cross-examiner believes the witness has made an Improper Invention of Fact under Rule 2.3, the only available remedy in trial is to impeach the witness using the witness's affidavit. Impeachments take two forms: impeachment by contradiction, or impeachment by omission. One suggested procedure for conducting an impeachment is as follows:

#### **Contradiction**

Attorney: Taylor, whenever you did stunts at parties to show off, you always won, didn't you?

Witness: No, I didn't go to parties and show off; I don't know why you say that.

A: Is it your testimony that you did not do crazy stunts at parties?

W: That's right; I never went to parties.

A: Taylor, you made a sworn affidavit before coming to court today, didn't you?

A: You knew you could have updated it at any time before today's trial?

A: You knew you had to tell the truth in your affidavit, correct?

A: And you did tell the truth?

A: Isn't it true that in your affidavit you said you would show off and do crazy stunts at parties?

W: I never said that.

A: Your Honor, at this time I would like to approach Taylor with his/her sworn affidavit for impeachment purposes. Permission to approach opposing counsel and the witness? [show relevant portion of affidavit to opposing counsel before approaching witness]

A: Taylor, do you recognize this document?

A: Is it complete?

A: Is that your signature at the end?

A: I want you to read the end of paragraph number two silently to yourself while I read aloud. "Whenever I wanted to show off, my teammates and I would do stupid stunts at parties to see who was crazier. I always won." Did I read that correctly?

W: Yes. I must have forgotten I wrote that.

A: Permission to approach and retrieve the document.

#### **Omission**

A: Dr. Goodall, you were not at the Utopia Zoo on the day of the incident, were you?

W: Yes, I was. I was excited to hear that the zoo had a gorilla exhibit, so I bought tickets and brought my niece to the zoo on opening day.

A: Is it your testimony that you were at the Utopia Zoo on August 9, 2009?

W: Yes, that's right. I brought my niece to the zoo that day. The gorillas were quite calm.

A: Dr. Goodall, you recall making a sworn affidavit before coming to court today?

A: You knew that you could have updated it at any time prior to today's trial?

A: You knew that you had to be complete and thorough in your sworn affidavit?

A: You had to include all pertinent and relevant information, right?

A: And you had to be truthful, isn't that so?

A: Isn't it true that nowhere in your affidavit do you state that you visited Utopia Zoo on August 9, 2009?

W: I am sure I put that in my affidavit. I remember the zoo visit clearly.

A: Your Honor, at this time I would like to approach Dr. Goodall with his/her sworn affidavit for impeachment purposes. Permission to approach opposing counsel and the witness? [show relevant portion of affidavit to opposing counsel before approaching witness]

A: Dr. Goodall, do you recognize this document?

A: Are all of the pages there?

A: Is that your signature on the last page?

A: I want you to show me where in that affidavit you mention a visit to Utopia Zoo on August 9, 2009.

A: I guess I forgot to put it in there.

A: Permission to approach and retrieve the document.

## Carolina Center for Civic Education

### Objections

Objections can be made by student attorneys when they believe an attorney or witness has violated the Rules of Evidence during either side's case-in-chief (see Competition Rules 4.17 and 4.18). The attorney wishing to object should stand up and do so at the time of the violation. For example, 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 for the objection. Then the judge will turn to the attorney who asked the question and give her/him a chance to explain why the objection should not be accepted (sustained) by the judge. Then, if the objecting attorney would like to be heard further on the reasons for the objection, s/he should politely ask the judge, "Your Honor, may I be heard?" The judge will usually allow both attorneys to speak twice before making a ruling, but students should not ask to speak a second time if they have nothing further to add. Finally, the judge will 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 some common mock trial objections (additional objections are listed in Rule 4.18 or are based upon the Rules of Evidence):

1. Relevance (Rule 401)  
"Objection, Your Honor. This testimony is not relevant to the facts of this case."
2. Leading question on direct examination (Rule 611(c))  
"Objection, Your Honor. Counsel is leading the witness."
3. Improper character testimony (Rules 404 – 405, 608 - 609)  
"Objection, Your Honor. Character is not an issue here."
4. Hearsay (Rules 801 – 805)  
"Objection, Your Honor. Counsel's question (or the witness' answer) is based on hearsay." (If the objection is sustained and the witness has already given a hearsay answer, the objecting attorney should also say, "and I ask that the statement be stricken from the record.")
5. Opinion testimony (Rule 701)  
"Objection, Your Honor. Counsel is asking the witness to give an opinion."
6. Lack of personal knowledge  
"Objection, Your Honor. The witness has no personal knowledge to answer the question."

**NOTE:** The bailiff/timekeeper should **stop the timer** as soon as the objection is made and should **restart the timer** after the judge makes his/her ruling.

## Objections by Category

Schools are permitted to raise any objection falling within the Simplified Rules of Evidence, which closely track the Federal Rules of Evidence. Listed below are the most commonly used objections with corresponding rule numbers (when applicable). This list, however, is not exhaustive and cannot be used to bar an opponent from raising an objection otherwise grounded in the Simplified Rules of Evidence.

### I. Objections to the Substance of the Question

|                                      |                                              |
|--------------------------------------|----------------------------------------------|
| Relevance [401]                      | Lack of Foundation                           |
| Lack of Personal Knowledge [602]     | Calls for Speculation [602]                  |
| Calls for Improper Opinion [701/702] | Ultimate Issue [704]                         |
| Calls for Hearsay [801]              | Improper Character Evidence [404]            |
| Cumulative [403]                     | More Prejudicial than Probative [403]        |
| Calls for a Narrative Answer         | Outside Scope of Re-Direct/Re-Cross [611(d)] |

### II. Objections to the Form of the Question

|                             |                                                                                |
|-----------------------------|--------------------------------------------------------------------------------|
| Leading                     | Vague                                                                          |
| Asked & Answered<br>Witness | Compound Question Argumentative/Badgering the<br>Assumes Facts not in Evidence |

### III. Objections to the Witness's Answer

|                                   |                                              |
|-----------------------------------|----------------------------------------------|
| Relevance [401]                   | Lack of Foundation                           |
| Lack of Personal Knowledge [602]  | Speculation [602]                            |
| Improper Opinion [701/702]        | Ultimate Issue [704]                         |
| Hearsay [801]                     | Hearsay within Hearsay [805]                 |
| Improper Character Evidence [404] | Improper Bolstering [608(a)]                 |
| Cumulative [403]                  | More Prejudicial than Probative [403]        |
| Narrative                         | Outside Scope of Re-Direct/Re-Cross [611(d)] |
| Non-Responsive                    |                                              |

### Motions

As stated in Rules 4.8 and 611(e), motions in mock trial are prohibited. No *voir dire* of witnesses or *motions in limine* are permitted (see glossary of legal terms). No exclusion of any witnesses from the courtroom (“sequestering”) is permitted. The only motion permissible is one requesting the judge to strike testimony following a successful objection to its admission.

As stated in Rule 4.10, bench conferences are allowed. However, for educational and scoring purposes, they should be held from counsel table so that scoring judges can hear the student arguments and take them into account in their scoring.