



# Tournament Guide



ONTARIO BAR ASSOCIATION  
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# **1. Introduction and Overview**

## **About the OBA/OJEN Competitive Mock Trials**

The OBA/OJEN Competitive Mock Trials (OOCMT) is a partnership between the Ontario Bar Association and the Ontario Justice Education Network. Together, the two organizations coordinate with a network of local mock trial tournament organizers throughout Ontario. These local tournaments all use the official OOCMT mock trial case that is developed each year, and follow a common format and rules which are set out in this Guide and in the OOCMT Official Rules.

### **About this Guide**

This Guide is intended to help teachers, students, and volunteers to understand how the OOCMT program works, how to set up a team, and how to prepare the team for the tournament. Another essential item to read is the OOCMT Official Rules, which covers crucial details about team make-up and trial procedures. Besides the Official Rules, the program website, [ojen.ca/oocmt](http://ojen.ca/oocmt), links to useful supplemental resources, such as demonstration videos. The website also contains information about each local tournament.

### **Purpose of OOCMT**

Student mock trials are one of the most exciting justice education opportunities for young people in our province as they provide a positive, experiential way of exposing students to the justice system, as well as developing their personal advocacy skills.

The mock trial experience also provides an opportunity for justice sector professionals and educators to work together towards common goals. By incorporating experiential learning and access to local lawyers and judges, students benefit by gaining a basic understanding of how our legal system works on a personal level. Lawyers also benefit, honing skills like plain language communication and learning about youth perspectives of legal issues. Over the years, mock trial competitions have led to lasting relationships between teachers and lawyers, and amongst teachers, who mentor, support and assist each other in providing this opportunity for their students.

## Objectives of OOCMT

- To offer students an experiential learning opportunity that builds advocacy skills while increasing their knowledge of the judicial system
- To provide opportunities for Ontario students to work collaboratively, gaining first-hand experience of the complexity of resolving legal issues
- To involve expert mentors from the legal community in the process of preparing legal arguments and to support students in the experience
- To develop relationships between educators and their local legal community that provide additional opportunities for the benefit of Ontario high school students
- To emphasize local and regional programs, increasing the accessibility for mock trial participation to the greatest number of students
- To support educators by providing opportunities for their students to apply what they are learning in class, while also minimizing the time commitment required for organizing these opportunities
- To support local mock trial tournaments where they exist, and to develop new events for students in areas where they do not exist.

## 2. Conduct and Expectations

### Code of Professional Conduct

Lawyers in Ontario are governed by a code of professional conduct enforced by the Law Society of Ontario (LSO). If a lawyer acts in a way contrary to that code, they are subject to disciplinary sanctions. For example, according to the Law Society's Rules of Professional Conduct, rule 5.1-2 (e):

*When acting as an advocate, a lawyer shall not knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct.*

The lawyer's duty of professionalism, integrity and promoting the administration of justice is a fundamental part of any mock trial tournament. Accordingly, the **OOCMT Code of Professional Conduct**, below, applies to all students, teachers and volunteers:

**The tournament shall be conducted as an educational exercise first and as a competition second. While winning the tournament is an admirable goal, it is a goal that is secondary to the educational exercise.**

**Some students may suffer disappointment, but will gain the rewards and benefits of participating in the tournament. Students must be prepared to lose even if it appears to them (and others) that they deserved to win.**

**While participating in OOCMT, students, coaches and all other mock trial stakeholders are encouraged to exemplify the qualities of courtesy, respect, civility, cooperation and professionalism that are fundamental to both the justice system and to Canadian society.**

**All participants are responsible for promoting conduct that is consistent with the OOCMT Code of Professional Conduct and the OOCMT Rules.**

## Avoiding and Accepting Disappointment

Participants are extremely enthusiastic about mock trials. Students, teachers and lawyer volunteers work very hard to prepare and are eager to have their efforts rewarded with positive results. While this enthusiasm is a natural element of the competitive nature of mock trials, if left unchecked it can lead to a negative experience for some participants.

Participants should remember that all of the students participating in mock trials have worked very hard, prepared for long hours, and are undoubtedly above-average students, or they would not have bothered to put in all the work required. Just as Olympic medals can be awarded based on very small margins, either of time, distance or a judge's interpretation, mock trials are often decided by just a few points.

There is an element of subjectivity in judging – not every judge will respond to the same points or the same style of presentation. Teams should keep in mind that their theory of the case and their interpretation of the evidence and the witness statements are not the only ones that are valid. The best way to avoid disappointment is to practise thoroughly: consider every possible angle, and don't just stick to practising on the case that will be used in the tournament. The program website has other fact scenarios that can be used for practice. Practising with other facts is a good way to get accustomed to the art of litigation and develop the ability to deal with the unexpected.

The biggest mistake that teams often make is to treat the mock trial like a performance piece, which can be executed exactly as planned, as if according to a script. The opposing team will have its own plans, and the more comfortable, adaptable and able to deal with the unexpected that a team is, the better its chances of success.

Teachers are encouraged to prepare their students to accept their results and to use the experience, whatever the outcome, as a learning opportunity.



## 3. Forming a Team and Entering a Tournament

### Running an In-School Program and Forming a School Team

The first stage consists of a school's internal selection of its team. Each secondary school in Ontario may submit one team to its local OOCMT event. Schools may be invited to submit a second team in exceptional circumstances of low or uneven registration numbers.

The composition of a school team is up to each school to determine as it sees fit. Schools commonly select their school team in one of the following ways:

- a) **Auditions:** the teacher may put out an open call or invite students to audition for a spot on the team.
- b) **In-school competition:** Multiple teams are formed within a school and an intramural competition is held, with the winning team representing the school at the local tournament.
- c) **Hybrid:** An in-school competition may be held, with the team representing the school to be composed of the standout members from amongst multiple teams.

Options (b) and (c) provide the opportunity to involve one or more whole classes of students in the education exercise of the mock trial at the school level, though it should be noted that once the school team is formed, some extra-curricular time will be required for the team to prepare and practise.

School teams do not have to be selected for a school to register – the exact roster of team members will be collected from teachers at later date. Once registration for an area has closed, and sometimes before, teams will be matched with a local lawyer to assist them in their preparations.

### Local Mock Trial Tournaments

OOCMT tournaments generally take place in April and May, and sometimes as early as March. The dates for the tournament and registration vary by region. Go to your local tournament's page on [ojen.ca/oocmt](http://ojen.ca/oocmt) to get information on your local tournament's time frame.

## Number of Students on a Team

Teams must have at least six students, and no more than eight, on the “core team” of lawyers and witnesses. However, teams may register up to three alternate members as well. Team alternates will step into a role if a core team member is not available. Alternates often fill the crucial role of team timekeeper. See Part 1 of the Official Rules for the specific rules about core team members, alternates, and timekeepers.

## Roles of Team Members

Teams must prepare to play as Crown, and to play as defence. In most cases, teams will get the chance to play both of these roles at least once. It's very important to understand that when setting up a team, you are not setting up a “Crown team” and a “defence team”. The mock trial team is one unit with two “lineups”: a Crown lineup and a defence lineup.

Each lineup consists of six jobs for the four lawyers:

- Opening statement
- Direct examination of your Witness #1
- Direct examination of your Witness #2
- Cross-examination of the other side's Witness #1
- Cross-examination of the other side's Witness #2
- Closing arguments

Each lawyer will conduct one of the four examinations, direct or cross. Of those four lawyers, one lawyer will also deliver the opening statement, and another will also deliver the closing arguments.

In addition to the four lawyers, each line-up must have two witnesses, for a total of six students on a lineup. Adding the two lineups together, that's roles for 12 students. Because a team can have a maximum of eight students, at least some students will need to play roles on both sides. On a team with only six core team members, they will all need to play roles on both sides.

Students are not restricted to playing only lawyers or only witnesses. A student can play a lawyer on one lineup and a witness on the other lineup. A strategy that some teams use is for the student who played a witness on one side to cross-examine the same witness character when the team plays the opposing side.

## Example Team Rosters

Shortly before tournament day, teams will submit a “roster”: a listing of both lineups and who is playing what on each lineup. Below are two examples of what your lineups could look like.

### Example Lineup #1

Let's say you have five students (Gordana, Wouter, Anna, Mila and Narcissa) who want to play lawyers and three who want to play witnesses (Amal, Zahid and Martin). Your two lineups could look like this:

Crown		Defence	
<u>Lawyer Job</u>	<u>Student Participant</u>	<u>Lawyer Job</u>	<u>Student Participant</u>
Opening statement	Gordana	Opening statement	Narcissa
Direct examination of Crown Witness #1	Gordana	Cross-examination of Crown Witness #1	Narcissa
Direct examination of Crown Witness #2	Wouter	Cross-examination of Crown Witness #2	Wouter
Cross-examination of Defence Witness #1:	Anna	Direct examination of Defence Witness #1	Anna
Cross-examination of Defence Witness #2	Mila	Direct examination of Defence Witness #2	Mila
Closing arguments	Wouter	Closing arguments	Mila
<u>Witnesses</u>	<u>Student Participant</u>	<u>Witnesses</u>	<u>Student Participant</u>
1	Amal	1	Martin
2	Zahid	2	Amal

In this example, Anna, Mila and Wouter play lawyers in both lineups. Narcissa and Gordana only play lawyers in one lineup and sit out one round. However, when they are in the lineup, they both do the opening statement as well as an examination to balance the fact that they

only do one round. Amal, Zahid and Martin wanted to play witnesses. With four witness roles to play in total between the two lineups, Amal plays two different witnesses while Zahir and Martin focus on one witness role.

## Example Lineup #2

In this example, we'll use the same names but imagine we want to maximize each student's chance to be a lawyer at least once. That could look like this:

Students: Gordana, Wouter, Anna, Mila, Narcissa, Amal, Zahid and Martin

Crown		Defence	
<u>Lawyer Job</u>	<u>Student Participant</u>	<u>Lawyer Job</u>	<u>Student Participant</u>
Opening statement	Mila	Opening statement	Narcissa
Direct examination of Crown Witness #1	Mila	Cross-examination of Crown Witness #1	Amal
Direct examination of Crown Witness #2	Anna	Cross-examination of Crown Witness #2	Zahid
Cross-examination of Defence Witness #1:	Wouter	Direct examination of Defence Witness #1	Narcissa
Cross-examination of Defence Witness #2	Gordana	Direct examination of Defence Witness #2	Martin
Closing statement	Anna	Closing statement	Martin
<u>Witnesses</u>	<u>Student Participant</u>	<u>Witnesses</u>	<u>Student Participant</u>
1	Amal	1	Wouter
2	Zahid	2	Gordana

Here, every student gets to play a lawyer. Narcissa, Anna, Martin and Mila only appear in one lineup, but do two lawyer jobs in that lineup, while the other four students do one lawyer job

in two lineups. Note that the students playing witnesses do the cross-examination of the same witness characters on the opposite side.

## 4. Mock Trial Time Chart

	<b>Segment</b>	<b>Conducted by</b>	<b>Time (in minutes)</b>	<b>Notes</b>
1	Preliminary matters	Judge(s) & Clerk	5	Introductions, read charge, enter plea, etc.
2	Opening statement	Crown	4	N/A
3	Direct examination of first Crown witness	Crown	10	For direct of <u>both</u> Crown witnesses
4	Cross-examination of first Crown witness	Defence	10	For cross of <u>both</u> Crown witnesses
5	Direct examination of second Crown witness	Crown	Remainder of 10 for direct examination	Subtract time used for direct of first Crown witness from 10
6	Cross-examination of second Crown witness	Defence	Remainder of 10 for cross-examination	Subtract time used for cross of first Crown witness from 10
7	Opening statement	Defence	4	N/A
8	Direct examination of first Defence witness	Defence	10	For direct of <u>both</u> Defence witnesses
9	Cross-examination of first Defence witness	Crown	10	For cross of <u>both</u> Defence witnesses
10	Direct examination of second Defence witness	Defence	Remainder of 10 for direct examination	Subtract time used for direct of first Defence witness from 10
11	Cross-examination of second Defence witness	Crown	Remainder of 10 for cross-examination	Subtract time used for cross of first Defence witness from 10
12	Preparation for closing arguments	Crown & Defence	2	Counsel may confer amongst themselves
13	Closing arguments	Defence	5	N/A
14	Closing arguments	Crown	5	N/A
15	Recess for judge's deliberation	Judge(s)	15	N/A
16	Delivery of verdict and feedback	Judge(s)	10	N/A
	<b>Total</b>		<b>90</b>	Trials may take longer depending on time stoppages

## 5. Preparation Advice for Lawyers

### Order of Proceedings

- During the trial, lawyers for both sides do:
  - Opening statements and closing arguments;
  - Direct examination (asking questions) of your own witnesses; and
  - Cross-examination (asking questions) of the other side's witnesses.
- The Crown will make its opening statement and call its witnesses first. After the Crown's witnesses have been examined, the defence presents its side of the case, starting with its opening statement, and then calls its own witnesses.
- After all witnesses have been called, the defence gives its closing arguments first. The Crown goes second.

### Opening Statement

- Your opening statement frames your case. It's an important opportunity to tell the judges what they are going to hear and how it all fits together into your "theory" of the case (i.e., what you say happened and why).
- The statement should be brief, to the point, and avoid rhetoric or argumentation.
- Briefly outline how the law applies to the facts of this case: what the Crown must prove beyond a reasonable doubt, and defences that apply, etc. Show the judges that you are familiar with the law.
- Tell the judges the important things you "anticipate" or "expect" your witnesses will tell the court. Don't say "the witness will say..." because you can't speak for the witness.
- This part of the mock trial can be completely scripted, but it's still very important to make good eye contact with the judges.

## Direct Examination (also called the Examination-in-Chief)

- Read the witness's sworn statement carefully, several times over. Write down all the things that your side is trying to prove.
- Make a list of all the facts in the witness's testimony that help and hurt your case. You will want to be sure to have the witness talk about what helps your case, and maybe also things that hurt your case so that you can put the best possible spin on them.
- Put a star beside the most important facts that you must make sure that your witness talks about. For example, an important fact for the Crown might be if your witness saw the actual crime take place.
- Remember not to ask leading questions. Ask open-ended questions that let the witness tell their story:
  - You can start with questions that will let the witness tell the Court who they are: "What is your name?" "What do you do?" "How long have you worked in that job?" to get the witness "warmed-up". You can also be more direct and ask leading questions on these "non-contentious" matters if you wish, e.g. "You work at X, correct?" And you've worked there for X years?"
  - Move to the events in question: "What were you doing on the night in question? Where were you? When did you first hear there was a problem?"
  - Then move to more specific questions: "What did you see? What did you do after that happened?"
- When your witness is on the stand, do not be afraid to ask a question twice, using different words, if you do not get the answer you were expecting.

## Cross-Examination

- Read the witness's sworn statement carefully, several times over. Make a list of all the facts in the witness's testimony that hurt your case.
- If there are a lot of facts that don't help your case, can you find a way to challenge the witness's credibility? For example, can you show that the witness may have made a mistake or has a reason for not telling the truth?



- Put a star beside the facts you must make the witness talk about.
- Ask short, leading questions that move toward the key points you want to make.
- Depending on what the witness says you might need to come up with different questions on the spot, rather than asking just the questions you intended to ask. Listening to the witness and following up based on what they have just said to get your points out is very important.
- Some lawyers like to have a list of questions they want to ask, but you make sure you don't just go down your list regardless of what answers the witness gives. Listen to the witness. Ask new questions if that will help your case; skip questions if the answers you wanted have already come out.
- Another effective strategy is to focus on what evidentiary points you want to bring out from the witness, e.g. they were distracted, they didn't get a good look at the assailant, they have a bias, etc. Ask questions that will get your desired points out, and once they are out, move on.
- Witnesses are allowed to explain their answers – you can't tell them just to give you a "yes" or a "no" response. But, you can pose questions that make it hard to say reply with anything besides yes or no. If a witness is being difficult, gently try to take back control of the examination – you'll get credit for that.
- Don't spend too long trying to get exactly the answer you want from a witness. You can't get a witness to admit to something that isn't obvious from their sworn statement. Even if a witness doesn't agree with anything you put to them, you are putting your theory of the case to the judges through your questions, and inviting the judges to question how much the witness's testimony can be relied upon.

### **Closing Arguments (also called the Summation)**

- Write down your key arguments and summarize the important facts you want to stick in the judges' mind, but be prepared to adjust them. The person giving the closing should be the person on the team who is best able to speak off the cuff. Avoid pre-scripting your closing word-for-word unless you will be comfortable deviating from the script at the last minute if you need to.
- Only summarize evidence that actually was given at trial. This may mean you have to drop and add some points, but this will keep your closing focused on reviewing the

evidence that was actually presented, and putting it in context with your theory of the case.

- Where a witness for the other side admitted something important to your case, point that out. For example: “The witness says she identified Mr. Smith as the man who broke into the car. However, she admitted that she was standing three blocks away from the car when she made the identification. She admitted that it was dark out. There is a real doubt that the witness actually could have identified anyone, let alone someone she had never met before, in the circumstances.”
- Remind the judges of what the law says and how it should be applied to the evidence.
- Some rhetorical flourishes can be effective, but stay away from too much TV lawyer-speak and drama. The best closings will be sharp, focused and leave a clear impression in the judge’s mind of what this case boiled down to, what were your key arguments, and why they should find for your side based on the evidence and the law.

## Courtroom Etiquette and Protocol

The courtroom is a formal setting, and there are some specific etiquette rules to follow that may not be familiar to you. Here are some pointers:

- If the courtroom has a jury box, the Crown sits on the side closest to the jury box. If the prisoner’s box is on the side of the room, rather than in the centre, the defence sits closest to the prisoner’s box. If neither of those are true, the Crown should sit on the side closest to the witness box.
- When the judges enter, all counsel, and everyone else in the courtroom, must stand-up. Counsel then bow to the judges. Sit down when the clerk instructs everyone to do so.
- When you are getting ready to address the judges, stand at the podium, or at your table if there is no podium. Wait until the judges seem ready to proceed. The judges may nod or may say that you can proceed. If you are not sure, ask.
- Usually the judges will ask teams to introduce themselves. If not, the first person to speak should introduce the other members of their team. It’s not necessary to introduce the witnesses as the judge will have your team roster, but you may do so if you wish.
- Do not be afraid to ask the judges procedural or preliminary questions. For example, if

you forgot to give your team roster (list of names) to the clerk prior to the judges entering, just ask if you can give it to the clerk now.

- It's helpful for counsel to remind judges of their name before they begin a new segment (e.g. when a new lawyer takes the podium to examine a witness).
- Try not to distract the judges with too much activity between counsel when seated at the counsel table. Write notes to communicate, and be careful not to cause a commotion, even if you're excited. Judges really frown upon this!
- Stand every time you are addressing or being addressed by the judge.
- Refer to other lawyers as "my colleague", "my co-counsel", or by name (e.g. Mr. or Ms. X). Opposing counsel should be referred to as "my friend" or "counsel for [Crown or name of accused]", or by name. "Counsel" is the common term for lawyers – not "attorney".
- It's not common in Canada to refer to the accused as "my client" if you are defence. Just say "Counsel for Mr./Ms. X" (this also helps to humanize the defendant). If you're the Crown, you are "counsel for the Crown"; the Crown is not your "client".
- Refer to each judge as "Your Honour" or "Your Honours" if there is more than one.
- Most people tend to speak fast when they're excited or speaking on a time limit. But, in order to be understood clearly, work really hard on speaking slower. The judges need you to speak slowly enough for them to make notes.
- Do not interrupt a judge, and if a judge interrupts you, stop immediately and wait until they are finished before replying. Never interrupt or object while an opposing counsel is addressing the judge. Wait until you are specifically asked by a judge to respond to a point argued by opposing counsel.
- If you have an objection, stand and wait for the judges to recognize you (do not shout "Objection!" like on TV). If they do not recognize you right away, then say "Objection, Your Honour" or "Your Honour, Objection". The judges will ask you what your objection is, and ask opposing counsel to respond. If you are conducting an examination, and opposing counsel objects, stay standing at the podium. The judges will ask for your response. Listen to the objection and think about it. Don't rush, and

don't just withdraw your question unless you know it was wrong. You are entitled to offer your side, and the judges will rule. No one can object during an opening or closing statement.

- Questions from judges do not mean you are doing a bad job. Usually, the judge just wants to make sure they understand your point clearly, or to know what you think about something. A question is actually a great opportunity to show that you can think on your feet. It's also a chance to engage with what's on the judge's mind. If a judge asks you a question, take your time to think about it before replying. If you do not understand the question, just say so, so that the judge can rephrase it so you do. Remember that questions from judges stop the clock, so you do not need to rush your response!

## 6. Preparation Advice for Witnesses

### General

- Witnesses are an integral part of the mock trial.
- You need to learn your role very well and “get into character”. This will help you feel more natural on the stand. Read your sworn witness statement carefully and try to act as your character comes across to you.
- As a team, you can decide if some members will play witnesses exclusively, or play a lawyer on one side of the case and then a witness when your team plays the other side.
- Witnesses may not use notes when being questioned. If you are playing a police officer, you may have a notebook as a prop, but it must be blank.

### Direct Examination (also called the Examination-in-Chief)

- The lawyer asking you questions will be on your team, and as a team you can plan the questions that will be asked and answers you will give.
- Your challenge will be to make an exchange which is largely rehearsed appear natural and realistic. To do this, you may wish to try different ways of answering the same question and consider leaving room for you and the lawyer to improvise somewhat.
- The more you practise getting into character, the easier it will be for you to give confident and natural responses to questions.
- You need to answer questions in a way that is “consistent” with your sworn statement. For direct examination, you and your teammates can come up with questions and answers which are grounded in the facts of your statement but *extrapolate* on them. In other words, your answers may expand on the facts in your statement but cannot contradict them. If something is clearly stated or obviously implied by your sworn statement, don’t try to deny it. If you do this you can expect some tough questions from opposing counsel, damage your credibility as a witness, and hurt your team’s score.

- If there are facts in your sworn statement that hurt your case, you can use your direct examination to minimize their significance or put the best possible spin on them.

## Cross-Examination

- This is where you are on the opposing side as the lawyer asking you questions.
- Unlike direct examination, you won't be able to know ahead of time just what the examining lawyer will ask you. You can, however, get a pretty good idea from your team preparations, as you need to prepare to play both Crown and defence.
- It's even more important than in direct examination to know your facts completely and get into character.
- It will never do your team any good to deny or try to hide from facts contained in your sworn statement. It's better for a witness's credibility to just admit a negative fact if you are asked a direct question about it, rather than try to dodge it.
- Give answers that help your side's case. Don't just agree with counsel's questions if they hurt your case. You can put your own spin on things, and you can dig in your heels if counsel is trying to get you to admit or agree to something that hurts your case and isn't clear from your sworn statement. But, be careful not to seem "evasive" in order to come across as a credible (i.e. believable) witness.
- Don't get flustered if you get a question you weren't expecting. If you know your character well, you can give an answer. You can answer however you like, as long as it is "consistent" with your sworn statement. There is more leeway for witnesses to give answers that aren't suggested by their sworn statement if it's in response to a question from opposing counsel.

## 7. Guide to Evidence and Procedure

### Overview

Court procedure and the rules of evidence are some of the most difficult things to learn. However, knowing court procedure and the rules of evidence is essential to a good trial. Judges make their decisions based on the evidence before them, and they will only accept evidence if it is presented according to the rules of evidence. It is important to understand that the rules of evidence are not “technicalities”. They have evolved over hundreds of years, and are based on the idea that some sources of information are more reliable than others. This does not mean the rules are perfect – in fact, the courts sometimes conclude that a certain rule has outlived its usefulness and will abolish it. Nonetheless, our justice system has found that the rules of evidence are, for the most part, important to a fair trial.

Most of the rules of evidence deal with whether or not evidence is admissible - only “admissible” evidence is considered by a judge in making his or her decision. Evidence can be inadmissible for a number of reasons. For example, confessions made under threat of torture are inadmissible because history has shown that people under duress will confess to things they didn't do. In this example, evidence is deemed to be inadmissible because it is not reliable. Occasionally, evidence will be inadmissible even though it is reliable. For example, evidence obtained in an unconstitutional manner (for example, illegal search or seizure by police) is often inadmissible for policy reasons. Our society has decided that if evidence obtained in an unconstitutional manner was admissible, it may encourage the police to disregard our constitutional rights. This sometimes leads to the flawed impression that useful evidence is excluded for “technical reasons”.

The following are some basic rules of evidence and procedure.

### Rules for Entering Exhibits

#### Types of Evidence

Evidence gets before the court in two ways: through oral testimony of witnesses, and through exhibits. Roughly speaking, there are three types of exhibits:

1. **Real Evidence:** The actual objects that played a role in the events that gave rise to the trial. For example, a bloodied shirt worn by an accused when arrested or a bullet casing with the accused's fingerprints on it may be real evidence useful to the trial.



Photographs of the crime scene are also considered real evidence in some cases. For example, a photograph of an intersection showing how a stop sign is obscured by tree branches would be real evidence.

- 2. Demonstrative Evidence:** Exhibits that are used to illustrate a witness' testimony. For example, models, graphs or drawings can be used to explain or illustrate the testimony of a witness. For example, a witness testifying about how an accident occurred could refer to the diagram of an intersection in order to more clearly explain what the witness observed.
- 3. Documentary Evidence:** Written documents such as notes, police records, business records or letters. The relevance of documentary evidence is usually related to the contents of the documents. For example, a police report may be used to cross-examine a police officer where the officer's oral testimony conflicts with what is contained in the report.

## Foundation

For exhibits to be used as evidence, the lawyer offering the exhibit must establish a foundation for the exhibit.

To establish a foundation for the exhibit, the lawyer introducing an exhibit has to have a witness verify under oath that the exhibit is, in fact, genuine. For example, a police officer can lay the foundation for a knife (real evidence) found at a crime scene if he or she is the person who found it there.

Likewise, a person who witnessed an accident at an intersection can verify that a diagram (demonstrative evidence) accurately represents that intersection.

Finally, a person who wrote a letter (documentary evidence) can testify that the exhibit is in fact the letter that he or she wrote.

The key to establishing the foundation for an exhibit is to have a witness who has direct personal knowledge of the exhibit.

The following are three examples of how to establish the foundation for different types of exhibits.



## 1. Real Evidence

- Q: Ms. X, I am showing you a kitchen knife. Do you recognize this knife?  
A: Yes I do. That was the knife I found in the dumpster behind my restaurant.  
Q: Your Honour, could I have this marked as an exhibit?

This may well be all you need to ask this particular witness depending on what else she saw. If you are trying to establish that the accused used the knife in the commission of a crime, you will next have to call the police officer who found the accused's fingerprints on the knife. You would establish with a similar line of questioning that the knife was the same one that the police officer tested for fingerprints. However, you would not have to have it marked as an exhibit again.

## 2. Demonstrative Evidence

- Q: Mr. X, I am showing you a diagram of the intersection where the accident occurred. Does it accurately reflect your recollection of the intersection?  
A: Yes.  
Q: Your Honour could I have this marked as an exhibit?

The lawyer can then proceed to have the witness draw on the diagram where he saw the pedestrian get hit. It is not good enough for the witness just to point to the diagram because the transcript won't capture the details of the witness's testimony. By having the witness draw on the diagram of the intersection, the judge will be able to look back at the exhibit after the trial and see what the witness indicated.

## 3. Documentary Evidence

- Q: Ms. X, I am showing you a cash register receipt for two items – a toothbrush and a tube of toothpaste. Do you recognize this receipt?  
A: Yes.  
Q: How is it that you recognize it?  
A: The cash registers in my store print out the name of my store on the top, like it is on this receipt.  
Q: Your Honour may I have this made an exhibit?

The lawyer can then go on to establish, for example, that the owner asked the accused to empty his grocery bag and found a shoplifted item as well as the two items paid for.

In all of these examples, some of the questions may seem a bit obvious. For example, you may ask why it is necessary for a lawyer to tell the witness that he or she is showing the witness a

kitchen knife. However, remember that in a real trial a transcript of all of the testimony will be prepared. The transcript is used by the judge to review what was said at trial. It is important that the transcript identify in words the visual aspect of the live trial. Students who will be asking questions of witnesses should think about how their questions will appear on paper.

### **Entering Exhibits with Consent of the Other Side**

One exception to the need to lay a foundation for an exhibit is where counsel enters an exhibit with the consent of the other side. The facts of the official case may call for this in situations where there is no witness character to lay the foundation for the exhibit; for example, an “agreed statement of facts”. If this is the case, instead of laying a foundation in the usual way, counsel should simply inform the judge that they wish to enter an exhibit with the consent of the other side. The judge will then confirm that with the other side and, for the purposes of the mock trial, opposing counsel is required to consent to the entering of the exhibit.

### **Marking Exhibits**

Once counsel has gone through the above procedures for entering exhibits, the exhibit should be passed to the court clerk, who will pass it to the judge. The judge will examine the exhibit, return it to the clerk and state that the exhibit is entered as number 1, 2, etc.

## **Oral Testimony**

As already mentioned, information becomes evidence either by being an exhibit or through oral testimony. In the mock trial, most of the evidence will be through oral testimony. Often, oral testimony of the witnesses will conflict. Where there are conflicts, they will either be due to different perceptions of the witnesses or because one witness is not being honest. If you think a witness is lying, ask them questions that will uncover the lie. On the other hand, if you think the witnesses just perceived things differently, then ask questions that will show why your witness’s perception is more reliable.

The following are specific rules that deal with the admission of oral testimony as evidence:

### **Hearsay**

Hearsay is not admissible if it is offered to prove the contents of the statement. Like the name suggests, hearsay is evidence that the witness “heard was said”. For example, suppose a witness testifies that she was told by the passenger of a vehicle that the driver was drunk. The witness did not observe the driver’s intoxication herself. Instead, she is only able to tell the

court that someone else told her the driver was drunk. In general, this type of testimony is not allowed because it is hearsay.

### Opinion Evidence

Opinion evidence is evidence in which the witness draws a conclusion based on a set of facts. Suppose a witness saw a car that had numerous dents all over the body, and the witness saw a hammer lying nearby on the sidewalk. Those are facts. Saying that the car had been dented by the hammer is an opinion.

**Lay Witness:** A “lay witness” (i.e. a witness who is not qualified as an expert) is not allowed to give opinion evidence except in limited circumstances.

A lay witness can give an opinion on such things as the speed a vehicle was travelling, whether a person was drunk, the height, age or weight of another person, and whether another person was happy, angry, scared, etc.

These opinions are allowed because they are thought to be within the normal experience of every person, and even though they are opinions, it would be too difficult to restrict the witness to pure facts.

**Expert Witness:** An expert witness is allowed to give opinion evidence. An expert witness can provide opinions because they have special knowledge which makes them better able to draw certain conclusions from the facts.

An expert witness must be properly qualified to offer an expert opinion. Before accepting expert opinion evidence, the court has to be satisfied that the witness is qualified to give such an opinion.

The following set of questions is an example of how to have an expert accepted by the court (note that leading questions are permitted when qualifying an expert):

- Q: I understand that you have been trained in fingerprint identification. Can you tell us what training you have?
- A: Yes, I have successfully completed the RCMP Fingerprint Training Program at the Centre for Forensic Sciences, and I have attended three upgrading sessions which have allowed me to be certified for advanced fingerprint recovery and analysis.

- Q: Does your training allow you to compare fingerprints and determine whether the prints come from the same individual?
- A: Yes.
- Q: How long have you been doing this kind of work?
- A: I've been certified for 4 years.
- Q: Your Honour, I would like to tender this witness as an expert in fingerprint identification.

At this point in a real trial, the judge would ask the opposing lawyer whether they have any objection or would like to cross-examine the witness on his or her credentials. Once any challenges to the witness's qualifications are done, the judge will rule on whether the witness can give expert testimony and the scope of that testimony. In a mock trial, the expert's credentials are unlikely to be in any doubt, so the opposing side can simply give their consent to the witness being qualified as an expert.

Notice that the witness was tendered as an expert "in fingerprint identification", not as simply "an expert witness" (these qualifications are fictional; you can come up with your own description of qualifications for any expert witness you might be calling).

An expert witness is only entitled to offer opinion evidence within the scope of their expertise. For example, a fingerprint expert should not be allowed to provide an opinion on DNA evidence. A surgeon, whom the court has qualified to provide opinions about heart surgery, is not qualified to give an opinion about an appendectomy.

The opposing lawyer should be careful to listen to the qualifications of the expert, and then make sure that the expert is only being offered as an expert within the scope of those qualifications.

## **Cross-Examining a Witness on an Inconsistency**

### **How to Cross-Examine on an Inconsistency**

This is also known as "impeaching" the witness, but "impeachment" is not as formal a process as it may sound. In fact, and particularly for the purposes of the mock trial, all "impeaching" a witness means is to cross-examine a witness on an inconsistency between their oral testimony and their sworn statement, in such a way that points out that inconsistency to the judge.

Participants can watch a video on the OOCMT website which shows the procedure for cross-examining a witness on inconsistent testimony. Below is an example of what this looks like:

- Q: You had a great scoring opportunity, didn't you?  
A: Yes, but it was ruined by the Jets player who tripped me.  
Q: That made you angry, right?  
A: I was annoyed, but I wouldn't say I was *that* angry. I mean, it happens...  
Q: You weren't angry?  
A: No, I'd say I was annoyed  
Q: You remember making your sworn statement to the police after the event, right?  
A: Yes.  
Q: That statement was just a couple of weeks after the incident, right?  
A: Yes.  
Q: You were telling the truth when you made that statement, weren't you?  
A: Yes.  
Q: Your honour, may I approach the witness?  
J: Yes.

*Counsel approaches the witness*

- Q: Your honour, please see paragraph 11 of the witness's affidavit. Sir, I'm reading your affidavit at line 11. "My scoring chance was completely ruined. I was so angry." Is that what your statement says?  
A: It does say that.  
Q: You told police you were *so* angry you were tripped, right?  
A: Well, yes, I said that at the time.

This is all that is necessary for the moment. There's no reason to dwell more on this as there will be many points to cover in a short time. The final step will be to re-iterate to the judge in closing arguments that the witness was shown to have given inconsistent testimony.

The other scenario that could well arise is where the witness gave inconsistent testimony when the lawyer on their own team conducted direct examination. As opposing counsel, this provides an opportunity to, on cross-examination, bring this up to discredit the witness. The procedure will look very similar to the above example, except that the lawyer will be the one bringing up the prior inconsistency.

In a real trial, a lawyer could have a variety of reasons for impeaching a witness. The lawyer may wish for the witness to adopt their oral testimony and explain why they said something different previously, because the new testimony better fits with the lawyer's objectives, among other reasons. In the mock trial, the primary purpose is to catch witnesses who are trying to change facts or who are inadequately prepared, and to prevent the unfairness that can arise from these situations.

If judges feel that inconsistent testimony is intentional and creates unfairness for the other team, they can factor that into their scores.

### **Proper Approach to Unexpected or Novel Testimony**

As with many things in law, determining what is truly inconsistent testimony is not an entirely easy or black-and-white exercise. Consider the following example:

- Q: You say you were sure you saw the accused punch the victim, but you only saw it out of the corner of your eye, right?
- A: That's right.
- Q: So, how can you be sure when you only saw it out of the corner of your eye?
- A: I have excellent peripheral vision.

In this example, the witness's sworn statement said only that the witness saw the incident "out of the corner" of their eye. It doesn't say anything about the quality of the witness's peripheral vision. Is this an opportunity to try to impeach the witness? No – it's an opportunity for counsel to show how they can "roll with it" – a quality which is very highly regarded by judges:

- Q: Okay... but what makes your peripheral vision so excellent – what makes it better than anyone else's?
- A: Well, it's just very good.
- Q: But it's not special peripheral vision is it, it's just the normal peripheral vision anyone has, correct?
- A: I think it's excellent. I can see very well in the corners.
- Q: But you only see what you see, you can't compare this to anyone else's vision, right?
- A: Well, I suppose so.
- Q: So really, all we know is that you saw it, not in the centre of your field of vision, but in the corner, right?
- A: Yes.

That is probably all that is needed on that point. The witness saw it, out of the corner of their eye – and their statement about their vision being “excellent” is shown to be an opinion and nothing more. If the witness responded by saying that they were certified by some official body as actually having above-average peripheral vision, that is the time to impeach.

It is very important for teams to remember that in real trials, no one has any control over what witnesses say. In mock trials, witnesses are expected to testify consistently with their statement, but the trials would not be much fun if there was no variability or colour to the witness characters. Therefore, impeaching a witness should only happen when the testimony is clearly inconsistent – not merely unanticipated or novel to the opposing team.

Being able to appreciate what is and is not truly inconsistent testimony will be an important skill for teams to develop as they become completely conversant with their facts. Teams that can think on their feet and respond effectively to “curve-ball” answers will do well. Teams that nit-pick over really insignificant aspects of a witness’s testimony, or try to score a procedural victory by trying to impeach unnecessarily, will not achieve the success they seek.

## Objections

The rules of evidence are meant to ensure that the judge only considers reliable and relevant evidence when making his or her decision. When one lawyer believes that certain questions or evidence are not within the rules of evidence, that lawyer can make an objection.

To make an objection, counsel should generally stand silently and wait for the judge to recognize them. If the judge has not noticed that counsel is standing, it is permissible to interrupt the proceedings by simply saying “Objection, Your Honour”.

After explaining the basis for the objection to the judge, and after the judge gives the other lawyer a chance to respond, the judge will rule on whether the objection is sustained (i.e. the judge agrees that the objection is valid) or overruled. Objections can be made either to a question asked of a witness, or to the answer provided by a witness.

The following is a list of common objections:

### 1. Leading Question

Generally, leading questions are not permitted in direct examination. Leading questions are permitted, however, when the questions relate to basic things like establishing the witness’s



name, age, or the qualifications of an expert witness. Leading questions are also permitted in cross examination. In fact, cross-examination should largely consist of leading questions.

## 2. Assuming Facts Not in Evidence

This objection can be made where the witness is required to assume some fact that has not been “proven”. Here, “proven” just means that some evidence has been offered to support the fact. Whether or not the judge will agree that the evidence establishes the fact will not be known until the end of the trial.

In the following question, the witness can't answer “yes” to having asked for an advance without implicitly agreeing that he was short of money. Assume that no evidence has been led with respect to whether the witness was short of money or had asked for an advance.

Q: Because you were short of money, you asked your boss for an advance on your paycheque didn't you?

The solution is to ask two separate questions:

Q: You asked your employer for an advance on your paycheque didn't you?

A: Yes.

Q: And you did that because you were short of money didn't you?

A: No, I was worried that my employer was going to go bankrupt and I wouldn't get paid if I waited until payday.

## 3. Repetitive Question

Once a lawyer has asked a question, she or he must move on. Variations of a question are permitted as long as the variations are trying to get at something different. You cannot ask the same question twice.

For example, this line of questioning (in cross-examination) could give rise to an objection:

Q1: Did you have an unobstructed view of the mugging?

A: Yes.

Q2: But you said you were standing on the southeast corner of the intersection didn't you?

A: Yes.

Q3: And isn't there a hedge and a fence in between that corner and the place where the mugging took place?



- A: Yes.
- Q4: So wouldn't that block your view of the mugging?
- A: No, the hedge and fence are both pretty low, I saw right over them.
- Q5: So even though there was a fence and a hedge, you say you had an unobstructed view of the mugging?

In the above example, Q5 is repetitive. It asks the witness exactly what was asked in Q4. In contrast, Q1 and Q4 are not repetitive: they are permissible variations. In Q1 the lawyer is asking a general question to see what the witness will say. When the witness says the view was unobstructed, the lawyer gets the witness to admit that there was a fence and a hedge in between the witness and the crime (Q2 and Q3). Having added this bit of information, the lawyer asks not just whether the witness had an unobstructed view, but whether the hedge or fence obstructed the view.

#### 4. Argumentative Question

An argumentative question is one that asks the witness to accept the lawyer's conclusion rather than to accept a fact.

Consider, for example, the questions about the unobstructed view in the previous example. Suppose the lawyer doing the cross-examination had asked the following question as Q5:

- Q5: You couldn't really see over the fence and hedge could you?

This type of question invites a "Yes you did" and "No I didn't" line of questions and answers. If the lawyer has a basis for believing the witness couldn't see over the fence (e.g. if the fence was eight feet high), then that should be put to the witness. It is improper just to argue with the witness.

#### 5. Hearsay

As discussed above, hearsay is evidence that doesn't come directly from a person who can be cross-examined on the truth of the evidence. Hearsay comes in many forms and can be quite difficult to identify.

The following are some examples to help you with the concept, and to show how an objection is made. ("Q" refers to the lawyer asking the questions, "OC" refers to the opposing counsel who is making the objections, "J" is the Judge, and "W" refers to the witness.)

### Example 1

- Q: When you were knocked unconscious, what did your friends do?  
OC: Objection, hearsay. The witness has no direct knowledge of what her friends may or may not have done while she was unconscious.  
J: Sustained.

### Example 2

- Q: Where was the knife found?  
A: My friend said it was in a...  
OC: Objection, Your Honour, this is hearsay. The witness only seems to know what his friend told him.  
J: [Looking at the questioning lawyer] Counsel, what do you say to that?  
Q: Your Honour, the witness was clearly right there when his friend told him where the knife was found. That isn't hearsay.  
J: [Looking at the opposing counsel] Any reply?  
OC: Yes, Your Honour. The issue here is where, in fact, the knife was. The witness has no direct knowledge of that because he only knows what this friend of his told him. What the friend may have told the witness is hearsay if it is being used to establish where the knife was.  
J: The objection is sustained.

### Example 3

- Q: What did the accused say to you when you passed her in the hall that morning?  
A: She said she was going to be at the mall that afternoon, and did I want anything really cheap.  
OC: Objection, that's hearsay.  
J: [Looking at the questioning lawyer] Counsel, what do you say to that?  
Q: Your Honour, the accused is charged with shoplifting items at the mall. The witness heard the accused state that she was going to be going to the mall. Furthermore, the accused made a comment that suggests the accused was offering to steal something for the witness. I don't think this is hearsay.  
J: I'll overrule the objection. If the witness was testifying that a friend of his was asked the same thing by the accused, then I would agree it was hearsay. However, in this case, what the accused told the witness can be used to establish that the accused had the intention of stealing items from the mall. Opposing counsel can challenge this inference on cross-examination by showing that the witness is not a credible witness or that the witness's recollection is faulty. Therefore, the testimony is not hearsay.

#### Example 4

- Q: What happened after school that day?
- A: Well, when I got home I found a note on the table.
- Q: Was it this note I'm showing you now?
- A: Yes.
- Q: And do you recognize the writing?
- A: Yes, the writing is that of the accused, my brother. He has very distinctive handwriting.
- Q: Your Honour, I would like to have this note made an exhibit.
- J: Mark it Exhibit 1.
- Q: So to your knowledge, where was the accused when you got home from school that day?
- A: The note said that the accused had gone to the park down the street.
- OC: Objection, Your Honour. This is hearsay. The witness is relying on the note and has no actual knowledge of where the accused was.
- Q: Your Honour, this is a note in the accused's handwriting placing him exactly where the victim's backpack was stolen. How can a written note be hearsay?
- J: I'm going to allow the objection. The witness was able to testify to the fact that Exhibit 1 is a note in the accused's handwriting, stating that he would be at what turned out to be the scene of the crime. That speaks for itself. However, to go one step further, and to allow the accused's sister to testify that the accused was at the park based only on having read the note would be hearsay.

#### 6. Lack of Foundation

Any exhibit has to have a foundation established. This means that a person who has first-hand knowledge of creating or receiving the exhibit (e.g. letters) or who can verify the accuracy of the exhibit (e.g. a photograph or diagram of the crime scene) must testify that the exhibit is what it appears to be.

If a lawyer attempts to introduce an exhibit without laying the proper foundation, opposing counsel can object. For example:

- Q: So you saw the accident from all the way on the other side of the street?
- A: Yes.
- Q: Well look at this picture, look at how many bushes and shrubs there are between where you were and where the accident took place. Are you sure you could have seen everything?

- OC: Objection, Your Honour, no foundation has been laid for this photograph.
- J: Objection sustained. We haven't even established that this is a photograph of the same street where the accident took place. Unless you establish the foundation for this photograph, it is not evidence and should not be put to the witness.

## 7. Speculative

A lawyer may not ask a witness questions which require speculation on the part of the witness. The following are examples of questions that likely call for speculation:

- Q: What would have happened if you hadn't been there to stop the fight?
- Q: Why did the accused do that?
- Q: What will happen to you next?

However, a witness is entitled to answer questions that call for reasonable estimates based on perception. There is a fine line between what is speculative and what is a justified estimation, and there is room for disagreement on any particular question.

By modifying a question slightly you may be able to make the same point without asking the witness to speculate. The following are examples of questions that likely would be allowed.

- Q: Did it look to you like one person was in worse shape than the other when you broke up the fight?
- Q: Was the accused angry when he did that?
- Q: How will your injury affect your ability to play basketball?

Because there is no firm rule for when a question ventures into speculation, if an opposing lawyer objects to your question and the judge sustains the objection, then take a moment to see if you can rephrase the question in a way that does not call for speculation.

## 8. Not Letting the Witness Answer the Question

Sometimes in cross examination, the lawyer will cut off the witness or demand just a "yes or no" answer. In some cases this can form the basis for an objection.

The most famous unfair question is "Are you still beating your wife, sir?". Obviously a witness who has never beaten his wife cannot answer the question by a simple yes or no. A witness is entitled to answer this sort of question fully. If the lawyer asking the question won't allow the witness to answer the question accurately, you should object.

In other cases, it is less clear whether a witness should be allowed to explain a yes or no answer. The reason is that cross-examination is an opportunity for the examining lawyer to control the process. The witness has had the chance in direct examination to say his or her piece, and if the witness is asked a simple (and fair) yes/no question, then that is what should be provided.

For example, suppose the witness is asked "Are you sure about that?" (this is a bad question for cross-examination, but assume it slipped out by accident). The witness will almost certainly say "Yes". That is a full answer to the question, and after realizing this was not a brilliant question, the lawyer would likely want to move on. The witness, on the other hand, may want to go on to explain why it is he or she is so certain. If the witness tries to explain, the lawyer can say something like "Thank you, you answered the question, I'd like to move on to my next question." At this point the opposing counsel may object on the basis that the witness is entitled to explain his or her answer. Whether the objection is sustained or not will likely depend on whether the judge feels it would be unfair to require the witness to be limited to yes or no.