OHIO CENTER FOR LAW-RELATED EDUCATION

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MIDDLE SCHOOL MOCK TRIAL
SIMPLIFIED RULES OF EVIDENCE

Revised August 2015

Rules Unique to Middle School Mock Trial

I. Invention of Facts and Extrapolation

The object of these rules is to prevent a team from "creating" facts not in the material to gain an unfair advantage over the opposing team.

Invention of Facts - Direct Examination**. On direct examination the witness is limited to the facts given in his/her own written statement.** If a witness testifies in contradiction or goes beyond the facts given in the witness statement, opposing counsel should impeach the witness's testimony during cross-examination and not necessarily object during the examination.

Invention of Facts – Cross Examination. If on cross-examination a witness is asked a question, the answer to which is not contained in the facts given in the witness statement, the witness may respond with any answer, so long as it is responsive to the question, does not contain unnecessary elaboration beyond the scope of the witness statement, and does not contradict the witness statement. An answer which is unresponsive or unnecessarily elaborate may be objected to by the cross-examining attorney. An answer which is contrary to the witness statement may be impeached by the cross-examining attorney.

The limits on fair extrapolation apply only to cross examination; no extrapolation is permitted on direct examination.

Example

An accident reconstruction expert (Mr. Smith) has testified that the accident was caused by the failure of the defendant to maintain an assured clear distance ahead. The defendant has claimed that he was undergoing a type of epileptic seizure when the driver ahead stopped abruptly. The accident reconstructionist testifies that even a person experiencing this kind of epileptic seizure would have seen the car brake abruptly.

Unnecessary Elaboration

Cross-examiner: "But you're not a neurologist, are you, Mr. Smith?"
Mr. Smith: "As a matter of fact, I have a Ph.D. in Neurology from Johns Hopkins University and have written extensively on epileptic seizures."

If there is no hint in the case materials that Mr. Smith has expertise in neurology, it would be regarded as an unnecessary elaboration

Elaboration necessitated by the Question

Cross-examiner: "Have you testified before as an expert in accident reconstruction, or is this the first time that you have ever testified?"
Mr. Smith: "I have testified in 27 trials"

It may be reasonable for the expert to claim he has testified in 27 trials, if his age and background make that plausible, even if there is nothing in the case materials to reflect an answer to that question. It is an elaboration necessitated by the question.

II. Hostile Witness Rule

No witness may be declared hostile

III. Voir Dire

Voir Dire examination of a witness is not permitted

IV. No offer of proof

No offers of proof may be requested or tendered

V. Separation of Witnesses

All witnesses will be considered to have been separated prior to their testimony

Rules Adapted From Ohio Rules of Evidence for Mock Trial Purposes

Article I. GENERAL PROVISIONS

RULE 101. Scope of Rules: Applicability; Privileges; Exceptions

Applicability. These rules govern proceedings in the Middle School Mock Trial Program and are the only basis for objections in the Middle School Mock Trial Program

- **No directed verdict or dismissal motion may be granted.**

Article IV. RELEVANCY AND ITS LIMITS

RULE 401. Definition of "Relevant Evidence"
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
Evidence which is not relevant is not admissible.

Article VI. WITNESSES

RULE 601. General Rule of Competency
Every person is competent to be a witness.

RULE 602. Lack of Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that s/he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 607. Who May Impeach
(A) Who may impeach. The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid.R. 801(D)(1)(A), 801(D)(2), or 803.

RULE 616. Bias of Witness
In addition to other methods, a witness may be impeached by any of the following methods:
(A) Bias. Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.
(B) Sensory or mental defect. A defect of capacity, ability, or opportunity to observe, remember, or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.
(C) Specific contradiction. Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony.

Article VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. Opinion Testimony by Lay Witnesses
If the witness is not testifying as an expert, his/her testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

RULE 702. Testimony by Experts
A witness may testify as an expert if: (1) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and (2) The witness's testimony is based on reliable scientific, technical, or other specialized information.

RULE 703. Bases of Opinion Testimony by Experts
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him/her or admitted in evidence at the hearing.

RULE 704. Opinion on Ultimate Issue
Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. Disclosure of Facts or Data Underlying Expert Opinion
The expert may testify in terms of opinion or inference and give his/her reasons therefore after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise.

Article VIII. HEARSAY

RULE 801. Definitions
The following definitions apply under this article:
(A) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
(B) Declarant. A "declarant" is a person who makes a statement.
(C) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(D) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with his testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition

(2) Admission by party-opponent. The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity

RULE 802. Hearsay Rule
Testimony which is hearsay is inadmissible.

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by testimony.

RULE 804. Hearsay Exceptions; Declarant Unavailable
(A) Definition of unavailability. "Unavailability as a witness" includes any of the following situations in which the declarant:

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

For the purposes of hearsay, witnesses other than those listed on the witness statements are to be considered to be available, unless the case file indicates that one of the above listed situations applies.

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

Article IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. Requirement of Authentication or Identification

(A) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

EXAMPLES OF COMMON OBJECTIONS AND TRIAL PROCEDURES

I. Procedure for Objections

a. An attorney may object if he/she believes that the opposing attorney is attempting to introduce improper evidence or is violating the MSMT Simplified Rules of Evidence. The attorney wishing to object should stand up and object at the time of the claimed violation. The attorney should state the reason for the objection. **(Note: Only the attorney who questions a witness may object to the questions posed to that witness by opposing counsel.)** The attorney who asked the question may then make a statement about why the question is proper. The judge will then decide whether a question or answer must be discarded because it has violated a MSMT simplified rule of evidence (objection sustained), or whether to allow the question or answer to remain in the trial record (objection overruled). Objections should be made as soon as possible; however, an attorney is allowed to finish his/her question before an objection is made. Any objection that is not made at the time of the claimed violation is waived. When an objection has been sustained, the attorney who asked the question may attempt to rephrase that question. Judges may make rulings that seem wrong to you. Also, different judges may rule differently on the same objection. Always accept the judge's ruling graciously and courteously. Do not argue the point further after a ruling has been made.

II. Examples of Common Objections

The following are examples of common objections. This is not a complete list. Any objection properly based on the MSMT Simplified Rules of Evidence and MSMT Courtroom Showcase Guidelines is permitted:

1. **Relevance:** "Objection, Relevance."
2. **Leading question:** "Objection. Counsel is leading the witness." (Remember, leading is only objectionable if done on direct examination).
3. **Narrative Answer:** "Objection, this witness's answer is narrative" Commonly used on direct examination when a witness's answer has gone beyond the scope of the initial question.
4. **Non-responsive Answer:** "The witness is nonresponsive, your honor. I ask that this answer be stricken from the record." The witness's answer does not answer the question being asked. Commonly used by the cross examining attorney during cross examination.
   Example:

Attorney:	Isn't it true that you hit student B?
Witness:	Student B hit me first. He/she was asking for it, acting like a jerk and humiliating me in front of all my friends.
Attorney:	Your Honor, I move to strike the witness's answer as non-responsive and ask that he/she be instructed to answer the question asked. (Another option is to impeach the witness with prior testimony if he/she testified in his his/her deposition that he/she hit student B.)

5. **Improper opinion:** "Objection. Counsel is asking the witness to give an expert opinion, and this witness has not been qualified as an expert." OR "Objection. Counsel's question calls for an opinion which would not be helpful to understanding the witness's testimony (or which is not rationally based upon what the witness perceived.)"
6. **Lack of personal knowledge:**"Objection." The witness has no personal knowledge that would allow her to answer this question.
7. **Speculation:** "Objection. The witness is speculating/this question calls for speculation." A hybrid between lack of personal knowledge and improper opinion.
8. **Hearsay:** "Objection. Counsel's question calls for hearsay." If a hearsay response could not be anticipated from the question, or if a hearsay response is given before the attorney has a chance to object, the attorney should say, "I ask that the witness's answer be stricken from the record on the basis of hearsay."

    Example:

    Witness X testifies that "Mrs. Smith said that the decedent's wife had a bottle of arsenic in her medicine cabinet." This testimony is inadmissible if offered to prove that the decedent's wife had a bottle of arsenic in her medicine cabinet, since it is being offered to prove the truth of the matter asserted in the out-of-court statement by Mrs. Smith. If, however, the testimony is offered to prove that Mrs. Smith can speak English, then the testimony is not hearsay because it is not offered to prove the truth of the matter asserted in the out-of-court statement. However, the testimony is only admissible if Mrs. Smith's ability to speak English is relevant to the case.

    Comment:

    Why should the complicated and confusing condition be added that the out-of-court statement is only hearsay when "offered for the truth of the matter asserted?" The answer is that hearsay is considered untrustworthy because the speaker of the out-of-court statement has not been placed under oath and cannot be cross-examined concerning his/her credibility. In the previous example, Mrs. Smith cannot be cross-examined concerning her statement that the decedent's wife had a bottle of arsenic in her medicine cabinet, since witness X, and not Mrs. Smith has been called to give this testimony. However, witness X has been placed under oath and *can* be cross-examined about whether Mrs. Smith actually made this statement, thus demonstrating that she could speak English. When offered to prove that Mrs. Smith could speak English, witness X's testimony about her out-of-court statement is not hearsay.

Remember, there are responses to many of these objections that the examining attorney can make after the objection is raised and he or she is recognized by the judge to respond.

III. Other Trial Procedures

Opening Statements (4 minutes maximum)

An opening statement has been defined as "a concise statement of [the party's] claim [or defense] and a brief statement of [the party's] evidence to support it." Judge Richard M. Markus, *Trial Handbook for Ohio Lawyers* (Thomson-West, 2006 Edition), §7:1, p. 305. A party seeking relief should indicate the nature of the relief sought. It may be useful to acknowledge the applicable burden, or burdens, of proof. An opening statement is not supposed to be argumentative, and should be used by attorneys to present their theories of the case. Legal authorities can be cited, to show what issue or issues are before the court for decision. It is appropriate to lay out what the attorney expects the evidence will show, but the wise attorney will be conservative in this regard.

The most important aspect of the opening statement is to frame the issues. The attorney wants to frame the issues so that there is a compelling narrative (the theory of the case) in his/hers client's favor into which all the favorable facts and all favorable legal authority neatly fit. A well-crafted opening statement tells a story that will dominate the trial that follows.

Closing Arguments (4 minutes maximum each, with an additional 2 minute Plaintiff/Prosecution rebuttal)

Closing arguments, "are permitted for the purpose of aiding the [finder of fact] in analyzing all the evidence and assisting it in determining the facts of the case." Markus, op. cit., §35:1, at p. 1013. In a bench trial (to a judge, rather than to a jury), the closing statement is also the time to argue the law to the judge.

The attorney should point out to the court that his/her side has proven everything that it promised to prove, while pointing out that the other side failed to prove what it promised it would. It can now be shown how the evidence that was presented fits into the narrative (the theory of the case) that was introduced in opening statement, which, in turn, applying the law, compels a result in that side's favor. Remind the court what that favorable result is; i.e., the particular relief your client is seeking from the court.

On occasion, your evidence won't survive an objection, or the attorney's best witness will be forced to equivocate on an important point on cross-examination. When this occurs adjustments have to be made to the closing statement to fit the evidence actually presented in the trial.

The closing statements are the final opportunities to persuade the judge. In oral presentation, the statements having the most impact are the first statements, and the final statements. The attorney should try to make the first and last things said in closing argument the most vivid and persuasive, while reserving those points that have less emotional impact, but need to be said, for the middle of the statement.

Direct Examination - Form of Questions.

Witnesses should be asked neutral questions and may not be asked leading questions on direct examination. Neutral questions are open-ended questions that do not suggest the answer and that usually invite the witness to give a narrative response. A leading question is one that suggests to the witness the answer desired by the examining attorney and often suggests a "yes" or "no" answer.

Examples:

1. Proper direct examination questions:
    a. What did you see?
    b. What happened next?
2. Leading questions (not permitted on direct):
    a. Isn't it true that you saw the defendant run into the alley?
    b. After you saw the defendant run into the alley, you called the police, didn't you?

Scope of Direct Examination: On direct examination an attorney may inquire as to any relevant facts of which the witness has first-hand, personal knowledge.

Examples:

Direct Examination of physician called by Plaintiff in murder case:

Attorney:	Doctor, why did you testify in your deposition that you did not know the defendant's cause of death?
Witness:	I had not yet received all of the test results which allowed me to conclude the defendant died of arsenic poisoning.
Attorney:	Doctor, why did you conclude that the defendant died of arsenic poisoning even though test X pointed away from arsenic poisoning?
Witness:	Because all of the other test results so overwhelmingly pointed toward arsenic poisoning, and because test X isn't always reliable.

Cross Examination - Form of Questions

An attorney should usually, if not always, ask leading questions when cross-examining the opponent's witness. Open-ended questions tend to evoke a narrative answer, such as "why" or "explain," and should be avoided. (Leading questions are not permitted on direct examination because it is thought to be unfair for an attorney to suggest answers to a witness whose testimony is already considered to favor that attorney's side of the case. Leading questions are encouraged on cross-examination because witnesses called by the opposing side may be reluctant to admit facts that favor the cross-examining attorney's side of the case.) However, it is not a violation of this rule to ask a non-leading question on cross-examination.

Examples:

Good leading cross examination question:

Isn't it true that it was almost completely dark outside when you say you saw the defendant run into the alley? (This is a good question where the witness's statement says it was "almost completely dark," but a potentially dangerous question when the statement says it was "getting pretty dark out."

Poor cross examination question:

How dark was it when you saw the defendant run into the alley? (the witness could answer, "It wasn't completely dark. I could see him.")

Scope of Cross Examination - The scope of cross-examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness's statement, including all reasonable inferences that can be drawn from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.

Examples:

***Cross Examination** of physician called by Plaintiff in murder case:*

Attorney:	Doctor, you testified on direct that the defendant died of arsenic poisoning, correct?
Witness:	Yes.
Attorney:	Isn't it true that you have a deposition in which you testified that you did not know the cause of death?
Witness:	Yes, that's true.
Attorney:	Doctor, isn't it true the result of test X points away from a finding of arsenic poisoning?
Witness:	Yes.

Opinion Testimony by Non-Experts

For mock trial purposes, most witnesses are non-experts. If a witness is a non-expert, the witness's testimony in the form of opinions is limited to opinions that are rationally based on what the witness saw or heard and that are helpful in explaining the witness's testimony. Non-experts (lay witnesses) are considered qualified to reach certain types of conclusions or opinions about matters which do not require experience or knowledge beyond that of the average lay person. Note, however, that the opinion must be *rationally* based on what the witness saw or heard *and* must be helpful in understanding the witness's testimony.

Examples:

1. Witness X, a non-expert, may testify that the defendant appeared under the influence of alcohol. However, it must be shown that this opinion is *rationally* based on witness X's observations by bringing out the facts underlying the opinion, e.g., the defendant was stumbling; his breath smelled of alcohol; his speech was slurred. If witness X thinks the defendant was under the influence because he had a strange look in his eye, then the opinion should not be permitted because it is not sufficiently rational and has potential for undue prejudice.

2. Witness X, a non-expert, may not testify that in his opinion the decedent died of arsenic poisoning, since this is not a matter that is within the general knowledge of lay persons. Only an expert, such as a forensic pathologist, is qualified to render such an opinion.

Opinion Testimony by Experts

Only persons who are shown to be experts at trial may give opinions on questions that require special knowledge beyond that of ordinary lay persons. An expert must be qualified by the attorney for the party for whom the expert is testifying. Before a witness can testify as an expert, and give opinions in the area of his/her expertise, a foundation must be laid for his/her testimony by introducing his/her qualifications into evidence. In a sense, every witness takes the stand as a non-expert, and the questioning attorney must then establish the witness's expertise to the court's satisfaction for the witness to be able to testify as an expert. This is usually accomplished by asking the expert himself/herself about his/her background, training and experience.

Example:

Attorney:	Doctor, please tell the jurors about your educational background.
Witness:	I attended Harvard College and Harvard Medical School.
Attorney:	Do you practice in any particular area of medicine?
Witness:	I am board-certified forensic pathologist. I have been a forensic pathologist for 28 years.

It is up to the court to decide whether a witness is qualified to testify as an expert on a particular topic.

Impeachment (Rule 607)

On cross-examination, the cross-examining attorney may impeach the witness. Impeachment is a cross-examination technique used to demonstrate that the witness should not be believed. Impeachment is accomplished by asking questions which demonstrate either (1) that the witness has now changed his/her story from statements or testimony given by the witness prior to the trial, or (2) that the witness's trial testimony should not be believed because the witness is a dishonest and untruthful person. Impeachment is a cross-examination technique used to discredit a witness's testimony.

Examples:

Impeachment with prior inconsistent statement:

Attorney:	Mr. Jones, you testified on direct that you saw the two cars *before* they actually collided, correct?
Witness:	Yes.
Attorney:	You gave a deposition in this case a few months ago, correct?
Witness:	Yes.
Attorney:	Before you gave that deposition, you were sworn in by the bailiff to tell the truth, weren't you?
Witness:	Yes.

Attorney: Mr. Jones, in your deposition, you testified that the first thing that drew your attention to the collision was when you heard a loud crash, isn't that true?

Witness: I don't remember saying that.

Attorney: Your Honor, may I approach the witness? (Permission is granted.) Mr. Jones, I'm handing you the summary of your deposition and I'll ask you to read along as I read the second full paragraph on page two, "I heard a loud crash and I looked over and saw that the two cars had just collided. This was the first time I actually saw the two cars." Did I read that correctly?

Witness: Yes.

Attorney: Thank you Mr. Jones.

Impeachment with prior dishonest conduct:

Attorney: Student X, isn't it true that last fall you were suspended from school for three days for cheating on a test.

Witness: Yes.

Introduction of Physical Evidence (Rule 901)

Middle School Mock Trial participants may not introduce physical evidence exhibits beyond those provided in the case file. All exhibits in the case file are stipulated as admissible to the court. As such, participants are not required to use witness testimony to authenticate or prove admissibility, nor are they required to move the court to admit the evidence.