1/11/2016

SUPPLEMENT TO CASE MATERIALS

Lilienthal Insurance, Inc. v. Nature Habitat Preserve

**All corrections and changes to the Case Materials noted in this Final Supplement will be included in an updated version of the Case Materials to be posted January 13, 2016 by Noon. Final high-resolution exhibits will also be included in the updated version of the Case Materials.

The deadline for submitting questions was noon on January 8, 2016.

THIS IS THE FINAL SUPPLEMENT AND IS THE OFFICIAL MEMO THAT MAY BE USED IN THE COMPETITION. THE FINAL SUPPLEMENT MAY BE USED AS PROVIDED BELOW:

Supplemental Materials – Evidentiary Value:

> The supplemental clarifications may be used in all the same ways (including for impeachment and as testimony) that the main body of the case materials are used. Answers clarifying a witness statement are to be treated as follows: Where necessary, information will be attributed to a specific witness in which case the clarifying information becomes part of that witness' statement. If the clarifying information is not attributed to a single witness, assume that all witnesses have this knowledge. The practical implication of this is that if a witness is challenged as to his or her knowledge reflected in the statement, he or she may refer to these supplemental clarifications to show knowledge. (See Rule of Competition 3.3)

NOTE TO THE SUPPLEMENT

Questions have been divided into "Case Clarifications" and "Rule and Evidentiary Interpretations." As with the past years' supplements, some case clarification questions have been answered with a general response: ***"The case materials provide all of the information available to answer this question."***

That response sometimes means that there is enough information already in the materials to answer the question asked; more often, the response means that the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of the competition. The case materials committee has tried to fill in unintentional gaps in the case materials without creating too much new information that might burden teams preparing for the competition.

Teams should be careful at trial if they ask questions which the problem does not answer in detail because, on direct examination, such answers might elicit an "unfair extrapolation" objection and, if asked on cross exam, the questioner is stuck with the answer given. (Rule of Competition 4.6)

Some questions have been edited for the sake of clarity and brevity.

CASE CLARIFICATIONS – Answers Provided:

12/10/15

Q: The following typographical errors were caught by readers who we welcome to apply for the prestigious, unpaid position of mock trial proofreader for next year.

1) On line 167 of Finley Lindbergh's statement, on page 26, the second to last word is, "her," while it should be, "his/her."

A. *It should be "her/his"*

2) In the captions, "Lilienthal" is spelled "Liliental"; that is a mistake. The plaintiff's name is missing an "h" in all of the legal document headers (Liliental instead of Lilienthal).

A. *It should be Lilienthal*

3) In Section 4 of the Jury Instructions (Burden of Proof), the paragraph beginning, "In determining..." appears twice; it should only appear once.

A. *It should only appear once*

4) In the Verdict Form, no date appears within Question 1.

A. *It should have the same date.*

5) In Yeager's testimony (line 4), a word is missing after "Academy" - most likely "training" or "course".

A. *It should be training*

6) In Stacey Earhart's testimony (line 93), "she" appears, rather than "s/he".

A. *It should be "s/he".*

7) In Exhibit 11, in the second sentence of the first Earhart quote, it appears that "them" should be "then."

A. *It should be "then"*

8) In the affidavits of Stacy Earhart and Finley Lindbergh, the accident involving Steven Yeager is on September 27, 2014 (Finley line 160, Stacey line 201). It is also stipulated in Stipulation 15 to be September 27, 2014. However, in the case summary, as well as Charlie Yeager's affidavit (lines 153 and 162), the accident it said to have occurred on September 28, 2014. I was wondering which date is correct?

A. *The correct date is 9/27*

9) There is a typo on page 7 at the bottom of the page right before the last sentence: *"If Earhart's actions were intentional (i.e. were designed to injure Yeager), or if the modifications affected airworthiness, Lilienthal wins. If **Yeager** acted negligently and the modifications – if any– were not enough to affect airworthiness, then NHP wins."*

In the context of the case, it seems like the underlined word should be Earhart instead of Yeager, because the case hinges on whether Stacey Earhart intended to injure Steven Yeager or was just acting negligently.

A. *It should be Earhart*

10) Within Exhibit 4 (the email from Stacey Earhart to the NHP list-serve) there is a date discrepancy. The date on the email is March 20th but mentions an incident on March 25th. According to Earhart's affidavit, the date on that email should be March 27th (see lines 71 - 86 of Earhart's affidavit).

A. *It should be March 27th*

Q. One of the critical legal questions in this case asks the jury to determine whether the defendant or its employee/agent intentionally piloted the drone, causing the injuries sustained by the victim. In clarifying the intent standard, the Memorandum and Opinion reads as follows: "A jury will be empaneled to decide two questions: (1) whether the actions of Stacey Earhart in operating the drone on the day in question were intentional or negligent.... **If Earhart's actions were intentional (i.e. were designed to injure Yeager)..., Lilienthal wins.**" This language seems to contradict the jury instructions, which say: "Thus, the issues for you to decide, in accordance with the law as I give it to you are: 1) When the drone flown by Stacey Earhart approached Steven Yeager, causing his horse to throw him, did Stacey Earhart intend for it to approach Steven Yeager very closely? In other words, the Defendant admits that Earhart intended to fly the drone in the area somewhere around Yeager, but it says that it was an accident that the drone got as close to Yeager as it did. Plaintiff must prove beyond a preponderance of the evidence that it was not an accident." Jury instructions further state in the intent section: "Similarly, in this matter plaintiff claims that the defendant's agent or employee, Stacey Earhart intended to fly the drone very close to Steven Yeager. **To find that Earhart had intent, you do not have to find that Earhart intended for Yeager to be injured.**" I am concerned that competitors will find development of case theory and strategy needlessly complicated with the current articulation of the intent standard, especially without the ability to clarify through a pre-trial motion.

A. Thank you for this question. It has caused us to look back at the legal framework established on this point, and we recognize the confusion the published draft has caused. As a result, three changes to the case will be made.

First, the parenthetical in the judicial opinion - "**(i.e. were designed to injure Yeager)" –** is inaccurate, and it will be replaced with a parenthetical which reads "(i.e. were designed to make Yeager fear injury or offensive contact)."

Second, a stipulation will be added as follows: "As a result of the drone's flight, Steven Yeager became reasonably afraid that it would hit him."

Third, we have also decided that a modification is required to the jury instructions. In order to clarify what proof is necessary, Jury Instruction 5, subsection 1 will be replaced with the following:

When the drone flown by Stacey Earhart approached Steven Yeager, did Earhart intend Yeager to anticipate that a harmful or offensive contact would occur? In other words, the Defendant admits that Earhart intended to fly the drone in the area somewhere around Yeager, and it admits that Yeager experienced fear when the drone approached as closely as it did. But the Defendant says that it was an accident that the drone got as close to Yeager as it did. Plaintiff must prove by a preponderance of the evidence that it was not an accident but, instead, that Earhart intended to fly the drone close enough to Yeager to cause him fear of contact with the drone or of injury.

Q. We are confused by the Verdict Form on Page 16. *Question 2 reads*
Do you find that...., by (1) flying the drone at a weight over 55lbs <u>and/or</u> (2) by modifying the drone...?
Yes ____ No_____

This seems to clearly be two different questions that don't depend on one another. In Opening and Closing argument, we have to explain to the jury the questions they are answering and discuss "Verdict Form Question 1", then "Verdict Form Question 2 Part 1", then "Verdict Form Question 2 Part 2" and possibly point out the and/or nature of Question 2. It would be much less confusing and time-consuming as Questions 1, 2, and 3 instead, or at least Question 2 (a) and Question 2 (b).

A. We agree, and we will provide a new verdict form with question two broken into distinct questions.

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Q. [Summary question from the case committee]

We received several questions from individuals confused by the response to the question in the last supplement with respect to the expertise of Wagstaff and Coleman, and the interaction between that and Rule 4.9, which provides that "expertise may not be questioned." These questions had several forms, which will not be repeated here.

A. In order to resolve the confusion, the witnesses will be stipulated as experts. The following stipulation will be inserted as Stipulation 16: "Val Coleman is an expert in materials engineering and in aviation crash investigation. Emory Wagstaff is an expert in aeronautical engineering. They may be deemed experts in other fields, as may other witnesses in those or other fields, if proper foundation is laid."

Teams may cross-examine consistent with Rule 4.9, but they may not contest their expertise. As a reminder, Rule 4.9 Expert Witnesses:

Some witnesses in the case materials may be identified as expert witnesses. In such a case, the fact of the witness' expertise may not be questioned; however, the expert's credibility may be otherwise impeached on cross examination. Witnesses not specifically identified as experts may be qualified as such if the proper foundation is laid. In either case, the expert's qualifications, credibility, biases and the scope and depth of her/his expertise may be otherwise raised on cross examination.

Q. We have a question about page 16 of the Verdict Form. As it is currently written, does the clause "and flying it in its modified condition on September 27, 2014" modify both prongs of Jury question 2 or does it modify only the second prong of question 2? In other words, does the clause clause "and flying it in its modified condition on September 27, 2014" modify both (1) "flying the drone at a weight over 55 lbs and (2) "modifying the drone in such a way as to materially change its airworthiness"? or just "modifying the drone in such a way as to materially change its airworthiness"? If it modifies both, the question the jury is required to decide seems much narrower, if the latter, than it seems that the jury could find that if the drone weighed over 55 lbs. at any time (not just at the time of the crash on September 27, 2014) that could be a violation of the rider. Which is the correct interpretation of the Verdict Form?

A: As noted in the first update, these questions are being separated in the final jury verdict sheet. This separation should resolve any ambiguity.

Q. Line 168 of Charlie Yeager's affidavit states "...get pictures to show the harm non-native animals could cause to a regeneration area", and then in line 171 states "...the hunt was causing harm to non-native animals". Should line 171 be reworded to say non-native animals were causing harm to the regeneration area or the hunt was causing harm to the regeneration area, or something to that effect?

A: Yes.

RULES CLARIFICATIONS – Answers Provided

12/10/15

Q: In past years the expert witnesses were stipulated as experts in the stipulation document. We could not find any such stipulation this year; however, the witnesses are still listed as expert witnesses on the List of Witnesses. My students would like to clarify whether these witnesses will need to be entered as experts during trial.

> **A:** ~~There is no stipulation as to expertise, and expertise may be contested at trial. The description of the witnesses in the List of Witnesses identifies their role in the case, but it does not bind either party~~
>
> **NOTE:** This answer has been deleted, and a stipulation has been added to the case. See above.

Q. We are going through the case materials, and the issue of defining "airworthiness" and "flight worthiness" and "material modifications" is a difficult decision. I understand that this is what the case is all about, but there is a more articulated definition of "airworthiness" in the jury instructions than the definition that's provided in the affidavits, exhibits, or memo of understanding.

The jury instructions are as follows:
Airworthiness is a subject on which you have heard expert testimony, but it means how the aircraft flies. You need only be concerned with changes that are "material," in other words ones that would or did cause a significant difference in the drone's flight. A slight or unimportant change is not a material change.

The memorandum states:
The remaining FAA rule is that any aircraft must receive an "airworthiness" certification. This provides a reasonable basis to define "material," because there is no reason to think that Lilienthal should have been troubled by any modification that would not impact the aircraft's ability to fly. The Court therefore finds that a "material" modification is one which could have impacted on its aircraft's flightworthiness.

The expert witness states:
Airworthiness is the ability of a craft to stay in the air, i.e. to fly without crashing.

I understand, again, that this is the point of contention around which the case revolves; however, is it permitted to use the definition provided in the jury instructions, or are we restricted to the definition in the memo, affidavits, and exhibits?

A: The jury instructions have been agreed upon by the parties in advance of trial, and they represent the binding legal definition for purposes of what the jury will be told. Teams are permitted to use that definition alongside the others or in place of the others.

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Q. When a witness talks about an exhibit sometimes there is an objection that the evidence needs to be entered into evidence first. However, I have not found a mock trial rule that states you need to enter evidence in order for your witness to discuss the content. Say for example, (foundation has been laid) that Finley is discussing that there was a paper drawing of a fire tower dropped from a back pack. Can an opposing team object to the document not being entered into evidence before or if discussing exhibit content?

A: There is no mock trial rule that addresses this topic specifically. In most courtrooms, as long as the evidence being offered is admissible (which may mean that a foundation has been laid for a hearsay exception, etc.), the exhibit can be discussed without entering it into evidence. Some presiding judges may have other preferences, and no rule of mock trial constrains their discretion.

Q. We had a question about the sequestration of witnesses. Based on Rule of Competition 4.7 non-party witnesses are considered sequestered. Does that mean that Charlie Yeager and Stacy Earhart are able to reference testimony by the other witnesses?

A. According to the case materials, Yeager and Earhart may sit as part representatives at counsel table. Accordingly, whether they do so or not, they are considered present for the trial. Teams are counseled, however, to be aware of the significant risk of unfair extrapolation when a witness comments on live testimony.

CASE CLARIFICATIONS – No Answers Provided

The answer to all of the following questions is:

> ***"The case materials provide all of the information available to answer this question."***

As noted, this response sometimes means there is enough information already in the problem; more often, this response means the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of this competition.

12/10/15

Q: Did Earhart intend to fly the drone is such a manner that it was more likely than not that she would cause injury to Yeager?

Q: I wonder if we know, in the problem, if any party paid the $2.5 million to Steven Yeager yet? I was under the impression that the Preserve paid out and is looking for reimbursement from Lilienthal.

Q: Can you please clarify if there were others with Steven on September 27, 2014 when he entered the restricted quadrant?

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Q. Our team is really looking for clarifications on the sequence of events. According to Val Coleman's affidavit/statement, on line 43, she received her call from Lilienthal to investigate in late September of 2014. She later states on line 116 to line 118 that her job would have been easier if the insurance investigator had taken pictures of the wreckage.

So as we understand it, Val Coleman was sent out after Charlie Yeager, the insurance investigator. But on line 117 of Charlie Yeager's affidavit/statement it states she was called out to investigate on October 7, 2014.

So we were wondering when exactly did Val Coleman investigate if she was called in late September, but commented on the lack of effort done by an investigator from 10 days after the incident.

Q. Can you please clarify if there were others with Steven on September 27, 2014 when he entered the restricted quadrant?

Q. As an intern to the NHP, do the actions of Findley Lindbergh attached to the NHP under the doctrine of respondent superior?

Q. If Earhart makes a material change to the drone which effected its ability to fly in the air on Sept 27 it could still make his/her actions unintentional? Earhart intentionally changed the drones ability to fly but never intended to cause fear of injury as it was just a modification and random conditions that day. I am assuming that a material change first breaks the rider and would still be a victory for the plaintiff?

Q. In the Court Memo, the judge states that the parties have agreed that there was a clear line of sight of the drone during the incident on 9/27, but Stacy and Finley's statements indicate otherwise?

Q. Can you clarify a statement in the insurance rider issued to the Preserve (Exhibit 9). Specifically, the second bullet point of condition 6 says that "the Preserve shall not fly the UAS directly over any individual." My question is about the use of the word directly: does the phrase "directly over any individual" mean being located above a reasonably sized area containing that individual, being above the minimum area required to contain that individual (i.e. inside the minimum vertical column that contains that individual), or something else entirely?

Q. What is the proper military rank for Emory Wagstaff?

As the title of Exhibit 8 says Cpt. (Captain) however it later stated in Exhibit 8 that: s/he "Achieved rank of Lt. Col," if a demotion occurred following the DUI conviction, Wagstaff's rank could only be reduced to Major as field grade officers can only be reduced one grade (unless to PFC as to allow their imprisonment in military correctional facility).

Also, the previous sentence is based off of my reading of the UCMJ, considering how long the UCMJ is, I very well could have missed something which may render this question moot.

Was Emory Wagstaff Court martial and dismissed?

Since her/his DUI occurred on base s/he would be subject to a court martial and a possible "Dismissal" (which is the equivalent to a Dishonorable discharge for an officer) as per UCMJ Section 911: Article 111.

A. Although our answer remains "The case materials provide all of the information available to answer this question," we wish to expressly note that we are not making any

statement with respect to the accuracy of your reading of the UCMJ. We may, however, be keeping your email for the next time we write a case involving military discipline.

Additional Helpful Items

No other rule and evidentiary questions have been asked but these questions and answers from past years that might help teams prepare for the trials:

Q: We saw a lot of teams dressing students in nerdish glasses, short pants, etc. for some characters. With the expert witnesses this year, I expect more of the same. I am just wondering how far does the rule go in dressing to the part? What does the rule really mean? I really want the clarification before telling my team what they are allowed to wear.

A: *Rule 6.14 deals with costuming and props. Like much of mock trial, that rule allows for some differences in interpretation. If a student does not normally wear glasses or uses specially selected "nerdish glasses", that seems to violate the spirit of Rule 6.14 and a team cross examining such a witness might raise a rule violation based on that. Similarly, the wearing of "short pants" raises the same concerns. We can envision teams having their witness wear his or her in certain ways that are perceived to be representative of the character. In as much as a team is advantaged over another team by having costuming and prop capacities, Rule 6.14 is meant to keep the playing field even. Generally a good rule of thumb is that if dress and hair are changed significantly to fit one character, the team allowing such behavior is violating the rule. Remember, accents are allowed.*

Q: Coaching multiple teams - this year our school has enough students to enter two teams in the city competition but could be prevented from doing so because we were not able to recruit a second teacher coach. As you know, funds for extracurricular activities and compensation for teachers has been severely cut this year. We do have multiple attorney coaches. I am trying to problem solve how to create two teams that meet the scouting and "appearance of impropriety" issue highlighted in the rule while also allowing the two teams to meet in the same room (which is important for safety reasons with one teacher present). As an FYI, the second team is "developmental" in every sense of the word.

A: *There are a lot of questions below from past years dealing with how to handle multiple teams and all of them underscore the need to have a firewall between the students and adults working with teams from the same school. The same teacher and room may be used without problem until the competition starts but after that steps will have to be taken to maintain the separation of the teams. The teacher will only be able to observe one team in competition and may work directly only with that one team. The two teams can practice in the same room as long as they do not share information. Our hope is that the lawyer coach(es) of the team not "coached" by the teacher will be able to be present often enough for that team to properly prepare. Here the interest of fairness collides with the desire to allow as many students as possible to participate. This is a good issue to share with your local coordinator so that any concerns raised by other teams can be addressed openly.*

Q: Sequestration - Is the defendant sequestered for the purposes of mock trial? If the answer is yes, are we required to lay foundation as if the defendant wasn't in the room?

> ***A:*** *Rule of Competition 4.7 deals with this explicitly. The defendant is a party and may be present.*

Q: Can any exhibit be split before shown to the jury?

> ***A:*** *Rule of Competition 5.1 deals with this explicitly. The teams "must present them in the form provided."*

Q: We have a question about the contents of openings and closings. We understand that it is against the rules to use outside sources, but is it against that rule to use famous quotes or poetry in openings and closings?

> ***A:*** *The use of quotes, illustrative examples and other thematic elements is in the discretion of the judge. There is no mock trial rule that forbids doing so, and many teams have found it effective. Mock trial rules forbid use of outside sources to conduct research into the facts, history, science or legal structure surrounding the cases. They do not foreclose the use of rhetorical devices.*
>
> *Teams should note, however, that certain quotes or themes may be objectionable for other reasons. For example, in opening, a quote could be so argumentative as to be objectionable, or quotes could prejudice the jury or confuse the issues. For example, some courts have prohibited prosecutors from using biblical passages demanding harsh vengeance, even while other biblical passages are considered appropriate. There is no one-size-fits-all answer to this question, either way.*
>
> *Likewise, many judges forbid the use of rhetorical devices asking the jurors "what would you do" or asking them to place themselves in the defendants' or witnesses' shoes, at least in regular practice. That is thought to be a violation of the rules of the courtroom and/or the rules of professional responsibility. There is no express prohibition on doing so in the mock trial rules, but teams should be aware that attorneys and judges serving as scorers are cautioned against rhetoric that asks the jury to put themselves into the case. Although local practice may differ from county to county, many scoring judges may react negatively to the use of such devices.*

Q: I have a question regarding the Mock Trial Competition rule 6.22. This rule states that there is to be "no communication among team members, other than the six students participating as attorneys or witnesses in that trial." I am unclear as to whether this means that the witnesses in the active trial are allowed to communicate with the attorneys and vice versa. I have always been under the impression that the attorneys were allowed to communicate with one another, but they were not allowed to communicate with the witnesses. If I could have clarification on this rule, it would be much appreciated.

> ***A****: Competition trial teams have 6 members--three lawyers and three witnesses-in each trial. Those six can communicate in ways that are non-disruptive and that do not violate the rules (i.e., no one but the examining lawyer can question, respond to objections, etc.). There may also be communication, about time issues only, allowed under the timing rules with a 7th member of the team, the student timekeeper.*
>
> *In those districts and regions that allow more than three attorneys in the trial rounds, all attorneys actively participating in the trial of a round (i.e. who have a role in the round in question, whether it be the opening, closing, direct or cross) may participate in such discussions.*
>
> *Teams are advised that scoring judges may observe witness behavior throughout a trial and score it as they see fit. Accordingly, students who are portraying witnesses with no legal training who appear to be repeatedly feeding objections to an examining attorney may not be felt to have remained in their role. Teams may therefore wish to be especially judicious or circumspect in their communications with their witnesses, even if those communications are permitted under the rules.*

Q: Can teams object to the content inside the exhibits?

> ***A:*** *There is nothing sacred about exhibits or about the factual material contained in them. Except to the extent that it is otherwise stipulated, every exhibit is subject to objection in whole or in part on any grounds. Notably, however, Stipulation 1 excludes authenticity as a grounds of objection with respect to all exhibits.*

1. All documents, signatures and exhibits, including pre-markings, included in the case materials are authentic and accurate in all respects; no objections to the authenticity of the documents will be entertained. The parties reserve the right to dispute any legal or factual conclusions based on these items and to make objections other than to authenticity.

Q: The rule of hearsay and its exceptions confuses us. If the speaker is dead and told a witness or a witness heard something they said, is that an exception?

A: *You are not alone. Hearsay is a challenging rule, and it often fools even experienced attorneys. If a statement is admissible pursuant to Rules 801 or 803, the fact that the declarant is dead (or otherwise unavailable) will not make it inadmissible. Rule 804 provides additional hearsay exceptions for unavailable witnesses. If a statement does not fall within the exclusions in Rule 801 or the exceptions in Rules 803 and 804, however, the fact that its declarant is dead does not provide a special basis for its admission.*

Q: Can the defense attorney defer making his/her opening statement until after prosecuting witnesses have testified?

A: *No. Pursuant to Rule 6.23, the sequence of the trial is: Opening Statements [plural], then Evidence Presentation, then Closing Arguments. This Rule is designed to assist the scoring judges in making a direct, like-to-like comparison between the performances of the students presenting the opening statements. It also mediates the impact of not allowing the prosecution to make a rebuttal case by allowing the prosecution to anticipate to some degree the defense case, based on its opening statement.*

Q: Is the team allowed to demur or move for a directed verdict (because prosecution/plaintiff hasn't proven the case)?

A: *No. In a criminal trial, the defendant would ask for a motion for judgment of acquittal, requesting the court to rule that the prosecution has not proven its case beyond a reasonable doubt, and in a civil trial, would raise a motion for nonsuit or a directed verdict, arguing that the court should rule the plaintiff has not proved its case by a preponderance of the evidence. Accordingly, because they must be raised by way of a motion, any requests for a judgment of acquittal, nonsuit or directed verdict are prohibited under Rule 6.20. Judges are instructed to tell the scoring judges that fact if one is raised.*

Nor can a team elect not to put on a defense case; Rule 4.1 requires teams to call all of their witnesses.

Q: Are any of the witnesses identified as expert witnesses? If so, does that mean that under direct examination a foundation for their expertise does not have to be established?

A: *"Expert witnesses" is used in Rule 4.9, which states:*

4.9 Expert Witnesses
Some witnesses in the case materials may be identified as expert witnesses. In such a case, the fact of the witness' expertise may not be questioned; however, the expert's credibility may be otherwise impeached on cross examination. Witnesses not

specifically identified as experts may be qualified as such if the proper foundation is laid. In either case, the expert's qualifications, credibility, biases and the scope and depth of her/his expertise may be otherwise raised on cross examination.

Technically, under this Rule, since "the fact of the witness' expertise may not be questioned" a team could elect to forego laying a foundation on its expert's expertise ("competency"), although the other team would remain free to impeach the expert as noted above.

Q: Based upon your past answers, if we impeach by omission, we are bound by the witness's answer under Rule of Evidence 611(b). [see Question 23 below, in the Previous Competition Question section] However, if the witness just makes up something supporting their side, is there really anything stopping us from just doing a normal impeachment proving they just lied about the prior statement?

A: *There is no express rule that precludes a team from doing so. However, consistent with the mock trial rules, a witness might respond that the question asked for an answer that was not in the witness statement and that s/he was just answering the question asked. Alternatively, her/his attorney might object to the impeachment on the grounds that it is improper, because the witness answered a question that was not in her/his statement and that pursuant to Rule of Competition 4.6 and Rule of Evidence 611(b)(2) the questioner is bound by the answer given. In either case, the impeachment would be contrary to both the rules and the spirit of the competition.*

Q: Must all jury members be provided a copy of the Guidelines for Jurors (Scoring Judges)?

A: *Jurors (scoring judges) may or may not be provided with a copy of the Guidelines. Generally, trial coordinators are encouraged to provide such copies to jurors. In addition, jurors at all levels of the competition are normally provided with a pre-trial orientation by the trial coordinator which generally includes a discussion of scoring issues.*

Q: The score sheet in the past did not have a comments section. Will the jury be encouraged to give comments for team improvement?

A: *The 2015 score sheet (see http://www.pabar.org/pdf/14MTOfficialScoreSheet.pdf) specifically provides a second page for comments. Jurors may comment as they wish.*

Q: Can we write on a white board, blackboard or flip chart during their closing arguments?

A: *No – it is a prop. (Rule of Competition 6.14.)*

Q: Can the defendant be asked questions about what other witnesses say at trial since this witness is not considered sequestered under Rule 4.7?

A: *No. Such questioning is explicitly prohibited by Rule of Competition 4.5.*

Q: Can the student presenting the opening also present two cross examinations?

A: *Yes. Rule of Competition 6.10.*

Q: Can we use cases we find in the materials during the trial?

A: *Please read the Answers provided below to Questions 19 and 20 in the "Questions From Previous Competitions" Section which should answer your question. With regard to citing legal opinions, we add the caveat to Answer 20 that only those parts of cases specifically cited in the materials can be used.*

Q: May an examining attorney make an objection to the answer of a witness and then follow with a motion to strike or a request to instruct the jury to disregard the testimony? I know that motions are generally not allowed, but is this an exception?

And

Q: Was the whole 'permitted objections Rule 611 left out of this year's case Rules of Evidence because we are using the Federal Rules of Evidence and permitted objections are understood?

A: *Regarding the "No Motions" rule, we explicitly allowed a motion to strike in our old set of Rules of Evidence (old rule 611(f)) before we replaced that set with the National-based set used for the 2013 competition. Our current Rule of Competition 6.20, which states no motions allowed except as otherwise permitted in Rules of Evidence, was a reference to that prior Rule of Evidence which permitted motions to strike.*

There is no good reason we should not allow a motion to strike. When we amended the Rules of Evidence before last year's competition, we failed to note that Rule 6.20 relied on the old rules of evidence to make sense of it. It was an oversight which was going to be formally corrected in the text of this year's Rule of Competition 6.20 but which was not changed because we missed it again!

Because it was never the Executive Committee's intent to preclude motions to strike, we will adopt, as we did last year, that as an interpretation of Rule 6.20 until the rule is formally modified. Accordingly, for this year's competition, as in years past, the only motion that will be allowed is a motion to strike testimony following a successful objection to its admission.

Q: I read in the materials of the "Developmental Teams." How do I find out if we are one? Also, can I have the identity of some other 'first time' teams so that we can invite them to participate with us in a practice trial?

A: *To encourage creative evolution of the program, the statewide competition allows local districts and regions to develop special programs. In some regions, a developmental*

competition is held. Please check with your local coordinator to find out if such a program exists in your region. Your local coordinator can also share with you the contact information for teams you might ask to scrimmage.

Q: Our team is questioning the timing—does our time include what the other team does? We have a question about the proper application of Rule of Competition 6.23 - Time Sequence and Time Limits. The rule states that each team has a thirty minute block of time to complete all of its evidentiary presentations, including reading any stipulations to the jury and its direct, re-direct, cross, and re-cross examinations. If our team is representing the plaintiff/prosecution, does that mean that our thirty minute block of time encompasses (1) the time we use on cross and re-cross of defense witnesses or (2) the time used by the defense attorneys in crossing and re-crossing our witnesses?

A: *Your team gets timed for the things it does, not the things the other side does. If your team is representing the plaintiff/prosecution, your thirty minute block of time encompasses the time you use for direct and re-directon of your own (plaintiff/prosecution) witnesses and the cross and re-cross of your opponent's (defense) witnesses. Your time also includes certain other defined matters, such as the time you take (if any) reading stipulations to the jury.*

Q: Can the memorandum and opinion be used during the trial?

A: *The answer to this question depends on what you mean by being "used." They may not be introduced into evidence, read to the jury, or used to examine a witness, either on direct or on cross examination. So in that sense, they are quite different than the other case materials and cannot be "used" at trial.*

However, pursuant to Rule 3.2, they are included in the case materials. Accordingly, the legal standards stated by the Court in the memorandum and opinion can be used to characterize the legal burdens for the jury in opening or closing argument, and the cases/decisional law cited in the opinion can be used in speaking to the jury. Teams are advised, however, that the Court would only instruct the jury using the jury instructions provided, and thus that to the extent that something in the memorandum and opinion conflicts with the jury instructions, they would risk confusing the jury or seeming not to know the law.

None of the factual conclusions or opinions of the court ("this is a closer call" or "there is a significant factual dispute") should be used in the trial in any way.

Q: We had an issue where the opposing team cited that case material affidavits are 'hearsay' and the exhibits are 'hearsay.' Both objections were sustained. There isn't much that can be done if case materials are thrown out. Are these materials in fact 'hearsay'?

A: *This is a question that arises from time to time, and it's worth discussing in some depth. An out-of-court statement being used for the truth of the matter is hearsay, unless some portion of Rule of Evidence 801 excludes it. (For example, statements of a party are never*

hearsay when they are being introduced by that party's opponent, i.e. if the defense is introducing the plaintiff's own statements.)

So the first answer is that it depends what the statement is being used to do. For example, if it is being used to impeach or to show a subsequent course of conduct, and not for the truth of the matter asserted in the statement, then it is not hearsay.

The second answer is that some exception to hearsay may address a particular statement. So, for example, if the exhibit is a record of a regularly conducted business activity or a public record, an exception to the hearsay rule applies.

One also must note that certain exhibits, such as a photograph, are likely not "statements" at all and are therefore not hearsay.

Other than that, however, the basic answer is that your opponent is correct. The statements themselves are made out of court, and they cannot be introduced for the truth of the matter asserted.

However, your statement that "There isn't much that can be done if case materials are thrown out" might suggest a fundamental misunderstanding. Take, for example, the second sentence in the first statement of the 2014 case: "My spouse, Keane, died when Jordan was only two." The facts alleged in that statement are not hearsay. Accordingly, if Kelly Simon was asked "When did your spouse die?," one could not object to her/him answering "When Jordan was only two," because that is a fact and is not hearsay if the witness testifies to it in court. (Hearsay is, by definition, an out of court statement.) However, if Kelly is asked "Didn't you say in your affidavit that your spouse died when Jordan was only two?," then unless one of the foregoing exceptions applies (most likely impeachment), the question may well be hearsay. The distinction is that the former version asks about a fact the witness knows, while the latter asks about an out of court statement that the witness made.

Exhibits are addressed similarly. Take, for example, the first line of Exhibit 7 from 2014, "When Lance Armstrong went down, I cried." That is an out of court statement by the author of the article, Mary N. Jones. If it is offered to prove that when Mary N. Jones heard that Lance Armstrong went down, she actually cried, it is a hearsay statement unless some other exception applies.

In short, everything in the case materials is subject to objection, if there is a valid objection. But many of the things that could be the subject of such an objection are admissible through a witness directly… and are admissible to impeach a witness who lies about them.

Q: Looking through the rules, I know that I cannot use a white board during opening or closing, but can I use one on direct examination?

A: *No white boards, electronic devices of any kind, or any other presentation materials may be used during any portion of the trial.*

Q: Looking at the above, I know lawyers cannot use a white board during any part of the trial, but can our timer use a small white board to write and then erase the times during the trial?

A: *Rule 6.28.2 (as amended this year) states that a student timekeeper may use individual cards or hand signals, so long as they are unobtrusive, and that such cards may be created during the trial. For environmental reasons, student timekeepers may use white boards for this purpose, so long as they are small enough to be unobtrusive and <u>no</u> other information is provided on them other than the time.*

Q: Portions of the case supplement in past cases appear to contradict. At times, it sounds like we are allowed to do outside research (the problem authors seem to encourage it) and include that information in our arguments on one hand, but that it is prohibited on the other. Can you please clarify?

A: *The use of outside resources is covered by Rule 6.15 Outside Materials, which says that if a student uses materials or items not included in the case materials or either cites or makes reference to any case or statute not included in the case materials, the opposing team can object and then the jurors can be informed of the violation to consider in scoring. Rule of Competition 3.5 states that students may only cite cases and statutes given and may introduce as evidence only those document and materials provided and in the form provided would govern as well. Also, in Rule & Evidentiary Questions in the "Supplement to Case Materials" it says that "Mock Trial rules forbid use of outside sources to conduct research into the facts, science or legal structure surrounding the cases." This would again seem to foreclose the use of outside research.*

The confusion may be coming from past Supplements to Case Materials that have said "Teams are welcome, nevertheless, to study anything they wish to study in preparation for the competition, and the Mock Trial Committee hopes students branch out and learn much more about the issues involved in the case." We hope students are curious about issues they read about in the case materials and we encourage them to research on their own those issues that spark that curiosity or matter in their lives.

However, during a competition round*, the mock trial competition is limited to the case materials provided. The only way anything outside of the case materials can be brought in is if a cross examination question asks a witness to go beyond the scope of the witness' statement. That scenario is addressed in Rule 4.6.*

Q: Is time paused during objections?

A: *Yes.*

Q: Rule 4.5 provides that "A witness may not be asked questions about information contained in another witness' statement/affidavit. Nor may a witness be asked questions about what another witness testified to." In this case, both experts testify to having reviewed all the other witnesses' statements, and they seem to base their opinions on facts not directly mentioned in their statement. Can they testify to those facts as the basis for their opinion without running afoul of Rule 4.5?

A: *This is a very interesting question, and it involves Rules of Competition 4.5 and 4.6 and Rule of Evidence 703. An expert is permitted to base her/his opinion on any facts of which s/he is aware, even if those facts would otherwise be hearsay. And the experts each identify the materials that they reviewed in order to avoid running afoul of Rule 4.6 (see specifically the second bulleted example).*

So the answer is twofold. First, each expert may be examined or cross-examined on the facts that they considered in forming their opinion. Even if some of those facts come from other witness affidavits or documents that they reviewed, they are fair game, because they were identified by the experts items they considered.

However, that does not mean that the experts can testify substantively to every fact in another witness's statement. Rather, on direct examination, they may only introduce those materials that they identify as forming the basis of their opinion or that the statement reasonably suggests that they relied upon in forming that opinion. On cross-examination, they may be questioned more broadly about facts that they considered, but they cannot be used to introduce for the truth of the matter asserted any facts that they read elsewhere. Such facts are only admissible to buttress or discredit their opinions.

ADDITIONAL QUESTIONS FROM PREVIOUS COMPETITIONS

Team Issues: Team Composition, Scouting, Scrimmaging and Outside Tournaments

1. May residents of other states compete in the competition (the situation involves a cyber-school student who resides in New Jersey).

   - *The competition is for students attending Pennsylvania schools. As long as a student is a properly registered student in a Pennsylvania school of any type, that student may compete. With regard to the eligibility of students home schooled in Pennsylvania, their eligibility is addressed in Rule of Competition 2.1.2.*

2. May an 8th grader compete on a team? May a post graduate student compete?

   - *Rule 2.1 limits teams to 9th-12th graders. If a team doesn't have enough students in those grades to field a team and seeks to use others, such as an 8th grader or a student who has graduated but may be earning additional credits at the school or is in some sort of post high school exchange program, to create a team, that team can seek special permission from the local coordinator to compete locally. However, if permitted, a team that includes others besides 9th to 12th graders cannot advance beyond the local competition to district or regional playoffs.*

3. Can two schools combine to field one team?

   - *This is addressed in the revised Rule 2.1.1(c).*

4. May students from one school sit in the court room and watch other schools' teams compete?

   - *No, if that student's school has a team in the mock trial competition. Yes, if that student's school has no team in the MT competition and the student has no other conflicts, and also if that student's school did have a team in the competition but the team is done competing.*

5. Is it okay that students from one school sit in the courtroom and watch their fellow students compete against another school?

   - *Yes, so long as those students does not compete on a second team from their school.*

6. If a school has more than one team, and if the second team is knocked out of the competition, can the advisor from team knocked out help coach the team still in (the advisor has not seen any of the other teams we would compete against)?

   - *If there is absolutely no chance the still competing team will compete against a team that the advisor previously observed as an advisor of the knocked out team, then the knocked out team advisor may help with the team still in the competition.*

7. Our team wants to watch other teams in a practice event before the real competition begins. Does this violate the "No Scouting Rule"?

    - *It is not a violation under our Competition Rules. Teams that participate in camps and other open pre-statewide program competitions allow their teams to be observed by anyone in attendance, subject to the rules of that competition. Our "No Scouting" prohibition refers only to our competition.*

8. Are teams allowed to practice in the courthouse in which they will be competing?

    - *There is no prohibition against such a practice under state rules.*

9. Can we scrimmage other teams in the competition?

- *Yes. We encourage teams to scrimmage each other, participate in the mock trial camps certain counties hold, and take advantage of any pre-statewide program competitions offered such as those that will be held this January by various colleges and schools.*

10. What happens when teams drop out?

    - *The local coordinator will reschedule trials and may have to create byes for some teams depending upon how late into the competition the drop out occurs. Teams are urged to contact their coordinator ASAP if they think they might not be able to follow through on their commitment. Late drop outs are a great inconvenience to other teams and volunteers working for the program. In the case of repeat offenders, teams may be banned from the competition for a period of time.*

11. Can a single teacher [or attorney] coach two teams?

    - *Under Rule of Competition 2.5, multiple teams from the same school are viewed as distinct. They may not communicate with each other about other teams once the competition begins since that would violate our anti-scouting prohibition. Thus, for practical purposes, a single teacher and a single lawyer might train and prepare two teams together; however, once either of those coaches takes a team to competition, they could not take the other team to another competition since they might meet common opponents in the future.*

      Even if coaches don't share information between their two teams, the appearance would be otherwise and this would directly violate the no scouting rules. It is possible for a school with one primary teacher coach and two teams to enlist another teacher or a lawyer coach to basically chaperone for one team while the primary teacher coach leads the other team. Once a teacher or attorney attaches him or herself to one team that person is then unavailable to accompany the school's other team in future matches.

      Once the two teams from the same school have had their first trials, they need to be reminded that they cannot share information about opposing teams. A difficult situation would arise for a teacher coach or lawyer coach who works with one team

that is eliminated and then has an interest in a remaining team that would compete against a team that the eliminated team competed against. The teacher or lawyer coach could observe but could not coach (teams out of the competition may observe without violating the no scouting rules).

Trial Issues

12. May we laminate the exhibits to better preserve them?

    - *No. This violates Rule of Competition 5.1.*

13. Pursuant to Rules of Competition 5.1 and 5.7: Can the exhibits to be entered into evidence be placed in plastic slip-cover page protectors to protect them from accidental spills?

    - *A team may keep their exhibits in plastic slip covers at their attorney table but each exhibit must be removed from any cover and submitted in its original form when used during the proceedings.*

14. Can we enlarge case materials or exhibits? Also, can we develop a timeline, enlarge it, and use it during opening statements and closing arguments?

    - *Rule of Competition 5.1 prohibits enlarging exhibits. Creating and presenting a timeline as a physical reference for the jury is also prohibited.*

15. Can we take to trial and use our laptop computers?

    - *You may not use laptops at trial unless the use of a laptop is a specifically required accommodation for a disability covered under the ADA. If needed under ADA compliance, the laptop must have no internet access and contain only the materials of competition otherwise available in paper form to all other competing students. (Rule of Competition 6.4.)*

16. Can we ask the witness to step down for a demonstrative purpose?

    - *There is nothing in the Rules that prohibit an attempt to do this. The trial judge will determine whether it is permitted.*

17. Can a previously introduced exhibit be re-shown to the jury during closing arguments?

    - *Yes, assuming the exhibit was admitted into evidence.*

18. Clock Issues: When entering in exhibits, does the clock stop when counsel says "Your honor, May I approach the witness?" Does it start again when counsel asks the next question such as "Can you identify this?" Or after counsel actually has the exhibit entered? Second, when counsel is impeaching a witness, does the clock stop when handing opposing counsel and the witness an affidavit? And when does it begin again?

- *Please review Rule of Competition 6.26. Generally, the clock runs at all times when an attorney is examining a witness concerning an exhibit. The clock stops during the marking of exhibits and when exhibit is being shown to opposing counsel except when the examining attorney continues to question the witness.*

19. May the information in the Statement of Facts, Complaint and Answer be used during the trial as credible sources of evidence?

    - *That depends. None of the pleadings are evidence in themselves, and none would be admissible as a whole at trial. However, that is not to say that they have no evidentiary value. All evidence must come in through witnesses, via their statements and exhibits, or through stipulations between the parties. The statement of facts, the complaint and the answer are not evidence in themselves, but the Answer has evidentiary value if the defendant attempts to deny a fact admitted there. The plaintiff's attorney could then impeach the witness with her/his prior admission, as with any other prior, unsworn statement. In this, the Complaint might be necessary, as the wording of the Answer alone (i.e., "Admitted") alone may provide insufficient basis for impeachment. The Statement of Facts is a part of the problem to which no party has assented. It therefore cannot be used at trial by either party in any way.*

20. Can information, cases, opinions cited in the problem be used in the trial?

    - *Students are permitted to read other cases and materials in preparation for the mock trial. However, they may cite only the cases and statutes given and may introduce as evidence only those documents and materials provided and in the form provided. (Rule of Competition 3.5.)*

      Teams are welcome, nevertheless, to study anything they wish to study in preparation for the competition, and the Mock Trial Committee hopes students branch out and learn much more about the issues involved in the case.

21. Can you file a Motion to Pre-admit in which you inform the court of your desire to use certain items of tangible evidence (exhibits in the case materials) during your opening statement?

    - *No. Rule of Competition 6.20 explicitly prohibits pretrial motions.*

22. Can we impeach by omission?

    - *The Rules warn attorneys against asking a question of a witness for information that is not in the witness' statement. If you do so, the witness is free to make up information. Rule of Competition 4.6 addresses this issue.*

23. May a judge preside over the district playoff if he/she was already a judge for one of the earlier district trials?

    - *Yes. A presiding judge who has participated in an earlier trial is not disqualified from presiding in a later trial involving the same team, absent some other basis for disqualification.*

24. May we bring transcription students to a mock trial to transcribe proceedings? Neither team will get a copy of the transcription until after the competition is completed.

    - *As long as Rule of Competition 6.4 is followed and teams face the same circumstances, no problem arises. However, the reporter may not be asked to read back testimony since so our rules do not provide for that circumstance.*