1/4/2017

SUPPLEMENT TO CASE MATERIALS

Commonwealth of Pennsylvania

v.

THIS IS THE FINAL SUPPLEMENT. 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.

Additionally, an updated version of the problem has been provided altering any change referred to in this documents. The updated pages referred to in the answers below can be found in the updated version of the problem. You can either print a new version of the case or the pages referred to in the questions below. The pagination has not changed in the new version of the problem.

CASE CLARIFICATIONS – Answers Provided:

1/4/17

Q: For purposes of the order concerning the motion in limine, does previous arson only mean "intentional setting of fires" or is it "intentional setting of fires of an inhabited structure" (as per the definition of arson provided in the case packet)?

A. *It is "intentional setting of fires," as the Court indicates on page 14 of the judicial opinion. The "intentional setting of fires of an inhabited structure" definition applies to the latter, felony charge. The distinction is relevant because the precise crime in the juvenile adjudication is not indicated, and there is no material in the case packet that would define the elements of any juvenile offense, which may be different from the elements of the felony conviction. As the Court indicates, when it uses the term "arson," it is looking to the substance of the offense, because it is looking at the "predicate for the profile" and to the correlations between the prior bad acts and the acts alleged in this matter.*

Q: Is a team allowed to bring up Taylor's past convictions on his cross examination or is his record sealed since they occurred when he was under 18?

A. *You may bring up the past convictions and the substance of the underlying acts. "[T]he Court holds that evidence of prior acts of fire-setting by Taylor Edsel may be admitted at trial…" (Judicial Opinion, p. 15)*

Q. In the case clarifications, it noted that the texts in Exhibit 11 occurred over a series of weeks. Does this refer to exhibit 11 specifically, or all of the conversations that Salve and Taylor have had about Salve's personal items? Thsi is confusing because the timestamp on Exhibit 11 says "today", which indicates that the texts provided all happened on the same day.

A. *The texts in Exhibit 11 occurred over a series of days.*

Q. On page 3 of the supplement, about when the text messages between Salve DeSoto and Taylor occurred. The answer given was that no exact date could be given because they took place over a series of weeks. However, if this were the case, then new times would be shown on the phone every time texts were sent after an extended period of time without any texts sent. Not only that, but the texts show that the first texts were sent at "Today 8:32 AM." With that in mind, the texts would have to be sent the day that the screenshots were taken. The screenshots were then taken at 9:42 PM, and on the day in question the police were called at 9:37 PM, making it impossible for it to happen on the day in question. In line 151-157 of DeSoto's statement, he said he asked

for his possessions "halfway through 2016," making it seem like it would not have been before July 4, the day in question. Since Taylor's phone would not have been searched and the images retrieved before the day in question, it would then have to be sent by Taylor and Salve after the day in question. Would it be possible to release a day that it was sent on, because it seems as if it was all sent on one day, or release a day it was retrieved from Taylor's phone on, which then could be used as the day it was sent.

There was also a discrepancy between the batman image sent, as it first appears that Taylor sent it, but then on the next screenshot the same watermark appears above texts sent by Salve.

A. *The texts in Exhibit 11 occurred over a series of days. An updated Exhibit 11 can be found in the updated problem.*

12/19/16

Q: There were no simple typographical errors caught by teams this year which means the problem authors and editors should take a bow!

A. *Bow taken!*

Q. In the statement of Dre Nash on lines 108-109, it says that D'Baker wanted to break Salve's contract in January of 2015. However, Salve didn't meet D'Baker until October 2015, and Salve contacted D'Baker to leave in November 2015. Is the date supposed to be January 2016?

A. *Yes, the date is January 2016.*

Q. We noticed that in Witness Statement #6 it says that Alex Packard received a master's degree in criminology from St. Joseph's University in 2009. In Exhibit 6 on the CV it says that s/he received a Master's degree in Child Psychology from St. Joseph's in 1989. Can we assume he has both or is this an error?

In Alex's statement he says he "obtained both my bachelor's and my PhD from UPenn" and later he got a "Master's degree in Criminology from St Joseph's University in 2009." Then in Exhibit 6, his resume, under education it is listed he has his PhD from UPenn, which holds true. But it says he has a Master's degree in Child Psychology from St Joseph's from 1989, not 2009. Also, his Bachelor's is from the University of Pittsburgh, not UPenn.

A. *These are errors — his degrees are the ones on the CV. Corrected pages for the statements will be forthcoming in the final supplement.*

Q: I am a mock lawyer assigned to the defense for this year's mock trial case. I will be cross examining Dr. Nash. If I were to instruct my witness, Dr. Nash, to confess to the crime and declare that he committed the act of arson discussed in the case, then (unless the prosecution can effectively prove that Nash is lying or mentally unsound) would the jury have to find in favor of the defendant? If we could reasonably prove that Nash could have committed the act himself (method and motive), then could we use such a strategy to prove the defendant's innocence?

A. *This question is a bit confusing, since the prosecution cross-examining Dr. Nash will never be in a position to instruct Dr. Nash regarding what to do. As a defense witness, Dr. Nash will be a member of the other team. Instead, let's look at this from the side of a defense team who thinks up this same clever strategy to introduce reasonable doubt.*

Normally we do not answer questions along the lines of "Is this an unfair extrapolation," but in this case we feel safe making a rare exception.

The analysis of whether something is an unfair extrapolation has two parts: whether it is an extrapolation, and whether it is unfair. Here, there is no question that it is an extrapolation; nowhere in the case materials is it suggested that Dre Nash set the fire, Dre Nash denies having a motive to do so, and Dre Nash certainly never confesses. Likewise, there is little question that it is unfair. A fair extrapolation is either reasonably inferred from facts in the case (e.g. it can be inferred that an expert witness graduated high school if the witness has a college degree) or has no impact on the case (e.g. a witness testifying that she was wearing a pair of brand new sneakers in a case where footwear has nothing to do with the merits).

A good starting point in deciding whether an extrapolation is unfair is the Rule 401 definition of relevance. If your extrapolation is not inferred from the case materials and makes something at issue in the case more or less likely - such as Dre Nash confessing to setting the fire makes it less likely that Taylor Edsel set it - you probably have an unfair extrapolation. It is always possible to find some way to bend the merits of a mock trial case if you are not tied to the actual materials, which is why the unfair extrapolation rule exists. No mock trial criminal case could ever be tried if one of the defense witnesses could just confess to whatever crime was charged.

This question also raises another valuable point to remember. It assumes that the role of a defense team is to find some way to win the trial, i.e. to have Taylor Edsel actually found not guilty. While that can help, the merits of the case (guilt or innocence) are not how winners and losers of mock trials are decided. Mock trials are decided by scores of each individual performance, regardless of who is "winning" or "losing" the hypothetical

trial. The scoring judges can think that the team playing the Commonwealth did not get beyond a reasonable doubt on the merits but still find that they outscored the defense. Indeed, this scenario and the reverse are both quite common. Your job in trying a mock trial is to demonstrate your skills by showing how the case in the case packet is best tried. While it is always fun to imagine scenarios other than the case in the packet - and we encourage it! - a competition based on them would be very different than this one.

Q. Packard states in his affidavit that he has "been a board certified psychologist since 1992"; however, his CV states that he has been a "Licensed Psychologist" (a member of the American Psychological Association) only since 1994 and that between 1997 and 1998, his license was suspended.

A. *These are errors — his degrees are the ones on the CV. Corrected pages for the statements will be forthcoming in the final supplement.*

Q. There is no date on Exhibit 11. Are you able to provide a date that these text messages were exchanged? What date where the text messages exchanged between Sal and Taylor?

A. *The text messages occurred over a series of weeks. Thus, dates are not needed.*

Q. In line 185 of Leslie Duesenberg's statement it says, " I can testify, within a reasonable degree of statistical certainty, that Taylor Nash 186 fits the behavioral and psychological profile of a serial arsonist." Can we assume this is a typo and should read Taylor Edsel?

A. *It should read Taylor Edsel.*

Q. We have been reviewing the case and noticed that there are no witness signatures on the affidavits.

A. *Assume the witness statements to be signed.*

Q. Wikipedia confirmed my recollection from my engineering days: "Torque has dimension<https://en.wikipedia.org/wiki/Dimension_(physics)> force times distance<https://en.wikipedia.org/wiki/Distance>"

In English units, this would be foot-pounds. (See statement of Dre Nash, line 67)

A. *Line 67 of Dre Nash's statement should read torque. A corrected statement will be forthcoming with the final supplement.*

Q. Questions about Effie Edsel's witness statement--On line 152 Effie describes Taylor's Zippo as flickering on their desk. Is Taylor supposed to be holding the Zippo or if it is supposed to be just lying there because Zippos cannot light without someone holding down the ignition piece. We believe it's important because Taylor claims they lost the

Zippo before the fire. Additionally, did the fire at Taylor's home happen in March or May of 2007? Line 61 of Taylor's statement and line 85 of Effie's say the fire occurred in March but Exhibit 4 was published in May and refers to the fire as happening "yesterday".

A. *The fire occurred in May. No further answer will be provided to the remainder of this question.*

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.

1/4/17

Q. As I was looking through the affidavits I found that in Effie Edsel's statement that Taylor left the Fourth of July party at 7 PM however, in Exhibit 10, the text message between Taylor and Dre Nash, Taylor sent a text that told Nash that he was on his way to the plant at 5:54 PM. I am confused because I brought this up in a cross because the 911 call did not come in until 9:36 PM which would provide roughly a three hour gap between the time he left the party and the time he contacted the police. Which is the accurate time Taylor left the party?

Q. Re: Exhibit 10 and 11; the text messages from Dre Nash and Taylor Edsel's phones. And in both exhibits, the date is not mentioned, as well as in the stipulations. Can it be assumed that these messages were sent on July 4th?

Q. In Taylor's affidavit, it's stated that he/she lost the Zippo in the morning on July 1. However in Effie's affidavit, it's also stated that Taylor had the Zippo two days before the fire (July 2). Is this intended or a mistake?

Q. Is Taylor Edsel allowed to supply an account of his/her time from 5:54 to 9:37?

Q. On page 28, last paragraph of Effie Edsel's statement, he/she mentions that on July 4, 2016 he/she decided to take Taylor to the neighborhood barbecue but in Taylor's statement he/she refers to it as Effie's party? Is this done intentionally or are they referring to the same thing?

Q. **On page 28, last paragraph of Effie Edsel's statement, he/she mentions that on July 4, 2016 he/she decided to take Taylor to the neighborhood barbecue but in Taylor's statement he/she refers to it as Effie's party? Is this done intentionally or are they referring to the same thing?**

12/19/16

Q: **Taylor says he /she was sentenced in 2007 for a minimum of 5 to 10 years – which would have him/her released in 2012. Effie says Taylor was released in April, 2014. Which is correct?**

Q. **On the first page of Exhibit 11, Taylor sends a Batman meme with a watermark on the bottom right that says 'imgflip.com'. However, on the second page of Exhibit 11, the image is moved to the left of the screenshot, making it look like there is either a part of the conversation missing or like Sal sent the picture, not Taylor. Could this inconsistency possibly be used to invalidate this exhibit or to not admit it into evidence?**

Q. **There seems to be a major flaw in the case timeline. These are always written to no advantage to one side, however Taylor texts Dre at 5:54 the day of the fire saying he's heading to the plant. Taylor says he went to the plant where he ran in but did not get far past the front doors due to the fire explosion. The 911 call he made reporting the fire is listed at 21:37 which is close to 4 hours after the original text. There is nothing that explains this missing time between the text and the 911 call. That is impossible to defend.**

Q. **Packard states in his affidavit that he "came up with the idea for 2nd start" in 2010; his CV implies that was merely "the chief provider of psychology and counseling services to 2nd Start" and thus makes no mention of his being a founder.**

Q. **Packard states in his affidavit that "in 2011, [he] became the Director of Screening and Mental Health Services...for 2nd Start"; his CV states that "Packard LLP staff serve as the directors of screening and mental health services" and does not reference a date.**

Q. **We were unsure of who the plaintiff's party opponent is. Originally we thought it was Leslie Dusenberg, but we read that s/he works for the federal government, not the state government. Taylor Edsel is being prosecuted by the Commonwealth of PA, not the federal government. Any clarity you could give us would be greatly appreciated!**

Q. **The statement of Dre Nash states that in January 2015, Stu D'Baker proposed buying out Salve DeSoto's non-compete clause for $1 million (around line 108). But in Salve DeSoto's statement (around line 135), s/he states that it was around Thanksgiving that s/he visits Stu D'Baker's plant and decides to leave Nash and go work for D'Baker. Are both dates correct?**

RULE AND EVIDENTIARY QUESTIONS:

12/19/16

Q: I noticed on the mock trial schedule that districts start 1/9/17. This is a couple weeks earlier than in the past. However, I also noticed that the supplement information will not be complete until 1/13/17. So this makes me wonder if the district competition starts after the holiday on 1/17/17 this year?

A: *The schedule for questions has been moved up since the Q&A has to be final before the competition trials begin. January 4th is the final date for questions and the final Q&A will be published January 6th.*

Q. There is a rule about no props but it does not specify anything in regards to enlarged images. Are we allowed to have a poster size of a photo to display or would that be considered a prop?

A. *That is a prop and is not allowed. The purpose of the prop and related rules (such as those regarding electronic devices is to balance the competition among teams with disparate resources. Certain teams will not be able to fund blow-ups, PowerPoint presentations, etc., so we do not permit them.*

Q. Most of the preseason tournaments are after the start of the regular season. I am wondering will this cause a problem with the scouting rules. The tournaments allow teams at times to watch other teams participate.

A. *In accordance with Rule 1.9, participation in external competitions is voluntary, and participation in these activities is not considered scouting under Rule 6.3. When a team chooses to participate in a pre-season tournament, it accepts the rules of that tournament. Tournament organizers of pre-season tournaments may set the rules they choose. The fact that a team participates in such a tournament does not, however, permit scouting of that team at any other time than during the tournament itself, and Rule 6.3 remains in full effect for our competition rounds regardless of whether a team does or does not participate in outside tournaments.*

Q: I heard about Mock Trial from a few friends at other schools who are involved in the program and I had a few questions. I am intending to contact my faculty advisor for my school's Youth and Government club in the hopes she can coach our team, however I was curious how important it is for a Mock Trial team to be affiliated with a school. I feel as though there may be some issues in creating a Mock Trial team through my school as we are a statewide cyber-charter school, and while theoretically some of these issues would also be present if I and some of my friends were to create a team on our own there would not be the issue of gathering support from administration and going through them if it was just my friends and I alongside some adult volunteers (most likely family or family friends) so I was hoping to keep this option open in the event we would be unable to conduct the program through my school. Additionally I was wondering if there was any information I could share with my school besides the video presented on the website? I know there were several videos on the website for the program but some of the details were slightly vague. What is the maximum number of student allowed on each team? In

the event my school was willing to host the program, would we be allowed to host multiple teams across the state or just one?

A: *Students enrolled in these schools are eligible to tryout/compete in the statewide mock trial competition only at the school in which the student is enrolled if that school sponsors a mock trial team. With the approval of the regional coordinator, schools covering more than one county must choose a county of residence and participate with other teams in that county for the entire season. If the school does not sponsor a mock trial team, the student may participate at the local public school of the student's residence. The student should first approach his school about the creation of a team. The team must be with students from that school, not just random high school students. Charter schools are public schools and should be treated as such. If his school is unable to field a team, he is permitted to reach out to other school districts that have a team and, if they are willing to allow him to participate, he can seek a dispensation from the Regional Coordinator. Just because it is a charter school does not mean that he is treated differently. If they want to have more than one team in multiple locations - that is perfectly fine. We have schools with more than one team - this would still be within the bounds of their "district."*

Full rules for the various kinds of alternative schools can be found at Rule 2.1.2, and any specific questions regarding eligibility may be directed to the Mock Trial Executive Committee.

Q. Our team has a question concerning the lack of any of the witnesses being identified as expert witnesses as they have been in other years. Was this done intentionally as part of the case or was this an oversight?

A. *It was intentional.*

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. in past years for some characters. With the new problem 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, the stipulations establish the authenticity and accuracy of all exhibits, in all respects; no objections to the authenticity of the documents will be entertained.*

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: *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. See 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-direction 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 no 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?

   - *The rules relating to team combination can be round at Rule 1.1.1(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 do 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 <u>not</u> 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. See Rule 1.9 for more specific information.*

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. See Rule 1.9 for more specific information.*

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. Are teams permitted to make the objection: "Objection, Narrative" during the opposing team's direct examination? If this is not permitted, should a sidebar be called?

- *Technically, this objection is not specifically prohibited under our Rules (See Rule of Evidence 611(e)). However, an objection that the witness is providing a narrative answer may be more appropriately objected to as being non-responsive, irrelevant and/or an unfair extrapolation. These are all objections specifically permitted under Rule 611(e).*

23. 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.*

24. 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.*

25. 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.