HERBERT
SMITH
FREEHILLS

Regional CLE Mock Pre-Trial Hearing Event
(27-28 Nov & 4 Dec 2021)

Manual

Contents

1. Introduction

Since 2003, BABSEACLE has assisted in the development of Clinical Legal Education (CLE) programs throughout Asia. These programs focus on strengthening the legal knowledge, skills and ethical and professional values of the participants, improving legal education overall, and helping to guarantee greater access to justice and improve the Rule of Law.

The programs further aim to advance and increase the pro bono movement across Asia.

To achieve these goals BABSEACLE works closely with law students, faculty members, law firms, government and non-government organisations to develop and implement university-based CLE programs. This Manual and related materials have been developed as a joint initiative of BABSEACLE, DLA Piper's global pro bono initiative New Perimeter and Herbert Smith Freehills to assist universities in the development of their CLE Mock Trial programs.

The CLE Mock Pre-Trial Hearing is a practical learning experience in which students simulate a trial or hearing of a civil dispute or criminal offence in a hypothetical jurisdiction. It is not focused on the law of a particular country. This is done with the aim of developing legal, analytical and advocacy skills, increasing familiarity with the court process and enhancing participants' appreciation and understanding of legal ethics and access to justice. The focus of the CLE Mock Pre-Trial Hearing Event is the development of these outcomes. As such, the CLE Mock Pre-Trial Hearing Event structure used for the event does not strictly adhere to any particular legal jurisdiction but has been modelled with the aim of facilitating the development of CLE outcomes in a practical setting.

The CLE Mock Pre-Trial Hearing is a collaborative learning exercise with subject matter that focuses on relevant legal issues and social justice outcomes, not a competition with winners and losers. It is an abbreviated form of the Standard/Traditional Mock Trial in which participants will have the opportunity to experience key aspects of the courtroom trial experience without all the formalities of a traditional mock trial.

2. Event rules

In order to participate in the CLE Mock Pre-Trial Hearing Event, students must be actively involved and committed to the university CLE program. The students must also have a working knowledge of the English language.

Back up students will be ready to fill the roles of other students in the event anyone is not able to attend at the last minute. Backup students will also fill the roles of clerks and time keepers during the event.

The CLE Mock Pre-Trial Hearing event organizers reserve the right to alter schedule, facts and rules of the event at any time. Notifications will be sent by email when reasonably possible

Any disputes between participants, which are unable to resolve, will be determined by the Event Organizers whose decision will be final.

The Event Organizers may arrange for the CLE Mock Pre-Trial Hearing to be video or audio recorded and will own the recording for use in all formats and media.

3. Event Structure

3.1. Regional CLE Mock Pre-Trial Hearing Training Workshop

The Regional CLE Mock Pre-Trial Hearing Workshop will occur on 20-21 November 2021. This will involve all the participants, and this is mandatory to attend. This training will be similar to the National CLE Mock Pre-Trial Hearing Training Workshop the participants in each country attended during October – November. The training will be used to further strengthen and refine the participants' abilities for the Asia Regional CLE Mock Pre-Trial Hearing Event (27-28 November and 4 December, 2021).

3.2.CLE Mock Pre-Trial Hearing Event Materials

The case materials for the CLE Mock Pre-Trial Hearing Event will be available online to all participants.

3.3.CLE Mock Pre-Trial Hearing Event Rounds and Teams

The CLE Mock Pre-Trial Hearing Event will consist of 4 rounds

During each round Prosecution and Defence teams will participate against each other. Each team will have 5 persons. (2 prosecutors o 2 Defence Advocates and 3 witnesses) Each event will take 1 ½ -2 hours. Round 1:

Round 1 will be conducted on November 27th, 2021.

Round 1 will have 16 teams (8 Prosecution and 8 Defence) and the teams will be made up of the participating law students from the regional universities. Selection of the team members for round 1 will be drawn from the CLE Mock Pre-Trial Hearing Workshop occurring the day before (20-21 Nov, 2021).

Once the teams are chosen, the team members may choose what roles the team members will have during the first round.

During Round 1 the judges will score the performance of both teams for each event. This will be done by evaluating the performance of each team member with a standardized evaluation form. At the end of each event each judge will add up the total points of all the members for each team. The team with the most points for that judge will be declared to be the "stronger team" by that judge.

There will be three judges per event. The team that receives the rating of strongest team by the majority of judges will advance to the next round.

Round 2:

Round 2 will be conducted either during the afternoon of November 27th, 2021 or the morning of 28th November, 2021 (to be determined).

Round 2 will have 8 teams. (4 Prosecution and 4 Defence). The teams will be made up of the participants who were part of the successful teams from Round 1. and as much as possible the composition of the Round 2 teams will be different than the teams in Round 1.

When at all possible, Round 2 team members will be placed in different roles than they had

during Round 1.

Round 2 team members will be given a minimum of 1 ½ hours to prepare their cases with their team members.

The scoring and advancing of the team members and strongest team will be the same as in Round 1.

During Round 2 there will also be a simultaneous consolation round for those participants who did not advance to the second round. The rules for the consolation round will be the same as for the second round.

Round 3: (Semi-Final Round)

Round 3 will be conducted during the morning or afternoon of November 28th (to be determined).

Round 3 will have 4 teams. (1 Prosecution and 1 Defence). The teams will be made up of a mixture of students from the successful teams of Round 2 and as much as possible, the composition of the Round 3 teams will be different from the teams from Round 2.

When at all possible Round 3 team members will be placed in different roles than they were during Round 1 and Round 2.

The scoring and advancing of the team members and strongest team will be the same as in Round 1 and Round 2.

Round 4: (Final Round)

Round 4 will be conducted during the morning of December 4th, 2021.

Round 4 will have 2 teams. (1 Prosecution and 1 Defence). The teams will be made up of a mixture of students from the successful teams of Round 3 and as much as possible will the composition of the Round 4 teams will be different than the teams from Round 3.

When at all possible Round 5 team members will be placed in different roles than they were during Round 1, 2 & 3.

The scoring and advancing of the team members and strongest team will be the same as in Round 1, 2 & 3.

3.4. Nature of the CLE Mock Pre-Trial Hearing Event

It is important to remember that the CLE Mock Pre-Trial Hearing Event is not a competition but is a CLE learning experience. Therefore, although students are placed in teams with the aim of advancing to the next round, the overriding goal is to learn and share with others from the experience.

4. What is a Pre-Trial Motion and a Pre-Trial Hearing?

4.1. Pre-Trial Motions

In the justice system, a case is often decided before the actual trial. A pre-trial motion is simply

an application to the Court to hear an argument about an issue before the hearing itself commences. Specifically, Advocates can file pre-trial motions in order to exclude evidence from being used during the trial. In criminal trials, pre-trial motions can be filed by prosecutors and/or Defence Advocates; in civil trials, these motions can be filed by plaintiff Advocates and/or Defence Advocates. There can be many legal reasons why some type of evidence should not be allowed to be used during a trial. The ability to file a pre-trial motion, and have a Court decide before the actual trial whether some evidence can be used at trial, is a core part of ensuring a fair trial.

4.2. Pre-Trial Hearing and Motions to Exclude Evidence

A Pre-Trial Hearing is not the trial itself. It is a hearing where a Court is asked to make a decision on some legal or factual issue before a case goes to trial. Many times at a Pre-Trial Hearing, a Court will hear arguments from prosecutors and Defence Advocates as to why evidence should, or should not, be allowed to be used at trial. Often during a Pre-Trial Hearing, Advocates and prosecutors call witnesses and provide the Court with other types of evidence in order to try to convince the Court that certain evidence should, or should not, be allowed to be used at trial. Prior to a Pre-Trial Hearing being held, Advocates and prosecutors file a pre-trial motion asking the Court to either allow or exclude certain types of evidence. If an Advocate or prosecutor wants the Court to exclude certain types of evidence, they usually file what is called a Motion to Exclude Evidence.

This case packet contains a Motion to Exclude Evidence that was filed by the Defence Advocate in the case of *Zaltanu Public Prosecutions v Eltra Parker.* The Defence Advocate filed a Motion to Exclude Evidence arguing: (1) that Senior Officer Strait did not possess the required "reasonable suspicion" that Eltra was armed and dangerous to conduct a pre-arrest frisk search; (2) that the identification of Eltra as a result of the photo board should be excluded on the basis that Senior Officer Strait suggestively influenced the witness's identification; (3) that the evidence found as a result of the unclothed search should be excluded as Officer Momo conducted the search in an improper manner; and (4) that Eltra's admission to Senior Officer Strait and Officer Momo was obtained by unlawful detainment and interrogation and should thus be excluded. Because the Defence filed a Motion to Exclude Evidence, it is now necessary for the Court to have a Pre-Trial Hearing to make a ruling on the motion. This Pre-Trial Hearing takes place before the trial. However, the purpose of the Pre-Trial Hearing is not to decide if the accused in this case, Eltra Parker, is guilty or not guilty of the criminal charges. The only purpose of the Pre-Trial Hearing is to decide whether the evidence that is the subject of the motion can be introduced, or should be excluded, from trial.

During the Pre-Trial Hearing, both the Prosecution and the Defence Advocates will try to convince the Court, through both witnesses and documents, that evidence should, or should not, be excluded during the trial. The Prosecution will try to convince the Court that the evidence should be allowed to be used at trial, and the Defence Advocates will try to convince the Court the evidence should not be allowed to be used.

4.3. Motions to Exclude and Burden of Proof

Even though the Defence Advocate files a Motion to Suppress the burden is on the Prosecution to prove that evidence it wants to admit during the trial was collected in a legal and proper manner. Unlike a criminal trial, where the burden is on the Prosecution to prove an accused is guilty beyond a reasonable doubt, in a Pre-Trial hearing on a Motion to Exclude evidence, the Prosecution's burden of proof to prove the evidence was obtained legally and properly is by a preponderance of evidence, or also known as a balance of probabilities. Under the

preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. This standard of proof requires proof beyond a reasonable degree of probability. This proof would allow the Court to say it thinks that some is "more probable than not'.

This standard is much lower than what is required to prove a person guilty at trial which is proof beyond a reasonable doubt.

5. Pre-Trial organisation

5.1. Prosecution and Defence Advocate Team Members

The first Defence Advocate will announce his/her appearance and read a summary of the Motion to Exclude Evidence that it has filed before the Court.

Next a prosecutor for the prosecution and an advocate for the defence will each give an opening statement.

Chief examination cross examination and re-examination optional) of each side's witnesses will then take place. The prosecution witnesses go first.

Due to the fact that each prosecutor or advocate is scored/evaluated by the judges the scoring must be evenly balanced as much as possible. Therefore questioning of the witnesses must be equally divided between the prosecutors and advocates.

A prosecutor or advocate cannot conduct more than two chief examinations or two cross-examinations. The advocate that does the chief examination will do the re examination of the same witness (optional)

The prosecutor or advocate that does two chief-examinations can only do one cross examination.

> **Example**
>
> Prosecutor A gives chief examination of Witness B and Witness C. During the cross examination Prosecutor A can only cross examine one Defence witness.

During the chief, cross and re-examination only the prosecutor and/or advocate for the other team who does the chief or cross examination of that witness is allowed to object.

> **Example**
>
> Prosecutor A gives chief examination of Witness B. During the chief examination Prosecutor A asks a question that involves hearsay. Defence Advocate C (who will conduct a cross-examination of Witness B) can object to the question as hearsay but Defence Advocate D may not.

After both teams have called all of their witnesses to testify each team will give a closing argument. The prosecution team will go first.

The prosecutors or advocates who did not give the opening statement will give the closing argument.

During closing arguments, judges may ask questions of both advocates. Be aware that *at any time* during your closing argument, the judges can and will interrupt you with questions.

It is vital that you fully answer the question to the best of your ability *when the judge asks it*. Do not tell a judge that you will answer that particular question later in your argument. Go where the judge leads you, even if that means not following the argument that you planned. Part of the challenge is adapting to and taking into consideration the judges' concerns while finding the time and opportunity to still voice that important parts of your argument

If you do not understand the question a judge asks, ask him/her to explain or clarify the inquiry. It is fully acceptable to ask for clarification.

If a judge asks a "yes" or "no" question, answer first with "yes" or "no" -- then elaborate. For example, reply with, "Yes, Your Honor, in fact ...," or "No, Your Honor, rather ...."

Never speak over a judge. When a judge starts talking, you should stop talking immediately, even if he or she has interrupted you mid-sentence (or even mid-word).

It is okay to stand firm in respectful disagreement with a judge as long as you can back up your position with a well-reasoned argument."

Prosecutors and advocates will be judged based on their performance on many aspects of their roles, including:

- Appropriate summary of facts and explanation of law under which charge is brought/claims made relevant to the case in the opening address;
- Clarity of expression and voice, poise, confidence etc;
- Proper introduction of evidence;
- Questioning in accordance with rules of evidence during 'examination-in chief';
- Cross-examination directed at relevant parts of evidence in chief;
- Avoidance of unnecessary repetition of chief examination;
- Cross-examination on relevant points of own case;
- Appropriate objections - making considered responses to objections;
- Summarising evidence and issues of fact accurately in the closing argument;
- Making appropriate submissions on issues of law in the closing argument; and
- Persuasion.

5.2. Witness Team Members

All witnesses for each team must be called by their team to testify. A team may choose the order that they call their witnesses.

All witnesses are expected to dress appropriately.

The witness gives sworn evidence for the parties to the action (plaintiff/prosecution or defence) and the purpose of the witness is to give evidence on what they have seen or heard, relevant to the case.

All witness/s' sworn statements are included in the CLE Mock Pre-Trial Hearing information packet and must be followed strictly. There must be no deletions and no additional material used such as maps, diagrams, plans, exhibits except where such materials are provided as part of the scenario.

During chief examination a witness must strictly adhere to their statements however during cross- examination scope is given for the witness to expand when necessary but during cross examination witness should not contradict information included in the sworn statement. If the witness does this then the advocate doing the cross examination can demonstrate this to the witness and the court. This is known as **impeaching** the witness.

The witnesses provide most of the information to be used in the trial and their accurate recall

is important. During chief examination the witness gives his or her evidence orally.

All witnesses, except for the Accused, must remain outside the courtroom until they are called to give evidence. Once the witness has been given his/her evidence he/she must not talk or approach a witness who has not given evidence. The witness may remain in the courtroom in the visitors' gallery.

The performance of the witness is marked on several areas, including:

- Full and accurate recital of chief examination,
- Presentation; clarity of expression, voice, calmness;
- Apparent preparation for cross-examination; and
- Ability to answer appropriately during cross-examination.

5.3. Steps in the CLE Mock Pre-Trial Hearing and Permitted Time

The following are an outline of the steps in the CLE Mock Pre-Trial Hearing.:

1. Several Judges will preside over the proceedings. However, one Judge will be selected as the Presiding Judge to control the proceedings.
2. JUDGE'S CLERK: "Everybody stand-up."
3. JUDGES: Judges enter the courtroom.
4. PRESIDING JUDGE: Asks both sides "are you ready?"
5. CLERK: Calls the case number.
6. DEFENCE ADVOCATE: Reads a brief summary of the Motion to Exclude.
7. JUDGE: Asks if the prosecution is ready to proceed with the hearing to establish its burden that the evidence obtained during the roadside checkpoint was lawfully obtained.
8. PROSECUTOR: Answers "We are ready to proceed, your honor".
9. PROSECUTOR: Gives opening statement. **(no more than 5 minutes)**
10. DEFENCE ADVOCATE: Gives opening statement. **(no more than 5 minutes)**
11. PROSECUTOR: Calls first witness (Officer Momo).
12. JUDGE: Administers oath.
13. PROSECUTOR: Examination-in-chief of Officer Momo. **(no more than 7 minutes)**
14. DEFENCE ADVOCATE: Cross-examination of Officer Momo. **(no more than 7 minutes)**
15. PROSECUTOR: Opportunity for re-examination. **(no more than 3 minutes)**
16. PROSECUTOR: Calls second witness (Senior Officer Strait).
17. JUDGE: Administers oath.
18. PROSECUTOR: Examination-in-chief of Senior Officer Strait. **(no more than 7 minutes)**
19. DEFENCE ADVOCATE: Cross-examination of Senior Officer Strait. **(no more than 7 minutes)**
20. PROSECUTOR: Opportunity for re-examination. **(no more than 3 minutes)**
21. PROSECUTOR: Calls third witness (Bertie Walsh).
22. JUDGE: Administers oath.

23. PROSECUTOR: Examination-in-chief of Bertie Walsh. **(no more than 7 minutes)**
24. DEFENCE ADVOCATE: Cross-examination of Bertie Walsh. **(no more than 7** minutes)
25. PROSECUTOR: Opportunity for re-examination. **(no more than 3 minutes)**
26. DEFENCE ADVOCATE: Calls first witness (Defendant - Eltra Parker).
27. JUDGE: Administers oath.
28. DEFENCE ADVOCATE: Examination-in-chief of Eltra Parker. **(no more than 7 minutes)**
29. PROSECUTION: Cross-examination of Eltra Parker. **(no more than 7 minutes)**
30. DEFENCE ADVOCATE: Opportunity for re-examination. **(no more than 3 minutes)**
31. DEFENCE ADVOCATE: Calls second witness (Lenny Bloom).
32. JUDGE: Administers oath.
33. DEFENCE ADVOCATE: Examination-in-chief of Lenny Bloom. **(no more than 7 minutes)**
34. PROSECUTION: Cross-examination of Lenny Bloom. **(no more than 7 minutes)**
35. DEFENCE ADVOCATE: Opportunity for re-examination. **(no more than 3 minutes)**
36. DEFENCE ADVOCATE: Calls third witness (Dianne Carriér).
37. JUDGE: Administers oath.
38. DEFENCE ADVOCATE: Examination-in-chief of Dianne Carriér. **(no more than 7 minutes)**
39. PROSECUTION: Cross-examination of Dianne Carriér. **(no more than 7 minutes)**
40. DEFENCE ADVOCATE: Opportunity for re-examination. **(no more than 3 minutes)**
41. PROSECUTION: Closing argument. **(no more than 15 minutes)**
42. DEFENCE: Closing argument. **(no more than 15 minutes)**
43. JUDGE'S CLERK: "Everybody stand-up."
44. JUDGES: Judges leave the room to make a decision on which team was the strongest according to the points evaluation.
45. JUDGE'S CLERK: "Everybody stand-up."
46. JUDGES: Judges return to the room and give their decisions on which team was the strongest according to the points evaluation. Judges provide constructive feedback to each participant.

    The team with the most judges voting for it advances to the next round CLE Mock Pre-Trial Hearing team participants.

    The Prosecution/Plaintiff team shall consist of:

    - 1st Prosecutor
    - 2nd Prosecutor witnesses

    The Defence team shall consist of:

    - 1st Advocate
    - 2nd Advocate

3 witnesses CLE Mock Pre-Trial Hearing team roles

5.4. Prosecutor or Advocate

Advocates should not conduct any additional legal research for the purpose of the CLE Mock Pre-Trial Hearing. Advocates are not permitted to make arguments based on legal principles and / or case law not included in this manual or the CLE Mock Pre-Trial Hearing scenario.

6. Scoring

Each CLE Mock Pre-Trial Hearing round will be scored by a panel of three judges. It may be possible to have more than three judges but the number of judges must be an odd number (3,5,7..). Judging is done individually (ie the Judges must not confer regarding their scoring). The scoring of the rounds relates first to the individual performance of each team member. Once this is done the cumulative scores of all team members are added together and by each judge. The team that has the most points for each judge is declared by that judge to be the stronger team. The team with the majority of judges deciding it is the strongest team advances to the next round of the CLE Mock Pre-Trial Hearing Event.

Although judging is done individually at the end of each CLE Mock Pre-Trial Hearing round, and prior to the scoring of each of the prosecutors, advocates and witness team members, the group of judges will be given an opportunity to discuss the strength and weaknesses of each team member and the team as a whole. This discussion will take place for approximately 20 minutes where the judges openly share their opinions and thoughts with each other. Following this discussion each judge will individually score each team member and then will add up the points for both teams as described above.

Following this procedure, the judges will return to the courtroom and individually announce which side they think is the strongest.

After this, and with time permitting, an open de-briefing discussion with the judges, team members, and CLE Mock Pre-Trial Hearing courtroom observers may occur. This is optional but is greatly encouraged to happen if possible.

It is important to note that the judges are not judging the facts of the case or the guilt or innocence of the accused. The facts of the case have been written in a way to be relatively balanced. The judges are judging the way each team uses the facts of the case to their advantage, as well as other ways the teams and individual members perform.

When scoring, the individual team members judges should consider the following guidelines:
Points will be deducted if:

- a witness adds, deletes or changes material in the witness statement;
- a team goes beyond the time limits;
- any team member is assisted by another person when the performance is supposed to be individually done;
- a team member argues with a judge; and
- any teacher/coach/other person offers assistance at any time during the hearing or while preparing for the closing argument.

The scoring sheets must be made available for each team member to review and learn from.

6.1. SCORE SHEET – PROSECUTOR/ADVOCATE

ROLE:

*Score each activity from 1 (lowest) to 5 (highest)

1. OPENING STATEMENT—clear, concise, logical, persuasive & accurate description of their side of the case. Easy for the judge(s) to follow. Their theory is clearly outlined. Made mention of witnesses who would testify to certain facts of the case.	5 4 3 2 1
2. CHIEF EXAMINATION & RE-EXAMINATION—logical series of questions, brought out key information for their side, persuasive, easy to follow with very little leading of the witness.	5 4 3 2 1
3. CROSS EXAMINATION—convincing, relevant, logical, brought out contradictions in the testimony which weakened the other side's case. Witness lacked credibility after questioning.	5 4 3 2 1
4. CLOSING STATEMENT—persuasive, logical, well organized & well-reasoned summary of the most important points for their case. Plea to the judge(s) to find a verdict of not guilty.	5 4 3 2 1
5. EVIDENCE: • made timely objections • reasons for objections, or opposition for objections is made clearly and rationally	5 4 3 2 1
6. BELIEVABILITY: • spoke loudly & clearly • dressed for the part • good eye contact with the witnesses/judge(s) • used properly phrased questions • made objections where appropriate proper entering of exhibits where needed	5 4 3 2 1

Total (calculate the combined score for role): _____ _____

6.2. SCORE SHEET – WITNESS

ROLE:

*Score each activity from 1 (lowest) to 5 (highest)

1. CHIEF EXAMINATION —witnesses were prepared & convincing in their testimony & did not deviate from the fact sheets. They answered questions posed to them under chief examination well & they were believable.	5 4 3 2 1
2. CROSS EXAMINATION—responded well to questions posed to them under cross-examination. They were believable& did not allow the advocate to change the facts that they gave under chief exam. Their credibility was intact after being questioned.	5 4 3 2 1
2 CHARACTER PORTRAYAL • spoke loudly& clearly • dressed for the part • good eye contact with the advocates/judge(s) • good character portrayal • took their role seriously	5 4 3 2 1

Total (calculate the combined score for role): _____ _____

7. Zaltanu Rules of Evidence and Procedural Grounds for Objection

7.1. Relevance

Before a party can introduce an item of evidence at trial, it must be relevant. Where the relevance of evidence is not obvious, a party introducing it must explain how it is relevant.

For example, in a case involving a collision of two motor vehicles, the speed that the vehicles were travelling would probably be relevant, but what the drivers ate for lunch would most probably be irrelevant, unless during lunch the drivers drank alcohol.

In order to be 'relevant' evidence must:

- Relate to the existence or non-existence of a fact in issue in the trial;
- Be relevant to a party's motive or intention;
- Relate to an important introductory fact; or
- Be so connected with a fact in issue in the trial that they form part of the same transaction.

The general test of relevance is that the evidence must rationally or logically affect the judging of the existence of a fact in issue in the trial, whether directly or indirectly. Where the effect of the evidence is so ambiguous that it could not rationally affect the judging of the fact in issue, the evidence is irrelevant.

Only relevant evidence is admissible. However, the mere fact that evidence is relevant does not make it automatically admissible. The application of the other rules of evidence may later result in the evidence being ruled inadmissible.

Example:

Question: What had you consumed on the day of making deliveries?

Objection: I object, your honor. What the witness ate is not relevant to circumstances surrounding the material day.

Possible response: Your honor, there is evidence that the witness was in possession of, or may have consumed drugs. This evidence goes to the probability of that.

7.2. Opinion

7.2.1. The rule against opinion evidence

A witness is not usually allowed to give their opinion in evidence. An opinion is a conclusion or view formed by a witness based on facts that they have observed.

For example, if a witness says that "The accused was angry", the opposing side's advocate should object because this statement is the witness' opinion.

Instead, the witness should give evidence of the facts that their opinion is based on. For example, the witness could say that the accused was:

- talking loudly;
- red in the face; and
- shaking his fist.

7.2.2. Exceptions to the rule against opinion evidence

There are two main exceptions to this rule:

(1) When the opinion is about a topic that ordinary people are considered to be knowledgeable about, for example about the weather, the age which someone appears to be, whether a person was affected by alcohol, what emotions a person was feeling, distance and speed.

Example:

Ordinary person: “The police officer did not do a good job when arresting those people”
(This is an objectionable opinion unless it is given by an expert on policing standards).

Example:

Ordinary person: “Eltra seemed to be very frightened”.

Objection: “Your honor, the witness is giving an opinion.”

Possible response: “Your honor, the witness may answer the question because ordinary persons can tell if someone is frightened.”

(2) When the opinion is about a topic that the witness is qualified as an expert in. A witness can be qualified as an expert in relation to a particular topic if they have had training, study or experience in that area. For example, amongst other things, a witness can be an expert in the areas of fingerprints, foreign laws or science. However, an expert witness can only give an opinion on topics they are qualified in. For example, an expert on foreign laws is not permitted to give expert evidence on fingerprints (unless they are also an expert on fingerprints).

Example:

Illegal Substances expert: “The powder in the bag was Cocaine.” (This opinion is allowed because the witness is an expert on illegal substances such as Cocaine)

Example:

Science expert: “The laws in the country of Zaltanu regarding drug possession are very strict.” (This opinion is not allowed as the Science expert is not an expert on the law in Zaltanu. An advocate should object to the witness giving this opinion)

7.2.3. Reason for the rule and exceptions

The purpose of the rule against opinion evidence is to assist the Court to objectively assess the facts which have been presented as evidence. In order for this to be possible, the Court must be presented with only the facts, not a conclusion or view that a witness has drawn based on these facts. If the witness is allowed to give their opinion, they may confuse or mislead the Court.

The first exception to the rule against opinion evidence saves time by allowing a witness to provide a short summary of a number of facts, some of which might be very hard to describe. It also allows witnesses to give an opinion in certain situations where they were better placed than the Court to form an opinion on a matter based on the facts.

For example, an opinion that someone was sad could be based on subtle observations of the way a person appeared or behaved, topics of conversation, tone of voice, facial expressions and actions. Instead of listing all these, the ordinary person can simply say “The accused was sad.”

The expert opinion exception allows a court to understand complicated or technical evidence which might otherwise be meaningless. For example, specific medical facts about the amount of chemicals in a body do not assist the court but a doctor's opinion that the person had been poisoned by the chemicals in the person's body does.

7.3. Hearsay

7.3.1. The Hearsay Rule

Hearsay evidence is an out-of-court statement, described by a witness in court, for the purpose of proving the truth of some fact from that out-of-court statement. With limited exception, hearsay evidence is not admissible in court.

An "out-of-court statement" is any statement that a speaker makes while not in court, under oath, and in view of the factfinder (usually the jury). The speaker's "statement" can be spoken, written, or made through any other form of communication (e.g., hand gestures). If a witness testifies in court about something a speaker said outside of the trial, the witness is testifying about that speaker's out-of-court statement.

Not all out-of-court statements are hearsay evidence. An out-of-court statement is considered to be hearsay evidence only when the out-of-court statement is introduced as evidence that some fact in the statement is true. If the out-of-court statement is introduced for any other reason, it is not hearsay evidence.

Example:

The Prosecution wants to prove that Eltra Parker likes using party drugs. The Prosecutor asks Daine Carriér, the witness, what he/she heard. Carriér replies, "Eltra said, 'I like to take drugs at parties.'"

Parker's statement "I like to take drugs at parties" is an out-of-court statement which includes the fact that Parker likes to use party drugs. The Prosecution asked about Parker's statement to prove that Parker likes to use recreational drugs. Therefore, Carriér's testimony about the out-of-court statement is hearsay.

Example:

The Prosecution wants to prove that Eltra Parker can speak English. The Prosecutor asks Daine Carriér, the witness, what he/she heard. Carriér replies, "Eltra said, 'I never pack the car myself when I go out on deliveries.'"

Parker's statement "I never pack the car myself when I go out on deliveries" is an out-of-court statement which includes the fact that Parker does not pack the PDP car for deliveries. The Defence is not trying to prove whether Parker packs the car his/herself, they are only trying to prove that Parker can speak English. Therefore, Carriér's testimony about the out-of-court statement is not hearsay.

7.3.2. Reason for the Hearsay rule

When a witness testifies in court, the factfinder (usually the jury) can observe the witness' tone of voice, body language, and attitude. The prosecution and Defence can also ask an in-court witness additional questions in examination and cross-examination. With out-of-court statements, neither is possible. The hearsay rule prevents out-of-court statements from being introduced when observation and examination/cross-examination are necessary to:

- Reduce ambiguity. A person's tone, body language, and attitude are sometimes

important to understanding what that person means when speaking; for example, the person's behavior might show that the person is being sarcastic or telling a joke. A person's responses to examination / cross-examination questions may also help the factfinder know what the person meant. If hearsay evidence is introduced to the court, the factfinder cannot observe the speaker and there is no examination / cross-examination to clear up any ambiguity.

- Give the factfinder an opportunity to consider the witness' believability. The factfinder must decide what facts it believes are true. Observing a person's behavior and hearing the person respond to examination / cross-examination questions helps the factfinder decide whether to believe the facts shared by that person. If hearsay evidence is introduced to the court, the factfinder has nothing with which to determine the speaker's believability. This makes hearsay evidence easy to falsify and hard to disprove.
- Reduce the effect of flawed memory. A person in court can be examined and cross examined to help that person remember or point out where the person's memory has become unreliable. If hearsay evidence is introduced, the factfinder must guess as to whether the speaker's memory is reliable.
- Help the factfinder understand the limits in the witness' perception. A person's responses to examination and cross-examination can show the factfinder what the witness actually perceived and what the person merely inferred. If hearsay evidence is introduced, the factfinder must guess as to the limits to what the speaker perceived.

7.3.3. Exceptions to hearsay

There are several exceptions to the hearsay rule in common law, but there are only two that are significant to this case.

7.3.3.1. A Party's Statement against His/Her Interest

If a defendant (or other party to a lawsuit) admits in an out-of-court statement that the same fact hurting his or her case is true, then that out-of-court statement can be used as evidence that the fact is true. The hearsay rule would normally not allow an out-of-court statement to be used this way, but there is an exception when the defendant admits to a fact that hurts his or her case. We say that such a fact is "against the party's interest" because the defendant (or other party) is interested in winning his or her case and admitting to the hurtful fact goes against that interest. This exception to the hearsay rule exists because a reasonable person would not admit to a fact hurting his or her interest unless it were true, and that makes the out-of-court statement more trustworthy.

The statement against interest exception to the hearsay rule can be used only when the following is true:

- The speaker of the out-of-court statement is the defendant or other party to the lawsuit.[1]
- The speaker admits to a fact that hurts his or her interests. For a defendant in a criminal case, this is a fact that hurts his or her Defence. The admission may be in the form of conduct that only makes sense if the fact against interest was true. This conduct can be behavior such as the defendant behaving as if he or she was willing to accept a state of affairs, or his or her demeanor.

[1] In civil cases, the exception extends to statements by non-parties who admit to facts against their interest if the non-party is unavailable to be called as a witness or refuses to testify.

Example:

750g of pure cocaine is found in the PDP car that Eltra Parker drives. The Prosecution wants to prove that the defendant, Eltra Parker, has used party drugs. The prosecution asks Daine Carriér, a witness in court, what he/she heard. Carriér replies, “Eltra said, “Do you want to come to a party with me tonight? It’s going to be crazy, and I have some pills we can take.”

Parker’s statement, “… I have some pills we can take” is hearsay evidence. However, Parker, a party to the lawsuit, admits in the out-of-court statement that he/she has used party drugs.

The prosecution wants to prove that Eltra Parker has used party drugs (i.e. taking recreational drugs such as ecstasy or cocaine at parties). Therefore, Carriér’s testimony about the out-of-court statement is admissible as a statement made by Parker against his/her own interest, an exception to the hearsay rule.

7.3.3.2. Original Evidence of State of Mind

If a speaker makes a statement about his or her intent, motive, or plans in an out-of-court statement, that statement can be used as evidence of the speaker’s intent, motive, or plans as of the time of the statement. The hearsay rule would normally not allow an out-of-court statement to be used this way, but there is an exception when a person is describing his or her state of mind at the time the out-of-court statement is being made.

Example:

The Prosecution wants to prove that Eltra Parker was going to the party with the intention of taking party drugs. The Prosecutor asks Daine Carriér, a witness in court, what he/she heard. Carriér replies, “Eltra said, “I am going to the party to take these pills my dealer sold me.”

Parker’s statement “I am going to the party to take these pills my dealer sold me” is hearsay evidence. However, the out-of-court statement shows Parker’s intent at the time of his/her conversation with Carriér. The Prosecution wants to prove Parker’s intent. Therefore, Carriér’s testimony about the out-of-court statement would be admissible as evidence of Parkers’s state of mind, an exception to the hearsay rule.

7.4. Bad character

In civil cases, evidence of the defendant’s character is irrelevant.

In criminal cases:

- evidence of the defendant’s previous good character is relevant.
- evidence of the defendant’s bad character is irrelevant and may not be first introduced by the prosecution.

However, if the defendant in criminal proceedings raises his or her good character, or attacks the character of a prosecution witness, the prosecution may cross-examine the defendant on his or her bad character.

Example:

Defendant: *“I am not the sort of person who uses drugs.”*

As the defendant has raised his good character, the Prosecution may cross-examine the defendant on his bad character.

Prosecutor: *"You gave evidence that you were not the sort of person who uses drugs, but it's true that you have previous convictions for drug possession, isn't it?"*

If the defendant had not previously raised his good character, the Defence could object to this question on the basis of character. However in this instance, the defendant had already given evidence of his good character and so the Prosecutor's question is not objectionable. If the defendant had not raised their good character, the Defence could make the objection below.

Possible objection: *"I object, your honor. The defendant has not given evidence of his good character. The question should not be allowed."*

7.5. Tendency

7.5.1. The rule against tendency evidence

Generally, a witness is not allowed to testify regarding tendency while giving evidence. Tendency evidence suggests either that:

- a person has acted in a particular way on one or more previous occasions; or
- a person currently has a particular state of mind or had a particular state of mind on one or more previous occasions.

Example:

Witness: "The accused has a prior drug conviction."

Possible objection: "Your honor, the witness is giving evidence about the accused's tendency to act in a certain way."

7.5.2. Exceptions to the rule

If a person's character or tendencies directly concern a fact in issue (for example one of the elements of an offence or Defence) the rule does not apply to evidence that is brought to prove this. For example, a person's past behavior or tendency to act in a certain way may be admissible in defamation proceedings.

It should also be noted that the rule does not apply to evidence given during either bail proceedings or sentencing proceedings because, during these proceedings, the Court is not concerned with whether the accused committed the crime. This will not be an issue in the Mock Trial Event.

7.5.3. Reason for the rule

The role of the Court is to consider the evidence in relation to a specific event. Tendency evidence is dangerous because it encourages the court to judge the accused based on their actions in previous situations. This evidence about past situations might distract the court from what has occurred in the situation in question.

For example, evidence that the accused previously committed one robbery is not proof that the accused committed this specific robbery.

7.6. Direct speech

Conversation should be recited as it occurred in direct speech and not summarized by the witness.

Where an objection is based on indirect speech, the witness may convert the evidence to direct speech.

Example:

Witness: Officer Strait asked me for my identification.

Possible objection: I object, your honor. The witness should give evidence of the words actually used.

Response: Ms Parker, could you please provide the answer to my question using the exact words that you recall Officer Strait stating? What did he say to you?

Witness: Officer Strait said to me, 'Can I please see your driver's license?'

7.7. Leading questions

7.7.1. What is a leading question?

A leading question is a question that suggests the answer to the witness. If an advocate asks leading questions of their own witness, the opposing Prosecutor or Advocate should object.

Example:

Question: "Eltra, you knew the police would find white powder in one of the packages in the trunk of your car, didn't you?"

Objection: "Objection, your honor, counsel is leading the witness.

Possible response: "Your honor, leading is allowed in cross-examination" or "I will rephrase the question your honor".

The question would not be leading if it were to be rephrased so that it does not ask for a "yes" or "no" answer. Rephrased question: "Eltra were you aware if the contents of the crate in your car varied from your normal delivery runs?"

7.7.2. When are leading questions allowed

A leading question may not be put to a witness in chief examination or re-examination. The exceptions to this in chief examination is where the Court has given leave to questions which relate to matters which are introductory or undisputed (for example, the witnesses' name or occupation).

The rule against leading questions does not apply to cross-examination. In cross-examination, leading questions should be used and open questions should be avoided.

7.7.3. Purpose of the rule

The purpose of the rule against leading questions in chief examination is to ensure that the witness' evidence is in his or her own words.

Leading questions are often referred to as 'improper questions' in chief examination. These questions are deemed to be improper since they may supply a false memory for the witness. Often improper or leading questions suggest only one answer and include questions which call for a yes or no response.

7.8. Prior inconsistent statements

An advocate in cross-examination may want to show that the witness' evidence is unreliable or not believable. One way of achieving this is by showing inconsistencies between that witness' version of events.

Example:

A witness gives evidence that is different from that which he/she gave in him/her sworn statement. The prosecutor may hand the sworn statement to the Defence and allow the Defence Advocate to cross-examine the witnesses on the statement.

The following steps should be used:

Step 1: Ask the witnesses if he/she recognizes the statement.

Step 2: Ask the witnesses to read the section that differs from the present answer.

For example:

Advocate: "Now, Eltra, you testified in your chief examination that you had no prior knowledge of the existence of the white powder found in a package in the trunk of your car on 1st March, didn't you?"

Eltra: "Yes, that is what happened."

Advocate: "Do you know what this paper is? Please tell the Judge what it is."

Eltra: "Yes, that is my sworn statement to the police."

Advocate: "Will you please read the second-last line of this paragraph?"

Eltra: "Yes I knew about the white powder found in the trunk of my car!"

Advocate: "That is sufficient, thank you."

7.9. Double Questions

Advocates may object to questions that cannot necessarily be answered with a single answer.

Example:

Question: Is it true that Eltra Parker is studying full-time and working part-time at night?

The answer to the first part of the question might be 'yes', while the answer to the second part of the question might be 'no'.

7.10. Contested evidence must be put to a witness in cross examination

An advocate must cross-examine a witness on all aspects of the witness' evidence that the advocate disputes.

In particular, the advocate must ask the witness to comment on the alternative version of events that the advocate's case relies on. For example:

Example:

Question: I suggest that you are mistaken about what you saw Eltra Parker suspiciously loading the packages into his/ her car?

Bertie Walsh: I know what I saw.

Question: I suggest that what Eltra actually did was that Eltra was not suspiciously loading those packages in the neighbourhood. Bertie Walsh: No I am sure that is who I saw.

In this example, Eltra Parker's advocate is cross-examining Bernie Walsh on what Bernie had seen Eltra Parker do because Eltra's evidence is that he/she was not suspiciously delivering any packages in the neighbourhood.

An advocate cannot rely on any evidence in their closing argument that concerns an opposing party's witness that they have not cross-examined the witness about. In the above example, the advocate can ask the court to accept Eltra Parker's evidence over Bernie Walsh's evidence in their closing argument because they have cross-examined Bernie about the alternative version of events.

7.11. Harassment of the witness

Advocates may make an objection if the opposing legal practitioner asks offensive, insulting questions of a witness. This usually occurs during cross-examination.

In the course of cross-examination advocates are permitted to ask questions which tend to test the witness' reliability and test their credit.

However, the Court must forbid any question which appears to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

A question will also not be allowed if it is indecent or scandalous.

It is also important that advocates are aware of their legal and ethical obligations when examining witnesses.

Example:

This type of questioning could amount to offensive and insulting questions of a witness, and should be disallowed:

"*You're a pathetic, filthy, drug addict, lying criminal, Ms/Mr. Parker, aren't you?!"*

"You've taken drugs before and can't stop, can you Ms/Mr. Parker?"

This type of questioning, which only tests the witness' reliability and credit, would generally be allowed:

"*Ms/Mr. Parker, one might assume you are lying right now, because you said you were not delivering the packages in the neighbourhood when there is a witness claiming that you were?"*

8. Opening statement

The purpose of an Opening Statement is to:

- introduce your case theory and your case themes; and
- provide an overview of the evidence or facts that you will present.

Your Opening Statement is your first interaction with the Judge and an opportunity to establish yourself as a trustworthy, reliable and confident advocate in his or her eyes. While each advocate will have their own style and their own approach to Opening Statements, the hallmarks of an effective opening include:

8.1. A strong introduction

In the first few minutes you should provide a brief overview of your case that is built around your case themes and that is cast in a positive and engaging way.

8.2. Engaging storytelling

Engaging storytelling involves using sensory language and visual images that put the fact finder firmly in the picture and reinforces your key themes. In particular:

- the labels you choose to apply to parties, events and other important elements of the case will shape the way your client and your case is viewed by the Judge. You should aim to personalise your client and witnesses and depersonalise the other side. For example, always refer to your client by name (e.g. “Mr/Ms Parker” rather than “my client” or “the plaintiff”); and

- take the time to spell out details that are important to your case. For example, if it is a personal injury claim and you appear for the plaintiff, spend time drawing out the precise nature of the injury.

8.3. Being a reliable storyteller

While you should tell a compelling story, your story must be grounded in facts to which your witnesses will testify. Do not overstate the evidence. If you do, it will be exploited by the other side and damage your credibility in the eyes of the Judge. By taking a measured, fact-based approach that does not venture into personal opinions or arguments, you are more likely to win the Judge’s trust and ultimately the case.

9. Examination Techniques

9.1. Chief examination

The first step in introducing evidence during the trial through witnesses is called chief examination. This is often quite challenging, as the purpose is to get the witness to tell his/her story. This is done by bringing out everything the witness can tell to prove the case, without suggesting to the witness what to say.

Chief examination typically asks open-ended, non-leading questions (i.e., questions that do not suggest an answer by the form in which they are asked) while cross examination is characterised by leading questions such as “isn’t it true that”, “you would agree with me that …”, etc. Typically, leading questions contain or suggest their own answer.

Unless you are establishing fundamental background facts, avoid leading questions when conducting chief examination. For example, in a collision case, the time and place of the collision may not be in dispute. Such preliminary leading questions enable the witness to be taken quickly to the real matters in dispute.

Example

Leading Question	Chief Examination Question
You found a small electronic scale in the pocket of Parker's jacket, correct?	What, if anything, did you find upon searching Parker?
The woman had blonde hair, correct?	Please describe what the woman looked like.
The defendant was distressed and pulling at their jacket zipper, correct?	What did the defendant do while they were in the cell?
After your behaviour, Officer Strait conducted a frisk search on you, correct?	What did Officer Strait do after approaching you?

A way to get the witness to tell his/her story without leading him/her, is to start your questions with words such as 'who, what, when, where and how'.

Chief examination questions explore the following:

- Who the witness is or is testifying about.
- What information the witness knows.
- When the witness knew it or when the event testified to occurred.
- Where the witness learned the facts or where the events testified to occurred.
- Why the witness knows the facts or why something happened.
- How the witness knows the facts or how something happened.

Ideally, the advocate asks very short and direct questions to which the answer can be given freely and fully. The effective chief examination is like a conversation with the witness doing most of the talking. In order to achieve this, a great deal of preparation goes into an effective chief examination, often with the advocate and the witness practising the testimony a number of times prior to presenting it in court.

The goal of a good chief examination is to present the testimony of witnesses in an understandable and persuasive manner. This requires a clear, logically organized presentation in which each witness describes the activities he observed or in which she participated. It requires an advocate to concentrate not only on presenting enough evidence to prove the basic case, but also on making that evidence persuasive. Remember, chief examination is telling a story through the words of each witness. A legally sufficient case may not be enough to persuade. Chief examination can help persuade a court if it is carefully prepared and conducted.

9.2. Cross-examination

After a witness has been examined-in-chief by the prosecutor or the r advocate, the prosecutor or advocate then cross-examines this witness. The aim of cross examination is to obtain favourable information from witnesses called by the opposing advocate, and if a witness has no testimony favourable to you, to make that witness less believable. The key to an effective cross-examination is preparation.

Ask questions that reflect on the witness's credibility by showing that he or she has given a contrary statement at another time or that the witness may be prejudiced or biased in his or her

opinion. Ask questions that weaken the testimony of the witness by showing that his or her opinion is questionable or that the witness is not competent or qualified due to lack of training or experience to render the opinion. Adapt your prepared questions to the actual testimony given during the chief examination.

Always listen to witnesses' answers. Try to avoid giving the witness an opportunity to re emphasise the points made against your case during chief examination. However, do not harass or attempt to intimidate the witness and do not argue with a witness as these tactics risk making you look like a bully and often create sympathy for the witness, making him/her more believable.

Before deciding whether to cross-examine a witness, consider how that witness has helped the opposing side and how he or she has hurt your case. Consider waiving (not doing) cross-examination when a witness does not hurt your case. If you decide to cross-examine the witness, start with questions that elicit facts that help your case and follow with questions designed to undermine the witness's credibility or version of events.

During the chief examination the judge's focus should be on the witness. However, during cross-examination, you want the judge's focus on you and your questions. By asking very clear and exact leading questions, and keeping control of the witness, you are effectively testifying to the court. Therefore, in a cross-examination, the advocate should be speaking 70 to 80% of the time and the witness should be forced to answer with short responses or merely "yes" or "no."

Cross-examinations should generally be short. Decide on three or four main points, and then do not deviate (until you have lots of experience). Remember, your ultimate goal during cross-examination is to discredit harmful testimony of the witness. Once you have sufficiently accomplished that goal, you do not have to discredit everything a witness has said during the chief examination. Once you establish that a witness is lying about one thing, the judge is likely to find it difficult to believe all of their testimony.

Additional questioning merely serves to give the witness the opportunity to rehabilitate (fix) their testimony.

10 Commandments of Cross-Examination

- Be brief
- Use plain words
- Ask only leading questions
- Be prepared
- Listen
- Do not argue with the witness
- Avoid repetition
- Do not allow the witness to offer explanations to an answer
- Limit your questions
- Save the main point for the summation

If seeking to disprove the other party's case, the cross-examiner usually attacks two areas of witness evidence, namely (a) competence and (b) credibility.

The competence of the witness to give the evidence, or the quality of such evidence, may be challenged by asking leading questions concerning the witness perception, ability to recall detail, and/or preoccupation, including whether he/she was affected by alcohol or drugs and could not be expected to be thinking clearly.

Example

If the objective is to establish that a witness was preoccupied (not concentrating or thinking about something else) at a particular time, the following would be one approach.

Question: You took Eltra back to a holding cell following the interview, correct?

Witness: Yes.

Question: You were at the guard room during this time, correct?

Witness: Yes

Question: You heard shouting while you were in the guard room, is that right?

Witness: Yes

Question: When you arrived at the holding cell, you saw Eltra quickly pulling at the zipper of his/her jacket, correct?

Witness: Yes

Question: That's when you instructed Eltra to remove his/her clothing, is that right?

Witness: Yes

Question: Upon doing this, you found a folded up note on Eltra's person, correct?

Witness: Yes

Question: That note was from Alex Smith, wasn't it?

Witness: Yes

Question: So following the interview, you took Eltra back to the cell but noticed that she/he was shouting, which led you to complete an unclothed search, is that correct?

Witness: Yes

NOTE: If the examiner intends to argue that the witness was preoccupied, the examiner should also ask the witness a specific question regarding whether she was preoccupied at the time. Under the rule in *Browne v Dunn,* an advocate is required to cross-examine an opponent's witness on evidence that the advocate disputes. In particular, an advocate must ask the opponent's witness to comment on the alternative version of events that the advocate's case relies on.

The credibility of the witness may also be challenged because of (i) bias, interest, prejudice - whether he or she is a close friend of the plaintiff/defendant; (ii) prior convictions; (iii) moral character - whether he/she has a reputation for lying or has a number of convictions for dishonesty; and/or (iv) prior inconsistent statements such as evidence given in a written statement which is different from the evidence now given at the trial.

The first step to conducting an effective cross-examination is to master leading questions. If "always use leading questions" is the golden rule of cross-examination, "never ask a question to which you do not know the answer" is a close second. This second rule covers many of the most common bad cross-examination questions. The worst example of a bad cross-examination question comes when an examiner asks a witness "why" in response to their answer. By asking "why," the examiner has totally lost control over the witness. The examiner has no idea what the witness is about to say, and the judge's focus has shifted away from you and back to the witness.

Practice Tips for Cross-examination

Do:

- Use leading questions
- Start with friendly questions; end with aggressive questions
- Listen to the witnesses answer and make sure they have sufficiently answered
- Control the witness with yes/no questions

Avoid:

- Non-leading (i.e., open) questions
- Asking the "gotcha" question
- Asking "why"
- Questions to which you do not know the answer
- Long questions
- Questions about gaps in an alibi or timeline
- "You testified" questions
- Characterisations and conclusions
- Using notes
- Arguing with a witness

10. Closing argument

The purpose of a Closing argument is to:

- summarise your case;

- highlight the evidence that supports your case; and
- make submissions (suggestions) on the principles of law that are relevant to the case.

It is your last opportunity to communicate with the Court about the decision, so you must present your case logically and clearly. A systematic way to do this is:

10.1. Start by setting out the issues

If you are the plaintiff or prosecution, you should aim to limit the issues to be proven to as few as possible and then show how the evidence brought before the Court proves those issues.

A defendant's advocate might try to create as many issues as possible. This will cast doubt as to whether the plaintiff or the prosecution has proven their case.

10.2. Sum up your evidence and argue the facts

Remind the Court of what the key witnesses said that proves your case, and of any other evidence that shows they are telling the truth (for example corroborating evidence, exhibits and admissions from the other side).

Identify the facts in dispute, and show how the evidence you have led indicates that your version of the facts is true.

10.3. Deal with the opposing evidence

Do not ignore evidence that does not suit you. If you can, explain the opposing evidence, point to weaknesses in it, or show why your evidence is more convincing.

Your weaknesses are the other side’s strengths. If you address your weaknesses, they are made less strong in the hands of the other side.

If there is conflicting evidence on a particular point from both sides which cannot be reconciled, you must persuade the judge as to why your witness should be believed as opposed to the other side’s witness.

10.4. Explain the law

Remind the court of previous decisions that help your case, and show how they apply to the proven facts of your case.

Discuss the prior decisions that favour your opponent's case and show the court why those decisions should not be applied to the facts in the trial.

10.5. Conclude

A good way to conclude your closing argument is to recall your opening statement, and show the judge that you have proved what you said you would at the beginning of the trial.

Bring all the parts of your case theory together and connect them together.

A closing argument does not need to be long to be effective. Advocates should aim to be efficient, and find a balance between covering the important parts of your case without trying to re-explain your whole case in the closing.

10.6. The art of persuasion

Persuasion in a court or tribunal depends on good communication. If you want to communicate you have to convince a person to listen to you. Remember that first impressions are valuable - so start confidently - make sure your voice is well modulated and able to be heard - and do not speak too quickly.

Try to maintain good eye contact with the witness and the Judge when addressing both and argue succinctly. This often requires the advocate to have a well outlined case theory, examination outlines, outlines for any argument to the court, and thoroughly documented and organised evidence. If your head is buried in your notes or outline, you will have a hard time communicating with the judge or witness. It is also critical that the advocate have a strong knowledge of the facts and key documents, so that he/she can speak directly to the evidence during examination and in response to any questions from the judge.

Good communication and persuasion does not necessarily mean telling the whole story from start to finish. An advocate may easily bore and tire a witness or judge by spending too much time on one subject, repeatedly asking the same questions, or taking too long to get to the point. As such, it is important to get out the necessary facts, but also to keep closely to what you are trying to prove or disprove and get to those issues fast enough so you do not lose the interest of the judge or exhaust the witness.

As a result, an outline for oral argument or witness examination need not flow in chronological order. For example, in a murder or vehicle speeding case, it may be more persuasive to begin with questions concerning the day of the incident. This will get the judge and witness engaged right from the beginning. The advocate may then go back later and fill in the details and background information necessary to support their case. In fact, advocates often use this as a preferred technique during cross examination, jumping around to points of interest and starting right into the heart of the issues, because it takes a witness by surprise and he/she will have to answer before they are ready.

On a fundamental level, persuasion is about creating a human connection with the listener – in this case the judge or witness. Typically, judges hear many cases day after day after day. Thus, the advocate must give the judge a reason to be interested in this case and to care about what they are saying. That is why a long line of questions for each witness concerning his/her schooling and work history (or other mundane areas of examination) may not be the best way to begin an examination unless it is required to get necessary facts into evidence.

Practice Tips for Persuasion

- Dress according to the norms and expectations of the judge and court.
- Always consider the audience and context, including the background and potential bias, constraints or influences of the witness or judge.
- Make eye contact and know the facts and arguments cold – do not read from your notes or outline.
- Be succinct and speak confidently. Avoid saying “I think” or “we believe” and state everything as a fact.
- Avoid verbal pauses such as “like,” “oh,” “um,” “uh,” or similar words that are often used to fill dead space while you are speaking.
- Create a short list of the few points you absolutely must get out, and refer to it as your argument nears its end.
- Modulate you’re the tone and pitch of your voice both for emphasis and to keep the witness and/or judge engaged.
- Stop speaking immediately when a judge asks a question. Never speak over a judge.
- Never interrupt a judge. Wait for the entire question.
- Do not display frustration by sighing, rolling your eyes, or shaking your head.
- Consider conceding on minor points (or simply move on) for the sake of time and credibility. I.e., choose your battles carefully.
- Do not make overly broad statements or generalizations that will be impossible to later defend.
- Do not argue with a witness – if a witness is wrong, allow the witness to discredit him/herself through a series of leading questions.
- Be aware of time limits and keep them in mind for planning your argument and when to move on and/or come back to the key points you must get out.
- Avoid distracting gestures or body movement. Use gestures or movement intentionally and with purpose.
- Find a place to put your hands and leave them there. Do not fidget. Stand tall and maintain good eye contact.
- Do not use sarcasm or indignation.
- When you do not know – it may at times be preferable to simply say so and then explain why the information is not relevant or provide a reasoned guess.
- Be professional and courteous to your opponent.

10.7. Proving your case

A prosecutor or advocate must prove his or her case using available evidence. The strength of the evidence to prove or disprove a case is called the ‘the burden of proof’’.

Typically, in a civil case the plaintiff is required to prove the case ‘on the balance of probabilities’, that is, by satisfying the court that their version of the facts is more probable than not. In a criminal case the prosecution has to convince the judge that the defendant is ‘guilty beyond reasonable doubt’. The prosecution bears a heavier burden of proof than a plaintiff in a civil case.

The defendant may also have the burden of proving things – such as the basis for one or more of his/her defences.

> **Example**
>
> If a witness says they were somewhere else at the time the offence was committed they have to prove this alibi; or if a statutory defence is provided for a breach of statute law.
>
> If the defendant only has to prove an alibi or statutory defence, they must do so on the balance of probabilities. It is only the prosecution in a criminal case, which must prove the case 'beyond reasonable doubt'.

What the prosecution (in a criminal case) and the plaintiff (in a civil case) have to prove are called the "elements". These elements are derived from the particular Acts of Parliament or case law. As a practical matter, it may be possible for the defence to succeed if they are able to defeat one key element of a claim. Thus, it is important to understand these elements, which will likely be integral to any theory of the case and related strategy for presentation.

As far as possible these matters for proof will be drawn to the attention of both sides in the case material for each round of the CLE Mock Pre-Trial Hearing Event. Once the elements are known, each side (plaintiff/prosecutor and defence) must prepare its theory of the case – how it is either going to prosecute or defend the case. The key questions which need to be asked to establish a good case theory and satisfy the relevant evidential burden are the following:

- What happened?
- Who was involved?
- When did it happen?
- Where did it happen?
- Why did it happen?
- Are there any applicable defences?
- Are there any weaknesses in this theory?

The "What", "Where" and "When" should be recorded in a detailed timeline. The "Who" should be recorded in a witness list. A good case theory has some emotional element which suggests the motive which supports what has happened. However, this case theory should be tested repeatedly against any possible weaknesses in the evidence. It is important to be realistic - base the case theory around a decision that is probable rather than simply possible.

The goal is to find a case theory which fits best with the evidence available and is most persuasive for your position (plaintiff/prosecutor or defence). Simple case theories are always preferable to complicated case theories. However, an advocate must always remember his/her duty to the court and may not advance a case theory that is not consistent with the facts.

Once a case theory has been identified by either side, the focus shifts to identifying how to present the witnesses and evidence in a way that will most support your case. Issues that may be considered in preparing to prove your theory of the case include the following:

- Witness selection and order – when telling your story who should testify first? Is there any witness that is not necessary or who you might chose not to examine?
- Presentation of the evidence – what are the key documents that support your case / defence? which witnesses may introduce these documents?

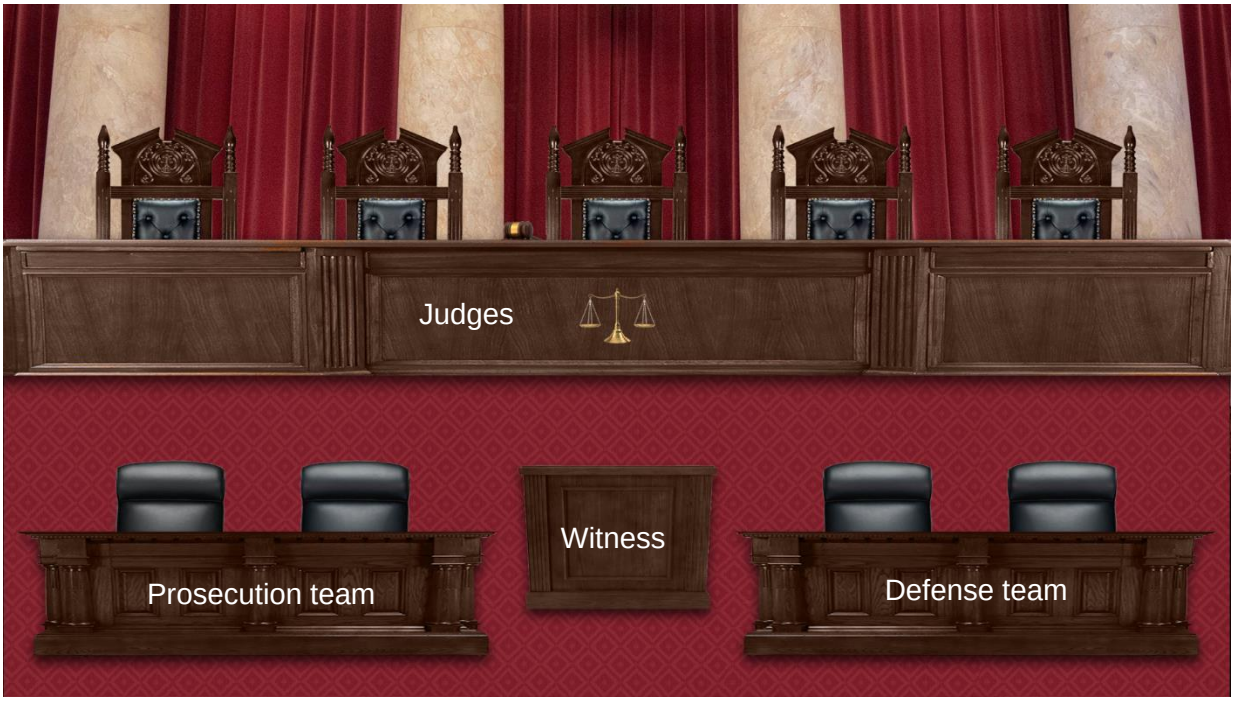
- Concessions – is there any benefit to conceding minor points so that they do not become a distraction? do you want to take the "sting" for any bad documents/information (admit it in your own words before the other side brings it up)?
- Key points for opening/closing argument – what are the key arguments, facts, documents that win the case for your side?
- Procedure – are there any rules, time limitations, or procedures that should be considered before putting on your case?
- Proving your case requires a combination of witnesses, evidence, legal procedure and rules, and legal strategy to present your theory of the case to the judge on why you have or the other side has not satisfied the applicable burden of proof.

10.8. Judge's Ability to Ask Questions

The judge may ask questions of either the Defence Advocate or the Prosecutor during their closing arguments. These questions should relate to points of law and fact that arise in the case packet.

In answering these questions, the participants should only use facts and laws that we have provided in the packet. No outside facts or laws should be used, nor should any case law be used outside of what has been provided within the case packet.

11. Court layout



12. General precedents

The following extracts of precedents and those provided in the case material for each trial may be used. Only these extracts are used for the CLE Mock Pre-Trial Hearing.

The burden of proof is the 'balance of probabilities'. This was described by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 372 as follows:

> *The…[standard of proof]…is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.*

13. A basic guide to professional ethics, courtesy and conduct

Advocates abide by standards of conduct, courtesy and ethics that must be observed for the proper administration of the legal system. Some of the more important ones are listed below.

An advocate's duty to the Court overrides all other duties (including the advocate's duty to their client).

13.1. Preparing for trial

Advocates must deal with witnesses in a manner that is consistent with their duty to the Court.

This means that, in preparing a witness to give evidence, an advocate must not:

- suggest to a witness that they should give false evidence;
- 'coach' a witness (i.e. suggest to a witness what the content of their evidence should be, or hint what might happen if certain evidence is given with the intention that the witness will change their evidence or give false evidence);
- suggest to a witness that they should speak to or collaborate with another witness or any other person about their evidence; or
- speak to a witness when they are giving evidence (e.g. during a Court adjournment).

It is important that advocates educate their witnesses about the importance of being honest to the Court.

13.2. In Court

13.2.1. Ethical duties to the Court

Prosecutors and advocates have a duty to assist the Court in the administration of justice and to conduct proceedings in Court openly and honestly.

This means that prosecutors and advocates should:

- conduct all proceedings in Court in a way that makes good use of the Court's time (i.e. is as fast, quick and inexpensive as possible); and

- ensure that the Court is not deliberately misled regarding the law that is applicable to the alleged offence or dispute, and bring any relevant law to the attention of the Judge.
- However, prosecutors and advocates must not:
- mislead the Court by presenting evidence that they know is not true. This means ensuring that the advocate must not state facts that they know to be untrue, not hold back facts which are relevant to the issues in the proceedings even if they may be harmful to the advocate's case;
- say in Court that any person is dishonest or fraudulent unless they are satisfied that there is evidence to support the allegation; or
- make any allegation in Court that is not supported by evidence, including during opening statements or closing argument or during cross examination.

13.2.2. Court etiquette

A prosecutor or advocate should not argue with the Judge. He/she is allowed to make submissions firmly but must do so courteously. A common phrase used is 'with respect...I submit ... '

A Judge in the Township Courts is referred to as 'Your Honour'. It is common to use this method of address fairly frequently, for example, when beginning any statement to the Judge or when replying to a question.

Whenever a prosecutor or advocate is speaking to the Judge he or she must stand. When the opposing advocate is speaking the former advocate must sit. This is important but can be a little tricky when making objections in chief examination or cross examination.

Prosecutors and advocates should remain behind the bar table and not wander around the courtroom (as is often seen on some television programs). Should a prosecutor or advocate wish to approach the witness in the witness box, permission should be asked of the Judge to do so.

Prosecutors and advocates must accept the Judge's ruling even though they may disagree with it. If a reply is called for it is usual to say, 'If your Honour pleases'.

If you are quoting reports in cases, do not use abbreviations. If, for example, you want to quote a case of *Smith v Jones* reported as (1942) 1 WLR 123 say, 'volume 1 of the Weekly Law Reports at page 123'. Your coach will help you if you have difficulty. If advocates are referring to what a particular judge said in a case, they should refer to the judge by his/her full name, for example, 'Justice Williams', not 'Williams J'.

14. Glossary of legal terms

Adjournment	When a case is not ready to proceed on the day that it is listed, it might be postponed (**adjourned**) to another day. Also if court proceedings have to be stopped for any reason they are "adjourned". If a criminal matter is adjourned and the defendant has not been granted bail he or she is "remanded" to appear on the adjourned day.
Advocate	An advocate is someone admitted to the roll of advocates. Advocates have full rights of audience in all courts and tribunals.
Bail	When a person is charged with a criminal offence he or she will usually remain in custody until the hearing of the case unless a Judge grants bail. This requires a formal promise that he or she will appear at the hearing. As a guarantee that he or she will appear, a sum of money may have to be paid to the court that is refunded if the defendant appears at the hearing but is forfeited if he or she does not.
Civil Proceedings	Proceedings brought by the state or a private person to redress a wrong that has been suffered and is not covered by a law that imposes a penalty. The most common civil proceedings involve recovery of debts, claims for damages for injury to a person or property and claims relating to breach of contract.
Common Law	Law in Common Law legal systems is made in two ways. The Parliament passes laws (which are known as statute law) or the law is developed by judges based on previous cases (the **Common Law**).
Committal Proceedings	When a person is charged with a serious criminal offence a Judge considers all the evidence presented by the prosecution. The defendant does not usually present his or her side of the story at these committal proceedings, reserving his or her defence until the trial.
Contract	A contract is an agreement between two or more parties that is enforceable. Generally, to be enforceable, there must be an offer by one party, an acceptance of that offer by the other party and "valuable consideration". Valuable consideration is what is given or done in return for the promise. The usual consideration given is money, goods or some promise to do something or refrain from doing something. A contract may be oral or in writing.
Criminal Proceedings	Proceedings usually brought by the State (often the police) where there has been a breach of the law; a penalty is imposed under Myanmar's penal code for that breach.
Defendant	A defendant is a party against whom an action or charge has been brought. Once a defendant in criminal proceedings is committed for trial before a judge, he or she is referred to as "the accused".
Evidence	The information put before the Judge that supports the truth or existence of a fact, for the court to consider when making a decision. Evidence may be oral (from the witness) or contained in documents or objects.

Exhibits	Things (documents, articles of clothing, equipment, etc) that are tendered to the Court and admitted as evidence by the Judge.
Judge	A person appointed to determine disputes between parties.
Jury	Members of the community who determine questions as to what happened (fact). There are twelve jurors in a criminal trial and usually four in civil proceedings.
Mens Rea	An intent to commit a crime.
Motion to Exclude Evidence	If an Advocate or prosecutor wants the Court to exclude certain types of evidence, they usually file what is called a Motion to Exclude Evidence.
Negligence	Negligence involves the failure of one party to exercise proper care towards another party; resulting in the other party suffering an injury or loss. The monetary compensation for the injury or loss is referred to as a "damage award".
Objection	An objection is a formal protest raised in court during a trial to disallow evidence or conduct which would be against the rules of evidence or other procedural law. An evidentiary objection may be raised on the following grounds (see section): • relevance; • opinion; • hearsay; • character evidence; or • direct speech. A procedural objection may be raised on the following grounds: • leading or double questions; • failure to put contested evidence to a witness in cross examination; or • harassing or arguing with witnesses.
Plaintiff	A person who commences a civil action.
Precedent	A principle established in a past case. A Judge is bound to follow a decision in a previous case (in which the facts are similar) where the court handing down the decision is higher in the court system. Sometimes a precedent of another court that is not binding will be followed by the court on the basis that it is persuasive because of the status of the court or the similarity of the law.
Preponderance of Evidence (Balance of Probabilities)	One type of evidentiary standard used in a burden of proof analysis. Under the **preponderance** standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.
Pre-Trial Hearing	A Pre-Trial Hearing is not the trial itself. It is a hearing where a Court is asked to make a decision on some legal or factual issue before a case goes to trial.

Pre-Trial Motions	A pre-trial motion is simply an application to the Court to hear an argument about an issue before the trial itself commences
Prosecutor	A person who presents evidence and conducts the case against an accused person in criminal proceedings.
Trial	This word is commonly used to cover legal proceedings.
Witness	A person who can give evidence in relation to the facts in issue during legal proceedings.