(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or

(b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

Restatement (Second) of Torts § 876(b) (1979)

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . .

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . .

"Comment d. Advice or encouragement to act operates as a moral support to a tort-feasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tort-feasor and is responsible for the consequences of the other's act. . . .

"Comment d, illustration 3. A and B participate in a riot in which B, although throwing no rocks himself, encourages A to throw rocks. One of the rocks strikes C, a bystander. B is subject to liability to C.

"Comment d, illustration 4. A, a policeman, advises other policemen to use illegal methods of coercion upon B. A is subject to liability to B for batteries committed in accordance with the advice."

V. THE FORM AND SUBSTANCE OF A TRIAL

A. A Civil Case - Background Information on the Law

In civil law, when someone does something wrong it is known as a tort. In this case the plaintiff, Johnson, alleges that a tort has been committed and is suing under the legal theory of wrongful death.

1. A Wrongful Death Cause of Action

A "wrongful death" occurs when a person is killed due to the negligence or misconduct of another. The plaintiff has the burden of proof. This means that Johnson has the obligation to offer evidence that will prove each element of the claim. These elements include:

- the death of a human being,
- caused by the negligence or misconduct of another (the defendant),
- the victim &/or survivor (plaintiff) has suffered loss as a result of the death.

(Note that a negligence action requires proof its own elements some of which overlap with those found in the wrongful death claim:

1. duty - the defendant owed a duty of care to the defendant
2. breach of duty – that duty was violated, or breached, by the defendant's conduct,
3. causation – the defendant's conduct caused the plaintiff's harm, and
4. damages – the plaintiff suffered actual damages.)

The plaintiff must prove each part. If the plaintiff fails to prove even one of the elements above, the defendant will win.

2. Defenses Against a Wrongful Death Action

For the defendant to prevail, he or she has different options. One is by showing that at least one of the elements above has not been proven. Other defenses in this case could be comparative negligence and assumption of risk.

The defendant will not be held liable if his or her actions are not the **proximate cause** of the harm. The proximate cause of an injury is the primary cause; it is the cause that produces the injury. (When pedestrian was struck by automobile driven by a drunk driver, for example, the driver's actions are the obvious proximate cause of injury.) In situations where the defendant's action plays a *substantial* part in causing the harm and that harm might have been reasonably anticipated as a natural consequence of the act, then it may also be considered the proximate cause. (Examples: a pedestrian is struck by a runaway car when the car's emergency breaks failed when parked on a hill, the car's owner may be liable. What if: 1) the owner knew the car had faulty breaks, or 2) the car was pushed downhill when hit by another speeding car?)

Comparative negligence means dividing the loss according to the degree to which each party is at fault. If the defendant can prove that more than 50% of the fault lies with the plaintiff (Leon Johnson, the deceased), then the plaintiff gets no damages and the defense wins.

Another defense, called **assumption of the risk**, may be used by the defense when the plaintiff (here, Leon Johnson, the deceased) knew there was a risk but proceeded with the risky behavior anyway. This defense can be used successfully only when the plaintiff had full knowledge of and appreciated the danger, yet voluntarily exposed himself to the risk.

3. Proof by a Preponderance of Evidence

The standard of proof in a civil case is the preponderance of the evidence. This standard requires that more than 50% of the weight of the evidence be in favor of the winning party -- the mere tipping of the scales to one side or the other. This means that the plaintiff only has to show that it is more likely than not that Leon Johnson's injuries and resulting death occurred as a result of either or both defendant's action or inaction. Likewise, the defendants need only prove that Johnson's death occurred because of his own actions or inactions.

B. Role Descriptions

1. Attorneys

Trial attorneys control the presentation of evidence at trial and argue the merits of their side of the case. They introduce evidence and question witnesses to bring out the facts surrounding the allegations.

Demeanor of counsel is most important. Generally, all attorneys should be sympathetic and supportive of their own witnesses. In the same vein, it is bad manners and unethical to be sarcastic, snide, hostile or contemptuous of the other side. The element of surprise may be a valuable attorney's tool, but it is best achieved by being friendly and winning over everybody in the courtroom.

The plaintiff's attorneys present the case for Martha Johnson. By questioning witnesses, they will try to convince the jury that the defendants, Brewster, Miller, and WASP, are responsible for Leon Johnson's death.

The defense attorneys present the case for the defendant, T. Brewster, Michael Miller, and WASP. They will offer their own witnesses to present the defendants' version of the facts. The defense may undermine the plaintiff's case by showing that their witnesses cannot be depended upon or that their testimony does not make sense or is seriously inconsistent.

Trial attorneys on both sides will:

- make opening statements and closing arguments
- conduct direct examination, cross examination conduct redirect and re-cross if necessary
- make appropriate objections (note: only the direct and cross-examining attorneys for a particular witness may make objections during that testimony)
- do the necessary research and be prepared to act as a substitute for an other attorneys

a. Opening Statement

The opening statement outlines the case it is intended to present. The plaintiff delivers the first opening statement. A good opening statement should explain what the attorney plans to prove, how it will be proven, and mention the burden of proof – the amount of evidence needed to prove a fact (in a civil case, preponderance of the evidence). It should be presented in an orderly sequence that is easy to understand.

Begin your statement with a formal address to the judge:

> "Your Honor, my name is (full name), representing the plaintiff/defendant in this case" or
> "You Honor, my name is (full name), counsel for the plaintiff/defendant in this action."

Proper phrasing in an opening statement includes:

> "The evidence will indicate that ..."
> "The facts will show that ..."
> "Witnesses (full names) will be called to tell ..."
> "The defendant will testify that ..."

Tips: You should appear confident, make eye contact with the judges, and use the future tense in describing what your side will present. Do not read you notes word for word – use your notes sparingly and only for reference.

b. Direct Examination

Attorneys conduct direct examination of their own witnesses to bring out the facts of the case. Direct examination should:

- call for answers based on information provided in the case materials
- reveal all of the facts favorable to your position
- ask questions that allow the witness to tell the story. Do not ask leading questions which call for only "yes" or "no" answers – leading questions are only appropriate during cross-examination
- make the witness seem believable
- keep the witness from rambling about unimportant matters

Call for the witness with a formal request:

> "Your Honor, I would like to call (full name of witness) to the stand."

The clerk will swear in the witness before you ask your first question.

You may wish to ask some introductory questions of the witness to make him/her feel comfortable. Appropriate introductory questions might include:

- the witness' name
- length of residence or present employment, if this information helps to establish the

witness as an expert

Proper phrasing of questions on direct include:

"Could you please tell the court what occurred on (date)?"
"Please describe how you know the plaintiff."
"Did anyone do anything while you waited?"

Conclude your direct examination with:

"Thank you Mr./s. _____. That will be all, your Honor."

Tips: Isolate exactly what information each witness can contribute to proving your case and prepare a series of clear and simple questions designed to obtain that information. Be sure all items you need to prove your case will be presented through your witnesses. Never ask questions when you do not know the answer! Listen to the answers -- if you need a moment to think, it is okay to ask the judge for a moment to collect your thoughts or to discuss a point with co-counsel.

c. Cross Examination

See explanations, examples, and tips for Rule 611.

d. Redirect and Re-Cross Examination

See explanation and note to Rule 40.

e. Closing Arguments

See explanation to Rule 41.

2. Witnesses

See explanation to Rule 3.

3. Court Clerk, Bailiff, Team Manager

It is recommended that you provide two separate people for these roles; if you use only one, then that person **must** be prepared to perform as clerk and bailiff in every trial. In addition to the individual clerk and bailiff duties outlined below, this person can act as your **team manager**. S/he could be responsible for keeping a list of phone numbers of all team members and ensuring that everyone is informed of the schedule of meetings. In case of illness or absence, the manager could also keep a record of all witness testimony and a copy of all attorneys' notes so that someone else may fill in if necessary.

When evaluating the team performance/participation category in the scoresheet, judges will incorporate the contributions of the clerk and bailiff in the point assessment.

The court clerk and bailiff aid the judge in conduction of the trial. For the purpose of the

competition, the duties described below are assigned to the roles of clerk and bailiff.

The **plaintiff** will be expected to provide the **clerk** for any given trial. **Defense** will provide the **bailiff**.

a. Duties of the Clerk

When the judge arrives in the courtroom introduce yourself and explain that you will assist as the court clerk. The clerk's duties are as follows:

1. Roster and rules of competition: The clerk is responsible for bringing a roster of students and their roles to each trial round. You should have enough copies to be able to give a roster to each judge in every round as well as a few extras. Use the roster form in the mock trial packet. In addition, the clerk is responsible for bringing to the trial a copy of the "Rules of Competition." In the event that questions arise and the judge needs further clarification, the clerk is to provide this copy to the judge.

2. Swear in the witnesses: Every witness should be sworn in as follows:

> "Do you promise that the testimony you are about to give will faithfully and truthfully conform the facts and rules of the Mock Trial Competition?"
>
> Witness responds, "I do."
>
> Clerk then says, "Please be seated and state your name for the court and spell your last name."

3. Mark exhibits for attorneys.

An experienced clerk is critical to the success of a trial and points will be given on his/her performance.

b. Duties of the Bailiff

When the judge arrives in the courtroom, introduce yourself and explain that you will assist as the court bailiff. The bailiff's duties are to call the court to order and to keep time during the trial.

Call to Order: As the judges enter the courtroom, say,

> "All rise. The mock trial circuit court, the Honorable Judge _____ presiding, is now in session. Please be seated and come to order."

If the judge calls a recess during the trial, say "all rise" as the judges leave the courtroom and again as they re-enter.

Timekeeping. The bailiff is responsible for bringing a stopwatch to the trial. Be sure to practice with it and know how to use it before the competition. Follow the time limits set for each

segment of the mock trial and keep track of the time used and time left on the time sheet provided in the mock trial materials.

Time should stop when attorneys make objections. Restart once the judge has ruled on the objection and the next question is asked. You should also stop the time if the judge questions a witness or attorney.

After each witness has finished his/her testimony announce the time remaining, e.g., if after direct examination to two witnesses, the plaintiff has used ten minutes, announce "10 minutes remaining" (20 minutes total allowed for direct/redirect, less the ten minutes already used). When the time has run out for any segment of the trial, announce "Time!" and hold up the "0" card. After each witness has completed his/her testimony, mark on the time sheet the time to the nearest one-half minute. When three minutes are left, bailiff will hold up "3" minute card, then again at "1" minute and finally at "0" minutes. Be sure time cards are visible to all the judges as well as to the attorneys when you hold them up.

Time sheets will be provided at the initial student orientation. You will be given enough time sheets for all rounds. It is your responsibility to bring them to each round. Time cards (3, 1, 0 minute) will be provided in each courtroom. Leave them in the courtroom for the next trial round.

An experienced bailiff is critical to the success of a trial and points will be given on his/her performance.

VI. RULES OF THE COMPETITION

A. The Problem

Rule 1. Rules

All trials will be governed by the Rules of the Oregon High School Mock Trial Competition and the Federal Rules of Evidence – Mock Trial Version.

Rules of the competition as well as proper rules of courthouse and courtroom decorum and security must be followed. Classroom Law Project has the discretion to impose sanctions, up to and including forfeiture or disqualification, for any misconduct, flagrant rule violations, or breaches of decorum that affect the conduct of a trial or that impugn the reputation or integrity of any team, school, participant, court officer, judge, or mock trial program. Questions or interpretations of these rules are within the discretion of Classroom Law Project; its decision is final.

Rule 2. The Problem

The problem is a fact pattern which contains statement of fact, witness statements, exhibits, etc. Stipulations may not be disputed at trial. Witness statements may not be altered.

Rule 3. Witness Bound by Statements

Each witness is bound by the facts contained in his/her own witness statement, also known as an affidavit, and/or any necessary documentation relevant to his/her testimony. Fair extrapolations may be allowed, provided reasonable inference may be made from the witness' statement. If, in direct examination, an attorney asks a question which calls for extrapolated information pivotal to the facts at issue, the information is subject to objection under Rule 4, unfair extrapolation.

If in cross-examination, an attorney asks for unknown information, the witness may respond, "I don't know," or may offer a response that is consistent with the witness' statement or affidavit and does not materially affect the witness/testimony.

A witness is **not** bound by facts contained in other witness statements.

> *Explanation:* Witnesses will supply the facts in the case. Witnesses may testify only to facts stated in or reasonably implied from his or her own witness statements or fact situation. On direct examination, when your side's attorney is asking you questions you should be prepared to tell your story. Learn the case thoroughly, especially your own witness statement. Know the questions your attorney will ask you and prepare clear and convincing answers that contain the information that your attorney is trying to get you to say. However, do not recite your witness statement verbatim. Be able to put it into your own words. Be sure that your testimony is never inconsistent with, nor a material departure from, the facts in your affidavit.
>
> During cross-examination, anticipate what you will be asked and prepare your answers accordingly. Isolate all the possible weaknesses, inconsistencies, problems in your testimony and be prepared to explain them as best you can. However, be sure that your testimony is never inconsistent with, nor a material departure from, the facts in your statement. *Witnesses can be impeached if they contradict the material contained in their witness statements (see FRE 607).*
>
> The stipulated facts are a set of indisputable facts from which witnesses and attorneys may draw reasonable inferences. The witness statements contained should be viewed as signed statements made in sworn depositions. If you are asked a question calling for an answer that cannot reasonably be inferred from the materials provided, you must reply, "I don't know" or "I can't remember." It is up to the attorney to make the appropriate objection when witnesses are asked to testify about something which is not generally known, or cannot be reasonably inferred from the fact situation or a signed witness statement.

Rule 4. Unfair Extrapolation

Attorneys shall not ask questions calling for information outside the scope of the case materials or requesting unfair extrapolation. Unfair extrapolations are best attacked through impeachment and closing arguments and are to be dealt with in the course of the trial. A fair extrapolation is one that is neutral.

NOT USING

Rule 40. Redirect/Re-Cross

Redirect and re-cross examinations are permitted, provided they conform to the restrictions in Rule 611(d) in the Federal Rules of Evidence - Mock Trial Version. **For both redirect and re-cross, attorneys are limited two questions each.**

> *Explanation:* Following cross-examination, the counsel who called the witness may conduct re-direct examination. Attorneys conduct re-direct examination to clarify new (unexpected) issues or facts brought out in the immediately preceding cross-examination only; they may not bring up other issues. Attorneys may or may not want to conduct re-direct examination. If an attorney asks questions beyond the issues raised on cross, they may be objected to as "outside the scope of cross-examination." It is sometimes more beneficial not to conduct it for a particular witness. The attorneys will have to pay close attention to what is said during the cross-examination of their witnesses, so that they may decide whether it is necessary to conduct re-direct. Once re-direct is finished the cross examining attorney may conduct re-cross to clarify issues brought out in the immediately preceding re-direct examination only.

If the credibility or reputation for truthfulness of the witness has been attacked on cross-examination, during re-direct the attorney whose witness has been damaged may wish to "save" the witness. These questions should be limited to the damage the attorney thinks has been done and should enhance the witness' truthtelling image in the eyes of the court. Work closely with your attorney coach on re-direct and re-cross strategies. Remember that time will be running during both re-direct and re-cross and may take away from the time needed to question other witnesses.

> *Note:* Time used for redirect and re-cross **will be deducted** from total time allotted for direct and cross-examination for each side.

D. Closing Arguments

Rule 41. Scope of Closing Arguments

Closing arguments must be based on the actual evidence and testimony presented during the trial.

Explanation: a good closing argument summarizes the case in the light most favorable to your position. The plaintiff delivers the first closing argument. The closing argument of the defense concludes the presentation. A good closing should:

- be spontaneous, synthesize what actually happened in court rather than being re-packaged;
- be emotionally charged and strongly appealing (unlike the calm opening statement);
- emphasize the facts which support the claims of your side, but not raise any new facts, by reviewing the witnesses' testimony and physical evidence;
- outline the strengths of your side's witnesses and the weaknesses of the other side's witnesses;
- isolate the issues and describe briefly how your presentation addressed these issues
- summarize the favorable testimony
- attempt to reconcile inconsistencies that might hurt your side

- be well-organized, clear and persuasive (start and end with your strongest point);
- the plaintiff should emphasize that it has proven liability/negligence by a preponderance of the evidence;
- the defense should raise questions that suggest the continued existence of doubt.
- weave legal points of authority with the facts.

Proper phrasing includes:

"The evidence has clearly shown that ..."
"Based on this testimony, there can be no doubt that ..."
"The plaintiff has failed to prove that ..."
"The defense would have you believe that ..."

Plaintiff should conclude the closing argument with an appeal to find liability/negligence against the defendant. And the defense should say there is no liability/negligence.

STOP

E. CRITIQUE

Rule 42. The Critique

The judging panel is allowed 15 minutes for critiquing. As a part of the bailiff's timekeeping duties, he or she shall monitor the critique following the trial. Presiding judges are to limit critique sessions to the 15 minutes total (5 minutes per judge) time allotted. The bailiff shall inform the judges if their time has expired.

Note: Judges' 15 minutes is not included in 40 minutes allotted to each side of the case.

VIII. FEDERAL RULES OF EVIDENCE - MOCK TRIAL VERSION

To assure each party of a fair hearing, certain rules have been developed to govern the types of evidence that may be introduced, as well as the manner in which evidence may be presented. These rules are called the "rules of evidence." The attorneys and the judge are responsible for enforcing these rules. Before the judge can apply a rule of evidence, an attorney must ask the judge to do so. Attorneys do this by making "objections" to the evidence or procedure employed by the opposing side. When an objection is raised, the attorney who asked the question that is being challenged will usually be asked by the judge why the question was not in violation of the rules of evidence.

The rules of evidence used in real trials can be very complicated. A few of the most important rules of evidence have been adapted for mock trial purposes. These rules are designed to ensure that all parties receive a fair hearing and to exclude evidence deemed irrelevant, incompetent, untrustworthy, unduly prejudicial, or otherwise improper. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the evidence will probably be allowed by the judge. The burden is on the mock trial team to know the Federal Rules of Evidence (Mock Trial Version) and to be able to use them to protect their client and fairly limit the actions of opposing counsel and their witnesses.

For purposes of mock trial competition, the Rules of Evidence have been modified and

Rule 409. Payment of Medical or Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 411. Liability Insurance (civil case only)

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Article VI. Witnesses

Rule 601. General Rule of Competency

Every person is competent to be a witness.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless *the witness has personal knowledge of the matter.* Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, related to opinion testimony by expert witnesses. (See Rule 3.)

> *Example*: "I know Harry well enough to know that two beers usually make him drunk, so I'm sure he was drunk that night, too."

Rule 607. Who May Impeach

The credibility of a witness may be attacked or challenged by any party, including the party calling the witness.

> *Explanation:* On cross-examination, an attorney wants to show that the witness should not be believed. This is best accomplished through a process called "impeachment," which may use one of the following tactics: (1) asking questions about prior conduct of the witness that makes the witness' truthfulness doubtful (e.g. "isn't it true that you once lost a job because you falsified expense reports?"); (2) asking about evidence of certain types of criminal convictions (e.g. "you were convicted of shoplifting, weren't you?); or (3) showing that the witness has contradicted a prior statement, particularly one made by the witness in an affidavit.
>
> Witness statements in the Mock Trial materials are considered to be affidavits.
>
> In order to impeach the witness by comparing information in the affidavit to the witness' testimony, attorneys should use this procedure:
> Step 1: Introduce the affidavit for identification (see Rule 38).
> Step 2: Repeat the statement the witness made on direct or cross-examination that contradicts the affidavit.

Example: "Now, Mrs. Burns, on direct examination you testified that you were out of town on the night in question, didn't you?"
Witness responds, "yes."

Step 3: Ask the witness to read from his or her affidavit the part that contradicts the statement made on direct examination.

Example: "All right, Mrs. Burns, will you read paragraph three?" Witness reads, "Harry and I decided to stay in town and go to the theater."

Step 4: Dramatize the conflict in the statements. Remember, the point of this line of questioning is to demonstrate the contradiction in the statements, not to determine whether Mrs. Burns was in town or not.

Example: "So, Mrs. Burns, you testified that you were *out* of town in the night in question didn't you?"
"Yes."
"Yet in your affidavit you said you were *in* town, didn't you?"
"Yes."

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. – The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence, or otherwise.

(b) Specific instances of conduct. – Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be asked on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character of truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination with respect to matters related only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime. Not applicable.

Rule 610. Religious Beliefs or Opinions. Not applicable.

READ

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by Court. -- The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to:

(1) make the questioning and presentation effective for ascertaining the truth,

(2) to avoid needless use of time, and
(3) protect witnesses from harassment or undue embarrassment.

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

Explanation: Cross examination follows the opposing attorney's direct examination of his/her witness. Attorneys conduct cross examination to explore weaknesses in the opponent's case, test the witness's credibility, and establish some of the facts of the cross-examiner's case whenever possible. Cross examination should:

- call for answers based on information given in witness statements or fact situation;
- use leading questions which are designed to get "yes" or "no" answers;
- never give the witness a chance to unpleasantly surprise the attorney;
- include questions that show the witness is prejudiced or biased or has a personal interest in the outcome of the case;
- include questions that show an expert witness or even a lay witness who has testified to an opinion is not competent or qualified due to lack of training or experience;

Examples of proper questions include: "Isn't it a fact that ...?" "Wouldn't you agree that ...?" "Don't you think that ...?"

Cross examination should conclude with:
"Thank you Mr./s _____ (last name). That will be all, your Honor."

Tips: Be relaxed and ready to adapt your prepared questions to the actual testimony given during direct examination; always listen to the witness's answer; avoid giving the witness an opportunity to re-emphasize the points made against your case during direct examination; don't harass or attempt to intimidate the witness; and don't quarrel with the witness. **Be brief; ask only questions to which you already know the answer.**

(c) Leading questions. -- Leading questions are **not** permitted on direct examination of a witness (except as may be necessary to develop the witness' testimony). Leading questions **are** permitted on cross examination.

Explanation: A "leading" question is one that suggests the answer desired by the questioner, usually by stating some facts not previously discussed and then asking the witness to give a yes or no answer.
Example: "So, Mr. Smith, you took Ms. Jones to a movie that night, didn't you?" This is an appropriate question for cross-examination but not direct or re-direct.

(d) Redirect/Re-cross. -- After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on re-cross, but such questions must be limited to matters raised on redirect examination and should avoid repetition. **For both redirect and re-cross, attorneys are limited to two questions each.**

Explanation: A short re-direct examination will be allowed following cross-examination

if an attorney desires, and re-cross may follow re-direct. But in both instances, questions must be on a subjects raised in the immediately preceding testimony. If an attorney asks questions on topics not raised earlier, the objection should be "beyond the scope of re-direct/cross." See Rule 44 for more discussion of redirect and re-cross.

Article VII. Opinions and Expert Testimony

Rule 701. Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Explanation: Unless a witness is qualified as an expert in the appropriate field, such as medicine or ballistics, the witness may not give an opinion about matters relating to that field. But a witness may give an opinion on his/her perceptions if it helps the case.
Example - inadmissible lay opinion testimony: "The doctor put my cast on wrong. That's why I have a limp now."
Example - admissible lay opinion testimony: "He seemed to be driving pretty fast for a residential street."

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

Note: Attorneys should qualify a witness as an expert by asking questions from the list suggested above.
Note: Witnesses, including experts, cannot give opinions on the ultimate issue of the case, that is, whether the plaintiff or defendant was responsible. This is a matter for the judge or jury to decide.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the field at in forming opinions or inferences, the facts of data need not be admissible in evidence.

Explanation: Unlike lay witnesses who must base their opinions on what they actually see and hear, expert witnesses can base their opinions on what they have read in articles, texts, or records they were asked to review by a lawyer, or other documents which may not actually be admitted into evidence at the trial. **These records or documents may include affidavits made by other witnesses.**

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference

testimony otherwise admissible is not objectionable because it embraces an issue to be decided by the trier of fact. (b) In a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

Note: Other than testimony of guilt or innocence in a criminal case, opinions on the ultimate issue are allowed; however, opinions on the ultimate issue must pass the requirements of Rules 701 and 702 that opinions be helpful to the jury, and the requirement of Rule 403 that evidence not waste the court's time. Opinions that merely tell the jury what result to reach are not helpful to the jury and waste the court's time.

STOP

Article VIII. Hearsay

Rule 801. Definitions

The following definitions apply under this article:
(a) Statement -- A *statement* is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant -- A *declarant* is a person who makes a statement.
(c) Hearsay -- *Hearsay* is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Explanation: If a witness tries to repeat what someone else has said, the witness is usually stopped from doing so by the hearsay rule. Hearsay is a statement made by someone other than the witness testifying. Because the statement was made outside the courtroom, usually a long time before the trial, it is called an "out-of-court statement." The hearsay rule also applies to written statements. The person who made the statement is referred to as the "declarant." Because the declarant is not the one testifying in court under oath, the declarant's statement is not considered reliable.

Example: Witness testifies in court, "Harry told me the blue car was speeding." What Harry said is hearsay because he is not the one testifying. He is not under oath, cannot be cross-examined, and his demeanor cannot be assessed by the judge or jury. Further, the witness repeating Harry's statement might be distorting or misinterpreting what Harry actually said. For these reasons, Harry's statement, as repeated by the witness, is not reliable and therefore not admissible. The same is true if Harry's prior written statement was offered.

Only out-of-court statements which are offered to prove what is said in the statements are considered hearsay. For example, a letter that is an out of court statement is not hearsay if it is offered to show that the person who wrote the letter was acquainted with the person who received it. But if the letter was offered to prove that what was said in the letter was true, it would be hearsay.

(d) Statements which are not hearsay -- A statement is not hearsay if:
(1) Prior statement by witness -- the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is
(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
(C) one of identification or a person made after perceiving the person; or

Explanation: If any witness testifies at trial, and the testimony is different from what the witness said previously, the cross-examining lawyer can bring out the inconsistency. In the witnesses' statements in the mock trial materials (considered to be affidavits), prior inconsistent statements may be found (see Impeachment Rule 607).

(2) Admission by a party-opponent -- The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course in furtherance of the conspiracy.

Explanation: A statement made previously by a party (either the plaintiff or defendant) is admissible against that party when offered by the other side. Admissions may be found in the plaintiff's or defendant's own witness statements. They may also be in the form of spoken statements made to other witnesses.

Rule 802. Hearsay Rule

Hearsay is not admissible, except as provided by these rules.

Rule 803. Hearsay Exceptions, Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) Present sense impression -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Example: "As the car drove by Janet said, 'Wow, that car is really speeding.' "

(2) Excited utterance -- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Example: A witness testifies, "Mary came running out of the store and said, 'Carl has shot Robert!' "

(3) Then existing mental, emotional, or physical conditions -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory of belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of a declarant's will.