VICTORIAN BAR WITNESS EXAMINATION COMPETITION 2017 GUIDEBOOK

VICTORIAN BAR

MU LSS

Welcome to the Witness Examination Competition 2017!

The Witness Examination Competition offers a fantastic opportunity for students to develop their skills in the field of advocacy. Whether you are an aspiring barrister, or simply interested in developing your ability in the art of persuasion, this competition provides an exciting and competitive medium in which to practice your craft.

This year, we are extremely excited to work alongside with our sponsor, Victorian Bar. On behalf of the LSS, we would like to thank them for their continuous support.

This Guidebook provides an overview of the competition, including rules, procedures and formalities. Please ensure both team members have thoroughly read through the Witness Examination Guidebook and understand its contents.

If you have any questions or concerns please feel free to contact the Witness Examination Competition Officers 2017, Ruben Clark or Elif Sekercioglu at lss-witness@lists.unimelb.edu.au.

Enjoy the competition and we look forward to hearing about your success at trial!

Ruben Clark

Elif Sekercioglu

WHAT IS WITNESS EXAMINATION?

The Witness Examination Competition is a simulated civil or criminal trial.

Teams consist of two students: one barrister and one non-competitive witness. Teammates may alternate or swap roles for different rounds as desired, or may choose instead to focus on one role each for the duration of the competition.

Teams will be required to develop a theory of the case and to present this case to the judge.

As the barrister, you will act as counsel for either the prosecution or defence. Your task is to ascertain the facts of the case through the examination and cross-examination of witnesses.

As a witness, you must memorise the facts of the case prior to trial and must testify in accordance with those facts. The witness is a non-competitive witness, meaning that they must be cooperative for both the defence and prosecution. *Witnesses will not be permitted to bring any written materials with them to the witness stand – including the witness statements and any agreed facts.*

WARNING: Teams must not create facts that are beyond the scope of those provided. Nor are teams to bring in any 'exhibits'. The nature of the competition is such that the scenarios presented may at times be factually vague. The strongest teams will be able to justify or exploit such vague facts or omissions as required rather than concoct facts to fill-in the gaps, as doing so might unfairly shift the balance of the competition. However, where counsel questions a witness in cross-examination on an issue that is not dealt with by the facts, the witness is of course at leave to respond in a manner that reflects a *foreseeable extension* of the problem. Teams will be penalised through a deduction of points for inferring facts that affect the opposing team.

HOW DOES IT WORK?

A problem case will be sent out to the nominated first team member of each team approximately 48 hours prior to the competition. The provided case will include any relevant law together with two witness statements. These statements will tell two different accounts of the same events, and the facts they contain will form the basis of each team's case theory.

Once the problem is received, the teams should start working together to prepare their case for trial. Counsel should discuss the case with their witness to ensure that both are familiar with the evidence and address any issues that may arise from the witness statements. Witnesses must adhere to facts outlined in the statement and additional facts must not be made up.

If there are any queries or concerns about the problem, please don't hesitate to contact Ruben Clark and Elif Sekercioglu at lss-witness@lists.unimelb.edu.au.

PROCEDURE: STRUCTURE OF TRIAL

The trial will run according to the following schedule:

1. Appearances (1 min)

2. Opening by Prosecution Counsel (2 mins)

3. Opening by Defence Counsel (2 mins)

4. Examination in Chief by the Prosecution (10 mins)

5. Cross Examination by the Defence (15 mins)

6. Examination in Chief by the Defence (10 mins)

7. Cross Examination by the Prosecution (15 mins)

8. Summation by the Prosecution (3 mins)

9. Summation by the Defence (3 mins)

PLEASE NOTE: Times given are guides to the upper-limits, and points will typically not be deducted for going slightly over time *per se*. There is no need to draw out a cross-examination for 15 minutes if it can completed more effectively in five. Conversely, if your chief gets to 15-20 minutes, then this will indicate a failure to adequately prepare, and points may be deducted for that failure (rather than arbitrary deductions for running over time).

1. Appearances (1 min)

The trial begins when the judge asks for 'appearances' whereby prosecution counsel stands to introduce him- or herself, and defence counsel then does likewise. The correct form for appearances in the Witness Examination Competitions is as follows: '*May it please the court, my name is [John Smith] and I appear on behalf of the Director of Public Prosecutions/the Defendant*.'

2. Opening by Prosecution/Plaintiff Counsel (2 mins)

This is counsel's opportunity to present their construction of the case to the judge in accordance with their case theory (see page 8 for more about case theories). Be clear, confident and concise, and structure your speech logically. Your address should not involve any argument but should be structured and spoken in a persuasive manner. A well-structured opening will not merely outline a list of relevant facts or items of evidence, but will be framed as a narrative. This narrative must fit with your case theory and should set out the undisputed facts whilst also defining the issues to be tried. As a narrative, counsel should strive engage the interest of the judge, and to this end should consider the manner of storytelling including point-of-view and chronology.

3. Opening by Defence Counsel (2 mins)

Similar to the opening by prosecution counsel above. However, it may not always be appropriate for defence counsel to set out a counter-narrative, as this would require counsel to assume the onus of

proof. The onus lies in the defence's favour, so counsel should try to preserve this advantage. Focus on re-framing the issues in dispute by reference to the prosecution's onus to satisfy the judge *beyond reasonable doubt*.

Following opening by defence counsel, the judge will then request that counsel for the prosecution call their witness.

4. Examination-in-Chief (by the prosecution/plaintiff) (10 mins)

Examination in chief is a simulated conversation between a curious interlocutor and a person with a story to tell. It is the process of questioning your own witness in a manner that reflects a conversation. You should aim to adduce evidence logically and coherently. Evidence should be extracted from the witness in a natural manner, i.e. in his or her own words.

Counsel's first question to the witness should ascertain the witness' full name, address and occupation.

Leading questions are not permitted in chief (see Grounds of Objection below). Try to ensure questions are brief and to the point. The goal should be to have the witness tell the story, rather than counsel. Counsel should act as though this is the first time they are hearing the story.

It is often best to avoid questions that are too open-ended, such as simply asking, 'What happened next?' Although there are times when such questions may be used effectively, they pose a risk that the witness may introduce evidence different to that which you sought to obtain. Instead, favour short, clear questions and engage with the witness' answers. Try to lead the witness through their story in the most effective way possible.

5. Cross-Examination (by the defence) (15 mins)

A cross examiner should attempt to discover and highlight the inconsistencies in a witness' evidence. Unlike examination-in-chief, you are permitted to use leading questions. In fact, most questions should be leading. In cross-examination you generally want to have the witness answer '*yes*' or '*no*'. You want to avoid giving the witness a chance to re-tell their side of the story.

The best cross-examination is based closely on the witnesses' police statement and their testimony, yet still undermines the witness' credibility. The goal should be to trap the witness with their own statements so that they are forced to concede a proposition beneficial to your own case. However, be wary not to get into an argument with the witness, and once you have what you need or feel the witness is not going to concede then it is best to move on quickly.

6. Examination-in-Chief (by the defence) (10 mins)

As with examination in chief by the prosecution.

7. Cross-Examination (by the prosecution/plaintiff) (15 mins)

As with cross-examination by the defence.

8. Closing by the Prosecution (3 mins)

In your closing argument, you must bring all of the evidence that came out in the examination of witnesses together to prove your case and to persuade the judge to rule in your favour. You should highlight testimony that supports your construction of the issues at hand, as well as that which

rebuts or weakens the opposing counsel's construction – particularly any propositions conceded in your cross-examination. Suggest resolutions to conflicting evidence that work in your favour. The goal should be to outline the facts proven at trial and to show how the proof of these facts means that your case theory should be accepted.

It is often beneficial to write your closing address at the very beginning of your preparation so that you set out the facts you need to prove in order to make out your case. The address should then be amended during trial to take into account what actually took place.

Be prepared, as at all times, to answer any questions from the judge.

9. Closing by the Defence (3 mins)

As with closing by the prosecution, but again typically focusing on the onus of proof.

OBJECTIONS

Unlike in other competitions such as Mooting, participants in the Witness Examination Competition are permitted to make objections to their opposition's questions and conduct.

There are two primary purposes of objections. First, they highlight the opposing counsel's breach of the rules of evidence. Second, they interrupt the opposing counsel's flow of thought. In practice, objections should be used sparingly. You should only object if the issue is of great significance to your case.

To make an objection, you just have to stand up and say, *'Objection, [grounds of objection e.g. hearsay]*'. When an object is made against you, sit down until you are asked to respond. The judge will hear counsel's objection and either question counsel on it, or give opposing counsel an opportunity to respond.

An objection may only be made during opposing counsel's examination in chief or cross-examination. Effective objections should be made *before* the witness answers the question.

GROUNDS OF OBJECTION

The following is a list of objections permitted in the Witness Examination Competition. These objections arise from the rules of evidence that govern admissibility. The effect of a successful objection is that evidence to which the objection is made will not be admissible and cannot be used by the judge to determine the outcome of the case.

Relevance

Relevant evidence is defined as evidence that could rationally affect the judge's assessment of the likelihood of the existence of a fact in issue. If the evidence is not relevant, it is not admissible. Therefore, if a barrister asks something that would have no tangible impact on the assessment of whether or not the crime has been committed, the opposing barrister may object. An example may

be a question as to the pecuniary status of a witness during a rape trial. This line of questioning is probably not going to assist in determining whether or not the crime was committed, and would therefore not be relevant.

Hearsay

You cannot use evidence of representations made out of court to prove that the content of those representations is true. For example, if a witness said, '*Bob's wife told me that she saw John killing Jane*', it is generally inadmissible to use such evidence to prove that John did in fact kill Jane. However, note that the evidence may still be used to prove that Bob's wife said those words (counsel may then need to consider whether the evidence might be prejudicial).

Opinion

An essential principle of evidence law is that witnesses are to testify only as to their direct observations and perceptions. Witnesses are not to testify to any inferences that they drew from such observations; it is not permitted that witnesses give opinions about an event, other than rudimentary, lay opinions (such opinions may include the nature of the weather, the assessment of the temperament of an individual). To illustrate with an example, a witness is prohibited to provide that '*Jane was drunk'*. Rather, the witness should explain the events and conduct that underlies such an assessment. For example: '*I saw Jane consume eight full strength beers, and stagger out of the pub while slurring her 7 words*'. This rule of evidence is based on the principle that it is ultimately the role of the court to determine whether the evidence infers a likelihood that Jane was drunk.

Prejudice

If evidence before the court assists in ascertaining the veracity of a fact, then it is considered 'probative evidence'. However, such evidence may also be prejudicial; if evidence damages the hypothetical jury's perception of the accused then it may be inadmissible. In order to determine whether such evidence is admissible, it is necessary to discern whether the probative value outweighs the prejudicial burden. If the probative value does not clearly outweigh any prejudice, the court should exclude the evidence and the opposing barrister will accrue the ability to object on such grounds.

For example, if there is evidence that suggests that Jane had many affairs prior to the alleged murder of her husband, the court must ascertain the relevance of the affairs and whether such evidence is too prejudicial for admission. The concern is that the hypothetical jury may come to dislike Jane because of her affairs; such evidence may contribute to the determination that she killed her husband.

Leading questions

Leading questions are not permitted during examination in chief. This ensures that witnesses are not being coached and are giving genuine, impartial testimony.

Leading questions are questions that either suggest an answer or direct the witness to evidence not yet introduced into court. For example, counsel must not ask, '*And that's when you hit him back?*' because it both suggests an answer and introduces evidence of the witness hitting another person before that fact has been introduced. Instead counsel might ask, '*How did you react to being hit?*' Ideally, the witness would respond with, '*I hit him back.*' If a witness can answer the question with a yes or no response then this should indicate to you that it may be a leading question.

TIPS

FIRST STEPS: DEVELOPING A CASE THEORY

1. Read both statements carefully and take note of any inconsistencies between the statements; these inconsistencies are the particular facts upon which you will need to draw to convince the judge that your witnesses' testimony is the more credible of the two.

2. Develop a clear case theory that is simple, logical and consistent. Your case theory should account for all the facts in your witnesses' statement. A case theory is what you want to prove – both the facts and the legal elements. In this respect, it is both your legal case as to why you should win, and your factual theory that explains of the facts in support your legal case. For example, if the accused had an exam and was seen rushing out of the shops, after which he was accused of theft, the most simple explanation for the prosecution would be that he rushed out of the shops because he was stealing. The defence, on the other hand, would assert that he was rushing because he was running late for his exam. Do not make up any facts – your job is to fill in the gaps with a plausible explanation that your opposition can pre-empt.

3. Run your case theory by your witness so they are aware of your line of questioning. Better still, develop your case theory together as a team – two heads are better than one! It may also help to map out your theory and the factual propositions required to prove it.

4. While going through this process, make sure you identify weaknesses in your case theory that your opposition may try to exploit, and weaknesses in your opposition's case that you can exploit. Be sure to develop plausible explanations for the weaknesses in your own case, and to address these in chief. You can be sure that your opponent will bring them up, so it is best to try to take the sting out of them.

PREPARING TO PROVE YOUR CASE THEORY

1. Once you have developed your case theory, consider writing your closing statement first. The closing statement is often easier to do; it is an argument put forward to the court as to why the evidence supports your factual version of the case rather than that of your opponent. Writing your closing statement first should give you an idea of the facts in issue, and how to structure your examination in chief and cross-examination. Remember, as noted above, you will need to adapt your closing statement depending on what takes place during the trial.

2. When writing your opening address, try to avoid the use of argumentative statements. The opening address should be styled as a narrative. Its purpose is to set the scene, outline the non-disputed facts, and frame the issues in dispute. For example, if there are inconsistent statements as to whether the defendant stole items from the shop, do not say in your opening statement, '*It is clear that the accused stole a book from the shop.*' This is the conclusion that you should elucidate in the eyes of the jury in your examination-in-chief and cross-examination,

not your opening statement. Rather, you might say, '*The defendant was seen leaving the shop with a book.*'

3. Pay attention in your opening also to the onus and standard of proof. In a criminal trial, the prosecution must prove their case *beyond reasonable doubt*. This means that it may not be appropriate for defence counsel to tell a counter-narrative in their opening statement; to do so would mean that the defence would be required to assume the onus of proving the facts of that counter-narrative and would therefore lose this valuable advantage. The more prudent approach may be to simply reframe the issues and to simply hold the prosecution to their proof, arguing that the evidence does not prove the prosecution case *beyond reasonable doubt*.

   For example, a counter-narrative in a theft case may tell that the accused in fact purchased the book. This would require the defence to produce proof of purchase, such as a receipt. Conversely, if the prosecution's case is constructed solely around one discredited witness' testimony, defence could argue that the evidence does not establish theft *beyond reasonable doubt*, and so may win the case without having to prove a counter-narrative. It is of course impossible to avoid counter-narratives in cases where the defence argues, for example, self-defence in a homicide case.

PREPARING YOUR EXAMINATION-IN-CHIEF

1. Questions must always be in an open format. Do not lead your witness or you risk an objection!

2. It may be useful to write your questions out, but you should not expect to stick precisely to your plan. Try to adduce evidence from your witness in a logical and methodological manner so that it makes sense. Chronology may be used to heighten suspense and impact. Emphasis can be used to encourage the judge to pay closer attention to a particular matter.

   For example, if you desire to draw attention to the fact that your witness was punched in the face, you will likely not begin at that point in the story but will rather build up to it. Once you have reached the relevant point in the chronology, and accrued due suspense, you may ask, '*What happened after you left the bar?*' Your witness will likely respond with, '*I was punched in the face.*' You may direct your questioning as to the associated pain, the specific details of how the punch occurred, the frequency of occurrence, the requirement of medical treatment, etc. all in order to highlight the impact and violence of the defendant's actions. As a result, this part of the witness' testimony is likely to stick in the judge's mind.

3. Examination in chief can be difficult because your witness may not always elicit the desired response. While you may pre-empt your questions and practice with your witness, be prepared to think on your feet, to improvise, and to tailor your questions to any situation that may arise. Preparation is key.

4. As noted above, witnesses are not permitted to bring any written materials with them to the witness stand. Although the expectation is that witnesses will have adequately memorised the relevant facts, counsel should be prepared for potential forgetfulness when under the pressure of testifying before the judge. In this event, an artful barrister may move on to other aspects of the case that the witness can accurately recall and which might jog the witness' memory as to

forgotten events. Alternatively, where counsel establishes that the witness has trouble recalling facts, they may seek the leave of the court for the witness to refresh their memory by reference to their witness statement.

PREPARING YOUR CROSS-EXAMINATION

1. It is in your interest to prevent the opposing witness from rehashing their version of events. Ideally, the judge will find the account provided by your own witness memorable, rather than that of your opposition. In order to achieve this, you can and should consistently ask leading questions that force the witness to deviate from his or her narrative. This format of question will provide you with the distinct advantage of forcing a 'yes' or 'no' response from the witness, inhibiting the admission of further evidence or caveats. You may interrupt any answers that stray from the crux of your question by telling the witness to, '*Please only answer the question asked.*' However, avoid excessive interruption of the witness as it is inadvisable to conduct yourself in an aggressive manner.

2. It may be of assistance of divide your cross-examination into distinct topics on which you plan to focus. These topics will be based around the arguments you want to be able to make in your closing, and what you need to prove in order to make those arguments persuasively. Topic-based division of your notes will also prevent digression from your envisaged line of questioning and will avoid any deviation from the crux of your argument. Think about the key propositions that you need the witness to concede in order to support your closing statement. There are, however, many different ways to perform the cross-examination, and you may develop your own style over time. It is in your best interest to focus on the major points of contention rather than those that are insignificant.

3. Pursuant to the rule in *Browne v Dunne*, any points of contention between your witness and your opposition's witness that form part of your case theory must be put to the witness in cross-examination. This rule operates to ensure that the cross-examined witness is treated fairly – fairness dictates that witness should be cognisant of any case that is put against him or her.

   For example, if your witness claims that they saw the accused shoot the victim, but the accused testifies to the contrary, you *must* put it to the accused in cross-examination that they shot the victim. You will undoubtedly receive adamant denial in response, but the question must nevertheless be asked.

4. You may wish to consider attacking the credibility of the witness if you have in your possession the information required to do so. For instance, if the witness has a propensity to commit violent acts, then you can use this to bolster your suggestion that such a violent predisposition resulted in the occurrence of the crime. Further, if you have evidence that the witness lies compulsively, this can be used in the cross-examination to suggest that the factual account given by the witness should not be believed.

5. Finally, do not ask any question to which you do not already know the answer. If there are multiple possible answers that a witness may give, prepare for each of them and adjust the course of your cross-examination accordingly. Some witnesses may not concede points that

reasonably and logically must be conceded. Rather than arguing with the witness, move on and trust that the judge has noted the witness' belligerence and the logic of your argument.

MANNERISMS

1. It is important that you remain respectful and polite at all times to the judge, to witnesses and to your opposition. This includes when objecting and cross-examining. Try not to get frustrated by belligerent witnesses or a judge that overrules objections you may think are well-founded.

2. As there is no jury in this competition, the prosecution will be seated closest to the witness box. If you happen to arrive in the allocated 'courtroom' before the judge, it may be expected that you stand when he or she enters the room. This is a sign of respect. If you need to make an objection, stand up when doing so. If your opposition makes an objection against you, sit down and wait for them to finish.

3. By all means take notes during the course of both chief and cross – some advocates suggest making a note after every answer to avoid inferences being drawn from notes made following a statement that weakens your case. But do not gesticulate incessantly with your pen or pencil. Put it down if not writing.

4. Consider your inflection, vocal modulation, and the speed/volume at which you speak. This will help to ensure that you retain the judge's attention and interest.

FURTHER DETAILS

Dress Code: Business attire

Scoring: The scoring will be in line with the ALSA guidelines. The scoresheet is available online at <www.mulss.com/competitions/witness_examination>.

Scoresheets are not ordinarily made available to participating teams and are instead used primarily to make scoring easier for judges. However, should teams wish to see their scoresheets, they may make a request by email at lss-witness@lists.unimelb.edu.au within three days of their trial. Teams are advised that raw scores will not be released, but scoresheets will indicate general qualitative scores within the prescribed ranges.

Time commitment: Witness Examination does not require research. The barrister should commit two hours to read the problem several times and to formulate an argument. It is recommended that one or two more hours are used to rehearse your examination in chief with your witness. However, remember that the more effort you put in prior to trial, the more prepared you will be for whatever may happen in court.

The witness can spend considerably less time preparing. All that is required of the witness is the memorisation of the witness statement, and perhaps the rehearsal of answering questions. As such, it may be in the interests of each team to change which partner occupies the role of the witness and

barrister in order to balance the workload and time commitment to this competition over the semester.

In 2017, the Witness Examination Competition will run on Monday and Tuesday evenings of alternate weeks, starting in week four. Every effort will be made to ensure teams are allocated their preferred evening, but we regret that this may not always be possible.

Should teams wish to swap time slots, they must do so personally via the Open Witness Examination 2017 Facebook page. Once confirmed, an email must be sent to lss-witness@lists.unimelb.edu.au at least 48 hours before trial. Please copy and paste the below template in order to provide us with the relevant information.

We confirm the following teams wish to exchange time allocations for this round:	
Team Name:	*Team Name:*
Current Time Allocation:	*Current Time Allocation:*
New Time Allocation:	*New Time Allocation:*

Team size: 2 students per team.

Elimination: Students participating in the Witness Examination Competition 2017 will compete in a knock-out style competition. Winning teams will progress to the next round, while losing teams will be eliminated from the competition.

Forfeiture: Should your team need to forfeit, you must notify the Competition Officers at lss-witness@lists.unimelb.edu.au *to the problem being released*. Teams may forfeit after the problem is released only in extreme circumstances, and will be required to contact both the Competition Officers and the Directors at lss-competitions@lists.unimelb.edu.au. Teams forfeiting without regard for these rules may be blacklisted from competing in future competitions.

Should your opponent forfeit from the competition, we expect you to prepare and compete as scheduled. We will attempt to provide you with an alternative opponent, though your progression in the competition will not be dependant on victory in this round. This will allow you to gain feedback for your own development and to receive a score that will contribute to the seeding and to the quality of the competition.


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