Clayton Utz MULSS Witness Examination Competition 2015 Guidebook

CLAYTON UTZ

Welcome to the Clayton Utz Witness Examination Competition 2015!

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, Clayton Utz. On behalf of the LSS, we would like to thank them for their continuous support.

The following pages contain 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 the rules, procedures and formalities.

If you have any questions or concerns please feel free to contact either Mark Giuseppini or Amer Husakovic at lss-witness@unimelb.edu.au.

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

Amer Husakovic and Mark Giuseppini

Witness Examination Competition Officers 2015

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. These are interchangeable roles, so you and your buddy can swap roles as often or as little as you like.

As the barrister, you will act as either counsel for the defence or counsel for the prosecution and your task will be 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 the facts. It is permissible to create facts that are not in the brief, but the facts created must always be consistent with the brief. The witness is a non-competitive witness meaning that they must be cooperative for both the defence and prosecution.

WARNING: Do not create facts to which the opposing team will have to spend time responding. This means that you should not be creating facts which will shift the balance of the competition. The police statements are meant to provide an even-handed case. It is your ability to argue the case that will determine whether you win or lose, not the creation of facts. Teams will be penalised through a deduction of points for inferring facts that affect the opposing team.

How does it work?

A question will be sent out to each member of the team 24 hours prior to the competition.

Once the question is received, the teams should start working together to prepare the 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 their statements. Witnesses must adhere to events provided in the statement of facts. It is imperative that additional information is consistent with the facts.

If there are any queries or concerns about the problem, don't hesitate to contact Amer Husakovic and Mark Giuseppini at lss-witness@unimelb.edu.au.

Procedure

Structure of Trial

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)

1. Appearances (1 min)

The trial begins when the judge commences with the statement 'I will now take appearances.' The counsel for the prosecution/plaintiff will rise and address the bench with: 'May it please the court, my name is [x]. I appear on behalf of the Director of Public Prosecution/plaintiff.' The defence counsel follows and introduces himself or herself in a similar manner.

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

This is the Counsel's opportunity to present their construction of the case to the judge. Be clear, confident and concise and structure your speech logically as you only have 2 minutes. You must outline your proposed series of facts and identify all of the major issues that you wish to cover. This is your opportunity to tell the story the way that you wish to present it.

The opening address is worth 15% of your marks.

3. Opening by Defence Counsel (2 mins)

This is similar to step 2 - see above.

The judge will then request that the counsel for the prosecution/plaintiff call their first witness.

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

This is a process of questioning your own witness. In doing so, the aim should be to have a conversation with your witness. 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 relate to the witness' full name, address and occupation.

Leading questions are forbidden and really don't achieve anything anyway! Make your questions brief and to the point, the aim is that the witness, not the counsel tells the story. The counsel should act as though this is the first time they are hearing the story.

Leading questions are questions that lead the witness to the evidence before the witness has mentioned it to the court. For instance 'then you hit him?' Instead you should ask, 'how did you react to being hit' and ideally the witness would say 'I hit him back'. Again, the counsel should be acting as though this is the first time they have heard the evidence.

Open-ended questions, such as 'what happened next?' should be avoided also. This question is too open and although it might extract the evidence you want with a trained witness, it is not a question a good barrister would ask. Instead, all good barristers use short, clear questions, engage with their witness' answers and are able to get the witness to tell his story in the most effective way possible.

The Examination in Chief is worth 30% of your marks.

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, the more leading questions the better!

The best cross-examination is based closely on the witnesses' police statement and their testimony yet still undermines the witness' credibility.

This is worth 30% of your marks and you will be judged on the clarity and quality of the questions asked, how the examination advances your own case and how effective the questioning was in eliciting the desired responses.

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

This is similar to step 4 - see above.

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

This is similar to step 5 - see above.

8. Summation by the Prosecution Counsel (3 mins)

In your closing statement, you must bring all the evidence together and prove that the verdict should be in your favour. You should try to rebut the opposing counsel's allegations and suggest resolutions to conflicting evidence in your favour. While you are not directly judged on this, it is critical that you put a lot of effort into your summation because a lot of your marks are based on your expression, the organisation of your presentation and your engagement with the court.

9. Summation by the Defence Counsel (3 mins)

See step 8.

Rules

Making an objection

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

To make an objection, you just have to stand up and say 'objection, [grounds of objection e.g. hearsay]'. The judge will hear the counsel's objection and either question counsel on it, or give the opposition an opportunity to respond.

An objection may only be made during opposing counsel's examination in chief or cross-examination. The most effective way of objecting is to do so before the witness answers the question.

Some grounds of objection

Relevance

Relevant evidence is defined as evidence that could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding. If the evidence is not relevant, it is not admissible. Therefore, if a barrister asks something that would have no impact at all on the assessment of whether or not somebody had committed a crime, the opposing barrister may object by standing up and saying 'objection, relevance.' An example is where a barrister asks about a witness' income in a rape trial. This is probably not going to be relevant in determining whether or not a rape was committed.

Hearsay

You cannot use evidence of representations made out of court to prove those representations were 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 kill Jane. (However, note that the evidence can be used to prove that Bob's wife said those words.)

Opinion

An essential principle of evidence is that witnesses are to testify only as to their direct observations and not to any inference that may be drawn from them. Generally, witnesses are not allowed to give opinions about an event, other than lay opinions (e.g. hot weather, angry temperament). An example would be that a witness could not say 'Jane was drunk'. Instead, the witness would have to say 'I saw Jane drinking five beers, staggering out of the pub and slurring her words', leaving the inference that Jane was drunk to the court to decide.

Prejudice

If the probative value of the piece of evidence is less than its prejudicial effect, the court should exclude the evidence. For example, if there is evidence to suggest that John was having many affairs before he allegedly killed his wife, the court must consider whether the affairs are relevant and, if so, whether the evidence is too prejudicial to be admitted (i.e. a hypothetical jury may dislike John because he cheated on his wife and rely on this week evidence to conclude that he murdered his wife).

Leading questions

During examination-in-chief, a barrister cannot suggest the answer desired, e.g. 'Did you run after seeing Jane killing John?' This ensures that witnesses are not being led and are given genuine testimony.

Tips

To begin the process

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

2. Develop a clear case theory that is simple, logical and consistent that accounts for all the facts in your witnesses' statement. 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 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.

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. You can then address these weaknesses in examination-in-chief and cross-examination, trying to create a plausible explanation for the weakness.

Once your case theory is developed

1. Once you have a case theory, it is suggested that you write your closing statement first. The closing statement is often easier to do because it is an argument put forward to the court as to why the evidence supports your factual version of the case rather than your opponent's.

2. When writing your opening address, try and keep any argumentative statements out of it. The opening address is supposed to be a narrative. You are setting the scene. 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 items from the shop'. This is an argument and a conclusion that your examination-in-chief and cross-examination should lead the jury to. What you can say is 'the defendant was seen leaving the shops with items'. At the end of your closing statement, there should be no doubt in the jury's mind that you are accusing the defendant of stealing the items.

Developing your Examination-in-Chief

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

2. Write your questions out initially but do not expect that you will stick to them. Try to adduce evidence from your witness in a chronological manner so it makes sense. Feel free to emphasise any parts to which you want the judge to pay attention. For example, 'What happened after you left the bar'? If the witness answers 'I was punched in the face', you can direct your questioning to asking the witness about the punch; how much it hurt, where he was punched, how many times, did he need treatment etc, to highlight the impact and violence of the defendant's actions.

3. An Examination-in-Chief can be difficult because your witness may not always answer your question with the information you wanted. While you may write your questions out and practice with your witness, be prepared to think on your feet and tailor questions on the spot to get the answers you want.

Cross-examination

1. Try and limit your opponent's witness from retelling their story. You want your witnesses' story to stick in the judge's mind, not your opponent's! You can achieve this by putting all your questions to them in a leading form. Putting questions in this form forces the witness to answer 'Yes' or 'No' and if they try to add extra information, you may interrupt and say 'please just stick to answering the question you've been asked Mr.X'. Having said this, do not try to cut them off too much lest you come across as being too aggressive.

2. Sometimes dividing your cross-examination into 'topics' you want to focus on can prevent you from going all over the place and losing the point you are trying to make. There are, however, many different ways of doing a cross-examination. Pick the big-ticket items rather than little insignificant points of contention.

3. Remember that if there are points of contention between your witness and your opposition's witness that are a part of your case theory, as per the rule in *Browne v Dunne*, you have to 'put' these points of contention to the witness. This rule seeks to be fair to the witness that is being cross-examined – they should know the case that is being asserted against them.

4. You may want to consider attacking the witnesses' credibility if you have the information required. For instance, if you know that the witness is prone to violence then use this to suggest that it is the witnesses' violent predisposition that caused him to fire up and murder the victim. Or if you have evidence that the witness is a compulsive liar, you can use this in your cross-examination to suggest that he should not be believed.

Objections

The rules regarding objections were explored on pages 7 and 8. Use these sparingly as in actual practice counsels do not object unless the issue is really significant to their case.

Formalities

Dress Code: Business attire

Scoring: The scoring will be in line with the ALSA guidelines. The scoresheet is available online at mulss.com.

Time commitment: Witness Examination does not require research. For the barrister, a couple hours should be given to read the problem over several times and to come up with an argument. It is recommended that another hour or two is to be used for rehearsals of your Examination in Chief with your witness. Preparation time for the witness is much less, as it only really requires memorising the witness statement and practicing answers.

Students participating in the Witness Examination Competition 2015 will experience a knock out style competition. The competition generally runs throughout the academic year (although not usually on holidays). Only the winning teams of a round will progress to the next round. Teams that do not win a round will be eliminated from the competition.

Team size: 2 students per team.

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