



**SOUTH TEXAS  
MOCK TRIAL  
CHALLENGE**

**2021 Local Rules**

## **General**

- 1.001 No one may break the fiction in a trial by referring to “the Mock Trial Challenge” or to “the problem.” If, during the course of the trial, a violation to the local rules occurs, the court should be directed to these local rules.
- 1.002 Unless directly contradicted by these local rules, the Model Rules of Conduct for Mock Trial Competitions apply. A copy is attached. If, during the course of the trial, a violation of the Model Rules occurs, the court should be directed to the “appendix to the local rules.”
- 1.003 Teams shall be identified to judges only by a team designation assigned by the Tournament Director. A team will be assigned a numeric designation for filing its trial brief. A separate letter designation will be assigned for the tournament. No team member, coach or person associated with a team shall directly or indirectly attempt to communicate the identity of a team to a judge before, during or after the round. This rule is not intended to prevent teams from using their individual names during the trial.
- 1.004 Trials are open to the public.

## **The Problem**

- 2.001 The South Texas Mock Trial Challenge problem is copyrighted and may not be used for purposes other than its intended use without the express consent of the Tournament Director.
- 2.002 The persons, organizations and events depicted in this problem are purely fictional and were prepared solely for the educational exercise being conducted in this tournament. Any resemblance to actual persons, living or deceased, is unintentional and purely coincidental.

## **Teams**

- 3.001 A team will consist of four law students enrolled in the same ABA-accredited law school. Only J.D. degree candidates may compete.
- 3.002 In every round, two team members will serve as attorneys and one team member will serve as a witness. Subject to provisions in these rules, participating teams have the discretion to determine which team members perform the specific roles in each round.
- 3.003 The fourth team member (not participating as an advocate or a witness in a particular round) is still considered a team member for purposes of these rules.

## **Pairings, Sides and Advancement**

- 4.001 Each team will argue three preliminary rounds. The Tournament Director will randomly assign sides and pairings for the first two preliminary rounds. The Tournament Director will assign pairings for the third preliminary round based on the criteria in Rule 4.002 and then will randomly assign sides.
- 4.002 The fourth round will be a blind Octofinal Round. Sixteen teams will advance to the Octofinal Round based on the following criteria: (1) win-loss record; (2) number of judge's ballots won; and (3) trial brief ranking. Those teams will be paired against one another to determine which teams advance to the Quarterfinal Round. The remaining teams will be paired against one another for the fourth round. No one but the Tournament Director will know which teams are competing in the Octofinal Round until the Quarterfinal Round pairings are announced.
- 4.003 The winners of the Octofinal Round will advance to the Quarterfinal Round. The winners of the Quarterfinal Round will advance to the Semifinal Round. The winners of the Semifinal Round will advance to the Final Round. The winner of the Final Round will be declared the South Texas Mock Trial Challenge Champion. Sides for the elimination

rounds will be randomly assigned by the Tournament Director.

### **Conduct of Trials**

- 5.001 The case will be tried using the Federal Rules of Evidence and the applicable law included in the problem. While counsel may argue the comments or advisory notes to the Federal Rules of Evidence, no case law may be cited during the trial.
- 5.002 Of the two team members serving as attorneys, one will make an opening argument, and one will make a closing argument. Each must conduct a direct examination of a witness and a cross examination of a witness. The team member conducting a direct examination will make objections to that witness' cross examination, and the team member who cross examines a witness will make objections to the direct examination of that witness.
- 5.003 Each team must call two live witnesses. A team may also constructively offer the deposition testimony of the remaining witnesses. In the interest of time, the testimony need not be read to the jury. The team may constructively offer the deposition testimony. But this is the team's choice. While this rule allows teams to constructively read the deposition testimony to the jury, teams may actually read portions to the jury. But any time used in doing so counts against a team's time allotment.
- 5.004 One team member will serve as a witness in each round.
- 5.005 The Tournament Director will provide each team with a second witness at the outset of the tournament. The assigned second witness will serve in that role as long as the team remains in the tournament. The second witness will be a South Texas College of Law student.
- 5.006 A team may prepare written questions and answers to give witnesses before the trial begins.
- 5.007 Neither side may call the other party's witnesses.

- 5.008 A witness may not be recalled.
- 5.009 Each side has seventy minutes, exclusive of time spent on pretrial motions, to present and argue its case. Each team bears the burden of efficiently using its time. A bailiff will keep track of time during the round. The presiding judge has the discretion to extend time limits.
- 5.010 Each team will have up to ten minutes to argue pretrial motions.
- 5.011 Objections will be brief, limited to legal basis and application to specific facts at issue.
- 5.012 Time consumed by objections is not charged against either team; however, the presiding judge, in his or her sole discretion, may order time charged against any team that makes excessive objections or uses excessive time to argue or respond to an objection.
- 5.013 All motions will be made orally.
- 5.014 Other than exhibits in the problem packet which are entered into evidence, no written materials may be presented to the court. The Tournament Director will provide the necessary materials to the judges. If a team wishes to direct the court to a specific portion of the record, the court should simply be instructed to refer to the page in the record.
- 5.015 An oral motion to exclude witnesses or “invoke the rule” may be offered. The presiding judge will rule on the motion, but in no event will any witness or other person be required to actually leave the courtroom.
- 5.016 At the appropriate time during the trial, counsel may move for a motion for judgment as a matter of law and may respond to the motion; however, the court will summarily deny the motion in all instances.
- 5.017 All trials will be conducted as if a jury were present. For purposes of this tournament, the presiding judge need not actually read the jury instructions to the jury; the parties will act as though this has been constructively done.

- 5.018 When questioning a witness, team members may either sit or stand.
- 5.019 Only the exhibits provided in the problem may be used. No other evidence will be allowed.
- 5.020 Teams may enlarge, in whole or in part, any exhibit, jury instruction, or other component of the case file for demonstrative purposes. Copies of any material in the case file may be made and enlarged for demonstrative purposes. No team may alter, modify, change, or redact any exhibit in any way. This rule does not apply to redactions ordered during a round by the presiding judge. Teams may use flip charts or white boards for the purpose of creating demonstrative exhibits during the round (subject to any appropriate objection by counsel). *See* MRMT 2.4.
- 5.021 Handwritten summaries or charts to be used during a closing argument may not be prepared before the time both sides have rested and the evidence is closed. But materials created while examining a witness during a trial may be used during the closing argument of that same trial.
- 5.022 Team members may not communicate with any faculty advisor or observer between the time a trial commences and concludes.
- 5.023 Faculty advisors, coaches and team members may only observe their own team and the team opposing their team in that particular trial. This rule does not apply after a team is eliminated from the tournament.
- 5.024 Closing arguments will proceed in the following order: plaintiff, defendant, plaintiff rebuttal.

### **Trial Brief**

- 6.001 Each team will submit a trial brief on an issue assigned by the Tournament Director.
- 6.002 A brief shall not exceed 3500 words. A team may rely on the word count of the word processing system used to prepare the brief.

- 6.003 While a brief's format is largely left to a team's discretion, judging will be based on a number of factors, including the substance of the arguments, quality of the writing, citation form and the document's overall appearance. Teams need not include a table of authorities or a table of contents. If included, these tables will count against a team's word count.
- 6.004 A brief should include citations to relevant case law. All citations should conform to the most recent edition of *A Uniform System of Citation* (commonly known as *The Bluebook*).
- 6.005 Each team must serve an electronic copy of its trial brief and the certification required by Rule 5.009 to [mocktrialchallenge@stcl.edu](mailto:mocktrialchallenge@stcl.edu). The e-mail must arrive by 11:59 p.m. CST on the date specified by the Tournament Director.
- 6.006 The pdf file name must start with the word "team," followed by the team number. All letters must be lower case, and there can be no space between the word "team" and the team number (e.g., team21)
- 6.007 The electronic document must contain only a copy of the submitted brief. The document must not contain appendices. The brief must be a single document. The electronic copy will not be posted or otherwise distributed to other participating teams until after the Tournament ends.
- 6.008 A team must include, in the lower right corner of each page, the team's numeric designation. No information serving to identify the team or its law school, other than its numeric designation, may be included anywhere in the brief.
- 6.009 A team must include, as a separate document in pdf form, a signed certification in the following form: "We hereby certify that our brief has \_\_\_\_\_ words." In addition, the certification should include the team designation, the law school name, the team members' printed names and the team members' signatures.

- 6.010 Because the purpose of this tournament is educational, a team may receive limited faculty assistance in the preparation of its brief. Permissible assistance is limited to general discussion of the issues with the students. The trial brief must be the team members' work product.
- 6.011 South Texas is the 51st state and is located in the Thirteenth Circuit. Teams are not limited as to what may be cited in the trial brief. United States Supreme Court authority is binding. All other authority is merely persuasive.

### **Conferring Period and Protests**

- 7.001 Where an advocate believes that an opponent has made up a fact or argued facts which were not part of the file, the advocate may meet and confer with the opponent to attempt to resolve the violation. The conferring period is an opportunity for a team to advise its opponent that it has gone beyond the file and request they take steps to correct the mistake. But teams are reminded that protests are not intended to be a substitute for cross-examination or re-direct. Teams will have different strategies and perspectives regarding the case file. Ordinarily, teams are expected to use cross-examination or redirect to challenge how an advocate or witness uses the facts in the case file.
- 7.002 Protests are not, and should not become, part of the competitive process; they are intended as a last resort. Thus, conferring with an opponent is required before a team files a protest with the Tournament Director.
- 7.003 Teams may not discuss a protest directly with the judges. Teams should leave the courtroom after closing argument and follow the procedure outlines in this section of the rules.
- 7.003 Conferring with an opponent may only occur following closing argument. If teams return into the courtroom for critique, any protest is waived.
- 7.004 Teams may consult with their coaches before conferring with an



opponent; however, only the team members serving as advocates may be present for the conferring period. During this period a team who believes its opponent (1) elicited a made-up fact from its witness; (2) prepped a witness to deny a fact the witness was obligated to acknowledge; (3) prepped a witness to improperly evade impeachment; or (4) argued facts elicited as a result of violating the above rules may remonstrate with opposing counsel to correct the mistake.

- 7.005 At the end of the conferring period, the teams may confer with coaches, and the advocates will jointly advise the bailiff as to one of the following outcomes: (1) the issue has been resolved; (2) the responding team acknowledges that a fact was improperly elicited or erroneously denied; or (3) the conferring period was not successful and a protest will be filed. At this point, the bailiff will get the Tournament Director to resolve the protest.
- 7.006 If, after hearing from both advocates, the Tournament Director determines that the protest has merit, he will confer with the judges to determine if a penalty is appropriate. The advocates will remain outside the courtroom while the Tournament Director confers with the judges. The following are available sanctions: (1) loss of one judge's ballot, (2) loss of a win or (3) disqualification. The Tournament Director also has the discretion to issue a warning and impose no penalty if he determines that the error did not affect the outcome of the trial.

### **Miscellaneous**

- 8.001 The Tournament Director, in his sole discretion, will interpret these rules. His decisions are final. The Tournament Director may make additional rules to address situations not presently covered by the rules.
- 8.002 No video or audio recording by teams or spectators is permitted. The Final Round will be videotaped. Photographs may be taken at other times as well. A student's decision to participate in the tournament constitutes consent to be recorded on videotape or in photographs. As a condition of publication and for no monetary compensation, this consent grants South

Texas College of Law the nonexclusive worldwide rights to reproduce, distribute, and sell any visual material in connection with the student's participation, in whole or in part, in any media, as part of a course book or any other publication and to license these rights to others. Consent also grants South Texas College of Law the right to use student's name, voice and image in connection with the published tournament materials.

- 8.003 Scores and rankings will not be released to teams until after the tournament. Copies of the ballots and information about ranking will be mailed to each team.

**MODEL RULES OF CONDUCT FOR MOCK TRIAL COMPETITIONS**

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[4/18/13, TOC revision]

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**PREAMBLE**

The Model Rules of Conduct for Mock Trial Competitions (MRMT) are intended to provide both guidance for and regulation of the conduct of participants (i.e., advocates, witnesses and coaches) in mock trial tournaments. Like the American Bar Association’s Model Rules of Professional Conduct (MRPC) and other lawyer codes<sup>1</sup>, the MRMT is an attempt at self-regulation. It reaffirms that excellence in trial advocacy and the zeal to win must be guided at all times by professional integrity in the fullest sense of the term. It offers concrete ways to address particular issues so that competitions ensure high standards of ethics and professionalism in tournaments at all times. While advocates are obligated to represent their sides vigorously and passionately in their efforts to win a tournament, they must abide by the demands and restrictions imposed by the rules of the competition, the rules of professional responsibility and the standards of professionalism, just like in the real trial courtrooms. Momentum for codification emerged from two workshops at the following conferences: The University of the Pacific McGeorge School of Law’s, Future Directions in Teaching Ethics Conference (April 14-16, 2011) and Stetson University College of Law’s Educating Advocates: Teaching Advocacy Skills (May 25-27, 2011). The conferences at McGeorge and Stetson made it possible for trial advocacy teachers and trial team coaches to exchange ideas and facilitated the drafting of these rules.

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<sup>1</sup>The ABA Lawyer’s Creed of Professionalism, The American College of Trial Lawyers’ Code of Trial Conduct, The American Association For Justice Code of Conduct, The Texas Lawyer’s Creed–A Mandate For Professionalism, The American Inns of Court Professional Creed. Every state has a code or rules governing professional responsibility.

During the drafting process, virtually no one asked the question, “Why have model rules of conduct for mock trial competitions when every competition has its own rules?” We begin with four primary indicators which have been widely accepted by trial team coaches and advocacy instructors:

(1) Mock trial competitions are primarily teaching and training enterprises, yet professionalism and ethics have become mere slogans which are preached but not always practiced. The two open national tournaments embrace this pedagogical agenda.

“The National Trial Competition (NTC) was created to stimulate student interest in developing trial advocacy skills and to encourage law schools to teach trial advocacy skills.” (Rules of the 36<sup>th</sup> Annual National Trial Competition, Article I(1)).

“One of AAJ’s goals is to inspire excellence in trial advocacy through training and education for law students and practicing attorneys.” (American Association for Justice, Student Trial Advocacy Competition statement)

For some, excellence in advocacy and the drive to win have collided with a commitment to teaching professionalism and ethics as part of the fabric of trial law. For others, perhaps the demand for success, the search for jobs and the thirst for rankings have translated into an aggressive competitive spirit that has often made a casualty of professionalism. These rules seek to rectify the imbalance by ensuring that we are all playing on the same field with the same rules.

(2) Existing competition rules have not done the job. They are, too often, murky, ambiguous and overly general. They have often failed to provide concrete answers to the more controversial and recurring questions. Often, these current rules are marginalized as “advisory” and either frequently ignored or arbitrarily and unevenly enforced by well-intentioned evaluators who, understandably, resist the opportunity to penalize or sanction violators. Remarkably, in 2011, non-participating observers witnessed rule violations—specifically, making up facts or explaining away omissions in depositions—in the final rounds of three prestigious tournaments—NITA’s Tournament of Champions, the American Association for Justice Competition and the National Trial Competition. This is worse than unfortunate. Regardless of whether the outcomes would have been different without the violations, there should be no room for murkiness or ambiguity regarding what constitutes “making up facts,” “doctoring exhibits” or improperly “evading” impeachment by omission.

(3) Increasingly, advocates have purposely undermined the spirit of a rule, arguably, without directly violating it. In this form of practiced un-professionalism, a competitor reads the rules of competition in the most narrow of ways and develops strategies to avoid its application. If caught, the competitor offers a prepared line of defense as to why the rule does or should not apply.

(4) Rules of professional conduct specifically geared to mock trial competitions are necessary because mock trial scoring is substantially different from real trial evaluations. In mock trial, the facts are artificial and are limited to the four corners of the file. There are often “no facts” or explanations or answers to questions which are raised in the file, either because they are overlooked or purposely omitted by the file drafter. Because there are no explanations for their absence, questions require fact invention. In real trials, the availability or unavailability of evidence is certain. It is offered or not offered. Its unavailability may be explained (often, by “I don’t know,” or “I don’t have that information”). And it may be offered for virtually all relevant facts. In the real trials, proceedings are conducted so that the facts are outcome determinative. In mock trial, evaluators are told to disregard the merits of the case; advancement is based upon advocacy skill. In the real trials, lawyers adapt their conduct to the rules. In mock trial, competitors all too often conform the rules to their conduct. These differences are invariably ignored by the evaluators. The result has been competitions corrupted by unprofessional conduct—cheating—and stained by protests and appeals.

These Rules are predicated on four principles:

- (1) The rules do not answer every question about professionalism which arises in competitions. By design they are neither comprehensive nor all inclusive. But they provide an unmistakable admonition that professionalism must be a central focus of mock trial performance and that there will be consequences for clear rule violations. The MRMT rules advise competitors to stay away from “the line” and not approach it.
- (2) The key rules in any competition involve not making up facts, impeaching by omission and cross-examining on the lack of evidence. Current rules are, most often, written in overly general and ambiguous terms. The Model Rules draw clear lines about what is impermissible and puts participants on the same page. In summary, the MRMT imposes a “necessary inference rule” for examinations (Rule 2.7), permits advocates to cross examine on the “lack of evidence” (Rule 2.5), allows evaluators to question advocates about the “page and line” basis for questions (Rule 2.9) and requires a point deduction when teams make up material facts and draw impermissible inferences (Rules 6.2).
- (3) These rules introduce a “conferring period” where advocates are required to informally resolve the dispute to avoid protest, if possible. Where an advocate is approached by an opponent and acknowledges that there is no specific “page and line” reference to a fact which the advocate presented, the advocate will formally withdraw the fact (Rule 6.0). If the advocates are unable to resolve the dispute and in the most egregious cases of cheating, teams may protest to the tournament director (Rule 6.3).
- (4) Some have expressed concern that codification of “new” rules paves the way for additional complaints of rule violations. Our history tells us otherwise. The current rules have not effectively regulated or satisfied competitors. The Model Rules simply incorporate the “common law” of tournament professionalism and ethics. Every rule and comment in the Model Rules were necessitated by complaints, virtually all of which have resulted in protests during

competition. The Model Rules and Comments simply subject the violations to transparency, openness and resolution. As Justice Brandeis observed, “sunlight is the best disinfectant.”<sup>2</sup>

The MRMT have drawn heavily from current rules of national and invitational competitions, the recent history of formally filed protests by teams, informal complaints offered by coaches and the healthy anecdotal amalgamation of email and blog postings.<sup>3</sup> There have been too many reports of too many teams “playing fast and loose” with the rules too many times.

As do the MRPC, the MRMT expresses only minimum standards of ethical conduct and professionalism. The rules should be construed liberally in favor of their fundamental purpose. This progressive perspective follows the agenda set forth in the preamble to the American College of Trial Lawyers’ Code of Trial Conduct:

“Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and trial conduct of counsel, presents [a] Code of Trial Conduct for trial lawyers, not to supplant, but to supplement and stress certain portions of the rules of professional conduct in each jurisdiction.”

For most participants, these rules, taken individually or collectively, will require little, if any, change from the high professional standards which define many mock trial programs and inform the practice of their advocates. For others, the MRMT will require a cultural change in perspective, preparation and performance. In the aggregate, it is our hope that their impact will be significant. They will clarify ambiguity which plagues the interpretation of existing rules, resolve recurring issues which have tacitly encouraged rule violations and invited protests and provide an enforcement mechanism for blatant unethical conduct. To be effective, the MRMT must have the support of the mock trial community. In calling for widespread acceptance, we are mindful of the MRPC’s admonition:

Compliance with the Rules . . . depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical consideration that should inform a lawyer for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law. [Preamble, 2011 ABA Model Rules at 16]

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<sup>2</sup>Louis D. Brandeis, “What Publicity Can Do,” *Harpers’ Weekly*, 1913.

<sup>3</sup>See The Trial Advocacy Blog, [www.advocacy-teaching-blog@googlegroups.com](http://www.advocacy-teaching-blog@googlegroups.com), supervised by Professors Chris Behan of Southern Illinois and Charles Rose of Stetson.

## SCOPE OF THE MODEL RULES OF CONDUCT FOR MOCK TRIAL COMPETITIONS

### 1.0 Application of the MRMT

**The MRMT rules apply to all participants in mock trial competition, including competition directors, program supervisors, coaches, advisors, advocates, witnesses and judges. These Rules express only minimum standards of ethical conduct and professionalism. They should be construed liberally in favor of their fundamental purpose.**

#### COMMENT

[1] The scope of the rules follows the agenda set forth in the preamble to the MRPC: [These] are rules of reason. . . . Some are imperatives, cast in the terms “shall” or “shall not.” . . . Others, generally cast in the term “may,” are permissive and define areas under the Rules in which discretion may be exercised. (2011 ABA Model Rules of Conduct, Preamble at 14)

We hope that tournament directors and sponsoring organizations will adopt these Rules and specifically incorporate them into their respective competition files or add them as an addendum to the competition rules. Tournament directors should send the MRMT to file drafters with specific instructions to change rules which conflict a specific rule in the MRMT. We call specific attention to four rules which, hopefully, will dramatically change the landscape:” The “Necessary inference” rule (Rule 2.7); Crossing-examining on the lack of evidence rule (Rule 2.3); Questioning the advocates rule (Rule 2.9); The Impeachment by Omission Rule (Rule 2.8) and the Conferring rule (Rule 6.0). Where these Rules differ from already existing rules, drafters and competition directors should substitute the MRMT.

[2] Where rules have not been incorporated into the file, tournament directors should distribute the MRMT along with the trial file.

[3] Tournament directors should meet with presiding and scoring judges before the competition begins to explain and review the key provisions of the MRMT.

### 1.1 The Pledge to Follow the MRMT

**By participating in a mock trial competition, all participants, especially advocates and coaches, pledge to follow the letter and spirit of the MRMT. An advocate’s conduct shall at all times be characterized by integrity, honesty, candor and fairness.**

#### COMMENT

[1] Each file should contain a stipulation that by participating in the competition, all coaches and advocates have pledged to follow the MRMT.



- [2] Tournament directors may wish to have advocates and coaches sign an honor pledge. The following may serve as an example:

As an advocate (coach), I will represent my side (coach my team) vigorously and passionately in my efforts to win this competition, and will abide by the demands and restrictions imposed by the rules of this competition, the MRMT, the rules of professional responsibility and by the standards of professionalism.

- [3] In the National Ethics Trial Competition sponsored by McGeorge School of Law, the competition rules stipulate that “all lawyers are expected to act with scrupulous observation of ethical and professional principles.” We applaud McGeorge’s initiative and recommend adoption of such a stipulation.

#### **ADVOCACY IS LIMITED BY THE FACTS IN THE FILE**

### **2.0 Fact Invention**

**An advocate may not invent or create facts.**

**(a) An advocate shall be extraordinarily careful to be fair and accurate in staying within the bounds of the file. When in doubt as to whether the file supports a question or argument, an advocate shall err on the side of not asking the question or arguing the fact.**

**(b) The case file is a “closed universe” of facts and competitors may use only the materials provided in the file except where the file states otherwise, subject to MRMT 2.3(b).**

**(c) A witness may not “invent” an individual or an exhibit not mentioned in the file nor offer testimony or evidence from that “invented” individual or about the exhibit.**

**(d) A team may not invent “anything” about a witness’s background which is not specifically stated in the file, subject to MRMT 2.3(b).**

**(e) Judicial notice may be taken under three circumstances: (i) Where the file specifically provides for judicial notice of a fact; (ii) Where the file provides a source of information “whose accuracy cannot reasonably be questioned;” and (iii) Where a fact is capable of accurate and ready determination by a calendar. See FRE 201.**

COMMENT

- [1] Making up facts, which is improper, is not to be confused with using synonyms, which is permissible. Expressing facts in alternate ways—albeit colorfully or dramatically—is the hallmark of good advocacy. This rule is not intended to change “word-smithing” which does not *materially change the content*. Often, the context in which a fact is raised determines whether the content has been materially changed. For example, in a case where “size” is material, testifying that “the defendant could not wrap his hand around the gun” is improper where the file said, “The gun was huge.” Yet, where the witness testified that “the defendant had difficulty walking through the door,” and the size of the defendant was neither in dispute nor material, it was permissible for the witness to testify that “the defendant was wide.”
- [2] Tournament directors are encouraged to adopt a procedure enabling teams to seek clarifications of what constitutes an invented fact or impermissible inference. The pre-competition “coaches’ meeting” is an appropriate opportunity. Historically, some teams took advantage of the ambiguity of the rule and played the odds against its enforcement. Frequently, “strategic” considerations about “not tipping the other teams off” militated against a team raising fact, inference, or “the absence of evidence” concerns at the pre-trial meeting. Under the less ambiguous MRMT Rules 2.0 and 2.7, pre-tournament discussion may make protesting less likely.
- [3] The following scenarios, drawn from competitions, are examples of improper fact invention:
- (a) A car thought to be driven by the robbers is found several blocks away from a crime scene. The prosecution’s detective (improperly) testifies that the defendant’s DNA and prints were found in the car. There is no reference in the file that DNA or fingerprints were found in the car. When impeached by the defense about the lack of mention of fingerprints or DNA in the statement or anywhere else in the file, the detective improperly explained that there was a written report which the defendant did not ask for in discovery.
  - (b) Two teenage boys, trick or treating at night while dressed in army camouflage clothing and face paint, are shot dead while approaching the front door of a residence. Before firing, the homeowner shouts for them to “stop” but they continue to the front door. The autopsy report stated that one of the young men had a bullet hole in his front. A plaintiff’s team had the coroner improperly explain that the bullet hole was actually in the back.
  - (c) In a products liability case, the defendant’s manual contained no warning on the “directions page” and, specifically, no warning about not cleaning the machine when it was on. Such warnings existed on other pages. A defense team asked its expert to re-assemble the pages so that the warnings were moved to the “directions page” which, in essence, created a new exhibit.

[4] Background information. A team may not ask a witness to provide any background information which is not specifically stated in the file. Other than what is supplied in the problem itself, there is nothing exceptional or unusual about the background information of any of the witnesses that would bolster or detract from their credibility.

(a) Traditional instructions prohibit witnesses from adding information that would “bolster or detract from their credibility.” As worded, this qualified prohibition is murky and invites argument and protest. This rule makes it clear that no background facts may be created.

(b) Concerns arise where a drafter has supplied sparse information about a witness’s background. To compensate and in their efforts to personalize or humanize the witness, advocates have asked witnesses to provide personal or professional background information which is not contained in the file but which, in their view, “is a reasonable or necessary inference” from the facts. From the opponent’s view, the supplementation runs afoul of the admonition to not bolster or detract from credibility. Any supplementation now violates Rule 2.0(d), which prohibits a team from inventing “anything” about a witness’s background which is not specifically stated in the file. This limitation applies to both sides since all witnesses are subject to this restriction.

(c) Problem drafters should be asked to provide sufficient background information sufficient to permit advocates to personalize or humanize their witnesses. Tournament directors should specifically advise judges that the advocates are limited to the background information provided in the file and should not be penalized for failing to personalize the witness with supplemental information.

(d) Where it appears that an advocate or witness “slips” and adds an inconsequential biographical background fact (i.e., how long have you been married; what is the name of your spouse, etc.), teams are advised to neither argue nor protest.

[5] Eliciting “made up facts” and inferences from witnesses for those invented facts is different from advocates arguing inferences in closing. Advocates may elicit from a witness no inferences other than those which are necessary for the witness’s testimony. Advocates may and are encouraged to draw and argue inferences from admissible facts in motions and speeches. (See Rule 2.7).

[6] Adoption of and reliance on reports of others. Where a witness, in his or her statement, deposition or report, adopts, relies upon or references with approval another’s statement, deposition or report, the witness’s testimony about the facts or opinions in the other’s statement, deposition or report does not constitute “making up facts.”

- (a) A witness may not testify to acting or behaving in any which is not explicitly stated in the witness's statement, deposition or report.
- (b) Whether the witness adopted or relied upon another's statement, deposition or report and if so, whether the adoption or reliance without mentioning what the statement, deposition or report explicitly says constitutes an "omission" is a jury question subject to impeachment and argument.

## **2.1 Facts Which Are Not in a Witness's Deposition, But Which Are Elsewhere in the File**

**A witness may testify to a fact which, although not in the witness's statement or deposition, is part of the file (as expressly stated in another witness's statement or appears in an exhibit). Under these circumstances, it is permissible for an advocate to show the "other witness's statement" or the "exhibit" to the witness. In such cases, however, the opponent may impeach the witness regarding the omission of the fact from the witness's statement under Rule 2.8.**

### **COMMENT**

- [1] In both mock and real trials, witnesses forget and therefore testify inconsistently. This rule prohibits a witness from intentionally testifying to facts which are inconsistent with what the witness said in his or her statement. See MRMT Rules 2.2 and 2.6.
- [2] To some, at first blush, it appears inconsistent to permit impeachment by omission where a witness testifies to a fact which is stated elsewhere in the file but which is not in his statement or deposition. It isn't. A concern is that judges may draw the impermissible inference that the team which asked the witness about the fact has "gone beyond the file." Often, but not always, the "omitted fact" was the result of a drafting error. In such situations, drawing an inference that a team has made up a fact would be wrong and arguing that the witness has "gone beyond the file" would be impermissible. The rule permits such impeachment because there is no practical way to regulate or limit its application during an examination. Simply put, judges should not be asked to determine whether "the fact . . . expressly stated [elsewhere]" was strategically or erroneously omitted. It is better left to the discretion of counsel to elicit the fact and argue, where appropriate, that the witness "knew it" or "did not know it."
- [3] For purposes of illustration, the following are permissible.
  - (a) Although witness A's statement or deposition does not refer to a diagram or map, Witness B authenticates or will authenticate the exhibit as fairly illustrating the area in question at the relevant time. Under these conditions, Witness A may use the map or diagram and may testify that it is accurate if he has personal knowledge of the area even if witness B has not already done so.

(b) Witness A interacts with a man but does not describe him in the witness's statement or deposition. Witness B's statement or deposition provides a description. Witness A may testify to the description.

(c) Witness A testifies that Witness B made a particular statement to him, but there is no mention of the statement being made in Witness B's statement or deposition. Witness B may testify that she did make the statement, that she did not make the statement or that she does not remember whether she made the statement. Witness B may not testify to make up a different statement than the one provided by Witness A.

(d) Consistent with his statement, Witness A testifies that he read, adopts the assertions in or relied upon a manual provided by the defendant, although, in his statement, he or she does not specifically refer to any of the techniques described in the manual. Subject to evidentiary rulings, the witness may adopted or relied upon another's statement, deposition or report and if so, whether the adoption or reliance without mentioning what the statement, deposition or report explicitly says constitutes an "omission" is a jury question subject to impeachment and argument.

## **2.2 Good Faith Bases For Asking Questions and Making Arguments**

**No advocate or witness shall ask a question or make an argument unless there is a good faith basis for doing so in the file. An advocate has a good faith basis for cross examining a witness on the lack or absence of evidence as provided in Rule 2.3.**

**(a) An advocate may not ask if a witness made a statement unless there is evidence in the file that the witness made such a statement;**

**(b) An advocate may not ask if a witness performed an act unless there is evidence in the file of such conduct by the witness.**

### **COMMENT**

[1] This rule follows MRPC 3.1, Meritorious Claims and Contentions and 3.3, Candor Before a Tribunal.

[2] An advocate's conduct shall at all times be characterized by honesty, candor and fairness (American College of Trial Lawyers' Code of Trial Conduct at 22).

[3] Implicit but not expressly stated in either the rules of evidence or procedure is that lawyers are not permitted to ask questions or make arguments without "prove-up" evidence to support the question or argument. This rule simply re-iterates this point. Most violations occur on direct examination and are addressed by Rules 2.0 and 2.7.

Customarily, on cross-examination, the “check” comes from the witness “denying” the invented fact (statement or conduct). Rule 2.2 has been included to underscore the un-professionalism of asking questions and making arguments with no bases before judges who may be unfamiliar with the file.

### **2.3 Cross-examining on the Absence of Evidence**

**(a) An advocate may cross-examine a witness on the lack or absence of evidence, the failure to perform standard tests or examinations or conduct an investigation or search which would have been reasonable for the witness or the institution to which the witness belongs to conduct. Because the file contains all of the evidence which exists, a witness must answer that the test, examination, or search has not been conducted, and that there is no evidence in the file of the matter which was not recovered or investigated. If an explanation is provided in the file, the witness may provide that explanation for the lack or absence of evidence.**

**(b) Expert and professional witnesses may not be cross-examined on scientific, technical or other specialized knowledge, techniques, procedures or examinations which are not generally known or not mentioned in the case file.**

**(c) If a witness is cross-examined about non-material background information not contained in the case file, the witness is permitted to invent a non-material answer, even though it is not contained in the case file. Non-material background information is information about a witness which does not affect the witness's credibility or competency to express an opinion. This includes, but is not limited to, information about the names of spouses and children or the names of schools, professors, courses, employment sites and supervisors.**

#### **COMMENT**

[1] One of the more controversial issues is whether an advocate may cross-examine a witness on the lack of evidence. These issues frequently arises in criminal cases where the police fail to search homes and cars, obtain or compare fingerprints and trace evidence such as blood and DNA or follow leads. The failure to perform examinations and tests also arises in medical malpractice, wrongful-death and product liability actions. For purposes of illustration, the following are examples of permissible cross-examination;

(a) The fact that the police did not search a suspect’s house, apartment or car (assuming there is evidence that the defendant has a house, apartment or car); and

(b) The fact that the police did not obtain or compare fingerprints, blood, DNA or other types of trace evidence.

- [2] For purposes of illustration, where the file says nothing about fingerprints, a detective witness, when questioned about the lack of fingerprint evidence is obligated to answer, “We didn’t take fingerprints” or “I have no evidence of fingerprints.” The witness may not explain, “Fingerprints are rarely obtained from that item.” The detective may answer, “I needed a search warrant.” The advocate may ask, “You didn’t get a search warrant?” In such a scenario, the detective is obligated to answer, “No, I did not get a search warrant.”
- [3] Some have commented that allowing impeachment on the lack of evidence is unfair because it permits impeachment based on facts that are missing through no fault of the proponent. In real trial courts, the rule of thumb is often that investigations are incomplete and that trace evidence is not recovered. The skill of spinning facts and making arguments to account for the lack of evidence is an essential skill for the trial lawyer and worth teaching in trial competition. This rule establishes a level playing field because it applies to both sides.
- [4] Recognizing the impossibility of regulating information which advocates may acquire and policing what they can consult, participants are reminded that: (1) Direct examiners are not permitted to ask witnesses to comment on industry, scientific, medical or other expert materials not provided for in the file; and (2) Cross examiners who ask such questions without the ability to offer supporting documentation may, at some point, be examining in bad faith.
- [5] It is improper for a cross-examiner to ask a witness about non-material personal or background information which is not in the file, such as the names spouses and children or the names of schools, professors, courses, employment sites and supervisors. Where the cross-examiner asks the witness about these types of details, the witness may make up non-material details or invent non-material answers to these types of questions.
- [6] The rules permit the cross-examination of experts and professionals on knowledge, techniques and procedures which are generally well known, such as DNA, fingerprinting and ballistics. The rules prohibit cross-examination on cross-examine a witness on techniques, procedures, knowledge which are not generally known—such as medical or engineering knowledge--not mentioned in the case file or which require research. In real life, such a cross-examination often fails because the witness knows more than the examiner. For these reasons, such “esoteric” cross-examination is prohibited.

## **2.4 Exhibits**

An advocate may not create, alter, modify redact or change an exhibit in any way except when ordered by the court. The exhibits are limited to those provided in the file and those created by counsel or the witness during the trial. Neither a lay nor expert witness may create an exhibit or diagram which goes beyond the witness's statement, deposition, former testimony or report.

To do otherwise is to make up new facts.” The court may order counsel to constructively redact an exhibit where appropriate and in response to counsel’s objection or motion.

#### COMMENT

- [1] For example, in a products liability case, the defendant’s manual contained no warning on the “directions page” not to clean the machine when it was on. Such warnings existed on other pages. A defense team asked its expert to re-assemble the pages so that the warnings were moved to the “directions page” which, in essence, created a new exhibit. This is impermissible.
- [2] This rule does not prohibit a witness from using or drawing an exhibit based upon his first-hand knowledge where the proper foundation can be established.

### 2.5 Courtroom Demonstrations

Advocates may ask witnesses to "demonstrate" objective facts such as height, time and distance where stated in the file. Advocates may not ask witnesses to "demonstrate" or “act out” or “show” *how* something occurred unless the event is explicitly described in the file, the description in the file contains all of the material details demonstrated, and the demonstration is consistent with the file description.

#### COMMENT

- [1] Demonstrations can be effective techniques on direct examination and are permissible where the demonstration illustrates what a witness has described in a statement or deposition.
- [2] By way of illustration, the following are permissible demonstrations:
  - (a) A witness says, "I was standing 15 feet away from the car." An advocate or witness may demonstrate by stepping off 15 feet;
  - (b) A witness says, "A man approached me from behind and stood face to face with me." An advocate may approach the witness and ask the witness to tell the advocate where to stop, even though the witness said nothing about the side from which the man approached where the “side of approach” is immaterial. Where the “side of approach is material,” the demonstration must be limited to the “face to face” position.
- [3] By way of illustration, the following are impermissible demonstrations:
  - (a) A witness says, "A man came running at me and I held out my hands." Neither the witness nor advocate may demonstrate that the witness's hands were extended out to the sides or were covering the witness's eyes unless described in the file.



(b) A witness says, "I reached into the car for my gun." Neither the witness nor advocate may demonstrate that the witness bent down, turned his back or used a particular hand unless described in the file.

## **2.6 Statements, Depositions and Former Testimony are Full and Complete**

**All formal statements (statements to investigators, police officers or public officials), depositions and former testimony are full, complete and accurate descriptions of all material events and occurrences within the witness's knowledge, unless the statement, deposition, testimony or file specifically states otherwise. All such statements are also presumed to be truthful unless the witness specifically states elsewhere that the statement was not truthful.**

(a) **Each witness who gave a statement agreed that he or she would give a full, complete, and accurate description of all material events and occurrences within the witness's knowledge unless the statement says otherwise;**

(b) **Each deponent testified under oath and signed his or her deposition after reviewing it to make sure it was accurate and complete.**

(c) **Witness statements/transcripts/depositions will contain self-limiting statements, such as "this is all I can remember of the event," or, in the case of a law enforcement officer, "all my investigative activities have been reduced to this report. If it is not in here I did not do it or observe it." It is stipulated that each witness has executed a separate certification that he/she has is familiar with the issues of the case, and that he/she has recently reviewed their statement/transcript/deposition, and that he/she has no further information relevant to the case.**

### **COMMENT**

[1] To make the impeachment of witnesses who make up facts or embellish their testimony more realistic, problem writers should end each witness statement or deposition with the averments in Rule 2.6(a) or 2.6(b), respectively.

(a) For example, a deposition might end as follows:

Q: Have you provided a full, complete and accurate description of all the events and occurrences within your knowledge?

A: Yes

(b) For example, a statement might end as follows:

I have read over this statement and it is a full, complete and accurate description of all the events and occurrences within my knowledge.

- [2] Regardless of whether the statement or deposition specifically contains the averments in Rule 2.6(a) and 2.6(b), all statements and depositions are presumed to be full, complete and accurate statements or transcriptions of what the witness earlier said, unless the statement or file specifically indicates otherwise.

## **2.7 Only Necessary Inferences Are Permitted in Direct Examination**

**No advocate may elicit from a witness and no witness may draw any inference during a direct or re-direct examination unless it is necessary for the witness's testimony to make sense. A necessary inference is where a witness testifies to a fact which could not have occurred without evidence of an additional fact which is absent from the file but which must be inferred without which the witness's testimony would be implausible.**

**Reasonable inferences may be drawn in motions, opening statements where appropriate and closing arguments.**

**(a) On direct examination, advocates must advise their witnesses that if they are asked to provide information which is not specifically provided in the file, they are to respond by stating, "No, I didn't do (hear, see) that" or "I don't know that," or "I don't have that information."**

**(b) An advocate is obligated to correct the record by withdrawing testimony which presented facts outside the file. Where an advocate's witness testifies to a fact outside of the file, the advocate shall promptly ask the witness to correct the witness's testimony by withdrawing it and stating that he or she has no first-hand knowledge of it. If the witness refuses or is unable to do so, the advocate shall move to strike the answer as being outside the file and ask the court to disregard the statement.**

### **COMMENT**

- [1] The following is an example of a necessary inference because it supplies a fact without which a witness's testimony becomes utterly untenable.

Defendant is charged with shooting a man who threatened her. She and the man are the only two witnesses to the incident. Both testify that the man drives into his compound, gets out of his car, approaches his house when the defendant pulls out her gun and confronts him. He walks back to his car where he keeps his gun under the passenger seat. He reaches into the car and turns toward the defendant at which point the defendant shoots him. When police arrive on the scene, they find the passenger door locked, a gun near the car and a cell-phone in his pocket. Neither the man's nor defendant's statement state that either locked the door or that a window was open. The only way the man could

have reached into the passenger side of the car was if the window were open—a fact unintentionally omitted by the drafter.

## **2.8 Impeachment By Omission**

**Advocates may impeach witnesses by omission. Where asked, witnesses must admit that the fact(s) to which they have testified are not in their statement(s) (deposition, testimony, etc.). It is a violation of these rules for witnesses to answer in any way which calls into question the reliability of the earlier statement. The witness must admit, if asked, that the facts to which the witness testified are not in his/her statement. The witness must also admit, if true, that the advocate who prepared the witness to testify, advised the witness to add or make up the fact to which an objection has been made. Advocates must instruct their witnesses that the following types of answers are not permitted to questions about what the witness earlier stated:**

- (i) “I was not asked that question in my deposition.”**
- (ii) “I was not asked to talk about that issue in my statement.”**
- (iii) “I was not asked about those facts in my deposition.”**
- (iv) “Those answers are in another part of the deposition which has not been transcribed.”**
- (v) “This is the first time I’ve been asked about those facts but I’m prepared to respond at this time.”**
- (vi) “Would you like me to tell you why I didn’t mention that before?”**

## **2.9 There is No “Beyond The Record” objection**

**Advocates may not object to a witness’s statement as being “beyond the record” or outside of the file. Rather, teams shall use impeachment by omission (Rule 2.8).**

### **COMMENT**

- [1] Except during closing argument, no objection shall be made that the opposing team is “going outside the record.” Any breach of the rule shall be addressed instead by means of impeachment by omission or by contradiction using another witness or document.

## **2.10 Judges May Question Advocates**

**At the conclusion of any examination and speech, the presiding judge and any scoring judge may ask the examining or presenting advocate to point to the specific language in the file which provides the basis for the question or argument.**

### **COMMENT**

- [1] During the drafting process, concern was expressed that judges would abuse the process. Given the historical reluctance of most judges to participate in any type of “sanctioning

process,” there is little likelihood that this rule will be frequently invoked, even where necessary. Judges who have limited familiarity with the facts of the case will be in no position to question the advocates. When judges avail themselves of it, we recommend that they simply ask, “Counsel, what is the page and line in the file that supports the basis for that question/argument?”

- [2] It is unlikely that all but a handful of evaluators will take advantage of this rule. We expect that the mere possibility of its invocation will serve to remind advocates to carefully re-consider asking questions which have no page and line references in the file.

### **2.11 Misrepresentations of Rules, Procedures and Stipulations**

**An advocate shall not misrepresent, mischaracterize, misquote or miss-cite stipulations, procedures, file instructions or supplemental problem clarifications.**

#### **COMMENT**

- [1] Many presiding judges are unfamiliar with trial competition rules and the effect of stipulations. For example, stipulations which provide that exhibits are authentic are different from those stipulations which provide the certain exhibits are admissible. Advocates shall be extraordinarily careful to be fair, accurate and comprehensive in stating and explaining file rules and stipulations to the bench.
- [2] This rule follows from MRPC 3.4 (Fairness to Opposing Party and Counsel), from the Texas Rule of Professionalism and from the ABA Guidelines for Conduct, Lawyers’ Duties to The Court, 5: “We will not knowingly misrepresent, mischaracterize, misquote, or miss-cite facts or authorities in any oral or written communication to the court.”]
- [3] Advocates have a duty to correct any misimpressions of the presiding judge as to rules, procedures and stipulations.

### **2.12 Frivolous Objections**

**An advocate shall not attempt to gain an unfair advantage by making frivolous objections or making objections without a good faith basis.**

#### **COMMENT**

- [1] Advocates shall not make frivolous objections to run down the clock or interfere with an opponent’s right to present evidence.

### **2.13 Re-Cross-examination**

**Notwithstanding a general prohibition of re-cross-examination, where on re-direct examination, an advocate offers evidence which (1) was not a subject of cross-examination,**

**(2) is outside of the record, or (3) is a statement inconsistent with the witness’s earlier statement, re-cross-examination shall be permitted.**

**COMMENT**

- [1] Where the tournament rules prohibit re-cross-examination, there has been a tendency for advocates to both make up facts and elicit “damaging” testimony on re-direct examination. This rule responds to that unsettling predicament.

**2.14 Witness’s First Hand Knowledge**

**A witness may not testify to having first-hand knowledge of a fact, unless the witness’s statement or deposition states that the witness has first-hand knowledge or another witness testifies that the primary witness has first-hand knowledge of the fact. First-hand knowledge may be presumed where the witness is testifies to an observable physical condition or relationship.**

**COMMENT**

- [1] For purposes of illustration, the following may help explain the “first-hand knowledge” issue: Where, the statement or deposition says, “I was with her,” the witness may testify, “She had bruises; it appeared that she was afraid of him.” The witness may not testify, “He beat her,” unless there is a statement in the file that the witness was present at an earlier beating.

**2.15 Extensions of Time**

**Either a presiding judge or tournament director may extend additional time to a team only (1) where its opponent used excessive time either in answering questions or making objections, (2) to resolve time-keeping mistakes, or (3) to address an inequity. The determination of the tournament director is not reviewable.**

**COMMENT**

- [1] Nothing in this rule prevents a team from agreeing to an extension of time for its opponents.
- [2] Teams are afforded the same specific time period in which to try their cases. The burden for the effective use of time and the choice as to how to allocate it falls on each team. A team may choose to spend its time on examinations at the expense of its closing, but it should not be rewarded for doing so by getting extra time to close.
- [3] Additional time may be afforded only to resolve an inequity and not to benefit a team that failed to control its own use of time.

## 2.16 Jury Instructions

**It is stipulated that included in the jury instructions is this instruction: In this case, each witness has signed a prior statement. Each witness later certified that the statement was complete, as did the attorney who called the witness. If a witness has provided information that differs from, or is in addition to information contained in the statement, you should consider that witness's entire testimony with great caution.**

### ANONYMITY

## 3.0 Anonymity

**Advocates may not refer or have their witnesses refer to “local facts” or in any other way disclose to the evaluators the school or jurisdiction from which the advocates come. This prohibition includes insignia on files and briefcases as well as pins and jewelry which may help to identify the advocates as coming from a particular school, jurisdiction or faith community.**

### COMMENT

- [1] Advocates should also refrain from speaking to non-team member law students or other parties during breaks. Other teams have no way of knowing whether the non-team members are coaches or have otherwise worked with the team.
- [2] After the witness prep time has ended, advocates should not sit with or speak to witnesses to avoid any tendency to identify the advocates as the home team.
- [3] The wearing of boots does not violate Rule 3.0.

### PRE-TRIAL MATTERS

## 4.0 Discovery

**Unless the file states otherwise, discovery is over and all discovery issues have been resolved. Accordingly, no advocate is permitted to invent, request or explain the non-existence of a document by stating that the document was “not requested in discovery.”**

### COMMENT

- [1] There are no reports or documents which exist, other than those which are referred to in the file. For example, if a police report, investigation file, bank record, receipt, or cancelled check is not mentioned in the file, it has never existed and could not have been supplied in discovery.

#### **4.1 Suppression Motions**

**Unless the file states otherwise, all suppression issues based upon constitutional or statutory violations have been denied and no further motions to exclude based upon constitutional grounds may be heard.**

#### **4.2 Prepping Witnesses**

**An advocate shall not counsel or assist a witness to testify in any manner inconsistent with the witness’s statement, deposition or former testimony, unless the file specifically states otherwise. An advocate shall not counsel or assist any witness to falsely claim lack of memory, become hostile on direct examination so as to permit impeachment or become unreasonably compliant (i.e., “roll over”) on cross examination for the purpose of helping the opposing team.**

#### **COMMENT**

- [1] Advocates may neither instruct nor advise witnesses to forget their deposition testimony or to testify inconsistently when examined by advocates from another school to force the opponents to use up time by refreshing recollection or by impeachment.
- [2] Advocates may neither instruct nor advise hometown witnesses to become unreasonably compliant (i.e., “roll over”) on cross examination when cross-examined by the home school’s advocates.
- [3] Advocates may neither instruct nor advise their witnesses to become uncooperative or hostile so that examining counsel may impeach the witness. Advocates may instruct their witnesses to “answer only the question which is asked and not volunteer information.”
- [4] Advocates should not be put in a position to examine a witness with whom the advocate has a personal relationship. When an advocate is put in this position, the advocate must disclose the relationship to his or her opponent.
- [5] Advocates shall neither instruct nor advise a witness to testify inconsistently with the witness’s statement or deposition so that the examining advocate may impeach the witness.

#### **IMPROPER ASSISTANCE**

#### **5.0 Improper Assistance**

**No team member may receive advice or assistance from any coach, faculty advisor, alternate team member or anyone else from the time witness prep begins until the time the trial ends. If there is no witness prep period, no advice or assistance may be provided once the judges walk into the courtroom.**

## **5.1 Scouting**

During the rounds, participants (i.e., team members and coaches) may observe only their own team and the team opposing their team in the particular trial. Once a team has been eliminated, the team's participants may view any trial. No participant may obtain information or assistance from anyone about any trial not involving their team.

### **PROTESTS AND PENALTIES**

## **6.0 Conferring Period**

Where an advocate believes that an opponent has made up a fact or argued facts which were not part of the file, the advocate may confer with the opponent to attempt to resolve the violation. The conferring period provides an opportunity for a team to advise its opponent that it has gone beyond the file and that it should take steps to correct it. Conferring is required before an issue is brought before the evaluators (Rule 6.1) if the competition rules provide for argument (see Rule 6.2) or a protest is filed with the tournament director (Rule 6.3).

Following final arguments but before any ballots are totaled and a winner declared, the presiding judge will advise the teams that they have 5 (five) minutes to confer. Teams may consult with their coaches before conferring. During this period, an advocate who believes that his or her opponent (i) made up a fact or elicited a made-up fact from a witness, (ii) prepped a witness to deny a fact the witness was obligated to acknowledge, (iii) prepped a witness to improperly evade impeachment as defined in these rules (see rule 2.8), (iv) argued facts as a result of violating i, ii or iii, as defined by these rules or the rules of the competition, may confer with the responding advocate to correct the violation(s).

Conferring takes place outside the hearing of the scoring judges. Once advised by an advocate that there is a need for conferring, the presiding judge shall recess the proceedings and the advocates shall leave the room to confer.

The complaining team shall ask the tournament director or designee to observe but not participate in the conferring session. At the end of the conferring period, the teams will confer with coaches and the advocates may jointly advise the presiding judge and bailiff as to one of the following outcomes:

- (1) The ballots may be scored; or
- (2) The "responding team" will (i) withdraw a fact which it improperly elicited, (ii) acknowledge the existence of a fact it had erroneously denied, or (iii) correct an argument it had made based upon (i) or (ii).

COMMENT



- [1] There was consideration that a conferring period be held at the conclusion of the exam or speech which prompted the concern. While an immediate objection is consistent with real trials where an objection must be made on the spot at peril of waiver, a single or multiple interruptions of the case for the purposes of collateral argument would unnecessarily prolong the trials and attach undue significance to rule violations.
- [2] Tournament directors are advised to instruct presiding judges that at the conclusion of final arguments, the presiding judge should ask the advocates, “Do you have anything to discuss with each other before we mark the ballots?”
- [3] Although the intent and spirit of the rules is that conferring will sufficiently cure error and obviate the need for protests, there may be situations where a responding team’s behavior may not be sufficiently addressed by withdrawing a fact which it had improperly elicited, acknowledging a fact it had erroneously denied , or correcting an argument it had improperly made. Teams should not be permitted to “make up facts” and “make improper arguments” only to claim safe harbor by later withdrawing the facts and amending its argument. In such cases where the complaining team believes that a penalty is required, the complaining team may protest to the tournament director (see Rule 6.3).

### **6.1 Protest Following Conferring Period**

**Where conferring has failed to resolve the matter, the complaining team shall advise the bailiff that a protest will be filed (see Rule 6.3). The bailiff shall instruct the scoring judges not to total the ballots or declare a winner.**

### **6.2 Point Deduction Guidelines**

**In determining whether a violation occurred and, if so, how many points should be deducted, judges and protest committees shall be guided by the following guidelines:**

- (i) Whether the violation was material (as defined in Rule 6.1).**
- (ii) Whether the fact was indispensable.**
- (iii) Whether the responding advocate’s made up fact(s) or improper argument affected the score of the examination or speech.**
- (iv) Whether the conduct was careless (negligent), reckless or intentional.**
- (v) Whether the fact (or impeachment evasion) was elicited once or more than once.**
- (vi) Whether an advocate referred to the fact in closing and if so, how many times and with what emphasis**
- (vii) Did the offending advocate attempt to address the complaint by withdrawing a fact Which s/he improperly elicited, acknowledging a fact erroneously denied, or correcting an argument improperly made?**

**(a) Once a violation is found, points shall be deducted from the score given to the responding advocate’s examination or speech.**

**(b) Material Violations: If a judge or protest committee finds the violation to be material, the judge or protest committee shall deduct no less than 5 (five) points from the responding advocate’s score using the guidelines.**

**(c) Non-Material Violations: If a judge or protest committee finds the violation to be non-material, the judge or protest committee shall deduct at least 1 (one) but no more than 2 (two) points using the guidelines.**

**(d) Judges and protest committees may not be advised nor take into consideration whether a point deduction will result in a team losing the round and/or not advancing in the tournament. Judges may discuss whether there was a violation and, if so, how many points to deduct, but the ultimate decision belongs to each evaluator.**

#### COMMENT

[1] For material violations, at least 5 points must be deducted based upon a consideration of the guidelines provided in Rule 6.2. For non-material violations, judges and protest committees must deduct 1 but no more than 2 points. There was strong sentiment that a 5-point deduction from an examination or speech is an insufficient deterrent or penalty for an “egregious” violation. Accordingly, judges and protest committees have the discretion to impose a point reduction commensurate with the violation.

[2] There has been considerable discussion as to whether judges and the protest committee consider the effect, if any, which a point deduction will have on the advancement of a team. Once the judges find that a violation occurred, points shall be deducted from the respective examination and/or speech based on the guidelines provided in Rule 6.2. Whether the point deduction for a particular examination or speech will result in the loss of a round or non-advancement in the tournament shall be given neither consideration nor weight.

### **6.3 Formal Protest to Tournament Director.**

**If a coach is dissatisfied with the results of the conferring period, the coach may protest to the tournament director who shall convene a protest committee to review the protest if provided for by the competition rules. No protest may be considered unless the protesting team has complied with the conferring period (Rule 6.0). The protest committee shall approve the decision of the scoring judges unless it finds by clear and convincing evidence that there was no violation or that the cheating was**

**(a) Inadvertent and inconsequential, in which event the protest committee may decrease or rescind the penalty; or**

**(b) Purposeful, material and egregious and that the point deduction is insufficient. With this finding, the committee may increase the point penalty or disqualify**

**the responding team. Whether the point deduction for a particular examination or speech will result in a team’s loss of a round or non-advancement in the tournament shall be given neither consideration nor weight.**

**COMMENT**

- [1] Every competition provides for a protest procedure which requires the involvement of the tournament director and a protest committee. The protest committee is invariably but not necessarily comprised of other coaches. The NTC, AAJ and Top Gun Tournaments have protest committees comprised of tournament officials.
- [2] Although the calculus of penalty becomes more complicated when a protest committee is composed of coaches, it should make no difference. We urge that if a team’s score might eventuate in non-advancement, the protest committee not be composed of coaches whose teams stand to benefit by disqualification of the responding team.

**6.4 Baseless Charges of Cheating**

**No advocate or coach may, without good cause, accuse another advocate or coach of cheating or unethical conduct.**

**COMMENT**

- [1] [See ABA Guidelines for Conduct, Lawyers’ Duties to Other Counsel, 4: “We will not, absent good cause, attribute bad motives or improper conduct to other counsel.”]
- [2] Some have advocated for a sanction for violating Rule 6.4. False accusations of cheating undermine the foundation of professionalism and cheapen the grade of legitimate challenges. There are several reasons why a sanction for “baseless charges” is not feasible:
  - (i) While the Rules are not designed to encourage baseless challenges, sanctioning those who make them may dissuade challengers who come forward with good faith and cause;
  - (ii) Requiring judges to make an additional determination as to whether a challenge is “baseless” after finding that no violation occurred, may encourage judges to improperly find “no violation” to avoid further inquiry; and
  - (iii) An additional inquiry into whether the challenge was “baseless” will unduly pro-long and misdirect the deliberation process.
- [3] Where a team makes baseless charges of cheating, the tournament director should be so informed after the completion of the round and the team should not be invited back to the tournament. See rules for American University’s Capitol City Challenge.

## 6.5 Post-Tournament Sanctions for Cheating

**Tournament directors, competition boards and sponsoring organizations are reminded that ethical behavior and professionalism in mock trial competitions—as in the legal profession—depends upon self-regulation. Where, during a competition, a team has been found, by a tournament’s protest committee, to have cheated by “inventing material facts” or to have otherwise egregiously breached these rules of conduct, it is recommended that tournament officials take the following actions:**

- (a) The offending team should not be invited to return to the tournament for the following year.**
- (b) The offending team’s Dean should be notified that the protest committee found that the team had cheated or otherwise violated the rules and would not be invited to participate in next year’s tournament.**

### COMMENT

[1] There are relatively few sanctions which may be imposed upon teams which have been found to have cheated during a competition. There is no enforcement mechanism other than what a respective tournament sees fit to impose. The “penalty” provided in Rule 6.5(a) follows the policy adopted by American Law School’s Capital City Tournament. This sanction is immediate, measured, decisive and proportional. We support its inclusion in tournament rules and recommend its application to tournament directors:

“If your team encounters a team that has violated the letter and spirit of the Competition Rules, the Administrators should be informed of this after the completion of the round. Any team that violates the letter and spirit of the Competition Rules shall not be invited back to the Capitol City Challenge.”

[2] The MRMT do not require teams to report or lodge a protest for misconduct or cheating. Such a requirement would be unenforceable and would substantially and misguidedly change the nature of the competition. It would also mean that the failure to report would, itself, be a violation of the Rules. But where a serious violation is reported and found to have occurred, a sanction should be imposed with measured judgment to further four interests:

- (i) Maintains the integrity of the competition;
- (ii) Underscores the commitment to ethics and professionalism in mock trial practice;
- (iii) Deters offending teams from continuing to violate the rules; and
- (iv) Deters other teams from violating the rules.