2013 / 2014
Mock Trial
Middle and High School
Competition Handbook

MODIFIED RULES OF EVIDENCE

(Section 2 of 4)

MODIFIED RULES OF EVIDENCE:

Overview of the Updates to the Modified Rules of Evidence for 2013/2014

The Modified Rules of Evidence were recently updated to reflect the changes made to the Federal Rules of Evidence, which in turn are reflected in the newest National High School Mock Trial rules. Because of the significant rewording, please read all rules for updates as they will apply.

2013 / 2014
MODIFIED RULES OF EVIDENCE [1]

In a trial, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy, or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the presiding judge. The presiding judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the presiding judge will probably allow the evidence. The burden is on the team to know the rules and to be able to use them to protect their client and to limit the actions of opposing counsel and their witnesses (for example, to exclude hearsay and prevent unfair extrapolation).

The Mock Trial Rules of Evidence are a modified version of the Federal Rules of Evidence. If there is any conflict between the Mock Trial Rules of Evidence and the Federal or South Carolina Rules of Evidence, the Mock Trial Rules of Evidence will control.

Formal Rules of Evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of the Mock Trial competition, the Rules of Evidence have been modified and simplified below. Not all presiding judges will interpret the Rules of Evidence (or procedure) the same way and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule you think proper. **No matter which way the presiding judge rules, accept his/her ruling with grace and courtesy.**

Rules of Evidence for use of the Middle and High School Mock Trial Competitions are included below and overrule any prior Rules of Evidence.

Anything outlined in a light grey box is something that South Carolina is providing as additional information.

ARTICLE I. GENERAL PROVISIONS

Rule 101 Scope
These rules govern proceedings in the South Carolina High School Mock Trial Competition.

Rule 102 Purpose and Construction
These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

ARTICLE II. JUDICIAL NOTICE
No Federal Rules of Evidence under Article II apply to the Mock Trial program.

[1] The applicable rules of evidence have been streamlined for the High School Mock Trial Competition.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

No Federal Rules of Evidence under Article III apply to the Mock Trial program.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401 Test for Relevant Evidence

Evidence is relevant if:

(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) The fact is of consequence in determining the action.

Rule 402 General Admissibility of Relevant Evidence

Relevant evidence is admissible unless these rules provide otherwise. Irrelevant evidence is not admissible.

Rule 403 Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404 Character Evidence; Crimes or Other Acts

Character Evidence:

(1) **Prohibited Uses:** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) **Exceptions for a Defendant or Victim in a Criminal Case:** The following exceptions apply in a criminal case:

(A) A defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) A defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) Offer evidence to rebut it;

(ii) Offer evidence of the defendant's same trait; and

(C) In a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) **Exceptions for a Witness:** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Crimes, Wrongs, or Other Acts:

(1) **Prohibited Uses:** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) **Permitted Uses:** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Rule 405 Methods of Proving Character

(a) **Reputation or Opinion:** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) **Specific Instances of Conduct:** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406 Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407 Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Rule 408 Compromise and Offers to Compromise (*Civil Case Only*)

(a) **Prohibited Uses:** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) Furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) Conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations

related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions:** This rule does not require exclusion if the evidence is offered for the purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or Prosecution.

Rule 409 Offers to Pay Medical and Similar Expenses *(Civil Case Only)*

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

Rule 410 Pleas, Plea Discussions and Related Statements

(a) **Prohibited Uses**: In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) A guilty plea that was later withdrawn;

(2) A nolo contendere plea;

(3) A statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) A statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) **Exceptions:** The court may admit a statement described in Rule 410(a)(3) or (4):

(1) In any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) In a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Rule 411 Liability Insurance *(Civil Case Only)*

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or proving agency, ownership, or control.

ARTICLE V. PRIVILEGES

Rule 501 General Rule

There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are:

(1) Communications between husband and wife,
(2) Communications between attorney and client,
(3) Communications among grand jurors,
(4) Secrets of State, and
(5) Communications between psychiatrist and patient.

ARTICLE VI. WITNESSES

Rule 601 General Rule of Witness Competency

Every person is competent to be a witness.

Rule 602 Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703 (Bases of Opinion Testimony by Experts). (*See Rule 2.2 – Witness Conduct.)*

Rule 607 Who May Impeach

Any party, including the party that called the witness, may attack the witness's credibility.

A video link showing examples on how to impeach can be viewed.

Visit *www.scbar.org/lre* and the click on the Middle School or High School Mock Trial logo on the main page. Go to Resources and then to Mock Trial Sample Videos.

Rule 608 A Witness's Character for Truthfulness or Untruthfulness

(a) **Reputation or Opinion Evidence:** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) **Specific Instances of Conduct:** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) The witness; or

(2) Another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Rule 609 Impeachment by Evidence of a Criminal Conviction

(this rule applies only to witnesses with prior convictions)

(a) **In General:** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) For a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) Must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) Must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

Probative Value: evidence which is sufficiently useful / important to prove something in a trial

(2) For any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) **Limit on Using the Evidence after 10 Years:** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation:** Evidence of a conviction is not admissible if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile Adjudications:** Evidence of a juvenile adjudication is admissible under this rule only if:

(1) It is offered in a criminal case;

(2) The adjudication was of a witness other than the defendant;

(3) An adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) Admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an Appeal:** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Rule 610 Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611 Mode and Order of Interrogation and Presentation

(a) **Control by Court:** The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) Make those procedures effective for determining the truth;
(2) Avoid wasting time; and
(3) Protect witnesses from harassment or undue embarrassment.

Scope of Direct Examination: *Direct questions should be phrased to evoke facts from the witness. Witnesses may not be asked leading questions by the attorney who calls them. A leading question is one that suggests to the witness the answer desired by the examiner and often suggests a "yes" or "no" answer.*

Example of a Direct Question: *"Mr. Patterson, prior to today, have you ever met the subject of this petition, Jeremiah Winstead?"*

Example of a Leading Question: *"Mr. Patterson, isn't it true that you kidnapped Jeremiah at the Hot Shoppes on New York Avenue?" While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or "narrate" a whole story. Narrative questions are objectionable.*

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

Cross examination is the questioning of a witness by an attorney from the opposing side of the case. Cross examination is not limited to direct questioning.

(1) ***Form of Questions:*** *An attorney may ask leading questions when cross-examining the opponent's witnesses. Questions tending to evoke a narrative answer should be avoided. Example of a leading question: "Mrs. Winstead, isn't it true that your son chose of his own free will to join the army?"*

(1) ***Scope of Witness Examination:*** *In the Mock Trial competition, attorneys are allowed unlimited range on cross-examination of witnesses as long as questions are relevant to the case. Witnesses must be called by their own team and may not be recalled by either side. All desired questioning of a particular witness must be done by both sides in a single appearance on the witness stand.*

A video link showing cross examination examples can be viewed.

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(c) **Leading Questions:** Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, the court should allow leading questions:

(1) On cross-examination; and
(2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

(d) **Redirect / Recross:** After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on recross, but such questions must be limited to matters raised on redirect examinations and should avoid repetition.

(e) **Permitted Motions:** The only motion permissible is one requesting the presiding judge to strike testimony following a successful objection to its admission.

Rule 612 Writing Used to Refresh Memory

If a written statement is used to refresh the memory of a witness either while testifying or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for inspection. The adverse party may cross examine the witness on the material and introduce into evidence those portions, which relate to the testimony of the witness.

Rule 613 Prior Statements of Witnesses

(a) **Showing or Disclosing the Statement during Examination:** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) **Extrinsic Evidence of a Prior Inconsistent Statement:** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Official Comment:

A cross-examining attorney may want to challenge the credibility of a witness by showing that the witness has testified in court in a way that is inconsistent with that witness' affidavit. This tactic is called "impeaching the witness." It may be executed by asking the witness whether s/he has ever given an out-of-court statement inconsistent with the witness' testimony. If the witness maintains that s/he has never testified inconsistently, the cross-examining lawyer may choose to present him/her with his/her affidavit and enter it in evidence to prove the contradiction to the jury.

*Note, however, that the cross-examining lawyer is not **required** to introduce the witness' affidavit in evidence in order to impeach the witness. It is acceptable merely to ask the witness whether s/he has ever given a statement out-of-court that is inconsistent with the witness' trial testimony. If the witness promptly admits the contradiction, the lawyer may choose to save valuable time by not going to the trouble of introducing and admitting the affidavit.*

A video link showing how to impeach examples can be viewed.

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ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701 Opinion Testimony by Lay Witness

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) Rationally based on the witness's perception;
(b) Helpful to clearly understanding the witness' testimony or to determining a fact in issue; and
(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 (Testimony by Experts).

Rule 702 Testimony by Experts

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

Rule 703 Bases of Opinion Testimony by Experts

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Official Comment:

A witness cannot give expert opinions under Rule 703 until s/he has been tendered as an expert by the examining lawyer and recognized as such by the court. To have an expert witness admitted by the court, first ask the witness to testify as to his/her qualifications. Then ask the presiding judge that the expert witness be qualified as an expert in the field of _____ . The presiding judge will then ask opposing counsel if there are any objections to having the witness recognized as an expert. Either there will be no objections or there will be argument as to why the witness is not qualified as an expert. The presiding judge will then rule if as to whether the witness is qualified as an expert.

Prior to the court's admission of a witness as an expert, the witness cannot provide any opinions and the attorneys should object to any attempts by an undesignated expert to render opinion testimony. Once the witness is qualified and admitted as an expert by the court, the witness can offer only opinions that are within the witness' recognized field of expertise.

Rule 704 Opinion on Ultimate Issue

(a) **In General – Not Automatically Objectionable:** An opinion is not objectionable just because it embraces an ultimate issue.

(b) **Exception:** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Rule 705 Disclosure of Facts or Data Underlying Expert Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

ARTICLE VIII. HEARSAY

Rule 801 Definitions

The following definitions apply under this article:

(a) **Statement:** A "statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant:** A "declarant" means the person who made the statement.

(c) **Hearsay:** "Hearsay" means a statement that:

(1) The declarant does not make while testifying at the current trial or hearing; an

(2) A party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements That Are Not Hearsay:** A statement that meets the following conditions is not hearsay:

(1) **A Declarant – Witness's Prior Statement:** The declarant testifies and is subject to cross examination about a prior statement, and the statement:

(A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) Is consistent with the declarant's testimony and is offered to rebut an expressed or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) Identifies a person as someone the declarant perceived earlier.

(2) **An Opposing Party's Statement:** The statement is offered against a party and:

(A) Was made by the party in an individual or representative capacity;

(B) Is one the party manifested that it adopted or believed to be true;

(C) Was made by a person whom the party authorized to make a statement on the subject;

(D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) Was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802 Hearsay Rule

Hearsay is not admissible except as provided by these rules.

NOTE:

Hearsay generally has a three step analysis:

1) *Is it an "out-of-court" statement?*
2) *If so, is it offered to prove the truth of the out-of-court statement?*
3) *If so, is there an exception that allows the out-of-court statement to be admitted despite the fact that it is hearsay?*

An example of hearsay would be a witness saying "I heard Bob Smith [who is not testifying in the case] say that he saw the Defendant kill the victim." If this is offered to try to prove that the Defendant killed the victim, the Defendant's attorney has no way of cross-examining Bob Smith about what he saw, or whether he has a bias against the Defendant, or whether there is any other reason to disbelieve the statement. Because we cannot test the credibility (truthfulness or untruthfulness) of the substance of Bob's statement, it is untrustworthy and should not be admitted.

An example that would not be hearsay: a witness testifies "I heard Bob Smith tell the Defendant that the Defendant's child was at the hospital and was seriously injured." If this is offered to show why the Defendant raced to the hospital, it is not a statement being offered "for the truth of the matter asserted" (i.e., it is not offered to show the child was actually injured, this is not the point), then it would NOT be hearsay. The statement is being admitted to show why someone took some action, not for the truth of the statement. (And it is irrelevant whether the statement is actually true or not.) In this instance, the issue is whether or not the statement was made (and the witness can be cross-examined on this point), not the truth of the statement.

An example which is hearsay, but which is likely an exception (and therefore might be admitted): a witness testifies "I was talking on the phone with the victim when he told me the Defendant was knocking at his door." This is hearsay; however, it likely falls under exception 803(1) – Present Sense Impression.

For the purposes of the Mock Trial competition, the exceptions to the hearsay rule which are listed herein (Rules 803 & 804) can be used.

Rule 803 Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness

A video link showing the hearsay exceptions can be viewed.

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The following are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness.

(1) **Present Sense Impression:** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) **Excited Utterance:** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) **Then Existing Mental, Emotional, or Physical Condition:** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Examples of Then Existing Mental, Emotional, or Physical Conditions:

Emotional State: *"I'm scared."*

Physical State: *"I have a headache."*

Mental State: *"I'm going to take this car out and see how fast it will go."*
(intent to speed)

(4) **Statements Made for Medical Diagnosis or Treatment:** A statement that:

(A) Is made for – and is reasonably pertinent to – medical diagnosis or treatment; and

(B) Describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded Recollection:** A record that:

(A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) Accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity:** A record of an act, event, condition, opinion, or diagnosis if:

(A) The record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity:** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) The evidence is admitted to prove that the matter did not occur or exist;

(B) A record was regularly kept for a matter of that kind; and

(C) Neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) **Public Records:** A record or statement of a public office if:

(A) It sets out:

(i) The office's activities;

(ii) A matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) In a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) Neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) **Learned Treatises:** To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.

(10) **Absence of a Public Record:** Testimony that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) The record or statement does not exist; or

(B) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(16) **Statements in Ancient Documents:** A statement in a document that is at least 20 years old and whose authenticity is established.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets:** A statement contained in a treatise, periodical, or pamphlet if:

(A) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence, but not received as an exhibit.

(21) **Reputation Concerning Character:** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction:** Evidence of a final judgment of conviction if:

(A) The judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) The conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) The evidence is admitted to prove any fact essential to the judgment; and

(D) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown, but does not affect admissibility.

Rule 804 Hearsay Exceptions; Declarant Unavailable

(A) **Criteria for Being Unavailable**. A declarant is considered to be unavailable as a witness if the declarant:

(1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) Refuses to testify about the subject matter despite a court order to do so;

(3) Testifies to not remembering the subject matter;

(4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) The declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) The declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(B) **Hearsay Exceptions:** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) **Former Testimony:** Testimony that:

(A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) Is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) **Statement Under the Belief of Imminent Death:** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(2) **Statement Against Interest:** A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(3) **Statement of Personal or Family History:** A statement about:

(A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) Not Applicable

(6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability:** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Rule 805 Hearsay Within Hearsay

Hearsay included within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 1103 Title

These rules came from the National High School Mock Trial Federal Rules of Evidence.

Special Rules Specific to South Carolina's Mock Trial Program:

Rule 105 Limited Admissibility

Evidence that is admissible to one party or for one purpose can be restricted at the discretion of the presiding judge, if requested by the opposing party. If the restriction is approved, the scoring jury will be instructed accordingly.

Rule 106 Remainder of Related Writings or Recorded Statements

When a party introduces a writing or a recorded statement, the opposing party may require the introduction of additional writings or recorded statements that should be considered at the same time to ensure fairness.

Rule 603 Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation, by the oath provided in these materials. The bailiff will swear in all witnesses at one time before opening statements as follows:

"Do you promise the testimony you are about to give will faithfully and truthfully conform to the facts and rules of the Mock Trial competition?"

A video link showing the bailiff opening court can be viewed.

Visit *www.scbar.org/lre* and the click on the Middle School or High School Mock Trial logo on the main page. Go to Resources and then to Mock Trial Sample Videos.

Rule 901 Assuming Facts Not in Evidence

An attorney shall not ask a question that assumes unproven facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by the evidence. Example of question that assumes unproven facts: "When did you stop stealing gum?"

Rule 902 Argumentative Questions

An attorney shall not ask a question which asks the witness to agree to a conclusion drawn by the questions without eliciting testimony as to new facts; provided, however, that the Court may in its discretion allow limited use of argumentative questions on cross examination.

Rule 903 Ambiguous Questions

An attorney shall not ask questions that are capable of being understood in two or more possible ways.

Rule 904 Lack of Proper Foundation

Exhibits will not be admitted into evidence until they have been identified and shown to be authentic (unless identification and/or authenticity have been stipulated). Even after a proper predicate has been laid, the exhibits may still be objectionable due to relevance, hearsay, etc. Given that the document is "authentic" means only that it is what it appears to be, not that the statements contained in the document are necessarily true.

PROCEDURE FOR OBJECTIONS

An attorney may object any time that the opposing attorney has violated the Mock Trial Rules of Evidence. The attorney wishing to object should stand up and do so at the time of the violation. When an objection is made, the presiding judge will ask the reason for it. Then the presiding judge will turn to the attorney who asked the question, and that attorney usually will have a chance to explain why the objection should not be accepted ("sustained") by the presiding judge. The presiding will then decide whether to "sustain" the objection, thereby disallowing the question or the answer; or the presiding judge will "overrule" the objection, thereby allowing the question to be answered or the answer to remain in the trial record.

REMEMBER: Winning or losing the ruling on an objection is not what is important,
but rather how knowledgeable of the Rules of Evidence the team is and how each team reacts to the decision of the presiding judge. What is important is the presentation of the objection and the opponent's response (both verbally and strategically) to the objection and to the Court's ruling.

Only the attorney "responsible" for the particular witness may object. For instance, the attorney who directly examines a witness objects when that witness is being crossed, and the attorney who crosses a witness objects when that witness is being directly examined.

Following are examples of standard forms of objection:

1. **IRRELEVANT EVIDENCE:** "I object, your Honor. The evidence/testimony is irrelevant to any issue in this case."

2. **LEADING QUESTION:** "Objection. Counsel is leading the witness."

   (NOTE: Remember that an attorney may ask leading questions when cross-examining the opponent's witnesses.)

3. **IMPROPER CHARACTER TESTIMONY:** "Objection. The witness' character or reputation has not been put in issue." OR "Objection. Only the witness' character for truthfulness is at issue here."

4. **HEARSAY:** "Objection. Counsel's question is seeking a hearsay response." (NOTE: If the witness makes a hearsay statement, the attorney should say, "The witness' answer is based on hearsay, and I ask that the statement be stricken from the record.") In responding to a hearsay objection, it may be appropriate for counsel to point out a specific exception, or to argue that the hearsay rule does not apply: "Your Honor, the testimony is not offered to prove the truth of the matter asserted, but only to show. . . ."

5. **OPINION:** "Objection. Counsel is asking the witness to give an expert opinion for which he has not been qualified."