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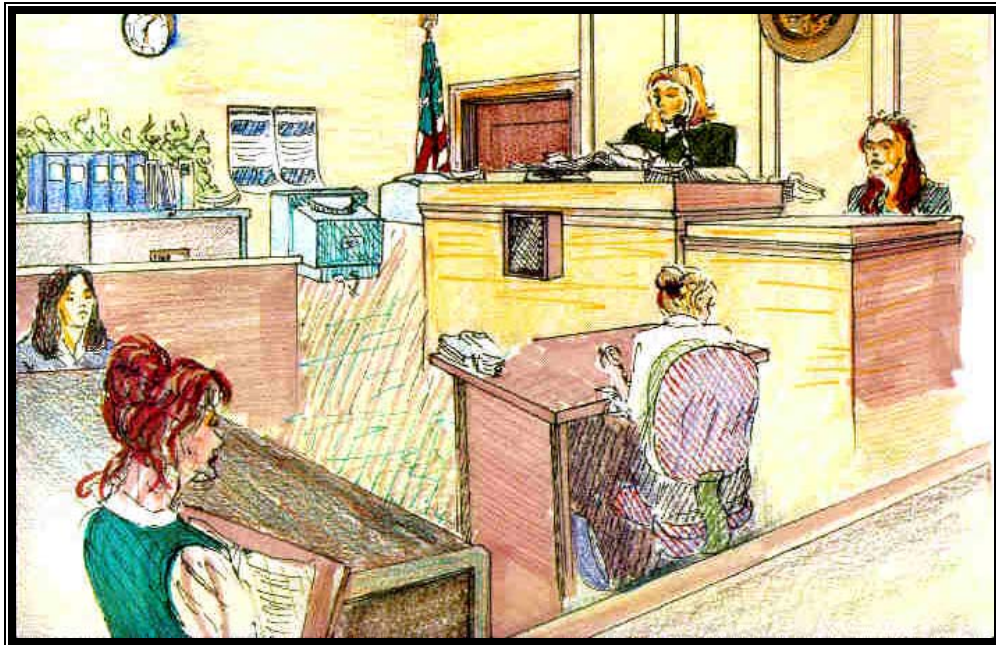
PEOPLE

V.

KELMAR

ISSUES OF YOUTH VIOLENCE, HOMICIDE AND PRIVACY

Featuring a pretrial argument on an issue of privilege and privacy rights in the California and U.S. Constitution



Co-Sponsored by:

California Department of Education
State Bar of California
California Young Lawyers Association
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**OFFICIAL MATERIALS FOR
THE CALIFORNIA MOCK TRIAL PROGRAM**



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PROGRAM OBJECTIVES

For the students, the Mock Trial Competition will:

1. Increase proficiency in basic skills such as reading and speaking, critical thinking skills such as analyzing and reasoning, and interpersonal skills such as listening and cooperating.
2. Develop understanding of the link between our Constitution, our courts, and our legal system throughout history.
3. Provide the opportunity for interaction with positive adult role models in the legal community.

For the school, the competition will:

1. Provide an opportunity for students to study key concepts of law and the issues of youth violence, homicide, and privacy.
2. Promote cooperation and healthy academic competition among students of various abilities and interests.
3. Demonstrate the achievements of high school students to the community.
4. Provide a hands-on experience outside the classroom from which students can learn about law, society, and themselves.
5. Provide a challenging and rewarding experience for participating teachers.

CODE OF ETHICS

At the first meeting of the Mock Trial team, this code should be read and discussed by students and their teacher.

All participants in the Mock Trial Competition must adhere to the same high standards of scholarship that are expected of students in their academic performance. Plagiarism* of any kind is unacceptable. Students' written and oral work must be their own.

In their relations with other teams and individuals, CRF expects students to make a commitment to good sportsmanship in both victory and defeat.

Encouraging adherence to these high principles is the responsibility of each teacher sponsor. Any matter that arises regarding this code will be referred to the teacher sponsors of the teams involved.

***Webster's Dictionary defines plagiarism as, "to steal the words, ideas, etc. of another and use them as one's own."**

- NOTES -

CLASSROOM DISCUSSION MATERIALS

Youth Violence

The statistics on violent crime are shocking. The 1990 FBI Uniform Crime Reports show that every year in the U.S. over six million people are victims of violent crimes. Every 22 minutes someone is killed and every 30 seconds someone is assaulted with a weapon. Young people are not immune. Teenagers are the most frequent crime victims. Teens are two to three times more often crime victims than adults, according to Teenage Victims survey.

Did you know?

- ▶ Each day in the U.S., more than 5,000 children are victims of crime. (National Crime Prevention Council)
- ▶ Teenage victims tend to be the same sex, age, and race as their offenders. (Teenage Victims)
- ▶ Four out of five deaths of persons in the 15-24 age group are a result of injury. Alcohol-related automobile crashes are the leading cause of death for this age group. Homicide ranks second and suicide ranks third. Homicide, however, is the leading cause of death for African-American youths. (U.S. Department of Justice (USDOJ))

Crime at schools:

- ▶ Nearly three million crimes occur on or near U.S. school campuses each year. That is the same as one crime every six seconds! (USDOJ)
- ▶ One-third of all violent crimes against youth take place on school grounds. (USDOJ)
- ▶ During a six month period in 1989, 9% of students between the ages of 12-19 had been crime victims at school, (School Crime survey)
- ▶ At least once a month, 9% of eighth graders carry a club, knife, or gun to school. (University of Michigan study)
- ▶ Every school day, 160,000 students miss class due to fear of physical harm, and over 6,250 teachers are physically attacked. (National Education Association)

Guns are deadly:

- ▶ Private Americans own an estimated 200 million guns. One-half of all American homes possesses at least one gun. (Bureau of Alcohol, Tobacco and Firearms)
- ▶ A gun kept in the home is 43 times more likely to kill friends or family than it is to be used in self-defense. (New England Journal of Medicine)
- ▶ Students carry over 270,000 guns to school every day. (Centers for Disease Control (CDC))
- ▶ During 1990, three out of four juveniles who committed a killing used a gun. (FBI)
- ▶ Every day in the U.S., 14 kids under the age of 19 die from guns. That equals over 5,000 juvenile deaths each year. Hundreds more kids are wounded by guns each day. (National Center for Health Statistics (NCHS))
- ▶ Six out of ten teens who take their own lives use a gun. (NCHS)
- ▶ The odds that a teen commits suicide double when a gun is kept in the home. (CDC)

Unfortunately, the statistics only reveal part of the tragedy. It is estimated that only half of all crimes that occur are reported to the police. (Teenagers are the least likely age group to report crimes.) Also, most statistics record white and African-American responses, but do not explore data relating to other ethnic minorities.

Factors Influencing Youth Violence

Experts say that there are many reasons why people are violent. Violence can be promoted by a variety of factors: family stress, poverty, drug and alcohol abuse, violent media programming, prejudice and racism, lack of opportunities, gangs, and easy access to guns. Often several of these factors compound each other and create a cycle of violence. A few of these factors are explored below.

Violence in our society occurs most often between people who know each other. Thus, it is not surprising that family experiences are important predictors of violence. Family values that tolerate aggressive behavior or that justify criminal behavior can lead to youth violence. Children who are abused by parents learn that violence is an acceptable way to deal with problems. These habits influence later behavior and they continue the cycle of violence. This also can lead to poor relationships with people outside the family unit.

Related to the factor of family environment is poverty. One in five children lives in poverty. These children have an above average chance of becoming involved in crime. Unemployment and poverty damage self-esteem and discourage family stability. Limited income restricts access to necessities and nutrition. Feelings of hopelessness and frustration can lead to anger and violence. Children learn they must protect themselves and fight for what they need. Many children living in poverty have little time with or supervision by their parents, because parents must work long hours. Every day single parents and two-income families leave one in five children home alone after school.

Drug and alcohol abuse can also increase the level of violence. Alcohol use can lower inhibitions and add to violence. Other drugs can enhance a person's violent tendencies. Also, parents who are substance abusers tend to be more abusive and negligent toward their children. Moreover, violence is often associated with the sale and use of illegal drugs.

The effect media has on violent behavior is controversial. Media does influence people, especially young people. Children tend to mimic what they see. Thus, violence in the media can reinforce violent behaviors they have already learned. Studies have shown that viewing violence leads to a feeling that violence is normal. Moreover, media may reinforce currently held stereotypes and prejudices.

Effects of Violence

Violence in our society affects people in many ways. Since violence is common, some young people have learned to accept it as a way of life. Those children who are raised in a violent environment often feel there is no way out so they continue the cycle of violence. Even those who are not directly victims are affected by the constant violence in the community. Children who witness violence may develop psychological problems such as withdrawal, anxiety, sleep disorders, lack of concentration, or depression. Violence also affects the economy. Often there are medical expenses. Communities must spend more money on police. Schools have to spend more money on security and violence prevention and less on educational resources. Fear of violence causes students and teachers to lose their focus on learning and teaching.

What Can You Do?

Young people often believe they don't have the power to change problems. Young people can turn frustration into hope and anger into action. Learn about the sources of violence in your

community. Report violent crimes. Control your actions and solve problems with words, not weapons. Swallow your pride and apologize. Avoid guns and knives. Avoid using alcohol and drugs. Be alert and street smart. Join others and take action against violence!

Activity - What Do You Know?

1. Have students read the Youth Violence materials on pages 5-7.
2. Lead a brief discussion on the causes and consequences of youth violence and how guns relate to the level of violence.
3. Divide class into groups of 5-6 students. Assign each group one or more of the scenarios described below.
4. Have each group choose a recorder to write their answers to the following questions and a reporter to share the group's answers with the rest of the class. Discuss.
 - a. What was the reason for each person's behavior?
 - b. What was the effect or consequence of the behavior(s)?
 - c. How could the violent situation have been avoided?
 - d. What programs could you start or join at your school to deal with violence?

Scenarios

1. Terry wants to be respected by other kids at school, so Terry buys a gun. Terry also thinks girls will like him better if he has a gun. Terry takes the loaded gun to school. He shows the gun to friends who playfully aim it at each other and pretend to shoot. Casey points it at Terry. A teacher comes over to see what the kids are doing. Casey tries to hide the gun and accidentally fires a bullet into Terry's leg, injuring Terry.
2. Rita doesn't like Dee, because she thinks that Dee stole her boyfriend, John. Rita wants to prove herself to her friends, so she takes a knife to school. Rita and a few friends approach Dee. Rita yells some obscenities at Dee. Rita thinks Dee has disrespected her by "stealing" John. Dee turns to walk away and Rita threatens her with the knife. Dee continues to walk. Rita lunges at her, injuring her in the arm.
3. Alex lives in a tough neighborhood and has done her best not to join a gang. Alex's little sister, Jo, begins hanging out with a gang. Alex tells Jo to stay out of the gang, but Jo won't listen. Alex runs into Tracy, a gang member, and asks her to leave Jo alone. Tracy doesn't like Alex telling her what to do. Alex gets a gun from her friend for protection. Alex runs into Tracy the next day. They get into an argument. Alex pulls the gun to scare Tracy and they struggle. The gun fires a bullet, killing Tracy.

1
2
3 **CALIFORNIA MOCK TRIAL FACT SITUATION**

4 Twin Lakes is a town of 40,000 people just outside the larger city of California City. Twin
5 Lakes is a close-knit community where everybody knows each other's business and
6 truth and fiction spread rapidly. Many families have lived in the Twin Lakes region for
7 generations.

8 Devon Kelmar's family moved from California City to Twin Lakes in 1992, just before
9 Devon's junior year at Twin Lakes High School. Devon was active in school, and began
10 playing in a local band with a neighbor friend, Jamie Fergusson. During Devon's senior
11 year, Devon experienced trouble in school. Early September 1993, Devon's father died.
12 Devon's mother sought advice from a close friend and family therapist, Dr. Carmen
13 Nichols. Devon went to see Dr. Nichols twice. In January 1994, Devon turned 18 years
14 old and was looking forward to graduation from Twin Lakes High. Kendall Lynch and
15 Cory Jackson were also seniors at Twin Lakes High.

16
17 On Friday, February 25, 1994, Kendall Lynch had a party. Cory, Devon, and Jamie all
18 attended the party. Cory and Devon saw each other and briefly spoke. February 26 was
19 the championship basketball game at Twin Lakes High School. Devon went to the game
20 early and parked in a lot across the street from the school. Jamie arrived later and sat
21 with Devon during the game. Cory and Kendall were at the game, as well as Vice Principal
22 Lynden Murphy. After the game, Devon and Jamie stayed to congratulate their friends
23 on the team's victory. They left the gym together. Jamie went to the locker area and
24 Devon went to the parking lot. Devon and Cory met in the parking lot near Devon's car.
25 Shortly thereafter, several shots were fired. Cory sustained three gun shot wounds--one
26 through the left forearm, one to the upper left chest, and a third through the middle of the
27 head. Devon ran from the scene. Jamie heard shots fired. Kendall and Vice Principal Murphy
28 saw the incident.

29
30 Jamie called 911 and several police officers arrived on the scene. Officer Lee Kim
31 checked the body for vital signs and found none. Officer Kim recovered two shell casings
32 but no bullets from the scene. After interviewing the witnesses, Officer Kim and partner
33 Lynn Estrada patrolled the area. Approximately 1/4 mile from Twin Lakes High, they saw
34 a person they thought to be the suspect, Devon Kelmar. The officers stopped Devon
35 who said, "I had to do it. Cory threatened me with a knife." Officer Kim asked Devon
36 some routine questions and then arrested and Mirandized Devon. In a search incident to
37 the arrest, Officer Kim searched Devon's backpack and recovered a .25 caliber, 6-shot,
38 semiautomatic handgun.

39
40 The coroner, Dr. Merrill Roth, determined that Cory had suffered massive hemorrhaging
41 from three gunshot wounds. Dr. Roth measured the path angles of the bullets and the
42 probable distance Cory was from the weapon which fired the shots. Dr. Roth found a
43 small folding pocket knife similar to a swiss army knife in Cory's left rear pant pocket.

1 During the investigation, Officer Kim spoke with Dr. Nichols. Dr. Nichols gave
2 information about therapy sessions with Devon believing it to be a therapist's duty under
3 Tarasoff and the dangerous patient exception to the psychotherapist-patient privilege.
4

5 **CHARGES**

6 The prosecution charges Devon Kelmar with one count:
7

8 Count 1 - Murder, a violation of California Penal Code section 187 - a felony.
9

10 The judge (or jury) will determine whether a first or second degree murder verdict is
11 appropriate. The court may also consider the lesser included offense of voluntary
12 manslaughter, if evidence is offered for voluntary manslaughter.
13

14 Under Cal. Pen. Code § 187, murder is the unlawful killing of a human being, or fetus,
15 with malice aforethought. "Unlawful" means without justification or excuse recognized
16 by law. Malice may be expressed or implied. It is expressed when there is a deliberate
17 intention unlawfully to take away another's life. It is implied, when there is no
18 considerable provocation, or when the circumstances around the killing show an
19 abandoned or malignant heart. When the killing resulted from the intentional doing of an
20 act with expressed or implied malice, no other mental state need be shown for malice
21 aforethought.
22

23 Murder can be either first or second degree. Murder in the first degree is a willful,
24 deliberate, and premeditated killing with express malice aforethought. "Willful" means
25 intentional. "Deliberate" means decided upon after careful thought and weighing of
26 considerations for and against the action. "Premeditated" means thought about
27 beforehand. In other words, if the killing is preceded and accompanied by a clear
28 deliberate intent to kill that was formed upon a pre-existing reflection, and not under
29 sudden heat of passion, it is murder in the first degree. The true test is not the duration of
30 time but rather the extent of reflection. A cold, calculated judgment and decision may be
31 arrived at in a short period of time. A rash impulse, even with the intent to kill, is not
32 deliberate and premeditated.
33

34 Murder in the second degree is the unlawful killing of a human being with malice
35 aforethought, but the evidence is insufficient to establish deliberate and premeditated.
36

37 Under Cal. Pen. Code § 192, manslaughter is the unlawful killing of a human being
38 without malice. Voluntary manslaughter requires an intent to kill. There is no malice if the
39 killing occurred upon a sudden quarrel or heat of passion. The provocation, or stimulus,
40 must be of the kind and degree as naturally would excite such quarrel or passion in the
41 mind of a reasonable person. Also, the assailant must act under the influence of the
42 sudden quarrel or heat of passion. Provocation may occur over a short or long time. If the
43 provocation is insufficient to arouse passion in a reasonable person, or if enough time
44 has passed between provocation and fatal blow for passion to subside and reason to
45 return, and if all elements of murder exist, then slight or remote provocation will not
46 reduce murder to manslaughter.
47

48 **DEFENSES**

1 The defendant may invoke the right to perfect self-defense or imperfect self-defense.
2

3 Perfect self-defense has two requirements: The killing of another person in self-defense
4 is justifiable and not unlawful when the person who kills honestly and reasonably
5 believes (1) that there is imminent danger of death or great bodily injury from an attack or
6 threat by the victim, and (2) it was necessary under the circumstances to kill the other
7 person to prevent death or great bodily injury. Perfect self-defense requires both
8 subjective honesty and objective reasonableness. Perfect self-defense is a complete
9 defense to the charge of murder and thus, the defendant would not be guilty of any
10 crime.

11
12 Imperfect self-defense is where a person kills another person in the honest but
13 unreasonable belief in the necessity to defend against imminent danger to life or great
14 bodily injury. This defense negates the element of malice aforethought necessary for
15 murder and reduces the homicide to manslaughter. This is true even if a reasonable
16 person in the same circumstances seeing and knowing the same facts would not have
17 had the same belief. Imperfect self-defense is not a defense to voluntary manslaughter.
18

19 Imminent danger means the defendant must fear another whom he or she knows, or has
20 reason to believe, is armed with a deadly weapon in order to take the life or inflict great
21 personal injury. Fear of future harm, no matter how great the fear or likelihood of harm, is
22 not enough. Threats alone do not justify taking another's life in self-defense. Evidence
23 that the victim made prior threats against the defendant is admissible if there is evidence
24 that the victim intended to attack the defendant at the time of the killing. Evidence of the
25 reputation of the victim (good or bad) is admissible only if it can be shown that the
26 defendant had knowledge of such reputation.
27

28 The defense is not required to prove self-defense. The burden is on the prosecution to
29 prove beyond a reasonable doubt each of the elements of the crime and that the killing
30 was unlawful and not justifiable.
31

32 **EVIDENCE:** Map of the scene
33 Coroner's diagrams
34 [Prosecution is responsible for bringing the evidence to trial. Only faithful
35 reproductions, no larger than 22x28 inches, are acceptable.]
36

37 **Note:** No guns, knives, or facsimiles are allowed in the courthouse at any time.

1 **STIPULATIONS:** Prosecution and defense stipulate to the following:
2

- 3 1. Devon Kelmar, the defendant, and Cory Jackson, the victim, are the same
4 gender.
5
- 6 2. Both parties will be present and argue the pretrial motion. It will not be in camera
7 since Dr. Carmen Nichols told Officer Lee Kim all potentially relevant information
8 to this proceeding. (In camera means in the judges chambers or a non-public
9 hearing.)
10
- 11 3. Devon Kelmar was properly Mirandized and no Fifth Amendment argument will
12 be heard at pretrial regarding any statements made by the defendant at the time
13 of the arrest.
14
- 15 4. Devon Kelmar's backpack was properly searched in accordance with the
16 warrant exception of a search incident to an arrest. No Fourth Amendment
17 argument will be heard at pretrial regarding this search.
18
- 19 5. Officer Lee Kim is a fingerprint expert and is qualified to give opinion testimony.
20
- 21 6. Dr. Carmen Nichols and Dr. Denali Moorad are psychotherapists within the
22 meaning of Cal. Evid. Code § 1010 and are medical expert witnesses who are
23 qualified to provide opinion testimony.
24
- 25 7. Devon Kelmar was a patient of Dr. Carmen Nichols within the meaning of Cal.
26 Evid. Code § 1011.
27
- 28 8. Dr. Merrill Roth, the coroner, is a medical expert witness qualified to provide
29 opinion testimony.
30
- 31 9. Any issues over the liability of Dr. Carmen Nichols for violation of the
32 psychotherapist-patient privilege were adjudicated in and settled upon in
33 separate proceedings.
34
- 35 10. The defense will make no argument at pretrial as to admissibility of two portions
36 of Dr. Nichols' testimony. Part I regarding background information and Part IV
37 about lay witness, non-privileged observations can be offered as testimony
38 regardless of the pretrial ruling, subject to the Simplified Rules of Evidence.

MOCK PRETRIAL MOTION AND CONSTITUTIONAL ISSUE

This section of the mock trial packet contains materials and procedures for the preparation of a pretrial motion on an important constitutional issue. The **judge's ruling** on the pretrial motion will have a **direct bearing** on the admissibility of certain pieces of evidence and possible outcome of the trial. The pretrial motion is designed to help students learn about the legal process and legal reasoning. Students will learn how to draw analogies, distinguish a variety of factual situations, and analyze and debate constitutional issues. These materials can be used as a classroom activity or incorporated into a local mock trial competition.

The pretrial motion in this case relates to the testimonial psychotherapist-patient privilege and the California Constitution and United States Constitution right to privacy. Testimonial privileges are primarily governed by state law. Privileges exist because of society's desire to encourage certain relationships by ensuring their confidentiality, even at the high price in loss of valuable information. The cases and statutes cited below will help you decide the admissibility of portions of the witness statement of prosecution witness Dr. Carmen Nichols.

ARGUMENTS

In the pretrial motion, the **defense** will argue that portions of the witness statement of Dr. Carmen Nichols, defendant's former therapist, are inadmissible. The defense will argue that the psychotherapist-patient privilege prevents Dr. Nichols from testifying to any confidential communication during the therapeutic relationship with defendant Devon Kelmar. The defense will argue that the statements within Part II of Dr. Nichols' witness statement do not fall within Cal. Evid. Code § 1016, the patient-litigant exception to the privilege, because Devon Kelmar has not placed any mental or emotional condition at issue by the claim of imperfect self-defense. The defense will also argue that the statements within Part III of Dr. Nichols' witness statement do not fall within Cal. Evid. Code § 1024, the dangerous patient exception to the privilege.

In the pretrial motion, the **prosecution** will argue that the entire witness statement of Dr. Nichols is admissible. The prosecution will argue that the purpose and policy behind the privilege do not protect the statements within Dr. Nichols' testimony. The prosecution will argue that the patient-litigant exception applies to Part II of Dr. Nichols' witness statement. The prosecution basis this on an argument that Devon Kelmar has placed a mental or emotional condition at issue by claiming imperfect self-defense and the Battered Person Syndrome. The prosecution will also argue that Part III of Dr. Nichols' witness statement satisfies the dangerous patient exception.

If the judge finds that Part II of Dr. Nichols' witness statement is relevant and falls within the scope of the patient-litigant exception, then Part II of Dr. Nichols' witness statement will be admissible at trial, subject to the Simplified Rules of Evidence. If the judge finds that Part III of Dr. Nichols' witness statement is relevant and within the scope of the dangerous patient exception, then Part III of Dr. Nichols' witness statement will be admissible at trial, subject to the Simplified Rules of Evidence. Parts I and IV of Dr. Nichols' witness statement may be offered regardless of the pretrial ruling, subject to the Simplified Rules of Evidence.

SOURCES

The sources for the pretrial motion arguments consist of excerpts of the United States Constitution, California Constitution, California Evidence Code, edited court opinions, the Mock Trial Fact Situation, and the witness statements of prosecution witness Dr. Carmen Nichols and defense witness Dr. Denali Moorad on pages 25-26 and 33-34.

The California Constitution expressly establishes a legally enforceable right to privacy. The U.S. Constitution implies a "zone of privacy." The Federal Rules of Evidence have no specific privilege provisions and leave privileges to be governed by the principles of common law and the laws of the state. Thus, most of the sources for the pretrial are California law. Remember, however, that U.S. Constitution and Supreme Court holdings are binding and must be followed by California courts. In developing arguments for this Mock Trial, both sides should compare or distinguish the facts in the cited cases from one another and from the facts in this case, *People v. Kelmar*.

LEGAL AUTHORITIES

STATUTES:

- 1
2 1. U.S. Constitution, Amendment XIV
3 "Section 1. All persons born or naturalized in the United States and subject to the
4 jurisdiction thereof, are citizens of the United States and of the State wherein they
5 reside. No State shall make or enforce any law which shall abridge the privileges or
6 immunities of citizens of the United States; nor shall any State deprive any person of life,
7 liberty, or property, without due process of law; nor deny any person within its jurisdiction
8 the equal protection of the laws"
9
- 10 2. California Constitution, art. I, § 1
11 "All people are by nature free and independent and have inalienable rights. Among
12 these are enjoying and defending life and liberty, acquiring, possessing, and protecting
13 property, and pursuing and obtaining safety, happiness, and privacy."
14
- 15 3. Cal. Evid. Code § 1012. "Confidential communication between patient and
16 psychotherapist"
17 "[C]onfidential communications between patient and psychotherapist' means
18 information, including information obtained by an examination of the patient, transmitted
19 between a patient and his psychotherapist in the course of that relationship and in
20 confidence by a means which, so far as the patient is aware, disclose the information to
21 no third persons other than those who are present to further the interest of the patient in
22 the consultation."
23
- 24 4. Cal. Evid. Code § 1014. Psychotherapist-patient privilege; application to
25 individuals and entities
26 "The patient, whether or not a party, has a privilege to refuse to disclose, and to prevent
27 another from disclosing, a confidential communication between patient and
28 psychotherapist...."
29
- 30 5. Cal. Evid. Code § 1016. Exception: Patient-litigant exception

1 "There is no privilege under this article as to a communication relevant to an issue
2 concerning the mental or emotional condition of the patient if such issue has been
3 tendered by: (a) patient...."

4
5 6. Cal. Evid. Code § 1024. Exception: Patient dangerous to himself or others
6 "There is no privilege under this article if the psychotherapist has reasonable cause to
7 believe that the patient is in such mental or emotional condition as to be dangerous to
8 himself or to the person or property of another and that disclosure of the communication
9 is necessary to prevent the threatened danger."

10
11 7. Cal. Evid. Code § 352. Discretion of court to exclude evidence
12 "The court in its discretion may exclude evidence if its probative value is substantially
13 outweighed by the probability that its admission will (a) necessitate undue consumption
14 of time or (b) create substantial danger of undue prejudice of confusing the issues, or of
15 misleading the jury."

16 **LEGISLATIVE HISTORY**

17
18 1. Senate Judiciary Committee comment to Cal. Evid. Code § 1014 (1965).
19 Psychotherapy depends upon the "fullest revelation of the most intimate and
20 embarrassing details of the patient's life.... Unless a patient... is assured that such
21 information can and will be held in utmost confidence he will be reluctant to make the full
22 disclosure upon which diagnosis and treatment... depends....

23
24 Although the... privilege applies in a criminal proceeding, the privilege is not available to
25 a defendant who puts his mental or emotional condition in issue, as, for example, by a
26 plea of insanity or a claim of diminished responsibility.... In such a proceeding the trier of
27 fact should have available to it all information that can be obtained in regard to the
28 defendant's mental or emotional condition."

29
30 2. Senate Judiciary Committee comment to Cal. Evid. Code § 1024 (1965)
31 "Although this exception might inhibit the relationship between the patient and his
32 psychotherapist to a limited extent, it is essential that appropriate action be taken if the
33 psychotherapist becomes convinced during the course of treatment that the patient is a
34 menace to himself or others and the patient refuses to permit the psychotherapist to
35 make the disclosure necessary to prevent the threatened danger."

36 **CASES**

37 **A. Patient-litigant exception**

38
39 1. In re Lifshutz 2 Cal.3d 415 (1970)

40 **Facts:** Housek sued Arabian for physical assault and severe mental and emotional
41 distress damages. Housek received treatment from Dr. Lifshutz 10 years prior to the
42 suit. Dr. Lifshutz refused to produce Housek's patient records or answer any questions
43 claiming the psychotherapist-patient privilege.

44
45 **Holding:** The court held that § 1016 applied, and ordered Dr. Lifshutz to produce the
46 records and answer the questions. The court could not tell from the trial record whether
47 the condition for which Dr. Lifshutz treated Housek was related to the condition for which
48 Housek was suing Arabian.

1 "[T]he patient-litigant exception allows only a limited inquiry into the confidences of the
2 psychotherapist-patient relationship, compelling disclosure of only those matters
3 directly relevant to the nature of the specific 'emotional or mental' condition which the
4 patient has voluntarily disclosed."
5

6 The patient's interest in keeping confidences and privacy has deep roots in the
7 Constitution. The zone of privacy established in Griswold includes the "confidentiality of
8 the psychotherapeutic session." Courts should respect the patient's privacy interest
9 when determining if communications sufficiently relate to the mental condition at issue.
10 In general, the psychotherapist-patient privilege "is to be liberally construed in favor of
11 the patient."
12

13 Exceptions to the privilege must be narrowly construed and apply only when the
14 patient's case "falls squarely within its ambit." Disclosure cannot be compelled as to
15 other aspects of the patient's personality, even though they may be relevant to the
16 substantive issues of the litigation. Communications not directly relevant to the specific
17 emotional or mental condition are not within § 1016 exception and therefore remain
18 privileged. The burden initially is on the patient to show a communication is not directly
19 related to the issue tendered to the court. Even when the patient-litigant exception
20 applies, courts may use protective measures to avoid unwarranted intrusions into the
21 confidences of the relationship. The court may limit the scope of the inquiry to best
22 preserve the rights of the patient.
23

24 2. Roberts v. Superior Court 9 Cal.3d 330 (1973)

25 **Facts:** In 1969 Roberts had psychiatric treatment after an overdose of pills. In 1971
26 Roberts sued the Wiests for damages for pain to her neck and back resulting from an
27 auto accident. Roberts did not claim damages for mental or emotional distress. Two
28 doctors examined Roberts after the accident and found no relationship between her
29 prior psychiatric treatment and current back problems. The Wiests wanted Roberts'
30 1969 psychiatric records, but the therapist refused, claiming the privilege.
31

32 **Holding:** The court held where no specific mental condition of the patient is at issue,
33 and discovery of the privileged communications is sought merely upon speculation that
34 there may be a "connection" between patient's past psychiatric treatment and some
35 "mental component" of her present injury, those communications should remain
36 protected by the privilege.

1 Since the privilege belongs to the patient, only the patient has the power to waive it.
2 Waiver exists where the patient reveals a significant part of the communication,
3 consents to disclosure, or fails to object when given the opportunity. Disclosure of
4 psychiatric treatment is not a waiver of the privilege. The therapist does not have power
5 to waive the privilege and has an affirmative duty to assert it.
6

7 3. Simek v Superior Court, 117 Cal.App.3d 172 (1981)

8 **Facts:** Ms. Simek sought disclosure of Mr. Simek's psychiatric records during child
9 custody and dissolution proceedings. Ms. Simek intended to show that Mr. Simek
10 suffered from emotional instability such that he should not have visitation rights. Ms.
11 Simek claimed that by seeking "extensive" visitation and legal custody rights, Mr. Simek
12 tendered his mental and emotional condition.
13

14 **Holding:** The court held that Mr. Simek did not tender his mental or emotional condition
15 because he did not voluntarily disclose a specific mental or emotional condition.
16 Disclosure is compelled only where a patient's own action or factual allegations initiates
17 exposure, not by the other party's denial. The patient-litigant exception typically applies
18 to personal injury cases where the plaintiff tenders a physical or emotional condition.
19 Tender has also been found where a mental patient sought release from a prison
20 hospital, contending that he was no longer dangerous.
21

22 4. People v. Mickle, 54 Cal.3d 140 (1991)

23 **Facts:** Mickle was convicted of murder and committing a lewd act on a minor. In the
24 penalty phase, Mickle testified that he had mental problems since he was a teenager. He
25 admitted to previously spending time in a mental hospital and being incarcerated at
26 another psychiatric ward for a previous sex-related crime. Mickle said that he suffered
27 from "hallucinations," had a "sexual" problem with his sister and other young girls, and
28 believed there was "something wrong with [his mind]" at the time of trial. Mickle also
29 accused the psychiatric hospitals of malpractice. The prosecutor was granted access to
30 defendant's psychiatric records by the trial court on the grounds that the patient-litigant
31 exception applied after Mickle testified to his psychiatric history. Mickle objected to
32 portions describing his sexual misconduct and assaultive behavior while in the
33 psychiatric hospitals.
34

35 **Holding:** The court upheld the trial court's finding that Mickle placed his mental
36 condition at issue by his statements on direct examination and that records of past
37 therapy would be relevant for effective cross-examination. Mickle waived the privilege
38 on direct regarding his condition, treatment and performance in the psychiatric
39 hospitals.
40

41 B. **Dangerous patient exception**

42 1. People v. Hopkins, 44 Cal.App.3d 669 (1975)

43 **Facts:** After committing several crimes, Hopkins told a psychiatrist and two nurses
44 about his involvement. One nurse informed security, who notified the police. This led to
45 Hopkins' arrest and subsequent confession. Hopkins brought a motion to suppress the
46 confession based upon violation of the therapist-patient privilege.
47

1 **Holding:** The court held that, even if Hopkins' arrest resulted from disclosure of
2 confidential communication with the psychiatrist, the facts were within the dangerous
3 patient exception, § 1024. There is no privilege if the therapist had reason to believe that
4 Hopkins was dangerous to himself or others and disclosure of the communication was
5 necessary to prevent threatened danger.
6

7 2. Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976)

8 **Facts:** The Tarasoffs filed a wrongful death action for the death of their daughter
9 Tatiana killed by Mr. Poddar. Poddar had told defendant therapists two months before
10 Tatiana's death that he intended to kill her. One therapist informed the police who
11 detained and released Poddar. No one warned Tatiana of her peril.
12

13 **Holding:** The court held that when a therapist determines, or under the standards of the
14 profession should determine, that a patient is a serious danger to another, he has an
15 obligation to use reasonable care to protect the intended victim against such danger.
16 The discharge of the duty depends upon the facts of the case. It may require that the
17 therapist warn the intended victim, warn others who will notify the victim, notify the
18 police, or take whatever steps reasonably necessary under the circumstances.
19

20 The court recognized the important public interest in effective treatment of mental
21 illness, in protecting the rights of patient privacy, and in maintaining the confidential
22 nature of therapeutic communication. Against this interest, however, the court weighed
23 the public interest in safety from violent assaults.
24

25 3. Mavroudis v. Superior Court, 102 Cal.App.3d 594 (1980).

26 **Facts:** Mavroudis, a psychiatric patient, attacked his parents with a hammer, causing
27 them multiple physical injuries. His parents sued the psychiatric hospital, claiming that
28 the treating therapists were negligent because they knew or should have known of
29 Mavroudis' danger. The parents sought discovery of Mavroudis' psychiatric records
30 without his consent.
31

32 **Holding:** Remand to trial court to determine under Tarasoff if the therapist prior to the
33 time of the injuries determined, or reasonably should have determined, that the patient
34 presented a serious and imminent danger of violence to the victim and that disclosure
35 was necessary to avert the danger. The patient does not have to identify the victim by
36 name but the victim must have been readily identifiable prior to the time of the injuries.
37

38 4. People v Wharton 53 Cal.3d 522 (1991)

39 **Facts:** During a first degree murder trial, therapist Dr. Hutcheson testified to diagnosing
40 Wharton as a paranoid schizophrenic-chronic. Dr. Hutcheson and another therapist also
41 testified as to Wharton's statements that led them to warn the victim that she was in
42 danger. Wharton told Hutcheson that he stayed away from guns and knives because he
43 was afraid he might use them on himself or others. He also said he feared hurting and
44 hitting his girlfriend. A month later he told the other therapist that he was losing control of
45 his anger and felt manipulated by his girlfriend because she frightened him. Wharton
46 never used the words "kill" or "murder." Wharton objected to the statements based on
47 therapist-patient privilege.
48

1 **Holding:** The court held that when a therapist warns a potential victim under § 1024, the
2 therapist may reveal in a later trial the warning and the patient's statements made in
3 therapy which triggered the warning. Section 1024 is not a waiver of the privilege, but
4 provides there is no privilege if a certain factual situation exists. The exception applies
5 even if the therapist does not repeat the patient's statements to the intended victim and
6 applies even after the intended victim is dead. Where some statements are
7 nonprivileged, it does not automatically make all of defendant's confidential
8 communications available to the prosecution. Statements made by the patient in
9 therapy that did not trigger the Tarasoff warning must be specifically excluded.

10
11 The court also held that Wharton voluntarily placed his mental condition at issue and
12 waived the psychotherapist-patient privilege under § 1016 with Dr. Hutcheson's
13 diagnosis that he was a paranoid schizophrenic-chronic.

14
15 5. Menendez v. Superior Court, 3 Cal.4th 435 (1992).

16 **Facts:** Lyle and Erik Menendez (brothers) were investigated for the murder of their
17 parents, Jose and Mary. Police obtained a search warrant for the office and residence of
18 Dr. Oziel, the brothers' therapist. Officers seized several audiotapes relating to sessions
19 with one or both brothers. The sessions took place after the murders and contained the
20 brothers' threats of harm to Dr. Oziel. Dr. Oziel disclosed the threats to both his wife and
21 his lover. The brothers objected to disclosure of the tapes based on the psychotherapist-
22 patient privilege.

23
24 **Holding:** The court held that as to one tape of an actual session involving both brothers,
25 the dangerous patient exception applied. Dr. Oziel had reasonable cause to believe the
26 brothers were dangerous to him and to the women who were necessary to prevent harm.
27 The court excluded other tapes because the exception did not apply.

28
29 Under Wharton, a therapist's Tarasoff warning to a potential victim of the patient is non-
30 privileged if there is reasonable cause for the therapist to believe that (1) the patient is
31 dangerous and (2) disclosure of the communication is necessary to prevent any harm.
32 Reasonableness is judged in light of the standards in the therapeutic community. The
33 test is objective, but takes account of all relevant circumstances. It is based on the norms
34 prevailing among therapists as a group, but allows broad discretion to the individual
35 therapist. The therapist need not warn the potential victim for the exception to apply.

36
37 C. **Privacy cases**

38 1. Griswold v. Connecticut, 381 U.S. 479 (1965)

39 **Facts:** A state criminal statute prohibited the use of contraceptives, as well as assisting
40 or counseling another in the use of contraceptives. Griswold was fined for giving
41 information and medical advice regarding contraceptives to married persons.

42 **Holding:** The Supreme Court struck down the statute as an unconstitutional
43 infringement of the marital right to privacy. Justice Douglas, writing the lead opinion,
44 believed the relationship lied within the zone of privacy created by several fundamental
45 constitutional guarantees. The Constitution and Bill of Rights guarantee rights beyond
46 those specifically enumerated. "[S]pecific guarantees in the Bill of Rights have
47 penumbras, formed by emanations from those guarantees they help give them life and
48 substance. Various guarantees create zones of privacy. The right of association

THE MOCK PRETRIAL MOTION HEARING

The following procedures provide a format for the presentation of a mock pretrial motion in the local and state competitions as well as for classroom use and discussion.

Specific Procedures for the Mock Pretrial Motion

1. Ask your coordinator if your county will present pretrial arguments before every trial of each round. We urge you to present one in as many rounds as possible both for its academic benefits and to prepare the winning team for state finals in Sacramento where it will be a required part of the competition. Performances will be scored according to the criteria on the scoring sheet.
2. Prior to the opening of the pretrial motion arguments, the judge will have read the background provided in the case materials.
3. Be as organized as possible in your presentation. Provide clear arguments so the judge can follow and understand your line of reasoning.
4. Arguments should be well-substantiated with references to any of the background sources provided with the case materials and/or any common-sense or social-interest judgments. Do not be afraid to use strong and persuasive language.
5. Use the facts of *People v. Kelmar* in the argument. Compare them to facts of cases in the background materials that support your position, or use the facts to distinguish a case that disagrees with the conclusion you desire.
6. Review the constitutional arguments to assist in formulating arguments.
7. The conclusion should be a very short restatement of your strongest arguments.

Order of Pretrial Motion Events

1. The hearing is called to order.
2. The judge asks the defense to summarize the arguments made in the motion. The defense has four minutes. The judge may interrupt to ask clarifying questions. The time spent answering the judge's questions is not part of the four-minute time limit.
3. The judge asks the prosecution to summarize arguments made in its opposition motion. The same conditions as in #2, above, apply to the prosecution.
4. The judge offers the defense two minutes of rebuttal time. The rebuttal time is to be used to counter the opponent's arguments. It is not to be used to raise new issues. The same attorney presents both the arguments and the rebuttal.
5. The judge offers the prosecution two minutes of rebuttal time. The same conditions as in #4, above, apply to the prosecution.
6. At the end of the oral arguments, the judge will rule on the motion.
7. Beyond having a direct effect on the allowable evidence and outcome of the trial, scores for the pretrial motion presentations will be added to the Mock Trial scores in determining the winner of the trial.

1 **WITNESS STATEMENT** - Prosecution Witness: OFFICER LEE KIM

2
3 My name is Lee Kim. I am 35 years old and have been a police officer for Twin Lakes
4 Police Department for the last 10 years. Upon entering the force, I spent six months
5 completing training in the Twin Lakes Police Academy. Since then, I have taken follow-
6 up training each year. I have completed specialized training with the Academy in
7 fingerprint lifting and identification and have testified about fingerprint identification in
8 over 75 trials.

9
10 My current assignment is patrol. On Saturday, February 26, 1994 I was on duty with my
11 partner Lynn Estrada. Around 11:10 p.m. we received a radio call from dispatch that
12 there had been a shooting across the street from Twin Lakes High School located at 123
13 Old School Road in Twin Lakes, California. We knew there was a basketball game that
14 night, so we were patrolling the area in case of any problems. We responded to the call.

15
16 We arrived on the scene at 11:15 p.m. I observed the body of the victim, later identified
17 as Cory Jackson, in the east side of the parking lot near a red 1966 Ford Mustang,
18 California license plate 3SFS076. The body was lying face-up in a pool of blood. It
19 appeared that the victim suffered from multiple gunshot wounds--one through the arm,
20 one to the upper left part of the chest, and a third to the head. I checked the body for vital
21 signs. There were none. I noticed two shell casings lying on the ground a few feet north
22 of the body. I found no expended bullets.

23
24 I interviewed Jamie Fergusson who told us that after the game a friend, Devon Kelmar,
25 headed to the parking lot. Fergusson went to the lockers and heard several shots ring
26 out. Fergusson arrived at Kelmar's car and Kelmar wasn't around, but Jackson was lying
27 on the ground. Fergusson gave us a description of Kelmar. Another witness, Kendall
28 Lynch, claimed to have seen a person named Devon Kelmar fire several shots at the
29 victim, Cory Jackson. Lynch said that Kelmar was wearing a white sweatshirt. I later
30 interviewed the other witnesses at the scene.

31
32 A second unit responded to the scene along with the coroner, so my partner and I
33 patrolled the area to find the suspect, Devon Kelmar. About 1/4 mile east of Twin Lakes
34 High, we approached Main and 7th streets. We saw a person in a white sweatshirt
35 walking along the road, matching the description of the suspect. We pulled over to the
36 curb and walked toward the suspect who looked distracted and disoriented. The suspect
37 blurted out, "I had to do it. Cory threatened me with a knife." I asked for identification and
38 positively identified the person as Devon Kelmar. I placed the defendant under arrest for
39 murder and proceeded to read the Miranda warnings. Defendant understood the rights
40 and invoked the right to silence.

41
42 We proceeded to complete a search incident to an arrest to locate any possible
43 weapons. Defendant was wearing a blue backpack. I opened the backpack and
44 recovered a small .25 caliber, 6 shot, semi-automatic handgun. Because of my
45 experience and specialized training on the police force, I am very familiar with this type
46 of weapon. It is a small handgun. The barrel is only a few inches long, with a black grip. It
47 can be easily carried in a purse or pocket. Six shot means that the gun holds six rounds,
48 or bullets, when fully loaded. A semi-automatic handgun means the hammer does not

1 [although not expressed is] contained in the penumbra of the First Amendment.... The
2 Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of
3 privacy...." The Fourth Amendment implies a right to privacy in its protection from
4 unreasonable search and seizure.

5
6 2. Roe v. Wade, 410 U.S. 113 (1973)

7 **Facts:** A Texas statute made abortion a crime except "by medical advice for the
8 purpose of saving the life of the mother." Jane Roe, who was unmarried and pregnant,
9 was unable to get a "legal" abortion in Texas because her life was not threatened by her
10 pregnancy.

11
12 **Holding:** The Supreme Court held the statute unconstitutional. The Court also held the
13 "right of privacy...founded in the Fourteenth Amendment's concept of ordered liberty...is
14 broad enough to encompass a woman's decision whether or not to terminate her
15 pregnancy." The Court balanced the privacy interests of a woman and the interests of
16 the state in protecting the health of the mother and the potentiality of human life to
17 determine when states may regulate abortion.

18
19 "The Constitution does not explicitly mention any right of privacy. [But] the Court has
20 recognized that a right of personal privacy, or a guarantee of certain areas or zones of
21 privacy, does exist under the Constitution." The court has found roots of the right in
22 several Amendments--the First, Fourth, Fifth, Ninth, the concept of liberty of the
23 Fourteenth Amendment, or the penumbras of the Bill of Rights.

24
25 3. County of Alameda v. Superior Court, 194 Cal.App.3d 254 (1987)

26 **Facts:** A female mental patient filed a personal injury action against the county after she
27 was allegedly raped by another patient in a psychiatric facility. She requested disclosure
28 of the identity of the alleged rapist. The trial court ordered disclosure of his name and
29 address.

30
31 **Holding:** Upheld the trial court on the grounds that the female patient's right to obtain
32 safety, as well as the public concern for safety, overcame the male patient's
33 psychotherapist-patient privilege. The privilege, although important to a patient's
34 constitutional right to privacy, is not absolute and may yield to compelling state interests.
35 Here, the patient's interest in confidentiality must yield where the victim had no other
means to identify her assailant.

1 have to be cocked between firing rounds. You only have to pull the hammer back once
2 and then can fire off rounds simply by pulling the trigger. Thus, it is possible for the
3 shooter to shoot six consecutive bullets very quickly, just by pulling the trigger quickly.
4 Also, it is a light trigger pull, meaning that it does not take a lot of force to pull the trigger
5 back to fire the weapon. There was one unexpended round jammed into the chamber of
6 the firearm and two live rounds were in the magazine inside the weapon. The magazine
7 is the supply chamber from which the rounds are fed.
8

9 Back at the station, I dusted the weapon for fingerprints. I was able to lift two sets of
10 prints. At the police lab, I compared these fingerprints to the ones I had lifted from
11 defendant Kelmar. I have lifted and compared fingerprints hundreds of times during my
12 police career. In my professional opinion one set lifted from the handgun matched the
13 right fingerprints of the defendant. The other set of prints lifted from the gun could not be
14 identified. I also confirmed that the weapon was registered to defendant's deceased
15 father, Mr. Al Kelmar.
16

17 Two days later, Monday, February 28, I was at the station reviewing some reports. A call
18 came into the station regarding this case. The caller, identified as Dr. Carmen Nichols,
19 told me that Devon Kelmar was a former patient. Dr. Nichols had read the newspaper
20 and heard of Cory Jackson's death. Dr. Nichols was very concerned and asked me to
21 come over. I went to Dr. Nichols' office located at 1999 First Place in California City,
22 California. I knocked on the door and Dr. Nichols let me in. We had a conversation and
23 Dr. Nichols told me about the therapeutic relationship with Devon Kelmar. Dr. Nichols
24 also told me about seeing Devon with a gun a few weeks before the incident.

1 **WITNESS STATEMENT** - Prosecution Witness: KENDALL LYNCH

2
3 My name is Kendall Lynch. I am 18 years old and a senior at Twin Lakes High School. I
4 live at 456 Highland Drive in Twin Lakes, California. Cory Jackson and I had been
5 friends for as long as I can remember. We met in the first grade. Cory had some family
6 problems so Cory sometimes stayed with me and my family. Cory was not living with me
7 at the time of the killing. People who did not know Cory might think Cory picked on
8 people. Cory talked some "smack" and got into some fights. But when it really came
9 down to it, Cory never meant any real harm. Cory sometimes carried a small pocket
10 knife. Lots of people carry pocket knives for camping, or whatever.

11
12 I know Cory and Devon Kelmar did not get along well. They would argue about silly
13 things. Most of the time they were just fooling. Usually that was the end of it, but every
14 once in a while it would go further and they might get into a fight. Cory liked to be in
15 control, but usually Cory's power was in words, not in actions.

16
17 Cory, Devon and I had English class together during our senior year. I always went to
18 class. Cory missed a lot of classes, but that was common for Cory. Devon began
19 missing classes over the last six months. Devon was playing in a band and getting more
20 into the party scene. I heard from other people that Devon often couldn't make it to class
21 the day after a gig because Devon had been out too late the night before. Cory had
22 nothing to do with Devon missing class. Besides, Cory was hardly ever there.

23
24 Cory was a practical joker. Cory liked to see other people's reactions and see how far
25 other people could be pushed. It was Cory's nature. One day last week, Cory was driving
26 in the parking lot across from school. I was in the car and we saw Devon walking in the
27 driveway toward us. We were only going a few miles an hour, but Cory sped up the car a
28 little. Cory swerved out of the way in plenty of time. Cory was only playing with Devon
29 who was never in any danger of getting hurt.

30
31 The night before the shooting, Friday, February 25, I had a party at my house. My
32 parents were out of town. Both Cory and Devon were there. I remember talking to Devon
33 when Cory came over to us. Then I saw someone I hadn't seen in a long time, so I left
34 Cory and Devon. I was hoping they wouldn't get into a fight that night, so I looked back
35 toward them. I was about 20 feet away. Devon was smiling and laughing. They seemed
36 to be getting along for a change, so I thought there wouldn't be a problem. Obviously,
37 Devon wouldn't be laughing if there was a problem. Since they weren't fighting, I didn't
38 worry about them.

39
40 The night Devon killed Cory, I was at the basketball game at our school. Everyone in
41 town was there. I went to the game by myself, but I did sit with Cory. Cory was late
42 coming to the game. I think Cory may have had a drink (of alcohol) or two before coming
43 to the game. Cory was in a great mood that night. We won the game and everyone went
44 crazy. I hung out with some friends just outside the gym for about 15-20 minutes. I
45 offered to give Cory a ride but Cory refused. I knew that Cory was staying at a friend's
46 house a few blocks away from school, so I figured Cory would walk there. I left Cory
47 outside of the gym.

1 I had parked my car where I always do in the lot across from school. Only a couple of cars
2 were left in the parking lot. On the way, I walked passed Devon Kelmar's car, a 1966 red
3 Mustang. I thought it was an unusual place for Devon to park, because it was THE spot
4 where Cory liked to park, except Cory didn't drive that night. The spot is shaded by an old
5 oak tree. Cory and I and our friends made lots of memories under that tree. I got in my car
6 which was parked near the end of the second row. I drove toward the Old School Road
7 exit of the lot. I saw two people near the passenger side of Devon's car. It was dark and
8 the lights in the parking lot were burnt out, so I couldn't see very well. The only light came
9 from my headlights. The street lights on Old School Road did not really shine on the
10 parking lot. It was a cool night and the windows in my car were fogged up. My defroster
11 wasn't working and I had to rub my windows with a towel so I could see.

12
13 I drove slowly, less than 5 m.p.h. I was about 50 feet from Devon's car when I saw Cory
14 was one of the people next to the Devon's car. I knew it was Cory because of Cory's
15 bright green sweatshirt. As I got closer within 40 feet, I saw the other person was Devon
16 who was wearing a white sweatshirt. Devon and Cory were facing each other. I could
17 see Cory's front and Devon's back. It looked like they were arguing by the sound of their
18 yelling voices. I couldn't hear what they were saying. I could only see the top half of their
19 bodies, because the car blocked their lower half. When I was about 35 feet, or the width
20 of 4 parking spaces, I saw Devon raise a gun in the right hand and aim and fire off several
21 shots. Two shots were very close together into Cory's heart. Bam, bam, just like that. I
22 couldn't believe it! Cory shot right in front of my eyes! Then Cory fell backwards on the
23 ground. Devon walked over to where Cory lay, knelt down and lifted the gun and bam --
24 fired a shot through the middle of Cory's head. I could not exactly see this because they
25 were on the other side of the car. I could only see the top of Devon's head while kneeling.
26 I know I heard a third shot after Cory fell to the ground and while Devon was kneeling. I
27 was in such shock I sat there in disbelief. My best friend dead on the ground. Before I
28 knew it, Devon had taken off. I stopped my car which was 20-25 feet away from Devon's
29 parked car. I got out of my car and ran to Cory. Cory was badly bleeding. A few other
30 people gathered and finally the police came.

1 **WITNESS STATEMENT** - Prosecution Witness: DR. CARMEN NICHOLS

2
3 PART I: My name is Carmen Nichols. I live at 2555 Lakeview Road in Twin Lakes,
4 California. I am 40 years old and am a family psychologist. My undergraduate degree in
5 psychology is from Stanford and my masters and doctorate in psychology are from the
6 University of Southern California. I have been practicing for eight years and have
7 testified and qualified as an expert in seven trials. My office is located at 1999 First Place
8 in California City, California. My field of expertise is family therapy, focusing on helping
9 families cope with the death of a family member.

10
11 I went to high school with Devon Kelmar's mother, Nora, and have seen Devon grow up.
12 Thus, I know Devon outside of my profession. Devon is a good student and involved in
13 many activities. Devon planned on attending a university. Although Devon has generally
14 been a good kid, Devon was suspended for three days in junior high for smoking
15 marijuana at school. Nora was very upset and told me she hoped that Devon did not
16 have a drug problem. That's the last I heard of any drug-related problems, but I know that
17 recently Nora found Devon drinking alcohol a couple times on the weekends.

18
19 In September of 1993, Devon's father, Al Kelmar, died unexpectedly of a heart attack.
20 Nora came to see me as a patient to discuss how she and Devon were feeling about Al's
21 death. She was quite grief-stricken, so Devon, being an only child, came to see me to
22 help with her depression and to talk about some feelings about death. Since I only saw
23 Devon professionally on two occasions, I did not have enough time to form any firm
24 opinion regarding aspects of Devon's mental condition.

25
26 PART II: Our first session was in late October, 1993. We primarily discussed how Nora
27 was coping and how Devon perceived her problems and troubles. It was my opinion that,
28 at that time, Devon was coping well with Al's death. Near the end of the session, Devon
29 asked what I knew about insanity. Devon said the interest was inspired by a TV movie
30 where a person killed another and claimed the insanity defense. Devon asked if
31 someone could really "get away with murder" by claiming insanity. These questions
32 caught me by surprise, because they had no relation to our discussion. I told Devon that I
33 had no experience with the legal workings of the insanity defense. I explained that
34 insanity is a legal term not a psychiatric one and it involves many possible mental
35 abnormalities. I said I'd had experience with a legal doctrine called "imperfect self-
36 defense." I'd testified as an expert in a trial involving a former patient of mine. The patient
37 suffered from "Battered Wife Syndrome." Devon seemed very interested and said, "This
38 stuff is so cool. I think I want to go to law school someday." I explained a little more about
39 the Battered Wife Syndrome and imperfect self-defense. It's very complicated and,
40 since I'm not a lawyer, I suggested Devon read more and gave Devon the name of a few
41 books. The discussion was brief since I had a patient following Devon. I didn't think a lot
42 about it at the time, but after I found out about Cory Jackson's death, I began thinking
43 more about the conversation. Devon was extremely interested in what I had to say about
44 the Battered Wife Syndrome and imperfect self-defense.

45
46 PART III: The second session with Devon was on January 20, 1994. Nora was not
47 making much progress with her depression, so I arranged to see Devon. We primarily
48 talked about how Nora was coping with the depression.

1 I brought up the topic of whether Devon's mom seemed to feel anger toward anyone.
2 This topic led to a discussion centering more on Devon than on Nora. Devon said, "I'm
3 tired of others getting the better of me. Next time someone crosses me it'll be their last." I
4 asked what Devon meant. Devon stared back at me and in a serious tone said, "I'm not
5 normally violent, but I'm tired of dealing with this person at school. If this person makes
6 one more threat, it'll be the last. It will be the end for that jerk. I have ways to handle
7 people who cross me one too many times." I remember this vividly, because Devon's
8 tone was so serious and methodical. Devon didn't name the person as Cory Jackson.
9 Since it was a small town and the purpose of our discussions was to help with feelings
10 related to loss of Al Kelmar, I believed it better that I not ask the person's name. Devon
11 said that the person was "crazy" with no reason for disliking Devon. Devon said that the
12 person held a grudge against Devon and did outrageous things. Then Devon said, "I'm
13 just fooling with you Doc. Don't look so scared. Sorry I got off track of what we were
14 talking about." Devon was so serious, calm and collected to be joking. Devon did not use
15 the word "kill," but I thought this was a threat.

16
17 I read in the paper about Cory Jackson's death and Devon Kelmar's arrest. I thought to
18 myself, "Oh my goodness, Devon was talking about Cory Jackson." Devon actually
19 pursued the threat and killed Cory. I thought I should have pursued Devon's threat
20 earlier and find out who that person was, but I didn't. Even though I didn't have a
21 professional duty to find out who the person was, I regretted not finding out more back
22 then. That is why I informed the police.

23
24 PART IV: Two weeks ago, Tuesday, February 15, I saw Devon in downtown Twin Lakes
25 on Main Street. I remember the day, because I had a lunch meeting at 11 a.m. in Twin
26 Lakes. My office is in California City, so I'm not usually in Twin Lakes on a weekday.
27 Devon had missed an appointment with me the day before. I saw Devon hanging out
28 near a park. I was surprised to see Devon at that time of day, but I think Devon was more
29 surprised to see me. I said hello and asked how Devon had been. Devon responded in
30 an annoyed and agitated tone, "Doctor, what are you doing in this part of town? Are you
31 spying on me? Trying to find out why I've missed therapy?" I said that I just was inquiring
32 as a friend. Devon was wearing a blue jacket. When Devon turned to leave, I noticed
33 what looked like the butt, or grip, of a gun sticking out of Devon's lower right jacket
34 pocket. The grip was black. I was very surprised to see Devon with a gun so I said,
35 "Devon, what's that sticking out of your pocket?" Devon said, "None of your business,
36 Doc." Devon quickly walked away, attempting to hide the gun I had seen. Perhaps I
37 should've reported it to the police, but since I'm friends with Devon's mother, I thought it
38 better to discuss it with her face-to-face at her next appointment. Unfortunately, all of this
39 happened before I had a chance to talk to her.

1 **WITNESS STATEMENT** - Prosecution Witness: DR. MERRILL ROTH, CORONER

2
3 My name is Merrill Roth. I am 37 years old. I am a medical examiner and have been
4 employed with the California City County Coroner for seven years. Twin Lakes,
5 California is in California City County. I received my undergraduate and medical degrees
6 from the University of California, San Diego. I conducted my residency at the University
7 of California, San Francisco. I have conducted several hundred autopsies during my
8 career. My job is to determine the manner, cause, and circumstances of death for each
9 body I examine. I examined the deceased, identified by next of kin as Cory Jackson, on
10 February 27, 1994. The deceased, an 18 year old from Twin Lakes, died from massive
11 loss of blood resulting from three bullet wounds. The order in which I describe the
12 wounds has no relation to which wound was sustained first. I describe the wounds in
13 order of least to most serious.
14

15 One wound was sustained to the left forearm. Entering in the middle of the forearm
16 about 6 cm. above the wrist bone of the back of the hand, the bullet tracked slightly
17 downward and exited about 4 cm. above the wrist bone on the palm side of the arm. This
18 wound was not fatal and Jackson could have fully recovered with proper medical
19 attention. A second wound was sustained to the left upper chest. The entry was at the
20 anterior (front) left, 2 cm. below the clavicle and 8 cm. from the center of the body. The
21 track of the bullet went straight through the body and exited on the posterior (back) left
22 side. This bullet partially punctured the aorta, leading directly to hemorrhaging. This
23 wound might not have led to immediate death and Jackson probably could have
24 survived 30-40 minutes without proper medical attention. A third wound was sustained
25 to the head. The entry wound was in the anterior center of the head 1 cm. above the
26 bridge of the nose. The track went slightly upward, front to back, through the midportion
27 of the brain and lodged near the posterior about 2 cm. above the entry. This bullet did not
28 exit the body, but remained in the head. This type of wound leads to massive
29 hemorrhaging and results in almost immediate death within 10-15 seconds.
30

31 Measuring the bullet tracking (the path), entrance and exit, size of the hole, and gun
32 powder marks on the body helps to determine the probable distance of Jackson from the
33 firing weapon. These distances represent the distance from Jackson to the end of the
34 barrel of the gun. They do not account for where the assailant was standing. That would
35 depend upon whether the assailant's arm was fully or partially extended when firing.
36 The wound to the arm was fired within 1/3 meter or 1 ft. The wound to the chest was fired
37 at about 1-1/3 meters or 4-1/2 ft. The wound through the head was fired at close range,
38 less than 1/2 meter or 1-1/2 ft. One bullet recovered from the head of the victim was
39 matched with the weapon recovered from the defendant, Devon Kelmar.
40

41 There were no other wounds or abrasions on the body. There was no physical evidence
42 of a struggle, such as bruises on the wrists or on other parts of the body. Blood taken
43 from Jackson during the autopsy revealed a blood alcohol level of .10. A standard small
44 folding pocket knife, similar to a swiss army knife, was found in the closed position in the
45 left rear pocket of the deceased, Jackson. It measured a little over 3 inches in the closed
46 position with a blade a little less than 3 inches.

1 **WITNESS STATEMENT - Defense Witness: DEVON KELMAR, DEFENDANT**

2
3 My name is Devon Kelmar. I am 18 years old and a senior at Twin Lakes High School. I
4 live with my mother at 451 Lakeside Drive in Twin Lakes, California. We moved to Twin
5 Lakes before my junior year in high school. I didn't know anyone, but I became friends
6 with Jamie Fergusson, my next door neighbor. Jamie is a year younger than I, but was
7 really cool to me. Jamie used to play drums in a band with Cory Jackson who was the
8 singer. It did not work out for them and they broke up the band and fizzled out as friends. I
9 sing and always wanted to be in a band, so Jamie and I began playing together. We
10 played well together and it helped me to meet people. We played at parties and at
11 special occasions around town.

12
13 About a year ago, Cory began to pick on me. I never initiated any of the fights. It had
14 gotten worse over the last six months. What I used to walk away from, I couldn't
15 anymore. Cory would corner me or jump me from behind. I'd get bruises. Cory said that I
16 didn't deserve to live because of all of the pain I caused. Cory was wrong. Cory was the
17 one causing all of the pain. Cory was jealous that the band was so successful. Cory
18 constantly accused me of stealing the band and Jamie. Cory didn't like Jamie and me
19 being friends. Jamie and Cory were better friends before I moved here.

20
21 Cory's abuse has been really hard to take since my dad's death in September of last
22 year. My mom was very upset over dad's death and got help from Dr. Nichols. Mom and
23 Dr. Nichols have been friends for a long time. Mom was really upset, so I went and saw
24 Dr. Nichols. I only saw Dr. Nichols twice in the last six months. The first time was in
25 October and the second in January. We mostly talked about mom's depression and my
26 view of death. I vaguely remember mentioning to Dr. Nichols that I had seen a T.V. movie
27 in which the person claimed insanity. It wasn't important. I don't really remember
28 anything else significant that we talked about. I haven't seen Dr. Nichols since the visit in
29 January.

30
31 Cory harassed me over the phone. I had my own phone line at home and I got numerous
32 hang-ups during the night. Other times the caller whispered obscenities. I lost sleep and
33 was irritable. It was Cory even though Cory never admitted it. Many times over the last
34 six months, I found my school locker jammed or shaving cream sprayed inside of it.

35
36 Cory and I had senior English together. Kendall Lynch was also in the class. Cory didn't
37 always go to class, but I always dreaded that class because of Cory. My grades suffered,
38 because I missed classes. I grew very stressed about seeing Cory. A couple months
39 ago, in December, Cory accused me of stealing our English teacher's wallet. Cory
40 confronted me and we got into a fight. We were both sent to the Vice Principal Murphy.
41 Vice Principal Murphy wanted us to talk out our differences. It didn't help. In fact, it made
42 Cory more upset. My car was egged twice within the last month when I parked it in a lot
43 across from school. Cory's friends hung out in that lot. Cory got mad when I parked there.
44 Cory would say, "These are my grounds." It made me mad since I've got a right to park
45 where I want.

46
47 Last Wednesday the 16th, Cory tried to kill me with a car. I was in the parking lot across
48 from school and I saw a car coming right at me, gaining speed. Cory was driving and had

1 a big smile. Cory aimed for me. I leaped out of the way just in time, or Cory would've run
2 me over. It really shook me up and confirmed my fear that Cory was out to get me.

3
4 Last weekend Jamie and I were working on new material for the band. I was a little sad
5 because I was thinking about my dad. We talked about our feelings about death. I
6 thought I'd write a song for my dad. Also, for a couple weeks we had been thinking about
7 changing the name of the band. Our's was lame. So I asked Jamie about "The Perfect
8 Crime." Then I realized that it was stupid too, so I said to forget it.

9
10 On Friday the 25th, Kendall had a party. Kendall and I were talking when I felt a hard tug
11 on my arm. It was Cory who was drunk. I said I didn't want any trouble. Cory laughed and
12 I noticed that Kendall had walked away. Cory got close to my face and threatened me
13 with a knife held real close to my throat. It was a sharp knife. I could feel it all the way
14 across my neck. I don't know the exact size, but it wasn't a little pocket knife. Cory
15 said: "I'm tired of you gettin' in my way always taking what's mine--stealing my friends
16 and my band. I hope you're not goin' to the game tomorrow, because you're dead. I'm
17 gonna slash you. I'm not kidding this time." I guess I laughed, because I was nervous.
18 Cory shoved me hard and I fell back into some people. Cory laughed again. It shook me
19 up, because I know that Cory's dad was in prison for stabbing someone. I saw Jamie and
20 said that Cory was really scaring me and I believed Cory was really out to get me this
21 time. I told Jamie about the threat. I felt like I needed to do something to protect myself.

22
23 The next morning I went to the closet where dad had kept a gun. It was still there, so I
24 took it and put it in my backpack. I had never held the gun before this time. It sort of
25 scared me, but I didn't know how else to protect myself. The abuse had been growing
26 over the last couple months. I knew Cory carried a knife. This was common for Cory to do
27 and everybody knew that. I was scared and afraid that Cory was going to kill me. Also, no
28 one was taking my fears seriously. Whenever I told anyone about the abuse, they
29 thought I was paranoid or over-reacting. That's why I often didn't tell others of the
30 ongoing abuse. But I knew what Cory was thinking and was serious about the threat.

31
32 That night I went to the basketball game at school. I took my backpack to the game
33 because I had some new music in it. Our band was going to play at a party after the
34 game. I got there early to watch the warm-ups. I parked in the lot across from the school,
35 because I knew a lot of people were going to the game and thought it would be easier to
36 leave from that lot after the game. I sat with Jamie during the game. We won the game.
37 Jamie and I talked to some friends on the team, then Jamie went to the lockers and I
38 went to my car. It was very dark because the lights in the parking lot were burnt out. I was
39 at the passenger side of my car when Cory came up from behind. Cory said, "Devon
40 Kelmar, jus' the person I'm lookin' for. I saw you and Jamie at the game. Now it looks like
41 you've entered my grounds." The place I had parked my car was where Cory's friends
42 would often hang out.

43
44 All I could think about was what Cory had said the previous night. "You're dead," "I'm
45 gonna slash you." I kept replaying this in my mind. I was thinking of all of the abuse--the
46 fights, the phone calls, the car, and how Cory had threatened and hit me the previous
47 night. I knew Cory carried a knife. I was so afraid and really thought that this was it. Cory
48 said something to me but I couldn't hear because of everything replaying in my mind. I

1 can't remember if I said anything. I was scared and sure Cory was going to pull the knife
2 on me. So, I unzipped my backpack and made sure the gun was there. I saw Cory reach
3 into a jacket pocket and then begin to lunge toward me. I saw my life flash and I started
4 firing. I had to save my life. I don't know how many shots were fired. It all happened so
5 fast. I was in shock and in fear for my life. I felt that it was Cory or me. I wanted Cory to
6 stop harassing me. I wanted the pain and fear to end. My gut reaction was to take off. I
7 had to think about what had happened. I started to run. A short way from school, I saw
8 two police officers and I told them that I had to do it because Cory had a knife. They
9 asked my name and I told them. They said I was under arrest for the murder of Cory
10 Jackson. They read me my rights and took me to the station.

1 **WITNESS STATEMENT - Defense Witness: JAMIE FERGUSSON**

2
3 My name is Jamie Fergusson. I am 17 years old and a junior at Twin Lakes High School.
4 I live next door to Devon Kelmar at 453 Lakeside Drive in Twin Lakes, California.

5
6 I have known Cory Jackson since elementary school. We used to be pretty good friends,
7 but we had a falling out when our band broke up. Cory sang and I played drums. It was
8 never anything great. We stopped playing together about six months before Devon
9 moved here. Cory and I haven't been friends since the band broke up. Cory has always
10 wanted to control other people. I think a lot of Cory's problems stem from family
11 problems. Cory told me Cory's dad was in prison for stabbing someone. Also, Cory's
12 mom is an alcoholic and most times I've seen her, she's drunk. It's hard on Cory, so Cory
13 often stayed with friends.

14
15 Devon and I have been good friends for a couple years. Devon moved here two years
16 ago and didn't know anyone. We went to the same high school so I introduced Devon to
17 some friends. Devon was shy at first, but made a lot of friends and was popular. Devon
18 sang, just like Cory, only better. About a year and a half ago, Devon and I began playing
19 in a band. We added a couple other members, but didn't ask Cory. We didn't need two
20 singers. I think Cory was jealous, because our band did very well. Devon and I spent a lot
21 of time together -- naturally we were neighbors and in a band together. Cory never liked
22 Devon. Cory was obnoxious and called Devon names and accused Devon of taking over
23 the band. It wasn't true. Cory and I broke up our band long before Devon came to town.
24 Besides, Devon was a much better singer than Cory. Cory was jealous of the friendship
25 Devon and I had.

26
27 Cory accused Devon of stealing a teacher's wallet. They got into a fight and were sent to
28 Vice Principal Murphy. Since then I think Cory was more hostile. Since then Devon's car
29 was egged and Devon's locker was filled with shaving cream. Devon's a great person
30 and I never understood why Cory didn't like Devon. Lately it seemed that they were
31 fighting more often. It seemed like they got into an argument a couple times a week.

32
33 Last weekend Devon and I were out in the shed behind my house talking about new
34 material for the band. We might have had a beer or two. We got into a discussion about
35 death. Devon asked if I'd ever thought about death about the worst way to die. Devon
36 must have been thinking about Devon's dad who had died. Devon was writing a song for
37 him. Then Devon said something kindof weird. Devon said, "Have you ever thought
38 about the perfect crime?" I said, "What!?" Devon said, "Oh never mind, forget it." I
39 thought maybe Devon had too many beers and wasn't thinking straight and we resumed
40 talking about some new songs.

41
42 Friday night, February 25, I went to Kendall Lynch's party. Around 11 p.m., Devon came
43 up to me and said that Cory had made a threat. Devon said something like "Cory said I
44 should stay away from you, and if I didn't, I'd be slashed, just like Cory's dad slashed."
45 Devon seemed mad and upset at the same time. Devon said that Cory pulled a knife and
46 held it to Devon's throat. I'd heard other people at school talk about seeing Cory with a
47 knife, like a switch blade, but I'd never seen one. Cory did have a reputation of bullying
48 people around. I also knew that Cory didn't like Devon, but I hoped Cory would never do

1 something as drastic. I asked what Devon was going to do and Devon said, "I don't know
2 but I need some protection." Devon was shaken up and left the party.
3
4 The next night, Saturday the 26 I met Devon at our school gym for the championship
5 basketball game. Devon seemed fine. We didn't talk about Cory or what had happened
6 the previous night. I did see Cory sitting with Kendall during the game. Cory was drinking
7 something from a paper sack. I don't know what it was, but Cory does have a reputation
8 for often getting drunk. I figured it was probably a beer in the sack.
9
10 It was a great game and we won by a point at the buzzer. Everyone was going crazy.
11 After the game we stayed and talked to some friends on the team. We planned to meet
12 them at a party our band was playing at. Devon and I left the gym. I went to my locker and
13 yelled to Devon to meet at the party. While at the locker I distinctly remember hearing
14 two gun shots ring out. I also heard a scream. The shots came from the parking lot. I
15 thought about Devon and ran to the parking lot. I didn't see Devon or Devon's car, so I
16 ran across the street and saw Devon's red Mustang and a couple people gathered.
17 When I got closer I saw Cory laying there in a pool of blood. Devon wasn't around. A
18 couple of other people gathered including Kendall Lynch and the Vice Principal.
19
20 I called 911 and told them that there was a shooting and that someone was badly hurt. I
21 stayed with Cory until the police came. They asked me a few questions about what had
22 happened and I told them what I knew.

1 **WITNESS STATEMENT - Defense Witness: DR. DENALI MOORAD**

2
3 My name is Denali Moorad. I am 39 years old. I am a psychiatrist and Associate Director
4 of the Psychiatric Institute located in California City. I received my undergraduate
5 degree in psychobiology and medical degree specializing in psychiatry from the
6 University of California, Los Angeles. I have worked at Psychiatric Institute for about 10
7 years and have been the Associate Director for the last two years.

8
9 Before I was the Associate Director, I regularly saw patients. My specialty has always
10 been children and young adults. I still see patients but I currently spend more time
11 researching and writing. I am quite familiar with the Battered Person Syndrome as well
12 as Battered Wife Syndrome and the Battered Child Syndrome. I have studied
13 syndromes related to juveniles and young adults over the last five years and have
14 helped to develop the research in this field. I have diagnosed and treated many patients
15 with these syndromes. I have written several books and articles on the subject. I also
16 speak at conferences. I have testified in about 40 trials over the last four years. I usually
17 charge a fee around \$2,400 to testify at trial. This includes preliminary interviews and
18 testing. I am being paid for my testimony today.

19
20 Battered Person Syndrome (BPS) is not a mental illness and is not listed in the third
21 edition of the Diagnostic and Statistical Manual of Mental Disorders (manual). This
22 manual is an extensive diagnostic classification system for psychological disorders.
23 BPS may be classified as a type of Post-traumatic Stress Disorder (PTSD). PTSD is
24 listed in the manual. In PTSD a number of symptoms arise after a traumatic event, or
25 stressor. The stressor is generally one that is outside the normal range of human
26 experiences. The stressor may be caused by many things such as military combat,
27 natural disasters, as well as man-made disasters, like torture, abuse, or rape.

28
29 The diagnostic criteria for Post-traumatic Stress Disorder include:

- 30
31 (1) A distinct stressor that would cause significant distress in almost anyone;
32 (2) Disturbing and vivid recall of the stressful event or recurrent dreams of the event;
33 (3) Numbing of responsiveness, feeling of detachment from others, or reduced
34 involvement in important activities;
35 (4) At least two of the following: sleep disturbance, trouble concentrating, increased
36 arousal, hypersensitive nerves, avoidance of activities causing a recollection or
37 resembling the traumatic event.

38
39 Battered Person Syndrome is similar to the more recognized Battered Wife Syndrome. A
40 battered person is one, who has been on several occasions, the victim of physical,
41 sexual, or serious psychological abuse by another person over a period of time. There is
42 usually a pattern of abuse or a cycle of violence for which the battered person assumes
43 responsibility. Several symptoms arise from the syndrome. One is a greater sensitivity to
44 danger. The battered person very honestly perceives the danger faster than someone
45 who hasn't been battered. This may make the battered person more edgy and more
46 emotional and responsive than someone who has not been battered. The battered
47 person does not misperceive the danger, but the battered person accurately senses that

1 an abusive episode is not over. Other symptoms include a numbing of feelings and re-
2 experiencing the traumatic abusive episodes.
3

4 A battered person's thought processes and reactions are different from those of
5 someone who is not abused. A battered person puts up with the abusive environment
6 because he or she may experience a loss of self-esteem and "learned helplessness,"
7 which is a kind of "psychological paralysis." The battered person views the violence as
8 random and thus, believes that there is no way to prevent the abuse. The resulting
9 feeling is helplessness. The person may have difficulty concentrating or have memory
10 loss, which results in poor school or work performance. Children may be aggressive or
11 irritable.
12

13 I have conducted three 1-hour sessions with Devon Kelmar since the arrest. I have also
14 reviewed the police reports and have briefly interviewed Devon's mother. Based on my
15 psychological evaluation, it is my opinion that Devon Kelmar suffered from Battered
16 Person Syndrome. My opinion is based on the exhibited symptoms associated with
17 BPS. There has been a history and a pattern of physical and psychological abuse of
18 Devon by Cory Jackson. Over the last year and heightened during the last six months
19 Devon experienced lengthy periods of verbal, physical, and emotional abuse. This was
20 evidenced by the fact that Devon sustained bruises on several occasions. Also, Cory
21 psychologically tormented Devon on a very frequent basis. Devon became more
22 agitated, would miss classes at school and Devon's grades dropped significantly. Devon
23 had trouble sleeping and concentrating at school. Devon didn't often tell others about the
24 abuse because Devon's was beginning to feel detached from others since they were not
25 sensitive to the abuse. Also, Devon exhibited a loss of self-esteem. Devon felt
26 threatened and experienced a feeling of not being able to escape the situation.
27

28 Just the night before the incident, Cory openly threatened Devon with a knife to the
29 throat. Along with the verbal threats and physical abuse, Devon was in a heightened
30 state of fear. When Devon saw Cory the following evening it would be normal for a
31 battered person to recall the pattern of abuse and the recent threat. This recall is very
32 vivid. Devon re-lived the moment of Cory's threat and the fear that Devon had felt. Devon
33 was also aware that Cory always carried a knife. When Cory reached for a jacket pocket,
34 Devon thought Cory was reaching for a knife. With this knowledge combined with the
35 threat, it would be reasonable for Devon to react. All of these symptoms fall within the
36 classic symptoms for PTSD, within which Battered Person Syndrome falls.
37

38 Based on my experience and BPS theory, it is my opinion that Devon's particular
39 experiences as a battered person affected the perception of danger, its imminence, and
40 the necessary actions to protect from danger. It is also my opinion that Devon genuinely
41 perceived danger and the need to kill Cory.

1 **WITNESS STATEMENT - Defense Witness: LINDEN MURPHY**

2
3 My name is Linden Murphy. I am 38 years old and live at 1000 Lakeview Road. I received
4 an undergraduate degrees in history and education and masters in education from the
5 University of California, Santa Barbara. I also have a teaching credential. I began
6 teaching history at Twin Lakes High about 11 years ago. I have been the Vice Principal
7 also known as the Dean of Students at Twin Lakes High School for almost 5 years.

8
9 As Dean of Students I make sure students receive a good education in a positive
10 learning environment. It is a close-knit community and we want our students to be
11 successful, productive members of society. If a student needs help, I want to be there. I
12 try to get to know as many students as possible. I also meet with students who've been
13 referred to me by teachers or administrators. Students are referred to me for many
14 reasons, such as violent or disruptive behavior to the learning environment. I also
15 counsel students who exhibit warning signals, such as major mood swings, significant
16 weight loss, significant decrease in school grades. Recently we have had a problem with
17 underage drinking in our community. We are trying to educate students about the
18 dangers of drugs and alcohol.

19
20 I knew Cory Jackson. I think Cory had a difficult life at home. I think Cory did not live with
21 family members. Cory's father had some troubles with the law. I felt that if Cory received
22 more support from family members, Cory could have been a good student. Cory had
23 been referred to me many times and seemed constantly in my office. Cory tended to
24 have a violent disposition. Cory often skipped class and fought with the other students.
25 Cory was sometimes referred to me for drinking or being drunk in class. I even heard
26 rumors that Cory sometimes carried a switchblade, but I never saw one or Cory would've
27 been immediately suspended. Cory also had problems with another student Devon
28 Kelmar.

29
30 Although I did not have many occasions to speak with Devon Kelmar, I had heard lots of
31 positive information about Devon. I know Devon was popular with the teachers and
32 many students. Devon was an exemplary student, earning good grades and was college
33 bound. Devon participated in many school activities. Devon was rarely ever in trouble. I
34 was keeping my eye on Devon, because I'd been told that Devon had missed several
35 classes, especially English class. Also, Devon's grades were falling. This concerned me
36 because this was not typical for a student like Devon and these can be warning signs of
37 trouble.

38
39 Devon was referred to me only once after an incident with Cory. In December, they got
40 into an argument which escalated into a fight. A teacher's wallet had been stolen from
41 her purse and Cory accused Devon of stealing it. We found no evidence that Devon stole
42 the wallet. Devon told me about problems with Cory. Devon said that Cory was always
43 harassing and trying to set up Devon for things Devon did not do. I suggested that Devon
44 and Cory try to work out their differences. I cautioned them that, if I saw them in my office
45 again, they could be subject to suspension. I directed this threat at Cory, because I
46 viewed Cory as a "hot head" with a temper. I wanted them to work out problems without
47 resorting to violence.

1 On February 26, 1994, I went to the school's championship basketball game. It was a big
2 event and many people attended. I stayed after the game to lock up the gym. Also, I
3 wanted to see that the students cleared the campus and the parking lot. About 20-25
4 minutes after the game, there were still a few people lingering around, reveling in the
5 victory. I walked away from the gym toward the parking lot. Most of the cars were gone.
6 There were a few in the lot across the street. Students like to "hang out" in that parking
7 lot, because it is off campus. Also, the school parking lot gets very crowded and it's
8 easier to get a parking spot in the lot across the street. I heard some arguing coming from
9 the lot across the street. I was concerned it might be someone upset about the game, so
10 I headed across the street.

11
12 At first, I couldn't make out what was going on or who was arguing. I headed towards the
13 argument and was about 60 feet away when I heard someone yell, "I should jus' rid' you
14 of you're misery. You're 'street sludge' who doesn't deserve to live." I wasn't sure who
15 said this. One person facing me had a white sweatshirt on. I could only see the back of
16 the other person who was wearing a green jacket. It was dark and all the lights were
17 burnt out in that area. I could not clearly see who either person was. The person in green
18 blocked my clear view of the person in white.

19
20 I walked closer and I think the person in white said something like, "I know you've got a
21 knife, but I've got strap." Strap is a common slang kids use for gun. I was about 50 feet (or
22 the width of six parking spaces) away. There was a parked car right in front of me and
23 five empty parking spaces, then the two people and another car. A car was coming
24 toward me and the headlights were partially in my eyes. I had to squint. I was about to
25 say something when the person in green reached for the right jacket pocket and make a
26 quick sharp movement and lunge toward the other person. Then I heard a shot fired and
27 I yelled out. I crouched down beside the car in front of me, because I didn't want to get hit
28 by any stray bullets. I peered over the top of the trunk. Then I saw the person in green
29 stagger toward the other person. I heard one more shot and the person in green fell
30 backwards onto the ground. The two shots were close together, only a few seconds
31 apart. There was nothing I could do. I waited a few seconds and then I looked around the
32 side of the car. Then I saw the person in white kneel down and touch the other person's
33 neck and then run off into the open field.

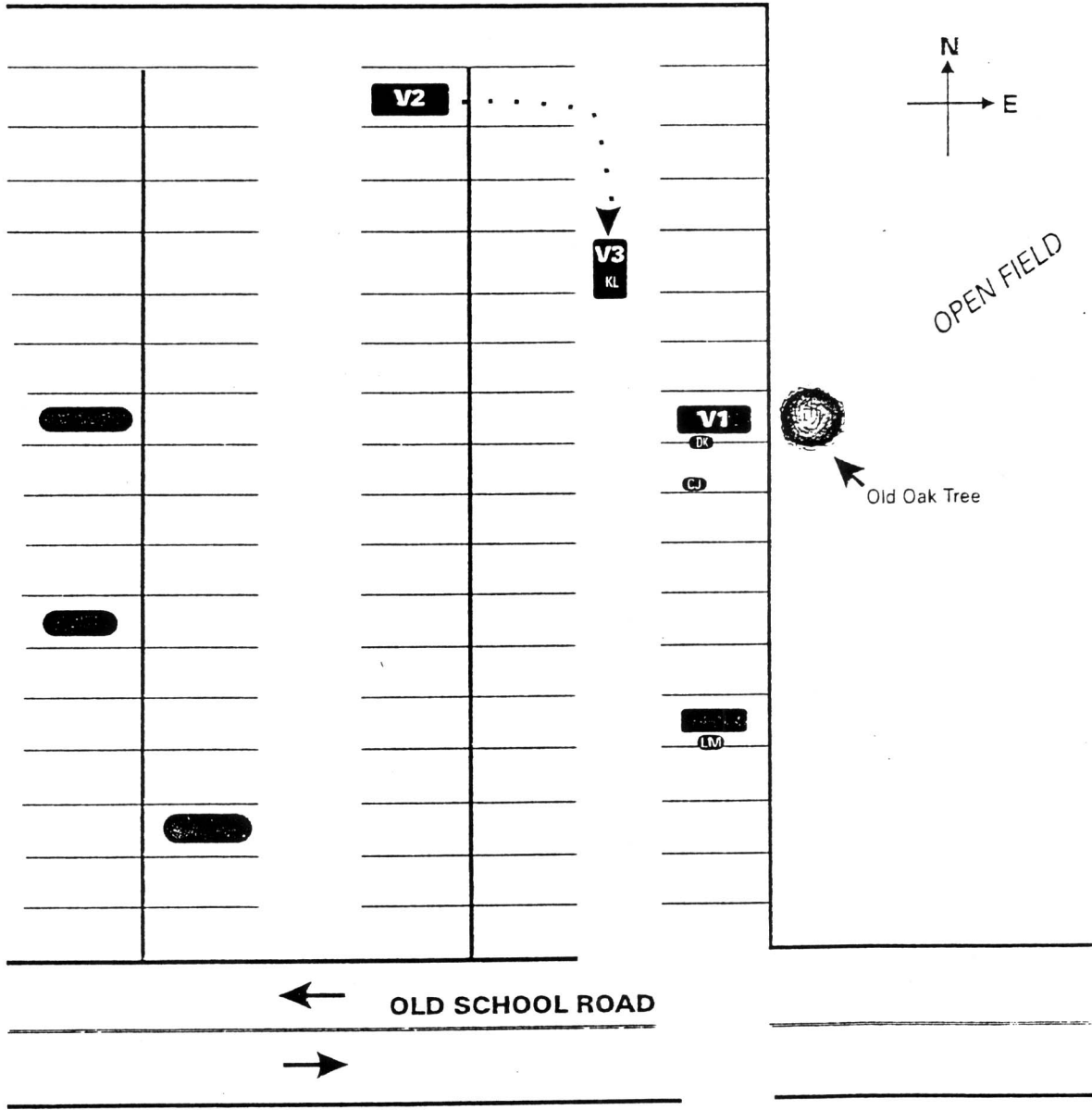
34
35 I walked cautiously toward the person on the ground. I realized it was Cory Jackson. A
36 few other students gathered. I told someone to call 911 and I stayed there until the police
37 arrived.

OFFICIAL DIAGRAM

Map of Scene

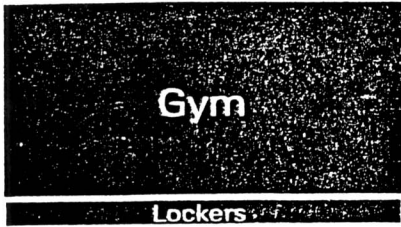
V1 - Devon Kelmar's car (parked)
V2 - Kendall Lynch's car (parked)
V3 - Kendall Lynch's car
(approx. position after incident)

DK - Devon Kelmar
CJ - Cory Jackson
LM - Linden Murphy
KL - Kendall Lynch

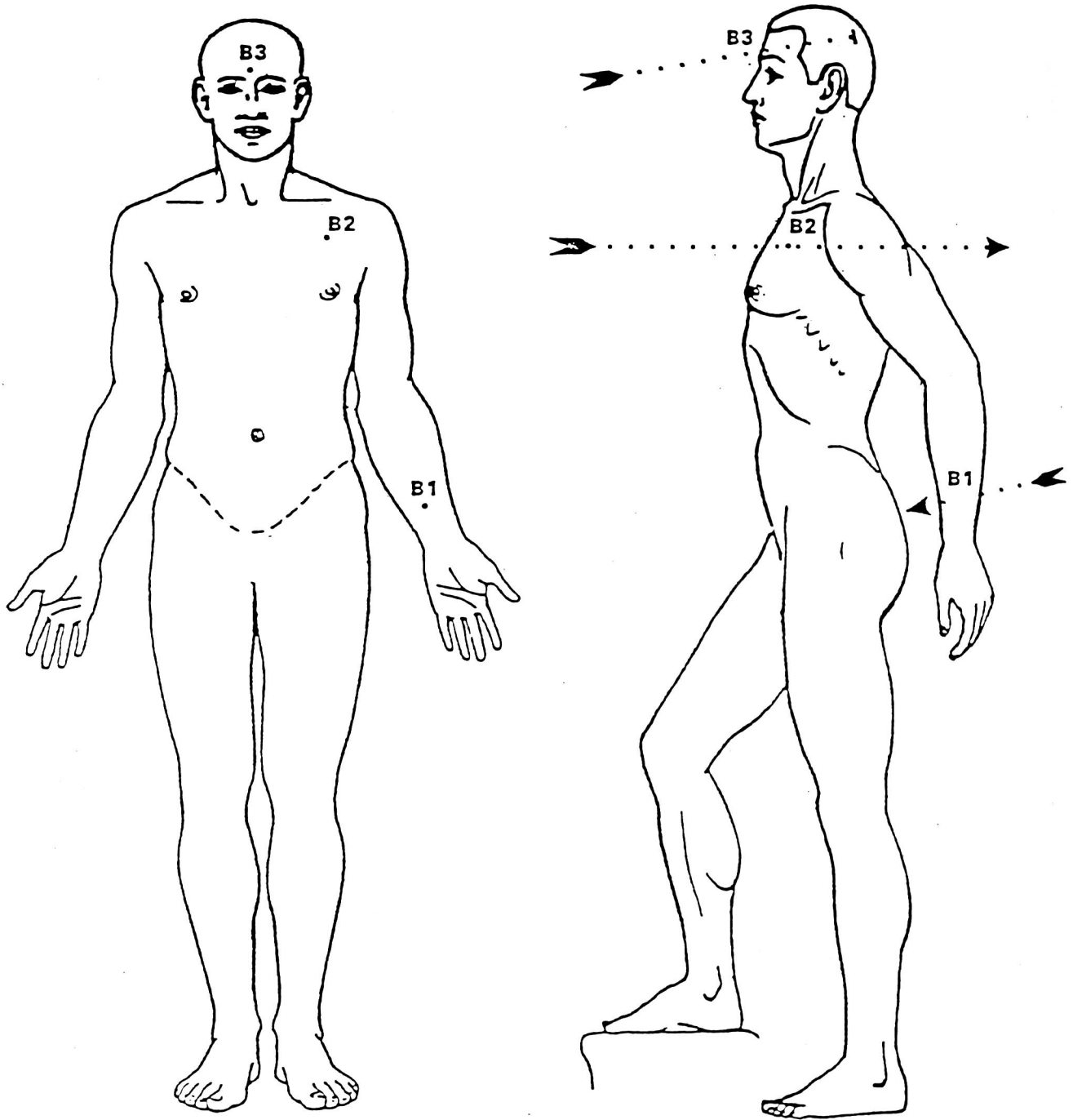


← OLD SCHOOL ROAD
→

Twin Lakes High School
Parking Lot



Coroner's Diagrams



Front

Left

Diagram courtesy of the Los Angeles County Department of Coroner

THE FORM AND SUBSTANCE OF A TRIAL

The Elements of a Criminal Offense

The penal (or criminal) code generally defines two aspects of every crime. These are the physical part and the mental part. Most crimes specify some physical act, such as firing a gun in a crowded room, and a guilty, or **culpable**, mental state. The intent to commit a crime and a reckless disregard for the consequences of one's actions are culpable mental states. Bad thoughts alone, though, are not enough. A crime requires the union of thought and action.

The mental state requirements prevent the conviction of an insane person. Such a person cannot form **criminal intent** and should receive psychological treatment rather than punishment. Also, a defendant may justify his/her actions by showing a lack of criminal intent. For instance, the crime of burglary has two elements: (1) breaking and entering (2) with the intent to steal. A person breaking into a burning house to rescue a baby has not committed a burglary.

The Presumption of Innocence

Our criminal justice system is based on the premise that allowing a guilty person to go free is better than putting an innocent person behind bars. For this reason, the prosecution bears a heavy burden of proof. Defendants are presumed innocent. The prosecution must convince the judge or jury of guilt beyond a reasonable doubt.

The Concept of Reasonable Doubt

Despite its use in every criminal trial, the term "reasonable doubt" is very hard to define. The concept of reasonable doubt lies somewhere between probability of guilt and a lingering possible doubt of guilt. Reasonable doubt exists unless the trier of fact can say that he or she has an abiding conviction, to a moral certainty, of the truth of the charge.

A defendant may be found guilty "beyond a reasonable doubt" even though a possible doubt remains in the mind of the judge or juror. Conversely, triers of fact might return a verdict of not guilty while still believing that the defendant probably committed the crime.

Jurors must often reach verdicts despite contradictory evidence. Two witnesses might give different accounts of the same event. Sometimes a single witness will give a different account of the same event at different times. Such inconsistencies often result from human fallibility rather than intentional lying. The trier of fact (in the Mock Trial competition, the judge) applies his/her own best judgment in evaluating inconsistent testimony.

A guilty verdict may be based upon circumstantial (indirect) evidence. However, if there are two reasonable interpretations of a piece of circumstantial evidence, one pointing towards guilt of the defendant and another pointing toward innocence of the defendant, the trier of fact is required to accept the interpretation that points towards the defendant's innocence. On the other hand, if a piece of circumstantial evidence is subject to two interpretations, one reasonable and one unreasonable, the trier of fact must accept the reasonable interpretation even if it points towards the defendant's guilt. It is up to the trier of fact to decide whether an interpretation is reasonable or unreasonable.

ROLE DESCRIPTIONS

ATTORNEYS

The **pretrial motion attorney** presents the oral argument for (or against) the motion brought by the defense. You will present your position and answer questions by the judge as well as try to refute the opposing attorney's arguments in your rebuttal.

Trial attorneys control the presentation of evidence at trial and argue the merits of their side of the case. They do not themselves supply information about the alleged criminal activity. Instead, they introduce evidence and question witnesses to bring out the full story.

The **prosecutor** presents the case for the state against the defendant(s). By questioning witnesses, you will try to convince the judge or jury (juries are not used at state finals) that the defendant(s) is guilty beyond a reasonable doubt. You will want to suggest a motive for the crime and will try to refute any defense alibis.

The **defense attorney** presents the case for the defendant(s). You will offer your own witnesses to present your client's version of the facts. You may undermine the prosecution's case by showing that the prosecution witnesses cannot be depended upon or that their testimony makes no sense or is seriously inconsistent.

Trial attorneys will:

- Conduct direct examination.
- Conduct cross-examination.
- Conduct re-direct examination, if necessary.
- Make appropriate objections. Please note rule #13, appearing on page 59: "Only the direct and cross-examination attorneys for a particular witness may make objections during that testimony."
- Do the necessary research and be prepared to act as a substitute for any other attorneys.
- Make opening statements and closing arguments.

Each student attorney should take an active role in some part of the trial.

WITNESSES

You will supply the facts in the case. A witness may testify only to facts stated in or reasonably inferred from his/her Witness Statement or the Fact Situation (if he/she reasonably would have knowledge of those facts). Suppose that your Witness Sheet states that you left the Ajax Store and walked to your car. On cross-examination, you are asked whether you left the store through the Washington or California Avenue exit. Without any additional facts upon which to base your answer, you could reasonably name either exit in your reply--probably the one closer to your car. Practicing your testimony with your team's attorney coach and your team attorneys will help you to fill in any gaps in the official materials. Imagine, on the other hand, that your Witness Sheet included the statement that someone fired a shot through your closed curtains into your living room. If asked whether you saw who shot the gun, you would have to answer, "No." You could not reasonably claim to have a periscope on the roof or have glimpsed the person through a tear in the curtains. Neither fact could be found in or reasonably implied from the case materials.

The fact situation is a set of indisputable facts from which witnesses and attorneys may draw reasonable inferences. The witness statements contained in the packet should be viewed as signed statements made to the police by the witnesses as identified. If you are asked a question calling for an answer which cannot reasonably be inferred from the materials provided, you must reply, "I don't know" or "I can't remember." It is up to the attorney to make the appropriate objections when witnesses are

asked to testify about something which is not generally known or cannot be reasonably inferred from the fact situation or a signed witness statement.

A witness can be impeached if he/she contradicts the material contained in his/her witness statement using the procedures as outlined on page 45.

COURT CLERK, COURT BAILIFF

We recommend that you provide two separate people for these roles, but if you use only one, then that person **must** be prepared to perform as clerk or bailiff in any given trial. In addition to the individual clerk and bailiff duties outlined below, this person can act as your **team manager**. He/she will be responsible for keeping a list of phone numbers of all team members and ensuring that everyone is informed of the schedule of meetings. In case of illness or absence, the manager should also keep a record of all witness testimony and a copy of all attorney notes so that another team member may fill in if necessary.

When evaluating the Team Performance/Participation category in the scoresheet, scorers will incorporate the contributions of the clerk and bailiff to the running of the trial into the point assessment.

The court clerk and the bailiff aid the judge in conducting the trial. In an actual trial, the court clerk calls the court to order and swears in the witnesses to tell the truth. The bailiff watches over the defendant to protect the security of the courtroom. For the purpose of the competition, the duties described below are assigned to the role of clerk and the role of bailiff.

Before each round of competition, the court clerks and bailiffs will meet with a staff person at the courthouse about fifteen minutes before the trial begins. At this time, you will be paired with your opposing team's clerk, or bailiff, and will be assigned your proper role. **Prosecution teams will be expected to provide the clerk for the trial; defense teams are to provide the bailiff.** The clerks will be given the time sheets. After ensuring that all trials will have a clerk and a bailiff, you will be sent to your school's trial.

Duties of the Court Clerk and Bailiff

Court Clerk

When the judge arrives in the courtroom, introduce yourself and explain that you will assist as the court clerk.

In the Mock Trial competition, the court clerk's major duty is to time the trial. **You are responsible for bringing a stopwatch to the trial. Please be sure to practice with it and know how to use it when you come to the trials.**

An experienced timer (clerk) is critical to success of a trial.

INTERRUPTIONS IN THE PRESENTATIONS DO NOT COUNT AS TIME. For direct, cross and re-direct examination, record only time spent by attorneys asking questions and witnesses answering them. Do not include time when:

- witnesses are coming into the courtroom.
- attorneys are making objections.
- judges are questioning attorneys or witnesses or offering their observations.

When a team has two minutes remaining in a category, call out "Two"; when one minute remains, call out "One," so that everyone can hear you. When time for a category has run out, announce "Time!" and **insist the students stop**. There is to be **no allowance for overtime under any circumstance**. This will be the procedure adhered to at the state finals in Sacramento. After each witness has completed his/her testimony, mark down on the time sheet the time to the nearest one-half minute.

Bailiff

When the judge arrives in the courtroom, introduce yourself and explain that you will assist as the court bailiff.

In the Mock Trial Competition, the bailiff's major duties are to call the court to order and to swear in witnesses. Please use the language below. In addition, you are responsible for bringing the witnesses from the hallway into the courtroom. Sometimes, in the interest of time and if your trial is in a very large courtroom, it will be necessary to ask someone sitting in the courtroom close to the door to get the witnesses from the hallway for you when they are called to the stand.

When the judge has announced that the trial shall begin, say:

"All rise, Superior Court of the State of California, County of _____, Department _____, the Honorable Judge _____ presiding, is now in session. Please be seated and come to order."

When you have brought a witness to testify, you must swear in the witness as follows:

"Do you solemnly affirm that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth?"

In addition, the bailiff is responsible for bringing to trial a copy of the "Rules of Competition." In the event that a question arises and the judge needs further clarification, the bailiff is to provide this copy to the judge.

PROCEDURES FOR PRESENTING A MOCK TRIAL CASE

Introduction of Physical Evidence

Attorneys may introduce physical exhibits, if any are listed under the heading "Evidence," provided that the objects correspond to the description given in the case materials. Below are the steps to follow when introducing physical evidence (clothing, maps, diagrams, etc.). All items are presented prior to trial.

1. Present the item to an attorney for the opposing side prior to trial. If that attorney objects to use of the item, the judge will rule whether it fits the official description.
2. When you first wish to introduce the item during trial, request permission from the judge, "Your honor, I ask that this item be marked for identification as Exhibit #__."
3. Show the item to the witness on the stand. Ask the witness if she/he recognizes the item. If the witness does, ask him/her to explain it or answer questions about it. (Make sure that you show the item to the witness; don't just point!)
4. When finished using the item, give it to the judge to examine and hold until needed again by you or another attorney.

Moving the Item Into Evidence

Exhibits must be introduced into evidence if attorneys wish the court to consider the items themselves as evidence, not just the testimony about the exhibits. Attorneys must ask to move the item into evidence at the end of the witness examination.

1. "Your honor, I ask that this item (describe) be moved into evidence as People's (or Defendant's) Exhibit #__, and request that the court so admit it."
2. At this point opposing counsel may make any proper objections she/he may have.
3. The judge will then rule on whether the item may be admitted into evidence.

The Opening Statement

The opening statement outlines the case as you intend to present it. The prosecution delivers the first opening statement. A defense attorney may follow immediately or delay the opening statement until the prosecution has finished presenting its witnesses. A good opening statement should:

- Explain what you plan to prove and how you will do it.
- Present the events of the case in an orderly sequence that is easy to understand.
- Suggest a motive or emphasize a lack of motive for the crime.

Begin your statement with a formal address to the judge:

"Your honor, my name is _____ (full name), the prosecutor representing the people of the state of California in this action;" or

"Your honor, my name is _____ (full name), counsel for _____ (defendant) in this action."

Proper phrasing includes:

"The evidence will indicate that ..."

"The facts will show . . ."

"Witness _____ (full name) will be called to tell . . ."

"The defendant will testify that . . ."

Direct Examination

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

- Call for answers based on information provided in the case materials.
- Reveal all of the facts favorable to your position.
- Ask the witness to tell the story rather than using leading questions which call for "yes" or "no" answers. (An opposing attorney may object to the use of leading questions on direct examination. See "Leading Questions" page 52.)
- Make the witness seem believable.
- Keep the witness from rambling about unimportant matters.

Call for the witness with a formal request:

"Your honor, I would like to call _____ (name of witness) to the stand."

The witness will then be sworn in before testifying.

After the witness swears to tell the truth, you may wish to ask some introductory questions to make the witness feel comfortable. Appropriate inquiries include:

- The witness's name.
- Length of residence or present employment, if this information helps to establish the witness's credibility.
- Further questions about professional qualifications are necessary if you wish to qualify the witness as an expert.

Examples of proper questions on direct examination:

"Could you please tell the court what occurred on _____ (date)?"

"What happened after the defendant slapped you?"

"How long did you see . . . ?"

"Did anyone do anything while you waited?"

"How long did you remain in that spot?"

Conclude your direct examination with:

"Thank you, Mr./Ms. _____ (name of witness). That will be all, your honor." (The witness remains on the stand for cross-examination.)

Cross-Examination

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

- Call for answers based on information given in Witness Sheets or Fact Situation.
- Use leading questions which are designed to get "yes" and "no" answers.
- Never give the witness a chance to unpleasantly surprise the attorney.

In an actual trial, cross-examination is restricted to the scope of issues raised on direct examination. Because Mock Trial attorneys are not permitted to call opposing witnesses as their own, the scope of cross-examination in a Mock Trial is not limited.

Examples of proper questions on cross-examinations:

"Isn't it a fact that . . . ?"

"Wouldn't you agree that . . . ?"

"Don't you think that . . . ?"

"When you spoke with your neighbor on the night of the murder, weren't you wearing a red shirt?"

Cross-examination should conclude with:

"Thank you, Mr./Ms. _____ (name of witness). That will be all, your honor."

Impeachment During Cross-Examination

On cross-examination, the attorney may want to show the court that the witness should not be believed. This is called impeaching the witness. It may be done by asking questions about prior conduct that makes the witness's credibility (truth-telling ability) doubtful. Other times, it may be done by asking about evidence of certain types of criminal convictions.

Impeachment may also be done by introducing the witness's statement, and asking the witness whether she or he has contradicted something in the statement (i.e. identifying the specific contradiction between the witness's statement and oral testimony).

Example: (Prior conduct)

"Is it true that you beat your nephew when he was six years old and broke his arm?"

Example: (Past conviction)

"Is it true that you've been convicted of assault?"

(NOTE: These types of questions may only be asked when the questioning attorney has information that indicates that the conduct **actually** happened.)

Examples: (Using signed witness's statement to impeach)

"Mr. Jones, do you recognize the statement I have had the clerk mark Defense Exhibit A?"

"Would you read the third paragraph aloud to the court?"

"Does this not directly contradict what you said on direct examination?"

Re-Direct Examination

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

If the credibility or reputation for truthfulness of the witness has been attacked on cross-examination during re-direct, the attorney whose witness has been damaged may wish to "save" the witness. These questions should be limited to the damage the attorney thinks has been done and should enhance the witness's truth-telling image in the eyes of the court.

Work closely with your attorney coach on re-direct strategies.

Closing Arguments

A good closing argument summarizes the case in the light most favorable to your position. The prosecution delivers the first closing argument. The closing argument of the defense attorney concludes the presentations. A good closing argument should:

- Be **spontaneous**, synthesizing what **actually happened in court** rather than being "pre-packaged."
- **Points will be deducted from the closing argument section of the scoresheet if concluding remarks do not actually reflect statements and evidence presented during the trial.**
- Be emotionally charged and strongly appealing (unlike the calm opening statement).
- Emphasize the facts which support the claims of your side, but not raise any new facts.
- Summarize the favorable testimony.
- Attempt to reconcile inconsistencies that might hurt your side.
- Be well organized. (Starting and ending with your strongest point helps to structure the presentation and gives you a good introduction and conclusion.)
- **The prosecution:** should emphasize that the state has proven guilt beyond a reasonable doubt.
- **The defense:** should raise questions which suggest the continued existence of a reasonable doubt.

Proper phrasing includes:

"The evidence has clearly shown that . . ."

"Based on this testimony, there can be no doubt that . . ."

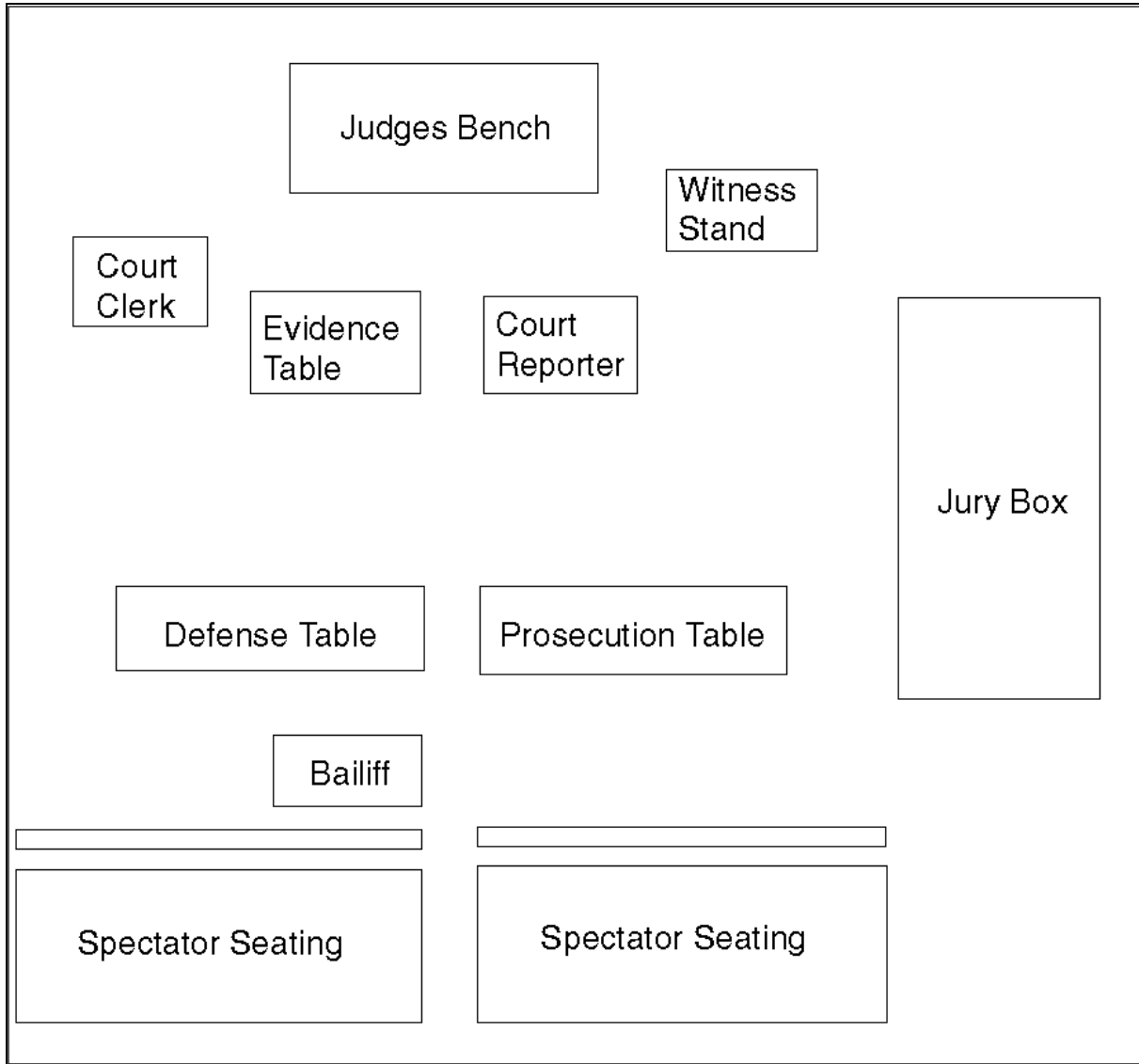
"The prosecution has failed to prove that . . ."

"The defense would have you believe that . . ."

Conclude the closing argument with an appeal to convict or acquit the defendant.

An attorney may reserve up to one minute of time for rebuttal. Only issues that were addressed in an opponent's closing argument may be raised during rebuttal.

DIAGRAM OF A TYPICAL COURTROOM



MOCK TRIAL SIMPLIFIED RULES OF EVIDENCE

Criminal trials are conducted using strict rules of evidence to promote fairness. To participate in a Mock Trial, you need to know about the role that evidence plays in trial procedure. Studying the rules will prepare you to make timely objections, avoid pitfalls in your own presentations, and understand some of the difficulties that arise in actual cases. The purpose of using rules of evidence in the competition is to structure the presentations to resemble those of an actual trial.

Almost every fact stated in the materials will be admissible under the rules of evidence. All evidence will be admitted unless an attorney objects. Because rules of evidence are so complex, you are not expected to know the fine points. To promote the educational objectives of this program students are restricted to the use of a select number of evidentiary rules in conducting the trial.

Reasonable Inference

Due to the nature of the competition, testimony often comes into question as to whether it can be reasonably inferred given facts A, B, C, etc. Consider the following:

Defendant while inside a department store puts a necklace into her purse. The security guard sees her. The guard approaches defendant and says, "I want to talk to you." The defendant runs away.

The fact at issue is, did the defendant steal something? The logical inference is that a reasonable person does not run away if he/she has nothing to hide. The fact of running away can be used to show the defendant's **state of mind**, i.e. that the defendant had a culpable (guilty) mind.

The above hypothetical is an example of an accurate use of reasonable inference. It is ultimately the responsibility of the trier of fact to decide what can be reasonably inferred. However, **it is the students' responsibility to work closely within the fact situation and witness statements.**

Objections

It is the responsibility of the party opposing evidence to prevent its admission by a **timely and specific objection**. Objections not raised in a timely manner are waived. **An effective objection is designed to keep inadmissible testimony, or testimony harmful to your case, from being admitted. A single objection may be more effective than several objections.** Attorneys can and should object to questions which call for improper answers before the answer is given.

For the purposes of this competition, teams will be permitted to use only certain types of objections. The allowable objections are summarized on page 55. **Other objections may not be raised at trial.** As with all objections, the judge will decide whether to allow the testimony, strike it or simply note the objection for later consideration. **Judges' rulings are final.** You must continue the presentation even if you disagree. A proper objection includes the following elements:

- 1) attorney addresses the judge,
- 2) attorney indicates that he/she is raising an objection,
- 3) attorney specifies what he/she is objecting to, e.g. the particular word, phrase or question, and
- 4) attorney specifies the legal grounds that the opposing side is violating.

Example: (1) "Your honor, (2) I object (3) to that question (4) on the ground that it is compound."

1. Facts in the Record

One objection available in the competition which is not an ordinary rule of evidence allows you to stop an opposing witness from creating new facts. If you believe that a witness has gone beyond the information provided in the Fact Situation or Witness Sheets, use the following form of objection:

"Objection, your honor. The answer is creating a material fact which is not in the record." or

"Objection, your honor. The question seeks testimony which goes beyond the scope of the record."

2. Relevance

Relevant evidence is that which tends to make a fact important to the case more or less probable than the fact would be without the evidence. To be admissible, any offer of evidence must be relevant to an issue in the trial. Relevant evidence may be excluded by the court if it is unfairly prejudicial, confuses the issues, or is a waste of time.

Either **direct** or **circumstantial** evidence may be admitted in court. Direct evidence proves the fact asserted without requiring an inference. A piece of circumstantial evidence is a fact (Fact 1) which, if shown to exist, suggests (implies) the existence of an additional fact (Fact 2), (i.e. if Fact 1, then probably Fact 2). The same evidence may be both direct and circumstantial depending on its use.

Example: Eyewitness testimony that the defendant shot the victim is direct evidence of the defendant's assault, while testimony establishing that the defendant had a motive to shoot the victim, or that the defendant was seen leaving the victim's apartment with a smoking gun is circumstantial evidence of the defendant's assault.

Form of Objection: **"Objection, your honor. This testimony is not relevant to the facts of this case. I move that it be stricken from the record." or**

"Objection, your honor. Counsel's question calls for irrelevant testimony."

3. Laying a Proper Foundation

To establish the relevance of circumstantial evidence, you may need to **lay a foundation**. Laying a proper foundation means that, before a witness can testify to certain facts, it must be shown that the witness was in a position to know about those facts.

Example: If attorney asks a witness if he saw X leave the scene of a murder, opposing counsel may object for a lack of foundation. The questioning attorney should ask the witness first if he was at or near the scene at the approximate time the murder occurred. This lays the foundation that the witness is legally competent to testify to the underlying fact.

Sometimes when laying a foundation, the opposing attorney may object to your offer of proof on the ground of relevance, and the judge may ask you to explain how the offered proof relates to the case.

Form of Objection: **"Objection, your honor. There is a lack of foundation."**

4. Personal Knowledge

A witness may not testify about any matter of which the witness has no personal knowledge. Only if the witness has directly observed an event may the witness testify about it. Witnesses will sometimes make inferences from what they actually did observe. An attorney may properly object to this type of testimony because the witness has no personal knowledge of the inferred fact.

Example: From around a corner, the witness heard a commotion. Upon investigating, the witness found the victim at the foot of the stairs, and saw the defendant on the landing, smirking. The witness cannot testify over the defense attorney's objection that the defendant had pushed the victim down the stairs, even though this inference seems obvious.

Form of Objection: **"Objection, your honor. The witness has no personal knowledge to answer that question."** or

"Your honor, I move that the witness's testimony about.....be stricken from the case because the witness has been shown not to have personal knowledge of the matter." (This motion would follow cross-examination of the witness which revealed the lack of a basis for a previous statement.)

5. Character Evidence

Witnesses generally cannot testify about a person's character unless character is an issue. Such evidence tends to add nothing to the crucial issues of the case. (The honesty of a witness, however, is one aspect of character always at issue.) In criminal trials, the defense may introduce evidence of the defendant's good character and, if relevant, show the bad character of a person important to the prosecution's case. Once the defense introduces evidence of character, the prosecution can try to prove the opposite. These exceptions are allowed in criminal trials as an extra protection against erroneous guilty verdicts.

- Examples:
1. The defendant's minister testifies that the defendant attends church every week and has a reputation in the community as a law-abiding person. This would be admissible.
 2. The prosecutor calls the owner of the defendant's apartment to testify. She testifies that the defendant often stumbled in drunk at all hours of the night and threw wild parties. This would probably not be admissible unless the defendant had already introduced evidence of good character. Even then, the evidence and the prejudicial nature of the testimony would probably outweigh its probative value making it inadmissible.

Form of Objection: **"Objection, your honor. Character is not an issue here,"** or

"Objection, your honor. The question calls for inadmissible character evidence."

6. Opinion of Lay Witness (non-expert)

Opinion includes inferences and other subjective statements of a witness. In general, lay witness opinion testimony is inadmissible. It is admissible where it is (a) rationally based upon the perception of the witness AND (b) helpful to a clear understanding of her testimony. Opinions based on a common experience are admissible. Some common examples of admissible lay witness opinions are speed of a moving object, source of an odor, appearance of a person, state of emotion, or identity of a voice or handwriting.

Example: A witness could testify that, "I saw the defendant who was elderly, looked tired, and smelled of alcohol." All of this statement is proper lay witness opinion testimony as long as there is personal knowledge and a proper foundation.

Form of Objection: **"Objection, your honor. The question calls for inadmissible opinion testimony on the part of the witness. I move that the testimony be stricken from the record."**

7. Expert Witness and Opinion Testimony

An expert witness may give an opinion based on professional experience. A person may be qualified as an expert if s/he has special knowledge, skill, experience, training, or education. Experts must be qualified before testifying to a professional opinion. A qualified expert may give an opinion based upon personal observations as well as facts made known to him/her outside the courtroom. The facts need not be admissible evidence if it is the type reasonably relied upon by experts in the field. Experts may give opinions on ultimate issues in controversy at trial. In a criminal case an expert may **not** state an opinion as to whether the defendant did or did not have the mental state in issue.

Example: A doctor bases her opinion upon (i) examination of the patient, and (ii) medically relevant statements of patient's relatives. Personal examination is admissible because it is relevant and based on personal knowledge. The statements of the relatives are inadmissible hearsay but are proper basis for opinion testimony because they are reasonably relevant to a doctor's diagnosis.

Form of Objection: **"Objection, your honor. There is a lack of foundation for opinion testimony,"**
or

"Objection, your honor. The witness is improperly testifying to defendant's mental state in issue."

8. Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is considered untrustworthy because the speaker of the out-of-court statement is not under oath and cannot be cross-examined. Because they are very unreliable, these statements ordinarily are not admissible. **For reasons of necessity, a set of exceptions allows certain types of hearsay to be introduced. Work with your attorney coach on the exceptions which may arise in this case.**

- Examples:
1. Joe is being tried for murdering Henry. The witness testifies, "Ellen told me that Joe killed Henry." If offered to prove that Joe killed Henry, this statement is hearsay and probably would not be admitted over an objection.
 2. However, if the witness testifies, "I heard Henry yell to Joe to get out of the way," this could be admissible. This is an out-of-court statement, but is not offered to prove the truth of its contents. Instead, it is being introduced to show that Henry had warned Joe by shouting. Hearsay is a very tricky subject.

Form of Objection: **"Objection, your honor. Counsel's question calls for hearsay,"** or

"Objection, your honor. This testimony is hearsay. I move that it be stricken from the record."

Courts have recognized certain general categories of hearsay which may be admissible. The following exceptions (and others not listed) have been made because of the practical necessity of including the information and circumstances that offer greater reliability to certain types of out of court statements:

- a. Admission by a party opponent--a statement made by a party to the legal action (or someone identified with him/her in legal interest) of the existence of a fact which is relevant to the cause of his/her adversary. (An admission is not limited to words, but may also include the demeanor, conduct and acts of a person charged with a crime.)
- b. Excited utterance--a statement made shortly after a startling event, while the declarant is still excited or under the stress of excitement.
- c. State of mind--a statement that shows the declarant's mental, emotional, or physical condition.
- d. Declaration against interest--statement that puts declarant at risk of civil or criminal liability.
- e. Records made in the regular course of business
- f. Official record and writings by public employees
- g. Past recollection recorded--something written by a witness when events were fresh in that witness's memory, used by witness with insufficient recollection of the event and read to the trier of fact. (The written material is not admitted as evidence.)
- h. Prior statements of a witness.
- i. Statements for the purpose of medical diagnosis or treatment.
- j. Reputation of a person's character in the community.

Testimony not offered to prove the truth of the matter asserted is, by definition, not hearsay. For example, testimony to show that a statement was said and heard, to show that a declarant could speak in a certain language, or to show the statement's effect on a listener is admissible.

Allowable Objections for Inappropriately Phrased Questions

9. Leading Questions

Witnesses may not be asked leading questions by the attorney who calls them. A leading question is one that suggests the answer desired. Leading questions are permitted on cross-examination.

Example: Counsel for the plaintiff asks the witness, "During the conversation, didn't the defendant declare that he would not deliver the merchandise?"

Counsel could rephrase her/his question, "Will you state what, if anything, the defendant said during this conversation, relating to the delivery of the merchandise?"

Form of Objection: **"Objection, your honor. Counsel is leading the witness."**

10. Argumentative Questions

An argumentative question challenges the witness about an inference from the facts in the case. A cross-examiner may legitimately attempt to force the witness to concede the historical fact of the prior inconsistent statement.

Questions such as "How can you expect the judge to believe that?" are argumentative and objectionable. The attorney may argue the inferences during summation or closing argument, but the attorney must ordinarily restrict his or her questions to those calculated to elicit facts.

Form of Objection: **"Objection, your honor. Counsel is being argumentative." or**

"Objection, your honor. Counsel is badgering the witness."

11. Asked and Answered

Asked and answered is just as it states, that a question which had previously been asked and answered is asked again. This can seriously inhibit the effectiveness of a trial.

Examples: 1. **On Direct Examination** - Counsel A asks B, "Did X stop for the stop sign?" B answers, "No, he did not." A then asks, "Let me get your testimony straight. Did X stop for the stop sign?"

Counsel for X correctly objects and should be sustained.

BUT: 2. **On Cross-Examination** - Counsel for X asks B, "Didn't you tell a police officer after the accident that you weren't sure whether X failed to stop for the stop sign?" B answers, "I don't remember." Counsel for X then asks, "Do you deny telling him that?"

Counsel A makes an **asked and answered objection**. The objection should be **overruled. Why?** It is sound policy to permit cross-examining attorneys to ask the same question more than once in order to conduct a searching probe of the direct examination testimony.

Form of Objection: **"Objection, your honor. This question has been asked and answered."**

12. Compound Question

A compound question joins two alternatives with "or" or "and" preventing the interrogation of a witness from being as rapid, distinct, or effective for finding the truth as is reasonably possible.

Example: "Did you determine the point of impact from conversations with witnesses and from physical marks, such as debris in the road?"

Form of Objection: **"Objection, your honor, on the ground that this is a compound question."**

The best response if the objection is sustained on these grounds would be, "Your honor, I will rephrase the question," and then break down the question accordingly. Remember, there may be another way to make your point.

13. Narrative

A narrative question is one that is too general and calls for the witness in essence to "tell a story" or make a broad-based and unspecific response. The objection is based on the belief that the question seriously inhibits the successful operation of a trial and the ultimate search for the truth.

Example: The attorney asks A, "Please tell us all of the conversations you had with X before X started the job."

The question is objectionable and the objections should be sustained.

Form of Objection: **"Objection, your honor. Counsel's question calls for a narrative."**

14. Non-Responsive Witness

Sometimes a witness's reply is too vague and doesn't give the details the attorney is asking for, or he/she "forgets" the event in question. This is often purposely used by the witness as a tactic in preventing some particular evidence to be brought forth.

Form of Objection: **"Objection, your honor. The witness is being non-responsive."**

15. Outside the Scope of Cross-Examination

Re-direct examination is limited to issues raised by the opposing attorney on cross-examination. If an attorney asks questions beyond the issues raised on cross, they may be objected to.

Form of objection: **"Objection, your honor. Counsel is asking the witness about matters that did not come up in cross-examination."**

SUMMARY OF ALLOWABLE EVIDENTIARY OBJECTIONS

1. **Facts in Record:** "Objection, your honor. The answer is creating a material fact which is not in the record," or "Objection, your honor. The question seeks testimony which goes beyond the scope of the record."
2. **Relevance:** "Objection, your honor. This testimony is not relevant to the facts of this case. I move that it be stricken from the record," or "Objection, your honor. Counsel's question calls for irrelevant testimony."
3. **Foundation:** "Objection, your honor. There is a lack of foundation."
4. **Personal Knowledge:** "Objection, your honor. The witness has no personal knowledge to answer that question," or "Your honor, I move that the witness's testimony about ___ be stricken from the case because the witness has been shown not to have personal knowledge of the matter."
5. **Character:** "Objection, your honor. Character is not an issue here," or "Objection, your honor. The question calls for inadmissible character evidence."
6. **Opinion:** "Objection, your honor. The question calls for inadmissible opinion testimony (or inadmissible speculation) on the part of the witness. I move that the testimony be stricken from the record."
7. **Expert Opinion:** "Objection, your honor. There is lack of foundation for opinion testimony," or "Objection, your honor. The witness is improperly testifying to defendant's mental state in issue."
8. **Hearsay:** "Objection, your honor. Counsel's question calls for hearsay," or "Objection, your honor. This testimony is hearsay. I move that it be stricken from the record."
9. **Leading Question:** "Objection, your honor. Counsel is leading the witness."
10. **Argumentative Question:** "Objection, your honor. Counsel is being argumentative," or "Objection, your honor. Counsel is badgering the witness."
11. **Asked and Answered:** "Objection, your honor. This question has been asked and answered."
12. **Compound Question:** "Objection, your honor, on the ground that this is a compound question."
13. **Narrative:** "Objection, your honor. Counsel's question calls for a narrative."
14. **Non-Responsive:** "Objection, your honor. The witness is being non-responsive."
15. **Outside Scope of Cross:** "Objection, your honor. Counsel is asking the witness about matters that did not come up in cross examination."

OFFICIAL JUDGE AND SCORER INFORMATION PACKET

**People
v.
Kelmar**

Issues of youth violence, homicide, and privacy

Featuring a pretrial argument on an issue of
privilege and privacy rights
in the California Constitution and
the United States Constitution

RULES OF COMPETITION

NOTE: At the first meeting of the Mock Trial team, the Code of Ethics appearing on page 3 should be read and discussed by students and their teacher.

I. ELIGIBILITY

To participate in the state finals in Sacramento (March 31-April 2, 1995) each county must implement the following procedures:

1. A county Mock Trial coordinator must be identified (usually through the county office of education).
2. Working in conjunction with CRF, the coordinator must plan and carry out a formal competition involving teams from at least two separate senior high schools in the county. These schools must be identified to CRF no later than **Friday, December 16, 1994**.
3. All local county competitions must be completed by **March 4, 1995**.
4. A teacher/sponsor and attorney coach volunteer must be identified for each team by the coordinator.
5. All team members must be eligible under school district and any state rules applicable to involvement in extracurricular activities. All team members must be registered in the school on whose team they are competing and be a member of the team, at the time of both their county and the state competition.

The Mock Trial Team

6. A Mock Trial team must consist of a minimum of 9 students and may include up to a maximum of 20 students all from the same school. At the local level, more students may be involved as jurors, but juries will not be used at the state finals. We encourage you to use the maximum number of students allowable, especially at schools with large student populations.
7. Team Structure - Involvement of all possible team members in the presentation of the case is reflected in the team performance/participation score. The team consists of the following members:
 - 2 Pretrial Motion Attorneys - one for the motion, and one against the motion. You are required to use students that are different from those serving as trial attorneys during the same round.
 - 3 Trial Attorneys for Prosecution (maximum)
 - 3 Trial Attorneys for Defense (maximum)
 - 4 Witnesses for Prosecution (all four must be called in one trial)**
 - 4 Witnesses for Defense (all four must be called in one trial)**

1 Clerk

1 Bailiff

Teams may have alternates listed on the roster, with a maximum of 20 students total participating as performers and alternates.

It is highly recommended that different trial attorneys do the opening argument and the closing argument, and that each trial attorney do at least one direct examination and one cross examination.

We encourage that you use the maximum number of student attorneys and that all attorneys question witnesses. We also encourage you to involve as many students as possible in other support roles such as researchers, understudies, and photographers.

II. CONDUCT OF THE PRETRIAL MOTION

Note: The pretrial motion (oral arguments only) is a mandatory part of the Mock Trial competition at the state level.

1. Only the fact situation (pages 8-11) and the materials on pages 12-19, 25-26 and 33-34 can be used for the purposes of the pretrial motion.
2. Each student arguing a pretrial motion has four minutes to present his/her statement and two minutes for rebuttal. During these proceedings, students must be prepared to answer questions from the judge clarifying their position.
3. Each attorney is expected to display proper courtroom decorum and courtesy.
4. In order to present a side/position in the most persuasive manner, students should carefully review and become familiar with materials provided in this packet. Additional background research may supplement their understanding of the constitutional issues at hand, but such supplemental materials may not be cited in arguments.
5. No written pretrial motion memoranda may be submitted to judges at local or state level.

III. CONDUCT OF THE TRIAL

1. All participants are expected to display proper courtroom decorum and courtesy.
2. Teachers and attorney coaches must identify themselves to the judge prior to the trial presentation. Teachers are required to submit team rosters (page 74) to presiding judges and scoring attorneys at all rounds of the state finals in Sacramento. No other materials can be furnished to the presiding judges or scoring attorneys by student team members, teachers, or attorney coaches.
3. The gender neutral names allow students of either gender to play the role of any witness.
4. All team members participating in a trial must be in the courtroom at the appointed time, ready to begin the round. Incomplete teams will have to begin without their other members or with alternates.
5. After the judge has delivered his or her introductory remarks, witnesses participating in the trial (other than the defendant) are to leave the courtroom until called to testify. After testifying, witnesses must remain in the courtroom for the remainder of the proceedings.

6. Teacher sponsors and attorney coaches are to remain in the seating area throughout the trial. There must be no spectator contact with student team members once the trial has begun. The sponsors and coaches, other team members and spectators may not talk, signal, and/or otherwise communicate with the students. There will be an automatic deduction of five points from a team's total score if the teacher or attorney coach, other team members, or spectators are found in violation of this rule either by the judge or by the Mock Trial staff.
7. Recesses will not be allowed in local or state competitions for any reason.
8. The fact situation starting on page 8 and the witness statements are the official case materials and comprise the sole source of information for testimony. The fact situation is a set of indisputable facts from which the attorneys may draw reasonable inferences. Witnesses may testify to any matter, **about which they would have knowledge**, directly stated or reasonably implied in the official case materials.
9. The witness statements contained in the packet should be viewed as signed statements made to the police by the witnesses. A witness can be impeached if he/she contradicts the material contained in his/her witness statement using the procedures as outlined on page 45.
10. All witnesses must be called. Cross-examination is required for all witnesses. If the direct examination team runs out of time without calling one or more witnesses, the cross-examination team will be automatically awarded five points for each witness not called, and the direct examination team will automatically receive a score of zero for the witness performance and direct examination for each witness not called. No other witnesses may be called. If the cross-examination team runs out of time, the team will receive a cross-examination score of zero for each witness not cross-examined.
11. Prosecuting attorneys must provide the physical evidence **listed under the heading "Evidence"** in the case materials. No other physical evidence, if any, will be allowed. Whether a team introduces, uses, and moves the physical evidence into evidence is entirely optional, but all physical evidence must be available at trial for either side to use. (See "Evidence" page 10.) If the prosecution team fails to bring physical evidence to court, it may be reflected in the team performance/participation score.
12. Attorneys may conduct re-direct examination when appropriate. (See "Procedures," pages 43-46.) Total time for direct/re-direct is 14 minutes.
13. Only the direct and cross-examination attorneys for a particular witness may make objections during that testimony.
14. Attorneys may use notes while presenting their cases. Witnesses are not allowed to use notes when testifying.
15. The Mock Trial Competition proceedings are governed by the "Mock Trial Simplified Rules of Evidence" on pages 48-54. Only specified types of objections will be recognized in the competition (see page 55). Other more complex rules may not be used at the trial.
16. There are no objections allowed during opening or closing arguments. (It will be the judge's responsibility to handle any legally inappropriate statements made in the closing, while scorers will also keep in mind the closing argument criteria.) **One minute of this time may be reserved for rebuttal to opponent's closing argument. Only issues that were addressed in an opponent's closing argument may be raised during rebuttal.**
17. The judge is the ultimate authority throughout the trial. If there is a rule infraction, it is solely the student attorneys' responsibility to bring the matter to the judge's attention, before a verdict is

rendered vocally in front of all present. There will be no bench conferences allowed. The judge will determine if a rule was, in fact, violated and her/his word is final. (The bailiff will be provided with a copy of the rules of competition for easy reference.) Unless a specific point deduction for a particular infraction is provided in these rules, it will be the individual decision of each scorer as to the amount of a deduction for a rule infraction.

18. No video/audiotaping of a trial competition outside of your own county is permitted. Please check with your local Mock Trial coordinator regarding guidelines for video/audiotaping your competition.
19. The official diagram establishes only relative positions. Because the scale is approximate, the diagram cannot be used to definitively establish distances. The issue of distances should be based on the witnesses' testimony and is a matter of fact for the triers of fact.

IV. TIMING

1. Each team will have 40 minutes to present its case, including the pretrial motion. If no pretrial motion is presented, total time is 34 minutes. Time limits for each section are as follows:

Pretrial Motion 6 minutes
Opening Statement & Closing Argument 10 minutes
Direct & Re-direct Examination 14 minutes
Cross-Examination 10 minutes

The clock will be stopped for witnesses coming into the courtroom, attorneys making objections, and when judges are questioning attorneys and witnesses or offering their observations. The clock will not be stopped if witnesses are asked to approach the diagram or for other physical demonstrations.

Teams may divide the 10 minutes for opening statement and closing arguments, the 14 minutes for direct and re-direct examination, and the 10 minutes for cross-examination as desired (e.g. 3 minutes opening, 7 minutes closing). The time may be utilized however they choose, but the maximum allowable totals for each category must be observed. **One minute of this time may be reserved for rebuttal to opponent's closing argument.**

2. Two- and one-minute verbal warnings must be given before the end of each category. Students will be automatically stopped by the clerk at the end of the allotted time for each section. Thus, there will be no allowance for overtime.
3. **One defense attorney at the counsel table or the bailiff may serve as an unofficial timer. This unofficial timer must be identified before the trial begins and may check time with the clerk twice during the trial, once during the prosecution's case-in-chief and once during the presentation of the defense's case. Any objections to the clerk's official time must be made by this unofficial timer during the trial, before the verdict is rendered. The judge shall determine if there has been a rule violation and whether to accept the clerk's time or make a time adjustment. Individuals not participating in trial presentation may not serve as unofficial timers.**

SUMMARY OF ORDER OF EVENTS IN THE PRETRIAL MOTION AND MOCK TRIAL

1. Court is called to order.
2. Defense (moving party) presents pretrial motion arguments.
3. Prosecution (opposing party) presents pretrial motion arguments.
4. Rebuttal arguments (both).
5. Judge rules on motion and thus determines which charges will be in contention during the trial.
6. Attorneys present physical evidence for inspection.
7. Judge states charges against defendant.
8. Prosecution delivers its opening statement.
9. Defense may choose to deliver its opening statement at this point or may wait to open after the prosecution has delivered its case.
10. Prosecution calls its witnesses and conducts direct examination.
11. After each prosecution witness is called to the stand and has been examined by the prosecution, the defense may cross-examine the witness.
12. After each cross-examination, prosecution may conduct re-direct examination of its own witnesses if necessary.
13. Defense may deliver its opening statement (if it did not do so earlier).
14. Defense calls its witnesses and conducts direct examination.
15. After each defense witness is called to the stand and has been examined by the defense, the prosecution may cross-examine the witness.
16. After each cross-examination, defense may conduct re-direct examination of its own witnesses if necessary.
17. Prosecution gives its closing argument.
18. Defense gives its closing argument.
19. **Rebuttal arguments (both--optional)**
20. Judge deliberates and reaches verdict.
21. Verdict is announced in court. (No scores/winners are announced at this time.)

SPECIAL INSTRUCTIONS FOR JUDGES AND ATTORNEYS

1. A student from each school will present a team roster before the trial to the judge and scoring attorney(s). This form will have names and designated trial roles. Please keep in mind rule 13:

Only the direct and cross-examination attorneys for a particular witness may make objections during that testimony.

Please ask team members (including teacher sponsors and attorney coaches) to introduce themselves before the trial.

2. Please score every box.
3. No fractions are allowed.
4. When filling out score sheets, **please make your decisions independently**. There should be no need for conferring.
5. The presiding judge is to fill out the bottom portion of the score sheet, indicating which team he/she feels should be the overall winner in the event of a tie.
6. It is very important to read the fact situation and witness statements carefully. Because this a **mock** trial, students will refer to specific points/facts and make references to certain pages in the text, and you need to be familiar with the pertinent details.
7. The fact situation starting on page 8 and the witness statements are the official case materials and comprise the sole source of information for testimony. The fact situation is a set of indisputable facts from which the attorneys may draw reasonable inferences. Witnesses may testify to any matter, **about which they would have knowledge, directly stated or reasonably implied** in the official case materials. Please keep in mind that witnesses can be impeached.
8. **VERY IMPORTANT!** The witness statements contained in the packet should be viewed as signed statements made to the police by the witnesses. **Witnesses can be impeached if they contradict the material contained in their witness statements.** This rule is designed to limit, **not** eliminate, the need for reasonable inference by providing a familiar courtroom procedure.
9. Costuming is **not** a factor in the Mock Trial competition. Therefore, costuming is not to be taken into account when scoring presentations.

Order of Pretrial Motion Events

1. The hearing is called to order.
2. The judge asks the defense to summarize the arguments made in the motion. The defense has four minutes. The judge may interrupt to ask clarifying questions. The time spent answering the judge's questions is not part of the four-minute time limit.
3. The judge asks the prosecution to summarize arguments made in its opposition motion. The same conditions as in #2, above, apply to the prosecution.
4. The judge offers the defense two minutes of rebuttal time. The rebuttal time is used to counter the opponent's arguments. It is not to be used to raise new issues. The same attorney presents both the arguments and the rebuttal.
5. The judge offers the prosecution two minutes of rebuttal time. The same conditions as in #4, above, apply to the prosecution.
6. At the end of the oral arguments, the judge will rule on the motion.
7. Beyond having a direct effect on the allowable evidence and outcome of the trial, scores for the pretrial motion presentations will be added to the Mock Trial scores in determining the winner of the trial.

PRETRIAL MOTION INSTRUCTIONS FOR JUDGES TO READ TO PARTICIPANTS

"Both sides have four minutes to present their arguments. Defense will go first. I may interrupt to ask clarifying questions. Time spent answering my questions is not part of the four minute time limit.

"At the conclusion of your arguments, each side will be offered two minutes of rebuttal time. Please remember that the rebuttal time is to be used to counter your opponent's arguments. It cannot be used to raise new issues.

"Under the rules of this competition, the same attorney presents both the arguments and the rebuttal for his or her side.

"At the end of your presentations, I will rule on the motion.

"Please remember that under the rules the pretrial attorneys may not participate in the general trial presentation as trial attorneys.

"Scores for this pretrial motion presentation will be added to the Mock Trial scores in determining the winner of the trial.

"Is counsel for the defense ready to begin?"

JUDGE'S ROLE

Pretrial Motion and Constitutional Issue

The pretrial motion section of this packet contains materials and procedures for the preparation of a pretrial motion on an important constitutional issue. It is designed to help students learn about the legal process and legal reasoning. Students will learn how to draw analogies, distinguish a variety of fact situations, and analyze and debate constitutional issues. Although mandatory in the state finals, the pretrial motion is **optional on the local level**. The county coordinator will inform you whether this will be part of the local competition. If it is, then the judge will read the "Pretrial Motion Instructions" on page 64 to the participants and the pretrial motion will be presented prior to the Mock Trial.

The judge's ruling on the pretrial motion will have a direct bearing on the evidence allowed in and the possible outcome of the trial. If the judge finds that Part II of Dr. Nichols' witness statement is relevant and falls within the scope of the patient-litigant exception, then Part II of Dr. Nichols' witness statement will be admissible at trial, subject to the Simplified Rules of Evidence. If the judge finds that Part III of Dr. Nichols' witness statement is relevant and within the scope of the dangerous patient exception, then Part III of Dr. Nichols' witness statement will be admissible at trial, subject to the Simplified Rules of Evidence. Parts I and IV of Dr. Nichols' witness statement may be offered regardless of the pretrial ruling, subject to the Simplified Rules of Evidence.

Also note that when the pretrial motion is included, the score is added to the Mock Trial score when determining the winner.

Trial Proceedings: *People v. Kelmar*

To the fullest extent possible, please conduct the case as you would under normal circumstances, familiarizing yourself with the case materials of *People v. Kelmar* before the trial. Although students will make errors, they must attempt to extricate themselves just as an actual attorney or witness would.

Please read the "Trial Instructions For Mock Trial Participants" on pages 66-67 of this packet to the students at the opening of the trial. Offering a few words of encouragement or insight into the trial process will help to put the students at ease, and by **emphasizing the educational, rather than the competitive aspects** of the Mock Trial, you will help to bring the experience into proper perspective.

**TRIAL INSTRUCTIONS FOR JUDGES TO READ TO MOCK TRIAL PARTICIPANTS
PRIOR TO THE BEGINNING OF THE TRIAL**

"To help the attorneys and me check the team rosters, would each of you please state your name and what role you are taking? Attorneys, please identify the witnesses you will call to testify today. And would the teacher-sponsor and attorney coach for each team please identify yourself to the court?"

"Presenting trial attorneys and the defendant should be seated at the prosecution and defense tables. Witnesses testifying today must go out into the hallway until called to testify. After testifying, they must remain quietly in the courtroom.

"I must remind you that witnesses are permitted to testify only to the information in the fact situation, their own witness statements, and what can reasonably be inferred from that information. Also, please keep in mind that witnesses can be impeached for testimony contradictory to their witness statements.

"You must complete your presentations within the specified time limits. The clerk will signal you as your time for each type of presentation begins to run out. At the end of each section, you will be stopped when your time has run out whether you are finished or not.

"Attorneys must call four of their five witnesses. Please remember that objections are limited to the 'Summary of Allowable Objections for the 1994-95 Mock Trial.'

"The following items may be offered as evidence at trial:

EVIDENCE: Map of the scene
Coroner's diagrams
[Prosecution is responsible for bringing the evidence to trial. Only faithful reproductions, no larger than 22x28 inches, are acceptable.]

Note: No guns, knives, or facsimiles are allowed in the courthouse at any time.

STIPULATIONS: Prosecution and defense stipulate to the following:

1. Devon Kelmar, the defendant, and Cory Jackson, the victim, are the same gender.
2. Both parties will be present and argue the pretrial motion. It will not be in camera since Dr. Carmen Nichols told Officer Lee Kim all potentially relevant information to this proceeding. (In camera means in the judges chambers or a non-public hearing.)
3. Devon Kelmar was properly Mirandized and no Fifth Amendment argument will be heard at pretrial regarding any statements made by the defendant at the time of the arrest.
4. Devon Kelmar's backpack was properly searched in accordance with the warrant exception of a search incident to an arrest. No Fourth Amendment argument will be heard at pretrial regarding this search.
5. Officer Lee Kim is a fingerprint expert and is qualified to give opinion testimony.
6. Dr. Carmen Nichols and Dr. Denali Moorad are psychotherapists within the meaning of Cal. Evid. Code § 1010 and are medical expert witnesses who are qualified to provide opinion testimony.
7. Devon Kelmar was a patient of Dr. Carmen Nichols within the meaning of Cal. Evid. Code § 1011.
8. Dr. Merrill Roth, the coroner, is a medical expert witness qualified to provide opinion testimony.

9. Any issues over the liability of Dr. Carmen Nichols for violation of the psychotherapist-patient privilege were adjudicated in and settled upon in separate proceedings.

10. The defense will make no argument at pretrial as to admissibility of two portions of Dr. Nichols' testimony. Part I regarding background information and Part IV about lay witness, non-privileged observations can be offered as testimony regardless of the pretrial ruling, subject to the Simplified Rules of Evidence.

"At the end of the trial I will render a verdict of guilty or not guilty in relation to the charges brought. The teams will be rated based on the quality of their performances, independent of my decision on the verdict.

"Before court is called to order, I would like to make reference to the Code of Ethics of the competition. I am assured you have all read and discussed its significance with your teachers.

"Barring unforeseen circumstances, no recesses will be called. If for any reason a recess is necessary, team members should remain in their appropriate places and should have no contact with spectators.

"If there are no questions I will ask the witnesses to please step into the hallway, and the trial will begin."

SCORING MATERIALS FOR JUDGES AND ATTORNEYS

GUIDELINES FOR 1-5 SCORING METHOD

The following are general guidelines to be applied to each category on the scoresheet. They refer to both attorneys and witnesses. These guidelines provide a reasonable framework on which to base your judgment. It is strongly recommended that scorers use "3" as an indication of an average performance, and adjust higher or lower for stronger or weaker performances.

- | | |
|----------------------------|---|
| 1 FAR BELOW AVERAGE | Unacceptable performance
-Disorganized
-Shows lack of preparation and poor understanding of task and rationale behind legal procedure. |
| 2 BELOW AVERAGE | Fair, weak performance
-Inadequate preparation and understanding of task
-Stilted presentation |
| 3 AVERAGE | Meets required standards
-Fundamental understanding of task and adequate preparation
-Acceptable but uninspired performance |
| 4 ABOVE AVERAGE | Good, solid performance
-Demonstrated a more fully developed understanding of task and rationale behind legal procedure. |
| 5 EXCELLENT | Exceptional performance
-Demonstrated superior ability to think on her/his feet
-Resourceful, original & innovative approaches
-Portrayal was both extraordinary and unique |

EVALUATION CRITERIA

Students are to be rated on the five-point scale for each category according to the following criteria appropriate to each presentation. **Points should be deducted if criteria are not met or are violated.** Each team may be awarded a maximum of 110 points by each scorer and/or judge if the pretrial motion is presented, and 90 points if it is not.

1. Pretrial Motion

- o Clear and concise presentation of issues with appropriate use of authorities.
- o Well-developed, well-reasoned and organized arguments.
- o Responded well to judge's questions and maintained continuity in argument.
- o Effective rebuttal countered opponent's argument.

2. Opening Statement

- o Provided a clear and concise description of the anticipated presentation.

3. Direct/Re-Direct Examination

- o Questions required straightforward answers and brought out key information for her/his side of the case.

- o Attorney effectively responded to objections made.
- o Properly introduced exhibits and, where appropriate, properly introduced evidence as a matter of record.
- o Attorney properly phrased and rephrased questions and demonstrated a clear understanding of trial procedures.
- o Attorney made **effective** objections to cross-examination questions of his/her witness when appropriate.
- o Throughout questioning, attorney made appropriate use of her/his time.
- o Attorney used **only** those objections listed in the summary of evidentiary objections.

4. Cross-Examination

- o Attorney made **effective** objections to direct examination (of the witness he/she cross-examined) when appropriate.
- o Attorney properly phrased and rephrased questions and demonstrated a clear understanding of trial procedures.
- o Attorney exposed contradictions in testimony and weakened the other side's case.

5. Witnesses

- o Witness was believable in her/his characterizations and convincing in testimony.
- o Witness was well prepared for answering and responded well to the questions posed to him/her under direct examination.
- o Witness responded well to questions posed under cross-examination without unnecessarily disrupting or delaying court proceedings.
- o Witness testified to key facts in a consistent manner and avoided irrelevant comments.

6. Closing Argument

- o Attorney's performance contained elements of spontaneity and was not based entirely on a prepared text.
- o Attorney incorporated examples from the actual trial, while also being careful not to introduce statements and evidence that were not brought out in her/his particular trial.
- o Attorney made an organized and well-reasoned presentation summarizing the most important points for his/her team's side of the case.
- o If and when questioned by the judge, attorney gave well-reasoned, coherent answers.
- o Effective rebuttal countered opponent's arguments.

7. Team

- o Team members were courteous, observed general courtroom decorum, and spoke clearly and distinctly.
- o **All** team members were involved in the presentation of the case and actively participated in fulfilling their respective roles, including the clerk or bailiff.
- o As much as possible, each trial attorney displayed examination and argumentation skills, and when appropriate, displayed knowledge of Simplified Rules of Evidence in making objections.
- o Witnesses performed in synchronization with attorneys in presenting their side of the case.
- o The clerk or bailiff performed his/her role so that there were no disruptions or delays in the presentation of the trial.
- o Team members demonstrated cooperation and teamwork.

The behavior of teachers and attorney coaches may also impact team performance score.

MOCK TRIAL SCORING CALCULATIONS

Based on last year's success, we will continue to use the following system to address the issue of artificially high and low scores skewing results of trials. We are encouraging all counties to adopt this method for consistency and familiarity when teams arrive in Sacramento.

This system will not affect power matching, if done in your county.

Instead of adding the points from each judge into a grand total for each round of the competition, calculate the percentage difference between the two teams from the total number of points given in that trial. For example, from the chart below, Team A received 241 points and Team B received 247, creating a total of 488 points given in the trial. To calculate the percentages for both teams, you do the following:

Trial 1

Team A: $\frac{241}{488}$ (team points)
divided by 488 (total for both teams) = .4939

Team B: $\frac{247}{488}$ (team points)
divided by 488 (total for both teams) = .5061

Use the same process for Trial 2 and subsequent trials. If you are **not** doing power matching, these percentage scores are an alternative to cumulative raw scores. Please note that if percentage scores are released, teams will know whether they won or lost, since scores higher than .5000 always indicate a win.

TRIAL 1			TRIAL 2		
Teams	Raw Scores	Total % of Points Given	Teams	Raw Scores	Total % of Points Given
TEAM A			TEAM C		
Judge 1	90		Judge 4	90	
Judge 2	90		Judge 5	90	
Judge 3	61		Judge 6	87	
TOTAL	241	0.4939	TOTAL	267	0.4917
TEAM B			TEAM D		
Judge 1	92		Judge 4	92	
Judge 2	89		Judge 5	89	
Judge 3	66		Judge 6	95	
TOTAL	247	0.5061	TOTAL	276	0.5083
Sum	488		Sum	543	

NOTE: The percentage team scores for A & B and for C & D are within one percent, which reflects the relative closeness of the judging. **Team B, having won, will not be penalized unreasonably for having a much lower score than Team D.** Teams B & D will then be ranked by their percentage scores in the 1-0 bracket. This additional step de-emphasizes disproportionately high or low scores without disrupting the scoring relationship between any two schools in a single round (in other words, who won or lost).

Following Round 2 - Each team's percentage scores for each successive round should be added and then ranked in the appropriate win-loss bracket. Power matching can proceed as usual. For example:

Team A: .4939 (Round 1)(lost)

$\frac{.5143}{1.0082}$ (Round 2)(won)

2-0	1-1	0-2
-----	-----	-----

Team A would be ranked somewhere in the (1-1) bracket.

If this method is used after each round, the additional calculation **does not** have to be a part of cumulative point totals given out to teams.

**Constitutional Rights Foundation's California Mock Trial Competition
Judge/Attorney Score Sheet**

Motion: Granted / Denied _____
 Verdict: Count #1:G / NG #2:G / NG #3:G / NG _____
 President's Tie Breaker _____

Scorer's Name _____ President's Name _____

Please refer to the guidelines and the evaluation criteria in your Mock Trial case packet to assist you in evaluating the performances. The judge's verdict should have no bearing on your scoring decisions. **Do not announce any winners or scores at the end of this trial. Do not confer with anyone regarding scores. FILL IN ALL SCORE BOXES AND DO NOT USE FRACTIONS WHEN SCORING.** Please indicate the verdict by circling the appropriate letters above.

0=Penalty 1=Far Below Average 2=Average 3=Average 4=Above Average 5=Excellent

PROSECUTION _____ DEFENSE _____

		PROSECUTION	DEFENSE	STUDENT'S NAME
PRETRIAL MOTION (Defense presents)		<input type="checkbox"/> x3= _____	<input type="checkbox"/> x3= _____	_____
OPENING STATEMENTS		<input type="checkbox"/> x2= _____	<input type="checkbox"/> x2= _____	_____
PROSECUTION'S FIRST WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
PROSECUTION'S SECOND WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
PROSECUTION'S THIRD WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
PROSECUTION'S FOURTH WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
DEFENSE'S FIRST WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
DEFENSE'S SECOND WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
DEFENSE'S THIRD WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
DEFENSE'S FOURTH WITNESS	Direct/Re Exam by Attorney Cross-Exam by Attorney Witness Performance	<input type="checkbox"/>	<input type="checkbox"/>	_____
CLERK (Prosecution) BAILIFF (Defense)		<input type="checkbox"/>	<input type="checkbox"/>	_____
CLOSING ARGUMENTS		<input type="checkbox"/> x3= _____	<input type="checkbox"/> x3= _____	_____
PARTICIPATION AND TEAM PERFORMANCE		<input type="checkbox"/> X2= _____	<input type="checkbox"/> X2= _____	_____
TOTAL		_____	_____	_____

AWARD NOMINATION SHEET

PROSECUTION NAME

DEFENSE NAME

Please list only the names of students whose presentations were noteworthy and would merit special recognition:

Outstanding Defense Pretrial Motion Attorney _____

Comments _____

Outstanding Prosecution Pretrial Motion Attorney _____

Comments _____

Outstanding Prosecution Attorney _____

Comments _____

Outstanding Prosecution Witness _____

Comments _____

Outstanding Defense Attorney _____

Comments _____

Outstanding Defense Witness _____

Comments _____

Scoring should be independent.

Workspace:

TEAM ROSTER SHEET

**TEACHERS ARE REQUIRED TO SUBMIT COMPLETED ROSTERS
TO JUDGES AND SCORERS BEFORE TRIAL BEGINS**

Prosecution	Defense
Pretrial Motion Attorney:	Pretrial Motion Attorney:
Trial Attorneys:	Trial Attorneys:
Witness #1 Role: Name of Student:	Witness #1 Role: Name of Student:
Witness #2 Role: Name of Student:	Witness #2 Role: Name of Student:
Witness #3 Role: Name of Student:	Witness #3 Role: Name of Student:
Witness #4 Role: Name of Student:	Witness #4 Role: Name of Student:
Clerk:	Bailiff:

PRETRIAL MOTION TIME SHEET

_____ V. _____
Defense - School Prosecution - School

Clerk _____

School _____

DEFENSE	PROSECUTION
Statement _____ (four minutes, excluding time judge asks questions and attorney answers them.)	Statement _____ (four minutes, excluding time judge asks questions and attorney answers them.)
Rebuttal _____ (two minutes, excluding time judge asks questions And attorney answers them.)	Rebuttal _____ (two minutes, excluding time judge asks questions and attorney answers them.)
TOTAL TIME	TOTAL TIME

NOTE: Give one-minute warnings before the end of **each** section.

Round off times to the nearest one-half minute.

Examples: 3 minutes, 10 seconds = 3 minutes
4 minutes, 15 seconds = 4 1/2 minutes
2 minutes, 45 seconds = 3 minutes

MOCK TRIAL TIME SHEET

Clerk _____ Judge _____ Date _____

_____ V. _____
 Prosecution - School Defense - School

INSTRUCTIONS:

Mark down on the time sheet the time to the nearest one-half minute. For direct, cross and re-direct examination, record only time spent by attorneys asking questions and witnesses answering them. Stop clock (do not time) when:

- witnesses come into the courtroom;
- attorneys make objections;
- judges are questioning attorneys or making observations from the bench.

PROSECUTION:

DEFENSE:

Opening Statement _____

Opening Statement _____

Direct/Re-Direct Exam (14 min.)

Cross-Exam (10 min.)

Prosecution Witness 1 ___/___

Prosecution Witness 1 _____

Prosecution Witness 2 ___/___

Prosecution Witness 2 _____

Prosecution Witness 3 ___/___

Prosecution Witness 3 _____

Prosecution Witness 4 ___/___

Prosecution Witness 4 _____

TOTAL TIME _____

TOTAL TIME _____

Cross-Exam (10 min.)

Direct/Re-Direct Exam (14 min.)

Defense Witness 1 _____

Defense Witness 1 ___/___

Defense Witness 2 _____

Defense Witness 2 ___/___

Defense Witness 3 _____

Defense Witness 3 ___/___

Defense Witness 4 _____

Defense Witness 4 ___/___

TOTAL TIME _____

TOTAL TIME _____

Statements (10 min. total)

Statements (10 min. total)

Opening (from above) _____

Opening (from above) _____

Closing _____

Closing _____

Rebuttal (1 min. max.) _____

Rebuttal (1 min. max.) _____

TOTAL TIME _____

TOTAL TIME _____

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ERRATUM

People v. Kelmar

See also revised Coroner's Diagram.

PLEASE NOTE: At the time of the shooting incident, the body of the victim was not necessarily in the position shown in the Coroner's Diagram, e.g. the arm may have been in front of the body or held up. The direction of the arrows indicate the approximate paths of the bullets in and/or through the victim's body, not the actual direction from which the bullets were fired.

10/18/94