

# **2013 INTERSESSION TRIAL ADVOCACY**

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# **INTERSESSION TRIAL ADVOCACY**

**2013**

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## **OVERVIEW OF 2013 INTERSESSION TRIAL ADVOCACY**

This course consists of reading assignments and lectures on specific trial skills, followed by exercises that require you to practice those skills. You must read the assigned materials, attend the lectures, prepare the exercises, and conduct those exercises in class. The lectures are given in the courtroom, and the exercises are conducted in small groups. The exercises are based on two case files developed by the National Institute for Trial Advocacy. The course is based on the belief that the best way to learn trial advocacy (other than actually conducting trials) is to stand up and practice trial advocacy skills in as realistic a simulation as possible.

The lectures and group exercises will be run by various clinical faculty members and trial lawyers. Many of these practitioners are among Colorado's most respected trial lawyers. The lectures will emphasize basic concepts and the small group sessions will be devoted to applying and refining those concepts in the context of the two mock trial problems that we use during the course. Certain exercises will be taped for review by the students and faculty. Your [student numbers](#) and [room assignments](#) are in these materials.

The reading assignments are contained in the two case files and on the TWEN page for this course. The relevant rules of evidence are contained in the TWEN page materials. Students 1 through 6 are assigned to and must purchase the case file *State v. Sanchez*. Students 7 through 12 are assigned to and must purchase *Potter v. Shrackle*. There is not a great deal of reading in these assignments. Students should spend more of their preparation time focusing on specific questions, arguments, etc. that the student intends to use in the exercises. Students who are assigned to be a witness for an exercise must prepare thoroughly as well; reading from the case file during testimony is not acceptable. All students will be expected to observe appropriate courtroom decorum during all exercises (except for dress) and must dress for court for the final trial.

You must attend all course events to receive credit. A grade of pass and two credit hours will be entered based on full attendance and your preparation and effort in assigned work. A numerical grade of 71 or below may be assigned otherwise. If you are unable to attend a session because of illness or other unexpected personal emergency that would lead you to seek a continuance of a court hearing, you should call in ahead of time, as you would a court. You may call or e-mail Professor Robinson or Professor England. If a student is absent from a session, others in the section should handle the absent person's role.

## **2013 INTERSESSION TRIAL ADVOCACY SYLLABUS**

<b>DATE</b>	<b>TIME</b>	<b>GROUP</b>	<b>EVENT</b>
1-7	8:30 – 9:00	All	Lecture: Introduction, Case analysis and organization
	9:00 – 9:30	All	Lecture: Trial Ethics
	9:30 – 10:30	All	Lecture: Direct and Cross Examination
	10:30 - 12:30	Groups	<a href="#">Section A</a> : Basic direct examination
	12:30 – 1:30	All	Lunch
	1:30 – 4:30	Groups	<a href="#">Section B</a> : Basic cross-examination and finish Section A
	4:30 – 5:00	All	Lecture: Opening statements
1-8	8:30 – 9:00	All	Lecture: Impeachment and Refreshing Recollection
	9:00 – 10:00	Groups	<a href="#">Section C</a> : Case Analysis <i>Potter</i> and <i>Sanchez</i>
	10:00 – 11:00	Groups	<a href="#">Section D</a> : Impeachment Exercises
	11:00 – 11:30	All	Lecture: Real and Demonstrative Evidence
	11:30 – 12:30	All	Lunch
	12:30 - 2:30	Groups	<a href="#">Section E</a> : Opening statements
	2:30 – 3:15	All	Lecture: Advanced direct and cross examination
1-9	3:15 – 5:00	Groups	<a href="#">Section F</a> : Real and demonstrative evidence
	8:30 – 11:30	Groups	<a href="#">Section G</a> : Advanced direct and cross-examination
	11:30 – 12:00	All	Lecture: Dealing with difficult witnesses
	12:00 – 1:00	All	Lunch
	1:00 – 1:30	Groups	Preparation for Exercise H/ Faculty Review of Skills
	1:30 – 3:30	Groups	<a href="#">Section H</a> : Difficult witnesses
	3:30 – 4:30	All	Lecture: Expert witnesses
1-10	8:30 – 9:00	All	Lecture: Objections.
	9:00 – 10:00	Groups	<a href="#">Section I</a> : Objections
	10:00 – 11:30	Groups	Communications in the Courtroom
	11:30 – 12:30	All	Lunch
	12:30 - 1:00	All	Preparation of expert witness
	1:00 – 3:00	All	<a href="#">Section J</a> : Expert witnesses
	3:00 – 4:00	All	Lecture: Closing arguments
1 – 11	4:00 – 4:30	All	Discussion of final trials / FCQ's
	8:30 – 12:00	Groups	Section K: Closing arguments
	12:00 – 1:00	All	Lunch
	1:00 – 4:30	Groups	<a href="#">Section K cont</a> and prep on your own for final trials
1 – 12	8:30 – 12:00	Groups	Final trials
	12:00 – 1:00	All	Lunch
	1:00 – 4:30	Groups	Final trials

## **MONDAY MORNING**

**Read:** Professionalism and Misrepresentations to the Court, Ethical Considerations in Litigation, An Overview of Trial Advocacy and Basic Direct & Cross Examination, all of which are on the TWEN page. Review the case file that has been assigned to you.

**Preparation:** As you are reviewing the case file that has been assigned to you, think about what the prosecution, plaintiff and defense have to prove to win their case. Consider which facts seem most important. Consider what persuasive ‘theme’ will help you present these facts in the most persuasive possible fashion.

### **SECTION A: BASIC DIRECT EXAMINATION** **(2 HOURS)**

**Read:** Read the statements of the witness that you will be portraying or examining in today’s exercises, and make sure that you understand how these witnesses fit into your overall theory of the case. Read “Basic Cross-Examination” on the TWEN page in preparation for the noon lecture and the afternoon exercises.

**Preparation:** For the purpose of these exercises, do not use visual aids or demonstrative exhibits. Concentrate on preparing and asking appropriate questions.

The focus in this first session of direct examination is in organizing your examination so that it is most easily comprehended by the jury, and in making sure that you ask appropriate (e.g., non-leading) questions. Break your examination into logical chapters, make sure you remember that the jury knows nothing about the case, and make the witness the star.

**Exercise 1 (30 minutes):** *Sanchez:* Students 1 – 3 conduct a direct examination of Sanchez prosecution witness Detective Hefler. The witness will be portrayed by students 4 – 6. Do not attempt to lay the foundation for expert testimony of Detective Hefler.

**Exercise 2 (30 minutes):** *Potter:* Students 7 – 9 conduct a direct examination of the Potter plaintiff witness, Marilyn Kelly. The witness will be portrayed by students 10 – 12.

**Exercise 3 (30 minutes):** *Sanchez:* Students 4 – 6 conduct a direct examination of Sanchez defense witness Victor Buentello. The witness will be portrayed by students 1 – 3.

**Exercise 4 (30 minutes):** *Potter:* Students 10 – 12 conduct a direct examination of Potter defense witness Alice Mallory. The witness will be portrayed by students 7 – 9.

## **MONDAY AFTERNOON**

### **SECTION B: BASIC CROSS-EXAMINATION** **(3 HOURS)**

**Read:** Review “Basic Cross-Examination” in light of the lecture on the topic and plan your afternoon presentation.

**Preparation:** Since you will often not have a pre-trial opportunity to ‘prepare’ a witness that you will be cross-examining at trial, no time is set aside for preparation of the witness. Obviously, you need to prepare your cross-examination in light of the reading and lecture.

The focus in this first session on cross-examination is in making sure that you ask appropriate questions (e.g. leading questions, only one fact per question, etc.) and that you touch upon only those facts that you need to prove your case.

**Exercise 5 (45 minutes):** *Potter:* Assume that Officer Michael Young has testified on direct examination for the defense to everything that appears in his statement. Students 7 - 9 conduct a cross examination and students 10 - 12 portray the witness.

**Exercise 6 (45 minutes):** *Sanchez:* Assume that Chris Cavallo has testified on direct examination for the defense to everything in his/her statement. Students 4 - 6 conduct a cross-examination of the witness, portrayed by students 1 - 3.

**Exercise 7 (45 minutes):** *Potter:* Assume that Alice Mallory has testified for the defense to everything that is contained in her statement. Students 10 - 12 conduct cross-examination of the witness, portrayed by students 7 - 9.

**Exercise 8 (45 minutes):** *Sanchez:* Assume that Mary Kelly has testified on direct examination for the prosecution to everything contained in her statement. Students 1 - 3 conduct a cross-examination of the witness, portrayed by students 4 - 6.

## **TUESDAY MORNING**

### **SECTION C: CASE ANALYSIS** **(60 MINUTES)**

In this exercise the group will divide into two groups. One group will contain students 1 – 6 (Sanchez) and the other group contains students 7 -12 (Potter). Each group should pick a scribe to record the information on the blackboards or the large paper provided. Students should first look at the case from the prosecution or plaintiff's side. Brainstorm and write on the board what facts are good facts and what facts are bad facts. Once you have completed this analysis thoroughly, switch to the defense side and do the same exercise from the defense perspective.

Then, once you have worked through a good fact / bad fact analysis – switch back to the plaintiff or prosecution side. Begin brainstorming phrases, words and images which are helpful for the plaintiff side and write those on the board. Then switch back and do this from the defense perspective.

### **SECTION D: REFRESHING AND IMPEACHING** **(64 MINUTES)**

**Read:** “Refreshing and Impeaching.”

**Preparation:** These exercises build upon the basic direct and cross-examination skills that you have learned. Continue to use those skills in these exercises. It is quite common for a witness to forget something. Often it is only a small and unimportant detail, but sometimes it is something of greater consequence. One of the basic tools of direct examination is refreshing the memory of a witness who has a memory lapse. It is also quite common for a witness to testify at trial to something different than what he or she said in a previous statement. One of the basic tools of cross examination is impeaching the testimony of a witness with a prior inconsistent statement.

**Exercise 9: (8 minutes)** *Potter:* Students 7, 8, and 9 are plaintiff's counsel. They are asking Jeffrey Potter about his trip to Martinique and his hotel bill, Exhibit 31. Assume he can't remember the total, or the details, about the hotel bill. Refresh his recollection. Student 11 is Jeffrey Potter for this exercise.

**Exercise 10: (8 minutes)** *Sanchez:* Students 1, 2 and 3 are the prosecution. They should continue the direct examination of Mary Kelly by refreshing Ms. Kelly's recollection (page 27). Student 5 is Mary Kelly for this exercise.

Assume that Ms. Mary Kelly testifies on direct as follows:

Q: Ms. Kelly, after the second Las Calaveras guy grabbed the guy from behind what did the first Las Calaveras guy do?

A. The first Las Calaveras guy got up from the ground.

Q. When the first Las Calaveras guy got up from the ground, did he have something in his hands?

A. Gee. Well I just can't remember right now. I sort of draw a blank.

**Exercise 11: (8 minutes)** *Potter:* Students 10, 11 and 12 are defense counsel. They have called Victoria Williams. Assume she was just asked if Ms. Potter stepped off the center strip right in front of the truck and she said that she couldn't remember (pg.15). Refresh her recollections. Student 7 is Victoria Williams for this exercise.

**Exercise 12: (8 minutes)** *Sanchez:* Students 4, 5, and 6 are defense counsel. Mr. Buentello is testifying. Assume he can't remember the details of his immunity agreement, exhibit 29, page 87. Refresh his recollection. Student 1 is Victor Buentello for this exercise.

**Exercise 13: (8 minutes)** *Potter:* Students 10, 11 and 12 are defense counsel. Daniel Sloan is on the stand for the plaintiff. He testifies that he was going to make Ms. Potter an executive vice president. In fact, he had a meeting scheduled with Ms. Potter for the next Monday, in which he planned to promote her and raise her salary. Impeach him using his deposition, page 37. Student 9 is Mr. Sloan for this exercise.

**Exercise 14: (8 minutes)** *Sanchez:* Students 1, 2 and 3 are the prosecution. Victor Buentello is testifying. Assume he has testified on direct examination that he never had any conversations with Ernest Sanchez prior to testifying in the case. Impeach him with his statement (pg. 42). Student 4 is Victor Buentello for this exercise.

**Exercise 15: (8 minutes)** *Potter:* Students 7, 8, and 9 are defense counsel. Assume that James Marshall is called as a witness for the plaintiff and testifies as follows:

Q. How long was it from the time you first saw the woman walking towards the crosswalk until you heard the thud?

A. No more than a couple seconds, maybe five seconds, certainly no more than ten. I know she must have been in the crosswalk when she got hit.

Impeach Marshall based using his deposition, and his handwritten statement. Student 10 is Mr. Marshall for this exercise. For the plaintiff, student 12 conducts any necessary redirect examination.

**Exercise 16: (8 minutes)** *Sanchez:* Students 4, 5, and 6 are the prosecution. On direct examination Mr. Buentello testified that Ernesto never carried a knife in the past. This was the first time that he had seen him with a knife. Impeach him with his statement (pg. 42). Student 3 is Victor Buentello for this exercise.



## **TUESDAY AFTERNOON**

### **SECTION E: OPENING STATEMENTS** **(120 MINUTES)**

**Read:** TWEN page “Opening Statement.” Students who are not performing should sit in a “jury box” during the opening statements.

**Exercise 17: (60 minutes)(8 minutes per student plus 2 minutes for feedback for each student):** *Potter:* Students 10, 11, 12 make an opening statement for the plaintiff in Potter and students 7, 8, 9 make an opening statement for the defense. Student 10 goes first, with student 7 responding, then 11 and 8, then 12 and 9. You may use any exhibit available.

**Exercise 18: (60 minutes)(8 minutes per student plus 2 minutes for feedback for each student):** *Sanchez:* Students 4, 5, 6 make an opening statement for the prosecution and students 1, 2, 3 make an opening statement for the defense. Student 4 goes first, with student 1 responding, then 5 and 2, then 6 and 3. You may use any exhibit available.

### **SECTION F: REAL AND DEMONSTRATIVE EVIDENCE** **(2 HOURS)**

**Student Preparation Instructions:** Exhibits are important for at least two reasons. First, most people learn and comprehend better when they can both see and hear about the topic. Exhibits are visual and tangible evidence that helps this comprehension. Secondly, exhibits go back into the jury room with the jury. A good exhibit, one that helps make your case, can continue to make your argument for you long after you have been forced to stop speaking.

A good foundation should do two things. One, it must satisfy the foundational requirements of all relevant rules of evidence. For example, FRE 901 sets out the basic requirements for identifying and authenticating an exhibit and FRE 803 sets out the foundational requirements for a wide range of hearsay exceptions. Satisfying the foundational requirements is a prerequisite to getting the judge to admit your exhibit.

A good foundation should also be comprehensible to the jurors. Make sure that you do not become overly enamored of legalese; use plain English so that the jury comes to trust the exhibit on practical and common-sense grounds.

Your group may not get through all of these exercises.

**Exercise 19: (30 minutes)** *Potter Congo Lines:* Students should sit in number order.

The object of this exercise is to lay the foundation for the diagram of the scene at Kirby and Mattis, exhibit 2, one question at a time. Student 12 begins as the witness, Officer Young. Student 7 asks the witness the first question. Student 8 asks the next question. Student 9 asks the next question, and so on, until all the necessary questions have been asked. When appropriate, the student who is up should move to enter the exhibit into evidence.

In the next exercise, student 7 plays the witness, Jeffrey Potter. Students 8 through 12 ask the foundation questions, one question at a time, to admit Exhibit 28, Potter’s letter to Dr. Stevens.

**Exercise 20: (30 minutes)** *Sanchez Congo Lines*: Students should sit in number order. Sanchez students 2- 6 each ask one question to lay the foundation for authentication, relevance, and any other necessary foundation for Exhibit 11, Buentello's diagram of the fight. Student 1 is Victor Buentello for this exercise.

In the next exercise students should introduce the pictures of the scene - Exhibit 8 (page 35 and 36). Students 1 – 6 sit in order minus student 3. Each student should ask one question to lay foundation to get in the picture of the scene. Student 3 is Detective Hefler for this exercise.

**Exercise 21: (15 minutes)** *Potter*: Students 7, 8, and 9 are defense counsel. They should conduct direct and redirect examinations of Officer Young, including introducing his police report which is exhibit 1. Student 10 is Officer Young for this exercise. Students 10, 11, and 12 are plaintiff's counsel. They should conduct cross-examination of Officer Young. Exhibit 1 is in the case file and in the trial notebook in each room. During cross examination student 8 is Officer Young.

**Exercise 22: (10 minutes)** *Sanchez*: Students 5 and 6 are the prosecution. They should introduce the autopsy report found in exhibit 23 (73-75) into evidence as an official record or business record exception to the hearsay rule. Student 2 is Dr. Lee Taylor (pages 73-86) for this exercise and is familiar with the record keeping methods of the coroner's office. Students 3 and 4 oppose and *voir dire* the exhibit. An "original" copy of the report is contained in the trial notebook in each room. Focus on the foundation for getting the exhibit admitted. Do not worry about any possible "hearsay within hearsay" objections.

**Exercise 23: (10 minutes)** *Sanchez*: Student 3 is Detective Hefler, Students 1 and 2 are the prosecution. Students should introduce the knife. Students 5 and 6 should *voir dire* and oppose the introduction of the knife.

**Exercise 24: (15 minutes)** *Potter*. Students 10, 11, and 12 are defense counsel. They should enter photos of the scene and the corresponding diagram, and use both the photos and the diagrams to "paint the scene". Student 9 is Officer Young for the direct examination. Students 7, 8, and 9 are defense counsel. They should *voir dire* and cross on the exhibits. Student 11 is Officer Young for the cross examination. The comprehensive diagram is on page 93, and the smaller diagrams and photographs are on pages 119 – 143. Choose at least two photos and two diagrams.

**Exercise 25: (10 minutes)** *Sanchez*: For this exercise assume that Mr. Buentello denies that he has any prior convictions. Students 3 and 4 are the prosecution and should introduce the convictions of Victor Buentello on cross examination using FRE 803(22) and 902(1). Assume the convictions are properly certified. Student 6 is Victor Buentello for this exercise. Students 1 and 2 should object if necessary.

## **WEDNESDAY MORNING**

## **SECTION G: ADVANCED DIRECT AND CROSS EXAMINATION (3 HOURS)**

**Read:** “Advanced Direct and Cross-Examination.”

**Preparation:** These exercises are designed to build upon the basic direct and cross-examination skills that you have already learned.

You have already worked on refreshing the memory of a witness. If a witness’s memory is not refreshed despite your efforts to help, the relevant document may be admissible as a recorded recollection. Make sure you understand the foundational requirements of FRE 803(5) and can translate that legalese into plain English to lay a foundation that is acceptable to the court and understandable to the jury. Exercises 26 and 27 require the introduction of a past recollection recorded.

You have already impeached a witness with a prior inconsistent statement made by that witness. There are a number of other ways to impeach witnesses. Some of those techniques are addressed in these exercises. Exercises 28 and 29 address the technique of impeaching a witness by omission; that is, impeaching a witness with the fact that the prior statement of the witness does not include the statement to which the witness testified on direct examination.

Ideally, you are able to impeach a witness with a statement that he or she wrote out or that was recorded in a pretrial hearing or deposition. Often, that is not the case. Exercises 30 and 31 address the situation in which you have to impeach a witness with a statement that witness made to someone else (often an investigator or third witness) and that was recorded by that other person.

Exercises 32 and 33 require you to impeach a witness with a felony conviction. Make sure you understand FRE 609 and are prepared to respond to objections by opposing counsel and/or inquiries from the judge about this impeachment.

Exercises 34 and 35 test the character of a witness for truthfulness. While character evidence is generally inadmissible, FRE 404(a)(3) specifically provides that the character of a witness may be introduced through, *inter alia*, FRE 608. You must be familiar with FRE 608 to properly conduct these exercises. Exercises 38 and 39 address attacks on the truthfulness of a witness using the opinion of a character witness, and the cross-examination of that character witness. Exercises 36 and 37 address the rehabilitation of a witness whose character for truthfulness has already been attacked by opposing counsel, using reputation testimony, and the cross-examination of that character witness. Cross-examination of a character witness should include the traditional cross-examination into bias, interest and motive, and may in the court’s discretion and pursuant to FRE 608(b), include cross-examination into specific instances of conduct that undercut the opinion of the character witness.

**Exercise 26: (15 minutes)** *Sanchez:* Past recollection recorded. The prosecution has called Det. Delgado, student 4, to the stand to talk about gang membership in Nita. The Detective has testified about the types of information that is collected for the Gang Member Database and the method by which that information is stored in the GMD. The Detective is unable to remember all the details contained in the GMD. Students 1, 2, and 3 should lay the foundation for and introduce the following summary of the GMD. Students 5 and 6 should object as appropriate.

## **NITA CITY POLICE DEPARTMENT**

### **GANG MEMBER DATABASE**

#### **Las Calaveras**

Colors	Red & white, often soccer or athletic gear
Signs	Skull tattoos
Activities	Drugs and extortion
Size	60+
Leadership	Pedro “Papa Ru” Ruiz
Miscellaneous	One of the most violent gangs, began as a soccer club, Hispanic

#### **Stone Cross**

Colors	Black
Signs	Celtic Cross tattoos, spiked hair
Activities	Drugs, extortion
Size	Est. of 50+
Leadership	Patrick “Mad Dog” Kilpatrick
Miscellaneous	Largely Irish

#### **28<sup>th</sup> Street Disciples**

Colors	Blue & white
Signs	Blue bandanas
Activities	Drugs, mostly cocaine, crack and heroin
Size	75 - 100
Leadership	Leadership in flux as many leaders incarcerated
Miscellaneous	Significantly weakened by investigation and prosecution in YR-1

**Exercise 27: (15 minutes)** *Potter*: Past recollection recorded. The defense has called their economic expert, Dr. Elizabeth Buchanan, student 12. Doctor Buchanan has been qualified as an expert, has described the general technique she uses to evaluate the economic loss of a wrongful death, and is now testifying about the application of those principles to the facts of this case. Dr. Buchanan is unable to remember many of the year-by-year numbers that are contained in her analysis. Students 7, 8 and 9 should lay the foundation for and introduce the document relating to future earnings on page 67, the document relating to historical earnings on page 69, or the document relating to fringe benefits on page 71. Students 10 and 11 should object as appropriate.

**Exercise 28: (15 minutes)** *Sanchez*: Impeachment by omission. Assume that Mary Kelly, student 1, testified as follows for the prosecution during her direct examination:

Q: Then what happened?  
A: I think the guy who was being held dropped the bat or whatever he was holding?  
Q: What did the guy on the ground do after the restrained guy dropped the bat?

A: The guy on the ground got up. He pointed at the big guy. Sorta shook his finger at him. It looked like he was yelling at the big guy. Then he lunged and drove a knife into him.

Obviously, the addition of the finger pointing testimony significantly undercuts a self-defense claim. Students 4, 5 and 6 should cross-examine Ms. Kelly about the omission of this critical information from her written statement. Students 2 and 3 object as necessary.

**Exercise 29: (15 minutes)** *Potter*: Impeachment by omission. Assume that James Marshall, student 7, testified for the Plaintiff as follows during his direct examination.

Q: What did you do when you heard the thump?

A: Well, naturally, I looked in the direction of the sound.

Q: What did you see?

A: I saw a pickup truck carrying a body on the front of it. The driver was looking down at the seat of the truck, like he'd dropped something. Then I heard him hit the brakes.

Obviously, the addition of the testimony that Shrackle was looking down and was slow to hit the brakes significantly undercuts the defense. Students 10, 11, and 12 should cross-examine Mr. Marshall about the omission of this critical information from his written statement. Students 8 and 9 should object as necessary.

**Exercise 30: (15 minutes)** *Sanchez*: Impeachment with a witness's statement that was recorded by someone other than the witness. Assume that Luis Ambrose, student 5, has testified on direct examination for the defense as follows:

Q: About how many Stone Cross gang members did you see?

A: I'd say twenty-five to thirty.

Q: And how many Las Calaveras members did you see?

A: I'd say about five to ten.

Students 1, 2 and 3 should impeach Mr. Ambrose with the statement he made to Det. Hefler on March 13. Students 4 and 6 should object as necessary

**Exercise 31: (15 minutes)** *Potter*: Impeachment with statement that is not the witness's own statement. Assume that Mr. Shrackle, student 10, testified on direct examination that "he saw a blur of clothing coming from his left" and almost immediately "felt an impact well after he passed the pedestrian crosswalk area." You would of course, attempt to impeach Mr. Shrackle with his own deposition. In this exercise, Students 7, 8 and 9 should impeach Mr. Shrackle with the statements he made to Officer Michael Young, as reflected in Young's deposition. Students 11 and 12 object as necessary.

**Exercise 32: (15 minutes)** *Sanchez*: Impeachment with a felony conviction. Students 5 and 6 should cross-examine Victor Buentello with regard to his prior criminal history. Student 4 should portray Mr. Buentello and Students 1 and 3 should object and conduct a re-direct examination as necessary. Assume that the criminal record appearing on page 53 is true and

accurate, and that it has been stipulated by the parties that the record fits within the public record exception of FRE 803(8).

**Exercise 33: (15 minutes)** *Potter:* Impeachment with a felony conviction. Assume that Benjamin Grissom, student 8, has testified for the defense in accord with his statement. Students 10, 11, and 12 should cross-examine Mr. Grissom about his criminal record. Students 7 and 9 should object and conduct a re-direct examination as appropriate.

**Exercise 34: (15 minutes)** *Potter:* Impeachment of a witness with opinion evidence of untruthfulness. Assume that Jeffrey Potter has testified and his credibility is now in issue. He has waived all claims of doctor-patient confidentiality. The following statement has been made by Dr. Stevens:

One of my jobs as a professionally trained psychologist is determining when people are telling the truth. I conducted a number of counseling sessions with the Potters and had one individual session with each party. Based on that, it is my opinion that Mr. Potter is not trustworthy. He is, in fact, quite manipulative and is very good at it. Very few people, other than trained observers like myself, can see through his deceptions.

Defense counsel, Students 7, 8, and 9, call Dr. Stevens to attack the truthful character of Mr. Potter. Student 11 is Dr. Stevens for this exercise. Counsel for the plaintiff, students 10 and 12 should object when appropriate and cross-examine on this issue only. Cross-examination should include references to the fact that Dr. Stevens acknowledges that most of the information provided to him by Mr. Potter was true, that Mr. Potter's wife confirmed much of the information, and that Mr. Potter revealed to Dr. Stevens, in their individual session, information that was highly personal about himself that Dr. Stevens believes to be true.

**Exercise 35: (15 minutes)** *Sanchez:* Impeachment of a witness with reputation evidence of untruthfulness. Assume that Jaime Delgado has testified about gangs and gang membership. In an effort to undercut the reliability of this testimony, the defense calls Pat Donahue, who testifies that Delgado's conclusions are wrong. Assume that Donahue's report includes the following paragraph:

I have spoken to a number of gang members about Jaime Delgado. His reputation is of a man who has become obsessed with gangs, who sees gang membership under every bush and who would lie to get a gang-related conviction. I have spoken with a number of store owners about Jaime Delgado as well. They tell me he has the reputation as a cop who pushes them harder than any other cop to give them information about gangs and about specific individuals who may be in gangs. They say that he feels the end (getting rid of gangs) justifies the means (even lying if necessary). I have even spoken with some police officers about Delgado's truthfulness. They tell me, off the record, that he fancies himself a 'super cop' who is going to singlehandedly rid Nita City of the scourge of gangs

and that they suspect he will stretch the truth as far as it can be stretched in order to achieve this goal.

Students 1, 2, and 3 conduct a direct examination of Mr. Donahue on the issue of Delagado's reputation for truthfulness. Student 6 portrays Donahue. Students 4 and 5 object and cross-examine as necessary.

**Exercise 36: (15 minutes)** *Sanchez*: Rehabilitation of a witness with opinion evidence of the truthfulness of that witness. Assume that the prosecution attacked Mr. Sanchez on cross-examination in the traditional ways, bias, interest motive, prior inconsistent statements, etc., and that they also attacked his character for truthfulness. In response to the character attack, the defense, Students 4, 5 and 6, call Martin Ambrose to testify that Mr. Sanchez's reputation is one of truthfulness. Student 3 portrays Mr. Ambrose. Students 1 and 2 cross-examine Mr. Ambrose, using the standard techniques and trying to use any specific instances of conduct that they deem relevant.

**Exercise 37: (15 minutes)** *Potter*: Rehabilitation of a witness with reputation evidence of the truthfulness of that witness. Assume that Jeffrey Potter's character for truthfulness has been attacked by defense counsel using the opinion testimony of Dr. Stevens as described in Exercise 34. In an effort to rehabilitate Mr. Potter's reputation for truthfulness, counsel for Plaintiff calls Dr. Alberta Einstein, an eminent physicist, who is the chair of the physics department at the University of NITA, who has worked with Jeffrey Potter for more than ten years, and who knows Jeffrey Potter's reputation for truthfulness among his colleagues on the faculty and the students and employees in the physics department. Students 10, 11, and 12 should conduct a direct examination of Dr. Einstein to introduce this reputation testimony. Student 9 should portray Dr. Einstein. Students 7 and 8 should object and cross-examine Dr. Einstein. The cross-examination should employ all the standard techniques and also address the fact that Dr. Einstein, in YR-9, caught Potter in a lie about how much work a student had done on a paper that was being submitted for publication and, in YR-7 reprimanded Potter for inappropriate flirting with a graduate student.

### **WEDNESDAY AFTERNOON**

#### **SECTION H: DEALING WITH DIFFICULT WITNESSES** **(2 HOURS)**

Prepare for your direct examinations below. During class, for the first 30 minutes, prepare the witness for both direct and anticipated areas of cross, even though there will be no cross. Witness instructions will be distributed to the witnesses at the beginning of class. Also during the first 30 minutes, faculty will be available to review any skills from anything we have already covered, if you need additional assistance.

**Exercise 38: (30 minutes)** *Potter*: Students 10, 11, and 12 are defense attorneys and they call Victoria Williams, age 10. Students 7, 8, and 9 portray Vicky.

**Exercise 39: (30 minutes)** *Sanchez*: Students 1, 2, and 3 are defense attorneys and call their client, Ernesto Sanchez. Students 4, 5, and 6 portray Ernesto Sanchez.

**Exercise 40: (30 minutes)** *Potter*: Students 7, 8, and 9 are defense attorneys and represent Charles Schrackle. They call Charles to the stand. Students 10, 11, and 12 play Charles.

**Exercise 41: (30 minutes)** *Sanchez*: Students 4, 5, and 6 are defense attorneys and call Victor Buentello. Students 1, 2, and 3 play the witness.

## **THURSDAY MORNING**

### **SECTION I: OBJECTIONS EXERCISES**

**Read**: TWEN page “Objections.”

**Exercise 42: (30 minutes)** *Sanchez*: Students 1, 3, 5 are a prosecutor’s team. Students 2, 4, 6, are on the defense team. The two faculty members will question and play the witness. The defense team will object during the first half of the exercise then respond to objections during the second half of the exercise. The prosecution team will respond during the first half of the exercise and object during the second half of the exercise.

**Exercise 43: (30 minutes)** *Potter*: Students 7, 9, 11 are on a plaintiff’s team. Students 8, 10 and 12 are on the defense team. The two faculty members will question and play the witness. The defense team will object during the first half of the exercise then respond to objections during the second half of the exercise. The plaintiff’s team will respond during the first half of the exercise and object during the second half of the exercise.

## **THURSDAY AFTERNOON**

### **SECTION J: EXPERT WITNESSES (120 MINUTES)**

**Read**: TWEN “Expert Witnesses.”

**Preparation**: The direct and cross-examination of expert witnesses employs all of the advocacy skills you have learned to date. On direct examination, counsel must 1) lay a foundation and qualify the witness as an expert, 2) elicit the data which the expert reviewed, 3) have the expert describe the application of the expertise to these data, and 4) elicit the expert’s conclusion. On cross-examination, counsel should 1) be careful about trying to “out-expert” the expert, 2) consider attacking the data upon which the expert relied, 3) attack the credibility of the expert, and 4) confine the examination to the issues necessary to support counsel’s theory of the case. In addition, counsel must take special care to make sure that the jury understands the testimony. Expert terms and jargon must be explained and the use of diagrams and other exhibits must be fully explored.

**Exercise 44: (30 minutes)** *Sanchez*: Students 4, 5 and 6 are the prosecution. They call Detective Delgado as an expert in gang membership, identification, and activities (see pages 93-95). They



should conduct direct and redirect examinations, including attempting to introduce the certified convictions of Victor Buentello (pages 49, 51, 53). Student 2 is Detective Delgado on direct examination. Students 1, 2 and 3 are defense counsel. They should object, *voir dire*, cross-examine Detective Delgado, and oppose the exhibits. Student 6 is Detective Delgado on cross examination.

**Exercise 45 (30 minutes)** *Potter*: Students 10, 11 and 12 are plaintiff’s counsel. After Katherine Potter’s boss, Daniel Sloan, has testified, the plaintiff calls Robert Glenn as a witness. Students should conduct direct and redirect examinations of Mr. Glenn. Try to get Dr. Glenn’s CV and report admitted into evidence. Also focus on, and use, at least one table during direct examination. Student 8 is Robert Glenn during direct examination. Students 7, 8 and 9 are defense counsel. They should cross-examine Mr. Glenn. Student 12 is Mr. Glenn during cross examination.

**Exercise 46: (30 minutes)** *Sanchez*: Students 1, 2, and 3 are defense counsel. They call Pat Donahue as an expert in gang membership, gang identification, and gang activities (See pages 97-101). Students should lay the proper foundation for him as an expert. Students should elicit his opinion and the basis for his opinion that neither Ernesto Sanchez nor Victor Buentello is in the Las Calaveras gang. Student 5 is Pat Donahue for direct examination. Students 4, 5, and 6 are the prosecution. They should cross examine Mr. Donahue on his opinions. Student 1 is Mr. Donahue for cross examination.

**Exercise 47: (30 minutes)** *Potter*: Students 7, 8, and 9 are defense counsel. They call Elizabeth Buchanan as an expert witness. They should conduct a direct examination of Ms. Buchanan. Try to get Dr. Buchanan’s CV and report admitted into evidence. Also focus on, and use, at least one table during direct examination. Student 11 is Ms. Buchanan for direct examination. Students 10, 11, and 12 are plaintiff’s counsel. They should cross-examine Elizabeth Buchanan. Student 7 is Ms. Buchanan for cross examination.

## **FRIDAY MORNING**

### **SECTION K: CLOSING ARGUMENT**

**Read:** TWEN “Closing Argument.”

**Preparation:** For the purposes of this exercise, students who are not performing should sit in a “jury box” during the closing arguments. Each closing should last approximately 10 minutes, and the class conducts their closings from 8:30 to 10:30. Closing arguments will be critiqued and reviewed from 10:30 to 12:00 pm. A student should tape the arguments using the provided equipment. See page 23 for additional instructions.

**Exercise 48: (10 minutes per student)** *Potter*: Students 7, 8, and 9 will do a closing argument for the plaintiff, and students 10, 11 and 12 will do a closing argument for the defendant. Student 7 goes first, with student 10 responding, then 8 and 11, then 9 and 12.

**Exercise 49: (10 minutes per student)** *Sanchez*: Students 1, 2 and 3 will do a closing argument for the prosecution, and students 4, 5 and 6 will do a closing argument for the defendant. Student 1 goes first, with student 4 responding, then 2 and 5, then 3 and 6.

### **VIDEO REVIEW PROCESS**

It is often quite helpful to see yourself as others do, and videotape review offers you a chance to do that. Closing Arguments will be videotaped. Hopefully the tapes will give you a sense of any issues relating to your language, body language, mannerisms, style, etc. There is additional value in watching your fellow students perform and in hearing the critiques of those performances, so the video review sessions will occur in groups as follows:

#### **Closing Argument Review**

Students 4 and 1	10:30 – 10:45
Students 5 and 2	10:45 – 11:00
Students 6 and 3	11:00 – 11:15
Students 10 and 7	11:15 – 11:30
Students 11 and 8	11:30 – 11:45
Students 12 and 9	11:45 – 12:00

When you are not in a review session, you may leave and work on preparing for your final trial. If your group is running late you may either continue and start lunch later or come back after lunch. When you all are finished then the rest of the day is to be spent preparing for your final trials.

## **2012 FINAL TRIAL SCHEDULE**

The groups you've been working with all week have been broken up a bit. The assignments are as follows:

### **SATURDAY MORNING, 8:30 – 12:00**

Room	Plaintiff	Defendant	Witnesses	Witnesses
204	101 – 103	201 – 203	104 - 106	210 - 212
205	207 – 209	107 – 109	110 - 112	701 - 703
206	507 – 509	301 – 303	510 - 512	304 - 306
WC	307 – 309	401 – 403	310 - 312	404 - 406
CC	407 – 409	707 – 709	410 - 412	504 - 506
300	607 and 608	204 and 206	609 and 611	704 and 705
301	501 and 503	602 and 603	710 - 712	604 - 606

### **SATURDAY AFTERNOON 1:00 – 4:30**

Room	Plaintiff	Defendant	Witnesses	Witnesses
204	104 – 106	701- 703	101 - 103	201 - 203
205	210 – 212	110 – 112	107 - 109	207 - 209
206	304 – 306	404 – 406	301 - 303	401 - 403
WC	310 – 312	504 – 506	307 - 309	501 and 503
CC	410 – 412	510 – 512	407 - 409	507 - 509
300.	609 and 611	704 – 706	607 and 608	204 and 206
301	710 – 712	604 – 606	707 - 709	601 - 603

\*\* WC = Wittmyer Courtroom

\*\* CC = Carrigan Courtroom

## **PROCEDURES AND INSTRUCTIONS FOR FINAL TRIALS**

1. Each team member presents three of the nine trial activities, including motions in limine. Motions in limine are addressed in your objections reading. The same person should not do both direct examinations, or both cross-examinations, and opening statement or closing argument.

2. Time Limits: The following limits apply to each side:

Motions In Limine	5 minutes
Opening Statements	10 minutes
Direct and Re-Direct Examination	40 minutes
Cross and Re-Cross Examination	30 minutes
Closing Argument	10 minutes

These time limits will be enforced. The minutes are not transferable. A properly prepared and focused case can be presented in less than the time allotted. Each team will keep time for itself.

3. The jury has been selected and sworn. You must rely on the included jury instructions; motions to change instructions are not allowed.

4. The trial record includes copies of documents that you may want to introduce into evidence. Remove copies from one of your trial records and mark those you want to use before trial. Plaintiff use 1, 2, 3, etc.; defendants use A, B, C, etc.

5. The one lawyer rule requires that only one lawyer from each side may be involved in the examination of a witness, including the making of objections.

6. Closing arguments follow the court's instructions to the jury, and the instructions will not actually be read. Rebuttal closing is permitted, subject to the time limits above.

7. Observe proper courtroom demeanor, whether you are a lawyer or a witness.

8. The witnesses should sit in the jury box when not testifying.

## **2013 INTERSESSION TRIAL ADVOCACY** **COURSE CRITIQUE**

Please submit this form to Professor Robinson or England or to Renee Larson in Room 105. You may submit this form anonymously; however, if you sign your name, it will help us if we need more information.

<b><i>EVENT</i></b>	<b><i>POOR</i></b>	<b><i>FAIR</i></b>	<b><i>GOOD</i></b>	<b><i>N/A</i></b>
Case Analysis and Organization				
Direct and Cross Examination Lecture				
Trial Ethics Lecture				
Section A				
Section B				
Opening Statement Lecture				
Impeachment and Refreshing Recollection Lecture				
Section C				
Section D				
Real and Demonstrative Evidence Lecture				
Section E				
Advanced Direct and Cross Examination Lecture				
Section F				
Section G				
Dealing with Difficult Witnesses Lecture				
Section H				
Expert Witness Lecture				
Objections Lecture				
Section I				
Section J				
Communication in the Courtroom Lecture				
Closing Arguments Lecture				
Section K and Video Review of Closing Arguments				
Final Trial				
Please note any exceptional faculty, or conversely, any that were not helpful:				

Any other suggestions or comments?

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Name (optional): \_\_\_\_\_

## **2013 INTERSESSION TRIAL ADVOCACY**

### **STUDENT NUMBERS**

#### Group 100

101 - Ashley Palomaki  
102 - Megan Nelson  
103 - Katie Downey  
104 - Kim Levy  
105 - Kenneth Bradtke  
106 - Thomas Codevilla  
107 - Adam Gianola  
108 - Lauren Thompson  
109 - Kelsey Velemirovich  
110 - Krista Hughes  
111 - Morgan Figuers  
112 - Miranda Rogers

#### Group 200

201 - Natalie Scarpella  
202 - Britta Beckstead  
203 - Matthew Gardner  
204 - Micah Jones  
205 - Rachel Marion  
206 - John Wood  
207 - Carol Liang  
208 - Elizabeth Bonanno  
209 - Mark Gibson  
210 - Tosh Grebenik  
211 - Laura McNabb  
212 - Liana Orshan

#### Group 300

301 - Jennifer Friedberg  
302 - Jessica Bunnell  
303 - Surbhi Garg  
304 - Richard Greene  
305 - Tonya Luna  
306 - Thomas Ward  
307 - Michael Wagner  
308 - Nancy Smith  
309 - Shira Cooks  
310 - Katharine Parker  
311 - Ryan Tyson  
312 - Kayla Smith

#### Group 400

401 - Tessa DeVault  
402 - Chelsea Strautman  
403 - Mark Griffith  
404 - Megan Scully  
405 - John Scarboro  
406 - Emily Wasserman  
407 - Kelsy Sargent  
408 - Anne Lee  
409 - Boe Nicholson  
410 - Prasanthi Paritala  
411 - Darren Smith  
412 - Nathaniel Wallshein

Group 500

501 – Lauren Butler  
502 - Katherine Brownlow  
503 - Peter Beyel  
504 - Rachelle Yeung  
505 - Vanessa Deveraux  
506 - Matthew Neal  
507 – Nora Katz  
508 - Reyna Montana  
509 - David DiGiacomo  
510 - Joel Hungerford  
511 - Dietrich Hoefner  
512 - Jason Obold

Group 600

601 – Mary Donachy  
602 - Jon Hoistad  
603 - Elizabeth Joyce  
604 - Katherine Nelson  
605 – Joshua Prackun  
606 - Holly Sutton  
607 - Robert Donald  
608 – Kimberly Jones  
609 - Christopher Stanton  
610 – Courtney Mosca  
611 - Daniel Saunders  
612 - Kevin Stern

Group 700

701 – Ashley Telleen  
702 - Erin Rossitier  
703 - Brian Montrose  
704 – Neil DeVoogd  
705 - Chester Fernandez  
706 - Molly Owens  
707 - Ashley Boothby  
708 - John Newman  
709 - Javad Abbas  
710 - Ariel Stiller-Shulman  
711 - Kelsey Mills  
712 - Matthew Schoettle

## **2013 INTERSESSION TRIAL ADVOCACY**

### **ROOM ASSIGNMENTS**

The seven groups are assigned to the following classrooms, except as noted, when the group meets in the courtroom. The group and classroom assignments for the final trials are on page 10.

Group 100	Room 204
Group 200	Room 205
Group 300	Room 206
Group 400	Carrigan
Group 500	Room 300
Group 600	Room 301
Group 700	Wittmyer