



**2012 / 2013
MODIFIED RULES OF EVIDENCE**

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Overview of the Updates to the Modified Rules of Evidence for 2012/2013

The Modified Rules of Evidence have been updated in an attempt for the Mock Trial programs to mirror the National High School Mock Trial's program in relation to their use of the Modified Rules of Evidence.

Middle and High School versions of the Modified Rules of Evidence were recently merged together. Please read all rules for updates as they will apply.

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

2012 / 2013

MODIFIED RULES OF EVIDENCE ¹

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

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

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

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

ARTICLE I. GENERAL PROVISIONS

Rule 101 Scope

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

Rule 102 Purpose and Construction

These rules are intended to secure fairness in administration of trials, eliminate unjust delay, and promote the laws of evidence so that the truth may be ascertained.

ARTICLE II. JUDICIAL NOTICE

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

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

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

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

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401 Definition of Relevant Evidence

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

Relevant evidence is admissible, except as otherwise provided by these rules. Evidence which is not relevant is not admissible.

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) **Character Evidence Generally:** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- (1) **Character of Accused:** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the Prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2) (Character of Alleged Victim), evidence of the same trait of character of the accused offered by the Prosecution.
- (2) **Character of Alleged Victim:** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the Prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the Prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
- (3) **Character of Witness:** Evidence of the character of a witness as provided in Rule 607 (Who May Impeach), Rule 608 (Evidence of Character and Conduct of Witness), and Rule 609 (Impeachment by Evidence of Conviction of Crime).

- (b) **Other Crimes, Wrongs, or Acts:** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action conforms to character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405 Methods of Proving Character

- (a) **Reputation or Opinion:** In all cases in which evidence of character or a *character trait* is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, questions may be asked regarding relevant, specific conduct.
- (b) **Specific Instances of Conduct:** In cases where character or a character trait is an essential element of a charge, claim, or defense, proof may also be of specific instances of that person's conduct.

Rule 406 Habit; Routine Practice

Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization, on a particular occasion, was in conformity with the habit or routine practice.

Rule 407 Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

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

- (a) **Prohibited Uses:** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
- (1) Furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) Conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
- (b) **Permitted Uses:** This rule does not require exclusion if the evidence is offered for the purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or Prosecution.

Rule 409 Payment of Medical and Similar Expenses (*Civil Case Only*)
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410 Inadmissibility of Pleas, Plea Discussions and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against a Defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of nolo contendere;
- (3) Any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty which is later withdrawn.

However, such a statement is admissible:

- (1) In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought, in fairness, to be considered with it, or
- (2) In a criminal proceeding for perjury or false statement if the statement was made by the Defendant under oath, on the record and in the presence of counsel.

Rule 411 Liability Insurance (*Civil Case Only*)

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

ARTICLE V. GENERAL PROVISIONS

Rule 501 General Rule

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

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

ARTICLE VI. WITNESSES

Rule 601 General Rule of Witness Competency

Every person is competent to be a witness.

Rule 602 Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703 (Bases of Opinion Testimony by Experts), related to opinion testimony by expert witnesses. (See Rule 2.2 – Witness Conduct.)

Rule 607 Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

A video link showing [examples on how to impeach](#) can be viewed.

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

Rule 608 Evidence of Character and Conduct of Witness

(a) **Opinion and Reputation Evidence of Character:** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) The evidence may refer only to character for truthfulness or untruthfulness, and
- (2) The evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct:** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609 (Impeachment by Evidence of Conviction of Crime), may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

- (1) Concerning the witness' character for truthfulness or untruthfulness, or
- (2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 609 Impeachment by Evidence of Conviction of Crime
(this rule applies only to witnesses with prior convictions)

- (a) **General Rule:** For the purpose of attacking the credibility of a witness:
- (1) Evidence that a witness other than the accused has been convicted of a

crime shall be admitted, subject to Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time), if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

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

- (2) Evidence that any witness has been convicted of a crime shall be admitted regardless of punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.
- (b) **Time Limit:** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date; unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs the prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
- (c) **Effect of Pardon, Annulment, or Certificate of Rehabilitation:** Evidence of a conviction is not admissible under this rule if
- (1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or
 - (2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
- (d) **Juvenile Adjudication:** Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Rule 610 Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Rule 611 Mode and Order of Interrogation and Presentation

(a) **Control by Court:** The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to:

- (1) Make the interrogation and presentation effective for ascertaining the truth,
- (2) Avoid needless consumption of time, and
- (3) Protect witnesses from harassment or undue embarrassment.

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

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

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

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

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

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

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

A video link showing [cross examination examples](#) can be viewed.

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- (c) **Leading Questions:** Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
- (d) **Redirect / Recross:** After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on recross, but such questions must be limited to matters raised on redirect examinations and should avoid repetition.
- (e) **Permitted Motions:** The only motion permissible is one requesting the judge to strike testimony following a successful objection to its admission.

Rule 612 Writing Used to Refresh Memory

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

Rule 613 Prior Statements of Witnesses

- (a) **Examining Witness Concerning Prior Statement:** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
- (b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness:** Extrinsic evidence of prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2) (Statements Which Are Not Hearsay – Admission by a Party Opponent).

NOTE: Impeachment: On cross-examination, the attorney may want to show the jury and judge that the witness should not be believed. This is called impeaching the witness. It may be done by asking questions about prior conduct that make the witness' credibility (truth-telling ability) doubtful. Impeachment may also be done, if the witness' testimony warrants it, by asking the witness whether s/he has ever testified differently, then introducing the witness his/her signed and sworn statement. The attorney should ask the witness whether the statement was made under oath, at a time much closer to the events in controversy,

NOTE: Impeachment: (continued) and contained all that the witness could then remember. The attorney may then want to (1) leave the matter and point out on closing argument the contradiction between the statement and the witness' testimony (both of which were under oath), (2) ask the witness why his/her testimony is different today under oath than it was when it was under oath and much nearer in time to the events (this can be a dangerous question), or (3) ask the witness whether s/he was lying under oath when s/he gave his/her statement or lying under oath today (this can also be a dangerous question unless the contradiction is very clear, definite and material).

A video link showing [how to impeach examples](#) can be viewed.

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ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701 Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, the witness' testimony in the form of inferences or opinions is limited to those opinions or inferences which are

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

Rule 702 Testimony by Experts

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

Rule 703 Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

NOTE: Ask the witness about his or her qualifications. Then ask the presiding judge that the expert witness be qualified as an expert in the field of _____. The presiding judge will then ask opposing counsel if there are any objections. Either there will be no objections or there will be argument as to why the witness is not qualified as an expert. The presiding judge will rule if the witness is qualified as an expert. Prior to this ruling, the witness cannot provide any opinions and the attorneys should object to any attempts for the unqualified expert to render opinion testimony. Once the witness is qualified as an expert, the witness can only provide opinion that is within the witness' field of expertise.

Rule 704 Opinion on Ultimate Issue

- (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of the fact.
- (b) No expert witness testifying with respect to the mental state or condition of a Defendant in a criminal case may state an opinion or inference as to whether the Defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact to determine.

Rule 705 Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

ARTICLE VIII. HEARSAY

Rule 801 Definitions

The following definitions apply under this article:

- (a) **Statement.** A "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) **Declarant.** A "declarant" is a person who makes a statement.
- (c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- (d) **Statements Which Are Not Hearsay:** A statement is not hearsay if:
 - (1) **Prior Statement by Witness:** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is
 - (A) Inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, including a deposition, or
 - (B) Consistent with the declarant's testimony and is offered to rebut an expressed or implied charge against the declarant of recent fabrication or improper influence or motive, or
 - (C) One of identification of a person made after perceiving the person, or
 - (2) **Admission by a Party Opponent:** The statement is offered against a party and is: (next page)

- (A) The party's own statement in either an individual or representative capacity, or
- (B) A statement of which the party has manifested an adoption of belief in its truth, or
- (C) A statement by a person authorized by the party to make a statement concerning the subject, or
- (D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
- (E) A statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 802 Hearsay Rule

Hearsay is not admissible except as provided by these rules.

NOTE: *An example of hearsay is a witness testifying that he heard another person saying something about the facts in the case. The reason that hearsay is untrustworthy is because the opposing side has no way of testing the credibility of the out of court statement or the person who supposedly made the statement. Although hearsay is generally not admissible, there are certain out of court statements which are treated as not being hearsay and there are out of court statements that are allowed into evidence as exceptions to the rule prohibiting hearsay.*

A statement, which is not hearsay, is: *omissions made by a party opponent.*

For the purposes of the Mock Trial competition, there are exceptions to the hearsay rule, which will be allowed.

Rule 803 Hearsay Exceptions, Availability of Declarant Immaterial

A video link showing the [hearsay exceptions](#) can be viewed.

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The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

- (1) **Present Sense Impression:** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

- (2) **Excited Utterance:** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) **Then Existing Mental, Emotional, or Physical Conditions:** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

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

Emotional State: "I'm scared."

Physical State: "I have a headache."

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

- (4) **Statements for Purposes of Medical Diagnosis or Treatment:** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **Recorded Recollection:** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) **Records of Regularly Conducted Activity:** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) **Public Records and Reports:** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth
 - (a) The activities of the office or agency, or
 - (b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or
 - (c) In civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority

granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

- (8) **Learned Treatises:** To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.
- (9) **Reputation as to Character:** Reputation of a person's character among associates or in the community.
- (10) **Judgment of Previous Conviction:** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not on a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

Rule 804 Hearsay Exceptions Where Declarant Unavailable

- (a) **Definition of Unavailability** - "Unavailability as a witness" includes situations in which the declarant
 - (1) Is exempted by a ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
 - (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
 - (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
 - (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
 - (6) Is exempted by a ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (b) **Hearsay Exceptions** - The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
 - (1) **Former Testimony:** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an

opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

- (2) **Statement Under Belief of Impending Death:** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
- (3) **Statement Against Interest:** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) **Statement of Personal or Family History:**
 - (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or
 - (B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) **Forfeiture by Wrongdoing:** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 805 Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

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

Rule 105 Limited Admissibility

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

Rule 106 Remainder of Related Writings or Recorded Statements

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

Rule 603 Oath or Affirmation

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

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

A video link showing the [bailiff opening court](#) can be viewed.

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

Rule 901 Assuming Facts Not in Evidence

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

Rule 902 Argumentative Questions

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

Rule 903 Ambiguous Questions

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

Rule 904 Lack of Proper Foundation

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

PROCEDURE FOR OBJECTIONS

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

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

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

Following are examples of standard forms of objection:

1. **IRRELEVANT EVIDENCE:** "I object, your Honor. The evidence/testimony is irrelevant to any issue in this case."
2. **LEADING QUESTION:** "Objection. Counsel is leading the witness."
(NOTE: Remember that an attorney may ask leading questions when cross-examining the opponent's witnesses.)
3. **IMPROPER CHARACTER TESTIMONY:** "Objection. The witness' character or reputation has not been put in issue." OR "Objection. Only the witness' character for truthfulness is at issue here."
4. **HEARSAY:** "Objection. Counsel's question is seeking a hearsay response."
(NOTE: If the witness makes a hearsay statement, the attorney should say, "The witness' answer is based on hearsay, and I ask that the statement be stricken from the record.") In responding to a hearsay objection, it may be appropriate for counsel to point out a specific exception, or to argue that the hearsay rule does not apply: "Your Honor, the testimony is not offered to prove the truth of the matter asserted, but only to show. . . ."
5. **OPINION:** "Objection. Counsel is asking the witness to give an expert opinion for which he has not been qualified."