

WITNESS EXAMINATION

Handbook

Presented By The UTS Law Students' Society

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Witness Examination competitions can revolve around either a civil or criminal case. In order to win a civil case, counsel for the plaintiff must prove, on the balance of probabilities, that his/her client's report of the facts is true. If counsel for the defendant prevents counsel for the plaintiff from achieving this, counsel for the defendant wins. In contrast, criminal cases require counsel for the prosecution to prove that the elements of the offence have been satisfied beyond reasonable doubt.

The Law Students Society offers Junior and Senior levels of Witness Examination competitions, held in second and first semester respectively. Witness Examination cases are based on the areas of Criminal Law and The Law of Torts.

Participating in the Witness Examination competition develops an understanding of the rules of evidence, court etiquette, logic and argumentations skills as well as advocacy and communications skills. Students may also elect to volunteer as a witness for the senior level of competition held in semester one each year, which would give an insight into understanding the way a Witness Examination competition is held.

How do Graduate Attributes fit with UTS LSS Competitions?

Competitions run by the UTS Law Students' Society provide an ideal opportunity to put your legal skills into practice and demonstrate the values you have been exposed to throughout the course of your law degree so far.

In witness examination, the focus is on active listening, quick thinking and the ability to adapt your approach to an unpredictable flow of answers and events, teasing out key testimony and turning it to your advantage – ethically and effectively.

How does a good lawyer deal with clients and witnesses?

"[With] a dose of telepathy! You need to be a bit of diplomat. The job of a solicitor is often negotiating between parties who just can't speak to each other, or witnesses who don't want to be involved. Having a good way with people is important."

Danielle Gatehouse. Lawyer, Australian Government Solicitor

What are graduate attributes?

Graduate attributes are the characteristics and qualities, skills and capabilities possessed by students by the time they complete their UTS:Law degree.

Why do we have them?

Because being a successful law graduate in today's world requires more than just knowing the law and how to apply it.

Graduates need to be able to think critically, to analyse information and its source, to behave professionally and to manage work and life priorities in an effective manner.

Graduates need to be ready to thrive and survive in a workplace that is more technologically dependent and rapidly changing than ever before.

As with all forms of education, there is no guarantee that you will leave university a 'model graduate.' What UTS seeks to do throughout your degree is to give you every opportunity – via your classroom exchanges, assessment, extracurricular activities such as these LSS competitions and other initiatives - to develop the intrinsic skills and values unique to a university experience and demanded by employers in a competitive job market.

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In other words, you are developing:

- 1. Critical Thinking**
- 3. Spoken & Written Communication**
- 7. Ethics**
- 9. Cultural Awareness & Global Outlook**

Below is a brief explanation of each attribute. For a more in-depth exploration, please refer to: www.law.uts.edu.au/students/ga.html

Being a Critical Thinker

A person proficient in this attribute can identify and apply themselves to problems, and create new or imaginative perspectives or solutions.

A critical thinker evaluates information by breaking it down and examining its component parts, or takes dispersed, disconnected ideas and information and synthesises them, or creates something new from them.

To critically analyse something requires independent thinking and creativity. It involves making a judgement as to the position adopted or rejected, and backing it up with evidence from the synthesised material.

Being an Advanced Communicator

Advanced communicators are highly effective in using the English language to convey legal ideas and views to different audiences and environments. They use their communication to inform, analyse, report and persuade.

They understand the purpose of their communications, and strategically select the appropriate medium and message.

They notice how their message is received and alter their strategy accordingly.

They are ready to communicate if there has been a miscommunication, and their focus is on correcting the miscommunication rather than looking at who is to blame for it.

Being an ethical professional

An ethical professional is honest, open and self-critical with a deep ethical sense of and commitment to professional responsibility. The ethical professional strives for intellectual and professional integrity; respects the principles, disciplines, values and ethics of the legal

profession; possesses a capacity to value and promote honesty, accountability and ethical standards; acknowledges personal responsibility for value judgements; cultivates a sense of social responsibility and appreciation for cultural diversity; and demonstrates leadership capacity to advocate for justice.

Being culturally and globally aware

A culturally aware person understands that people spring from a variety of ethnic, cultural, religious, political and economic backgrounds, and there are differences between the genders, age groups, and with those who face disadvantages and disabilities. They also understand that their intellectual viewpoints, be they on law or on life in general, will not be shared by all others, and that being open to intellectual diversity can enrich their own intellectual understanding of the world.

Global outlook requires a state of mind that is capable of thinking outside the domestic law square. This requires an appreciation of global interconnectedness through knowledge of public, private and comparative international law.

Rules

- 2.1 The championship consists of one practice, two preliminary rounds, quarter finals, semi finals and a grand final.
- 2.2 If an odd number of teams enter the Championship, one bye per round is declared. The bye is allocated randomly. A competitor with a bye will be awarded the average mark scored by that competitor in the other rounds for the bye. A bye will not count for or against.

- 2.3 At the end of the preliminary rounds, each competitor's score is totalled and their win/loss ratio calculated.
- 2.4 The eight competitors with the highest win-loss ratio will progress to the quarter-finals.
- 2.5 In the event that two competitors only have tied win-loss ratios, and the two teams have faced each other in the preliminary rounds, then the winner of that round shall proceed to the quarter-finals.
- 2.6 If the two teams referred to in 2.2.5 have not faced each other, or there are more than two teams with tied win-loss ratios, the team or teams will progress to the quarter-finals on the basis of the highest average winning margin as a proportion of the highest score. A team's 'average winning margin as a proportion of the highest score' is to be calculated by, for each trial, dividing the margin (positive for winning margin, negative for losing margin) by the highest score in that trial, and multiplying by 100.
- 2.7 If the teams remained tied, the teams will progress based on a coin toss conducted by the Competitions Director.
- 2.8 Competitors will receive their materials 90 minutes before the commencement of the judging. The allocation of that time will be as follows: 60 minutes to review the problem; and 30 minutes to interview the relevant witness.
- 2.9 Materials given will consist of: The statement of their witness; The statement of the opponent's witness; The relevant section of any Act(s).
- 2.10 All questions, regardless of whether in a preliminary or final round, may be based on either criminal or civil law trials.
- 2.11 The applicable law for the championship (including the rules of evidence) is that of the jurisdiction in which the Conference is held.
- 2.12 At the completion of each round the judge must not disclose the results to the competitors. Marking sheets are to be handed directly to the championship co-ordinator or the appropriately appointed person(s).
- 2.13 Witnesses are to be supplied by the competitors.
- 2.14 There is one prosecutor or counsel for the plaintiff and one counsel for the accused or defendant and competitors are randomly allocated sides.
- 2.15 No re-examination will be allowed.

Introduction and Purpose of this Guide

- 1.1 This Guide is not a textbook, written by theorists. It is the combined effort of a group of witness examiners with a combined experience of ten or so years in witness examination competitions, mock trials, and, in some cases, actual court advocacy. We've learnt (often the hard way, through in-court humiliation), the practical information and knowledge needed to survive witness examination.

1.2 If you're looking for long, boring, theoretical explorations of advocacy, you're looking in the wrong place. The entire point of this guide is to make sure that you know what you're doing, and most of all, derive some sense of achievement when you crush your colleagues' cases like so much tissue paper, or make a witness cry.

1.3 This Guide will explain:

- What is Witness Examination, and why should I do it?
- What is the procedure in a Witness Exam?
- How do I win a Witness Exam?
- Is there anything else you might care to tell me while you're here?

What is Witness Examination?

- 2.1 A very good approximation of a witness examination can be found in any episode of vanilla *Law and Order*.
- 2.2 At heart, a witness examination is a very structured storytelling session, with the witness being the storyteller, the court being the audience, and the advocates being the censors of the storyteller. It is basically the trial of a person charged with an (usually minor) offence.
- 2.3 The job of a witness examiner (you!) is to make sure that your witness tells their story well enough and convincingly enough to the court to be able to make evidence from this story. It is also your job to make sure that the opposing side's witnesses do not tell a story that the court will believe, either through Objections, or from Cross Examination.
- 2.4 This evidence will go to either proving the commission of a crime, or that the crime did not occur.
- 2.5 This is the competition that looks most like the stereotypical Lawyers in Court scene on TV. Very few practicing lawyers actually have the guts to stand up in court and speak. Most write motions on pieces of paper which they make multiple copies of and then pulp. Most lawyers are simply too *scared* to speak in court. The wish to be an advocate, therefore, puts you in a select crowd.

The Procedure of a Witness Exam case

- 3.1 Procedure is Important in Witness Examination, and is NOT to be taken idly. The whole reason why witness examination is so artificial and structured is to make sure that the person on trial receives a fair trial and that the advocates are acting professionally.
- 3.1.1 It also makes it easier for the judge to know what is going on.
- 3.1.2 A Witness Examination is structured as follows:
- 3.1.2.1 Appearances- The Judge will ask for appearances. The Prosecutor will stand, say "My name is X and I appear for the Prosecution in the matter of *case name.*" and then sit. If required, spell your name for the judge. The Defence Counsel will then do the same.
 - 3.1.2.2 Opening Address- Prosecution- 2 minutes
 - 3.1.2.3 Examination- Prosecution Witness by the Prosecution- 10 minutes
 - 3.1.2.4 Cross Examination- Prosecution Witness by the Defence- 15 minutes
 - 3.1.2.5 Opening Address- Defence- 2 minutes
 - 3.1.2.6 Examination- Defence Witness by the Defence-10 minutes
 - 3.1.2.7 Cross Examination- Defence Witness by the Prosecution- 15 minutes
 - 3.1.2.8 Closing Address- Defence- 3 minutes
 - 3.1.2.9 Closing Address- Prosecution- 3 minutes
- 3.1.3 Court advocates should note that the order in which closing addresses occur is slightly different from real life. This is because in real life, there is a presumption of innocence in favour of the accused, and real life criminal court rooms are not meant to be fair to the prosecution. The defence should always have the last word. In the witness exam competition, however, the prosecution may have some spare time to consider and write their closing remarks while the defence makes their closing remarks, in the interests of fairness.
- 3.1.4 You should also remember that you don't have a chance to re-examine a witness (or redirect, as is the Americanism.)

Court Etiquette

- 3.2 This Competition is based on etiquette in the Local and District Courts of New South Wales. Ignore it at your peril.
- 3.2.1 Always wear business attire in court. Judges actively begin to dislike you if you wear loud, obnoxious, or clearly unfit clothing. "Business Casual" is not acceptable in higher levels of competition, although clearly there is some leeway depending on the intensity of the level of competition.
- 3.2.2 If you are in a court room, there is actually no set rule as to where you are meant to sit as long as you are seated at the bar table. Only advocates should sit at the bar table. For anyone who is interested, prosecutors in the Local Court will sit at the right of the bar table and be on the judge's left.
- 3.2.3 If you are not in a courtroom, there will usually be two tables forming the "bar table." Advocates and witnesses will be able to sit at the tables.
- 3.2.4 It is not necessary in witness examinations (but it is in court) for any person who enters a court room to bow to the judge in session. If you frequent court often, it is not a bad habit to cultivate. It is not, contrary to what some think, necessary to bow to the crest. It is merely a sign of respect to the judge. You do not need to bow to an empty court room.
- 3.2.5 Refer to the Judge as "Your Honour." Your opponent is not "my opponent," but "Counsel for the Prosecution" or "Counsel for the Defence" or "my learned friend" if you are being wanky. You should be able to say "Mr/Ms LastName" but that is a little informal.
- 3.2.6 Similarly, no matter how much any court officer or opposing lawyer annoys you, *never* get angry or defensive with a judge or another lawyer, and *always* refer to them with appropriate respect. Judges in the witness exam competition are actually being nice; judges in real life are far meaner. It's really not a personal affront.
- 3.2.7 Always stand up when you are addressing the court. That means if the judge asks you a question, you must stand up to answer it. If you make an objection, you must stand up and stay standing until the objection has been dealt with.
- 3.2.8 Conversely, if you are not addressing the court, you must sit down. If your opponent makes an objection, you must sit down until it is your turn to speak again.
- 3.2.9 DO NOT walk around the courtroom when you are addressing it or examining a witness. Stay behind the bar table at all times, in one place.
- 3.2.10 Fidget and grandstand as much as you like, but remember that the judge will be distracted by your histrionics, which is not what you want.
- 3.2.11 The judge is allowed to interrupt you at all times and for whatever reason. It is not acceptable to tell the judge to "wait til I finish."
- 3.2.12 It is OK to confer with your witness while the other party is in the middle of their examination in chief, but do so quietly and discreetly, so that you do not distract the judge, other witnesses, or the other counsel. If a judge notices that you are conferring with your witness and tells you to stop, you are not being discreet enough.

Before the Witness Exam

3.3 Before you witness, you need to work out what it is you are going to be arguing.

- 3.3.1 All competitors receive their questions approximately one and a half hours before they are due to compete. In some competitions, it is one hour.
- 3.3.2 You will be assigned the prosecution or the defence.
- 3.3.3 The question consists of a law, a prosecution witness statement, and a defence witness statement. The law will always consist of the offence, and the elements of the offence. For example, from s18(1)(a) of the NSW crimes act:

“Murder shall be taken to have been committed where **the act of the accused, or thing by him or her omitted to be done, causing the death charged,**

was done or omitted with **reckless indifference to human life, with intent to kill or inflict grievous bodily harm upon some person...**”

In less verbose terms:

Murder consists of the following elements:

1. Act or omission by the accused causing death (Causation + Actus Reus)
2. Intent to kill or inflict Grievous Bodily Harm OR reckless indifference to the actions causing death (Mens Rea)

It is the advocate's responsibility and duty to work out what the elements of the offence are. Sometimes the judge may not agree, as some judges are well experienced criminal law barristers and judges.

- 3.3.4 The prosecutor's job is to show that, based on the evidence of prosecution and defence, the elements of the offence set out in the law have been made out.
- 3.3.5 The defence's job is to show that based on the same evidence, the elements of the offence have NOT been made out, or in rare cases, that the defendant has a legal defence to the offence.
- 3.3.6 Prepare all your questions on the basis of the TWO statements that you have received. The question you should always ask yourself is, “What story do I want this witness to tell?”
- 3.3.7 The statements consist of various pieces of evidence. They tell a story of what happened. Every witness exam will be set up such that there will be pieces of evidence that go to supporting or disproving that the accused committed some element of the offence. So if a part of the statement says, “I saw A plunge a knife into B,” it goes to the element of murder in the “Actus Reus” as outlined above.
- 3.3.8 Thirty minutes before the competition, you will be introduced to your witness. This person will have read their statement and awaits your instructions as to what to say or not say in relation to their statement. Brief them as to how you want them to act.

Statements and how they work

- 3.4 You'll note that you get a set of statements when you get your question. There are two statements. One is by one of your witnesses, the other is by the witness for the other side. They detail the information that your witnesses have seen or perceived.
- 3.4.1 According to the witness examination competition rules, those statements technically "do not exist." This means that if a witness does not say something that is on the statement, what is on the statement cannot be adduced as evidence.
- 3.4.2 At the same time, a witness cannot directly contravene what is said on their statement. If the statement says "I went to my house" on witness A's statement, Witness A cannot say that they did not go to their house. However, Witness B is free to say that Witness A did not go to their house.
- 3.4.3 **DO NOT TELL YOUR WITNESS TO WILFULLY CONTRAVENE ANYTHING ON THEIR STATEMENT.**
- 3.4.4 If a witness directly lies, there are two ways you can go about it- you can either say to the judge that the "Witness is contravening their statement," or you can be really awesome and do the following:
- 3.4.4.1 Tell the witness "I will show you a document." Hand them their statement.
 - 3.4.4.2 Ask the witness what the document is, making sure that they identify it as a statement "they made" and for what reasons.
 - 3.4.4.3 Take the witness to the offending paragraph, and then ask them to read it out.
 - 3.4.4.4 Ask the witness which version of events is correct.

Opening Address

- 3.5 Now we get to the nitty gritty of the witness exam. In the opening address, both sides seek to explain their story to the court, the evidence they will be using, the legislation framing the offence that is in front of the court, and the elements that the judge will need to determine that make up the offence.
- 3.5.1 Your opponent is not allowed to object to anything you say during the opening, although the judge may.
- 3.5.2 You have two minutes to make your opening arguments. Make sure they count.
- 3.5.3 In your address, you want to explain, as prosecutor:
- 3.5.3.1 What crime is being discussed in the court today
- 3.5.3.2 The elements of that crime (for example, larceny requires that a person take an object, and intend to deprive its owner of the object, and not honestly believe that the object was theirs. Thus the elements are "Moving, Intention to Deprive, and Lack of Honest belief in ownership")
- 3.5.3.3 What pieces of evidence will prove that crime. For example, in the larceny case above, that the person "was seen taking the object by a security officer," that "the person walked out of the shop in which he took the object past the cashiers," and that "they put the object into their bag, outside of view." These things all go to show the elements above.
- 3.5.3.4 Make sure you are clear and concise and the judge knows what pieces of evidence he or she will be looking out for.
- 3.5.4 In your address, you want to explain, as defendant:
- 3.5.4.1 What element of the crime you are fighting (In the above example, if your witness says that they had paid for the object, say that there was no intention to deprive, and there was an honest belief in ownership.)
- 3.5.4.2 What evidence proves either your case (In the above case, "my client paid for the object," and that "they put the object into their bag)
- 3.5.4.3 What evidence you will adduce that proves the fallacy of the prosecution's case (that "the security officer didn't see the client pay for the object,")
- 3.5.4.4 What your defendant actually did, in story form.

Examination in Chief

3.6 Examination in chief lasts for ten minutes. In this situation, the counsel calls *their* witness and asks them questions about the matter.

3.6.1 The important point is that you must ask non-leading questions in examination in chief when you are discussing matters in dispute. Asking a leading question is objectionable.

3.6.2 What is a matter in Dispute? A matter in dispute is simply a fact or event that the parties disagree as to what happened, or is related to the central events of the case. For example, in the larceny case above, what the Officer used to observe the defendant is a matter in dispute. The Officer's experience in security is a matter in dispute (as they relate to his competence.) The officer's address is NOT a matter in dispute. You can ask leading questions about matters not in dispute in chief as much as you like.

3.6.3 What is a leading Question?

3.6.3.1 A question that assumes the existence of certain state of affairs- for example, asking "So what did you do after murdering the victim?" is a leading question.

3.6.3.2 A question that suggests to the witness what the answer should be (generally speaking, a question that elicits an answer "yes" or "no.")

3.6.3.3 It is NOT an objectionable leading question to ask a leading question that clarifies something the witness has said. For example, if a witness says that "He was only wearing one shoe," it is perfectly acceptable to ask "Why did you know he was only wearing one shoe?" as it is no longer leading; whereas if you had asked that question first it would have been unacceptable (assuming the state of affairs.)

3.6.4 Knowing that you can't ask leading questions, what questions should you ask?

3.6.4.1 You want the witness to tell their story, in their own words, of what happened.

3.6.4.2 Why, what, where, and how are important words. You want the witness to *describe what happened, explain what they perceived, explain why they saw what they perceived.*

3.6.4.3 To that end, it is perfectly acceptable to get a witness to *clarify* what they've said. Asking questions once a witness has mentioned something to describe that something are perfectly acceptable.

3.6.5 The general outline of an examination in chief:

3.6.5.1 Ask the witness their name and address.

3.6.5.2 Ask the witness what they do for a living.

3.6.5.3 If you are intending to use their expert status for evidentiary purposes, ask the witness about the qualifications, job experience, and what they did in that experience.

3.6.5.4 Take the witness to the incidents described in the statements ("I'll take you to the day in question. Tell the court what happened on that day.")

- 3.6.5.5 Ask the witness to explain the things they've seen ("You mentioned that the person you saw hid the object they took. What did you mean by that?") Remember that these questions are to provide the evidence to help prove or disprove the elements that you've stated in your opening address.
- 3.6.5.6 Only ask questions about incidents and things that the witness has said that help provide the evidence that prove or disprove elements in your case.
- 3.6.5.7 When you're done, say "No further questions, your honour" and sit down. It is perfectly acceptable to sit down before your 10 minutes is up.

Cross Examination

3.7 Cross examination lasts for up to fifteen minutes. In this situation, the counsel “for the other side” will ask questions of the witness that the other side has called. So, a defence counsel will cross examine all prosecution witnesses, and prosecution counsel will cross examine all defence witnesses.

3.7.1 Leading Questions- In Cross Examination, ALWAYS ASK LEADING QUESTIONS! This may seem a little odd considering that we’ve been telling you not to do so in examination. It’s not. In this instance the witness is technically “hostile,” and so will be thinking of ways to thwart you. It is absolutely necessary to lead the witness and the court expects you to do so.

3.7.2 In a corollary, unless you really know what you’re doing (and in junior wit ex you don’t, trust us), NEVER ASK A NON-LEADING QUESTION in Cross examination. It’s not a rule, but it might as well be.

3.7.3 What questions should I ask?

3.7.3.1 In Cross Examination, you are asking questions that go to show that the witness is stupid, inobservant, lying, or is otherwise unreliable as a witness.

3.7.3.2 Having heard the examination in chief of the witness, you will want to Cross examine on certain pieces of that examination in chief. You’ll note that the important pieces of evidence underpinning the case of the other side are the ones you should cross examine on. (For a prosecution counsel, the evidence of the defendant that attacks one of the elements of your own case- for a defence counsel, the evidence underpinning the elements of the offence the prosecution is trying to make out.)

3.7.3.3 To do so, you want to ask “a series of questions,” known in the parlance as a “line of questioning.” This is to start from a series of basic propositions or assumptions, setting up your answers from the witness such as to ask one “final question,” which goes to show how silly the witness sounds. For example, if you want to show a witness had no intention of paying for a particular object they took, you don’t ask straight out, “you had no intention of paying for that object, did you?” You first ask, “You took the object from the shelf, yes?” “You then walked past 5 sets of cashiers on the way out, yes?” “None of those cashiers was busy, were they?” “You walked out the store, didn’t you?” THEN you ask, “you had no intention of paying for that object, did you?”

3.7.3.4 Do not, however, ask the question that gives the witness a chance to explain their answer. In the above example, the last question has the slight possibility of being answered with, “I did, because I had a receipt and had paid for it earlier.” Some “final questions” leave this distinct possibility open. Some people recommend not asking that final question in order to save having that answer thrown in your face.

3.7.3.5 For example, if as defence, your witness’ statement differs significantly from the prosecution witness statement and you intend to adduce what your witness has said to court, you must ask questions about those events to the prosecution witness. For example, if your defence witness says that the prosecution witness could not have seen him because the prosecution witness was blindfolded at the time, you must ask the prosecution witness whether he was wearing a blindfold.

Closing Arguments

- 3.8 Closing arguments take about three minutes. Generally speaking, this is where your debating skills ought to come in. As long as it is well structured, you will not have to discuss much law or statute.
- 3.8.1 Note that at any time, the judge may ask you questions. You may not tell them to wait or let you finish speaking. If your judge also judges moots, they may even ask you a few questions about the elements of the law in the case and how the evidence you've led relates to those elements of law. Simply answer them as best as you can; a good impression helps, a poor impression doesn't hurt you, so don't feel worried by these questions.
- 3.8.2 The defence goes first (In a bizarre twist on court procedure- normally the defendant always gets the last word.) The defence should explain:
- 3.8.2.1 What evidence has been adduced;
- 3.8.2.2 Whose evidence should be more believed;
- 3.8.2.3 What elements of the offence made by the prosecution fail to have been proved because the evidence adduced is insufficient;
- 3.8.2.4 How the defence has effectively attacked any or all the elements of the offence with the evidence adduced, or created a defence.
- 3.8.3 The prosecution should then explain:
- 3.8.3.1 What evidence has been adduced;
- 3.8.3.2 Whose evidence should be more believed;
- 3.8.3.3 What elements of the offence made by the prosecution have been proven *beyond a reasonable doubt* (Even if you haven't, just say you have.)
- 3.8.3.4 How the defence has not disproven any part of the offence, nor created a defence based on the evidence.
- 3.8.4 To finish, both counsel should say, "if I may be of no further assistance to the court, this completes the prosecution's/defence's submissions on the matter." This is based on the polite fiction that lawyers are members of the court and are in fact officers of the court who are there to help the court come to the right decision.

How do I win a witness exam?

- 4.1 If you get the procedure correct, you will do pretty well at witness exam. Winning and conclusively winning a witness exam requires more work. You will need to know what evidence adduced by the other side is unacceptable, and how to make your evidence part of a cohesive argument.
 - 4.1.1 It's not as hard as you think. Strategy and tactics are a part of witness exam, just as they are a part of actual court procedure. It takes experience to know what tools to use, and how to use them. We've detailed some of these tools below; play with them.
 - 4.1.2 **Objections-** Both counsel need to know what objections there are to evidence, in order to filter out unacceptable material.
 - 4.1.3 **Case Theory-** Both counsel need to know how to convert their evidence from the statements and the evidence of the witnesses into the stories they both want to tell the court. This is known as Case Theory.
 - 4.1.4 **Expert Evidence-** Counsel may want to use Experts to explain what conclusions should be made from the evidence led by a witness.
 - 4.1.5 **Lines of Questioning-** How to sound awesome and engage in some forensic questioning while you're at it.
 - 4.1.6 **Building a Model-** The Prosecution needs to build a model for their case, and prove each element for the crime they have been given.
 - 4.1.7 **Attacking a Model-** The Defence needs to know how to muster evidence to attack a case, and therefore disprove the chosen element according to the facts.

Objections to Evidence

- 4.1.8 Some evidence or narrative of a witness is objectionable; this means that in the interests of fairness, it should not be allowed into the story that the court makes when it gathers its evidence.
- 4.1.9 Objections either relate to questions (The question asked is unfair in some way) or to the evidence “adduced” by a witness (The witness has no right to say what they said as proof of a fact or event.)
- 4.1.10 Do not be afraid to object. If you think a piece of evidence is objectionable, stand up and object. You will not only learn more about the law of evidence, you will earn points with the judge for interacting with them in such a well spoken manner.
- 4.1.11 If you let objections pass, you are not impressing the judge. They will simply assume you are too stupid to pick up that the question or evidence is objectionable.
- 4.1.12 At the same time, you have to develop an ear for when to object. Some judges might hate objections to minor problems (for example, the “First Person Speech” objection.) Others might want you to object to everything. Sometimes the objectionable material *actually helps you*, either by making the other side’s evidence and case stupid, pointless or illogical, or by proving your own case.

Making an Objection

- 4.1.13 It is necessary to know how to make an objection just as it is to know when to make one.
- 4.1.14 To make an objection, stand up and say to the judge, “I object,” and then state the basis of what you are objecting to (eg. “I object, your honour, on the basis of Hearsay.”) None but the very most pedantic of judges will correct you if you use the Americanism “Objection” but some do. Remember that.
- 4.1.15 The Judge will ask you to sit down (unless they want an explanation as to where you find the alleged hearsay etc. in the question) The judge will expect the other counsel to respond to the objection. If you have been objected to, explain why the question you asked is acceptable, or if the evidence adduced by the witness is acceptable. If you can’t, then admit that you will “withdraw” the question, or “rephrase” the question if you still want to ask a question down that line of reasoning.
- 4.1.16 The judge may decide to ask more questions of both counsel. When they are satisfied, the judge will either overrule the objection or sustain the objection. If you think the judge is blatantly wrong, you may “press your objection” but always be polite and respectful. If the judge still insists, say “if the court pleases,” admit defeat for the moment, and sit down. There’s a reason why there are appeal courts.

The Objections

4.2 Some of these objections have exceptions. They will be noted where possible. If you like, print these pages out and have them on you at the witness exam.

- 4.2.1 **Hearsay-** The evidence which the witness has just given is that “A has told me that B did or said something.” This is not acceptable unless:
- 4.2.1.1 The witness was there themselves and is merely recounting what they saw or perceived about B;
 - 4.2.1.2 The person A was talking about themselves and about how they felt.
 - 4.2.1.3 The witness made that statement not to prove that A did or said something, but for some other reason (for example, “B told me that A killed someone, which made me very nervous,” is simply an explanation as to why they felt nervous, not that B killed someone.) There are other complex interactions with other parts of evidence law that fall under this section but it is highly unlikely that you will encounter these in a witness exam.
- 4.2.2 **Opinion-** Either the advocate has asked an opinion of the witness “Do you think A is a bad person?” or the witness has ventured an opinion about something- “I think a reasonable person would stay behind after crashing into someone!” This is not acceptable unless:
- 4.2.2.1 The witness is an expert or has some experience in the field in which they are giving an opinion (eg, a police officer is entitled to give an opinion about police procedure or whether it is acceptable for a police officer to act in a certain way)
 - 4.2.2.2 The witness is offering an opinion that a random person in the street could give a very definite opinion on based on what they saw or perceived (Basically, speeds, brightness of lights, facial expressions, how loud something is, etc. so “It was very loud!” is an acceptable opinion but “He ought to pick up the trash he dropped” is not.)
- 4.2.3 **Calling for Speculation-** The advocate has asked that the witness speculate about a certain series of facts or events, eg “Is it possible that a person could murder someone with a knife?” is calling for speculation. Witnesses are only there on the stand to explain and describe what they saw or perceived of the incident, unless they are experts.
- 4.2.4 **Relevance-** Evidence which is relevant is any evidence that would directly or indirectly affect the determination of a fact or a matter in dispute, or in simpler terms, anything which would have some rational connection with determining a case is relevant. Thus, whether a person is violent is relevant in a murder case, but is irrelevant in a stealing (larceny) case. Irrelevant evidence is unacceptable.
- 4.2.5 **Asked and Answered-** If an advocate has already asked a question to which the witness has answered, asking it again repetitively is grounds for objection.
- 4.2.6 **Badgering, Harassing or Oppressive questioning-** Advocates are not meant to make witnesses cry (Although some of us have, to spectacular and often winning effect.) Shouting, yelling, and being pointlessly aggressive to a witness (For example, telling a witness they are a liar) are all grounds for objection. There is a difference between being unrelenting and a complete dick.
- 4.2.7 **Question is Erroneous-** A question which is based on something factually incorrect or inconsistent with agreed facts or just adduced evidence is erroneous and grounds

for objection eg. after being told the sky is blue, the advocate asks, "So did you see anything on the horizon in the green sky?"

- 4.2.8 **Confusing Question-** If a legally trained advocate doesn't understand a question the other is asking, odds are the witness isn't going to get it either. Confusing and multiple questions (asking more than one question at a time) are unacceptable and grounds for objection.
- 4.2.9 **Tendency/Co-incidence-** An advocate must not introduce evidence that tries to copy the *modus operandi* of a crime as proof of the crime currently in front of a court. For example, a prosecutor must not ask a witness if they have been found guilty of a previous crime, nor can they draw the inference that because the actions of the witness are very similar to a previous crime, that the witness is guilty of that crime.
- 4.2.10 **Character Evidence-** The prosecution must not adduce evidence or ask questions about the character or law abiding nature of a defendant unless the defendant has done it themselves. So, it is not acceptable to ask about a previous conviction a defendant may have unless the defendant has said that they are a law abiding person and would never get in trouble with the law.
- 4.2.11 **Speech not in First Person-** When a witness is relating evidence relating to conversations they directly saw or perceived, the court prefers if the speech was in first person. Hence, instead of saying "He said he would go to his house," the witness should say "He said, "I'm going to go home.""
- 4.2.12 **Prejudicial to the point of rendering the answer useless-** Asking a witness if they are a liar is pointless and prejudicial and has no bearing on the case. Similar questions, such as asking whether the witness is a drug user, has a job, is gay etc. fall under this section.
- 4.2.13 **Leading Question in Examination in Chief-** Refer to "Examination in Chief." A leading question in examination in chief is not acceptable. Of course, in cross examination all questions really should be leading questions.
- 4.2.14 **The Evidence was not adduced at Evidence in Chief (The "Browne v Dunne Rule")-** This rule has made many a defence counsel weep. It is a rule of evidence that if a defence counsel wants to ask questions that paint a certain picture of events, they must put that version of events to the prosecution witnesses, as far as they can comment about it. For example, a case relates to a series of events that occurred in a room. The prosecution witness has commented that they walked in the door and saw what happened. At Cross examination, the defence counsel has asked no questions about the room. At the examination of the defence witness, the counsel asks questions and adduces evidence that there was more than one door in the room. The questions and evidence relating to the second door are not acceptable and are objectionable.

Case Theory

- 4.3 Case theory is a complex term for a very simple concept- What story do I want to tell the court? It is also surprisingly hard to place within the artificial constraints of a court. To do so, follow this simple guide:
- 4.3.1 Most basically, you want to take the statement of the witness and turn it into a narrative that you intend to give the court as to what exactly happened. So if you have a statement of a police officer observing someone taking a bag from a shelf at Myer, seeing that person put the bag under their clothes, and then walk out the store without stopping at a cashier, the case theory is that the accused took the bag, hid the bag under their clothes, and then walked out of the store with no intention of paying.
- 4.3.2 Why have a case theory? The case theory provides the evidence that will help make up the elements of the crime that you are discussing in the case. Reducing it into a story not only makes it easier for the judge to know the sequence of events that he or she can find the elements from, it makes it easier for you to know what questions you will want to ask to bring out the evidence you want.
- 4.3.3 **Use the case theory to make your questions-** If you know that you absolutely have to make sure that, using the stealing example, “the accused walked out the door past the cashiers without paying” in order to prove that the accused “had intention to permanently deprive the victim,” then your questions and details you need to fill out will relate to the case theory. “How big are the doors? How long is the cashier? Is the cashier spacious? Were there people attending the cashier?”
- 4.3.4 A witness exam is at heart a consideration by the judge whose case theory is better, or more believable, or more likely.
- 4.3.4.1 As a result, asking questions that reinforce the narrative you’ve given to the court make your case theory more believable and therefore win you witness examinations.
- 4.3.4.2 It is also necessary to undermine the narrative the other side is trying to set up through your cross examination. If you can show that the other side’s recollection of events is faulty, could not possibly have occurred, or is not detailed enough, you will also win the witness examination.
- 4.3.4.3 Details are vitally important. It is from details that you build an unassailable picture of what happened, or provide a way for an opponent to use the details you’ve given, or lack of details, to paint a very different picture of what happened. If you are leading evidence, always make sure to pack as much important detail as possible into evidence- if you’re trying a car accident case, the makes of cars, the roads markings, lighting, heaviness of traffic, the directions the vehicles in the accident took... witness examinations hinge on grasp of details.

Expert Evidence

- 4.4 Courts in real life often have recourse to experts. These people are, because of their training, skill, and expertise, allowed to advance opinions that may be led in evidence.
- 4.4.1 Experts are often useful if you want to ask various questions that require that a witness’ opinion about something is placed onto the record. Since you are only allowed to call one witness in the competition, that witness is the only person who can also be your expert.

- 4.4.2 It is perfectly OK to make your witness an expert in something not explicitly stated in your witness statement, as long as it does not contravene it, but of course, some fields of expertise are more believable than others. A police officer can have 15 years experience in forensics, be a crack shot, be trained in highway pursuit and vehicle mechanics, but will have a harder time convincing the court that he is also a qualified brain surgeon.
- 4.4.3 Experts are asked about various circumstances around a set of events, so they may give answers about those events. So for a police officer, he may be asked about arresting procedures. A store security officer can explain about security procedures, surveillance, or even how busy a store can get at certain times. A motor mechanic may explain about how the suspension set up of a car could affect handling.
- 4.4.4 To advance your witness as an expert in the field, during examination, ask them, while you are introducing them to the court, what they know about the subject you want their opinions on. An expert has had significant training or experience in the subject, and you require more if you want more expert opinion. For example, a store security guard of 6 months' experience would be able to validly discuss standard arrest procedures at a store they work at; they would not be able to discuss whether the store has become busier over a period of years (They weren't there!)
- 4.4.5 witness examinations at UTS are full of erudite, well learned and knowledgeable witnesses able to give valid opinions on bullet ballistics, psychiatric treatment therapies, motor vehicle safety standards, and even (in a celebrated case) prehistoric aboriginal tribal customs in a very specific part of western New South Wales. Use them! They allow you to craft the evidence of your witness and show whether the evidence led in the statements could lead to proving or disproving the elements of an offence.

4.4.5.1 An example:

"You've said you are a traffic policeman of 10 years experience in vehicle collision forensics. How far would a stock standard Toyota Camry of the same make as the accused's travelling at 50kmh take to stop if brakes were applied?"

"I'd say... about 50 metres."

"How far did the car actually go?"

"Something like 150 metres."

"Was there anything special about the accused's car?"

"No. I inspected it at Forensics."

"So what speed would it be travelling when the brakes were applied?"

"Probably 70kmh."

"What's the speed limit of the road the accused's car was on?"

"50kmh."

The expert has led evidence that the accused's car was over the speed limit. If the witness was not a vehicle forensics expert, he would not be able to make any observation about the projected speed of the car versus the distance it has actually gone.

Lines of Questioning

4.5 We've already discussed this very briefly in Examination and Cross examination. A Line of Questioning is a series of questions designed to elicit certain answers from a witness.

4.5.1 Lines of Questioning usually come from Cross Examinations, although it is also evidence in examination in chief.

4.5.2 Lines of Questioning arise from conclusions you want to draw from the evidence. Because there is nothing stopping a witness from lying (in real life, or not contrary to their statement) it is necessary to ask preparatory questions to finally elicit the final answer.

4.5.3 A conclusion can only be reached with the support of various facts. The trite and obvious conclusion that "it's fine weather today" is supported by the facts that:

1. The sky is clear.
2. Cloud cover is sparse.
3. The sun is shining.

4.5.4 If it can be conceptualized, a line of questioning functions as thus:

Establish Fact → Establish another Fact → Establish another Fact → Conclusion that can be logically reached from the establishment of all the facts.

4.5.5 So you can see that people make these logical conclusions every day and without thinking about it. So moving it to a criminal law case simply requires you to think about the final conclusions that you want to make- that an element of a crime has been committed, or on the defence, that it has not been committed, or that the witness did not properly witness the events that occurred.

4.5.6 So here's an example: Counsel is handling a larceny case, and wishes to lead into evidence the conclusion that the accused had no intention of paying for an object in a store (An element of larceny). They are cross examining the accused:

"You had the item in your hand?"

"Yes."

"You had \$20 on you?"

"Yes."

"No Credit Card?"

"No Credit Card."

"The Price of the item is \$50, isn't it?"

"Yes."

"Let's talk about the layout of the store. You picked the item up at a display, yes?"

“Yes.”

“You moved toward the exits?”

“Yes”

“The cashiers are at the exits, aren’t they.”

“Yes.”

“You’d have to walk past them to get out, wouldn’t you?”

“Yes.”

“And you walked straight past them without paying, didn’t you?”

“Yes.”

Read that? A bit of practice: Work out what the *conclusions* are to the facts elicited. There are two.

Building a Model

- 4.6 The prosecution must do the following things- Detail the elements of the offence the accused is charged with, and then adduce the evidence. There is a very easy way to do this.
 - 4.6.1 Building your case model- distinct from your case theory, the case model consists of:
 - 4.6.1.1 The offence (Let's say larceny)
 - 4.6.1.2 The elements of the offence (Taking, Deprivation, no belief it is yours)
 - 4.6.1.3 The evidence used to prove the elements of the offence (The person took the object, the person did not pay, the person admitted they had not paid.)
 - 4.6.2 In order to prove the offence, you must find the elements of the offence. In order to find each element of the offence, you must find the pieces of evidence that support that element. As you can see from the above, there is a logical progression from the evidence, to the elements, to the offence.
 - 4.6.3 Your questions must adduce that evidence from the witness at the bottom, and do not proceed unless you have adduced that evidence! If an element fails because you did not adduce that evidence supporting that element, you cannot make out the crime and you cannot prove your case. You also tend to lose witness examinations that way.
 - 4.6.4 A Legal Defence also consists of the defence, its elements, and the evidence to prove those elements. For example:
 - 4.6.4.1 Self Defence (The Defence)
 - 4.6.4.2 The Elements (An otherwise proven murder or assault, a subjective and honest belief they had to defend themselves, and the act of defending themselves the way a normal person would have.)
 - 4.6.4.3 The evidence. In this case, a defence counsel would have to prove that there was already an otherwise proven murder (which the prosecution is hardly going to disagree with), that the accused honestly believed they had to defend themselves (For example, the victim lunged at them with a knife) and that the act of defending themselves was essentially reasonable (the victim was a 50 kg woman being attacked by a large mugger who wanted to kill her.)
 - 4.6.5 Proving a defence is no different to proving the commission of a crime.

Attacking a Model

4.7 Similarly, a counsel also has to know how to attack a model. Usually, only the defence will have to attack a model, but if the defence raises a Legal Defence, the prosecution has to know how to knock down a defence.

4.7.1 If we use the model from above:

4.7.1.1 The Crime- If you don't have the elements, you cannot make out the crime

4.7.1.2 The Elements- If you don't have the evidence, or the evidence there is seems to point against the element being fulfilled, you can't prove the element.

4.7.1.3 The Evidence- If you show that the pieces of evidence that support an element are false, the other side cannot prove an element and therefore cannot prove their case.

4.7.2 So what you have to do is to either ask questions that nullify the evidence adduced that support an element, or adduce evidence that negatives the element. In example, for a stealing case, you can ask questions about what the prosecution witness adduces (For example, that the police officer didn't really see what was going on; what he saw was fleeting and in a large mass of people, what happened was far away.) or you can adduce your own evidence (For example, ask your witness that you had bought the object and have the receipt.) Both of these lines of questioning will successfully negative some element of the crime, and therefore "attack the model."

4.7.3 It takes a while and practice to get the hang of the above. Don't feel discouraged if you don't get it at first. It is a simple case of proving things by logic and evidence, and as a result it is quite easy to get a hang of, since we do that naturally all the time in everyday life. The trick is to make these arguments through the indirect means of choosing the right Lines of Questioning.

Little Things that don't fit anywhere else

- 5.1 **What's the difference between a Defence and "Attacking the case of the prosecution?"**- This is a good question. In criminal law, it is necessary for the prosecution to firstly prove their case. They do so by proving the elements that make up the crime they are charging the defendant with. A defence lawyer can do one, or both: either assert and prove that the prosecution has not made out one of the elements of the offence, or argue that if the charge has been made out, the defendant acted in a way that is excused by law. The latter option is known as a defence. If we take the crime of murder, a defence is that you did the murder in self defence. Not making the crime out would be to plead that you didn't in fact commit the murder.
- 5.2 **How do I deal with a mean judge?**- This question has plagued the authors for a while. There is a general consensus that at no point should an advocate get angry, nor should the advocate break down (mean judges can smell fear and weakness.) It is perfectly acceptable for an advocate to press an objection or argument, but at all times you must remain respectful. Do not raise your voice. *A judge is not being mean simply because they ask lots of questions. They are probably actually trying to help you out.* Listen to what they say, and answer them candidly and honestly, and you will do fine. Also do not confuse a judge genuinely but erroneously believing something false with a personal slight against you.
- 5.3 **My case is unfair!**- you might think that you can't win a case because it's absolutely obvious that you can't convict the defendant, or the defendant is so obviously guilty. That's OK, because that's not the point of the witness exam. The judge is judging your skills, not the actual case, and as a result there is no problem with you winning or losing "the case." Indeed, a properly made witness exam question will be almost impossible to prosecute successfully in a real court. And what can be more wonderful, as an egomaniac lawyer, than winning an "unwinnable case?"
- 5.4 **What do I wear in Court?** This is a good question. One author's personal opinion is "Whatever you can get away with wearing meeting a client at Freehills." (A large law firm) While this is a high standard, it is NOT in fact as high a standard as you need to be to turn up at the Supreme Court. They have to wear the wigs etc. Local Court advocates generally keep their jackets on while speaking- for you, it is really up to you whether you want a jacket on or not.
- 5.5 **Stop being so serious about it!**- No one is going to jail because you screwed up a witness examination. You're not getting paid, either, and neither is the judge. Go with the flow and enjoy wit ex, because it has all the fun of being on *Law and Order* with none of the downsides of doing a bad job.