

# TRY MOCK TRIAL: PART III -- WHO GOES WHERE?

by M. Donna Ross

*Prosecutor's Wife at dinner: Did you have a big, complicated legal battle in court today?*

*Prosecutor: No, just a little plain-tiff.*

Sign-ups are over. You've auditioned or "know" the talent you have to work with. Isn't it about time to read the case? Skim it twice. Don't even try for an exhaustive analysis. Visualize witness possibilities. You probably won't have to think too hard. There are always three witnesses. They nearly always represent three categories (listed from most to least important).

1. Big Yahoo (that's the defendant or respondent on defense and the key witness or plaintiff on the other side).

2. Big Mouth (that's the expert witness or at least the one that seems to know it all).

3. Little Sidekick (that's often a character witness and many times may be a liability to the side he's supposed to be testifying for).

Since the case writers try to make most characters playable by witnesses of either sex, they are all named Pat, Lee, and Chris.

The most logical thing to do is pick your best attorney material, so naturally I always start by casting the witnesses. Consider these reasons. First, think evaluators. Most of your judges will be attorneys in private practice. They tend to be overly impressed with good witnesses--probably because they are so burdened by their own clients' lack of acceptable looks and speech. They tend to undervalue attorneys--probably because they are comparing the high school students to themselves -- so obviously no one can really measure up. Second, while a good attorney can speak effectively in a number of slots, only witnesses can speak eloquently merely by walking to the witness chair. Try casting witnesses by these criteria:

1. Can the witness be appealing? Even hard-boiled professional witnesses will sell their testimony when it's topped with a liberal dollop of charm.

2. Can the witness present the character in a way that says what you want said? To illustrate, I once cast a student who was a high school junior as defendant in a murder case. (The student was five 'one' and weighed 101 pounds--in a wet parka.) He was accused of drowning his wife and 10-year-old son while on a camping trip. We never once mentioned his size; yet at every trial, the evaluators brought up one thing. He did not look as though he could drown even a blind and rather tired kitten. So, try casting against type and for sympathy.

3. Consider the order for witnesses testimony. Will the witnesses be able to complement each other? While your first order consideration has to be how best to tell the story, don't forget egalitarian concerns. Diversity in sexes and races can only redound to your favor.

To order witnesses, the first must tell the basic story. Bury your weakest, most boring, least important or least controversial one in the middle. Aim to have the greatest appeal in the last witness. That appeal can be emotional or logical or both.

For student attorneys, start at the end of the trial and try to match student jobs to each student's best skills. Place your very best debate rebuttalist in the clean-up spot of **closing**. This student must be able to recognize and answer key arguments, sell your own key points **and** be persuasive and slow. Now consider who is best at **cross-x**. Give that person the most crucial or the most complex cross-x. Often, this will be a cross of an expert. Next, you will need someone good at cross but also "sensitive" to deal with any potentially sympathetic witness such as a defendant. Now, consider who would be your best orator to give the **opening** statement.

It took me a three years to figure this next bit out; but once I did, I was able to save myself a lot of time and confusion. Since you must divide the eight duties equally; with three attorneys, you're best off to

have each do a cross and a direct (after choosing who's to open and who's to close). Even with four attorneys if you follow the pattern of having 2 **different** tasks, you will have greater flexibility when changes become unavoidable later.

Do not think that I find **directs** unimportant. They are the key to being understood and being understood is the key to success. But, you have total control over directs. You can rewrite questions to make them close to objection-proof, and you can prepare the witnesses to the *nth* degree which gives even novices a good level of comfort and self-confidence. Besides, when you put off deciding who does which direct until last, the choices usually work themselves out without much added brain-drain.

Another consideration is how well your pairs of examiners and witnesses fit together as a team. If they are close friends, they will spend more time together and present a much more unified appearance than if they don't get along or if they seldom see each other.

One good ploy is to have any given attorney do the direct of one witness and either play that witness or cross that witness on the other side. Not only does the attorney really learn the testimony--usually word-for-word--but also he has to examine it as it looks from both sides. By the time he has done that, he won't have missed very much.

When posting the trial assignments, try also posting other attorney duties. Assign them to the student who best suits each one. For "head counsel" choose someone charming; for "procedure" choose someone analytic or knowledgeable about the law; for "exhibits" choose someone well-organized and trustworthy with detail; and whoever is left keeps time. With 3 attorneys, the "exhibits" person keeps time.

Here is a sample posting:

## Mock Trial Attorney Duties

Notations: The numbers by the names of the attorneys indicate additional duties for each:

1. Head Counsel (THE

STYLES): Follows protocol. He introduces himself and his teammates to the judges and evaluators and shakes hands. He also does introductions with opposing counsel and includes witnesses. He asks for premarking of exhibits (and "publishing of exhibits if that is needed). He thanks the judge and evaluators at the end. He smiles a lot.

2. Timer (THE DIALS): Keeps time for all presentations and objects when the other side is 30 seconds over.

3. Exhibits (THE FILES): Keeps all copies of exhibits, 5 clean copies of each labeled in folders for:

- self
- opposition
- judge
- evaluator
- evaluator

(Note: these last two may be used only if we ask the judge to publish to the jury and the judge agrees. In actual trials, the juries are allowed to examine the evidence only later in the jury room. In mock trial, jury deliberation will never happen; so sometimes the judge will allow jurors to handle "published" copies of exhibits. Ask **only** if you really need the evaluators to see the exhibits up close. You can also remind the judge that mock trial does not allow you to enlarge exhibits or use slides which would make the mate-

rials easy for all to see.) Be sure to retrieve the exhibits at the end of each trial and to refile.

4. Procedural objections (THE WILES): objects whenever the opposition's procedure is faulty. Call bench conferences as necessary. (These often are on account of excessive embellishment--Here's what we do--Noting that all our witnesses are to be completely straight and conservative. They are to stay entirely within their testimony on direct. On cross, when asked about anything not in the testimony, they have liberty to make up just about any answer that helps our side if they stop short of actually making the trial itself seem useless. If the opponents object (on embellishment), explain that the cross examiner forced the witness to make something up since the information requested is not covered in the stipulated facts or his witness testimony, (thus, the questioner opened the door). So we can't be faulted for embellishment. Consider the unfairness of the questioner if we should be penalized for embellishment. Either he gets an answer he likes (which is good for him) or he accuses us of embellishment (which is also good for him). Even if we refuse to answer, he still wins since we look stupid or afraid to say anything. Appeal to the court's sense of fair play--the other guys are the tricky ones--not us.

### All Attorneys

Each attorney (from direct) is responsible for protecting his own witnesses. Each attorney (from cross) is responsible for keeping out undesirable testimony from the witnesses he will cross-examine and will also generally harass the opposition when the time is ripe.

*(Mary Donna Ross has coached champion Mock Trial teams at Parkway-Central (MO) H.S. She is co-host of the 1998 St. Louis Nationals.)*

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*(Davis from Page 23)*  
'substantially' terms in the resolutions, buddy? It's how I can still get into the debate."

"You don't mean--"

"Yes. I now live under the power of the House of T! And everyone knows, we are the only arguments more important than disads. And next thing you know, you'll see me in a kritik."

He smiled as he raised his topicality blocks to return me to dreamland. "Isn't it ironic? One guy with a name you can't pronounce has to die to bring on someone else who can't spell!"

And he dropped his arguments.

*(Bill Davis coaches at Blue Valley, (KS) and writes this regular Rostrum column.)*