



Judge's Handbook 2020



ONTARIO BAR ASSOCIATION
L'ASSOCIATION DU BARREAU DE L'ONTARIO
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1. Summary of Materials

The Ontario Bar Association and the Ontario Justice Education Network would like to thank you for participating as a judge in this year's mock trial events.

Along with this handbook, you should also have:

- The case, *R v Kaye*, which takes the form of sworn witness statements, and exhibits
- The Legal Guidance Memo
- The OOCMT Official Rules, which are the rules that govern the tournament

It is absolutely crucial that you review the materials thoroughly before the day of the event. Familiarizing yourself with the materials should take about 90 minutes.

Unlike a real trial, mock trial judges need to read the witness statements to be able to effectively evaluate the students' presentations. This handbook contains a brief "quick reference" guide to some of the most important rules and features of the mock trial.

2. The Day of the Mock Trial

1. Please Print: It would be appreciated if you are able to print out and bring a copy of this handbook, the case scenario and the Official Rules with you to the event. A few extra copies will be on hand for those without easy access to a printer. Score sheets will be provided: the sheets included with the handbook are samples for your reference.

2. Court Dress: If at all possible, please wear court robes to the event, as it adds a certain air of ceremony to the proceedings. If you do not have robes to bring, please inform your local tournament organizer in advance so that arrangements may be made if possible. Robes are not required to judge, but organizers may be able to have extras on hand.

3. Your Role

Your role is to **preside over the trial, score teams' performances in their roles, and provide constructive feedback.**

1. Panel Judging: In many cases, you will sit on a panel with one or two other judges. You will all preside over the trial together. You will make rulings collectively, and the common practice if a ruling is required on an objection or a matter of procedure, etc., is to briefly confer amongst each other. This usually presents no problems, as those less experienced in criminal procedure will always sensibly defer to those on the panel who are more experienced.

2. You have a dual decision-making role: You will render a brief "verdict" of guilty or not guilty, *and* score the teams on their performances: The students will want to know what the "real world" result in this case would be, so the verdict is important but should be very brief: just lay out the key points that led you to convict or acquit. Your panel is free to give a split decision if you feel differently about the verdict.

You will also fill out the score sheet and the judicial remarks sheet based on the students' performances, in accordance with the marking scheme. Your panel can choose either to fill out these sheets separately or jointly, unless told otherwise by your tournament organizer.

If you fill out separate sheets, the scores will be averaged together. Be mindful that time is short: only fill out joint sheets if you are in total agreement as a panel, as debating the exact scores to give out jointly can take up more time than simply filling out separate sheets and having the scores averaged together.

Whether or not you would convict or acquit is a *separate* issue from how you score the teams. Acquittals are fairly common in mock trials because the parameters of the exercise allow for a lot of reasonable doubt to emerge (for example, only a small number of exhibits and witnesses are permitted, although you may wish to take this into account when determining your "verdict").

Therefore, in order to ensure fairness, teams are scored on how well they performed their roles under the conditions of the tournament, not the “verdict”.

2. Students appreciate constructive feedback: The students who participate in competitive mock trials are usually very keen and mature, and you do not have to feel that you cannot give critical feedback. In many cases the teams will go on to another round and will appreciate tips on how to improve. At the same time, the students have worked very hard and the competition can be stressful, so please be sensitive to that fact.

The most effective way to give feedback is to give your verdict with some brief reasons, then proceed to highlight the key strengths and weaknesses of each team’s presentations. There is rarely enough time to give detailed feedback to each student (see the next note on time restrictions). While you will not disclose the scores you gave to the teams, the most helpful thing you can do is give feedback on the main aspects of the trial that impacted the scores (e.g. a particularly strong cross-examination, a key aspect of a team’s theory that worked or didn’t, etc.). Take care not to make it obvious which team got a higher score.

3. Keeping to time is crucial: After the teams give their closing statements, judges have 15 minutes reserved for deliberation and 10 minutes in which to give feedback. It is very important that you keep to these timelines. Otherwise, subsequent trials may be delayed and the whole event impacted negatively. If you have any additional time remaining before the round is scheduled to end, you may use it, but the round must end on time.

It is also important that students keep their submissions within the allotted time frames (see time chart in section 5). There will be timekeepers in each round. You do not need to keep time. The timekeeper will hold up a sign to indicate that time is up. Most students will see that and ask for permission to finish a thought or a question, and you may allow them to. However, in fairness to the other team you should not allow any

counsel to go substantially over their allotted time unless there is a very good reason to do so.

4. You need to manage the trial: The students will often be very deferential to you, and most won't just begin their submissions without you asking them to. Please refer to the time chart in this guide, which will show you the phases of the trial, step-by-step. Call on the students each time a new phase of the trial is reached.

5. Dealing with objections: Students may be flustered by an objection from the other side. If an objection is made, ask the objecting counsel to state their case, and then be sure to give opposing counsel an opportunity to respond. If the student who is speaking does not seem able to effectively respond to the objection, it is acceptable for another member of their team to respond. Make sure both sides have had their chance to be heard before making a ruling. The clock stops for objections, so you can take your time without cutting into the students' time for submissions.

The appropriate use of objections, and the ability to respond to them, are key items you should look for when scoring teams (under the "Knowledge of Law and Procedure" section of the marking scheme).

6. Questions during the trial: Questions to counsel should be kept to the closing arguments only, at which time it may be appropriate to ask some questions, which should always be to help you better understand students' submissions – not just to "test" them arbitrarily. At all other times of the trial, any questions or interventions should only be asked in the context of a need to manage the trial.

Please note that judges' interventions and students' responses stop the clock and therefore add to the time required to complete the round.

4. Highlights from the Tournament Rules

Please do read through the Official Rules, but below are quick references to some of the most common rules issues and items that are specific to the mock trial context.

Quick Note	Rule Number
<ul style="list-style-type: none">• Before the trial begins, teams must provide you with their "roster", showing the names of all the students, and what roles they are playing. Make sure you have that before you begin.	8
<ul style="list-style-type: none">• Counsel should set out the elements of the offences in question and be able to apply the relevant legal tests to the issues. However, teams are not to cite case or statute law by name, apart from the sections of the <i>Criminal Code</i> provided with the case package. It is always assumed that any <i>Charter</i> issues have been resolved pre-trial.	19
<ul style="list-style-type: none">• Teachers and lawyer coaches may not advise their team while a trial is under way.	23
<ul style="list-style-type: none">• Only the exhibits included in the case package may be entered in evidence. Teams bring their own copies of the exhibits, and the first copy entered becomes the "real" exhibit for the round. Enlargements of the provided exhibits are permitted, with restrictions.	31, 32
<ul style="list-style-type: none">• Witnesses can be called in any order, but each side must call both its witnesses.	34
<ul style="list-style-type: none">• Motions to dismiss the proceedings or exclude witnesses are not allowed. It's not a lot of fun to sit in the hallway for most of the trial, and the witnesses are integral members of the team who should be able to watch the whole trial. Do not make an order to exclude witnesses.	35

<ul style="list-style-type: none"> • There is no right to redirect/re-examination, and judges should not offer this. There is simply not enough time available. 	21
<ul style="list-style-type: none"> • Witnesses must give testimony that is consistent with the sworn statements that are provided. They must not contradict, unfairly extrapolate or unfairly omit facts in a way which negatively impacts the mock trial. 	40, 41, 42
<ul style="list-style-type: none"> • Witnesses can be played by students of any gender, and teams cannot make an issue of gender or a team referring to the witness by one gender or other. 	36

Other key points about the rules:

1. Inconsistent testimony [Rules 40-42]: Allegations that a witness’s oral testimony unfairly deviates or contradicts their sworn statement is a common source of conflict in mock trials.

Teams are to deal with this by cross-examining the witness. This can lead to a situation where a witness is “impeached” when the examining lawyer points out the inconsistency between their oral testimony and their sworn statement. “Impeachment” within the mock trial is meant to be a simple procedure where the examining lawyer asks the witness questions and possibly brings the sworn statement up to them to clearly point out the inconsistency.

It is important to pay attention for any cases of witness “impeachment”. If a witness is caught contradicting their written sworn statement, it could be a very serious issue, or a very minor one. Counsel may also try to impeach a witness when they haven’t really deviated unfairly from their sworn statement – they are permitted to “extrapolate” and expand on their sworn statement to some degree. One of the most common mistakes that students make is to try to impeach a witness based on something a *different* witness said. Deliberate unfairness is the crucial thing to look out for. If you feel that a

witness has been deliberately unfair under the rules, their score should be substantially reduced to reflect this.

2. Dealing with rule violations: Teams should address any alleged rule violations before the trial begins to tournament organizers, who are better placed to deal with such issues [Rule 46]. Teams are also instructed to only raise alleged rule violations during the trial when absolutely necessary [Rule 47], in which case they may rise on a “special objection” [Rule 44]. Ask the student to direct you to the section of the rules to which they are referring, and give the other side an opportunity to respond, just as you would for a regular objection. Use the rules and your best judgment to deal with the issue. Most issues can likely be dealt with easily in the moment, with you taking the issue under advisement for a discussion with tournament organizers during your deliberations. Please do notify the organizers of any serious issues so that a consistent approach can be taken to alleged rule violations.

5. Evidence and Procedure in the Mock Trial Context

1. Note the evidence and procedure directions specific to the case: Appendix II of the *R v Kaye* case package contains the provided exhibits, with directions on how teams can use them.

2. Use and entering of exhibits: Teams are expected to bring their own copies of the exhibits. Counsel who wish to use an exhibit must enter it into evidence in the usual way, by establishing a foundation for the exhibit. The first time an exhibit is entered, the copy that was entered becomes the “real” exhibit, and subsequent counsel will need to ask for the exhibit from the court clerk in order to put it to a witness.

3. Exhibits not yet in evidence: Sometimes, students will forget that an exhibit they are referring to has not yet been entered into evidence. If they do, remind them that what they are referring to is not in evidence and suggest that they enter it. You should consider the ability to properly enter and work with the exhibits in scoring the performances.

4. Entering photo exhibits: The team entering photos does not have to prove that they have not been altered or tampered with. Counsel is only required to lay a standard evidentiary foundation for the photos by having them verified under oath by a person capable of doing so. Photos are routinely used in place of what would actually be physical items in a real case.

5. The rule in *Browne v Dunn* should not be strictly applied: The rule in *Browne v Dunn* (1893) 6 R 67 (HL) requires counsel to put a matter to a witness where counsel intends to present contradictory evidence on the same matter through a later witness. It would be unfair to apply this rule during a mock trial, especially since a different student on a team does each examination. Please do not disallow any questions to a witness or entertain objections on the basis of *Browne v Dunn*.

Please do, as the marking scheme requests, take into account the overall coherence and coordination of the case theory a team advances through their questioning. Following the rule in *Browne v Dunn* may reflect well on the coherence of team's presentation. However, we aim to avoid over-complicating or impeding the flow of the trials.

6. Objections: Any objections that would be allowed in a real court (and which are not otherwise disallowed by the rules) may be allowed in the mock trial.

6. Mock Trial Time Chart

	Segment	Conducted by	Time (in minutes)	Notes
1	Preliminary matters	Judge(s) & Clerk	5	Introductions, read charge, enter plea, etc.
2	Opening statement	Crown	4	N/A
3	Direct examination of first Crown witness	Crown	10	For direct of <u>both</u> Crown witnesses
4	Cross-examination of first Crown witness	Defence	10	For cross of <u>both</u> Crown witnesses
5	Direct examination of second Crown witness	Crown	Remainder of 10 for direct examination	Subtract time used for direct of first Crown witness from 10
6	Cross-examination of second Crown witness	Defence	Remainder of 10 for cross-examination	Subtract time used for cross of first Crown witness from 10
7	Opening statement	Defence	4	N/A
8	Direct examination of first Defence witness	Defence	10	For direct of <u>both</u> Defence witnesses
9	Cross-examination of first Defence witness	Crown	10	For cross of <u>both</u> Defence witnesses
10	Direct examination of second Defence witness	Defence	Remainder of 10 for direct examination	Subtract time used for direct of first Defence witness from 10
11	Cross-examination of second Defence witness	Crown	Remainder of 10 for cross-examination	Subtract time used for cross of first Defence witness from 10
12	Preparation for closing arguments	Crown & Defence	2	Counsel may confer amongst themselves
13	Closing arguments	Defence	5	N/A
14	Closing arguments	Crown	5	N/A
15	Recess for judge's deliberation	Judge(s)	15	N/A
16	Delivery of verdict and feedback	Judge(s)	10	N/A
	Total		90	Trials may take longer

				depending on time stoppages
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7. Scoring and Judicial Remarks

Attached to this handbook, you will find:

- A sample of the score sheet you will use to score the teams
- The marking scheme
- A sample of the “Judicial Remarks Sheet” you will use to make brief written remarks explaining your reasons for the verdict you reached and key points on the performances of the teams

How to Fill Out the Score Sheet

1. Guide to score ranges: All the categories are scored out of 10. As you can see, the descriptions on the marking scheme represent a standard corresponding to 7 to 8 out of 10. Use that standard as your starting point for scoring in each category. Go category by category, and ask yourself:

Did the performance in the category...

- **Meet the standard described? = 7 to 8/10:** If the performance was mostly to the standard, but a bit lacking on one or two points, that would be a 7. If it was very solidly to the standard, that would be an 8.
- **Exceed the standard? = 8.5 to 10/10:** If you are satisfied that the performance met the standard and went beyond it, score 8.5 and higher. But, to give a score of 10, you need to be convinced that there was essentially nothing else that the student/team could have done better in that category.
- **Fall below the standard? = 5 to 6.5/10:** If the performance was below the standard on more points than it met the standard, then you’ll score 6.5 or 6. Score 5.5 or 5 for performances what were well off the mark.
- **Fall well below the standard? = 0 to 4.5/10:** The scale is out of 10, just as marks in school are out of 100%. So, this is a “fail”. Marks in this range are for where there are major problems with a performance. To score in this range, performances will have been very disorganized and difficult to follow, have really

failed to engage with the facts and relevant law of the case, or made crucial errors. There may also have been issues of discourtesy, rudeness, etc.

2. Please follow the marking scheme: Scoring is inherently subjective. It's up to you to determine what score to give in each category. What helps ensure some consistency in scores is that judges use the marking scheme to assess quality of the performances in line with a basic standard. The system is fatally undermined if one judge sets a floor of "8", while another judge sets "8" as their ceiling.

Don't be afraid to score too high or too low – just be sure that you are giving an honest assessment in line with the criteria provided. Look at the baseline standard (7 to 8/10), and work up or down, thinking about how the standard may have been exceeded or not met.

3. There is no "winner" or "loser" in the preliminary rounds: Each team will play two rounds of mock trial, and their average score across both rounds will determine their ranking in the tournament and whether they advance to the next stage. You score the teams against the marking scheme, and two strong teams can be equally rewarded for strong performances, even though one team may score slightly higher than the other. This is why it is crucial to follow the marking scheme. Being overly generous or overly stingy with marks in your round may unfairly disadvantage teams playing in other rounds where the judge followed the marking scheme if you did not.

You will naturally compare two teams in a round to each other, but be careful not to simply mark one team a mark higher or lower in direct comparison to their opponent. For each team, ask yourself how they lived up to the standard. It's entirely acceptable for two teams to be very close in scores or very far apart if you are basing your scores on the criteria.

4. It's a good idea to note down "preliminary" scores on scrap paper throughout the trial: Judges have found this to be extremely helpful when the time comes to give "official" scores on the score sheet. You will have had a lot of information to process, so

noting your initial thought as to a mark for each examination and witness performance as you go along really helps when it comes time to deliberate and finalize scores after the trial.

5. Please do not give the score sheets to teams or tell them who “won” at the conclusion of the round.

6. You don’t need add up the individual scores: You can fill in your scores in the categories and leave the “Subtotal” and “Grand Total” fields blank. Tournament organizers will tally the subtotals and totals.

7. Half-marks are permitted (e.g. 7.5, etc.), but no other fractions (.25, .75, etc.).

8. In any rounds subsequent to the preliminaries (i.e. semi-finals, and finals), one team does need to win the round: You can choose whether you want to fill out the score sheet, or just be guided by it. At this stage of the competition, it’s just a matter of picking the strongest team. Some judges do still find it helpful to use the score sheet to help them differentiate one team as the winner. It’s up to you. If you’re on a panel, you can reach a consensus or, if necessary, the majority rules.

How to Fill Out the Judicial Remarks Sheet

The Judicial Remarks sheet is designed to focus in on the most key reasons behind your assessment of the trial, because there simply is no time to write extensive written feedback. The aim is to provide some context to accompany the scores. It may also help you to organize your oral feedback.

1. Reasons for your verdict: Remember that the verdict you come to should have no bearing on the scores for the performances. However, the students really like to know what you thought. Typically, a panel will agree on the verdict and have one member deliver it. A dissent is also acceptable, since then both teams feel like they got something.

2. Comments on performance and arguments: Take a moment to summarize the whole round, and think about the points that really stuck out for you. This is an opportunity to provide students with a bit more information to help them understand the scores you gave them. You don't have to give three points of both strength and weakness: give as many as apply (up to three maximum), and make sure they were key points related to the team's overall performance: things like a team's case theory, use of evidence, lines of questioning, etc. Things that only relate to one or two students should be left for oral feedback.

Panels will often fill out a single judicial remarks sheet based on common impressions. However, if you are far apart in your assessment of the round, it is better not to fill out a joint sheet, as settling on common comments will be more time-consuming than filling them out individually.

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