FAMILY LAW MOCK TRIAL: ROLE PREPARATION

OJEN ROEJ
ONTARIO JUSTICE EDUCATION NETWORK
RÉSEAU ONTARIEN D'ÉDUCATION JURIDIQUE

For each OJEN Family Law Mock Trial, there are three packages:

» **Mock Trial Scenario**

» **Role Preparation Package**

» **Justice Sector Volunteer Package**

Youth need the **Scenario** and **Role Preparation** packages.

Justice sector volunteers/ teachers/organizers need all three packages.

PREPARING FOR A MOCK TRIAL

Mock trials are designed to help you learn more about the justice system. Many of you may have some idea about what a family trial is from what you have seen on television or in movies. Some of what you have seen might be accurate, but a lot of what is shown in courtroom dramas is not. In an actual trial many witnesses say things that are not planned, and lawyers have to think quickly on their feet.

Now is your moment to try out playing one of the many important roles in the family trial process. Get into character and have fun with it. Those of you who are lawyers and witnesses will have a lot of work to do up front. Others who are judges and court staff will play an important role on the day of the trial.

DIFFERENCES BETWEEN CRIMINAL, CIVIL AND FAMILY TRIALS

There are many differences between civil, criminal and family trials. The type of trials usually seen on television and in movies are criminal. In criminal trials, the Crown Attorney (or prosecutor) acts as an agent for the government to try someone accused of a crime (such as robbery or murder). In a criminal trial, the Crown must convince the judge or jury that the accused is guilty *beyond a reasonable doubt*.

Civil trials, on the other hand, revolve around a dispute between two (or sometimes more) private parties called the plaintiff and the defendant. Here, the courts are stepping in to try to resolve a private dispute. The goals of civil law are to:

- Compensate (with money) a victim of a private wrong;
- Condemn unfair or unjust conduct;
- Punish the person that injured the other person; and
- Deter other people from acting this way in the future.

Unlike criminal law, which addresses the innocence or guilt of someone accused of a crime, at a civil trial the issue is whether one party is *liable*, or responsible, for the injury of the other party. In determining whether a party is liable the judge or jury must be convinced *on a balance of probabilities*. This standard is not as high as criminal trials, where the standard is *beyond a reasonable doubt*. To meet the "balance of probabilities test," the judge or jury must think it is more likely than not that the party is responsible for the damage caused.

Although juries are rarely used in civil trials, they may be used in certain cases. A civil jury consists of six jurors rather than twelve jurors as in criminal juries. Unlike a criminal trial where all members of the jury must agree on a verdict, a civil jury only needs five of the six jurors to agree on a decision. The primary role of the jury is to determine whether or not damages should be owed to the plaintiff.

Family Trials are different from both criminal and civil trials in that they revolve mainly around the divorce or separation of a married or common law couple, and involve issues related to:

- Child custody and access;
- Spousal and child support;
- Division of family assets;

- Treatment of a matrimonial home;
- Enforcement of child support payments;
- Child protection; and
- Adoption.

The standard of proof for family cases is like that of civil trials, which is on a balance of probabilities. The judge tries to best resolve the issues.

OVERVIEW OF A FAMILY LAW CASE

Once a dispute comes before the court, the manner in which it's resolved is determined by the rules of the court. There is one set of rules that apply to all family law cases in Ontario – the *Family Law Rules*. There are three courts that deal with family law cases, all of which operate under the *Family Law Rules*:

- The Superior Court of Justice, Family Court
- The Superior Court of Justice
- The Ontario Court of Justice

The Superior Court of Justice, Family Court

The Superior Court of Justice, Family Court (sometimes referred to as the Unified Family Court) is a branch of the Superior Court of Justice and is located in the following centres across Ontario: Barrie, Bracebridge, Brockville, Cobourg, Cornwall, Hamilton, Kingston, L'Orignal, Lindsay, London, Napanee, Newmarket, Oshawa, Ottawa, Perth, Peterborough and St. Catharines. The Family Court also sits regularly in Huntsville, Collingwood, Midland and Orillia.

The Superior Court of Justice, Family Court is the only court in Ontario that can hear **all** types of family law cases, including cases involving:

- Divorce;
- Child support;
- Spousal support;
- Support enforcement;
- Custody of, and access to, children;
- Division of family property;
- Exclusive possession of the family home;

- Trust claims and claims for unjust enrichment;
- Adoption; and
- Child protection.

Outside of Superior Court of Justice, Family Court locations, family law matters are dealt with in the Superior Court of Justice *or* the Ontario Court of Justice.

Superior Court of Justice

The Superior Court of Justice can hear family law cases involving the same types of issues as those in the Superior Court of Justice, Family Court, except for adoption and child protection cases.

Ontario Court of Justice

The Ontario Court of Justice can hear family law cases involving the same types of issues as the Superior Court of Justice, Family Court, except for cases involving divorce, the division of family property, or exclusive possession of the family home.

The Family Law Rules

The proceedings in all courts are governed by the *Family Law Rules*, which include a set of standardized forms that the *applicant* and *respondent* must complete in order to initiate proceedings.

The *Family Law Rules* were designed to accomplish three things:

1. to impose a system of case management that would allow speedier case resolutions - earlier settlements save parties a great deal of time and money, and also help to promote greater family harmony;

2. to make court procedures easier for unrepresented parties (parties who do not have a lawyer), and;

3. to provide consistency between various court practices.

Bringing an Application

In order to begin a family law case, the applicant must prepare an *application*, a legal document that contains all of the important facts and information about the applicant's case, and which sets out the claim and the grounds supporting that claim. The applicant must then submit the application to the court and pay a fee to begin a lawsuit (fees are paid only in the Superior Court of Justice and the Superior Court of Justice, Family Court; there is no fee to pay in the Ontario Court of

Justice). The applicant must also give a copy of the application to the respondent so that the respondent knows the claims being made against him/her and s/he can respond appropriately. Giving a copy of the party's documents to the other party is called service.

Depending on the Court, the application can be for a divorce; custody or access; support (both spousal and child); property division; for a restraining order, or for any combination of those claims, or other matters in dispute, between two people in a family law context.

Responding to a Claim – An Answer

After a respondent is served with an application, there are several options for how to proceed. The served party has 30 days in which to respond to the claims if s/he lives within Canada, and 60 days if s/he lives outside of Canada. S/he may also make a claim of his/her own. If s/he does not, then the applicant can get a default judgment, meaning that s/he can ask the court to grant his or her claim without hearing from the other party. If the responding party raises new issues with which the applicant did not deal in the application, the applicant can respond to the *answer* with a *reply* within a specified period of time. Most cases get settled outside of court because going to trial is very expensive.

Joint Application for Divorce

Spouses can ask a court together for a divorce. This is called a *joint application*. They can also jointly ask the court to include an order relating to custody, access, support, and/or property, but only if they both agree on the terms of the order.

First Appearance

In most family courts, the parties first appear before a court clerk or registrar before they see a judge. This is to ensure that the application has been properly filled in and to deal with any initial procedural matters such as service. If everything is in order, the clerk will schedule a case conference date. In the Superior Court of Justice in Toronto, there is no need for a first appearance to schedule a case conference. Either party can request a case conference at any time.

Case Conference

Generally, the *case conference* is the first court appearance in front of a judge. It is relatively informal, although a document which summarizes the case, called a *case conference brief*, must be prepared, served and filed with the court.

The primary purpose of a case conference is to have a judge review the case and place the case on a schedule, especially with respect to any procedural steps that must be taken to move the case along or settle the case. Such steps might include appointing the Children's Lawyer (for children who need to be represented by someone of majority age, but cannot have a parent represent them – this might be required in abuse cases, for example) or requiring disclosure of each party's financial situation by a certain date. The judge will also look at if any issues can be settled, and if so, will make an *order* describing what should be settled and how. A judge may also give his/her opinion about the merits of each party's position (i.e. how strong or weak each party's position is).

Motions

After the case conference, either party is entitled to bring a *motion*. A motion is a court appearance where one side asks the court to make a temporary order such as an order for temporary support, temporary custody or temporary access. The order can be an interim order, which is meant to last between the date the order is made and the trial; or it can be a temporary order, which lasts until a further hearing of the same motion.

Under the *Family Law Rules* no motion (unless it is an emergency) can be brought until after a case conference is held. Emergencies can include:

- There are serious threats being made against one party by the other (in which case the court may be asked to make a non-harassment order);
- If one party has been left completely without money (in which case a court may be asked to order temporary support);
- If one person has threatened to move out of the province with a child (in which case the court may be asked to make an order stopping them).

Motions can be expensive. They require evidence to be assembled in a *motion record*, which consists of the *notice of motion*, an *affidavit* setting out the facts supporting the motion, and *exhibits* (documents referred to in the affidavit).

In the Toronto Superior Court of Justice, you must also file another document summarizing the contents of the motion record and the arguments and law to be relied on at the hearing. This is called a *factum* or *statement of fact, law and argument*.

The party asking for an order at the motion is called the *moving party*. The other party is called the *responding party* or the *respondent*. The motion record has to be served and the responding party has the right to file opposing material.

The motion is presented or argued at a hearing, which is a formal court appearance. Usually there are no witnesses.

Cross-Examinations & Examination of One Party by the Other

There may be out-of-court examinations or questioning of one of the parties that may be held either before a motion or after a motion. If these examinations are held **before** a motion and for the purposes of the motion itself, these are called *cross-examinations*. If they are held **after** the motion and deal with all the issues in the case, they are called *examination of one party by the other*, held under oath. The purpose is to narrow the issues between the parties, to test the strength of the other party's case, to obtain full disclosure of the evidence and tactically, to test the other party's presentation as a witness. Under the *Family Law Rules* courts, there is no right of examination without a court order.

Settlement Conference

After the case conference, motions and examinations are complete, a *settlement conference* is held. This conference is designed to encourage the settlement of the case and the judge is actively involved in trying to resolve the dispute. It is an informal procedure, and a special document must be prepared.

The judge cannot force settlement of a case, although in the Ontario Court of Justice and Superior Court of Justice, Family Court, a judge may order *costs* if s/he feels the other side is unprepared or being unreasonable.

Trial Management Conference

If a case is not settled at the settlement conference, a *trial management conference* is scheduled. Again special documents are filed, including a written opening trial statement. Procedural matters, such as expert reports and the number of witnesses to be called, are discussed and a final effort is made at settlement. If this last effort fails, the matter is scheduled for a trial.

Setting Down for Trial

Once both parties are ready, they have their case *set down for trial*. This tells the court that both parties are ready for trial. Both parties are required to file a document called a *trial record* which includes copies of the pleadings and any orders previously made in the case.

Trial

Only 3% of cases make it to trial; 97% of cases settle before trial. A trial is a formal procedure. In the interest of fairness, rules of evidence and procedure must be

strictly observed. Witnesses testify before the judge, documentary evidence is presented in a formal way and each side makes a closing statement.

At the start of the trial, each party is given an opportunity to present their case in an opening statement. Both parties provide evidence by calling witnesses to testify and entering relevant documents or objects, known as exhibits, into evidence.

At the end of the trial, each party makes closing arguments about the evidence heard during the proceedings and how the law applies to their case. The judge may make a decision or may inform the parties that s/he wants more time to consider the decision (called a *ruling*). Once the ruling is made, the judge will also make an order regarding court costs.

Financial Statement

One unique feature of family law cases is that both parties have to prepare a financial statement and swear as to its truth. The financial statement contains information that will be used to determine support and property issues.

The statement is lengthy and is divided into three sections:

1. Income from all sources;
2. A summary of the party's living expenses;
3. The value of a party's property (usually at the date of marriage, the date the parties separated, and the date the financial statement is sworn).

The financial statement is a sworn document and can be looked upon as an indication of a party's credibility. If it is full of errors, either intentional or otherwise, the court may decide that the entire statement is suspect. A fair and honest estimate will suffice, so long as it is an estimate based on the person's best information and honest belief.

The other spouse will often request documentation to verify the entries in a financial statement. This is intrusive and causes a great deal of resentment. Nevertheless, a court will eventually order the information to be provided so it is best that it be done voluntarily and quickly. If a party hesitates to provide the information, a court might conclude that it is not being provided because the party has something to hide.

Because it is difficult to precisely determine certain expenses or property values, especially early on in a case, it is not unusual for several financial statements to be

completed during the course of a case. Regardless of how many financial statements are sworn, however, each must be as accurate as possible and it is the client's responsibility to ensure that accuracy.

WHO YOU WILL SEE IN THE COURTROOM

When you enter the courtroom, you may see all or some of the following people:

JUDGE: In a courtroom (or a motions room), the judge will be sitting on the elevated platform called a *Bench*. His or her formal title is *Mr. Justice X* or *Madam Justice Y*, but you may refer to the judge as *Your Honour*. The judge will be wearing a black gown with a red sash.

COURT REGISTRAR: Sitting near and below the Judge's Bench is the Court Registrar. He or she wears a black gown. The Court Registrar hands material to the judge and keeps the records of the court organized. Any exhibits or documents to be given to the judge are to be handed to the Court Registrar.

COURT REPORTER: The person sitting opposite the Registrar is the Court Reporter who is responsible for ensuring that all of the court proceedings are properly recorded. If you wish a transcript of all or part of your case, it will be provided to you by the Court Reporter for a prescribed fee.

COURT SERVICE OFFICERS: Judges are assisted by Court Service Officers, often referred to as *CSOs*. The CSO will be wearing a uniform that includes a dark blue blazer with the Ontario Coat of Arms on the pocket. You should advise him or her that you are present and are ready to have your case heard. CSOs are available to answer your questions about when your case might be heard, whether the other parties to your case have arrived, where to find duty counsel, etc.

DUTY COUNSEL: In some court locations, there may be Duty Counsel, lawyers from Legal Aid Ontario, to assist people who cannot afford to hire lawyers.

CHILDREN'S LAWYER: In some court cases, there may be a Children's Lawyer appointed by the court to represent the interests of a minor child who may be either caught in the dispute between two parents, or who may not be able to be represented by either parent.

LAWYERS: Below the Judge's Bench there is a bar that divides the courtroom. The public normally sits behind the bar and lawyers normally sit in front of it. Lawyers will be wearing black gowns.

TIME CHART FOR A FAMILY LAW MOCK TRIAL

Clerk calls to order, calls case and counsel introduces themselves	1 min
Applicant's opening statement	2 mins
Respondent #1's opening statement	2 mins
Respondent #2's opening statement	2 mins
Applicant's Case	
Applicant's direct examination of Cameron Michaels	3 mins
Respondent #1's cross-examination of Cameron Michaels	3 mins
Respondent #2's cross-examination of Cameron Michaels	3 mins
Applicant's direct examination of Sylvia Pereira	3 mins
Respondent #1's cross-examination of Sylvia Pereira	3 mins
Respondent #2's cross-examination of Sylvia Pereira	3 mins
Respondent #1's Case	
Respondent #1's direct examination of DeShae Frederick	3 mins
Applicant's cross-examination of DeShae Frederick	3 mins
Respondent #2's cross-examination of DeShae Frederick	3 mins
Respondent #1's direct examination of Alex Chin	3 mins
Applicant's cross-examination of Alex Chin	3 mins
Respondent #2's cross-examination of Alex Chin	3 mins
Respondent #2's Case	
Respondent #2's direct examination of Alejo Ferrer	3 mins
Applicant's cross-examination of Alejo Ferrer	3 mins
Respondent #1's cross-examination of Alejo Ferrer	3 mins
Closing Arguments	
Applicant's closing arguments and legal submissions	2 mins
Respondent #1's closing arguments and legal submissions	2 mins
Respondent #2's closing arguments and legal submissions	2 mins
Judge gives feedback and discusses family trial process, etc.	2-10 mins

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COURTROOM ETIQUETTE AND PROTOCOL

The courtroom is a formal setting, and there are some specific etiquette rules to follow that may not be familiar to you. Here are some pointers:

- When facing the judge, counsel for the applicant usually sits at the table to the left and counsel for the respondent sits at the table to the right.
- When the judge enters, all counsel, and everyone else in the courtroom, must stand-up. Counsel then bow to the judge. Sit down when the clerk instructs everyone to do so.
- When you are getting ready to address the judge, either stand at your table or by the podium (if there is one). Wait until the judge seems ready to proceed. The judge may nod or may say that you can proceed. If you are not sure, ask the judge if you may proceed.
- The first counsel to address the court should introduce her colleague. For example, you might say "[name] appearing for the applicant; my colleague [name] is also appearing for the applicant" or "my friends [name] and [name] appear for the respondent".
- Every other counsel should introduce themselves again before starting to address the court.
- If it is not your turn to address the judge, pay attention to what is happening. Take notes that you can use during your submissions or closing statements.
- Try not to distract the judge. If you need to talk with your co-counsel, write a note.
- Stand every time you are addressing or being addressed by the judge.
- When making arguments, do not say "I believe…." or "I feel…." when starting your argument. You should say "I submit that…."
- Refer to your co-counsel as "my colleague" or "my co-counsel". Opposing counsel should be referred to as "my friend" or "counsel for [position or name of the client]".

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ETIQUETTE

- Address the judge formally. Refer to each judge as "Justice" or "Your Honour".
- Do not interrupt the judge, and if a judge interrupts you stop immediately, and wait until s/he is finished before replying. Never interrupt or object while an opposing counsel is addressing the judge. Wait until you are specifically asked by the judge to respond to a point argued by opposing counsel.
- If the judge asks you a question, take your time to think about it before replying. If you do not hear the question, or are confused by it, ask the judge to repeat or restate the question. If you do not know the answer, say so. Once a question has been answered, pick up from where you were before the question.

REMEMBER TO:

» Speak clearly

» Use an appropriate volume

» Try not to say "um", "ah" or "okay"

» Do not go too fast

ROLE PREPARATION FOR APPLICANT AND RESPONDENT LAWYERS

As the **applicant's lawyer** you represent the party who is starting the case.

As the **respondent's lawyer** you represent the person who is responding to the applicant's case.

During the trial, **lawyers for both sides will**:

- Make opening and closing statements;
- Conduct direct examination of your own witnesses; and
- Conduct cross-examinations of the other side's witnesses.

The applicant's lawyer will make an opening statement and call witnesses first. The respondent's lawyer follows with an opening statement and witnesses.

The applicant's lawyer presents closing arguments first.
The respondent's lawyer goes second.

WHAT IS AN OPENING STATEMENT?

The opening statement gives a brief overview of your case.

HOW TO PREPARE AN OPENING STATEMENT:

- Thoroughly review the application, the response and your witnesses' fact sheets.
- Select which facts should be included in the opening statement. Include the central facts to your case that are not likely to be challenged by the other side.
- Stick to the facts. The facts are what will paint the picture for the judge.
- The purpose of an opening statement is to tell the judge what they will hear in the course of the trial. It is best to stick to uncontested facts.
- When giving the opening arguments, try to speak in short, clear sentences. Be brief and to the point.
- Have notes handy to refresh your memory.
- Remember that the opening statement is very brief but gives an overview of your case.

WHAT IS A DIRECT EXAMINATION?

- Direct examination is when one side puts a witness in the witness box to give evidence to support its case.
- The purpose of a direct examination is to have the witness tell the court, in a clear and logical way, what the witness observed.

HOW TO PREPARE FOR DIRECT EXAMINATION:

- Write down all the things that your side is trying to prove.
- Read the witness' testimony carefully, several times over.
- Make a list of all the facts in the witness' testimony that help your case.
- Put a star beside the most important facts that you must make sure that your witness talks about. For example an important fact for the Applicant might be that your witness saw the event at issue first-hand.
- Create questions to ask the witness that will help the witness tell a story:
  - » Start with questions that will let the witness tell the court who s/he is: *"What is your name? What do you do? How long have you worked in that job? Do you have children? If so, what are their names and ages?"*
  - » Move to the events in question: *"Do you have a good relationship with your child? If not, why not?"*
  - » Move to more specific questions: *"Why don't you have a good relationship with your child?"*
- Remember to keep your questions short and to use simple language.
- Remember not to ask leading questions. A leading question is a question that suggests the answer.
  - » An example of a leading question is *"Were you married for 14 years to Doreen?"*
  - » Instead you might ask: *"Please tell me how long you were married to your wife?"* or, *"On what date did you separate?"*
- When your witness is in the witness box, do not be afraid to ask a question twice, using different words, if you do not get the answer you were expecting.

WHAT IS CROSS-EXAMINATION?

- Cross-examination is when the lawyer for the other side gets to ask your witness questions.
- There are two basic approaches to cross-examinations:

  1. **To get favourable testimony**. This involves getting the witness to agree to facts that support your case.

  2. **To discredit the witness.** This approach is used so the judge or jury will minimize or disregard evidence or comments that do not support your case.

HOW TO PREPARE FOR CROSS-EXAMINATION:

- Make a list of all the facts in the witness' testimony that help your case.
- Put a star beside the facts you must make the witness talk about and get the witness to admit those facts.
- If there are a lot of facts that don't help your case, can you find a way to challenge the witness' credibility? For example, can you show that the witness made a mistake or has a reason for not telling the truth?
- All of your questions should be leading. You don't want to give the witness a chance to explain. You just want the witnesses to answer "yes" or "no."
- Depending on what the witnesses' say you might need to come up with different questions on the spot during the trial, to make sure you cover everything.

WHAT IS A CLOSING STATEMENT?

- This is your last opportunity to communicate to the judge.
- The closing statement should logically and forcefully summarize your side's position and the legal arguments/reasons why you are entitled to win (i.e. to get what it is you are asking for).

HOW TO PREPARE CLOSING STATEMENTS:

- Write down your key arguments and summarize the important facts that you want to stick in the judge mind. You can urge the judge to accept your client's view of the evidence.
- The closing statement should be similar to your opening statement to some degree.

- When delivering the closing arguments, try to speak in short, clear sentences. Be brief and to the point.
- You can only refer to evidence that actually was given at trial. This may mean you have to re-write your closing arguments to some degree during the trial if evidence you were expecting to come out did not actually do so.
- Where a witness for the other side admitted something important to your case, point that out in your closing statement.
- Check with the lawyer writing the opening statements for your side, to make sure that both the opening and closing statements are very similar, and cover the same facts.

ROLE PREPARATION FOR JUDGE

A judge's role is to:

- Be a referee and explain the law to the jury or to the parties.
- Make procedural rulings.
- If a lawyer objects to a question by another lawyer, decide whether or not the witness must answer the question.
- At the end of the trial, summarize what the law and evidence are relating to this case.

ROLE PREPARATION FOR COURT SERVICES OFFICER

Your role is to:

- Help the judge in keeping order in the courtroom.
- Escort the witnesses to the witness box.
- You can prepare for your role by reviewing the background documents and understanding what will happen during the trial.
- The judge will expect you to escort anyone who becomes too loud or is not behaving out of the courtroom.

ROLE PREPARATION FOR COURT CLERK

Your role is to help the judge to make sure that the trial runs smoothly. You will:

1. Open the court
2. Swear in the witnesses
3. Adjourn the court for a recess
4. Close the court

1. HOW TO OPEN THE COURTS:

When all participants are in their places, you will bring in the judge and say:

Order in the court, all rise please. The Honourable Judge [name] presiding.

After the judge has entered and sat down you say:

Court is now in session, please be seated.

2. HOW TO SWEAR IN WITNESSES:

If either one of the lawyers calls a witness during the trial then ask them to enter the witness box (closest to the reporter) and you will swear them in by saying:

Will you please state your name for the court? Please spell your first and last name.

A witness can either affirm (promise) or swear on a holy book, to tell the truth. Ask the witness:

Do you wish to affirm or swear on a holy book?

If the witness chooses to affirm, you ask:

Do you solemnly affirm that the evidence you are about to give, shall be the truth, the whole truth and nothing but the truth?

If the witness chooses to swear on a holy book, you ask:

Do you swear that the evidence you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?

3. HOW TO ADJOURN THE COURT FOR A RECESS:

After both the applicant and respondent have made their closing arguments, the judge may recess before giving their ruling.

When the judge is ready to adjourn, s/he will announce that the court is going

to recess for _____ minutes (usually 10 or 15 minutes but the judge will say the length of the break).

When ready to adjourn, you stand and say:

All rise please. Court is in recess for _____ minutes.

When the Judge is ready to return, you enter the courtroom and say:

Order in court all rise.

When the judge has sat down you say:

Court is now reconvened. Please be seated.

4. CLOSING THE COURT:

After the lawyers have made their closing arguments and the Judge has given its decision, then the Court is closed and you will say:

All rise please. Court is adjourned for the day.