

Activity Idea: Mock Trial Analysis of the 2017 Gladiator Final Round

Video links

Opening Statements: <https://www.youtube.com/watch?v=LxJRKi77BZY>

Government Case in Chief: <https://www.youtube.com/watch?v=lqfbT5AUAKM>

Defense Case in Chief: https://www.youtube.com/watch?v=0gMHQoxfO_k

Closing Arguments: <https://www.youtube.com/watch?v=a9Zt7XNpt2c>

Background information

Gladiator is a one-on-one high school competition that has one witness per side in the preliminary rounds. Each student plays each role once (P and D attorney; P and D witness). In the championship round, the top two students go head-to-head as attorneys; experienced college and law school “mockers” serve as the witnesses. For this final round, the government called two witnesses, while the defense called one witness. Each side had the same total length of time for all witness questioning (direct and cross examinations).

Preliminary Matters

The first two minutes are “off the clock” while the attorneys introduce themselves and ask judge preferences about documents, approaching the judge and witnesses, etc. You can skip these first 2 minutes if you like.

Opening Statements (begin ~ 2:00)

As you’ll see, the prosecution attorney speaks first. Opening statements give the attorneys a chance to preview the case for the jury, to make the jury more inclined to believe their side of the case, and to “forecast” the evidence the jury will hear in the trial.

1. How is each opening statement structured? What are the main topics each attorney covers?

Prosecution: Theme; theory of the case (story); burden and elements; review of P witness and forecast of the evidence to be presented in trial; theme; charge to the jury to find defendant guilty at conclusion of the trial.

Defense: Theme; theory of the case (story from defense viewpoint); review of government’s burden; review of witnesses and forecast of evidence to be presented in trial; theme; charge to the jury to find defendant not guilty at end of trial.

2. Are there certain phrases that you hear repeated throughout each attorney’s statement? If so, what are they? Why do you think they use these phrases?
“You will learn” “You will hear” “The evidence will show” The attorneys use these phrases to remind the jury that the opening statement is not testimony; the evidence will come in through witness testimony and evidence admitted during trial.
3. What is each attorney’s “theme” – a phrase they use to describe their case theory?

Prosecution: Our actions reveal our true intentions.

Defense: He was a spy; she (defendant) was expendable

- Which statement did you find to be more effective? Why?
Responses may vary; review the students' reasoning.

Direct Examination of First Prosecution Witness: FBI Agent Avery Carlisle

The prosecution also calls its witnesses first. When an attorney questions a witness that their side has called to the stand, the questioning is called a "Direct Examination." Note that in this competition, attorneys may stand as they question witnesses. In our state competition, attorneys must remain seated during questioning at Regionals and may stand at State Finals.

1. What is the format of the questions used in Direct Examination? What words are used to begin these questions? Open-ended; who, what, when, why, how, where... words that give the witness leeway to answer as they desire.
2. Generally speaking, who talks more – who is the "star of the show" – in direct examination: the witness, or the attorney? The witness.
3. The FBI agent was entered as an expert.
 - a. What types of questions were asked in order to show that the witness was qualified to testify as an expert? Questions covering the witness's education, experience, training, previous times testifying as an expert, etc.
 - b. What is the difference in the types of testimony that experts can give, versus what a lay witness can give? Experts can give opinion testimony related to their area of expertise, not simply testimony regarding facts of which they have personal knowledge and experience.
4. Listening to the witness, did you think the witness seemed credible as an FBI agent? Why or why not? Responses may vary; review the students' reasoning.
5. At 4:10, the defense attorney raises an objection, and the two attorneys argue the objection before the judge for several minutes.
 - a. What is the procedure during an objection? What do the attorneys do? To whom do they speak when making their argument? The objecting attorney stands; says "objection"; gives the basis for the objection (reason and/or rule number); explains reasoning if requested to do so by the judge. Opposing counsel will then speak to the judge to explain why the evidence should be admitted. Both attorneys speak to the judge to explain why the evidence should be admitted. Both attorneys speak to the judge, not to each other, and they always stand when addressing the judge.

- b. What was the basis given for the defense attorney's initial objection? Did she give the rule number from the Rules of Evidence? If not, can you? Hearsay. No, she did not. It is Rule 802.
 - c. Did she continue to argue the same basis for her objection, or did her basis change as she kept talking? How did the prosecution attorney respond? The defense attorney began arguing that no background had been laid for the FBI agent to be able to respond to the question (thus, she changed the basis for her objection). The prosecution attorney argued that the witness should be able to answer under Rule 703.
 - d. What was the judge's ruling? Based on that ruling, did the attorney ask her question again, or ask a new question? The judge sustained the objection on the basis that more background needed to be laid before the witness would be allowed to answer the first question. The prosecution attorney had to ask new questions to establish that the witness had done the necessary work to be able to testify about the background check (in other words, questions to build foundation that the testimony was reliable).
6. At ~ 9:20, the prosecution attorney played an audio excerpt (Exhibit 2) and entered it into evidence. Please list the steps she took and the questions she asked in order to enter the Exhibit into evidence. She asked the witness to identify the recording and asked whether it was a "fair and accurate" version (i.e., was it the same as before, making sure it had not been altered in any way). After building this foundation, she asked to enter it into evidence. Opposing counsel did not object, so it was admitted. She could then ask additional questions pertaining to the recording (if she desired).
 7. Did the attorney ask questions that told a chronological story, or questions that were topical in nature, or a mixture of both? Why do you think the attorney organized the examination in this fashion? A mixture; some questions were chronological, but she also asked more in-depth questions on specific aspects of his investigation. This type of organization made the testimony more understandable for the jury, and it enabled her to emphasize the facts she wished to highlight.

Cross Examination of First Prosecution Witness: FBI Agent Avery Carlisle

1. Is the format of these questions the same as for direct examination? If not, what type of questions is the attorney asking? Please define this type of question if you can. What techniques does the attorney use to vary or make her statements sound like questions? It is different; the crossing attorney should ask leading questions. Leading questions are designed to elicit a specific answer (yes OR no) from the witness. The crossing attorney essentially states a fact, and then uses rising tone or an add-on such as "correct?" "isn't that right?" to turn it into a question.
2. Generally speaking, who talks more in cross examination: the witness, or the attorney? The attorney.

3. At 19:00, the defense counsel begins the steps to enter a document into evidence (which can be done on direct or cross examination). List the steps the attorney followed and the types of questions she asked prior to entering the document into evidence. How are her questions both prior to and after entering the document different from the types of questions the prosecution attorney asked when she entered documents on direct examination? Shows the exhibit to opposing counsel; asks permission to approach the witness; shows the document to the witness; asks the witness to identify it (builds foundation); asks to enter it into evidence; once entered, the attorney can question the witness about the document. The basic procedure is the same, but the crossing attorney continues to ask leading questions, rather than open-ended questions (as would be done on direct examination).
4. How would you describe the structure of this cross examination: chronological? Topical? Was it effective? Did it help create “reasonable doubt” in your mind? Topical, in order to make it harder for the witness to predict the questions that will be asked, and in order to highlight only the points the attorney wishes to emphasize. No need to cover every topic covered on direct. The crossing attorney only wants to address the points that are beneficial to their case. [Answers re effectiveness may vary; assess the students’ reasoning.]

Direct Examination of Second Prosecution Witness: Cooperating Witness Sonny Osborne, aka Sasha Levin

This witness is the spouse of the defendant and allegedly is cooperating with the government as part of a plea deal for a reduced sentence.

1. How are the initial questions in this examination different from those of the FBI agent? The questions help the jury get to know the witness; they don’t need to discuss the witness’s education or experience.
2. Is this witness an expert witness or a lay witness? What difference does that make in terms of the types of testimony the witness can give? Lay witness. He can only testify about facts with which he has personal knowledge (not expert opinion testimony).
3. Did you find this witness to be credible on direct examination? Answers may vary; assess the students’ reasoning.

Cross Examination of Second Prosecution Witness: Cooperating Witness Sasha Levin

1. How does the defense attorney raise doubts about the credibility of this witness? Reminds jury that the witness is a confessed spy and is getting a reduced sentence (plea deal) for testifying.

2. At 30:35 the defense attorney asks a question that she didn't specifically know the answer to. The prosecution attorney objected. How did the judge rule? How did the witness respond to the question? What did you learn from this exchange (lessons for attorneys and witnesses)? Prosecution objected to relevance (not usually a good objection, as it gives opposing counsel a chance to, in effect, testify as they explain the relevance). Judge overruled. Witness said he **did** "get down on one knee" to propose, which drew a laugh and made the witness more likeable.

Lesson for attorneys: don't ask questions you don't know the answer to. Witness: on cross, if you're asked a question that isn't answered in your statement, you have leeway to make up facts as long as they address the question and don't contradict your statement – so listen carefully to questions!

Direct Examination of Defense Witness: Cory Osborne, Daughter of Defendant

As you'll see, this lay witness is an emotional witness.

1. The prosecution attorney objects to foundation or hearsay several times in the first few minutes of this direct examination. How does the defense attorney respond? What is the judge's ruling? Not offering the testimony "for the truth of the matter" (Rule 801) but for different reasons: for the effect of the fact on the listener, or for foundation, etc. The judge gave the jury a limiting instruction in one instance and overruled the objection in another instance since the fact had already been stipulated (agreed by both parties to be true).
2. Do you find this witness's story and emotions to be credible / believable, or not? Why?

Answers may vary; assess the students' reasoning.

Cross Examination of Defense Witness: Cory Osborne, Daughter of Defendant

Notice that the format of these questions is different from the questions on direct examination and the same as on the previous cross examination.

1. Compare / contrast this cross examination with the crosses of the two prosecution witnesses. Is the crossing attorney's demeanor the same as earlier? Why or why not? She had to be a bit softer and gentler than the defense attorney was during her cross examinations of the FBI agent and the spy. Her demeanor needed to be gentler, because she was cross-examining an emotional high school student whose parents are facing time in prison.
2. It pays to think carefully about how you phrase your questions. It's also important to listen carefully to opposing counsel's questions. Explain how we see this in action from 16:47 - 17:20. What was defense counsel's objection? What did the judge rule?

Defense counsel objected to lack of personal knowledge. The judge sustained the objection, and the prosecution attorney had to revise the question.

Closing Arguments

Again, the prosecution goes first. In closings, the attorneys can “argue” – discuss the implications of the evidence that came into trial to convince the jury that their case theory is correct.

1. How is each closing structured? How does it differ from each attorney’s opening statement? What topics did the attorney cover, and in what order? Who was more effective?

Prosecution: Theme (slightly revised); focused on the actions of the defendant and sought to persuade the jury how those actions proved their case; burden and elements; reviewed the testimony in trial, focusing on each witness in relation to the elements; charge to jury to see past the lies and find defendant guilty.

Defense: Emphasized facts to demonstrate that Sasha Levin was the spy, argued that defendant didn’t know what was going on (expendable – theme); reminded jury that prosecution has burden; argued implications of the evidence presented in trial; reminded jury of why Sasha Levin’s testimony should not be believed; lack of definitive physical evidence against defendant; theme; charge to jury to find defendant not guilty.

2. The prosecution attorney can give a rebuttal if time is remaining. What did this attorney focus on? Was it effective/persuasive? Focused on Sasha’s (Sonny’s) testimony re the defendant, and that the defendant was the one involved in the dead-drop. Make decision based on defendant’s actions (theme). Answers re effectiveness may vary; evaluate students’ reasoning.

Overall Evaluation

1. Discuss each attorney’s use of pacing, gestures, use of the courtroom. What did each do well? Where could each improve? Was anything particularly effective or distracting?

Prosecution:

Defense:

Answers may vary. Discuss use of gestures, where each attorney stood in the courtroom on direct versus cross examination, demeanor during examinations; maintaining composure during unexpected testimony; choice of objections and ability to argue them, etc., as you evaluate the students’ reasoning.

2. In this competition, judges don't give numerical scores; instead, the attorneys are evaluated head-to-head on each aspect of the trial. Put an "x" by the attorney you feel won each aspect of the trial:

Opening statement:	Prosecution _____	Defense _____
Direct Examination:	Prosecution _____	Defense _____
Cross Examination:	Prosecution _____	Defense _____
Closing Argument:	Prosecution _____	Defense _____
Objections:	Prosecution _____	Defense _____
Improvisation:	Prosecution _____	Defense _____
Use of Exhibits:	Prosecution _____	Defense _____
Who won? Total score:	Prosecution _____	Defense _____

Answers may vary; as you tally your team's responses, use the occasion to remind the students that mock trial will always be a somewhat subjective activity. Nonetheless, as this exercise has demonstrated, students have a fair amount of control over the results by working to create and present a persuasive, well-organized case.