CIVIL LAW MOCK TRIAL: ROLE PREPARATION

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For each OJEN Civil 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 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 court-room 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 civil 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, jury members, and court staff will play an important role on the day of the trial.

DIFFERENCES BETWEEN CIVIL AND CRIMINAL TRIALS

There are many differences between civil and criminal 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) 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 trials, which address the innocence or guilt of someone accused of a crime, civil trials address whether one party is liable, or responsible, for the injury of another party. In determining whether a party is liable, the judge or jury must be convinced on a balance of probabilities. This is known as the standard of proof. 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. This standard is not as high as in criminal trials where the standard of proof is beyond a reasonable doubt. In criminal trials, the burden of proof is on the Crown to prove their case beyond on a reasonable doubt, while in civil trials, the plaintiff is responsible for proving his/her case on a balance of probabilities (i.e. the burden of proof is on the plaintiff).

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.

OVERVIEW OF A CIVIL ACTION

In Ontario, the Superior Court of Justice hears most civil proceedings. These civil matters are governed by the Rules of Civil Procedure which include a set of standardized forms that the plaintiff and defendant must complete in order to initiate proceedings.

Some civil proceedings also occur in courts other than the Superior Court of Justice, which have their own rules and procedures. For example, the Divisional Court, a branch of the Superior Court of Justice, hears some civil appeals from a broad range of administrative tribunals in Ontario. The Small Claims Courts, another branch of the Superior Court, also hears civil matters for damages under $25 000.

BRINGING A CLAIM

In order to begin a civil action, the plaintiff must prepare a statement of claim, a legal document which contains all of the important facts and information about the plaintiff's case. The plaintiff must then submit the statement of claim to the court and pay a fee to begin a lawsuit. The plaintiff must give a copy of the statement of claim to each defendant included in the lawsuit so that the defendant(s) know that a lawsuit has been filed against them and what the lawsuit is about.

DEFENDING A CLAIM

After a defendant is served with a statement of claim, there are several options for how to proceed. If the defendant agrees to pay the plaintiff some or all of the requested damages, both parties may agree to settle the case before it gets to court. Most cases get settled outside of court because going to trial is very expensive. If the defendant chooses to contest the allegations, a statement of defence must be prepared explaining why the defendant is not responsible (liable) for the damages being requested by the plaintiff.

DISCOVERY

The next step in the civil procedure is known as discovery. Discovery allows both parties to be informed of the opposing party's evidence before going to trial. Parties must agree on a Discovery Plan if they wish to obtain evidence through the discovery process. Discovery has two main steps: documentary discovery and examinations for discovery.

During documentary discovery, both parties must disclose all of their documentary evidence to each other through a sworn affidavit of documents, which lists all documents in their possession that relate to the case. For example, this might include a contract between the two parties, letters, cheques, invoices, and also any relevant videos, recordings, and electronic information, such as email. There can be serious consequences if a party fails to disclose a relevant document, and parties are still obliged to disclose any new documents that may come up after documentary discovery.

Examinations for discovery allow parties to meet and ask each other questions, under oath, before the trial begins. The maximum time limit each party has to examine persons for discovery is seven hours, regardless of the number of persons to be examined for discovery.

In response to lengthy and costly discoveries, when the parties have not agreed on a Discovery Plan, the court must look at the amount of time and money spent on a case in proportion to the importance and monetary value of the case. The court will consider costs and work involved in the production of documents and restrictions will be placed on overall document production and length of oral examination of witnesses.

SETTING AN ACTION 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 and scheduling begins. Both parties are required to file their trial record which includes copies of the pleadings and any orders previously made in the case.

PRE-TRIAL CONFERENCE

Parties must have a pre-trial conference with a judge before a trial is held. A pre-trial is an opportunity to discuss matters such as settling the case, simplifying the issues related to the case, and how long the hearing is expected to last. This allows for the narrowing of issues and facts to be proved, and encourages the parties to settle.

TRIAL

Civil trials may proceed before a judge alone, or before a judge and jury. Unless a statute says otherwise, a party may request that the case be heard by a jury by filing a jury notice.

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.

TIME CHART FOR A CIVIL LAW MOCK TRIAL

Clerk calls to order, calls case and counsel introduces themselves	**2 mins**
Plaintiff's opening statement	**3 mins**
Defendant's opening statement	**3 mins**
PLAINTIFF'S CASE:	
Plaintiff's direct examination of plaintiff witness # 1	**4 mins**
Defendant's cross-examination	**4 mins**
Plaintiff's direct examination of plaintiff witness # 2	**4 mins**
Defendant's cross-examination	**4 mins**
DEFENDANT'S CASE	
Defendant's direct examination of defendant witness # 1	**4 mins**
Plaintiff's cross-examination	**4 mins**
Defendant's direct examination of defendant witness # 2	**4 mins**
Plaintiff's cross-examination	**4 mins**
CLOSING ARGUMENTS	
Plaintiff's closing arguments and legal submissions	**3 mins**
Defendant's closing arguments and legal submissions	**3 mins**
Judge instructs jury (*if there is a jury. If not, judge deliberates and renders a verdict - 12 minutes*)	**2 mins**
Jury deliberates and gives verdict (*if there is a jury*).	**10 mins**
Judge gives feedback and discusses civil trial process, etc.	**10 mins**

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 plaintiff usually sits at the table to the left and counsel for the defendant 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 his colleague. For example, you might say "[name] appearing for the plaintiff; my colleague [name] is also appearing for the plaintiff" or "my friends [name] and [name] appear for the defendant".
- 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]".
- 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 they are 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 PLAINTIFF AND DEFENDANT LAWYERS

As the **plaintiff's lawyer** you represent the victim who is suing.

As the **defendant's lawyer** you represent the person who is being sued.

During the trial, lawyers for both sides:

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

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

The plaintiff's lawyer presents closing arguments first. The defandant'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 statement of claim, the statement of defence, 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 facts. The facts are what will paint the picture for the judge.
- The purpose of an opening statement is to tell the judge and/or jury 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 Plaintiff 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?")
- Move to the events in question ("What were you doing on the night in question? Where were you? When did you first hear there was a problem?")
- Move to more specific questions ("What did you see? What did you do after that happened?)
- 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 "was the man six feet tall and about 25-years old?"
- Instead you might ask: "please describe what the man looked like." Or, "how old was he? And how tall?"
- 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, did not see things clearly, 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 or jury.

The closing statement should logically and forcefully summarize your side's position and the legal arguments/reasons why you are entitled to win.

HOW TO PREPARE CLOSING STATEMENTS

Write down your key arguments and summarize the important facts that you want to stick in the judge and jury's mind. You can urge the judge and jury 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. For example: "The witness says she identified Mr. Smith as the man who ran away. However, she admitted that she was standing far away when she saw Mr. Smith run away. She admitted that it was dark out. There is a real doubt that the witness actually could have identified anyone, let alone someone she had never met before, in the circumstances."

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.
- 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 is relating to this case.
- If it is a jury trial, instruct the jury who then decides if the accused is liable and how much the plaintiff should be awarded in damages.
- If it is not a jury trial, the judge decides whether the accused is liable and, if so, how much the plaintiff will be awared in damages.

ROLE PREPARATION FOR JURY

A jury's role is to:

- Listen to all of the evidence without making any decisions until the end of the trial about the liability of the defendant.
- Listen to the judge describe the evidence and what the law is.
- Elect a Foreperson (spokesperson) to head the jury and give their final decision.
- Talk about the evidence with other jurors behind closed doors. Based on the evidence, decide whether or not damages should be awarded.
- Come up with a decision that at least five of the six jurors agree on.

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 and/or Jury has given its decision, then the Court is closed and you will say:

All rise please. Court is adjourned for the day.

ROLE PREPARATION FOR COURT ARTIST

In Canadian Courts, cameras are not allowed in the trial level courtroom. Your job is to sketch what is taking place in the courtroom for record keeping and for reporting to the public. Perhaps your sketches might appear in the newspaper or on TV news.

Divide up the roles so that one of you is:

- Sketching the witnesses.
- Sketching the plaintiff's and defendant's lawyers in action.

ROLE PREPARATION FOR MEMBERS OF THE PRESS

Things for you to think about reporting on:

- What is the name of the case?
- Who are the people involved?
- Which court is the trial taking place in?
- Is it a judge and a jury or just a judge?
- Is there a publication ban in place?
- Why is a trial taking place?
- What is the defendant accused of doing?
- What are the key facts?
- What is the outcome / decision?
- Is there anything you want to ask the plaintiff and defendant's lawyers about after the hearing?
- Are there any other things you want to say in general in your article about these particular types of proceedings?
- Why would the public be interested in hearing about this case? Is there a public interest element to the case?