Trial Advocacy - Student Materials
Fall 2017
Course Director(s): Rachel Grinberg & Jonathan Rosenthal

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Trial Advocacy Materials 2017

Sequence of Study

Course Directors: Jonathan Rosenthal and Rachel Grinberg

Osgoode Hall Law School
York University
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Welcome to the TRIAL ADVOCACY SEMINAR. Tonight at the opening meeting, we will introduce you to the program, the schedule and how it all works. We will then break into the three sections and have two short workshops.

The skills workshop introduces you to the basic techniques of direct and cross examination.

The second session focuses on “case analysis and cooperative brainstorming”.


Format:

7:00 - 7:30 ALL SECTIONS MEETING (Moot Court, Room 1005).

7:30 - 8:30 FULL SECTION MEETINGS (Home rooms)
Basic skills workshop based on Problem #1

8:30 – 8:45 FULL SECTION MEETINGS (Home rooms)
Case analysis and cooperative brainstorming of Problem #1 (Bier).

8:45- 9:00 Break

9:00 - 10:00 Demonstration (Moot Court, Room 1005).


The problems will be made available online for those students who have not yet purchased the casebook from MDC.
The goal of this evening is to work on basic direct-examination and cross-examination of a lay witness – *i.e.* an eye witness to certain events.

**Direct-examination** -- introducing the witness; setting the scene; and eliciting what the witness saw. The examinations and critiques will focus on the structure of the examination and the form of the questions -- a topic sentence (heading) followed by short, non-leading questions, simple language -- and on eliciting testimony in appropriate detail in a way that develops your case theme.

**Cross-examination** -- having a point and making the point through a sequence of short, simple, single-fact, leading questions, which build toward a conclusion that relates to theme of your case.

Making **objections** will also be covered.

**Readings:**

1. **Casebook**
   - Introduction pg 4-5
   - Some Points on Witness Examination pg 6-16
   - Examination in Chief, Cross-Examination and Re-Examination pg 17-19
   - Rules of Professional Conduct pg 112-115

2. **Modern Trial Advocacy**
   - Chapter One: Case Analysis, Persuasion and Storytelling pg 1-13
   - Chapter Four: Examination-in-Chief pg 43-78
   - Chapter Five: Cross-Examination pg 79-137
   - Chapter Nine: Objections pg 235-270

**Problem:**

Problem #1: *N.L.C. v. Jones & Chateau Guy* (Bier) - [Casebook, page 116.](#)

**Assignment:**

- “Xs” will conduct a **direct**-examination of Bier
- “Ys” will conduct a **cross**-examination of Bier
All students must be prepared to play the witness role.

The purpose of this class is to develop basic examination skills. It will also focus on the making of objections and submissions to the court supporting the objection. An opposing counsel will be selected for each student performance. His or her job will be to raise an objection to each question that is not a proper or effective direct-examination question. For example:

• counsel is leading the witness;
• the question calls for a conclusion; or
• the question is too long and/or complex.

Note: These objections are broader than those that could be made at a real trial.

Keep in mind the following ground rules:

• if you are going to make an objection you will first need to stand and state that you object to the question and then wait to be recognized by the court.

• if the question is likely to draw an objectionable answer, for example hearsay, you need to object promptly and before the witness answers;

• when the opponent stands and objects the examining counsel should sit down while opposing counsel makes his or her submissions.

Format:  
7:00 – 8:45  SMALL GROUP SESSION (Breakout Rooms)  
Direct and Cross Examination of Officer Bier

8:45 - 9:00  Break

9:00 - 10:00  ALL SECTIONS Demonstration (Moot Court Room 1005)

Demonstration:  Direct and Cross Examination of Bier in Problem #1
This evening’s focus will again be on direct and cross-examination.

You will spend the whole of the evening (prior to the demonstration) in your break out groups performing direct and cross-examinations of Officer Bier with real police officers playing Officer Bier.

Readings:

1. Casebook
   - Some Points on Witness Examination pg 6-16
   - Examination in Chief, Cross-Examination and Re-Examination pg 17-19
   - Rules of Professional Conduct pg 112-115

2. Modern Trial Advocacy
   - Chapter One: Case Analysis, Persuasion and Storytelling pg 1-13
   - Chapter Four: Examination-in-Chief pg 43-78
   - Chapter Five: Cross-Examination pg 79-137
   - Chapter Nine: Objections pg 235-270

Problems:

Problem #1 N.L.C. v. Jones and Chateau Guy (Bier) - Casebook, page 116.

Assignment:
- “Ys” will conduct a direct examination of Officer Bier
- “Xs” will conduct a cross examination of Officer Bier

Note: Police officers will play the role of Officer Bier.

The purpose of this session is to develop basic direct and cross-examination skills. This session will also continue to focus on the making of objections and submissions to the court supporting the objection. An opposing counsel will be selected for each student performance.

By the end of this class, you should understand the difference between leading and non-leading questions; be able to develop a line of cross-examination; to make and meet objections and to develop a theory of the case.

Format:
7:00 – 8:45 SMALL GROUP SESSION (Breakout Rooms)
Direct and Cross-examination of Bier
8:45- 9:00      Break

9:00 - 10:00    ALL SECTIONS (Moot Court, Room 1005)
                Demonstration/Lecture on Exhibits

Demonstration Readings:

- “The Introduction and Use of Exhibits,” “Introducing Exhibits into
  Evidence,” “Demonstrative Evidence” and “Tangible Objects” - Casebook,
  pages 21-31.

- “Notes for the Lecture/Demo on Introducing Exhibits Into Evidence”
  Casebook, pages 35-41.

* For these notes, please use the following information to reference the
  problems, rather than the page number indicated in the note:

Demonstration:


PHOTOGRAPHS:              Problem #8: *Murphy v. Wagner* page 143 (photo
                          at page 145).

REAL OBJECT/BOTTLE:       Problem #5 *N.L.C. v Jones* (wine bottle at page
                          135).

LETTERS AND PHONE LOG:    Problem #10: *NitaSport v. Nita Slugger* - at page
                          152 (letters/phone log begin at pages 155-157).
We will spend this evening working on exhibits and demonstrative aids -- the third fundamental building block of witness examination (along with direct and cross-examination).

First, we will work with diagrams, photographs and real evidence. The goal will be to learn how to lay the foundation necessary for introducing/using an exhibit or demonstrative aid at trial -- and then working with the exhibit. Then, we will work with paper exhibits: letters, documents and summaries. We will continue to work on the fundamentals of laying a foundation, getting an exhibit into evidence and then working with the exhibit.

Rather than have everybody perform a few problems, we will take up a range of problems with just a couple of people performing each one. This will allow us to work with a broad sample of exhibits and demonstrative aids.

Readings:

1. Casebook
   - The Introduction and Use of Exhibits pg 21 - 23
   - Introducing Exhibits Into Evidence pg 24 - 31
   - Statutes Regarding Business Records Exception pg 32 - 34

2. Modern Trial Advocacy
   - Chapter Ten: Foundations and Exhibits pg 271 - 332

Problems and Assignments:

Problem #5  \textit{N.L.C. v Jones}
\text{Y}_1 - \text{Introduce} 
\text{Diagram} 
page 135

Problem #7  \textit{Brown v. Byrd}
\text{X}_1 - \text{Introduce} 
\text{Photographs} 
page 137

Problem #8  \textit{Murphy v. Wagner}
\text{Y}_2 - \text{Introduce} 
\text{Beer Bottle} 
page 143

Problem #8  \textit{Murphy v. Wagner}
\text{X}_2 - \text{Introduce the medical records} 
\text{Medical records} 
page 143

Problem #10  \textit{NitaSport Inc. v. Nita Slugger}
\text{Part 1 (letter)} 
\text{Y}_3 - \text{Introduce} 
\text{Part 2 (phone log)} 
\text{X}_3 - \text{Introduce} 
page 152

-\text{x-}
With regard to each of these exercises, the persons who have responsibility for introducing the exhibit are to choose and prepare a person or persons (from your small group) to play the witness(es).

* No one is assigned to play the role of opposing counsel - faculty will do this as necessary.

**Format:**

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<th>Time</th>
<th>Activity</th>
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<tr>
<td>7:00 - 8:45</td>
<td>SMALL GROUP SESSION (Breakout rooms)</td>
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<tr>
<td></td>
<td>The focus of this class will be on introducing exhibits into evidence and their use in examinations. By the end of this session, students should know how to introduce an exhibit and how to make use of it in an examination.</td>
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<tr>
<td>8:45 - 9:00</td>
<td>Break</td>
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<tr>
<td>9:00 - 10:00</td>
<td>ALL SECTIONS Demonstration (Moot Court, Room 1005)</td>
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**Demonstration:**

Lecture/Demonstration on Impeachment and Rehabilitation
Problem #11 *R v Carrol* (O’Rourke) Casebook, page 158.

CLASS #5: INTRODUCTION TO IMPEACHMENT
September 26th, 2017

This evening will be devoted to Impeachment. Our goal is to provide you with the basic skills of Impeachment. (Next week, we will have another evening on Impeachment.)

Readings:
1. Casebook
   - Materials on Impeachment of Witnesses pg 42 - 63

2. Modern Trial Advocacy
   Chapter Six: Impeachment, pg 139 - 188
   Chapter Seven: Re-Examination and Rehabilitation pg 189 - 194

Problems:
   (James Bier), Casebook page 161.
2. Problem #11: R. v. Carroll (O’Rourke), Casebook page 158.

Assignments:
   (James Bier)
   - Xs cross-examine
   - Ys re-examine and play witness role

2. Problem #11: R. v. Carroll (O’Rourke)
   - Ys cross-examine
   - Xs re-examine and play witness role

This class is an introduction to impeachment by use of prior inconsistent statements, and by reference to omissions made from an earlier statement, e.g., omissions from a police officer's notes.

Format:
7:00 – 8:45       SMALL GROUP SESSIONS (Breakout Rooms)
8:45 - 9:00       Break
9:00 - 10:00      ALL SECTIONS Demonstration (Moot Court, Room 1005)

Demonstration: Impeachment
1. Problem #13 Manning v Carleton, Casebook page 162.
2. Problem #14 Gentry v Smith (James Taylor) signed statement, Casebook, page 164.
This evening we will continue with Impeachment and Rehabilitation, followed by a demonstration of opening and closing statements.

Readings:
1. Casebook
   - Materials on Impeachment of Witnesses pg 42 - 63
2. Modern Trial Advocacy Review:
   Chapters Six and Seven pg 139 - 194

Problems:
1. Problem #13 Manning v. Carleton (M. Carleton) discovery of transcript, Casebook page 162.

Assignment:
1. Problem #13 Manning v. Carleton (M. Carleton)
   - Xs cross-examine
   - Ys re-examine and play witness role
2. Problem #14 Gentry v. Smith (James Taylor)
   - Ys cross-examine
   - Xs re-examine and play witness role

Format:
7:00 – 8:45 SMALL GROUP SESSION
   (Breakout Rooms)
   Performance of Impeachment Problems
8:45 - 9:00 Break
9:00 - 10:00 ALL SECTIONS Demonstration (Moot Court, Room 1005)

You have now learned all the basic techniques to conduct a trial, other than opening statement and closing arguments (but you have seen these demonstrated). This evening you will get a chance to put it all together, in a mini-trial in *N.L.C. v. Jones and Chateau Guy*.

Readings: 1. Casebook
- Materials on Openings and Closings pg 78 - 111

2. Modern Trial Advocacy
- Chapter Twelve: Final Argument pg 385 - 432


Assignment: The facts are contained in Problem #1. Dan Jones will be called as a witness for the defence. At the voir dire, the judge ruled admissible the voluntary statement Jones gave.

At trial, Dan Jones will testify in accordance with his statement to police except he will state that he recalls seeing Watkins in the store but does not recall speaking to him. The direct examiner is to elicit this evidence from Jones on the examination-in-chief.

Format: The *Bier* trial will take place in the Small Groups according to the following rules:

Time Guidelines and Rules

Two rounds of trials; 1.5 hours each.

7:00 - 8:30 Trial #1
8:30 - 10:00 Trial #2
Classmates will be witnesses to play the role of Bier or Jones. Each side is also invited to bring three jurors (friends, family, even children from the age of eleven are very suitable as jurors).

Trial teams will consist of two students within your small group who will act as counsel for either the defence or the Crown.

   - The Mini Trial Schedule will be posted on the course website shortly before the Mini Trials and this schedule is to be followed absolutely.

Skills

You will be expected to make use of the skills, which you have learned so far. In particular, you will be expected to:

   (a) prove the diagram;
   (b) use it in examination and cross-examination;
   (c) introduce the wine bottle as an exhibit;
   (d) make appropriate objections on any matters which call for objections, including the admissibility of evidence.
We will devote the whole of the evening (except for the demonstration) to performance of the two parts of Scott v. Jamison.

The demonstration of the examination and cross-examination of an expert witness will prepare you for next week’s performance exercise.

**Readings:**

1. **Casebook**
   - Some Points on Witness Examination pg 6-16
   - Examination in Chief, Cross-Examination and Re-Examination pg 17-20

2. **Modern Trial Advocacy**
   - Chapter Five: Cross-Examination pg 79-138

**Problem:**

Problem #4: Scott v Jamison (Horrigan & Colson) Casebook, page 129.

**Assignment:**

(a) Xs to conduct the cross-examination of Horrigan;
(b) Ys to conduct the cross-examination of Colson;

Students should also be prepared to play the role of the witness in the problem to which they are assigned.

**Format:**

7:00 - 8:45 SMALL GROUP SESSION (Breakout Rooms)
Performance of cross-examinations in Scott v. Jamison

8:45 - 9:00 Break

9:00 - 10:00 ALL SECTIONS Demonstration on Expert Witnesses and Q & A for Pracicum Paper (Moot Court, Room 1005)

**Demonstration:**

Tonight the entire evening will be devoted to the examination and cross-examination of an expert witness, with the role of the expert witness being played by real, real estate appraiser experts!

**Readings:**

1. Casebook
   - Materials on Examination of Expert Witnesses  pg 69 - 77

2. Modern Trial Advocacy
   - Chapter Eight: Expert Testimony  pg 195 - 234

**Problem:**


**Assignments:**

1. The focus of this class will be the examination and cross-examination of an expert witness. Real experts will play the witness roles.

2. - Xs will conduct the direct examination;
   - Ys will conduct the cross-examination.

   You will be given up to 15 minutes to conduct your examination or cross-examination. Given the nature of the problem, you should attempt to conduct an entire direct or cross within this time frame.

**Format:**

7:00 - 10:00  SMALL GROUP SESSION (Breakout Rooms)
The entire class will be spent in small groups. You will be given 10 minutes at the outset of the class to ask the expert witness any questions you may have.
For the first part of the evening everyone in the seminar will divide into two groups, according to which side of the case you will be presenting in your final trial. An email will advise students which room to attend at 7:00 pm. We will be working with you on “brainstorming”/analysing/planning the presentation of your case for your final trial. We believe this is a useful method of trial preparation and we will try to share with you some of the techniques that are available.

In the second half of the evening we will be working on opening & closing statements. Each student is to prepare and present BOTH an opening statement AND a closing argument.

Readings:

1. Casebook

   Materials on Openings and Closings pg 78 - 111

2. Modern Trial Advocacy

   Chapter Eleven: Opening Statements pg 333 - 383
   Chapter Twelve: Final Argument pg 385 - 432

Problems: You must be fully familiar with the case file you will be trying in the final trials.

Assignment: Openings and Closings

The purpose of this class is to alert you to the differences in:

(a) tone
(b) format
(c) content

in opening statements and closing arguments.

Opening statements will focus on having a theme, telling a story, engaging the jury and using clear, simple, forceful language. Remember, you must start the process of persuasion without “arguing your case,” which is not permitted in opening statements.

We will also focus on the techniques of a good closing:

(a) persuasive language;
(b) use of jury instructions and key exhibits;
(c) arguing why your side should win, rather than simply restating the evidence.

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Remember:

(a) Closing argument is no time for a neutral review of the evidence. It is the time for powerful argument to persuade the jury of your client’s position.
(b) Openings and closings are your only opportunities to speak directly to the trier of fact.

Also, we will reinforce the principle that in preparing any trial you should start with your closing argument. The closing argument is your blueprint for the trial and the conduct of the entire trial should be geared towards adducing the evidence which you will emphasize in your closing argument. This will assist you in developing your theory of the case and will help you decide how you will present the evidence.

**Format:**

7:00 - 7:30  In the first part of this class we will divide into two separate groups (Plaintiff and Defendant) for the case analysis and trial preparation session. Rooms will be assigned shortly before class.

Case analysis and trial preparation for the case you will be trying at the final trial.

7:30 – 7:45  Break

7:45 - 10:00  Regular Small Group Sessions: (Breakout Rooms)
Openings and Closings
This evening you will perform a direct or cross-examination of a witness from your final trial.

Readings: Read and fully familiarize yourself with the file you will be working with in your final trial.

Assignment: Prepare and perform the direct or cross-examination of a witness from your final trial.

Format: 7:00 - 10:00 SMALL GROUP SESSIONS

Tonight you are to do the direct or cross-examination of a witness in your Final Trial (your choice as to both task and witness). By now you will have developed a clear theory of your case so tailor your direct or cross to dovetail with your case theory.

In the small groups for this evening you will be with your final trial partner. The groups and room assignments will be posted in advance. You must be prepared also to play the role of all the witnesses for the side you will be representing at trial.
CLASS #12: DIRECT OR CROSS-EXAMINATION OF A WITNESS IN YOUR FINAL TRIAL AND TRIAL PREPARATION
November 21, 2017

In the first part of the evening we will have a discussion session on conducting the final trial. In the second part of the evening you will perform a direct or cross-examination of a witness from your final trial.

Readings: Read and fully familiarize yourself with the file you will be working with in your final trial.

Assignment: Prepare and perform the direct or cross-examination of a witness from your final trial.

Format: 7:00 - 7:15 FULL SECTION MEETINGS (Moot Court, Room 1005)
Discussion will focus on conducting the final trial and answering any questions you may have about the final trial.

7:30 - 10:00 SMALL GROUP SESSIONS (Breakout Rooms)

Tonight you will again do a direct or cross-examination of a witness in your Final Trial (your choice as to both task and witness). By now you will have developed a clear theory of your case so tailor your direct or cross to dovetail with your case theory.

The small groups for this evening will be organized according to trial assignments: each group will have only lawyers for a particular trial. The groups and room assignments will be posted in advance. You must be prepared also to play the role of all the witnesses for the side you will be representing at the trial.
Please refer to Section 10, Final Trials, located in the Course Description.

Please keep in mind that the final trials are not to be an exercise in making up facts. This is not a course in teaching you how to suborn perjury! As in real live trials, you are “stuck with the facts that you are dealt”. Stay with the evidence and facts that are in the record in your case and attempt to put them in the most persuasive context for your side.
Trial Advocacy Materials 2017

Course Description

Course Directors: Jonathan Rosenthal and Rachel Grinberg

Osgoode Hall Law School
York University
1. Materials

(a) Casebook: *Trial Practice Materials: Problems and Case Files*, adapted for
Canadian usage by Prof. Garry D. Watson. The Casebook is available from the
Material Distribution Centre (MDC). Be sure to read the *Introduction* (pages 4-5)
and *Some Points On Witness Examination* (pages 6-16) found in the Casebook.

(b) Required Reading: Available from MDC and on Reserve in the Library:

Steven Lubet, *Modern Trial Advocacy: Canada*, Third Edition, Sheila Block and
Cynthia Tape, editors (NITA, 2010).

(c) Optional Readings on Advocacy:

Marilyn Pilkington and Garry Watson, eds., *Selected Readings in Trial Advocacy*
(Toronto: Osgoode Hall, 1981, call no. KF 8914 Y075). Most of the reading references
given in the Casebook can be found in Pilkington and Watson. At the end of this Course
Description you will find references to other useful texts.

You will frequently make reference to the law of evidence and procedure, and will want
to have access to the following:

i) A recommended text on evidence is Sopinka, Lederman and Bryant, *The


vi) Ethical questions frequently arise in trial practice. Please read carefully
Rule 4.01, "The Lawyer as Advocate", from the Professional Conduct Handbook,
The Law Society of Upper Canada (which can be found in your materials).
2. Learning Method

The purpose of the course is to assist you in developing the skills of trial advocacy so that you can conduct a trial from beginning to end with reasonable competence.

The method and materials are based on a program developed in the United States by the National Institute for Trial Advocacy (NITA), and adapted for Canadian use by Prof. Garry D. Watson. The method is explained in the Introduction in the Casebook. Basically, the techniques employed are (a) demonstration by experienced counsel, (b) student performance, and (c) critique.

How, within this framework, do you develop the requisite skills to a reasonable level? Obviously, the major key is careful preparation for each assignment. But how do you prepare? The assigned readings will be of assistance. After you have done that, carefully read and analyse the assigned problem. What should you consider in preparing for your performance? NITA has produced some notes on teaching and critiquing student performances in trial advocacy. Excerpts can be found in your materials. The comments are oriented to teachers of trial advocacy, but you may find them useful as a guide in the preparation and performance of your assignments.

There are two aspects of the teaching methodology used in this course which call for particular explanation.

Although you are expected to prepare the whole of the examinations that you are assigned each evening, when it comes to in-class performance, you will only be called upon to perform a segment of the examination - typically 10 minutes. **[Note: In the time assigned to you do not attempt to do your whole direct or cross (etc.) - do only what you would actually do in a real courtroom in this time frame.]**

There is a specific rationale for this "10 minute format". Experience indicates that trial skills are developed best by students performing short segments often, rather than one single, long performance. Obviously, if each student were given the opportunity to do the complete assignment each evening, not every student could perform even one assignment on a given evening. Experience also indicates that 10 minutes gives you an opportunity to adequately demonstrate to the teaching team your present level of performance so that they can offer suggestions as to how you can improve your performance.

The second aspect calling for comment is that, unless directed otherwise by your instructor, you are to assume that all problems arise in a trial that is being conducted before a judge and jury. Given that civil jury trials are now quite rare in Canada, questions are often raised as to why we use this assumption. The reason is that law students, for some strange reason, have it firmly fixed in their minds that judges like to have facts presented in a complicated manner, and they like to be bored. Obviously, this is untrue. On the other hand, students also recognize the need to simplify facts for a jury, and to make the story telling interesting. By assuming that all the assigned performances arise in the context of a jury trial, it is hoped you will strive to make your factual presentations simple, comprehensible and interesting.
3. **Sequence of Study**

The Sequence of Study (on the course website) sets out for each week:

(a) the student performance and witness assignments;
(b) the problems that will be demonstrated; and
(c) the reading assignments.

4. **Breakdown of Sections/Instructors**

There are three sections, each of the three sections consists of 30 students and is divided into five "small groups" (see "Small Group Lists" which will be handed out at the first class along with the “List of Instructors”). Within groups, each student has an "X" or "Y" designation. These designations are used in the Sequence of Study to indicate performance assignments.

The Trial Advocacy Seminar is organized and directed by:

Rachel Grinberg  
*Barrister & Solicitor*

Jonathan Rosenthal  
*Barrister & Solicitor*

The other instructors of the course are all either experienced trial lawyers or judges from both the Ontario Court of Justice and the Superior Court of Justice. The trial lawyers practice in a wide variety of disciplines.

5. **Class Format**

The format of classes will vary from evening to evening, noted in the Sequence of Study.

- Most evenings each section will divide up to its breakout groups and go to assigned rooms. Please check the Breakout Room Assignment Chart each week. This chart tells you where your small group session will meet. During these breakout sessions you will perform the assigned problems for the evening, and your performances will be critiqued.
- On almost all evenings all three sections will meet together in the Moot Courtroom for a short lecture and demonstration. It is imperative that you attend the lecture and demonstration, as you will be performing what was demonstrated the following week. In addition to the Course Materials covered, the lectures will also deal with the Praxicum requirements of the Course for which your essay will be based.
- You will be video taped every third session. You must bring a USB key and laptop to these sessions. After performing and being critiqued by two faculty members you will move on to Video Review where you will meet one on one with another instructor to watch your performance. These sessions have always proven to be one of the best teaching/learning methodologies.
Generally, students will not meet with and prepare their witnesses. At this stage of your development, we feel there is more to be learned from conducting examinations without preparing witnesses. See Section 6 below for further discussion of witness assignments.

In class, you will always be called on in pairs. When you have been called up, but are not examining, you will be expected to play the role of opposing counsel and make any proper objections. Initially, you will be asked to make all possible objections. Later, you will likely make only those objections consistent with your strategy at trial. In addition, non-performing students will be responsible for making any objections overlooked by the opposing counsel. In preparation for making and responding to objections, you should review the applicable evidence law. Finally, you will be asked to re-examine the witness.

6. Class Witness Assignments

With the exceptions noted below, witness assignments are outlined in the Sequence of Study. When you are assigned a witness role, you must also be prepared to carry out the exercise assigned to you as an X and Y for the evening.

In addition, we will have members of the Toronto Police Service and the RCMP attend to play the role of witnesses on two nights. When we examine expert witnesses, real experts will play the role of the witness.

Witness assignments are to be taken seriously -- learn your part and take your role seriously.

7. Attendance

Class attendance is compulsory. If you are unable to attend, advise Julia Flood and/or Cassandra Jarvis, the course coordinator by email at trialadvocacy@osgoode.yorku.ca as soon as you are aware of your anticipated absence. If you fail to attend more than two classes in the absence of exceptional circumstances you will not receive credit. In the event you anticipate missing more than two classes you must contact Jonathan Rosenthal in writing as soon as you become aware of the situation.

8. Mini-Trials, Final Trials and Written Essay

Mini Trial

The Mini-Trial will take place on October 10, 2017. You and a partner will either be acting for the Crown or the Defence in the NLC v. Jones and Chateau Guy (Bier) Trial. Think of this as your mid-term. We will have members of the RCMP attend to play the roles of Inspector Bier. You must attend and actively participate in the mini-trial to obtain credit.
Written Essay

Trial Advocacy is now part of the Osgoode Hall Praxicum Requirement. In each week’s lecture, in addition to dealing with a particular skill, the lecture will also deal with a critical thinking component. This will cover topics such as why trial lawyers engage certain techniques, are the techniques effective and why? Why we have a trial system at all. Is the trial system effective? Is it really a search for the truth? What works? What doesn’t work? And why? How can it be improved?

You will be required to submit a 5 page, double-spaced essay on or before November 14, 2017 at 11:59 PM on any of the topics covered in the course. This is a reflection paper that can be based on the class readings, the classes themselves, outside materials or a combination of the above. There isn’t a limit on secondary sources. Nor is there a restriction on topics. In order to receive credit, you must complete the written assignment by the due date. Please submit the essay to the Osgoode electronic drop box with your name and student number included. This assignment will be graded on a credit/no credit basis and returned to you with comments.

Final Trial

(a) Trial teams and cases:

The culmination of the course will be half-day trials held on November 25, 2017. You will be paired with another student in the course and will oppose another trial team of two fellow students in the course. The case file is not included in the materials and will be distributed by email and posted on the course website later in the semester.

You may express a preference for a partner from the students in the course. If you do not choose a partner, one will be assigned to you. Please send an e-mail to the course coordinator indicating your partner preference (including your partner’s name, section and e-mail address) no later than October 3, 2017. We will attempt to accommodate all preferences to the extent that we are able to. Also, please note if you have no objection to conducting your final trial alone. The final trial schedule will be prepared by the end of October. In order to receive credit, you must actively participate in the Final Trial. If for religious reasons you are unable to attend on Saturday, November 25, 2017, please notify the course coordinator immediately. We will arrange an alternate trial at a time to be arranged. This alternate trial will take place on campus.

(b) Witnesses:

Witnesses will be your fellow Trial Advocacy students, which will be determined by a “Paired Trials” system i.e. if you are assigned the morning trial session #1, you will act as a witness for the corresponding afternoon trial session #1.
(c) **Jurors:**

It will be the responsibility of each trial team to obtain four jurors for their trial (i.e., four jurors for each two-person team). Jurors may be law students, your parents, significant others, etc. You should start arranging for your jurors NOW. We cannot stress enough how important Jurors are. The Jurors are called upon not only to decide the case but also to provide direct feedback on your performances. This will be the only time in your career (legally or unless you end up practicing in the United States) where you will receive feedback from jurors.

(d) **Courts:**

The final trials will be held at the Courthouse at 361 University Avenue. All trials will be presided by either a Judge of the Ontario Court of Justice or the Superior Court of Justice.

(e) **Trial Book:**

Each team should prepare a trial book for use at trial. It should contain:

- tactical analysis of the case, setting forth your theory of the case, the problems you anticipate encountering, and how you expect to handle them;

- a “proof” check list, setting forth:
  
  (i) facts you must prove as part of your case, and their source or sources, i.e. witnesses, exhibits, judicial notice, admission, etc.;

  (ii) every fact the other side must prove;

- an outline of your Opening Statement and Closing Argument;

- a list of witnesses you expect to call, in the order you expect to call them;

- an outline of your preparation for the direct and cross-examination of all witnesses, and a description or list of the items you are prepared to cover in re-examination;

- copies of all exhibits you plan to introduce;

- copies of any previous statements made by witnesses, with key passages indexed;

- legal memoranda on the substantive issues;

- legal memoranda on any anticipated evidentiary issues;
- proposed jury instructions.

You are NOT required to hand in your trial book, but you cannot conduct a trial properly unless you prepare one.

9. Evaluation

The faculty has approved a credit/no credit grading system for this course. Despite this grading system your class performances (including being adequately prepared for witness assignments), mini-trial and the final trial will be evaluated each week in addition to giving you oral comments. These will be cumulated and averaged for the selection of various trial teams and awards as listed below.

10. Course Directors’ Contact Information:

Ms. Rachel Grinberg (416) 777-9599, rachel@grinberglaw.ca
Mr. Jonathan Rosenthal (416) 360-7768, jrosenthal@bondlaw.net

11. Reading about Trial Advocacy

A major focus of this course is learning by doing, coupled with critique of your performance. This involves thorough preparation, and the ability to listen objectively to comments about both your performance and those of other students. The emphasis on performance in class leaves little or no time for lecturing. This gap can only be overcome by out-of-class reading.

The literature about trial advocacy is voluminous, increasing, and varied in quality. You will find that its usefulness varies considerably. Some people find a particular author useful, while others will not. To get the most out of the course, you will have to do a great deal of reading. Each week there are specific reading assignments. The references to Lubet should be treated as required reading, although like other readings on trial advocacy, it is not a "bible." You will likely find one or two areas in which the views of Lubet and those of your instructors differ. You will find it useful to read, at the outset of the course, Chapters 1, 2 and 4 in Hegland, Trial and Practice Skills (on Reserve). The book is short, and basic, but excellent for a beginner. During the course, you should also read either: Sopinka, The Trial of an Action, or Williston & Rolls, The Conduct of an Action. While not exclusively concerned with trial advocacy in the narrowest sense, both deal with preparing for and conducting a civil trial.

In addition, you are expected to read "Some Points on Trial Advocacy", found in the Casebook. It is not a substitute for more substantive readings, but it does discuss some basic aspects of trial advocacy. There are also some Canadian texts on trial advocacy, which are well worth reading. The following are on reserve in the library:

- call number KF 8915 A72

VII
- call number KF 9672 L48

- call number KF 8915 A2 A42

- call number KF 8920 S34

- call number KF 8913 O53

- call number KF 8915 M38C

12. **Arnup Cup**

Each spring an inter-law school trial advocacy competition, called the Arnup Cup, is held. The Osgoode team is chosen, on the recommendation of Trial Advocacy instructors, from students who have participated in the Trial Advocacy Seminar. The Osgoode team will be chosen in late fall or early in the spring term. If successful in the Arnup Cup, the team will proceed to the national Sopinka Cup competition in Ottawa. Course credit is available to team members.

13. **OTLA Cup**

Every year, on the first Saturday in March, Ontario law schools participate in the OTLA Cup. The students conduct a civil trial from beginning to end, which is held in a courtroom with a real judge presiding. Six jury members select a number of awards for best advocate, team, opening etc. The students are provided all of the materials to participate in the event well in advance and they work together with their coaches at each school. The team will be chosen on the recommendation of trial advocacy instructors.

14. **Trial Advocacy Awards/Prizes:**

1) **Beard Winter LLP Prize in Trial Advocacy**

Awarded to the top two students.

2) **The Honourable Paul Bentley ’77 Prize for Professionalism**

This is awarded to the student in Trial Advocacy who best embodies Paul Bentley's qualities of civility, gentility and professionalism.
15. OSGOODE and YORK ACADEMIC POLICIES

a. Academic Honesty and Integrity

Osgoode students are required to maintain high standards of academic integrity and are subject to the York Senate Policy on Academic Honesty and the relevant Osgoode Academic Rules. The Senate Policy can be found at: http://www.yorku.ca/secretariat/policies/document.php?document=69

The York University academic integrity website can be found at http://www.yorku.ca/academicintegrity

The Senate Policy and Osgoode Academic Rules are also found in the Student Handbook, which is available on the MyOsgoode website, under the Documents and Publications tab.

b. Religious Observance

York University is committed to respecting the religious beliefs and practices of all members of the community, and making accommodations for observances of special significance to adherents. Should any of the dates relating to examinations or assignments for this course pose such a conflict for you, please let Assistant Dean, Students, Mya Rimon, know within the first three weeks of class.

c. Students with Disabilities and Accommodation Needs

York University has a range of resources to assist students with physical, mental, and learning disabilities/challenges in achieving their educational objectives. Students with disabilities requiring accommodation in the classroom or in the examination or evaluation process are encouraged to identify themselves to York’s Counselling & Disability Services office (N110, Bennett Centre for Student Services or 416-736-5297) or Osgoode’s Office of Admissions & Student Services as soon as possible. Students seeking accommodation in experiential education settings are encouraged to read the Accommodation Information for Clinical & Intensive Program handout provided to them with their enrolment offer. All requests for accommodation will be kept confidential.

Requests for accommodation for in-term work must be made, in writing, to either the instructor or to the Assistant Dean, Students, Mya Rimon. Such requests must be made as soon as the need for accommodation arises and, barring exceptional circumstances, in advance of the deadline for the work.

Requests for accommodation for final examinations and final papers may only be made to and approved by the Assistant Dean, Students, Mya Rimon and must be made in advance of the examination date or final paper due date.

IX
d. Other York University Policies, including Ethics Review Process

Further information concerning relevant York University academic policies, such as the Ethics Review Process for research involving human participants is available on the Senate Committee on Academic Standards, Curriculum and Pedagogy webpage (see Reports, Initiatives, Documents) –
http://www.yorku.ca/secretariat/senate/committees/ascp/index-ascp.html
RULES FOR FINAL TRIALS

You are to work with the facts given in the file and you are not to make up new facts. This is not an exercise in suborning perjury but in trying the case as given to you.

1. Trial Realism

The trial should be conducted as realistically as possible. Each participant, judge, counsel, witness - should stay in "role". E.g., do not stop the trial for critique.

2. Trial Materials

The factual basis for the trial is in the relevant case file.

If a witness' testimony is inconsistent with the case file the witness may be impeached. For the purposes of impeachment at trial, it is assumed that any statement in the file was given by the witness, was read and signed by the witness. The objection that "it's not in the script or case file" will not be permitted.

3. Facts

Please keep in mind that the final trials are not to be an exercise in making up facts. This is not a course in teaching you how to suborn perjury! As in real live trials, you are “stuck with the facts that you are dealt”. Stay with the evidence and facts that are in the record in your case and attempt to put them in the most persuasive context for your side.

4. Agreements

Any agreed facts, etc., stipulated in the case file are beyond controversy. Counsel are encouraged to meet and agree to facts or admissibility of exhibits.

5. Time Limits

Suggested Time Guidelines have been prepared for the trial and will be given to you. It is important that the trial proceed within these approximate time limits so that time will be available for critique.

6. Jury Selection

This will be dispensed with and the available jurors accepted and empanelled.
7. **Counsel's Division of Responsibility**

Counsel may divide the opening statements, final arguments and witness examinations in any way they wish. However, only one counsel per witness examination is permitted. See Rule 8, infra.

8. **Objections**

Proper objections should be made (if it is tactically sound to do so). State the basis of your objection succinctly. Judges have been asked to rule quickly and not to permit excessive argument.

9. **One Person to a Witness**

Only one lawyer may make objections or participate in the examination of any given witness. The trial partner may not ask questions or make objections during that examination.

10. **No Exclusion of Witnesses**

A motion to exclude witnesses may be made as a matter of form for the experience of doing it. However, witnesses shall not be excluded at the trial. The participants/witnesses are to serve as shadow counsel and must be present in the courtroom to observe the trial.

11. **Jury Instructions**

The Judge's charge will be limited to the applicable law; summarizing the evidence and the statement of each party's theory will be left to counsel's closing argument.

12. **Critique**

When the jury retires to deliberate, the judge will critique counsel's performance.

13. **Comments by the Jury**

After the verdict is returned, the jury should be invited to comment on the case and counsel's performance. The judge should ensure that each juror has the opportunity to express his/her comments.

Unlike the situation in real life, today counsel are permitted to talk with the jury regarding the deliberations and counsels' performance during the trial. This is an opportunity for an excellent learning experience. Counsel should utilize it to discover the jury's perceptions of the case and their performance, not to quibble with them regarding the verdict. The verdict itself, who won or lost, is not important as this is a mock trial;
what is important in the learning process is how the jury perceived the case and counsels' performance. What the jury thought was significant is the key element for discussion.

Counsel cannot impeach the jury verdict or win the case on appeal, but they can learn why the jury did what they did. Counsel should use the time well as it will pay many dividends.