

## 2012 Middle School Mock Trial Forum Discussions

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### Postings as of 10/25/12:

#### Creation of Material Fact

**Question:** I have a question about creation of material facts. For example, Jess McGee makes no statement regarding whether or not he told the sheriff about cuts in his fence. If he is asked whether he told the sheriff what is the proper response?

**Answer:** The presiding judge is likely to rule that the only fair inference to be drawn from the case materials is that Jess McGee did NOT show Sheriff Walle the cut(s) in the fence. Hunter Brown did, however. If Jess is asked whether s/he showed the sheriff the cut(s), s/he should reply "No, but I understand that Hunter Brown did."

If Jess says that s/he DID show the sheriff the cut(s), that would probably be a creation of a fact that is not a fair inference from the case materials. The judge probably won't find that it is a creation of a "material" fact, though, because Jess' employee Hunter Brown ended up showing the Sheriff the cuts anyway. **Keep in mind that the presiding judge in your case might see it differently, so be prepared for a different ruling.**

**Question:** But what if the attorney asks if Jess had ever reported the cuts prior to the accident? It's not in Jess's affidavit....it's one of those "cross by omission". Either answer Jess would give would create a fact.

**Answer:** I think the questions are the same so I guess the answers are the same. "Creation of material fact" is the rule, but the test is "fair inference" - I don't think it is a fair inference that Jess reported the prior cuts in the fence, but it would be a fair inference that he didn't. Both are "created facts" but one is inferred from the affidavit and one is not.

The presiding judge could rule that it is not a "material" fact. Or, the judge could rule that this is a "material" fact because one of the legal issues in the case is whether or not Jess used reasonable care to keep the animals in the fence. It could be argued that failure to call the sheriff to complain about prior cuts in the fence was unreasonable conduct that led to Pete escaping on the day of the wreck.

But hoping for such a ruling is not a good strategy. It is too risky a question for the defense. Why would you ask that on cross and give Jess an opportunity to bolster the plaintiff's case? What if he says yes he reported it, you object, and the judge rules against you and allows it in? You then have no evidence to controvert that fact and the only evidence (Jess's testimony) is in Jess's favor.

You are better off not mentioning it on cross and waiting until closing arguments and saying "Jess claims his fence had been cut before, but there is NO EVIDENCE that he EVER reported this to the sheriff before the wreck. Any reasonable farmer would have called the sheriff if he thought that someone was deliberately cutting his fence to let out his livestock - knowing full well that it created such a dangerous situation for motorists on the adjacent highway."

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#### Power Matching and the Third Round

**Question:** This third round, do we pick which side goes again? Or do you pick? Is it the stronger side or just a random thing? How does the power matching work — is it bracketed with the strongest against weakest, or is it stronger teams vs. other strong teams, etc.?

**Answer:** In the process of power matching (Mock Trial Rule 5.6, pg. 24 of Competition Handbook), teams are randomly paired for the first round. At the end of the first round, that leaves half the teams with a win and half with a loss. These two groups constitute the brackets used for power matching the second round. The strongest team in the winning bracket plays the weakest team in the same winning bracket and so on down the line until all have been paired in that bracket. The rule for switching sides in subsequent rounds is that if a natural switch can be made (i.e. both teams played opposites in the first round) then it is done. If both teams were plaintiff in the previous round, then the stronger of the two teams must flip sides. After the second round there will be teams with 2 wins, some with 1 win, and some with no wins. For the purposes of power matching these constitute the three brackets of the third round. The same process is repeated with the caveat that if a team has performed the same side in both of the previous two rounds, then they must flip and perform the opposite side in the final round.

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#### Mel Hinnant's Affidavit

**Question:** Mel Hinnant's affidavit, page 25 line 32: "Last week, I saw a bull roaming around...It might have been Pete." Does "last week" mean the week before the accident?

**Answer:** "Last week" refers to the week prior to the accident.

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#### Pronunciations

**Question:** How should we pronounce the Sherriff's last name? Like Wall? Wallee? What about Sung Ye? Is it Soon yee? Sung Ye?

**Answer:** Walle - sounds like "wall" and Sung Ye - sounds like "sue-ng – yeeh." The best you can do will be fine.

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