



New York State 2014 High School Mock Trial Tournament Materials

*People of the State of New York
vs.*

*Penn HydraGas, Inc., and
Mitchell Tomley, CEO*

*Materials prepared by the Law, Youth & Citizenship Program
of the New York State Bar Association.*

Supported by The New York Bar Foundation.

Law, Youth and Citizenship
New York State Bar Association®





2013 New York State Bar Association
High School Mock Trial Champions
WILLIAM FLOYD HIGH SCHOOL

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With The Honorable Karen K. Peters the Presiding Justice New York Supreme Court,
Appellate Division, Third Department
May 21, 2013

2013-2014 Mock Trial Case Materials

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New York State Bar Association

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November 12, 2013

Dear Mock Trial Students, Teacher-Coaches and Attorney-Advisors:

Thank you for participating in the 2013-14 New York State High School Mock Trial Tournament. The tournament is now entering its 33rd year and because of the continued financial and logistical support from the New York Bar Foundation and the New York State Bar Association, New York can continue to boast as having one of the largest and longest running high school mock trial programs in the nation. Equally, the program would not be as successful as it is without the support of the numerous local bar associations across the state that sponsor mock trial tournaments in their counties and to the County Coordinators who spend many hours managing the local tournaments. Of course, the teacher-coaches and the attorney advisors have our thanks for their time, dedication and commitment to the program. And last, but not least, a special thank-you is for the students who devote their time and energy in preparing for the tournament. Every year, we are amazed at the level of skill and talent the students bring to the courtrooms. Congratulations to the 2012-13 NYS Tournament Champion, William Floyd High School, who turned in a winning performance last May at the State Finals here in Albany.

Please take the time to carefully review all of the enclosed mock trial tournament information. The simplified rules of evidence should be studied carefully as should the general tournament rules. There are several rule changes for the 2014 tournament: timing, redaction of evidence and constructive sequestration of witnesses. These changes are discussed further below. This year's case is *People of the State of New York vs. Penn HydraGas, Inc., and Mitchell Tomley, CEO*. Penn HydraGas and Tomley are accused of polluting the drinking water supply of a small village in upstate New York as a result of the defendants' "fracking" operation that is located near the village. The company and CEO are charged with violating section 71-4001 of the Environmental Conservation Law, a criminal offense.

The mock trial program is first and foremost an educational program designed to teach high school students basic trial skills. Students learn how to conduct direct and cross examinations, how to present opening and closing statements, how to think on their feet and learn the dynamics of a courtroom. Students will also learn how to analyze legal issues and apply the law to the facts of the case. Secondly, but equally important, is that participation in mock trial will teach the students professionalism. Students learn ethics, civility, and how to be ardent but courteous advocates for their clients. Good sportsmanship and respect for all participants are central to the competition. We thank the teachers, coaches, advisors, and judges not only for the skills that they teach, but for the example of professionalism and good sportsmanship they model for the students throughout the tournament.

We remind the teams that all participants: students, teachers, attorneys, parents and all spectators must conduct themselves before, during and after each round with the utmost respect and civility toward the judge. If there is a circumstance in which any participant does not abide by this standard, a referral will be made to the LYC Mock Trial subcommittee to consider appropriate sanctioning.

Please be sure to encourage your students to consider participating in the Mock Trial Summer Institute. MTSI is scheduled for July 13-18, 2014 at Silver Bay YMCA on the shores of beautiful Lake George. If you have not had a student attend MTSI, now is the time! The students who return from MTSI become the team leaders of tomorrow and an inspiration to the rest of the team. Having a student or two attend MTSI will give you a definite leg up as you start the tournament season next year.

Please review the new timing format outlined in Part I, “14. Time Limits.” Additionally, please review the language added to Part I, “11. Witnesses” regarding the constructive sequestration of witnesses.

A new rule regarding redaction of evidence can be found in Part III under the “Physical Evidence” section as Rule 602. Please note that the former Rule 602 regarding *voir dire* is now Rule 603. Finally, Rule 903 has been added, supplementing direct and circumstantial evidence definitions.

Another positive change that’s being instituted for the 2014 tournament season is the inclusion of two additional regions. Starting this year, New York City, Region V, will be given an additional region, to wit: Region VI, in order to give the teams from New York City a better representation at State Finals. This is also being done for Long Island, which now will be divided, by county, into Regions VII and VIII. The new regional map can be found in the appendix.

The tournament finals will be held in Albany on May 19 and 20, 2014. As in years’ past, the regional winners in each of the eight regions will be invited to participate in the semi-finals and two of the teams will advance to the final round the next day. The New York Bar Foundation is generously supporting the tournament again this year and will fund the teams’ room and board for the state tournament. More details will be available closer to the date of the tournament.

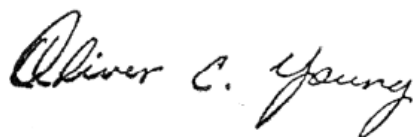
This year’s Mock Trial Tournament materials will be posted on the Law, Youth and Citizenship website, www.lycny.org and there will be frequent updates to the Facebook and twitter pages (NYS Mock Trial and Mock Trial Summer Institute and @NYSMockTrial.) We are also on Pinterest, where our “pin” is nyciviced. Alternatively, you can look for us on Pinterest’s Mock Trial boards.

We trust you will enjoy working on this year’s case. Best wishes to all of you for a successful and challenging mock trial tournament.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard Bader".

Richard Bader, Esq., Albany
Chair, Committee on Law, Youth and Citizenship

A handwritten signature in black ink that reads "Oliver C. Young". The signature is written in a cursive style with a large, stylized 'O' and a long, sweeping tail on the 'y'.

Oliver Young, Esq., Buffalo
Chair, Mock Trial Subcommittee

Subcommittee Members:

Karen Callahan, Esq., New York City
Melissa Ryan Clark, Esq., New York City
Michael L. Fox, Esq.,
Eugenia Brennan Heslin, Esq., Poughkeepsie
Seth Gilbertson, Esq., Albany
Stuart Kahan, Esq., White Plains
Susan Katz Richman, Esq., Mineola

STANDARDS OF CIVILITY

“ . . . [O]urs is an honorable profession, in which courtesy and civility should be observed as a matter of course.”

Hon. Judith S. Kaye, Former Chief Judge of the State of New York

The following standards apply to all participants in the Mock Trial Tournament, including students, teachers, attorneys, and parents/guardians:

1. Lawyers should be courteous and civil in all professional dealings with other persons.
2. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
3. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.
4. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.
5. A lawyer should adhere to all expressed promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.
6. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.
7. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.
8. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.
9. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.
10. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.
11. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

The foregoing Standards of Civility are based upon the Standards of Civility for the New York State Unified Court System.

NEW YORK STATE HIGH SCHOOL MOCK TRIAL TOURNAMENT RULES

PART I

MOCK TRIAL TOURNAMENT RULES

1. TEAM COMPOSITION:

- a. The Mock Trial Tournament is open to all 9th - 12th graders in public and nonpublic schools who are currently registered as students at that school.
- b. If a school chooses to limit student participation for any reason, this should be accomplished through an equitable “try-out” system, not through disallowing participation by one or more entire grade levels.
- c. Each school participating in the Mock Trial Tournament may enter only **ONE** team.
- d. Members of a school team entered in the Mock Trial Tournament—including teacher-coaches, back-up witnesses, attorneys, and others directly associated with the team’s preparation—are **NOT** permitted to attend the trial enactments of any possible future opponent in the contest. This rule should not be construed to preclude teams from engaging in practice matches, even if those teams may meet later during the competition.

Violations of this rule can lead to being disqualified from the tournament.

- e. Immediately prior to each trial enactment, the attorneys and witnesses for each team must be physically identified to the opposing team and the judge by stating their first and last names. Please do not state the name of your school in front of the judge since the judge will not otherwise be told the name of the schools participating in the enactment he or she is judging.

2. OBJECTIONS

- a. Attorneys should stand when making an objection, if they are physically able to do so.
- b. When making an objection, attorneys should say “objection” and then, very briefly, state the basis for the objection (for example, “leading question”). Do not explain the basis unless the judge asks for an explanation.
- c. Witnesses should stop talking immediately when an opposing party makes an objection. Please do not try to “talk over” the attorney making an objection.

3. DRESS

We emphasize to the judges that a student’s appearance is not a relevant factor in judging his or her performance. However, we strongly encourage students to dress neatly and appropriately. A “business suit” is not required.

4. STIPULATIONS

Any stipulations are binding on all participants and the judge, and may **NOT** be disputed at the trial.

5. OUTSIDE MATERIALS

Students may read other materials such as legislative histories, judicial opinions, textbooks, treatises, etc., in preparation for the Mock Trial Tournament. However, students may cite only the materials and cases provided in these Mock Trial Tournament materials.

6. EXHIBITS

Students may introduce into evidence or use only the exhibits and documents provided in the Mock Trial Tournament materials. Students may not create their own charts, graphs or any other visual aids for use in the courtroom in presenting their case. **Evidence is not to be enlarged, projected, marked or altered for use during the trial.**

7. SIGNALS AND COMMUNICATION

The team coaches, advisors, and spectators may not signal the team members (neither student-attorneys nor witnesses) or communicate with them in any way during the trial, including but not limited to wireless devices and text messaging. A witness may talk to his/her student attorney during a recess or during direct examination but not during cross examination.

8. VIDEOTAPING/AUDIOTAPING

- a. During any tournament round, except State semi-finals and State finals, a trial may be videotaped or audio taped but only if each of the following conditions is satisfied:
 1. The courthouse in which the tournament round is taking place must permit video or audio taping and the team wishing to videotape or audiotape has received permission from the courthouse in advance of the trial. *We note that many state and Federal courthouses prohibit video or audio taping devices in the courthouse.*
 2. The judge consents before the beginning of the trial.
 3. The opposing team consents in writing prior to the time the trial begins. Written consents should be delivered to the County Coordinator. Fax or e-mail is acceptable.
 4. A copy of the video or audio tape must be furnished to the opposing team (at no cost) within 48 hours after the trial.
 5. The video or audio tape may not be shared by either team with any other team in the competition.
- b. Video or audio taping of the State semi-finals and final rounds is **NOT** permitted by either team.

9. MOCK TRIAL COORDINATORS

The success of the New York State Mock Trial Program depends on the many volunteer county and regional coordinators. **The appropriate supervisor will be contacted if any representative from a high school, parent, coach, or team member addresses a mock trial volunteer or staff person at any level of the competition in an unprofessional or discourteous manner. County Coordinators may also refer any such matters to the Law, Youth and Citizenship Committee of the New York State Bar Association for appropriate action by the LYC Committee.**

10. ROLE AND RESPONSIBILITY OF ATTORNEYS

- a. The attorney who makes the opening statement may not make the closing statement.
- b. Requests for bench conferences (i.e., conferences involving the Judge, attorney(s) for the plaintiff or the people and attorney(s) for the defendant) may be granted after the opening of court in a mock trial, but not before.
- c. Attorneys may use notes in presenting their cases, for opening statements, direct examination of witnesses, etc. Witnesses are **NOT** permitted to use notes while testifying during the trial.
- d. Each of the three attorneys on a team must conduct the direct examination of one witness and the cross examination of another witness.
- e. The attorney examining a particular witness must make the objections to that witness's cross examination, and the attorney who will cross-examine a witness must make the objections to the witness's direct examination.

11. WITNESSES

- a. Each witness is bound by the facts of his/her affidavit or witness statement and any exhibit authored or produced by the witness that is relevant to his/her testimony. Witnesses may not invent any other testimony. However, in the event a witness is asked a question on cross examination, the answer to which is not contained in the witness's statement or was not testified to on direct examination, the witness may respond with any answer that does not materially alter the outcome of the trial.
- b. If there is an inconsistency between the witness statement or affidavit and the statement of facts or stipulated facts, the witness can only rely on and is bound by the information contained in his/her affidavit or witness statement.
- c. A witness is not bound by facts in other witnesses' affidavits or statements.
- d. If a witness contradicts a fact in his or her own witness statement, the opposition may impeach the testimony of that witness.
- e. A witness's physical appearance in the case is as he or she appears in the trial enactment. No costumes or props may be used.

- f. Witnesses, other than the plaintiff and the defendant, may be constructively sequestered from the courtroom at the request of opposing counsel. A constructively-sequestered witness may not be asked on the stand about the testimony another witness may have given during the trial enactment. A team is **NOT** required to make a sequestration motion. However, if a team wishes to make such motion, it should be made during the time the team is introducing itself to the judge. Please note that while a witness may be constructively sequestered, said witness **WILL REMAIN** in the courtroom at all times. (Note: Since this is an educational exercise, no participant will actually be excluded from the courtroom during an enactment.)
- g. Witnesses shall not sit at the attorneys' table.

12. PROTESTS

- a. Other than as set forth in 12(b) below, protests of judicial rulings are **NOT** allowed. **All judicial rulings are final and cannot be appealed.**
- b. Protests are highly disfavored and will only be allowed to address two issues: (1) cheating (a dishonest act by a team that has not been the subject of a prior judicial ruling) and (2) a conflict of interest or gross misconduct by a judge (e.g., where a judge is related to a team member). All protests must be made in writing and either faxed or emailed to the appropriate County Coordinator and to the teacher-coach of the opposing team. The County Coordinator will investigate the grounds for the protest and has the discretion to make a ruling on the protest or refer the matter directly to the LYC Committee. The County Coordinator's decision can be appealed to the LYC Committee.
- c. Hostile or discourteous protests will not be considered.

13. JUDGING

THE DECISIONS OF THE JUDGE ARE FINAL.

14. TIME LIMITS

- a. The following time limits apply:
 - Opening Statement: 5 minutes for each team
 - Direct Examination: 10 minutes for each witness
 - Cross Examination: 10 minutes for each witness
 - Closing Argument: 10 minutes for each team
- b. At all county and regional trials, the time will be kept by two timekeepers. Each team shall provide one of the timekeepers. Timekeeper shall be a student of the participating school. A school may use a student witness who is not a witness during a particular phase of the trial. (For example, a defense witness can keep time when the plaintiff/prosecution attorneys are presenting their case.)

The timekeepers will use one watch and shall agree as to when a segment of the trial (eg., the direct examination of a witness) begins. When one minute remains in a segment, the timekeepers shall flash the “1 Minute Remaining” card (found in the Appendix), alerting the judge and the attorneys. The timekeepers will not stop the clock during objections, *voir dire* of witnesses or bench conferences. Since the number of questions allowed on redirect and recross is limited to three, time limits are not necessary. Any dispute as to the timekeeping shall be resolved by the trial judge. The judge, in his/her sole discretion, may extend the time, having taken into account the time expended by objections, *voir dire* of witnesses and/or bench conferences, thereby allowing an attorney to complete a line of questioning.

15. TEAM ATTENDANCE AT STATE FINALS ROUND

Eight teams will advance to the State Finals. All eight teams are required to participate in all events associated with the Mock Trial Tournament, including attending the final round of the competition.

NEW YORK STATE
HIGH SCHOOL
MOCK TRIAL
TOURNAMENT
POLICIES AND
PROCEDURES

PART II

MOCK TRIAL TOURNAMENT POLICIES AND PROCEDURES

New York's Annual Mock Trial Tournament is governed by the policies set forth below. The LYC Committee and the Law, Youth and Citizenship Program of the New York State Bar Association reserve the right to make decisions to preserve the equity, integrity, and educational aspects of the program.

By participating in the Mock Trial Tournament, participants agree to abide by the decisions rendered by the LYC Committee and the Mock Trial program staff and accept such decisions as final.

1. GENERAL POLICIES

- a. All mock trial rules, regulations, and criteria for judging apply at all levels of the Mock Trial Tournament.
- b. The Simplified Rules of Evidence and Procedure contained in Part III govern the trial proceedings.
- c. County Coordinators administer county tournaments. County Coordinators have sole responsibility for organizing, planning, and conducting tournaments at the county level and should be the first point of contact for questions at the county level.
- d. For any single tournament round, all teams are to consist of three attorneys and three witnesses.
- e. For all tournament rounds, one judge will be utilized for trial re-enactments.
- f. Teams must not identify themselves by their school name to the judge prior to the announcement of the judge's decision.
- g. If a team member who is scheduled to participate in a trial enactment becomes ill, injured, or has a serious conflict and as a result cannot compete, then the team may substitute an alternate team member. If an alternate team member is not available, the local coordinator may declare a forfeit or reschedule the enactment at his or her sole discretion.
- h. Members of a team may play different roles in different rounds, or other students may participate in another round.
- i. Winners in any single round will be asked to switch sides in the case for the next round. Where it is impossible for both teams to switch sides, a coin flip will be used to determine assignments in the next round.

- j. Teacher-coaches of teams who will be competing against one another are required to exchange information regarding the names and gender of their witnesses at least three days prior to each round.
- k. No attorney may be compensated in any way for his or her service as an attorney-advisor to a mock trial team or as a judge in the Mock Trial Tournament. When a team has a student or students with special needs who may require an accommodation, the teacher-coach **MUST** bring this to the attention of the County Coordinator at least two weeks prior to the time when the accommodation will be needed.
- l. The judge must take judicial notice of the Statement of Stipulated Facts and any other stipulations.
- m. Teams may bring perceived errors in the problem or suggestions for improvements in the tournament rules and procedures to the attention of the LYC staff at any time. These, however, are not grounds for protests. Any protest arising from an enactment must be filed with the County Coordinator in accordance with the protest rule in the Tournament Rules.

2. SCORING

- a. Scoring is on a scale of 1-5 for each performance (5 is excellent). Judges are required to enter each score on the performance rating sheet (Appendix) after each performance, while the enactment is fresh in their minds. Judges should be familiar with and use the performance rating guidelines (Appendix) when scoring a trial.
- b. Judges are required to also assign between 1 and 10 points to **EACH** team for demonstrating professionalism during a trial. A score for professionalism may not be left blank. Professionalism criteria are:
 - Team's overall confidence, preparedness and demeanor
 - Compliance with the rules of civility
 - Zealous but courteous advocacy
 - Honest and ethical conduct
 - Knowledge and adherence to the rules of the competition
 - Absence of unfair tactics, such as repetitive, baseless objections and signals

A score of 1 to 3 points should be awarded for a below average performance, 4 to 6 points for an average performance and 7 to 10 points for an outstanding or above-average performance.

- c. The appropriate County Coordinator will collect the Performance Rating Sheet for record keeping purposes. Copies of score-sheets are not available to individual teams; however, a team can get its total score through the County Coordinator.

3. LEVELS OF COMPETITION

- a. For purposes of this program, New York State has been divided into eight regions:

Region #1: West	Region #5: New York City
Region #2: Central	Region #6: New York City
Region #3: Northeast	Region #7: Nassau County
Region #4: Lower Hudson	Region #8: Suffolk County

- b. See Map and Chart of Counties in Regions (Appendix).

4. COUNTY TOURNAMENTS

- a. All rules of the New York State Mock Trial Tournament must be adhered to at tournaments at the county level.
- b. In these tournaments there are two phases. In the first phase each team will participate in at least two rounds before the elimination process begins, once as plaintiff/prosecution and once as defendant. After the second round, a certain number of the original teams will proceed to the second phase in a single elimination tournament. Prior to the competition and with the knowledge of the competitors, the County Coordinator may determine a certain number of teams that will proceed to the Phase II single elimination tournament. While this number may be more or less than half the original number of teams, any team that has won both rounds based on points, but whose combined score does not place it within the established number of teams, **MUST** be allowed to compete in the phase II single elimination tournament.
- c. The teams that advance to Phase II do so based on a combination of wins and points. All 2-0 teams automatically advance; teams with a 1-1 record advance based on total number of points; if any spots remain open, teams with a record of 0-2 advance, based on their total number of points.
- d. If the number of teams going into the single elimination phase is odd, the team with the most wins and highest combined score will receive a bye. If any region starts the year with an odd number of teams, one team from that region may receive a bye—coin toss, etc.
- e. Phase II of the contest is a single round elimination tournament; winners advance to the next round.
- f. At times, a forfeit may become a factor in determining aggregate point totals and which teams should advance to the single elimination tournament. Each county should review its procedures for dealing with forfeits, in light of the recommended procedures below. Please note that due to the variety of formats in use in different counties, it is strongly urged that each county develop a system which takes its own structure into account and which participants understand prior to the start of the local tournament. That procedure should be forwarded to the New York State Mock Trial Program Manager, before the first round of competition is held.

- g. If a county has an established method for dealing with forfeits, or establishes one, then that rule continues to govern. If no local rule is established, then the following State rule will apply: *In determining which teams will advance to the single elimination tournament, forfeits will first be considered to cancel each other out, as between two teams vying for the right to advance. If such canceling is not possible (as only one of two teams vying for a particular spot has a forfeit victory) then a point value must be assigned for the forfeit. The point value to be assigned should be derived from averaging the team's point total in the three matches (where possible) chronologically closest to the date of the forfeit; or if only two matches were scheduled, then double the score of the one that was held.*

5. REGIONAL TOURNAMENTS

- a. Teams who have been successful in winning county level tournaments will proceed to regional level tournaments. Coordinators administer regional tournaments. Coordinators have sole responsibility for organizing, planning and conducting tournaments at the regional level. Participants must adhere to all rules of the tournament at regional level tournaments.
- a. Regional tournaments are held in counties within the region on a rotating basis. Every effort is made to determine and announce the location and organizer of the regional tournaments before the new mock trial season begins.
- b. All mock trial rules and regulations and criteria for judging apply, at all levels of the Mock Trial Tournament.
- c. The winning team from each region will be determined by an enactment between the two teams with the best records (most number of wins and greatest number of points) during the regional tournament. The winning team from each region will qualify for the State Finals in Albany.
- d. The regional tournaments MUST be completed 16 days prior to the State Finals. Due to administrative requirements and contractual obligations, the State Coordinator must have in its possession the schools' and students' names by this deadline. Failure to adhere to this deadline may jeopardize hotel blocks set aside for a region's teacher-coaches, attorney-advisors and students coming to Albany for the State Finals.

6. STATEWIDE FINALS

- a. Once regional winners have been determined, The New York Bar Foundation will provide the necessary funds for each team's room and board for the two days it participates in the State Finals in Albany. Funding is available to pay for up to nine students, one teacher coach and one attorney-advisor for each team. Students are up to four to a room. Transportation costs are not covered. However, if a school can cover additional costs for room and board for additional team members above the nine sponsored through the Bar Foundation, all members of a team are welcome to attend the State Finals.

- b. Additional students' and adults' costs will not be covered by the New York Bar Foundation grant or the LYC Program. The Mock Trial Program Manager will not be responsible for making room arrangements and reservations for anyone other than the nine students, one teacher-coach and one attorney-advisor for each team. However, every attempt will be made to pass along any special hotel rates to these other participants. Additional students and adults attending the State Finals may participate in organized meal functions but will be responsible for paying for their participation.
- c. Each team will participate in two enactments the first day, against two different teams. Each team will be required to change sides—plaintiff/prosecution to defendant, defendant to plaintiff/prosecution—for the second enactment. Numerical scores will be assigned to each team's performance by the judges.
- d. The two teams with the most wins and highest numerical score will compete on the following day, except that any team that has won both its enactments will automatically advance, regardless of its point total. In the rare event of three teams each winning both of their enactments, the two teams with the highest point totals, in addition to having won both of their enactments, will advance.
- e. The final enactment will be a single elimination tournament. Plaintiff/prosecution and defendant will be determined by a coin toss by the Mock Trial Program Manager. All teams invited to the State Finals must attend the final trial enactment.
- f. A judge will determine the winner. **The judge's decision is final.**

7. MCLE CREDIT FOR JUDGES AND ATTORNEY-ADVISORS

The LYC Program applies for MCLE credit for attorneys participating in the New York State High School Mock Trial program. All paperwork is submitted to the MCLE board after the State Finals are held in May. Coordinators and the LYC Program must follow the following procedures:

- a. County Coordinators receive and disseminate the appropriate forms to attorneys and judges that participate in their counties.
- b. The County Coordinators will collect all forms from attorneys who participated in the Mock Trial Tournament during the current year, complete the required form provided by the Mock Trial Program Manager and return it to Albany by June 1.
- c. The MT Program Manager compiles all of the forms and submits them to the MCLE board within 7 days of receiving the forms from the County Coordinators.
- d. Once the tournament has been accredited, certificates will be generated by MCLE staff at the NYSBA and emailed to attorneys.
- e. According to MCLE rules, each attorney-judge or attorney-coach may earn CLE credits by participating in a specific activity. That is, an attorney-judge earns credits for trial time only; an attorney coach earns credit for time spent working with students only, which does not include the advisor's personal preparation time. A maximum of three (3) CLE credits may

be earned for judging or coaching mock trial competitions during any one reporting cycle, i.e., in a two-year period. Finally, an attorney who has been admitted to the New York State Bar in the last two years **MAY NOT** apply for this type of CLE credit.

NEW YORK STATE
HIGH SCHOOL
MOCK TRIAL
SIMPLIFIED RULES
OF EVIDENCE AND
PROCEDURE

PART III

SIMPLIFIED RULES OF EVIDENCE AND PROCEDURE

In trials in the United States, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy, or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the judge will probably allow the evidence. The burden is on the attorneys to know the rules of evidence and to be able to use them to protect their client and to limit the actions of opposing counsel and their witnesses.

Formal rules of evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of this Mock Trial Tournament, the New York State rules of evidence have been modified and simplified. Not all judges will interpret the rules of evidence or procedure the same way, and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule that you think is proper. No matter which way the judge rules, you should accept the ruling with grace and courtesy.

SCOPE

- Rule 101: SCOPE. These rules govern all proceedings in the mock trial competition. The only rules of evidence in the competition are those included in these rules.
- Rule 102: OBJECTIONS. The court shall not consider an objection that is not contained in these rules. If counsel makes an objection not contained in these rules, counsel responding to the objection must point out to the judge, citing Rule 102, that the objection is beyond the scope of the listed objections. However, if counsel responding to the objection does not point out to the judge the application of this rule, the court may exercise its discretion and consider such objection.

RELEVANCY

- Rule 201: RELEVANCY. Only relevant testimony and evidence may be presented. This means that the only physical evidence and testimony allowed is that which tends to make a fact which is important to the case more or less probable than the fact would be without the evidence. However, if the probative value of the relevant evidence is substantially outweighed by the danger that the evidence will cause unfair prejudice, confuse the issues, or result in undue delay or a waste of time, the court may exclude it. This may include testimony, physical evidence, and demonstrations that do not relate to time, event or person directly involved in the litigation.

Example:

Photographs present a classic problem of possible unfair prejudice. For instance, in a murder trial, the prosecution seeks to introduce graphic photographs of the bloodied victim. These photographs would be relevant because, among other reasons, they establish the victim's death and location of the wounds. At the same time, the photographs present a high danger of unfair prejudice, as they could cause the jurors to feel incredible anger and a desire to punish someone for the vile crime. In other words, the photographs could have an inflammatory effect on the jurors, causing them to substitute passion and anger for reasoned analysis. The defense therefore should object on the ground that any probative value of the photographs is substantially outweighed by the danger of unfair prejudice to the defendant. Problems of unfair prejudice often can be resolved by offering the evidence in a manner that retains the probative value, while reducing the danger of unfair prejudice. In this example, the defense might stipulate to the location of the wounds and the cause of death. Therefore, the relevant aspects of the photographs would come in, without the unduly prejudicial effect.

Rule 202: CHARACTER. Evidence about the character of a party or witness may not be introduced unless the person's character is an issue in the case or unless the evidence is being offered to show the truthfulness or untruthfulness of the party or witness. Evidence of character to prove the person's propensity to act in a particular way is generally not admissible in a civil case.

In a criminal case, the general rule is that the prosecution cannot introduce evidence of the bad character of the defendant to show that he or she is more likely to have committed the crime. However, the defendant may introduce evidence of her good character to show that she is innocent, and the prosecution may offer evidence to rebut the defense's evidence of the defendant's character. With respect to the character of the victim, the general rule is that the prosecution cannot introduce evidence of the character of the victim. However, the defendant may introduce evidence of the victim's good or (more likely) bad character, and the prosecution may offer evidence to rebut the defense's evidence of the victim's character.

Examples:

A limousine driver is driving Ms. Daisy while he is intoxicated and gets into a car accident injuring Ms. Daisy. If Ms. Daisy sues the limousine company for negligently employing an alcoholic driver, then the driver's tendency to drink is at issue. Evidence of the driver's alcoholism is admissible because it is not offered to demonstrate that

he was drunk on a particular occasion. The evidence is offered to demonstrate that the limousine company negligently trusted him to drive a limousine when it knew or should have known that the driver had a serious drinking problem.

Sally is fired and sues her employer for sexual harassment. The employer cannot introduce evidence that Sally experienced similar problems when she worked for other employers. Evidence about Sally's character is not admissible to prove that she acted in conformity with her prior conduct, unless her character is at issue or it relates to truthfulness.

If an attorney is accused of stealing a client's money, he may introduce evidence to demonstrate that he is trustworthy. In this scenario, proof of his trustworthiness makes it less probable that he stole the money.

Richard is on trial for punching his coworker, Larry, during an argument. The prosecution wants to offer that Richard has, in the past, lost his temper and has neared physical altercations. This evidence constitutes character evidence within the meaning of the rule, because it is being offered to show that Richard has a propensity for losing his temper and that he may have acted in conformity with this character trait at the time he struck Larry. Therefore, it would only be admissible if Richard, as the defendant, has decided to place his character at issue.

Rule 203: **OTHER CRIMES, WRONGS, OR ACTS.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person. Such evidence, however, may be admissible for purposes other than to prove character, such as to show motive, intent, preparation, knowledge, or identity.

Examples:

Harry is on trial for stealing from a heavy metal safe at an office. The prosecution seeks to offer evidence that, on an earlier date, Harry opened the safe and stole some money from the safe. The evidence is not being offered to show character (in other words, it is not being offered to show that Harry is a thief), but rather it is being offered to show that Harry knew how to crack the safe. This evidence therefore places Harry among a very small number of people who know how to crack safes and, in particular, this safe. The evidence therefore goes to identity and makes Harry somewhat more likely to be guilty.

William is on trial for murder after he killed someone during a fight. The prosecution seeks to offer evidence that a week earlier William

and the victim had another physical altercation. In other words, the victim was not some new guy William has never met before; rather, William and the victim had a history of bad blood. The evidence of the past fight would be admissible because it is not being offered to show that William has bad character as someone who gets into fights, but rather to show that William may have had motive to harm his victim.

In the same trial, the evidence shows that the victim died after William struck him in the larynx. William's defense is that the death was completely accidental and that the fatal injury suffered by his victim was unintended and a fluke. The prosecution seeks to offer evidence that William has a black belt

in martial arts, and therefore has knowledge of how to administer deadly strikes as well as the effect of such strikes. This evidence would be admissible to show the death was not an accident; rather, William was aware that the strike could cause death.

WITNESS EXAMINATION

a. Direct Examination (attorneys call and question witnesses)

Rule 301: FORM OF QUESTION. Witnesses should be asked direct questions and may not be asked leading questions on direct examination. Direct questions are phrased to evoke a set of facts from the witnesses. A leading question is one that suggests to the witness the answer desired by the examiner and often suggests a “yes” or “no” answer.

Example of a Direct Question: “What is your current occupation?”

Example of a Leading Question: “Isn’t it true that in your current position you are responsible for making important investment decisions?”

Narration: While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or “narrate” a whole story. Narrative questions are objectionable.

Example of a Narrative Question: “Please describe how you were able to achieve your financial success.” Or “Tell me everything that was said in the board room on that day.”

Narrative Answers: At times, a direct question may be appropriate, but the witness’s answer may go beyond the facts for which the question was asked. Such answers are subject to objection on the grounds of narration.

Objections:

“Objection. Counsel is leading the witness.”

“Objection. Question asks for a narration.”

“Objection. Witness is narrating.”

Rule 302: SCOPE OF WITNESS EXAMINATION. Direct examination may cover all the facts relevant to the case of which the witness has first-hand knowledge. Any factual areas examined on direct examination may be subject to cross examination.

Objection:

“Objection. The question requires information beyond the scope of the witness’s knowledge.”

Rule 303: REFRESHING RECOLLECTION. If a witness is unable to recall a statement made in an affidavit, the attorney on direct may show that portion of the affidavit that will help the witness to remember.

b. Cross examination (questioning the other side’s witnesses)

Rule 304: FORM OF QUESTION. An attorney may ask leading questions when cross-examining the opponent’s witnesses. Questions tending to evoke a narrative answer should be avoided.

Rule 305: SCOPE OF WITNESS EXAMINATION. Attorneys may only ask questions that relate to matters brought out by the other side on direct examination, or to matters relating to the credibility of the witness. This includes facts and statements made by the witness for the opposing party. Note that many judges allow a broad interpretation of this rule.

Objection:

“Objection. Counsel is asking the witness about matters that did not come up in direct examination.”

Rule 306: IMPEACHMENT. An attorney may impeach the credibility of a witness (show that a witness should not be believed) in the following ways:

1. A witness may testify as to another witness’s reputation for truthfulness, provided that an adequate foundation is established for the testifying witness’s ability to testify about the other witness’s reputation.

Example:

Ben testifies at trial. Jeannette then takes the stand and is familiar with Ben's reputation in the community as not being truthful. Jeannette therefore would be able to testify to Ben's reputation for truthfulness.

2. Counsel may ask questions demonstrating that the witness has made statements on other occasions that are inconsistent with the witness's present testimony. A foundation must be laid for the introduction of prior contradictory statements by asking the witness whether he or she made such statements.

Example:

If a witness previously stated that the car was black but at trial testified that the car was red, the witness could be questioned about this prior inconsistent statement for impeachment purposes.

3. An attorney may ask questions demonstrating the witness's bias in favor of the party on whose behalf the witness is testifying, or hostility toward the party against whom the witness is testifying or the witness's interest in the case.

Examples:

"Isn't it true that you are being paid to testify at this trial?" If the witness is paid to testify, he may have an incentive not to tell the truth while testifying.

Steve is on trial for bank robbery, and calls his father as a defense witness to testify that they were watching football at the time of the crime. On cross examination, the prosecutor could attempt to demonstrate the father's bias that could cause him to fabricate an alibi for his son. Proper questions to impeach the father's credibility might include, "You love your son very much, don't you?" and "You don't want to see your son go to jail, do you?"

Rule 307: IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted, but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the value of this evidence as reliable proof outweighs its prejudicial effect to a party. Crimes of moral turpitude are crimes that involve dishonesty or false statements. These crimes involve an intent to deceive or defraud, such as forgery, perjury, counterfeiting and fraud.

Example:

“Have you ever been convicted of criminal possession of marijuana?”

Objections:

“Objection. The prejudicial effect of this evidence outweighs its usefulness.”

“Objection. The prior conviction being testified to is not a felony or a crime involving moral turpitude.”

c. Re-Direct Examination

Rule 308: LIMIT ON QUESTIONS. After cross examination, up to three, but no more than three questions may be asked by the attorney conducting the direct examination, but such questions are limited to matters raised by the attorney on cross examination. The presiding judge has considerable discretion in deciding how to limit the scope of re-direct.

NOTE: If the credibility or reputation for truthfulness of the witness has been attacked on cross examination, the attorney whose witness has been damaged may wish to ask several more questions. These questions should be limited to the damage the attorney thinks has been done and should be phrased so as to try to “save” the witness’s truth-telling image in the eyes of the court. Re-direct examination is limited to issues raised by the attorney on cross examination. Please note that at times it may be more appropriate not to engage in re-direct examination.

Objection:

“Objection. Counsel is asking the witness about matters that did not come up in cross examination.”

d. Re-Cross Examination

Rule 309: LIMIT ON QUESTIONS. Three additional questions, but no more than three, may be asked by the cross-examining attorney, but such questions are limited to matters on re-direct examination and should avoid repetition. The presiding judge has considerable discretion in deciding how to limit the scope of re-cross. Like re-direct examination, at times it may be more appropriate not to engage in re-cross examination.

Objection:

“Objection. Counsel is asking the witness about matters that did not come up on re-direct examination.”

e. Argumentative Questions

Rule 310: Questions that are argumentative should be avoided and may be objected to by counsel. An argumentative question is one in which the cross-examiner challenges the witness about his or her inference from the facts, rather than seeking additional facts.

Example:

“Why were you driving so carelessly?”

Objection:

“Objection. “Your Honor, counsel is being argumentative.”

f. Compound Questions

Rule 311: Questions that are compound in nature should be avoided and may be objected to by counsel. A compound question requires the witness to give one answer to a question, which contains two separate inquiries. Each inquiry in an otherwise compound question could be asked and answered separately.

Examples:

“Tony, didn’t you get sued by the buyer of your company and get prosecuted by the IRS?”

“Did you see and feel the residue on the counter?”

Objection:

“Objection. “Your Honor, counsel is asking a compound question.”

g. Asked and Answered Questions

Rule 312: Questions that have already been asked of and answered by a witness should not be asked again and may be objected to by opposing counsel.

Objection:

“Objection. “Your Honor, the witness was asked and answered this question.”

h. Speculation

Rule 313: Questions that ask a witness to speculate about matters not within his personal knowledge are not permitted, and are subject to an objection by opposing counsel.

Example:

"Do you think your friend Robert knew about the robbery in advance?"

Objection:

"Objection. Your Honor, the question asks the witness to speculate."

HEARSAY

Understanding and applying the Hearsay Rule (Rule 401), and its exceptions (Rules 402, 403, 404, and 405), is one of the more challenging aspects of the Mock Trial Tournament. We strongly suggest that teacher-coaches and students work closely with their attorney-advisors to better understand and more effectively apply these evidentiary rules.

Rule 401: **HEARSAY.** A statement made out of court (i.e., not made during the course of the trial in which it is offered) is hearsay if the statement is offered for the truth of the fact asserted in the statement. A judge may admit hearsay evidence if it was a prior out-of-court statement made by a party to the case and is being offered against that party. The party who made the prior out-of-court statement can hardly complain about not having had an opportunity to cross examine himself regarding this statement. He said it, so he has to live with it. He can explain it on the witness stand. Essentially, the witness on the stand is repeating what she heard someone else say outside of the courtroom. The hearsay rule applies to both written as well as spoken statements. If a statement is hearsay and no exceptions to the rule are applicable, then upon an appropriate objection by opposing counsel, the statement will be inadmissible.

REASONS FOR EXCLUDING HEARSAY: The reason for excluding hearsay evidence from a trial is that the opposing party was denied the opportunity to cross-examine the declarant about the statement. The declarant is the person who made the out-of-court statement. The opposing party had no chance to test the declarant's perception (how well did she observe the event she purported to describe), her memory (did she really remember the details she related to the court), her sincerity (was she deliberately falsifying), and her ability to relate (did she really mean to say what now appears to be the thrust of her statement). The opportunity to cross

examine the witness on the stand who has repeated the statement is not enough because the judge or the jury is being asked to believe what the declarant said.

Example:

Peter is on trial for allegedly robbing a Seven-Eleven store on May 1. A witness who is testifying on Peter's behalf, testifies in the trial "I heard Joe say that he (Joe) went to the Seven-Eleven on May 1." Peter, the party offering the witness's testimony as evidence, is offering it to prove that Joe was in the Seven-Eleven on May 1, presumably to create a question as to whether it could have been Joe at the scene of the crime, rather than Peter. In this example, Joe is the declarant. The reason why the opposing party, in this case the prosecution, should object to this testimony is that the prosecution has no opportunity to cross examine Joe to test his veracity (was he telling the truth or just trying to help his friend Peter out of a mess) or his memory (was Joe sure it was May 1 or could it have been May 2)?

EXCEPTIONS

Hearsay may be admissible if it fits into certain exceptions. The exceptions listed below are the only allowable exceptions for purposes of the Mock Trial Tournament.

Rule 402: **ADMISSION OF A PARTY OPPONENT:** A judge may admit hearsay evidence if it was a prior out-of-court statement made by a party to the case that amounts to an admission that is against that party's interest at trial. Essentially, the party's own out-of-court statement is being offered into evidence because it contains an admission of responsibility or an acknowledgment of fault. The party who made the prior out-of-court statement can hardly complain about not having had the opportunity to cross examine himself. He said it, so he has to live with it. He can explain it on the witness stand.

Example:

Pam is involved in a car accident. Wendy was at the scene of the crash. At Pam's trial, Wendy testifies that she heard Pam say "I can't believe I missed that stop sign!" At the trial, Wendy's testimony of Pam's out-of-court statement, although hearsay, is likely to be admitted into evidence as an admission against a party's interest. In this example, Pam is on trial so she can testify about what happened in the accident and refute having made this statement or explain the circumstances of her statement.

Rule 403: **STATE OF MIND:** A judge may admit an out-of-court statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health). Such out-of-court statements of pain or intent

do not present the usual concerns with the reliability of hearsay testimony. For instance, when a witness testifies as to a declarant's statement of intent, there are no memory problems with the declarant's statement of intent and there are no perception problems because a declarant cannot misperceive intent. When applying this exception, it is important to keep in mind that the reliability concerns of hearsay relate to the out-of-court declarant, not to the witness who is offering the statement in court.

Example:

Mike is on trial for a murder that occurred at the West End Restaurant. Mike's defense relies upon the theory that another person, Jane, committed the murder. The defense then calls a witness who testifies that on the night of the murder he heard Jane say that she intended to go to the West End Restaurant. This hearsay statement is admissible as proof of Jane's intent to go to the restaurant.

Rule 404: BUSINESS RECORDS. A judge may admit a memorandum, report, record, or data compilation concerning an event or act, provided that the record was made at or near the time of the act by a person with knowledge and that the record is kept in the regular course of business. The rationale for this exception is that this type of evidence is particularly reliable because of the regularity with which business records are kept, their use and importance in the business and the incentive of employees to keep accurate records or risk being reprimanded by the employer.

Example:

Diane is on trial for possession of an illegal weapon. The prosecution introduces a written inventory prepared by a police officer of items, including a switchblade knife, taken from Diane when she was arrested as evidence of Diane's guilt. The written inventory is admissible. In this example, the statement that is hearsay is the written inventory (hearsay can be oral or written), the declarant is the police officer who wrote the inventory and the inventory is being offered into evidence to prove that Diane had a switchblade knife in her possession. The reason that the written inventory is admissible is that it was a record made at the time of Diane's arrest by a police officer, whose job required her to prepare records of items taken from suspects at the time of arrest and it was the regular practice of the police department to prepare records of this type at the time of an arrest.

Rule 405: PRESENT SENSE IMPRESSION. A judge may admit an out-of-court statement of a declarant's statement describing or explaining an event or condition made while the declarant was perceiving the event

or condition, or immediately thereafter. The rationale for this exception is that a declarant's description of an event as it is occurring is reliable because the declarant does not have the time to think up a lie.

Example:

James is witnessing a robbery and calls 911. While on the phone with the 911 operator, James describes the crime as it is occurring and provides a physical description of the robber. These hearsay statements are admissible because they are James's description or explanation of an event – the robbery – as James is perceiving that event.

OPINION AND EXPERT TESTIMONY

Rule 501: OPINION TESTIMONY BY NON-EXPERTS. Witnesses who are not testifying as experts may give opinions which are based on what they saw or heard and are helpful in explaining their story. A witness may not testify to any matter of which the witness has no personal knowledge, nor may a witness give an opinion about how the case should be decided. In addition, a non-expert witness may not offer opinions as to any matters that would require specialized knowledge, training, or qualifications.

Example:

(General Opinion)

The attorney asks the non-expert witness, "Why is there so much conflict in the Middle East?" This question asks the witness to give his general opinion on the Middle East conflict.

Note: This question is objectionable because the witness lacks personal perceptions as to the conflict in the Middle East and any conclusions regarding this issue would require specialized knowledge.

Objection:

"Objection. Counsel is asking the witness to give an opinion."

Example:

(Lack of Personal Knowledge)

The attorney asks the witness, "Why do you think Abe skipped class?" This question requires the witness to speculate about Abe's reasons for skipping class.

Objection:

“Objection. The witness has no personal knowledge that would enable him/her to answer this question.”

Example:

(Opinion on Outcome of Case)

The attorney asks the witness, “Do you think the defendant intended to commit the crime?” This question requires the witness to provide a conclusion that is directly at issue and relates to the outcome of the case.

Objection:

“Objection. The question asks the witness to give a conclusion that goes to the finding of the Court.”

Rule 502: OPINION TESTIMONY BY EXPERTS. Only persons qualified as experts may give opinions on questions that require special knowledge or qualifications. An expert may be called as a witness to render an opinion based on professional experience. The attorney for the party for whom the expert is testifying must qualify as an expert. This means that before the expert witness can be asked for an expert opinion, the questioning attorney must bring out the expert’s qualifications, education and/or experience.

Example:

The attorney asks the witness, an auto mechanic, “Do you think Luke’s recurrent, severe migraine headaches could have caused him to crash his car into the side of George’s house?”

Objection:

“Objection. Counsel is asking the witness to give an expert opinion for which the witness has not been qualified.”

However, a doctor can provide an expert opinion on how migraine headaches affect eye sight.

PHYSICAL EVIDENCE

Rule 601: INTRODUCTION OF PHYSICAL EVIDENCE. Physical evidence may be introduced if it is relevant to the case. Physical evidence will not be admitted into evidence until it has been identified and shown to be authentic or its identification and/or authenticity has been stipulated

to. That a document is “authentic” means only that it is what it appears to be, not that the statements in the document are necessarily true.

A prosecutor must authenticate a weapon by demonstrating that the weapon is the same weapon used in the crime. This shows that the evidence offered (the weapon) relates to the issue (the crime). If the weapon belonged to the prosecutor, it would not be relevant to the defendant’s guilt. The evidence must be relevant to the issue to be admissible.

PROCEDURE FOR INTRODUCING EVIDENCE: Physical evidence need only be introduced once. The proper procedure to use when introducing a physical object or document for identification and/or use as evidence is:

- a. Have exhibit marked for identification. *“Your Honor, please mark this as Plaintiff’s Exhibit 1 (or Defense Exhibit A) for identification.”*
- b. Ask witness to identify the exhibit. *“I now hand you what is marked as Plaintiff’s Exhibit 1 (or Defense Exhibit A). Would you identify it, please?”*
- c. Ask witness questions about the exhibit, establishing its relevancy, and other pertinent questions.
- d. Offer the exhibit into evidence. *“Your Honor, we offer Plaintiff’s Exhibit 1 (or Defense Exhibit A) into evidence at this time.”*
- e. Show the exhibit to opposing counsel, who may make an objection to the offering.
- f. The Judge will ask opposing counsel whether there is any objection, rule on any objection, admit or not admit the exhibit.
- g. If an exhibit is a document, hand it to the judge.

NOTE: After an affidavit has been marked for identification, a witness may be asked questions about his or her affidavit without its introduction into evidence. In order to read directly from an affidavit or submit it to the judge, it must first be admitted into evidence.

Rule 602: **REDACTION OF DOCUMENT.** When a document sought to be introduced into evidence contains both admissible and inadmissible evidence, the judge may, at the request of the party objecting to the inadmissible portion of the document, redact the inadmissible portion of the document and allow the redacted document into evidence.

Objection:

“Objection. Your Honor, opposing counsel is offering into evidence a document that contains improper opinion evidence by the witness. The defense requests that the portion of the document setting forth the witness’s opinion be redacted.”

- Rule 603: **VOIR DIRE OF A WITNESS.** When an item of physical evidence is sought to be introduced under a doctrine that normally excludes that type of evidence (e.g., a document which purports to fall under the business record exception to the Hearsay Rule), or when a witness is offered as an expert, an opponent may interrupt the direct examination to request the judge’s permission to make limited inquiry of the witness, which is called “*voir dire*.”

The opponent may use leading questions to conduct the *voir dire* but it must be remembered that the *voir dire*’s limited purpose is to test the competency of the witness or evidence and the opponent is not entitled to conduct a general cross examination on the merits of the case.

The *voir dire* must be limited to three questions. The clock will not be stopped for *voir dire*.

INVENTION OF FACTS (Special Rules for the Mock Trial Competition)

- Rule 701: **DIRECT EXAMINATION.** On direct examination, the witness is limited to the facts given. Facts cannot be made up. If the witness goes beyond the facts given opposing counsel may object. If a witness testifies in contradiction of a fact given in the witness’s statement, opposing counsel should impeach the witness during cross examination.

Objection:

“Objection. Your Honor, the witness is creating facts which are not in the record.”

- Rule 702: **CROSS EXAMINATION.** Questions on cross examination should not seek to elicit information that is not contained in the fact pattern. If on cross examination a witness is asked a question, the answer to which is not contained in the witness’s statement or the direct examination, the witness may respond with any answer that does not materially alter the outcome of the trial. If a witness’s response might materially alter the outcome of the trial, the attorney conducting the cross examination may object.

Objection:

“Objection. The witness’s answer is inventing facts that would materially alter the outcome of the case.”

PROCEDURAL RULES

Rule 801: **PROCEDURE FOR OBJECTIONS.** An attorney may object any time the opposing attorneys have violated the “Simplified Rules of Evidence and Procedure.” Each attorney is restricted to raising objections concerning witnesses, whom that attorney is responsible for examining, both on direct and cross examinations.

NOTE: The attorney wishing to object (only one attorney may object at a time) should stand up and do so at the time of the violation. When an objection is made, the judge will ask the reason for it. Then the judge will turn to the attorney who asked the question and the attorney usually will have a chance to explain why the objection should not be accepted (“sustained”) by the judge. The judge will then decide whether a question or answer must be discarded because it has violated a rule of evidence (“objection sustained”), or whether to allow the question or answer to remain on the trial record (“objection overruled”).

Rule 802: **MOTIONS TO DISMISS.** Motions for directed verdict or dismissal are not permitted at any time during the plaintiff’s or prosecution’s case.

Rule 803: **CLOSING ARGUMENTS.** Closing arguments must be based on the evidence presented during the trial.

Rule 804: **OBJECTIONS DURING OPENING STATEMENTS AND CLOSING ARGUMENTS.** Objections during opening statements and closing arguments are **NOT** permitted.

Rule 901: **PROSECUTION’S BURDEN OF PROOF** (criminal cases).

Beyond a Reasonable Doubt: A defendant is presumed to be innocent. As such, the trier of fact (jury or judge) must find the defendant not guilty, unless, on the evidence presented at trial, the prosecution has proven the defendant guilty beyond a reasonable doubt. Such proof precludes every reasonable theory except that which is consistent with the defendant’s guilt. A reasonable doubt is an honest doubt of the defendant’s guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary one. It is a doubt that a reasonable person would be likely to entertain because of the evidence that was

presented or because of the lack of convincing evidence. While the defendant may introduce evidence to prove his/her innocence, the burden of proof never shifts to the defendant. Moreover, the prosecution must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed the crime charged. (Source: NY Criminal Jury Instructions).

Rule 902: PLAINTIFF’S BURDENS OF PROOF (civil cases).

902.1 Preponderance of the Evidence: The plaintiff must prove his/her claim by a fair preponderance of the credible evidence. The credible evidence is testimony or exhibits that the trier of fact (jury or judge) finds to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, *i.e.*, its convincing quality, the weight and the effect that it has on the trier of fact. (Source: NY Pattern Jury Instructions, §1:23).

902.2 Clear and Convincing Evidence: (To be used in cases involving fraud, malice, mistake, incompetency, etc.) The burden is on the plaintiff to prove fraud, for instance, by clear and convincing evidence. This means evidence that satisfies the trier of fact that there is a high degree of probability that the ultimate issue to be decided, *e.g.*, fraud, was committed by the defendant. To decide for the plaintiff, it is not enough to find that the preponderance of the evidence is in the plaintiff’s favor. A party who must prove his/her case by a preponderance of the evidence only need to satisfy the trier of fact that the evidence supporting his/her case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish his/her case by clear and convincing evidence must satisfy the trier of fact that the evidence makes it highly probable that what s/he claims is what actually happened. (Source: NY Pattern Jury Instructions, §1:64).

Rule 903: DIRECT AND CIRCUMSTANTIAL EVIDENCE

903.1 Direct evidence: Direct evidence is evidence of a fact based on a witness’s personal knowledge or observation of that fact. A person’s guilt of a charged crime may be proven by direct evidence if, standing alone, that evidence satisfies the fact-finder (a judge or

a jury) beyond a reasonable doubt of the person's guilt of that crime. (Source: NY Criminal Jury Instructions).

903.2 Circumstantial evidence: Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or non-existence of another fact. A person's guilt of a charged crime may be proven by circumstantial evidence, if that evidence, while not directly establishing guilt, gives rise to an inference of guilt beyond a reasonable doubt. (Source: NY Criminal Jury Instructions).

NOTE: The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case as the fact-finder (a judge or a jury) finds them to be. [Source: NY Criminal Jury Instructions].

NEW YORK STATE HIGH SCHOOL MOCK TRIAL TRIAL SCRIPT

PART IV

Case Summary

PEOPLE v. PENN HYDRAGAS, INC., and MITCHELL TOMLEY, CEO
Mayberry County Court
Indictment No. 2013-23456-7

On February 15, 2013, the defendants, Penn HydraGas, Inc., and Mitchell Tomley, Chief Executive Officer of Penn HydraGas, Inc., were indicted on one count of violating the federal Safe Drinking Water Act (SDWA), codified in New York under section 71-4002 of the Environmental Conservation Law. The defendants are accused of contaminating the water supply of the Village of Molivar in Mayberry County, located in western New York on the northern Pennsylvania border. As the principal federal law intended to ensure safe drinking water for the public, the SDWA empowers the Environmental Protection Agency (EPA) to set standards for drinking water quality for all states and localities. Except for private wells, the statute applies to every public water system in the United States that has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals. The population of the Village of Molivar, according to the 2010 census, is 905.

The U.S. Justice Department declined to prosecute the case, having concluded after a cursory review that the investment of scarce resources to prosecute a case where direct proof of contamination by the defendants was lacking was not warranted. The District Attorney of Mayberry County, after some pressure from the residents of Molivar, led principally by a farmer named Mickie McDonald, and from Dr. Ryan Toolittle, producer of the documentary film *Gas Country*, sought and obtained the indictment. Mr./Ms. McDonald reached out to Dr. Toolittle after seeing *Gas Country*. The District Attorney had to step aside after it was discovered that his spouse had invested heavily in Penn HydraGas, Inc., stock that is traded over-the-counter. The State Attorney General was appointed by the governor to take over the prosecution.

Mr./Ms. McDonald owns a farm in the Village of Molivar, located on the New York-Northern Pennsylvania border. His/her residence is located on the farm land and said residence receives water from the municipal water system. Farmer McDonald also has a private well for watering his/her crops and for hydrating the farm animals. In March 2013, s/he filed a civil lawsuit against Penn HydraGas, Inc., in New York State Supreme Court, 8th Judicial District, alleging that the Eastern Pennsylvania company has contaminated his/her property with dangerous hydrocarbons. In Northern Pennsylvania near Molivar, the defendants use a high-volume horizontal hydraulic fracturing (HVHFF) process, known colloquially as fracking, to drill for natural gas. The drilling process employed by Penn HydraGas allegedly uses diesel fluids. The byproducts of the diesel fluids allegedly contaminated McDonald's water supply. Because of diversity of citizenship, the defendants made a proper motion to remove the case to federal court. The motion was granted and the case was removed to the U.S. District Court, WDNY.

McDonald's lawsuit, seeking 10 million dollars in damages, alleges that the drilling for natural gas by the Pennsylvania company caused contaminated wastewater to pollute the water supply servicing the farm and the residence. Mickie McDonald contends that three of his/her hogs and one of his/her cows died in late 2012 as a result of drinking the contaminated water. S/he also contends that his/her spouse and his/her child have become sick because of the contamination. McDonald's daughter has developed asthma and his/her spouse has constant and unexplained

headaches. McDonald now has to truck in water for their crops and animals and buy bottle water for family consumption.

Mitchell Tomley, CEO of Penn HydraGas, Inc., contends in the civil lawsuit that the plaintiff has no proof that his/her company has contaminated McDonald's water supply. Tomley further contends that the plaintiff has not shown, and is not able to show, that his/her company caused the death of his/her animals or the illnesses to his/her daughter and spouse. According to Tomley, it was not possible that Penn HydraGas could have polluted the defendant's water supply because the drilling process is carefully monitored and, in any event, the drilling is not close enough to the plaintiff's farm land to have impacted said property. Moreover, Penn HydraGas alleges that the contamination of the plaintiff's water supply, if any, was caused by the chemicals found in the fertilizers used on the crops grown on the farm that are fed to the animals. Also, Penn HydraGas assert that a large diesel fuel leak that occurred on the farm contributed to the contamination. Diesel fuel and the fertilizer chemicals are known to seep into the aquifer. Therefore, the defendant company has moved for summary judgment.

Dr. Ryan Toolittle, a geology professor at SUNY Buffalo, is an expert in the area of chemical environmental contamination. S/he received his/her undergraduate degree in chemistry from the University of Wisconsin-Madison. Dr. Toolittle earned a master's degree and a Ph.D. in geology from the University of California at Berkley. S/he is also executive producer of the widely-acclaimed documentary film *Gas Country*. The film, shown on the cable premium channel OBH, documents how HVVHF, or fracking, has harmed land and aquifers all across the country, including Northern Pennsylvania. Dr. Toolittle is set to release *Gas Country II* next year. While *Gas Country* did not mention Penn HydraGas by name, *Gas Country II* has a big exposé on the company, including interviews of several former high level employees. The defense believes that a conviction in this case would create a buzz for the *Gas Country II* film and yield huge profits for Dr. Toolittle's production company.

In addition, Dr. Toolittle is co-owner of a laboratory that has been certified by the EPA and the NYS Department of Environmental Conservation to conduct testing of drinking water. Although his/her laboratory certification was provisional, the lab was still able to analyze water samples so long as the clients were made aware of the provisional status of the lab's certification. Dr. Toolittle took samples from the McDonald well and from the Molivar water station and found that benzene, a dangerous byproducts that could come from the use of diesel fluids, was present. S/he concluded, to a reasonable degree of scientific certainty, that the benzene contamination was the result of the nearby fracking done by Penn HydraGas.

Another witness for the prosecution is Bobbie Jones, a former chemical engineer of Penn HydraGas. S/he worked for the company and the predecessor company, Natural Shalegas, for approximately twenty-five (25) years until s/he was fired in December 2010. Mr./Ms. Jones challenged the firing, but the Pennsylvania Department of Labor determined that the firing was justified. The company had accused him/her of arriving to work late on many occasions, of sleeping on the job and of being insubordinate. The insubordination charge occurred as a result of Mr./Ms. Jones' refusal to work overtime when important projects had to be completed on time. S/he sent an e-mail to the Mitchell Tomley, informing the CEO that s/he, Bobbie Jones, was not available to work overtime.

Bobbie Jones maintained that the several times s/he was found sleeping on the job; it was the result of medication s/he was taking for a thyroid problem. After his/her doctor adjusted the prescription dosage, s/he had no further problems with on-the-job sleeping. S/he also alleges that s/he was late on occasions and could not work overtime because s/he was caring for an elderly parent. S/he believes that if Mitchell Tomley wasn't so money-hungry, Mr./Ms. Tomley would understand his/her predicament and make some accommodations. In fact, s/he once heard Mitchell Tomley comment to one of his/her vice presidents, "We don't care if a few farm animals croak. Fracking is the future and we are frackin' it up." Mr./Ms. Tomley admitted to making the comment, but said it was all in jest. In any event, Mr./Ms. Jones believes s/he was fired because Mr./Ms. Tomley thought s/he, Bobbie Jones, was accumulating information about the company's illegal drilling practices and was planning to become a whistle blower. Mr./Ms. Jones admits that s/he never visited any of Penn HydraGas drilling sites and was not completely familiar with all of the drilling practices. His/her job was to work at Penn HydraGas lab next to the central office testing samples of natural gas brought to him/her for trace detection levels of impurities. Natural gas trace impurities include hydrogen, nitrogen, carbon monoxide, carbon dioxide, oxygen, mercury, water and other components.

Mr./Ms. Jones was let go before amassing enough information to go to the state authorities. S/he disagreed with the state labor department's finding that his/her firing was justified. However, s/he did not seek an administrative appeal or a judicial review of the decision.

Shortly before his/her firing, Bobbie Jones became disillusioned with the natural gas exploration industry and became a member of Pennsylvania's green environmental group, Stop All Fracking Forever (SAFFE). S/he became a pariah in the eyes of business interests in Northern Pennsylvania and could not find employment anywhere in that area after his/her firing. When the position of water quality engineer for the Molivar Water Authority was posted, s/he applied, was hired and moved to Molivar in January 2012. Starting in July 2012, Bobbie Jones began to notice his/her weekly water samples had increasingly higher levels of benzene, toluene, ethylbenzene and xylene, all known toxic constituents of diesel. Mr./Ms. Jones learned in September 2012 that Penn HydraGas several months prior had started a big fracking operation in Northern Pennsylvania, just five miles from Molivar. Earlier, s/he had received by mistake an e-mail from Mr./Ms. Tomley to Larry Lyonheart, the current vice president of operations, suggesting that Lyonheart might want to consider using diesel fluids in the drilling operation as a way to lower costs. The e-mail was a reply to an e-mail Larry had sent companywide. Apparently, Bobbie Jones' personal e-mail address was still in the company's group listserve. Mr./Ms. Tomley accidentally selected REPLY-ALL, which would explain how Jones got a copy of the e-mail.

Suspicious that Penn HydraGas was polluting the water supply, Mr./Ms. Jones contacted Dr. Toolittle's lab to test the water at the station and hopefully confirm the results that Jones was getting. After Dr. Toolittle's lab confirmed that very high levels of benzene were found in the water supply, Mr./Ms. Jones contacted the Mayberry County District Attorney's Office.

Dr. Ryan Toolittle interviewed Dr. Shawn Marshall for the *Gas Country* documentary. Dr. Marshall is a geologist with the Natural Gas Institute. The Institute is the lobbying entity for the

natural gas industry and is supported completely by membership dues paid by natural gas drillers and suppliers. In *Gas Country*, Dr. Marshall advocated fiercely and unapologetically for fracking. S/he believes that “tree-hugging” environmentalists have produced no credible evidence that fracking has caused any harm. Moreover, fracking could lead to a reduction in this country’s dependency on foreign oil supplies. Dr. Toolittle believes that Dr. Marshall is just a hack for the natural gas industry and even said in *Gas Country* that, “Dr. Marshall is just full of “natural” gas, if you know what I mean.” Dr. Marshall took exception to Dr. Toolittle’s remark and refused to be interviewed for *Gas Country II*.

Billie Jo Simpleton is Deputy Director of Business Development Council of Pennsylvania. The council is a non-governmental organization whose mission is to attract new businesses and jobs to Pennsylvania. Mr./Ms. Simpleton believes that fracking has been great for the Pennsylvania economy, having produced jobs for many Pennsylvania residents and put money in the pockets of landowners who lease their property for drilling. While employed as Vice President of Operations for the predecessor company, Natural Shalegas, and for Penn HydraGas, Inc., from 2002 to 2009, s/he did not approve the use of diesel fluids in the drilling process. This opposition to using diesel fluid in the drilling process didn’t sit well with Mr./Ms. Tomley because it was cheaper to use diesel. Mr./Ms. Tomley was not unhappy when Mr./Ms. Simpleton left to take the business development job. Soon after s/he left Penn HydraGas, Mr./Ms. Simpleton suspected the company began to use diesel fluid. However, s/he did not report his/her suspicions to the authorities.

The Safe Drinking Water Act does not allow the use of diesel fluid in the drilling process without a permit issued by the Environmental Protection Agency. The permit is quite costly, which cuts into the drilling company’s profits. The high cost of the permit is to discourage drillers from seeking to use diesel fluid. Since diesel fluid is relatively cheap and makes the drilling process relatively easy, it is alleged that many drilling companies use diesel fluid without obtaining the required permits.

Mr./Ms. Tomley vehemently denies using diesel fluid. S/he also discovered that Mickie McDonald had a serious diesel fuel leak on his/her farm in April 2012. Mr./Ms. McDonald uses diesel fuel for his/her farm vehicles and equipment. His/her 200-gallon diesel fuel tank sprung a leak, spilling the fuel onto the ground. Mr./Ms. McDonald alleges that the tank was not full, but s/he does not know exactly how many gallons were spilled. The spill occurred towards the end of the month when the supply of diesel fuel is very low. S/he was expecting a new shipment of fuel at the beginning of May 2012. In any event, Mr./Ms. McDonald hired a spill recovery company to clean up the mess. S/he asserts that the recovery effort was a complete success. Nevertheless, the leak was reported to the New York State Department of Environmental Conservation (DEC) and s/he was fined. It was later learned that the cleanup company went out of business.

Mitchell Tomley is at his/her wits-end with all of the protesting by green environmentalists at Penn HydraGas headquarters and drilling sites. S/he feels that the protest signs they carry, which says “FRACK YOU,” “DON’T FRACK WITH US” and “NO FRACKING WAY,” are vile and juvenile. Mr./Ms. Tomley maintains that any contamination of McDonald’s private well and the Molivar water supply was the result of McDonald’s diesel fuel tank spill and fertilizer utilization.

S/he believes that Mr./Ms. McDonald is testifying for the prosecution and hoping for a conviction to enhance his/her recovery in the civil case.

The People must prove beyond a reasonable doubt that Penn HydraGas, Inc., and Mitchell Tomley used diesel fluid in the drilling operation near the Village of Molivar and that said drilling contaminated Molivar's drinking water supply.

Witnesses:

For the Prosecution:

Mickie McDonald, victim and hog and dairy farmer

Dr. Ryan Toolittle, geology professor, co-owner of an EPA-approved testing laboratory and Executive Producer of the documentary films *Gas Country* and *Gas Country II*

Bobbie Jones, former chemical engineer of Penn HydraGas, Inc., a member of Pennsylvania's and New York's green environmental group (Stop All Fracking Forever [SAFFE]) and the water quality engineer of the Village of Molivar Water Authority

For the Defense:

Mitchell Tomley, defendant and CEO of Penn HydraGas, Inc.

Dr. Shawn Marshall, geologist with the Natural Gas Institute

Billie Jo Simpleton, Deputy Director of the Business Development Council of Pennsylvania and former Vice President of Operations for Penn HydraGas, Inc.

STIPULATIONS

1. All witness statements are sworn and notarized.
2. All items of evidence are eligible for use at trial, following proper procedure for identification and submission.
3. Any enactment of this case is conducted after the named dates in the stipulated facts and witness affidavits.
4. No other stipulations shall be made between the plaintiff/prosecution and the defense, except as to the admissibility of evidentiary exhibits provided herein.
5. This is a true and accurate copy of the drilling site diagram and is admissible subject to the laying of proper foundation.

STATE OF NEW YORK
COUNTY COURT : MAYBERRY COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

Indictment No. 2013-23456-7

PENN HYDRAGAS, INC., and
MITCHELL TOMLEY, CEO,

Defendants,

THE GRAND JURY OF THE COUNTY OF MAYBERRY, by this indictment, charges PENN HYDRAGAS, INC., and MITCHELL TOMLEY, CEO, the defendants, with violating the federal Safe Drinking Water Act (42 U.S.C.A. 300h) and section 71-4002 of the Environmental Conservation Law, when PENN HYDRAGAS, INC., and MITCHELL TOMLEY, CEO, the defendants, in or about the month of May 2012 and thereafter, with reckless disregard, contaminated the drinking water supply of the Village of Molivar, County of Mayberry, State of New York, by the use of diesel fluids in the defendants' high-volume horizontal hydraulic fracturing (HVHHF) drilling process without a permit.

Mortimer Snerd

MORTIMOR SNERD

District Attorney of Mayberry County

NEW YORK STATE HIGH SCHOOL MOCK TRIAL AFFIDAVITS

Affidavit of Mickie McDonald

1. My name is Mickie McDonald. I am forty-five years old. I live on a farm with my spouse and fifteen year-old daughter Molly. The farm, located on Saunders Settlement Road in the Village of Molivar, has been in my family for more than one hundred years. When my parents passed away in a horrific vehicle accident six years ago, I moved back to take care of the farm. At the time of the accident, I was residing in Manhattan. My spouse had a very lucrative job as an investment banker on Wall Street. I was an associate professor in the management department at small college in Queens. My spouse was somewhat reluctant to make such a dramatic move, but at the time in 2007 the stock market was tanking and huge layoffs at all of the investment houses were expected. So, we decided to move to the farm. We had always talked about cutting back and leading a simpler life at some point in the future, like running a bed and breakfast place. The death of my parents just accelerated the date for transitioning to a new life. Besides, the farm is a great place for us to raise our daughter.
2. On the farm, we raise hogs that we sell to local and regional butchers. We have cows and sell milk to the refiner in Erie County that produces milk that's sold under store brand names like Kegman's and Pops Market. We also grow corn and alfalfa that are sold all over western New York. The farm uses well water for hydrating the animals and for watering the crops. For our residence, we receive water from the Village of Molivar Water Authority.
3. Beginning in June 2012, I began to notice that some of my hogs and cows were lethargic and were not feeding as usual. Several of the animals were throwing up frequently and sleeping excessively during the day. Then in September 2012, three of my hogs and one of my cows died. I did not know what to do. So, one day in October 2012, I happened to talked to my neighbor, Farmer Bob, who lives five miles up Saunders Settlement Road, about the problem with my animals. He told me to have my well water checked.
4. I had recently seen the documentary film *Gas Country*. I later learned that the producer of the film, Dr. Ryan Toolittle, is a professor at SUNY Buffalo and also owns a laboratory that is certified to test drinking water systems. So, I called the lab in late October 2012 and made arrangements for testing my well water and the water going into the house. I was informed at that time that the lab's licensing was only provisional, but that was a temporary situation and Dr. Toolittle's lab consistently produced valid data and ran the lab in full compliance with all policy mandates. Dr. Toolittle himself/herself came out personally to perform the testing. Dr. Toolittle phoned me in mid-November 2012 to deliver the test results. As I suspected, after having talked to Farmer Bob, the test results confirmed that my well water and the water servicing my house was contaminated. Dr. Toolittle found high levels of benzene in both water supplies.
5. I decided to sue Penn HydraGas, Inc., for contaminating my water supplies. So, in March 2013, my attorneys filed a civil lawsuit against the company in State Supreme Court, alleging that Penn HydraGas contaminated my property with dangerous levels of benzene. The company is fracking for natural gas in northern Pennsylvania six miles or

so from my farm. It is the only company doing any fracking around here. Dr. Toolittle suspects Penn HydraGas is using diesel fluids in its drilling process. It is the diesel fluids that have contaminated my property and water supply.

6. I am seeking 10 million dollars in damages on the civil case. In the complaint, my attorneys allege that the drilling for natural gas by Penn HydraGas caused contaminated wastewater to pollute my well water and the water supply going to my house. The contamination led to the deaths of three of my hogs and one of my cows. Other animals on my farm are very sick and close to death. Also, since Penn HydraGas started drilling near my farm, my daughter has developed asthma and my spouse now has constant and unexplained headaches. I now have to truck in water for my crops and my animals. I also have to buy bottled water for my family's consumption. It will take millions of dollars to clean up the mess Penn HydraGas has caused. Without a massive cleanup, we will have to abandon the farm and the property will become a wasteland.
7. The attorneys for Penn HydraGas finagled the system to get the civil case moved to the federal district court in Buffalo. It appears that the civil case is languishing there, pending the outcome of the criminal case. I need the money now to start the cleanup effort. None of the loan companies are willing to advance us money (referred to by my lawyers as a non-recourse loan); probably because the loan companies don't believe that my lawsuit has any merit.
8. After learning in mid-November 2012 that my well water and drinking water supplies were contaminated, I contacted the Village of Molivar Water Authority in early December 2012. Mr./Ms. Bobbie Jones, the water quality engineer, said s/he started some weekly testing of water samples in July 2012 and found increasingly higher levels of benzene, toluene, ethylbenzene and xylene each time. Mr./Ms. Jones said s/he just needed confirmation of his/her results. I told him/her all about Dr. Toolittle's lab. Mr./Ms. Jones was concerned about the provisional certification of the lab, but said s/he would still contact Dr. Toolittle. In passing, Mr./Ms. Jones mentioned that the aquifer for the Molivar water supply runs under my farm.
9. Because so many things were happening at the time, I forgot to mention to Bobbie Jones that I had a diesel fuel leak on my farm in April 2012. Anyway, I believe it was just a small spill and it was quickly cleaned up. The cleanup company, I believe was called Larry, Moe and Curley Quick Response Recovery, recently went out of business. I was completely happy with the work that had been done. Besides, Dr. Toolittle cannot state definitively one way or the other that the diesel spill was enough to harm my well water or the Molivar drinking water supply.
10. In January 2013, Bobbie Jones called to let me know that Dr. Toolittle confirmed that dangerously high levels of benzene were found in the Moliver water supply. There were only trace (non-dangerous) amounts of the other hydrocarbons. Mr./Ms. Jones said s/he would now contact the EPA and the U.S. Justice Department to discuss how to proceed against Penn HydraGas.

11. My attorneys informed me on February 18, 2013 that Penn HydraGas and Mitchell Tomley, CEO, were indicted on February 15, 2013, charged with one count of violating the federal Safe Drinking Water Act as adopted by New York State pursuant to section 71-4001 of the Environmental Conservation Law. The company and the CEO were accused of contaminating the water resources of the Village of Molivar. My attorneys said a conviction would be great for the civil case we eventually filed in March 2013.
12. According to my attorneys, the U.S. Justice Department declined to prosecute the case, having concluded after a quick look at everything that the investment of scarce resources to prosecute a case where direct proof of contamination was lacking was not warranted. Well, I was not about to let the Justice Department decision be the end of this matter. So, I contacted some local residents and Dr. Toolittle to put some pressure on the District Attorney of Mayberry County to seek an indictment. The District Attorney with great reluctance did obtain the indictment. However, the District Attorney had to step aside after it was discovered that his spouse had invested heavily in Penn HydraGas stock. The State Attorney General had to be appointed by the governor to take over the prosecution.
13. I don't care that Dr. Toolittle's new film *Gas Country II* may benefit financially from finding benzene in my water supplies. That is not my concern. I'll do whatever it takes to get Penn HydraGas and Mitchell Tomley to pay for what they have done to my family and my farm.

To the best of my knowledge the above is true.

DATED: Molivar, New York
October 21, 2013

Mickie McDonald

Mickie McDonald

Affidavit of Dr. Ryan Toolittle

1. My name is Ryan Toolittle and I am 59 years old. I live in Sardinia, New York, which is located about half-way between Buffalo and Molivar.
2. I received my B.S. in chemistry from the University of Wisconsin-Madison in 1976. I earned my master's degree in ecology and environment in 1979, from the University of California at Berkeley, where I was also awarded a Ph.D. in geology, in 1985. I am presently a professor at SUNY Buffalo, and an expert in chemical environmental contamination.
3. I am also the co-owner of a laboratory which has been certified by the Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation to analyze drinking water samples for compliance purposes. Our licensing is provisional, based upon alleged deficiencies in our lab, despite which we have demonstrated the ability to consistently produce valid data within the acceptance limits specified in the National Primary Drinking Water Regulations and in full accordance with the policy mandated by the state certification authority. Nonetheless, due to this provisional certification, we are required to notify our clients of this "downgraded" status, which I believe is unwarranted and am fighting to correct.
4. Further, I am the Executive Producer of the widely-acclaimed documentary film, *Gas Country*, which is shown on the premier cable channel OBH. The film documents how the high-volume horizontal hydraulic fracturing process, also known as "HVVHF" or "fracking," and used to drill for natural gas, has harmed land and aquifers all across our country, including Northern Pennsylvania, where Penn HydraGas has recently started a fracking operation.
5. I am set to release *Gas Country II* in 2015. Although the initial documentary did not mention Penn HydraGas, Inc., by name, *Gas Country II* includes a huge exposé on Penn HydraGas and its CEO, Mitchell Tomley, including interviews of several former high-level employees.
6. Sure, I realize that some people think that I'm testifying for the prosecution to get publicity for my upcoming film release. And of course, it would be great for my new movie to make a lot of money, especially because I intend to donate some of the profits to SAFFE, Stop All Fracking Forever. What more appropriate cause is there? It's the same as my having helped Mr./Ms. McDonald and other residents persuade the district attorney to indict Penn HydraGas for what they were doing; before it was too little, too late!
7. In late October 2012, I was contacted by Mickie McDonald, a farmer who was gravely concerned about his/her family's recent illnesses, and the deteriorating condition and some deaths of his/her livestock. Mr./Ms. McDonald wanted the well on his/her property and the water going into his/her house tested.

8. I arranged to personally go to the McDonald farm and took samples from the well myself. I also took samples from the water faucets in the farm house. McDonald's house gets its water from the Molivar water station. The source of the water for the well and for the Molivar water station is the aquifer that runs under the farm.
9. Mr./Ms. McDonald told me that fertilizers containing chemicals are used on the crops grown on the farm, which are consumed by people and fed to the animals. However, following the conduct of thorough and extensive testing procedures, I found, as to both the well and the water going into the house, that byproducts that could only come from diesel fluid were present. I also determined that the drilling being done by Penn HydraGas had caused this contamination.
10. Our lab used the "purge and trap" method to prepare the water samples. Then, utilizing the gas chromatography technique along with mass spectrometry, we were able to determine that a dangerous level of benzene was present in the farm's well water and in the water servicing the McDonald's house provided by the Molivar Water Authority. Specifically, I found high levels or concentrations of benzene, a hydrocarbon that result from fracking. I also detected trace amounts of other hydrocarbons produced by fracking; toluene, ethylbenzene and xylene, although those particular levels are not considered "dangerous."
11. At this point, I should add when I initially went to his/her property, Mr./Ms. McDonald informed me that s/he kept diesel fuel used for farm vehicles and equipment in a 200 gallon tank on the property, which had sprung a leak in late April 2012, causing some fuel to spill into the ground. Although Mr./Ms. McDonald was not sure how much was spilled, s/he was certain that the tank was not full at the time of the incident. S/he also told me that a spill recovery company had successfully cleaned it up. I was not able to reach anyone at the recovery company because it went out of business.
12. As stated previously, Penn HydraGas had been conducting fracking operations in Northern Pennsylvania, at a location near the Village of Molivar. I learned from an EPA blog posting that a crack was found in the cement casing of Penn HydraGas' well bore at that site in June 2012. This breach was right in the aquifer providing drinking water for the village and probably involved a significant emission of diesel fluid. Since Farmer McDonald started having trouble with his/her animals in June 2012, I suspect the breach in the cement casing occurred in May and, according to the blog posting, was not fixed until June 7, 2012.
13. In December 2012, I was contacted by Bobbie Jones, the Water Quality Engineer for the Molivar Water Authority. Mr./Ms. Jones, whom I interviewed for *Gas Country*, contacted me to test the water at the Molivar water station. S/he had noticed over the past few months that his/her weekly samples had increasingly higher levels of benzene, toluene, ethylbenzene and xylene; all known toxic constituents of diesel fluid. Mr./Ms. Jones was aware of Penn HydraGas' fracking operation near Molivar. Ms./Mr. Jones was hoping that my lab would confirm his/her results. My testing in fact did confirm that, based on a reasonable degree of scientific certainty, the benzene contamination of the Molivar water resources was caused by the high-volume horizontal hydraulic fracturing done by Penn HydraGas at its drilling site near Molivar. At the water authority's request, I prepared a

written report. I have not yet prepared a report regarding the contamination I found on the farm and inside the McDonald house.

14. Let me explain the difference between diesel **fuel** and diesel **fluid**. Diesel fuel is what goes into tanks to power a diesel vehicle. Regardless of the amount of any such spill at the McDonald farm, my scientific findings confirm that it was not enough to have caused the subject contamination to both the McDonald well and the aquifer which provides water to Molivar residents and runs under McDonald's farm. Diesel fluid, on the other hand, is the "chemical cocktail" consisting of water, sand, and 1% of diesel that's used in the fracking process to release the natural gas trapped in shale rock. This fracking operation is what produces the hydrocarbon byproducts I mentioned earlier.
15. Diesel fluid is relatively inexpensive. However, no one is allowed to use it in the drilling process without a permit issued by the EPA, which is expensive to secure. I'm sure that's because of the serious dangers HVHFF presents. That's why I think it's extremely reckless that Penn HydraGas and other companies do it, without a permit no less!
16. My concerns about fracking and its potential harm to the environment led me to produce my first documentary. In fact, during the investigation for that film, anonymous sources revealed that around 2009, Mitchell Tomley, the CEO of Penn HydraGas, was pressuring its operations unit to be more productive and to lower costs by using diesel in the drilling operation.
17. Although I do believe that Mr./Ms. Tomley and Penn HydraGas are trying to save the world from political turmoil by decreasing our dependency on foreign oil, they are killing the earth in the process. So, thanks a lot Mr./Ms. Tomley! For nothing! Particularly since there are renewable energy resource alternatives that use wind, solar and biofuels.
18. I interviewed Dr. Shawn Marshall for my first documentary *Gas Country*. S/he is a real hack, a "paper" geologist who got his/her Ph.D. online. S/he works for the Natural Gas Institute, which is the lobbying entity for the industry and is funded entirely by money from natural gas drillers and supplies, polluters all. In *Gas Country*, Dr. Marshall unabashedly advocated for fracking, proclaiming that "tree-hugging" environmentalists have produced no credible evidence that fracking causes any harm. Can you believe s/he also tried to justify fracking as a solution to reducing our country's dependency on foreign oil supplies? Then again, why wouldn't s/he? That's what s/he gets paid a huge amount of money to do! As I said in *Gas Country*, Dr. Marshall is just full of "natural gas," if you know what I mean. S/he probably refused to be interviewed for *Gas Country II* because s/he ran out of gas!

To the best of my knowledge the above is true.

Dated: Sardinia, New York
December 21, 2013

Dr. Ryan Toolittle

Ryan Toolittle, Ph.D.

Affidavit of Bobbie Jones

1. My name is Bobbie Jones. I am 52 years old, and I reside at 22 Town Line Rd. in Molivar, New York. I graduated from University of Pittsburgh in 1983 with a B.S. degree in chemistry. I serve as the Water Quality Engineer for the Molivar Water Authority, a position I have served in since January 2012. Molivar is a quaint little village with a population of approximately 905 residents, according to the 2010 census.
2. From 1985 until 2010, I was a chemical engineer employed by Natural Shalegas and then the successor company, Penn HydraGas, Inc. In December 2010, I was terminated by Penn HydraGas. I believe that my termination was because the company's CEO, Mitchell Tomley, who bought Natural Shalegas in 2005 and changed the name to Penn HydraGas, Inc., discovered that I was accumulating information that Penn HydraGas was using diesel fluid in its drilling operations without a permit.
3. While I did not accumulate enough evidence of the illegal drilling to go to the Environmental Protection Agency, I did overhear Mr./Ms. Tomley say that s/he "didn't care if a few farm animals croaked, because fracking is the future." And then, after I was terminated, I happened to receive an email sent companywide wherein Tomley indicated that s/he thought using a more "cost effective" drilling solution should be considered. Penn HydraGas apparently deleted my work email address, but they must have overlooked my personal email address. Some of us were allowed to use personal email addresses. I printed this email and saved it.
4. Penn HydraGas claims that it fired me because of tardiness, insubordination, and falling asleep on the job. After 25 years, they claim that all of a sudden I wasn't a good employee. Now, I admit that I was late a few times. I also had a problem with my thyroid at one point that caused me to doze off, but that was fixed with new medication long before I was fired. As far as insubordination goes, it's almost like they entrapped me. They knew that my father was sick and that I was caring for him alone, yet they still demanded more and more overtime from me. Eventually, I had to say enough is enough and refuse. I think that any reasonable employer would have taken these things into consideration, but apparently the Pennsylvania Department of Labor disagrees. However, I did not appeal the labor department's decision, but not because I didn't believe my case had merit. I just wanted to move on with my life.
5. To tell the truth, part of the problem was that I was fed up and disillusioned with the whole industry. Right about the time that I overheard Tomley practically bragging about his/her contempt for the environment, I saw *Gas Country*. After that, it was hard to go get up and to work for those money-hungry polluters.

6. I spent a good part of my life supporting Penn HydraGas and its ilk. When the company was called Natural Shalegas, I had significant input into the development of the chemical cocktail that our frackers are supposed to be using. That made it all the harder to take when I found out that Penn HydraGas was using diesel. While I never visited any of the drilling sites, I was well aware of what Tomley was up to. Just take a look at that email Tomley sent. So, the way I look at it, I've simply decided to use my knowledge, time, and effort to fight for the environment instead of business. For me, it's good versus evil, and I chose good.
7. So, in June 2010 when I was still working at Penn HydraGas and before I was fired, I became a member of the Pennsylvania chapter of Stop All Fracking Forever (SAFFE). This did not sit well with Mr./Ms. Tomley and the other business interests in northern Pennsylvania. I became a pariah in their eyes such that after Mr./Ms. Tomley fired me, I could not find work anywhere in northern Pennsylvania.
8. In addition to my position with the Molivar Water Authority, I'm also heavily involved with the New York chapter of SAFFE that I started in late January 2012, shortly after taking the water authority position. And despite all the resistance from business interests, we are making a dent in the fracking industry, just not fast enough. I'm pretty sure that the growing public resistance to their way of doing business is beginning to cut into profits. That's probably why they are cutting corners. Just wait until the public gets a look at *Gas Country II*. Dr. Toolittle interviewed me and even arranged a special pre-screening for SAFFE members. It's pretty compelling stuff.
9. In July 2012, not long after I started as the Water Quality Engineer, I began seeing the levels of toxins like benzene, toluene, ethylbenzene and xylene rise. Sure enough, not far down the road, Penn HydraGas had just started another fracking operation. It's not that I'm finding these chemicals that is so surprising, I know a company like Penn HydraGas will do just about anything to keep its profits high, but it was like someone was putting diesel straight into the tap water.
10. Farmer Mickie McDonald contacted me in early December 2012 to report that his/her well water and drinking water supplies were contaminated. I told him/her about the increasingly higher levels of benzene, toluene, ethylbenzene and xylene that I was finding each week since July. I told Mr./Ms. McDonald that I just needed to confirm my results. Mr./Ms. McDonald told me about Dr. Toolittle's lab. Dr. Toolittle never mentioned to me that s/he had a testing lab when I was interviewed for his/her documentary. I was a little concerned about the provisional certification of Toolittle's lab, but I contacted him/her anyway. In passing, I mentioned to Mr./Ms. McDonald that the aquifer for the Molivar water supply runs under his/her farm. By the way, I don't remember Mr./Ms. McDonald ever telling me about the diesel fuel leak on his/her farm. I believe I heard it from Dr. Toolittle, but it is something that Mr./Ms. McDonald

should have told me. Anyway, Dr. Toolittle's lab confirmed my findings, i.e., that a very high level of benzene is present in the Molivar water supply, but only trace amounts of other hydrocarbons.

11. With such a clear link between the timing of the rising toxins and the Penn HydraGas operation, I had to report it. It wasn't anything personal, but I went to the D.A. and told him what I had seen, both while I was at Penn HydraGas and then at the Water Authority. I will admit, however, that the publicity this trial has brought to fracking has sure been good for SAFFE. Donations are up 50%. Even Dr. Toolittle has promised to give SAFFE some of the proceeds from *Gas Country II* to help fund our environmental initiatives.
12. The charges that I misappropriated SAFFE funds for personal use are completely unfounded. The environmental polluters accuse me of using SAFFE money for personal travel. That is not true. As the head of the New York chapter of SAFFE, I travel to conventions put on by the Tierra Club, a worldwide environmental organization. SAFFE is affiliated with the Tierra Club. It is true that some of the conventions are held in places like Paris, Copenhagen, Rio de Janeiro and San Francisco. I have to go where the conventions are held to represent my chapter. So what if I stay longer and make a vacation out of the trip? After the conventions are over, I spend my personal money during the extra time I might stay at a location.
13. The polluters are always trying to distract us from the real issues. I'm not testifying just because it might be beneficial for SAFFE; I'm testifying to expose the truth about Penn HydraGas and Mr./Ms. Tomley.

DATED: Molivar, New York
October 29, 2013



Bobbie Jones

Affidavit of Mitchell Tomley

1. My name is Mitchell Tomley. I reside in Jim Thorpe, Pennsylvania. I am the Chief Executive Officer of Penn HydraGas, Inc., a public company that is traded over the counter. Our company headquarters are located in eastern Pennsylvania. I am 57 years old. I obtained a bachelor's degree in physics and mechanical engineering from SUNY Stony Brook in 1977. I also hold an MBA from Wharton School of the University of Pennsylvania and have served as an adjunct faculty member there since 1998. I teach aspiring executives how to develop and assess techniques to comply with governmental regulations while maintaining the highest possible profitability. In addition, I worked on Wall Street for a division of a hedge fund specializing in oil and gas futures. I was quite successful and, not bragging, I made a ton of money.
2. I left the hedge fund in 2004 and in 2005 I bought a small fracking operation from a Mr. Larkin called Natural Shalegas. The company was renamed Penn HydraGas, Inc., and we significantly expanded the natural gas drilling operations.
3. Our company designs and operates high-volume horizontal hydraulic fracturing systems (HVHHF). Basically, HVHHF, also known by (much to my dismay) the silly term "fracking," is simply a drilling method used to extract natural gas or oil from rock by breaking, or fracturing, the rock by use of a pressurized liquid, also known as a drilling fluid. The process itself has been around since 1947, and the first commercially successful applications were in 1949, shortly after World War II.
4. We started a project in Northern Pennsylvania, about five miles from the Village of Molivar in New York, in early May 2012. On February 15, 2013, my company and I were indicted on one count of violating the Federal Safe Drinking Water Act. The claim is that somehow I personally, and Penn HydraGas, polluted the aquifer servicing the Moliver public water system. Apparently some farmer named Mickie McDonald lost three hogs and a cow in September 2012. Also, his/her spouse and daughter developed some maladies. Anyway, it is my understanding that s/he uses well water for his/her plants and animals.
5. My attorneys tell me that the U.S. Justice Department had dropped this case, having concluded after a cursory review that it would be a waste of scarce resources to prosecute a case where there was no direct proof that we had contaminated anything. However, the District Attorney of Mayberry County, probably because of pressure from McDonald and the so-called "environmentalists," sought and obtained the indictment against us. Our lawyers told us not to worry about it; an indictment means nothing. One famous New York judge even said a zealous prosecutor could indict a ham sandwich.
6. The good District Attorney Mortimer Snerd had to step aside when he remembered that his wife had invested heavily in Penn HydraGas stock. The State Attorney General was appointed by the governor to take over the prosecution. The AG should come to the same conclusion as the Justice Department and drop this nonsense case.

7. The HVHHF business has become quite profitable in recent years, due to technological advances, and, I must admit, the willingness of governmental and non-governmental organizations to cooperate with us. What's in it for them? HVHHF creates jobs. We also pay a lot of money to lease property from people whose property values have declined, in some areas quite drastically. We are doing our part to reduce this nation's dependency on foreign sources of oil, which can only help our national security. Bottom line is that we provide a lot of money, especially to people in distressed economies, many of whom can't afford to keep their property and can't sell it, while at the same time helping our nation take charge of our energy needs.
8. I wish that people would learn a little about the process before they jump to conclusions that our company intends to pollute the world, kill animals, and poison the water supply. I get very annoyed by the protesters at our headquarters and some of our sites, and I am especially offended by their juvenile double-entendre slogans and puns. In fact, I once commented to one of our vice presidents, "We don't care if a few farm animals croak. Fracking is the future and we are frackin' it up." I was joking, of course.
9. Sure there is an environmental impact, but everything has benefits and risks. The mixture that we inject into the well bore, and the contents of the storage ponds, if not properly monitored and contained, can seep into aquifers providing drinking water. But, drilling is carefully monitored, and we are subject to numerous federal, state and local regulations wherever we do business. We hire people to make sure we comply with the law in as fiscally responsible a way as we can.
10. We spent years of engineering time and millions of R&D money developing our proprietary drilling fluid, and our formula is a trade secret that is covered by numerous patents. The formula itself is never revealed to anyone except government regulators.
11. It would be a lot cheaper to use diesel fluid in Penn HydraGas' drilling process. Our former vice president of operations, Billie Jo Simpleton, simply wouldn't approve diesel fluid for use in our operations under any circumstances. That was a frustration for me since I bought the company in 2005. I was not unhappy to see Simpleton move on to other ventures. But Simpleton certainly wasn't the only obstacle: the EPA permit to use diesel fluid is quite costly, just to discourage drillers from using it.
12. Larry Lyonheart, our current Vice President of Operations, is solely responsible for manufacturing the drilling fluid. He used to report to me on a regular basis. Unfortunately, he was involved in a serious motor vehicle accident and is in a coma. He is not likely to recover.
13. Like Simpleton, Larry is a scientist without much business sense. We had many animated discussions about the drilling fluid, and we frequently and respectfully disagreed with each other. As CEO, the final decisions, though, are mine. I have seen the email that was supposed to be deleted, and I confirm that yes, I did send it to Larry when I was on vacation in September 2011. The email was a reply to an email Larry had sent companywide. Apparently, Bobbie Jones' personal email address was still in the company's group email address. I accidentally selected REPLY-ALL, which would explain how Jones got a copy of the email.

14. It's true that I wanted Larry to give further consideration to using diesel fluid. Our company's board of directors authorizes big bonuses to employees who bring projects in under budget or with higher profitability. I am always in communication with our top people to enhance the bottom line, usually by confidential email.
15. I have heard that companies use diesel fluid without obtaining the permit because diesel fluid is cheap and easy to use in the drilling process. But, our lawyers tell me that the prosecutor has not discovered any direct proof that Penn HydraGas ever used diesel fluid. I acknowledge that EPA inspectors found several unopened drums containing diesel fluid in our warehouse nine months ago. These drums were ordered by mistake. We just have not gotten around to returning the diesel fluid to the distributor.
16. The techniques we use at the project near Molivar are typical. First, we created a well bore, basically a deep vertical hole. Then we line the well bore with a cement casing, which protects the equipment and our workers. Cement is quick, easy, and cheap.
17. Penn HydraGas uses our patented proprietary mixture of water, sand and chemicals, which is lowered into the well bore and injected at high pressure horizontally, to create small fractures (typically less than 1mm, or about as wide as your pinky finger), along which fluids such as gas may migrate to the well. We then reduce the hydraulic pressure by moving the mixture to storage ponds.
18. Since our equipment and employees are regularly in and out of the well bore, we usually notice cracks in the cement casing pretty quickly, and if they need repairs, we are able to do them promptly. That's only good business. It's in our best interests to detect leaks quickly, because our proprietary mixture is expensive, and we don't want a competitor to have access to a sample and reverse-engineer it.
19. On June 4, 2012, my people reported a leak in the casing at the project near Molivar. In accordance with Penn HydraGas' policies and best practices protocol, I ordered the field supervisor to prepare a diagram of the project for company files, showing the breach before it was repaired. I'm pretty sure, but not certain, that it was caught very early on, and that there probably wasn't a leakage of any significant amount. If I remember correctly, the leak was found and fixed in about three days.
20. One of the prosecution's witnesses is Mickie McDonald. Yes, the same farmer who is suing our company in a civil lawsuit for \$10 million in damages. S/he claims damages for four dead animals, and has alleged that his/her spouse has headaches and their daughter has asthma because of contaminated water. Headaches and asthma? Probably two of the top ten conditions in the entire country. Really?! Even if McDonald isn't making the whole thing up, there is no way s/he can prove our company caused the animals' death or any illnesses. The drilling operation is simply too far away in my opinion to have any effect on any water system servicing the McDonalds – public or private. Anyway, my attorneys have filed a summary judgment motion seeking dismissal of the civil case. I expect a favorable decision on the motion after this silly criminal case is over.
21. All kinds of things can migrate through rock and into aquifers – acid rain, fertilizers, chemical spills, even storm water runoff from asphalt highways. It's pretty easy to point at us, but the fact is we can't be blamed for everything! Not that government and certain greedy people haven't tried!

22. What McDonald probably didn't tell the EPA was that s/he has used chemical fertilizers, probably for years, which can leach into the aquifers. McDonald probably also failed to mention a large leak from the farm's diesel tank. McDonald used some cleanup company called Larry, Moe and Curley Quick Response Recovery to clean up the mess. I'm told the company went out of business. Diesel fuel can also leach into the aquifer. The chemical fertilizer usage and the diesel fuel leak are the logical explanations for any problems with Molivar's water quality.
23. Bobbie Jones worked at our company and the predecessor company for 25 years as a chemical engineer. You shouldn't believe anything s/he has to say. Jones showed up late for work on numerous occasions, was found sleeping on the job several times, and refused to work overtime when important projects needed to be completed. What a disaster. Jones had every excuse in the book and then some: medication, caring for an elderly parent, you name it. Finally we had enough and fired him/her in December 2010.
24. Besides that, Bobbie Jones knows nothing about our drilling procedures. S/he was never at our drilling sites. His/her job was to work at our lab next to our central office testing samples of natural gas brought to him/her for trace detection levels of impurities. Natural gas trace impurities include hydrogen, nitrogen, carbon monoxide, carbon dioxide, oxygen, mercury, water and other components. The fact that Jones got "employee of the month" awards several times means nothing. In 2003, s/he got it from his/her good friend Mr. Larkin and before I bought the company from Larkin. S/he got it again in 2006, a year after I took over, before we really knew what type of worker s/he really was. S/he was never happy that Mr. Larkin sold the company.
25. Jones claimed the firing was because s/he was amassing information to be a "whistleblower." Ridiculous. Jones wasn't at work enough, or awake enough, to do his/her own job, much less take on the extra project of assembling information against us except for leaking a confidential email. Jones tried to collect unemployment, but the Pennsylvania Department of Labor ruled that we were right and that the firing was justified. That's probably why Jones didn't try to appeal the labor department's decision.
26. I guess Jones is still angry about the firing and the labor department decision. Bobbie Jones has been a thorn in our side since June 2010 when s/he became a member of the Pennsylvania chapter of the so-called "environmental" group SAFFE, whose sole mission is to stop HVHHF completely. I would not be surprised if Bobbie Jones is asleep at the switch at his/her new job with the Village of Molivar as a water quality engineer, and is sleeping through the village's problems, trying to pin them on us!

Dated: Jim Thorpe, Pennsylvania
October 31, 2013

Mitchell Tomley

Mitchell Tomley

Affidavit of Shawn Marshall

1. My name is Shawn Marshall and I am 58 years old. I divide my time between homes in London, New York, which is about 30 miles northeast of the Village of Molivar, and Washington, D.C.
2. I received my B.S. in geology from Northern South Dakota College in 1987. Thereafter, I attended University of Nexus, an online institution, where I received a master's of science in biology in 1992 and a Ph.D. in ecology and environment in 1997. I put up my credentials against any of those other Ph.D.'s who went to the over-priced and fancy-named brick and mortar schools.
3. I currently work as a Geologist for the Natural Gas Institute (NGI) which is a lobbying organization. The NGI is funded by membership dues paid by individuals and companies in the natural gas industry, like drillers and suppliers. Penn HydraGas, Inc., is a dues paying member of NGI and we have considered asking Mitchell Tomley to join our board of directors. S/he is probably too busy now running the company and protecting the company from baseless charges.
4. I disagree with the EPA and other purported "scientists" who believe that the use of diesel fluids harms the environment. I haven't seen any credible evidence to support the theory that fracking has caused any harm.
5. In my opinion, fracking is completely safe and causes no harm to the soil or the ground water supply; there is research to support my view. The federal government did a study that showed that fracking does not contaminate the drinking water supply. The Associated Press reported on the study in a July 18, 2013, article titled, "DOE study: Fracking chemicals didn't taint water." The study monitored the drilling sites for a year and found that drilling fluids remained about a mile away from drinking water supplies.
6. The environmental extremist groups like SAFFE ignore the science showing conclusively that fracking is safe and that natural gas exploration is beneficial to our economic prosperity. In fact, rather than be harmful to society, fracking could lead to a reduction in the country's dependency on foreign oil supplies. This natural gas can create electricity and heat, income from tax revenues and new jobs. SAFFE is only concerned about distorting the truth and raising money from the gullible public.
7. Even if some of the chemicals used in fracking, like diesel fluids, are not healthy for plant and animal life, they are kept away from the human water supply. Indeed, fracking allows the industry to access natural gas, which is an environmentally-friendly, clean-burning fuel, in places where conventional drilling may not work.
8. Fracking is safe and beneficial to the economy, but I always encourage NGI Institute members to obtain the proper permits before using diesel fluids. Anyway, it is probably

just government over-regulation to restrict the use of diesel fluids in drilling operations. These wells are typically miles away from aquifers and other water supplies. I don't know exactly how far away the Penn HydraGas' well was from the Molivar aquifer, but I would be surprised if the drilling operation had any effect on the village's water supply. These people like SAFFE and its environmental cohorts are just making stuff up! Anyway, I heard that there was a large diesel fuel leak on the McDonald farm and the company that supposedly did the cleanup work went out of business. If anything, the diesel fuel leak and the sloppy cleanup work were probably the cause of the contamination to McDonald's well water and the Molivar water supply.

9. I am familiar with the allegations in *People v. Penn HydraGas, Inc., et al.* I am also familiar with one of the prosecution's witnesses, Dr. Ryan Toolittle. I was interviewed about fracking in Dr. Toolittle's documentary, *Gas Country*. I told Dr. Toolittle, in plain terms, that I support fracking. I did not appreciate that Dr. Toolittle's editing made me appear so extreme, nor did I appreciate that Dr. Toolittle disputed my credentials, showing his/her juvenile wit by saying in the film that I was "just full of 'natural' gas." Accordingly, I declined to appear in *Gas Country II*. I will not help Dr. Toolittle gain more money and publicity via his/her baseless anti-fracking documentaries. S/he seems far more concerned with selling a story than science.
10. Now, I am aware that there was a breach in the cement casing of one of Penn HydraGas' wells near Molivar. I admit that a crack can present a problem and allow drilling fluid to escape into the surrounding environment. Although the breach was very close to the Molivar drinking water resources, I am told the crack was discovered early and the leak was minimal. But, no one really knows for sure, even Dr. Toolittle. Toolittle owns a lab that tests drinking water systems, but the lab is not fully certified. So, you can't trust any test results from that quack. Anyway, I just hope Penn HydraGas and my good friend Mitchell Tomley were not using diesel fluid without a permit.

To the best of my knowledge, the above is true.

Dated: London, New York
November 13, 2013

Shawn Marshall, B.S., M.S., Ph.D.

Shawn Marshall, B.S., M.S., Ph.D.

Affidavit of Billie Jo Simpleton

1. My name is Billie Jo Simpleton. I am 34 years old, and I reside at 35 Nittany Lion Lane in Harrisburg, Pennsylvania, where I have served as the Deputy Director of the Business Development Council of Pennsylvania since 2009.
2. The Business Development Council of Pennsylvania is a not-for-profit corporation whose mission is to foster job creation and economic development in the Keystone State. The Business Development Council enthusiastically supports hydraulic fracturing as an enterprise that will put the United States on the road to energy self-sufficiency, and free our nation from its long-standing dependence on oil imported from foreign countries. Perhaps even more important to Pennsylvania, hydraulic fracturing has brought and will continue to bring to our State thousands of high-paying jobs, particularly in rural communities that have received the resulting benefits of increased population and property tax revenue to fund vital public services. Simply put, hydraulic fracturing is a “win-win” for our State, its economy, and its citizens. By the way, I really dislike the term “fracking” that the environmental groups use when they refer to hydraulic fracturing.
3. Unfortunately, some detractors have sought to scare the public about the alleged environmental effects of hydraulic fracturing. Such scare tactics do not at all concern the Business Development Council. They are unsupported by any credible research that would demonstrate a cause-and-effect relationship between hydraulic fracturing and purported environmental harm. As such, they should not stand in the way of the expansion of hydraulic fracturing and the economic benefits that it generates.
4. I earned my bachelor of science degree in mechanical engineering from Michigan State University in East Lansing, Michigan, in 2002. Upon my graduation, I accepted a position as a manager in the operations unit of the Natural Shalegas Company, which was engaged in hydraulic fracturing ventures in northern Pennsylvania, near Bradford. Over the course of my five years as a manager, Natural Shalegas and its successor, Penn HydraGas, Inc., experienced a threefold increase in profits as a result of the success of mining several new gas wells in McKean and Potter Counties.
5. In 2005, after Mitchell Tomley purchased Natural Shalegas’ drilling operation and renamed the company Penn HydraGas, I was promoted to the position of Vice President of Operations. In that capacity, I oversaw all of Penn HydraGas’ hydraulic fracturing enterprises throughout northern Pennsylvania. I am confident that the success of the company’s mining in McKean and Potter Counties earned me this promotion.

6. In order for Pennsylvania's residents to reap the benefits of hydraulic fracturing, it must take place with safety as a first priority. For that reason, I have always opposed the use of diesel fluids in Natural Shalegas' and Penn HydraGas' drilling operations. Diesel is undisputedly unsafe for consumption, and its use in hydraulic fracturing – though more cost-effective – has the potential to contaminate groundwater supplies upon which plants, animals, and humans rely.
7. I know that Mitchell Tomley disagreed with my reticence to use diesel fluid in Penn HydraGas' hydraulic fracturing activities. Mitchell Tomley did say once that s/he did not object to such use of diesel because s/he didn't "care if a few farm animals" would "croak," and because "fracking is the future" and Penn HydraGas was "fracking it up," but s/he made these statements in jest. In deference to my opposition, Penn HydraGas never used diesel in its drilling operations while I was employed there.
8. I decided to leave Penn HydraGas in 2009 not only because the Deputy Director position at the Business Development Council offered me a 25% increase in my salary, but also because I wanted to move closer to my parents who reside in nearby Hershey. (Living closer to my favorite amusement park is also a plus!)
9. When I told Mitchell Tomley that I would leave Penn HydraGas for my new opportunity at the Business Development Council, Mitchell did not express disappointment and did not ask me to stay. Mitchell simply wished me well in my future endeavors. Any suggestion that I departed from Penn HydraGas because Mitchell pressured the Operations unit to increase productivity or to use diesel fluid in drilling, however, is not at all true. Mitchell Tomley gave me nothing but positive feedback concerning the Operations unit's performance as long as we worked together, and never asked me to betray my convictions by authorizing the use of diesel.
10. Given Mitchell Tomley's support for using diesel in hydraulic fracturing, it would not surprise me if Penn HydraGas did so after I left, and I suspect that it did under Mitchell's continued leadership. This is only a guess on my part. I have no evidence to prove my suspicion, and I have never reported it to any authorities. Mitchell did tell me on several occasions, however, that s/he did not believe the use of diesel in drilling would harm the environment and that even if it did, s/he did not particularly care because it would reduce costs.
11. So-called environmental "activists" like Bobbie Jones just don't get it. They go around stirring up controversies about hydraulic fracturing just to raise money for their dishonest environmental groups. I've known Bobbie Jones since the time we worked at Natural

Shalegas and then Penn HydraGas. S/he was weird, always snooping around and making everybody uncomfortable, except those times s/he was sleeping on the job.

12. Now, Bobbie Jones is running some local green environmental group miscalled SAFFE. I heard that s/he was accused of misspending SAFFE funds to finance his/her fancy lifestyle. S/he takes these lavish junkets to some of the swankiest places around the world, all on SAFFE's dime. These groups like SAFFE get their money by trashing energy producers involved in legitimate activities like clean coal production and hydraulic fracturing. The more controversy Bobbie Jones and his/her ilk can stir up about hydraulic fracturing the more money these organizations take in. And Bobbie Jones travels the world! Nice!! The Attorney General might want to spend some time looking into that.

DATED: Harrisburg, Pennsylvania
November 4, 2013

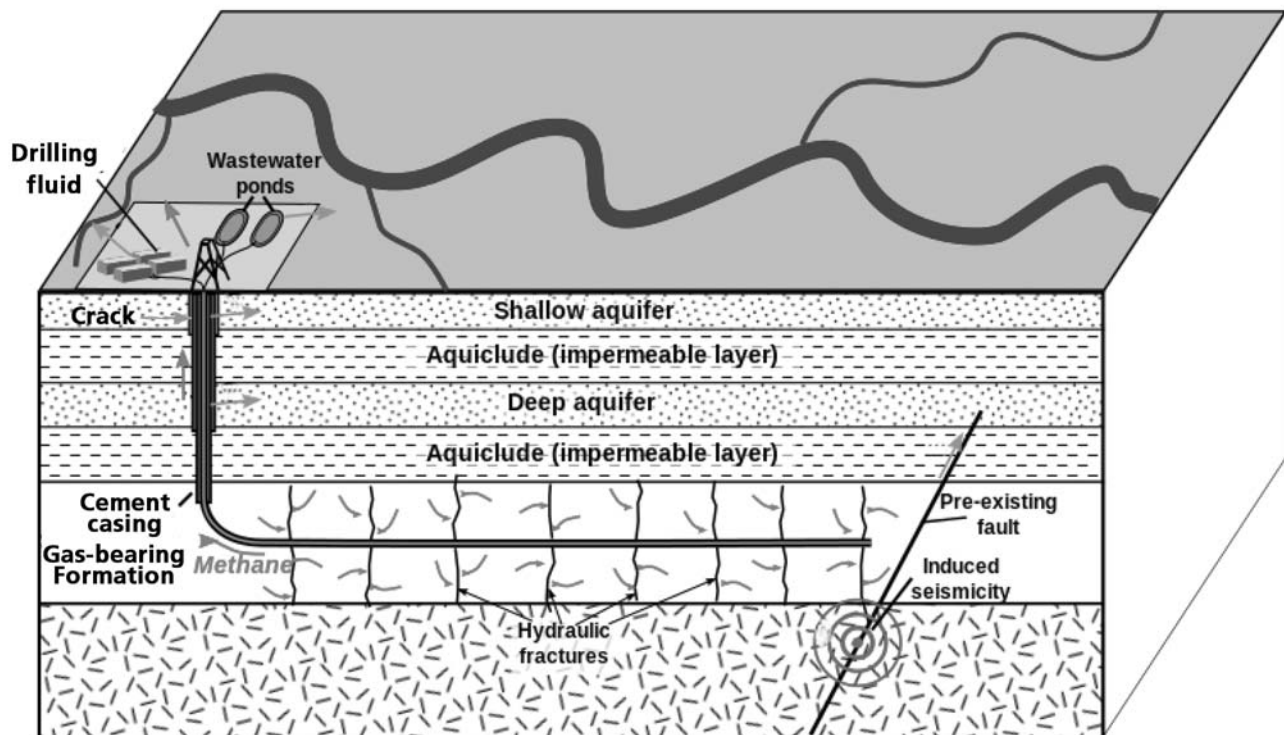
Billie Jo Simpleton

Billie Jo Simpleton

NEW YORK STATE
HIGH SCHOOL
MOCK TRIAL
TOURNAMENT
EVIDENCE

PART V

Penn HydraGas Drilling Operation near Molivar, NY



Prepared by: Vincent Taylor, Field Supervisor, Penn HydraGas, Inc

EDITED VERSION FOR FINAL USE 12/20/13

RE: PROJECT MEETING

Mitchell Tomley <mtomley@pennhydragas.com>

Mon 09/28/11 4:04 PM

To: Lyonheart, Larry <LLYONHEART@PENNHYDRAGAS.COM>; EVERYONE;

Larry, last quarter profits are dismal. We've got to turn it around soon. We really should start using diesel fluid to improve our drilling operation, but as you know the cost of those EPA permits is a killer. Anyway, it's your call. Just remember, all of our jobs and livelihood are on the line! I'm sure you know what I mean. You are still solely responsible for mixing our proprietary drilling fluid and only you need to know what's in it. Delete this e-mail immediately after reading it. Let's talk next week when I get back from vacation. MT

>>> "Lyonheart, Larry" <LLYONHEART@PENNHYDRAGAS.COM> 09/28/11 3:56 PM>>>

REMINDER! Close of third quarter meeting will be held 09/30/11 at 11 AM in the large conference room. Lots to discuss. Attendance is required by all managers.

Larry Lyonheart
Vice President of Operations
Penn HydraGas, Inc.

DOE study: Fracking chemicals didn't taint water

Kevin Begos, Associated Press

July 18, 2013



Pittsburgh (AP) — A landmark federal study on hydraulic fracturing, or fracking, shows no evidence that chemicals from the natural gas drilling process moved up to contaminate drinking water aquifers at a western Pennsylvania drilling site, the Department of Energy told The Associated Press.

After a year of monitoring, the researchers found that the chemical-laced fluids used to free gas trapped deep below the surface stayed thousands of feet below the shallow areas that supply drinking water, geologist Richard Hammack said.

Although the results are preliminary — the study is still ongoing — they are a boost to a natural gas industry that has fought complaints from environmental groups and property owners who call fracking dangerous.

Drilling fluids tagged with unique markers were injected more than 8,000 feet below the surface, but were not detected in a monitoring zone 3,000 feet higher. That means the potentially dangerous substances stayed about a mile away from drinking water supplies.

"This is good news," said Duke University scientist Rob Jackson, who was not involved with the study. He called it a "useful and important approach" to monitoring fracking, but cautioned that the single study doesn't prove that fracking can't pollute, since geology and industry practices vary widely in Pennsylvania and across the nation.

The boom in gas drilling has led to tens of thousands of new wells being drilled in recent years, many in the Marcellus Shale formation that lies under parts of Pennsylvania, New York, Ohio and West Virginia. That's led to major economic benefits but also fears that the chemicals used in the drilling process could spread to water supplies.

The mix of chemicals varies by company and region, and while some are openly listed the industry has complained that disclosing special formulas could violate trade secrets. Some of the chemicals are toxic and could cause health problems in significant doses, so the lack of full transparency has worried landowners and public health experts.

The study done by the National Energy Technology Laboratory in Pittsburgh marked the first time that a drilling company let government scientists inject special tracers into the fracking fluid and then continue regular monitoring to see whether it spread toward drinking water sources. The research is being done at a drilling site in Greene County, which is Southwest of Pittsburgh and adjacent to West Virginia.

Eight new Marcellus Shale horizontal wells were monitored seismically and one was injected with four different man-made tracers at different stages of the fracking process, which involves setting off small explosions to break the rock apart. The scientists also monitored a separate series of older gas wells that are about 3,000 feet above the Marcellus to see if the fracking fluid reached up to them.

The industry and many state and federal regulators have long contended that fracking itself won't contaminate surface drinking water because of the extreme depth of the gas wells. Most are more than a mile underground, while drinking water aquifers are usually within 500 to 1,000 feet of the surface.

Kathryn Kleber, the CEO of the Industry-led Marcellus Shale Coalition, called the study "great news."

"It's important that we continue to seek partnerships that can study these issues, and inform the public of the findings," Kleber said.

While the lack of contamination is encouraging, Jackson said he wondered whether the unidentified drilling company might have consciously or unconsciously taken extra care with the research site, since it was being watched. He also noted that other aspects of the drilling process can cause pollution, such as poor well construction, surface spills of chemicals, and wastewater.

Jackson and his colleagues at Duke have done numerous studies over the last few years that looked at whether gas drilling is contaminating nearby drinking water, with mixed results. None of them have found chemical contamination but they did find evidence that natural gas escaped from some wells near the surface and polluted drinking water in northeastern Pennsylvania.

Scott Anderson, a drilling expert with the Environment Defense Fund, said the results sound very interesting.

"Very few people think that fracking at significant depths routinely leads to water contamination. But the jury is still out on what the odds are that this might happen in special situations," Anderson said.

One finding surprised the researchers: Seismic monitoring determined one hydraulic fracture traveled 1,800 feet out from the well bore; most traveled just a few hundred feet. That's significant because some environmental groups have questioned whether the fractures could go all the way to the surface.

The researchers believe that fracture may have hit naturally occurring faults, and that's something both industry and regulators don't want.

"We would like to be able to predict those areas" with natural faults and avoid them, Hammack said.

Jackson said the 1,800-foot fracture was very interesting, but also noted it is still a mile from the surface.

The DOE team will start to publish full results of the tests over the next few months, said Hammack, who called the large amount of field data from the study "the real deal."

"People probably will be looking at the data for years to come," he said.

EDITED VERSION FOR FINAL USE 12/20/13

GAS COUNTRY II

**The truth behind how high-volume horizontal hydraulic fracturing has
harmed land and aquifers all across the country.**

A film by Dr. Ryan Toolittle

OBH  DOC

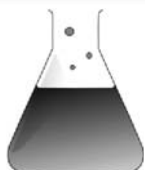
*Don't FRACK
with us!!!*



No
FRACKING
WAY!!



**FRACK
YOU**



TOOLITTLE LABORATORIES LLC

Dr. Ryan Toolittle, Analyst

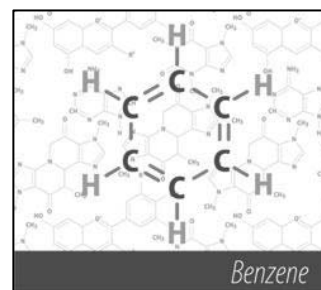
REPORT AND ANALYSIS OF THE VILLAGE OF MOLIVAR WATER RESOURCES

SUMMARY

An analysis of the Village of Molivar water resources was undertaken pursuant to the Safe Drinking Water Act (SDWA) to determine the level of contaminants in the drinking water. Using the purge and trap method, the water samples were prepared. Then, using the Gas Chromatography technique along with the Mass Spectrometry technique, it was determined that the level of benzene present in the water supply was 0.015 mg/L or 15 parts per billion (ppb). This level is 10 ppb higher than the regulations set by the Environmental Protection Agency and poses health risks to the residents of Molivar. Other hydrocarbons, such as toluene, ethylbenzene and xylene, were found in non-dangerous trace amounts.

DISCUSSION

Benzene is an organic chemical compound with the molecular formula C_6H_6 . It is classified as a hydrocarbon because its molecules contain only carbon and hydrogen atoms.



The maximum contaminant level goals (MCLG) the EPA has set for benzene is zero. However, in consideration of the current technology and resources, the enforceable regulation level, also known as the maximum contaminant level (MCL), for benzene is 0.005 mg/L (or 5 ppb).

Benzene, a light non-aqueous phase liquid, is slightly soluble in water and can pass through the soil column into groundwater. It degrades more slowly once it is in groundwater.

Physical and Chemical Properties of Benzene

Molecular weight	78.11 grams/mole
Color	Clear, colorless
Physical state	Liquid at ambient temperatures
Odor	Aromatic
Odor threshold	Lower 0.84 ppm Upper 53 ppm (parts per million)
Taste threshold	0.5 to 4.5 mg/L
Melting point	5.50

Benzene is listed as a human carcinogen. Eating food or drinking fluids containing high levels of benzene can be fatal. Even exposure to small amounts of benzene can cause paralysis, coma, convulsions, dizziness, sleeplessness, headaches and rapid breathing.

**TOOLITTLE LABORATORIES LLC**

Drinking water resources within half a mile of a leaking underground casing or storage tank containing benzene may be contaminated. The EPA recommends that drinking water with benzene in excess of 5 ppb should not be consumed. Water with benzene in excess of 100 ppb should not be used for washing, bathing or any other purposes.

CONCLUSIONS

Based on a reasonable degree of scientific certainty, the benzene contamination of the Molivar water resources was caused by the high-volume horizontal hydraulic fracturing done by Penn HydraGas at a drilling site near Molivar. It is recommended that the Village of Molivar undertake steps immediately to ameliorate the hazard.

DATED: Buffalo, New York
December 30, 2012

Dr. Ryan Toolittle

Ryan Toolittle, Ph.D.

NEW YORK STATE
HIGH SCHOOL
MOCK TRIAL
RELATED CASES
AND CASE LAW

PART VI

***People v. Saccente*, 6 Misc3d 1022 [2005]**

The defendant was convicted after a jury trial of assault in the third degree (reckless assault). The court held that a person acts recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk (of inflicting injury). The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation (P.L. § 15.05[3]; **see also**, *People v. Powell*, 101 AD3d 1369 [2012]).

***People v. Formica*, 15 Misc3d 404 [2007]**

Defendant was charged in a seven count indictment with criminal offenses involving either reckless or criminally negligent conduct. He sought to challenge the legal sufficiency of each count of the indictment. The court, explaining the difference between recklessness and criminal negligence, wrote that:

“A person is guilty of manslaughter in the second degree when: (1) he recklessly causes the death of another person (P.L. §125.15[1]). A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists (P.L. §15.05[3]). A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person (P.L. §125.10). A person acts with criminal negligence with respect to a result or to a circumstance described by a statute when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists (P.L. §15.05[4]). The mental state of the actor for both recklessness and criminal negligence situations requires that the risk must be of such nature and degree that disregarding the risk (‘recklessly’) or the failure to perceive it (‘criminal negligence’) constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation (P.L. §§ 15.05[3] and [4]). Thus the risks for each mental state are equal. The distinction between the mental states of reckless and criminally negligent conduct, in simplest terms, is that for reckless conduct the actor is aware of and consciously disregards the risk, while for criminally negligent conduct the actor fails to perceive the same degree of risk.” (**See also**, *People v. Asaro*, ___ NY3d ___ [Oct. 22, 2013], 2013 WL 5707871.)

***People v. Minnamon*, 35 Misc3d 1369 [2012]**

The defendant was convicted in Italy Town Court of two counts of reckless operation of a vessel (Navigation Law §45[1][a]). The arresting officer felt that it was reckless for passengers to be riding on the sun deck of the motorboat. On appeal to the Yates County Court, reversed the conviction, concluding that the People had provided insufficient proof that the defendant had acted recklessly and recognizing that:

“A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree

that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” (P.L. §15.05[3]).

***U.S. v. King*, 660 F3d 1071 [2011]**

Defendant was charged with, and convicted of, injecting fluids into deep wells without a permit, in violation of the SDWA. The court noted that the permit requirement process of the SDWA is necessary so that the drilling operator can show that the fluids used will not contaminate drinking water sources.

STATUTES and REGULATIONS

Environmental Conservation Law, §71-4002. Criminal liability and penalty

Except as otherwise specifically provided elsewhere in the Environmental Conservation Law, a person who intentionally, knowingly or recklessly, as defined in section 15.05 of the Penal Law, violates any provision of the Environmental Conservation Law, or any rule, regulation or order promulgated pursuant thereto, or the terms or conditions of any permit issued thereunder, shall be guilty of a class E felony and, upon conviction thereof, shall be punished (a) by a fine of not less than three thousand seven hundred dollars nor more than thirty-seven thousand five hundred dollars per day of violation, or (b) by a sentence of imprisonment as authorized by Article 70 of the Penal Law, or (c) by both such fine and imprisonment.

6 NYCRR §360-1.3. References

(a) Federal. The following documents are incorporated by reference and are on file with the New York State, Department of State. The documents are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 and for inspection and copying at the department's offices at 625 Broadway, Albany, NY 12233-4010 in the office of the Division of Solid Waste.

(1) Federal laws:

...

- (ii) Section 502(4) of the Federal Water Pollution Control Act (33 USC 1362[4]), as amended through January 20, 1986.
- (iii) Sections 110 and 111 of the Clean Air Act (42 USC 7410-7411), as amended through November 15, 1990.
- (iv) Sections 300f—300j of the Public Health Service Act (Safe Drinking Water Act, 42 USC 300), as amended through October 31, 1988.
- (v) Section 401 of the Federal Water Pollution Control Act as amended by the Clean Water Act (33 USC section 1251 et seq.) through October 1, 1984.

Safe Drinking Water Act, 42 USC §§ 300f – 300j.

Visit www.nysba.org/MockTrial for a download of the above SDWA sections.

<http://www2.epa.gov/laws-regulations/summary-safe-drinking-water-act>

<http://water.epa.gov/lawsregs/rulesregs/sdwa/index.cfm>

PENAL LAW § 15.05. Culpability; definitions of culpable mental states

The following definitions are applicable to this chapter:

1. “Intentionally.” A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.
2. “Knowingly.” A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.
3. “Recklessly.” A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.
4. “Criminal negligence.” A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.15.05.

PENAL LAW § 70.00. Sentence of imprisonment for felony

1. **Indeterminate sentence.** Except as provided in subdivisions four, five and six of this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.
2. **Maximum term of sentence.** The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:
 - (a) For a class A felony, the term shall be life imprisonment;
 - (b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;
 - (c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;
 - (d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and
 - (e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.
3. **Minimum period of imprisonment.** The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

...

 - (b) For (felonies other than class A), the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.
4. **Alternative definite sentence for class D and E felonies.** When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

NEW YORK STATE HIGH SCHOOL MOCK TRIAL APPENDICES

MOCK TRIAL TOURNAMENT PERFORMANCE RATING GUIDELINES

POINTS	
1 Ineffective	<ul style="list-style-type: none"> • Not prepared/disorganized/illogical/uninformed • Major points not covered • Difficult to hear/speech is too soft or too fast to be easily understood • Speaks in monotone • Persistently invents (or elicits invented) facts • Denies facts witness should know • Ineffective in communications
2 Fair	<ul style="list-style-type: none"> • Minimal performance and preparation • Performance lacks depth in terms of knowledge of task and materials • Hesitates or stumbles • Sounds flat/memorized rather than natural and spontaneous • Voice not projected • Communication lack clarity and conviction • Occasionally invents facts or denies facts that should be known
3 Good	<ul style="list-style-type: none"> • Good performance but unable to apply facts creatively • Can perform outside the script but with less confidence than when using the script • Doesn't demonstrate a mastery of the case but grasps major aspects of it • Covers essential points/well prepared • Few, if any mistakes • Speaks clearly and at good pace but could be more persuasive • Responsive to questions and/or objections • Acceptable but uninspired performance
4 Very Good	<ul style="list-style-type: none"> • Presentation is fluent, persuasive, clear and understandable • Student is confident • Extremely well prepared—organizes materials and thoughts well and exhibits a mastery of the case and materials • Handles questions and objections well • Extremely responsive to questions and/or objections • Quickly recovers from minor mistakes • Presentation was both believable and skillful
5 Excellent	<ul style="list-style-type: none"> • Able to apply case law and statutes appropriately • Able to apply facts creatively • Able to present analogies that make case easy for judge to understand • Outstandingly well prepared and professional • Supremely self-confident, keeps poise under duress • Thinks well on feet • Presentation was resourceful, original and innovative • Can sort out the essential from non-essential and uses time effectively • Outstandingly responsive to questions and/or objections • Handles questions from judges and attorneys (in the case of a witness) extremely well • Knows how to emphasize vital points of the trial and does so
Professionalism of Team Between 1 to 10 points per team	<ul style="list-style-type: none"> • Team's overall confidence, preparedness and demeanor • Compliance with the rules of civility • Zealous but courteous advocacy • Honest and ethical conduct • Knowledge of the rules of the competition • Absence of unfair tactics, such as repetitive baseless objections and signals

NEW YORK STATE MOCK TRIAL TOURNAMENT PERFORMANCE RATING SHEET

In deciding which team has made the best presentation in the case you are judging, use the following criteria to evaluate each team's performance. For each of the performance categories listed below, rate each team on a scale of 1 to 5 as follows (use whole numbers only).

1=Ineffective 2=Fair 3=Good 4=Very Good 5=Excellent

Time Limits

Opening Statements	Direct Examination	Cross Examination	Closing Arguments
5 minutes for each side	10 minutes for each side	10 minutes for each side	10 minutes for each side

		Plaintiff/ Prosecution	Defense
Opening Statements			
Plaintiff/ Prosecution- First Witness	Direct and Re-Direct Examination by Attorney		
	Cross and Re-Cross Examination by Attorney		
	Witness Preparation and Credibility		
Plaintiff/ Prosecution-Second Witness	Direct and Re-Direct Examination by Attorney		
	Cross and Re-Cross Examination by Attorney		
	Witness Preparation and Credibility		
Plaintiff/ Prosecution- Third Witness	Direct and Re-Direct Examination by Attorney		
	Cross and Re-Cross Examination by Attorney		
	Witness Preparation and Credibility		

In the event of a tie, please award one point to the team you feel won this round (circle your choice below):

Defense



The Mock Trial criminal case must proceed in this order:

- Prosecution gives opening statement
- Defense gives opening statement
- Direct examination of prosecution's first witness
- Cross examination of prosecution's first witness
- Re-direct, if any
- Recross, if any
- Direct examination of prosecution's second witness
- Cross examination of prosecution's second witness
- Re-direct, if any
- Recross, if any
- Direct examination of prosecution's third witness
- Cross examination of prosecution's third witness
- Re-direct, if any
- Recross, if any
- Prosecution rests

- Direct examination of defense's first witness
- Cross examination of defense's first witness
- Re-direct, if any
- Recross, if any
- Direct examination of defense's second witness
- Cross examination of defense's second witness
- Re-direct, if any
- Recross, if any
- Direct examination of defense's third witness
- Cross examination of defense's third witness
- Re-direct, if any
- Recross, if any
- Defense rests

- Defense gives closing arguments
- Prosecution gives closing arguments

There can be no deviation from this ordering.

Thank you,

Oliver C. Young, Chair
NYSBA's Mock Trial Subcommittee
(2/12)

PREPARING FOR THE MOCK TRIAL TOURNAMENT

Learning the Basics

Teachers and attorneys should instruct students in trial practice skills and courtroom decorum. You may use books, videos and other materials in addition to the tournament materials that have been provided to you to familiarize yourself with trial practice. However, during the competition, you may cite only the materials and cases provided in the Mock Trial Tournament materials contained in this booklet. You may find the following books and materials helpful:

Mauet, Thomas A., Trial Techniques (6th ed.), Aspen Law and Business

Murray, Peter, Basic Trial Advocacy, Little, Brown and Company

Lubet, Steven, Modern Trial Advocacy, National Institute for Trial Advocacy

Vile, John R., Pleasing the Court: A Mock Trial Handbook (3rd ed.), Houghton Mifflin Company

Preparation

1. Teachers and attorneys should teach the students what a trial is, basic terminology (e.g., plaintiff, prosecutor, defendant), where people sit in the courtroom, the mechanics of a trial (e.g., everyone rises when the judge enters and leaves the courtroom; the student-attorney rises when making objections, etc.), and the importance of ethics and civility in trial practice.
2. Teachers and attorneys should discuss with their students the elements of the charge or cause of action, defenses, and the theme of their case. We encourage you to help the students, but not to do it for them.
3. Teachers should assign students their respective roles (witness or attorney).
4. Teams must prepare both sides of the case.
5. Student-witnesses cannot refer to notes so they should become very familiar with their affidavits and know all the facts of their roles. Witnesses should “get into” their roles. Witnesses should practice their roles, with repeated direct and cross examinations, and anticipate questions that may be asked by the other side. The goal is to be a credible, highly prepared witness who cannot be stumped or shaken.
6. Student-attorneys should be equally familiar with their roles (direct examination, cross examination, opening and closing statements). Student attorneys should practice direct and cross examinations with their witnesses, as well as practice opening and closing arguments. Closings should consist of a flexible outline. This will allow the attorney to adjust the presentation to match the facts and events of the trial itself, which will vary somewhat with each trial. Practices may include a judge who will interrupt the attorneys and witnesses occasionally. During the earlier practices, students may fall “out of role”; however, we suggest that as your practices continue, this be done less and that you critique presentations at the end. Each student should strive for a presentation that is as professional and realistic as possible.
7. Each team should conduct a dress rehearsal before the first round of the competition. We encourage you to invite other teachers, friends and family to your dress rehearsal.

1

**NEW YORK STATEWIDE HIGH SCHOOL
MOCK TRIAL TOURNAMENT
REGIONAL CHAMPIONS**

2013

Frewsburg Central High School
Jamesville-Dewitt High School
Saratoga Central Catholic High School
The Mount Academy
Tottenville High School
William Floyd High School

2012

Clarence High School
Jamesville-Dewitt High School
Notre Dame-Bishop Gibbons High School
Nyack High School
Townsend Harris High School
William Floyd High School

2011

Buffalo Academy of the Sacred Heart
Seton Catholic Central
LEAH Schenectady Homeschool Team
Blind Brook High School
Bronx High School of Science
William Floyd High School

2010

Brighton High School
Vestal High School
LEAH Schenectady Homeschool Team
Scarsdale High School
James Madison High School
William Floyd High School

2009

Pittsford Mendon High School
Lehman Alternative Community School
Madrid-Waddington Central School
Rye Neck High School
Tottenville High School
W. Tresper Clarke High School

2008

Clarence High School
Bishop Ludden Jr./Sr. High School
Notre Dame-Bishop Gibbons High School
Nyack High School Tottenville High School
Tottenville High School
East Islip High School

2007

Clarence High School
Vestal High School
Potsdam High School
Blind Brook High School
Bronx School for Law, Government and Justice
Bay Shore High School

2006

Buffalo Academy of the Sacred Heart
Lehman Alternative Community School
LEAH Schenectady Homeschool Team
Blind Brook High School
Marymount High School of New York
William Floyd High School

2005

Buffalo Academy of the Sacred Heart
Vestal High School
Notre Dame-Bishop Gibbons High School
Blind Brook High School
James Madison High School
William Floyd High School

2004

McQuaid Jesuit High School
Union-Endicott High School
Notre Dame-Bishop Gibbons High School
Ramapo High School
Tottenville High School
William Floyd High School

2003

Albany Academy for Girls
Hunter College High School
Minisink Valley High School
Vestal High School
Williamsville North High School
W. Tresper Clarke High School

2002

Pittsford-Mendon High School
Vestal High School
Coxsackie-Athens High School
Ramapo High School
The Rabbi Joseph H. Lookstein Upper School of Rainaz
William Floyd High School

2001

St. Francis High School
Chittenango High School
Albany Academy for Girls
Kingston High School
The Kew-Forest School
William Floyd High School

2000

St. Francis High School
Norwich High School
Notre Dame-Bishop Gibbons High School
Sleepy Hollow High School
The Kew-Forest School
Roslyn High School

1999

Orchard Park High School
Dewitt High School
The Academy of the Holy Names
Mt. Vernon High School
Louis D. Brandeis High School
William Floyd High School

1998

Allendale Columbia School
Seton Catholic Central High School
Scotia-Glenville High School
John S. Burke Catholic High School
The Rabbi Joseph H. Lookstein Upper School of Rainaz
Stella K. Abraham High School for Girls

1997

Canisius High School
Susquehanna Valley High School
Waterford-Halfmoon High School
Mt. Vernon High School
St. Ann's School
Hebrew Academy of the Five Towns and Rockaway

1996

Canisius High School
Fayetteville-Manlius High School
Waterford-Halfmoon High School
Port Jervis High School
Townsend Harris High School
Port Washington Senior High School

1995

Clarence High School
New Berlin Central School
Scotia-Glenville High School
Spring Valley Senior High School
Sheepshead Bay High School
Hebrew Academy of the Five Towns and Rockaway

1994

Buffalo Seminary High School
Seton Catholic Central School
Waterford-Halfmoon High School
Kingston High School
York Preparatory School
Hebrew Academy of the Five Towns and Rockaway

1993

Pittsford Mendon High School
Seton Catholic Central School
Waterford-Halfmoon High School
Kingston High School
Martin Van Buren High School
Syosset High School

1992

Pittsford Mendon High School
Fayetteville-Manlius High School
Ballston Spa High School
Byram Hills High School
Edward R. Murrow High School
Half Hollow Hills High School—West

1991

Brighton High School
Fayetteville-Manlius High School
Academy of the Holy Names
Kingston High School
Andrew Jackson High School
Port Washington Senior High School

1990

Canisius High School
Seton Catholic Central High School
Ballston Spa High School
Kingston High School
Edward R. Murrow High School
Roslyn High School

1989

Canisius High School
Binghamton High School
Waterford-Halfmoon High School
Kingston High School
Riverdale Country School
Roslyn High School

1988

St. Francis High School
Chittenango Central School
Christian Brothers Academy Spring Valley High School
Packer Collegiate Institute
Half Hollow Hills High School—East

1987

Greece-Athena High School
Binghamton High School
Shenendehowa High School
Ossining High School
Packer Collegiate Institute
Roslyn High School

1986

Clarence Central High School
Binghamton High School
Albany High School
Mount Vernon High School
Jamaica High School
George W. Hewlett High School

1985

Pittsford Mendon High School
Union-Endicott High School
South Colonie High School
Harrison High School
Martin Van Buren High School
Brentwood High School

1984

R. L. Thomas
Fayetteville-Manlius High School
Colonie High School
Harrison High School
The Ramaz School
Bay Shore High School

1983

Pittsford Mendon High School
Union-Endicott High School Keveny Memorial Academy
Ossining High School
The Ramaz School
Half Hollow Hills High School—West

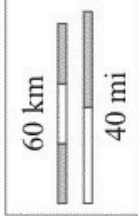
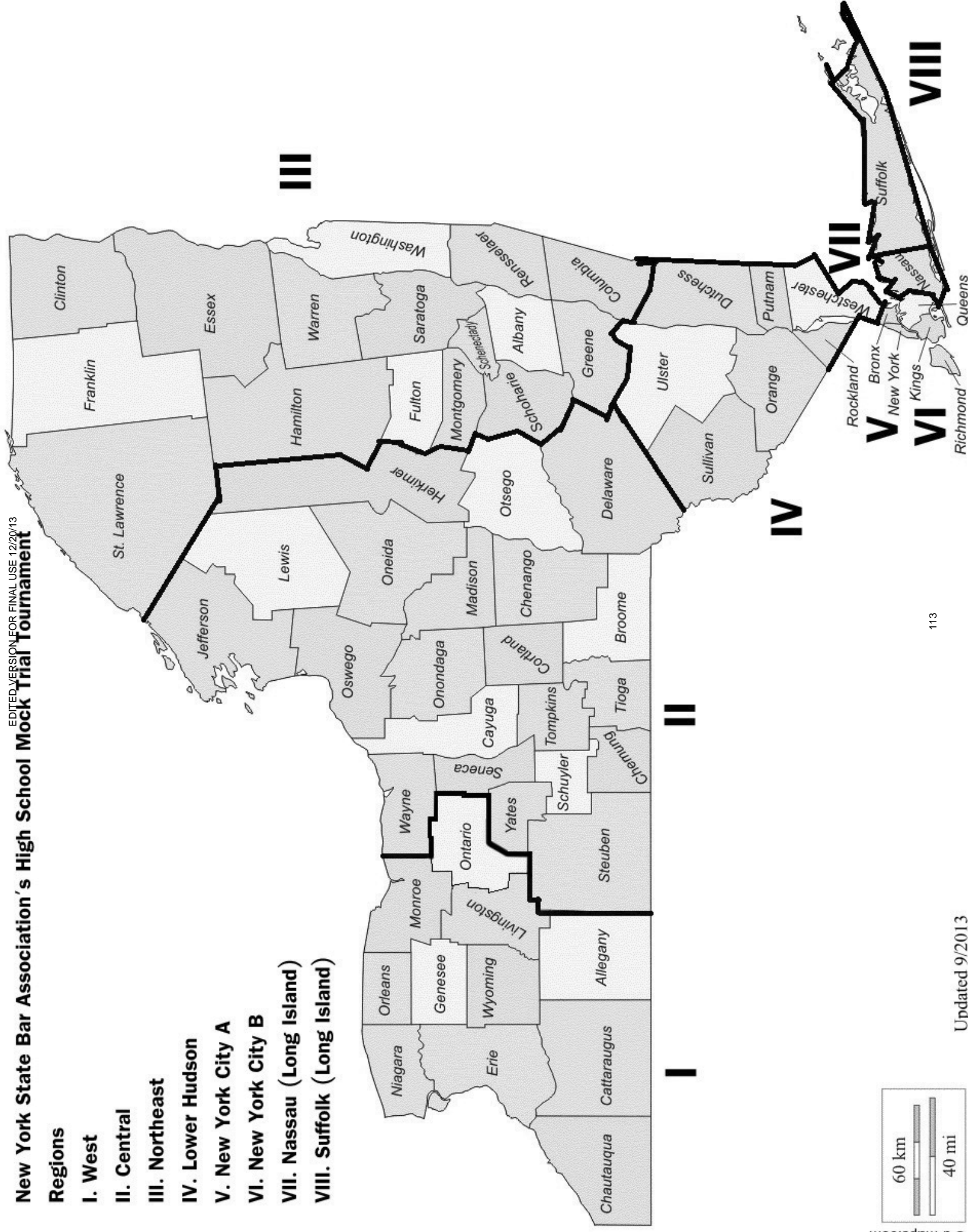
1982

Fairport High School
Maine-Endwell High School
Cohoes High School
North Rockland High School
Jamaica High School
Hewlett High School

New York State Bar Association's High School Mock Trial Tournament

Regions

- I. West
- II. Central
- III. Northeast
- IV. Lower Hudson
- V. New York City A
- VI. New York City B
- VII. Nassau (Long Island)
- VIII. Suffolk (Long Island)





**2014 Mock Trial
Summer Institute
July 13-18, 2014
Silver Bay YMCA
Lake George, NY.**

**Send an email to Kim Francis at
kfrancis@nysba.org with 2014 MTSI in the
subject line to be included on future email
notifications!**

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Law, Youth and Citizenship

www.lycny.org

YOUTH COURT...IS IT FOR YOU??

- Do you wish to practice your courtroom skills in more “real life” situations?
- Would you like to be an agent of change in another young person’s life?
- Do you want to be part of the solution?
- Would you like to work closely with attorneys, judges, and law enforcement officials as you further your legal and civic education?
- Would you like to work with like-minded students that are both passionate about the law as well as interested in providing positive peer pressure for those most at risk?

If you answered yes to any of the questions above, then you should become a Youth Court member.

If your school or community doesn’t have a Youth Court, let us help! LYC and the Association of NYS Youth Courts can assist in providing resources and training material to start a Youth Court in your school or in your community. With hands on help from one of the many Association members and from the NYSBA, along with the support of your community, you can get a Youth Court started too.

For a list of NYS Youth Courts and more information regarding Youth Courts please visit:

www.nysyouthcourts.org

