1.11.19

SUPPLEMENT TO CASE MATERIALS

Commonwealth of Pennsylvania v. Rae Shafer

THIS IS THE FINAL SUPPLEMENT TO THE CASE MATERIALS--OFFICIAL MEMO THAT MAY BE USED IN THE COMPETITION. THE FINAL SUPPLEMENT MAY BE USED AS PROVIDED BELOW. NOTE, ANY CHANGES TO THE FIRST SUPPLEMENT HAVE BEEN HIGHLIGHT IN GOLD:

Supplemental Materials – Evidentiary Value:

> The supplemental clarifications may be used in all the same ways (including for impeachment and as testimony) that the main body of the case materials are used. Answers clarifying a witness statement are to be treated as follows: Where necessary, information will be attributed to a specific witness in which case the clarifying information becomes part of that witness' statement. If the clarifying information is not attributed to a single witness, assume that all witnesses have this knowledge. The practical implication of this is that if a witness is challenged as to his or her knowledge reflected in the statement, he or she may refer to these supplemental clarifications to show knowledge. (See Rule of Competition 3.3)

NOTE TO THE SUPPLEMENT

Questions have been divided into "Case Clarifications" and "Rule and Evidentiary Interpretations." As with the past years' supplements, some case clarification questions have been answered with a general response: ***"The case materials provide all of the information available to answer this question."***

That response sometimes means that there is enough information already in the materials to answer the question asked; more often, the response means that the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of the competition. The case materials committee has tried to fill in unintentional gaps in the case materials without creating too much new information that might burden teams preparing for the competition.

Teams should be careful at trial if they ask questions which the problem does not answer in detail because, on direct examination, such answers might elicit an "unfair extrapolation" objection and, if asked on cross exam, the questioner is stuck with the answer given. (Rule of Competition 4.6)

Some questions have been edited for the sake of clarity and brevity.

CASE CLARIFICATIONS – Typographical Errors:

Rae Shafer, line 28: “last result” should be “last resort”

CASE CLARIFICATIONS – Answers Provided:

Q. The Nature of the Charge p. 10-11 is written that she was not acting in good faith OR that he/she failed to act in accordance with treatment principals, however, under the Memorandum and opinion p. 16 it uses the word AND. Will we need to prove all or just one? "And" or "Or"?

> **A.** The Memo and Order uses the word “and” in describing what the questions are. There are indeed two questions. But its use there identifies two questions; it does not state whether those questions. That question is answered in the disjunctive, as the Jury Instructions make clear. The Commonwealth can succeed by providing either prong; it need not prove both.

Q. We have a question about the information on page 4. In the charge held over the court, it only mentions hydromorphone. However, in many of the other materials, it mentions both hydromorphone and/or oxycodone. Is this an error or Shaeffer only on trial for hydromorphone.

> **A**. You are correct. The Information should include both hydromorphone and oxycodone. The case will be revised accordingly.

Q. I believe there is an error on Ex. 11. It indicates that the prescription that was prescribed by Dr. Harrison the oxycodone acetaminophen (Percocet) had a strength of 5 – 325. As a lawyer who is also a licensed pharmacist I know the 5 mg is the oxycodone and the 325 mg as the acetaminophen. I don't see how 30 mg applies at all to that drug. If there something else that I'm missing I would appreciate if you would let all of us know.

> **A**. This was an error on the case authors’ part. We apologize. The exhibit refers to Percocet, a combination of oxycodone and acetaminophen (Tylenol). The dosing makes no sense as written. In the final copy of the case will delete “30 mg” from lines 2 and 4 of that table, leaving only “5-325.” Any witness experienced with the prescription of opiate painkillers or with experience in investigation into their diversion would be able to explain that this means 5 mg of oxycodone and 325 mg of acetaminophen.

Q. My students wanted me to ask about stipulation 8. As I'm sure you know the materials are replete with the deceased getting opioids for various other sources. One of the things the students wanted to argue is that it was the oxycodone from other sources the caused the death not the one prescribed by Dr. Shafer. Was this in error or intentional? I assume it was intentional so the students focus on other areas but if it's not as I'm sure you're aware it makes it much easier to make an argument that the oxycodone that killed the deceased was not from the defendant but was from another source.

A. The Stipulation identifies the cause of death as an interaction between Xanax and the opioids prescribed and administered by Dr. Shafer. The Stipulation will be enforced.

Q. As concerns the unfair extrapolation changes, I've advised the students that it is not unfair extrapolation for the doctor or other medical experts to be able to testify that the opioids are typically prescribed 1 to 2 tablets every 4 to 6 hours as needed for pain. It could be less than that but it shouldn't be more than that. The argument is that a physician who prescribes opioids would know the dosing which would be appropriate for a patient who was suffering from pain. If you believe this is going to be unfair extrapolation I'd appreciate if you would please let everyone know.

A. The reasoning in this question is flawed. In essence, it says that "This very specific dose is a fact that a doctor would know, so this doctor would know that and it's not unfair." But that is not the way that the rule is written or works.

First, the question does not specify whether this information would be used on direct or cross-examination. Extrapolation is more strictly prohibited on direct. As Rule 4.6 provides, a fair extrapolation is one that is neutral and can reasonably be inferred from the case materials. (The rule reads "the witness's statement," but that is not quite accurate. Exhibits with which the witness is familiar may also provide the basis for a fair extrapolation. This will be corrected in the rule text for next year's trials.) The dosing of the drug is nowhere in the witness's statement, making extrapolating based on "this is a real world fact and the real world fact is something this witness would know" particularly problematic.

Note in this connection that the point of the unfair extrapolation rule is threefold. First, it exists to prevent mock trial from becoming a research contest. Although such contests are very valuable extracurricular exercises, and indeed certain forms of forensics make it a critical skill component, it is not an aim of this competition. Second, and relatedly, by avoiding research as a primary endpoint, we limit the importance of resources. Those teams that do not have ready internet access, research help, and access to friends and family who are physicians or pharmacists are not hindered by that fact. And third, oddly, it helps with case writing by allowing the authors to slightly bend reality at points without worrying about a team pulling out a fact from the "real world" to mess everything up.

Back to the question. Second, we need to look to the from the lens of cross-examination. The definition there is the same, but its application is different, because fair extrapolation is permitted – and indeed necessitated, in some sense – when a cross-examination question goes beyond the scope of the statement. So the question for cross-examination is really whether this is too specific a form of information, i.e. whether physicians know all the doses of all the drugs and/or specialists know all the doses of all the drugs within their specialty. This is, admittedly, close to the line.

Which of course raises the question of why the case authors would ever build the case with an important fact like this omitted when it could reasonably have been included. Why wouldn't the case authors at least tell you at least the doses that the patient in question was receiving, if only inferentially?

So, the question for you is: do you really think we would?

And if we did, do you think other parts of the case materials might allow you to infer reasonably, if less specifically, in a way that would more clearly be a fair extrapolation?

Q. My team's question is whether the defendant, Rae Shafer, M.D. is permitted to be qualified as an expert witness.

A. Any witness who meets the Rules of Evidence definition of an expert may be submitted as an expert, and virtually every witness will be an expert in something, just by virtue of existing in the world. (For example, an HR professional might be an expert in the procedures of his company.) The key questions are whether there is sufficient basis to qualify the witness in the case materials and whether the opinion such a witness could offer would be helpful to the jury.

Q. The publish date of Exhibits 6 & 7 - the CDC reports - is not available in the Case Materials. When were these documents published to the public?

A. Exhibit 7's date of publication is identified in the case materials, although it is hard to read: May 9, 2016. Please treat Exhibit 6 as published the same day.

Q. My team has a question regarding two of the exhibits. On Exhibit 10, the Oxycodone dosage is 20 Mg. (Mega grams) Should that be milligrams? The same issue occurs in Exhibit 11. In 11, all of the Oxycodone and one of the Xanax appears as Mg instead of milligrams. Mega grams would have killed the person upon ingestion.

A. Auto-capitalization in formatting strikes again. All drug doses identified as "Mg" are in ("mg"), i.e. milligrams. It is also very unfair of you all to expect lawyers to do science.

Q. Can the definition of "placebo" be considered common knowledge in the trial (referencing line 129 of Shafer's statement)?

A. All English language words are given their common meaning. Each witness using each word is presumed to be familiar with that meaning.

Q. Which witness(es) had access to the documents obtained but the JEH Ambulance Co. subpoena?

A. Typically, the case investigating agent and the attorneys for the Commonwealth share investigative materials.

Q. Is the "toxicology report" the same as exhibit 12?

A. No.

Q. In Exhibit 3, what is written under "How often?" in reference to McAdoo's alcohol consumption?

A. Haven't you heard about medical professionals and handwriting?

"6-pack/wk."

Q. I am wondering if either Royal Copeland or Ry Haight are already accepted to be expert witnesses or if either or both of them need to be entered as experts during the trial portion. If you could let me know it would be much appreciated.

A. Any witness who meets the Rules of Evidence definition of an expert may be submitted as an expert, and virtually every witness will be an expert in something, just by virtue of existing in the world. (For example, an HR professional might be an expert in the procedures of his company.) The key questions are whether there is sufficient basis to qualify the witness in the case materials and whether the opinion such a witness could offer would be helpful to the jury.

The only difference with someone noted as an expert in the case materials is that the case authors have determined that the witness is an expert in something. Whether that witness is an expert in what s/he is being offered to testify about is, of course, a separate question. For example, just because Ry Haight might be in expert in some form of medicine does not make her/him an expert in all forms of medicine, much less, say, automobile mechanics or arson investigation. For that reason, foundation still needs to be laid and these witnesses still need to be tendered as experts in a particular area or areas during the trial.

We seem to have found a spelling typo in exhibit 4. Rae Shafer's name is spelled as "Shafter" in the top right corner; this mistake does not appear in any of the other spellings of his name in the exhibit. If this is a mistake, than it could potentially mislead teams into pressing the argument that the Facebook account was fake. Was this error intentional or just a spelling mistake? Thank you for your time and have a happy new year.

> Oops. That should be "Shafer." Unfortunately, we are unable to correct the typographical error. Please read it as Shafer.

CASE CLARIFICATIONS – No Answers Provided

The answer to all of the following questions is:

> ***"The case materials provide all of the information available to answer this question."***

As noted, this response sometimes means there is enough information already in the problem; more often, this response means the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of this competition.

> **Q**. Does Kelsey have a lawful duty to report Dr. Shafer to the medical licensing board for hydromorphone usage?

> **Q**. What was contained in the waiver that Hadley signed before receiving hydromorphone?

> **Q**. Is there a way for doctors to alter information in the PDMP after it has been entered, rendering it incorrect and/or invalid? Who can enter information into PDMP on the prescribing physicians behalf? (any office worker or PA or someone else?

> **Q**. Who entered the data contained in to exhibit 1?

> **Q**. Are any witnesses aware of or connected to exhibit 6?

> **Q.** Are any witnesses aware of or connected to exhibit 7?

> **Q**. What is the result of the malpractice suit filed by Patricia Danica? (2013?? As Patricia missed entire race season) monetary repercussions? Impact from incident was not immediate but 'doom' was looming
> In Shafer's statement (line 114), Shafer mentions first meeting Coach in January 2014 and prescribing a mild opioid for "placebo" effect. Is that intended to be the same prescription as the first prescription in exhibit 10, If not, what was the dosage of that "placebo?"

Q. Exhibit 3 says that McAdoo's oxycodone dosage was 15mg, exhibit 10 and 11 have 20's and a 30, is this a mistake or intentional?

Q. In Exhibit 4, would there be a "read receipt" if the message had been viewed?

Q. On Exhibit 12 (under Pertinent Findings - Current Medication) it states that Hadley McAdoo was found with 15mg of Oxycodone. This 15mg was not prescribed pursuant to Exhibit 11. Is this an error?

RULE AND EVIDENTIARY QUESTIONS:

ADDITIONAL QUESTIONS FROM PREVIOUS COMPETITIONS

Team Issues: Team Composition, Scouting, Scrimmaging and Outside Tournaments

1. May residents of other states compete in the competition (the situation involves a cyber-school student who resides in New Jersey).

   - *The competition is for students attending Pennsylvania schools. As long as a student is a properly registered student in a Pennsylvania school of any type, that student may compete. With regard to the eligibility of students home schooled in Pennsylvania, their eligibility is addressed in Rule of Competition 2.1.2.*

2. May an 8th grader compete on a team? May a post graduate student compete?

   - *Rule 2.1 limits teams to 9th-12th graders. If a team doesn't have enough students in those grades to field a team and seeks to use others, such as an 8th grader or a student who has graduated but may be earning additional credits at the school or is in some sort of post high school exchange program, to create a team, that team can seek special permission from the local coordinator to compete locally. However, if permitted, a team that includes others besides 9th to 12th graders cannot advance beyond the local competition to district or regional playoffs.*

3. Can two schools combine to field one team?

   - *The rules relating to team combination can be round at Rule 1.1.1(c).*

4. May students from one school sit in the court room and watch other schools' teams compete?

   - *No, if that student's school has a team in the mock trial competition. Yes, if that student's school has no team in the MT competition and the student has no other conflicts, and also if that student's school did have a team in the competition but the team is done competing.*

5. Is it okay that students from one school sit in the courtroom and watch their fellow students compete against another school?

   - *Yes, so long as those students do not compete on a second team from their school.*

6. If a school has more than one team, and if the second team is knocked out of the competition, can the advisor from team knocked out help coach the team still in (the advisor has not seen any of the other teams we would compete against)?

   - *If there is absolutely no chance the still competing team will compete against a team that the advisor previously observed as an advisor of the knocked out team, then the knocked out team advisor may help with the team still in the competition.*

7. Our team wants to watch other teams in a practice event before the real competition begins. Does this violate the "No Scouting Rule"?

   - *It is not a violation under our Competition Rules. Teams that participate in camps and other open pre-statewide program competitions allow their teams to be observed by anyone in attendance, subject to the rules of that competition. Our "No Scouting" prohibition refers only to our competition. See Rule 1.9 for more specific information.*

8. Are teams allowed to practice in the courthouse in which they will be competing?

   - *There is no prohibition against such a practice under state rules.*

9. Can we scrimmage other teams in the competition?

- *Yes. We encourage teams to scrimmage each other, participate in the mock trial camps certain counties hold, and take advantage of any pre-statewide program competitions offered such as those that will be held this January by various colleges and schools. See Rule 1.9 for more specific information.*

10. What happens when teams drop out?

    - *The local coordinator will reschedule trials and may have to create byes for some teams depending upon how late into the competition the drop out occurs. Teams are urged to contact their coordinator ASAP if they think they might not be able to follow through on their commitment. Late drop outs are a great inconvenience to other teams and volunteers working for the program. In the case of repeat offenders, teams may be banned from the competition for a period of time.*

11. Can a single teacher [or attorney] coach two teams?

    - *Under Rule of Competition 2.5, multiple teams from the same school are viewed as distinct. They may not communicate with each other about other teams once the competition begins since that would violate our anti-scouting prohibition. Thus, for practical purposes, a single teacher and a single lawyer might train and prepare two teams together; however, once either of those coaches takes a team to competition, they could not take the other team to another competition since they might meet common opponents in the future.*

Even if coaches don't share information between their two teams, the appearance would be otherwise and this would directly violate the no scouting rules. It is possible for a school with one primary teacher coach and two teams to enlist another teacher or a lawyer coach to basically chaperone for one team while the primary teacher coach leads the other team. Once a teacher or attorney attaches him or herself to one team that person is then unavailable to accompany the school's other team in future matches.

Once the two teams from the same school have had their first trials, they need to be reminded that they cannot share information about opposing teams. A difficult situation would arise for a teacher coach or lawyer coach who works with one team that is eliminated and then has an interest in a remaining team that would compete against a team that the eliminated team competed against. The teacher or lawyer coach could observe but could not coach (teams out of the competition may observe without violating the no scouting rules).

Trial Issues

12. May we laminate the exhibits to better preserve them?

- *No. This violates Rule of Competition 5.1.*

13. Pursuant to Rules of Competition 5.1 and 5.7: Can the exhibits to be entered into evidence be placed in plastic slip-cover page protectors to protect them from accidental spills?

- *A team may keep their exhibits in plastic slip covers at their attorney table but each exhibit must be removed from any cover and submitted in its original form when used during the proceedings.*

14. Can we enlarge case materials or exhibits? Also, can we develop a timeline, enlarge it, and use it during opening statements and closing arguments?

- *Rule of Competition 5.1 prohibits enlarging exhibits. Creating and presenting a timeline as a physical reference for the jury is also prohibited.*

15. Can we take to trial and use our laptop computers?

- *You may not use laptops at trial unless the use of a laptop is a specifically required accommodation for a disability covered under the ADA. If needed under ADA compliance, the laptop must have no internet access and contain only the materials of competition otherwise available in paper form to all other competing students. (Rule of Competition 6.4.)*

16. Can we ask the witness to step down for a demonstrative purpose?

- *There is nothing in the Rules that prohibit an attempt to do this. The trial judge will determine whether it is permitted.*

17. Can a previously introduced exhibit be re-shown to the jury during closing arguments?

    - *Yes, assuming the exhibit was admitted into evidence.*

18. Clock Issues: When entering in exhibits, does the clock stop when counsel says "Your honor, May I approach the witness?" Does it start again when counsel asks the next question such as "Can you identify this?" Or after counsel actually has the exhibit entered? Second, when counsel is impeaching a witness, does the clock stop when handing opposing counsel and the witness an affidavit? And when does it begin again?

    - *Please review Rule of Competition 6.26. Generally, the clock runs at all times when an attorney is examining a witness concerning an exhibit. The clock stops during the marking of exhibits and when exhibit is being shown to opposing counsel except when the examining attorney continues to question the witness.*

19. May the information in the Statement of Facts, Complaint and Answer be used during the trial as credible sources of evidence?

    - *That depends. None of the pleadings are evidence in themselves, and none would be admissible as a whole at trial. However, that is not to say that they have no evidentiary value. All evidence must come in through witnesses, via their statements and exhibits, or through stipulations between the parties. The statement of facts, the complaint and the answer are not evidence in themselves, but the Answer has evidentiary value if the defendant attempts to deny a fact admitted there. The plaintiff's attorney could then impeach the witness with her/his prior admission, as with any other prior, unsworn statement. In this, the Complaint might be necessary, as the wording of the Answer alone (i.e., "Admitted") alone may provide insufficient basis for impeachment. The Statement of Facts is a part of the problem to which no party has assented. It therefore cannot be used at trial by either party in any way.*

20. Can information, cases, opinions cited in the problem be used in the trial?

    - *Students are permitted to read other cases and materials in preparation for the mock trial. However, they may cite only the cases and statutes given and may introduce as evidence only those documents and materials provided and in the form provided. (Rule of Competition 3.5.)*

      Teams are welcome, nevertheless, to study anything they wish to study in preparation for the competition, and the Mock Trial Committee hopes students branch out and learn much more about the issues involved in the case.

21. Can you file a Motion to Pre-admit in which you inform the court of your desire to use certain items of tangible evidence (exhibits in the case materials) during your opening statement?

    - *No. Rule of Competition 6.20 explicitly prohibits pretrial motions.*

22. Are teams permitted to make the objection: "Objection, Narrative" during the opposing team's direct examination? If this is not permitted, should a sidebar be called?

    - *Technically, this objection is not specifically prohibited under our Rules (See Rule of Evidence 611(e)). However, an objection that the witness is providing a narrative answer may be more appropriately objected to as being non-responsive, irrelevant and/or an unfair extrapolation. These are all objections specifically permitted under Rule 611(e).*

      Sidebars should never occur during a mock trial. All objections are constructively presumed to occur at sidebar, so that the arguments made with respect to them may be scored by the scoring jurors.

23. Can we impeach by omission?

    - *The Rules warn attorneys against asking a question of a witness for information that is not in the witness' statement. If you do so, the witness is free to make up information. Rule of Competition 4.6 addresses this issue.*

24. May a judge preside over the district playoff if he/she was already a judge for one of the earlier district trials?

    - *Yes. A presiding judge who has participated in an earlier trial is not disqualified from presiding in a later trial involving the same team, absent some other basis for disqualification.*

25. May we bring transcription students to a mock trial to transcribe proceedings? Neither team will get a copy of the transcription until after the competition is completed.

    Rule 6.4 addresses this question in depth.