

The parent of a three-year-old sues a day care center for negligence after the child breaks his arm under staff supervision.

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#### Wright v. Play and Learn Child Care Center

#### **Stipulated Facts**

Shawn Wright is the parent of Junior Wright, a three year old. Shawn first visited the Play and Learn Day Care Center on July 14, 2000. S/he met with the center director, Sydney Little, and visited two classrooms for three year olds. On that day there were fifteen students in each class with three adult teachers: one lead teacher and two assistant. Shawn met the lead teachers from each class, Joy and Lorraine. At that time, Shawn said that s/he had a couple of places to consider and would contact Sydney Little if s/he decided to enroll Junior.

On Monday, July 17<sup>th</sup> Shawn Wright returned to Play and Learn and completed an enrollment application and intake forms. These included his social and medical histories. Junior attended his first day at the center on Monday, July 24<sup>th</sup>. He was placed in the Giraffe Class with Lorraine. This class was immediately next door to the Elephant Class where Joy was the lead teacher.

Junior Wright previously attended the Teach the Tots PreSchool. Teach the Tots had asked Junior to leave, due to behavioral problems. Shawn withdrew Junior and immediately had him tested by a developmental pediatrician, Dr. Ellis Baldwin, who specialized in developmental issues. Dr. Baldwin diagnosed Junior with HID (Hyperactive and Impulsive Disorder). Dr. Baldwin referred Junior to Carla Thomas, a clinical psychologist, for follow up evaluation.

On Wednesday, July 26th the Play and Learn Day Care Center sent home its weekly newsletter. Each Wednesday the center sends out newsletters with weekly reminders, the calender of events and field trips, and any other information the staff feels parents should have. Shawn received the newsletter on July 26th, which contained information about pink eye and reduced staffing at the Center.

On July 28<sup>th,</sup> afternoon snack was served to the students in the Giraffe Room at 2:30 PM according to the master schedule. Joy, the head teacher in the Elephant Room, was absent from work because she contracted pink eye. Sandy, the office manager, was serving as substitute head teacher that day in the Elephant Room. The Giraffe Room was staffed by Lorraine (the regular lead teacher) and Lee and Sherri (the regular assistants in that class). Adam, one of the assistant teachers from the Elephant Room entered the Giraffe Room while snack was being served and explained that they were having some problems with

a student next door. Sherri left the Giraffe Room and went to help in the Elephant Room. At some point while Sherri was out of the room, Junior left his assigned table seat and climbed the changing table located in the back corner of the room. Lee and Lorraine heard him hit the floor and rushed to his aid. The staff at Play and Learn immediately put in place their emergency medical plan. They called Shawn and paramedics. Lorraine accompanied Junior to Children's Hospital.

Junior's left arm was fractured in several places. There was also some tendon damage. He wore a cast for three months. During the time he was in the cast he was unable to use his left arm for any reason. Despite intense physical therapy, Junior's motor skills have been impaired. Even though he has tried to learn how to write and eat with his right hand, he has had problems because he is left handed.

After Junior was released from the hospital, Shawn placed him in another day care center that continues his physical therapy and he has not had any other injuries since that time.

Shawn is suing Play and Learn on Junior's behalf for negligence for the full amount of his medical expenses and physical therapy, and for the income s/he has lost in having to manage his needs since the accident. Both parties stipulate to the amount of these damages. Shawn Wright is also suing for \$50,000 for pain and suffering that resulted from this accident.

Play and Learn defends by claiming that Shawn is at fault for what happened to Junior, because Shawn did not inform Play and Learn of Junior's diagnosed behavioral problems. It claims that Shawn was aware that Junior suffered from HID and failed to inform the day care center. Play and Learn further asserts that if it had known about Junior's behavior, the staff would have followed different procedures regarding the care of special needs children. Play and Learn maintains it followed the regulations and customs of the child care industry.

## <u>Stipulation:</u> Parties Stipulate to the following Definition of HID (Hyperactive & Impulsive Disorder)<sup>1</sup> and Testimony

HID is a disorder characterized by inappropriate levels of three observable behaviors: inattention, impulsivity, and hyperactivity. Children with HID cannot stop their responses to events and

<sup>&</sup>lt;sup>1</sup>HID is not a real disorder but was created for the purposes of this Mock Trial. Diagnostic and child care procedures followed in the mock trial are similar to but not intended to be the exact equivalents of, actual procedures required by federal and local laws.

situations long enough to think about and modify what they are saying or doing. They may be able to recite classroom rules, for example, but in the heat of the moment they are unable to stop, think about the rules, and alter their behavior. Therefore, their actions in these situations result not from willful

disobedience but from the inability to apply their skills and knowledge appropriately.

Plaintiff waives any claim to confidentiality of medical records pertaining to this case.

**Applicable Statutory Law** 

Section 18-101 Negligence. Standards Governing Tort Actions

(A) Standard Governing Negligence Actions: To support a finding of negligence, a plaintiff

must prove by a preponderance of the evidence that:

i) defendant owed plaintiff a duty of care;

ii) defendant breached that duty;

iii) defendant's breach caused plaintiff's injuries; and

iv) plaintiff suffered damages as a result.

(B) Comparative Negligence: In a negligence action, to assess damages the finder of fact must:

i) determine the percentage of fault attributable to each party; and

ii) reduce the amount of the damages due plaintiff by the percentage of fault attributed to the

plaintiff;

(C) Parental Liability in Comparative Negligence: In suits brought by a parent on behalf of a

minor child under the age of eight, any parental negligence which contributes towards any injury to the

child which is the subject of the suit is imputed to the child. This section operates in effect to make the

parents the same party as the child for purposes of comparative negligence assessment.

Selected Portions of Olympia Municipal Regulations

Title 29: Public Welfare

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Chapter 3: Child Development Facilities

<u>Section 315.4</u> Teachers at child development centers shall be qualified by meeting the requirements of one of the following:

- 1) A bachelor's degree in early childhood education or a related field with minimum of 15 hours in early childhood education courses;
- 2) Two or more years of college, including at least 15 hours of early childhood education courses; and one year of experience in a child development facility;
- 3) A high school diploma or its equivalent and 3 years of experience as an assistant teacher plus 9 college credit hours in early childhood education
- 4) Experience as a teacher or assistant teacher in a licensed child development center; provided that he or she has been awarded a child development associate credential.

<u>Section 315.5</u>: An assistant teacher shall be qualified by meeting the requirements of one of the following:

- 1) Two or more years of college and demonstration, to the satisfaction of the director, of skill and competence with children; or
- 2) A high school diploma and certificate in child development from an accredited vocational school; or one year of experience in a child development center.

<u>Section 316.2</u>: There shall be a teacher, who may also be the director, and an assistant teacher or aide for each group of children at all times. During non-peak hours (before 8:30 a.m. and after 4:30 p.m.), an assistant teacher may substitute for a teacher.

#### **SELECTIONS FROM APPLICABLE CASES**

Carson v. La Petite Academy, 751 V.V. 67 (1999).

Facts: Jimmy Carson, who was three at the time, fell off the steps of a slide on the playground of La Petite Academy. La Petite argued that it was not negligent and that "children will be children."

Holding: The court ruled in favor of the plaintiff. It held that the mere fact that the nature of small

children is such that they fall and hurt themselves is a consideration in the evaluation of the duty of care owed to the child.

Wood v. Wingfield, 457 V.V. 890 (1995).

Facts: The defendant day care center in this case was granted summary judgment in response to a suit by a parent on behalf of a child who injured his thumb. The nine year old tripped on a floor mat and injured his thumb while playing bean bag catch with another child. The legally required ratio for school age children to adults was 18 to 1, in this case the actual numbers were 6 to 1. The defense also stated that no prior injuries have occurred while children played bean bag catch in the room.

Holding: The appellate court held that in order to establish actionable negligence, the plaintiff must show the existence of a duty, a breach of duty, and an injury proximately resulting therefrom. Whether a duty of care is owed to a particular plaintiff depends on whether the defendant should have foreseen that its conduct would likely cause harm to a person in the plaintiff's position. The dismissal of the case in favor of the defendant was upheld.

#### Witnesses

#### **Plaintiff Witnesses:**

Parent: Shawn Wright

Early Childhood Psychologist: Tyler Larsen, Ph.D.

Former Employee of Play and Learn: Lee Morrison

#### **Defense Witnesses:**

Director of Play and Learn: Sydney Little

Developmental Pediatrician: Dr. Ellis Baldwin

Neighbor: Dell Anderson

#### Witness Statement of Shawn Wright

I am a thirty year old parent with two children. Junior is three and Mark is eight. I lost my spouse a year and a half ago and now I work hard to raise our sons in a loving, nurturing environment. When Mark first entered kindergarten, we had some problems with his teacher. She felt that he was disruptive in the class, spoke out too often and failed to follow directions as other students of the same age did. My spouse and I were very upset, especially when we received his first report card. After several meetings we, the principal, and the teacher agreed that it would be best to move Mark to a different classroom. Once he began working with a different teacher, Mark absolutely thrived. He was even tested and placed in the program for gifted and talented students. That was three years ago. Mark has been on the honor roll ever since. It's true that I have been suspicious of teachers and anyone who wants to label my children since then, but I sincerely believe that as parents of young black males we cannot be too careful. My spouse was labeled as learning disabled as a child and always felt it held him/her back.

That's why, when Junior first began having problems at Teach the Tots, I was less than happy at the idea of testing him. He was so young and was going through his "terrible two's." I thought it seemed very premature to label him. Junior was also in a transition stage. He was moved from home day care situation where he was cared for by a neighbor with three other children to a big, bustling day care center, not to mention losing a parent. Ms. Ruby, the woman who kept Junior from the age of six months to two years, felt that it was time for him to move on. She told me about a program called "Child Find" that helps families diagnose disabilities. She said she thought that Junior was possibly hyperactive. I thought it was too early to tell. We placed him at Teach the Tots, a center known for aggressively educating young children. Since Junior and Mark are so close, Junior is exposed to a lot of things for older children. In addition to being very bright, has learned a great deal from his brother. I thought that he would do well in a center really focused on student learning.

Well, it was a disaster from the beginning. In the course of four months Junior spent time in two different rooms. I hoped he would bond with at least one of the teachers, but both felt that he was too active and could not control his behavior. We never had problems with him at home, but for some reason, they felt that he was disruptive in the classroom. Even the other parents were biased. In Junior's first month there he was invited to two birthday parties which he attended. Later, when I was picking him up one day I saw another parent putting party invitations in the student cubbies, but Junior did not receive one. A friend of mine who also had a child at Teach the Tots went to the birthday party with his child and

told me that he heard parents saying that Junior really acted up at the two parties he did attend. I am convinced that it was just the teachers gossiping and complaining about him and not his behavior. After all, how can a child be an angel at home and so wild everywhere else?

That's really what lead me to have Junior tested. Both of his teachers at Teach the Tots recommended it. I even took him to the specialist they suggested, Dr. Baldwin, who diagnosed him with HID. Dr. Baldwin referred Junior for more testing, but I didn't follow up. The HID diagnosis was what his teachers expected, but I was not happy with that and decided that things really were not working there. I looked into moving Junior again and selected Play and Learn Day Care Center. The director seemed not only nice, but very knowledgeable about early childhood education.

I didn't know what to think when Junior was injured at the Play and Learn Day Care Center. One morning I dropped off a happy, energetic, extremely healthy three year old. Then I got a call at the office around 3 PM. Junior's teacher, Miss Lorraine, said that he had been taken to the hospital. I was so upset I couldn't even drive myself. When I got there Junior's entire arm was bandaged. His face was puffy and red and there were tubes in him. I couldn't even tell where he was hurt. The moment I touched his left hand I could feel that something really terrible had happened to my baby and I almost passed out.

When the doctor came out and explained Junior's injuries to me it was just too much. Apparently when he fell and hit the hard, linoleum floor of the classroom he broke his arm in several places. This would be a serious injury at any point, but to have such a thing happen to so young a child has been my worst nightmare as a parent. Junior was in a cast that covered his entire left arm for over three months. I had to take him to physical therapy three times a week and do exercises with him at home every night. I have also had to place him in a special day care center that has trained staff. They work on his motor skills with him there as well. Since Junior is left handed, it has been especially difficult. He was doing so well, but in the last year went from learning to eat with his left hand to using his right hand to going back to using the left.

This has taken a serious toll on the entire family. As a single parent I am all that my children have. I have been devoting so much time to Junior's care and recovery that I worry that Mark feels neglected. I have enrolled him in gymnastics classes, as well as art, but that means that I spend even more time trying to coordinate their schedules. Between Junior's therapy, Mark's classes and little league, and the fact that Junior's new day care center is so far from our home- I feel like I am on my last leg. It is a

struggle to maintain this pace. I try to stay busy though, because when I think of how sad Junior looks watching his big brother who he admires so much playing softball, I am just overwhelmed. Who knows when, if ever, Junior will be able to swing a bat?

Play and Learn claims that this is my fault because I did not inform them of the fact that Junior was diagnosed with HID. However, when I first had Junior tested I was not convinced the doctor was right. The doctor who tested Junior was referred to me by the staff at Teach the Tots. Junior was at Teach the Tots for four months and always had problems, and the doctor used notes from Junior's teachers as part of his/her analysis. I met with his teachers repeatedly and they kept voicing the same complaints: he was hyperactive, impulsive, disruptive, and inattentive. They didn't seem to understand that Junior is an active and busy toddler. He is very close to his older brother and tries to imitate everything that he does. After the diagnosis I did some research and learned that many people are skeptical of the HID diagnosis. The "disorder" has only been known of for a couple of years, and some think it is just a way of tracking black males at an even earlier stage. I felt it was my duty as a parent not to allow my child to be labeled if I was not 100% certain that it was correct.

I did not tell Play and Learn about Junior's diagnosis because I knew that they would be difficult about it. Besides that, I planned on having Junior tested again to get a second opinion. I didn't have time to do the follow up until after the fall. I really don't see why everyone thinks it is so important that Junior may have these problems. The point is that he is a three year old and should be properly supervised at all times. Play and Learn should have had enough staff to supervise the children in their charge, even the active ones, and should not have had things that were so easy to climb (not to mention leaving the starfish crackers out). I did read the newsletter on July 26th, but didn't think his behavior was so bad that I had to notify his teacher.

Witness Statement of Dr. Tyler Larsen (Early Childhood Psychologist) I am a psychologist who specializes in early childhood development. I was trained at the University of DC and George Washington University. I teach several courses on child development and have published four books on the subject, including Active While Black: A Critical Look at the Over-diagnosis of Hyperactivity in Black Males. I also consult in the establishment and management of child care centers in Olympia. I have been in this field for over twenty (20) years and have worked with families with special needs children since I began my career. After recognizing a problem of active Black male students being over-diagnosed with any number of hyperactive disorders, I helped found the professional organization, Professionals Against Labeling Students (PALS). Our mission is to work to end the mislabeling of Black youth as having Hyperactive Impulsive Disorder (HID). Many of our members even doubt the existence of such a condition. We also work to educate the professional community about some of the reasons why black children are misdiagnosed. That includes working to dispel stereotypes and working to reform the testing that is currently used for assessment purposes. Many in the medical community do not agree that black males are often misdiagnosed. However, I am not a medical doctor but I qualified to take a much more complete view of these matters, considering factors other than simple outward behaviors. I am receiving a fee of \$2,500 for my work in this case.

I have reviewed the records in this case and met with Junior Wright. In my professional opinion he does not suffer from HID. Dr. Baldwin's diagnosis was based in large part on the statements of Junior's teachers at Teach the Tots. For a truly accurate assessment of a child to be made, a doctor should directly observe the child in the classroom. That way the doctor can ascertain exactly what is going on without viewing the facts through the filter of the teacher's perceptions. In addition, even the experts who developed the diagnostic criterial for HID believe that it takes 4 months of observation to accurately assess and evaluate behavior. Most care givers have the best of intentions, but this is a world in which for a number of reasons certain children, especially young black males, are misdiagnosed with HID and other related conditions. I believe that this is what happened to Junior. Children develop at different rates. The range of normal behavior goes from "quiet children" to "active children." When black males fall into that active end of the normal range, they are often labeled as HID.

We don't have data on Olympia just yet, but in cities of similar sizes like Boston, blacks are enrolled in special education 30% more often than white students. Once placed in special education programs, black students are twice as likely to be placed in restrictive classroom environments. A New York study showed that, in New York school systems, once enrolled in special education programs only one in twenty students are declassified and put back in regular classes. In almost every setting black children are more likely to be deemed mentally retarded. Black parents are more likely than other racial groups to be told by a school that a black child has behavioral problems. This leads to all kinds of unnecessary concerns, especially when the children get to school. That is why we advise parents to be careful in selecting doctors and always urge them to get second opinions when their children are diagnosed. We also encourage parents to seek options other than having their children placed in special programs. PALS offers, for a small fee, consulting services to parents with these needs.

When Shawn first came to see me and brought Junior, my immediate reaction was that this bright, energetic child could not possibly have HID. I met with Junior alone, saw him interact with Shawn and with his older brother Mark, observed him in the new day care center, and performed my own testing. As a result, I am convinced that while active and curious, he is not hyperactive or impulsive. Although he displayed some signs of inattention, many children his age do. Junior is not always in control of his behavior, but this is because he is an especially imaginative and thoughtful child. Mark and Junior lost their other parent rather tragically. Even though Junior is only three, he feels the stress of this. Much of what Dr. Baldwin calls hyperactivity and impulsiveness is really just a sign of

Junior's anxiety and stress. These are the kind of factors that the tests used to diagnose children with behavioral problems and learning disabilities do not take into account.

For the Play and Learn Center to claim that Junior was so impulsive and out of control is ridiculous. He is an active and emotional child, but he does not have any type of condition that excuses the center of its negligence. I visited the Play and Learn Center and saw the room where the accident occurred. The first thing I observed was that immediately next to the changing table is a diaper disposal. Diaper disposals are commonly used in child care centers because they are so convenient and sanitary. However, the proximity of this diaper disposal to the changing table created a virtual staircase to something attractive, like the starfish cookies. It takes only a child with a little ingenuity, not one with a hyperactive disorder, to recognize and seize such an opportunity. If the diaper disposal were kept in the cabinet this would not have happened. It is common practice to keep diaper disposals out to the side of changing tables in rooms with children up to the age of two, but in a classroom for children over 36 months they should be kept away from children, and if even visible, should be in an open shelf and not simply freestanding. Not only is it no longer necessary to have them out in classes for children over 30 months (most children are potty trained or at least wearing tug-ups and no longer using the changing table), but by the time that children are 30 to 36 they have the gross motor skills necessary to climb something like that. In this business, child care providers have to think beyond the municipal regulations and what makes their lives easier when it comes to classroom design. They have to think about the continuing and progressive motor development of the children. Any three year old with an average level of motor skills could have climbed that diaper disposal to reach the top of that changing table and fallen off. It is unfortunate that in this case the unlucky little boy had also be misdiagnosed with HID.

#### Witness Statement of Lee Morrisson (Former Play and Learn Teacher)

My name is Lee Morrison and I am a child care provider with Tender Years PreSchool. Up until a few months ago I worked at Play and Learn as an assistant teacher. I really love kids and plan on going back to school to complete my undergraduate degree in early childhood education. I completed my two year certification in 1999 and have been taking classes in education ever since. Sydney Little fired me a few months after Junior's accident and claims that it was because I couldn't get along with people and lowered staff morale. I can't believe that people like to work in that type of environment, no structure for employees, no rules for the kids– I just couldn't understand it. They were always saying "They're children, Lee, cut them some slack," but if they don't learn what's right in preschool the real world is going to be a shocker. There is no reason that young children can't "learn to color in the lines." I actually believe that children crave discipline and order. I know that some of the other assistants called me Major Morrisson, but they are adults who lack order in their own lives. The real reason is that I was fired was that Sydney didn't like the suggestions I was making on how Play and Learn could change to better serve the children in its care. Play and Learn was all play. The curriculum was too unstructured and the only thing Sydney wanted us to teach was how to play games (and even then Sydney felt that the kids should make up and change the rules).

I worked at two other child care centers before going to Play and Learn. They spent more time on professional development and training than Play and Learn. Most day care centers struggle to keep good staff, but at Play and Learn not having enough adults to go around was a chronic problem. Often people from the office staff, like Sandy, would fill in. Sandy is a lovely person and has a degree in education, but all of her experience is in teaching high school kids. Sometimes having her as lead teacher just made more work for the assistants.

I worked with the Giraffe and Elephant Classes the entire year that I was there. We usually had about fifteen kids to a class, but often had two assistant teachers and a lead teacher. It wouldn't have been so bad, but the teaching staff had no support from the administrators. Someone is supposed to rotate into the room when one teacher has a lunch break or just has to run to the restroom, but that rarely happened. There was no formal training program. When I started, I had an interview with the director, s/he took me on a brief tour, and the next day I was in the classroom. No one really talked about policies. At the day care where I worked before Play and Learn, they had an orientation and explained things like how we were supposed to take kids to the playground, how we should serve lunch, all kinds of things like that. At Play and Learn, we just kind of figured it out as we went along.

Most of the time things ran fairly well. We had some difficulty at snack time because of the set up of the room. The rooms are really nice and large, but aside from the children's tables, we don't have a lot of flat surfaces. Since we had to serve snacks in the room, we would put the food wherever there was space, and sometimes that included the changing table. All of the kids in the three year old room were potty trained (otherwise they were kept back with the two year olds), so the changing table evolved into a kind of extra flat surface for placing things.

I worked with Junior a lot during the week he was at Play and Learn. He was a happy child. He didn't mix too much with the other children, but that is normal. For one thing, he was new at the center. For another, three year olds do a lot of independent play. Even when they appear to play with other children, they are actually doing more of their own thing than playing what you could say "collaboratively." It's called "parallel play." They are just beginning to learn social interaction and how to play together at that age. Junior did have a strong will and did what he wanted to do, but that is common for many children his age. I had to constantly remind him to follow our routines. He loved playing in the playground, too. He constantly was running on our play equipment and was a real

climber on the jungle gym. I talked to Lorraine from Junior's classroom, and she said that Junior should be evaluated for hyperactivity or some other developmental problem because of his activity. I didn't agree.

People shouldn't think that because Junior managed to get up to the top of the changing table that we weren't paying attention or anything like that. Sometimes things get chaotic because you are trying to keep fifteen to sixteen three year olds sitting still while you serve each one a snack. It's a lot of work- some kids have food allergies, some have to take medication with snack, some like Tommy always throw their cups (sometimes full of juice, sometimes not)— it's hard work! We had four tables to cover, and like I said, when another teacher in the room had to run out, even for a second, mutiny could happen before you realized it.

I was in the room when Junior fell. The other assistant, Sherri, had just gone into the hall with the assistant teacher from next door, something about a disruptive child next door. It was the kind of thing that happened all the time. On that particular day it was because Joy, the lead teacher in the Elephant Class, was out with pink eye. Lorraine, the lead teacher, was helping other children at another table. I was putting the cups down for each child that we place the starfish crackers in. I guess Sherri had taken the starfish out of the food cupboard. When she was called to the door she probably set them down on the changing table. Junior sat at table two and I was at table one. I remember because Tommy would always throw his cup across the room and I wanted to make sure that he kept it right there. I was explaining to Tommy that we do not throw cups in the classroom and the next thing I knew I looked up in time to see Junior falling off of the changing table. I felt terrible for him. Junior was such a sweetheart, even if a bit of a busy bee, so it really seemed especially sad.

#### Witness Statement of Sydney Little (Director of Play and Learn)

My name is Sydney Little and I am the executive director of Play and Learn. I founded Play and Learn ten years ago with one of my classmates from college. We had a vision of young children learning through their play, and Play and Learn was born. We are a full service child care provider and take infants from 6 weeks old and provide after school care for children up to twelve.

I vividly remember my first meeting with Shawn Wright. S/he seemed quite anxious to find a suitable place for Junior, and said that s/he had not been happy with the dynamic between Junior and the teachers at Teach the Tots. I took Ms./Mr. Wright on a tour of our facility and s/he met with both of the head teachers of the three year olds. I was pleased when s/he returned a few days later to enroll Junior. I sat with Mr./Ms. Wright and Junior as Mr./Ms. Wright completed the application form and history. I also asked him/her if Junior had any special needs, anything from a favorite blanket to a tendency to have a hard time coming out of naps, anything at all, that perhaps the center or his teachers should be aware of, and Mr./Ms. Wright said no. I recall because I go through these questions with all parents. Sometimes they know their children so well they forget to tell us the important details. I did notice that Junior was very active and didn't pay much attention to his parent. He didn't look at any of

the books we had for him, and he went rapidly from toy to toy. I didn't think much about it at the time because children can be restless during these interviews. Sometime during the week, though, Lorraine, the lead teacher, came to me about Junior. She told me that she thought Junior should be evaluated for hyperactivity or other developmental problems because of his inattention, his extreme activity, and his impulsiveness.

Mr./Ms. Wright told me that s/he had heard only positive things about Play and Learn. We have an excellent reputation in the community because we hire only the best and most qualified staff. It isn't enough to have the credentials required by the licensing board of Olympia. A Play and Learn teacher must truly love children and be ready to help them develop and grow into their own personalities, their own identity. I look for qualities like patience, character, and personal integrity in everyone we hire. This is certainly the first time we have ever been sued. In ten years we have never had an incident like this before.

It's funny that our former employee, Lee Morrisson, is so critical of our policies and training. I think it's really just Lee's way of lashing out for the ridicule s/he suffered at the hands of his/her colleagues. At first I felt bad for him/her, but when a person is as rigid and strict as Lee was its hard to have patience. Lee was a good worker but closed minded. Lee saw nothing wrong with kids watching videos everyday as long as it was at the same time, nothing wrong with a morning going by in which Lee's was the only voice heard. Lee did not share our vision of children learning through play, so we had to let him/her go. Lee frequently said that she had two children in her class who were handfuls, Tommy and Junior.

Our training and policies are truly first rate. We have a manual that explains everything from procedure during fire drills to how to complete supply order forms. Play and Learn has received only the highest ratings from the licensing board. We have had some staffing problems in the past, but that is the case with all child care centers. When we anticipate problems in staffing, we take proactive steps like informing parents in our newsletter. Parents were informed of the pink eye epidemic and were asked to inform the center of any problems. Fortunately, we also have a good office staff with several retired high school teachers like Sandy who assist when we are missing teachers.

We also put great care in the design of Play and Learn classrooms. Because we want to have as much flexibility within our building as possible, we had the changing tables installed in each classroom in

the preschool part of the building. We also keep diapers and changing supplies, including a diaper disposal, in each room just in case. But in ten years we have never had a child use the diaper disposal as a step stool.

I was the director on site the day that Junior was injured. It is true that we had experienced a pink eye epidemic around the center. Our attendance was down ten percent from normal and several staff members were also out. However, each class was adequately covered by other competent adults. In fact, in Junior's class that day both his lead teacher and two regular assistants were present, unlike in many other classes around the center where there were more absences. When Junior fell the assistant teacher, Lee, immediately went to his aid. The lead teacher in the same instant, called the ambulance and paged for me to come. Lorraine was absolutely frantic and said that Sherri left the room for just an instant, but she and Lee were both there with the children, and somehow one of the children had climbed and fallen off of the changing table. When I entered the room I saw Junior being given as much care and support as anyone could have wanted. His teacher even went to the hospital with him, and I conducted an investigation to determine what must have happened.

It was right around snack time and the children were seated at their tables with the cups and napkins passed out to three of the four tables. Junior's table had not yet received cups and napkins, and even after everything had happened, all of the other children remained seated at their assigned seats. I saw the changing table where Junior fell. There were some starfish crackers on the table, but we certainly do not serve food from the changing table. That would be unsanitary and inappropriate for any number of reasons. It's possible that one of the teachers pulled the crackers from the snack cabinet, had to take care of something immediately, and set the crackers down for a moment. However, there would be no reason to believe that a child would leave his seat to get the crackers, especially when all of the children knew that they were about to be served. And it's not as if any toys or blocks were left out that the children could have used to climb to the top of the table.

The only reason this type of thing happened is that we were not informed of Junior's condition. There is another little boy in one of the four year old rooms who has HID. We have never had any problems with him because his parents informed us of his condition as soon as he was diagnosed. He is on a medication that works beautifully at controlling his impulsive behavior. Play and Learn has a policy of staffing all rooms with special needs children with at least one teacher or assistant teacher with special training pertaining to the special needs involved. We will meet their needs even if we are short of staff,

as we indicated in the newsletter on July 26th. If we had known about Junior we could have taken precautions like putting his seat closer to the teacher work station or simply monitoring him more closely. He had only been with us for a week, so it is understandable that we had not yet concluded that he had that type of problem. We are dependent upon the honesty of parents in completing their applications and in the interviews to become informed of such conditions, at least until we have some time to observe the child.

We are very sorry about what happened to Junior. He is a delightful child and really rather clever. But as sorry as we are, we cannot be responsible for the behavior of children when we are not given the information we need to care for them properly. No one at Play and Learn failed to fulfill each and every duty of a day care provider.

#### Witness Statement of Dr. Ellis Baldwin (Developmental Pediatrician)

My name is Ellis Baldwin and I am a developmental pediatrician. My training was conducted at Mercy Hospital. I went there for residency after graduating from Georgetown University with a B.S. in biology and behavioral sciences and Howard Medical School. I did my medical fellowship at Johns Hopkins Medical School in developmental pediatrics. I specialize in diagnosing and treating children with behavioral problems like HID and ADHD (Attention Deficit and Hyperactive Disorder). I have evaluated more than 800 children for in the last nine years. In fact the majority of my practice involves this type of testing. I have worked with many of the day care providers in Olympia and have done testing for Teach the Tots on numerous occasions. I know first hand what an excellent center it is, both of my daughters went to preschool there and my spouse is on the board of directors. I am not being paid for my testimony because this relates to work done prior to this lawsuit and trial.

This is an especially tragic case because I see in Shawn Wright a kind and caring parent who is unable to come to grips with the fact that his/her son has a condition that needs treatment. I met with Junior for two hours in my office and not only reviewed the records from Teach the Tots, but also conducted a fifteen minute phone interview with one of his teachers there. Junior displayed many tendencies of a HID child.

He was totally unable to control and direct his behavior in response to environmental and situational demands. When testing a child for HID, he or she is compared to other children of the same age. On the majority of tests Junior was lacking in the self control exhibited by the average three year old. For example, when I gave him some toys to play with, he went quickly from toy to toy and then threw them around. His may not be the easiest case to diagnose simply because he is sweet and charming, but it does not take a great deal of observation to see that Junior is hyperactive. Both of his teachers at Teach the Tots indicated in their six week progress report to Shawn Wright that Junior was disruptive and fidgety. I personally observed that Junior was a squirmer, was easily distracted by extraneous stimuli, and did not seem to listen when spoken to directly. These behavioral tendencies are each on the list of HID assessment factors. I'm not saying that Junior has every symptom on the board-approved list, but those that he does have are more than strong indicators that he has HID.

Another symptom is a child who runs or climbs excessively. It is quite likely that a child like Junior who is easily distracted could have seen something near the changing table that caught his eye and

decided to go for it. Junior's motor skills are rather advanced, and he could have made great progress towards climbing the changing table before any adult who is also watching other children would have noticed.

HID is not an uncommon disorder. Since the development of the diagnostic criteria and treatment program in the last couple of years, many children have been diagnosed and helped. It is true that a disproportionately high numbert of these children have been black males, but that does not mean that the diagnosis of every black male child should raise suspicion. Parents should really be grateful that these children are being identified and helped before they get to school and it becomes more of a problem. With treatment including guided play and activities that channel children's energy, many kids with HID are able to start elementary school with regular classes and no medication. HID therapy can make it possible for kids to really succeed in a traditional classroom setting.

Of course, for preschool children, there may be other disabilities, like reduced language development, that cause communication problems and increased activity. These children may not have HID. That is why I referred Junior to Ms. Carla Thomas, the developmental specialist, for additional evaluation. These types of evaluations are common, and are important in identifying developmental disabilities in their early stages. The Federal law, Individuals with Disabilities Education Act, know as IDEA, provides that every child who is identified with disabilities is entitled to services to meet their specialized needs.

I sincerely wish that there was more accurate information about HID, perhaps then a parent like Shawn wouldn't feel compelled to hide it from a child care provider. The student with HID who runs to the window when a passing car honks or watches students passing in the hall instead of completing his coloring is no more choosing to disobey the rules or the teacher than the blind child is choosing not to see the blackboard.

#### Witness Statement of Dell Anderson (Shawn Wright's Neighbor)

I am 65 years old and have lived in Olympia all of my life. I have actually lived in the same neighborhood for the last forty years. Unfortuntely Shawn and her children, those wild kids, live in the unit next to mine. Don't get me wrong, I liked kids well enough thirty, even twenty years ago, but now my nerves just can't take it. Regular kids would be one thing, but that Junior is too much. He's a cute little kid, actually kind of small for his age. A person wouldn't think he could get into so much, but he can. He can be a real brat, too. When first met him I would try to get his attention, but he was always too active to stay in one place. I didn't want to chase him around, so I never had much to do with him.

The real problems started with my flowerbed. First Junior would just run and play in my flowers when he and the brother were outside. Apparently that was not killing enough of my plants so then he decided it would be fun to pull them out of the ground. I've never seen anything like it. The older boy, Mark, would try to get him to stop, but once he got into something that was it. He was going to be into it until he broke it. Shawn was nowhere around when this happened.

I said something to Shawn about it . Shawn seemed shocked that anyone would think that the little angel could do anything wrong. When I told Shawn that he climbed to the top of my El Dorado s/he didn't believe it until I showed her the peanut butter and jelly stains that were the size of his hands all over my rag top roof. Imagine if my moon roof had been open! To say that she has a blind spot when it comes to that kid is like saying Luther Vandross can sing—it just isn't strong enough language.

Apparently Shawn heard that my friend Myrtle babysits on the weekends. She arranged to have Myrtle watch those two for an entire Saturday afternoon and evening. (Shawn was always looking for a babysitter-- I guess it's a struggle to have such an active social life with two young boys). I tried to warn her, "Myrtle, I said, you have no idea what you are in for--just watch out!" I babysat one time and all the kids did was run around from one toy to the next. They wouldn't even stay put in front of the TV. But Myrtle said the money Shawn was offering was good and that she been losing at bingo lately. Anyway, Myrtle called me when they left her place that night. She sounded like she barely had the energy to dial the phone. She told me that if she had known she was going to be babysitting a little dynamo, she would have said no, no matter how bad her bingo debts. Myrtle said that Junior climbed every piece of furniture in her house, including her curio cabinet full of porcelain bingo chips (he didn't tip it over, but two or three cracked from the jostling).

I see those kids all the time. As captain of the neighborhood patrol I make it my business to see. That Junior can't be still for two minutes put together. I've seen him get into it up and down the street. In my day we would have straightened him out, but not Shawn. I just don't understand parents these days. Every time I stop by their house the TV is on, sometimes the radio too, and the boys clearly have the run of the house.

Shawn never seems to discipline either boy at all. With Shawn, anything goes. I don't know if Shawn is trying to make up for the loss of their other parent or what, but Shawn should take a step back and see what the lack of rules is doing to those boys.

I did feel bad for the little tyke when he broke his arm so badly. It didn't seem like the same Junior with him whimpering about all the time. But I must say he is calmer. Nice enough kid, but I always suspected that he knew when "Oprah" was on. Seems like just when the interview was getting good he would decide to throw something against the wall. I can't believe it took so long for him to hurt his little self. Please don't think I'm glad he got hurt, but I do feel like I am getting my money's worth for cable now.

#### **Table of Stipulations and Documents**

#### Stipulation

Copy of Damages Stipulated to by Both Parties

#### Documents

- 1. Excerpts from Play and Learn Policy Manual
- 2. Copy of Dr. Baldwin's testing form and evaluation
- 3. Copy of the application form for Play and Learn completed by Shawn Wright
- 4. Excerpt from Play and Learn Newsletter
- 5. Map of the Giraffe Classroom where Junior was injured

### Stipulated Damages\*

The following amounts have been stipulated to by both plaintiff and defendant.

Initial Hospital Stay \$25,000

Physical Therapy \$75,000 over 5 yrs

Rehabilitative Day Care

Difference between cost of day care that provides \$10,000 over 2 yrs

physical therapy and regular day care center

Shawn Wright's Lost Wages \$5,000

Total \$115,000.00

#### Excerpt from Play and Learn Policy Manual, Chapter 2, Staffing

Play and Learn will maintain a least one lead teacher and assistant in each toddler to pre-school classroom. The following chart lists the numbers to be followed for each toddler and pre-school age group in the Play and Learn Center. See modifications to the numbers of staff needed for special needs children in the Special Needs Chapter of this manual. In the case of an emergency teachers and assistants should use their best judgment to determine how to meet the needs of the center.

<sup>\*</sup> Shawn Wright is requesting an additional \$50,000 for pain and suffering.

Age of Students	Maximum Number of	<u>Lead Teacher(s)</u>	<u>Assistants</u>
	Students in Class		
24-35 months	8	2	0
3 years	16	1	1
4 years	20	1	1
5 years	25	1	1
6-12 years*	30	1	2**

<sup>\*</sup> Aftercare programs only. Look to Chapter 5 on Summer Camp for guidelines for staffing summer programs.

Excerpt from Play and Learn Policy Manual, Chapter 4, Special Needs Children

Play and Learn is a full service child care provider that accommodates children with special needs involving learning and/or behavioral issues. There will be at least two classes for each age group. If there are any special needs children in a class, the teachers will be provided with special training for the special needs of the children. At least one of the assistants in each class with a special needs child must have completed the course Special Education for Early Childhood Education that is offered at the University of Olympia and obtained a B average or better. If any assistant or lead teacher is interested in taking that course Play and Learn will pay the course fees and purchase all necessary books.

#### **Test for Hyperactive and Impulsive Disorder**

Prepared by the Board Certified Pediatricians and Child Development Experts for Professional Use and Diagnosis [This form is to be used for children between 36 and 47 months old.]

Doctor: Ellis Baldwin, MD Date: June 30, 2000

Patient's Name: Tyrone (Junior) Wright

	Diagnostic Criteria for Hyperactive Impulsive Disorder	Present in Child
1	Often has difficulty sustaining attention in tasks of play activities.	
2	Often does not seem to listen when spoken directly to.	

<sup>\*\*</sup> Two assistants are only needed on the days when arts and crafts are offered or groups are taken on field trips.

3	Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort.	
4	Is often easily distracted by extraneous stimuli.	X
5	Often fidgets with hands or feet or squirms in seat.	X
6	Often has difficulty playing or engaging in leisure activities quietly.	
7	Is often "on the go" or acts as if "driven by a motor."	X
8	Often talks excessively.	
9	Often has difficulty waiting turn.	X
10	Often interrupts or intrudes on others.	
11	Often runs or climbs when he should not.	X
12	Often wanders off.	X

Instructions for form: A diagnosis of HID is appropriate if seven (or more) of the symptoms in the chart above of hyperactivity and impulsivity have existed for at least 4 months, according to a consistent observation by one teacher or child care provider who knows the child well. Such observation should reflect behavior to a degree that is maladaptive and inconsistent with developmental level.

Evaluators should observe children for at least ninety (90) minutes. Additional information from other child care professionals may also be considered in determining whether HID characteristics are present in a child.

When observing children for the purposes of diagnosis, testers should keep in mind the widely held expectations for normal behavior for the age group of the child in question.

Widely Held Expectations for the Social and Emotional Development of 3 Year Olds

- Shows difficulty taking turn and sharing objects, activity changing form often during a play period; lacks ability to solve problems well among peers; usually needs help to resolve a social situation if conflict occurs.
- Plays well with others and responds positively if there are favorable conditions in terms of materials, space, and supervision (less likely to engage in positive behavior if any of these are lacking).
- Can follow simple requests; likes to be treated as an older child at times but may still put objects in mouth that can be dangerous or wander off if not carefully supervised.
- Toddlers react impulsively.

Additional comments or observations by tester.

This child runs in circles, doesn't stop to rest, bangs into objects or people, and asks questions constantly. Despite having spent time in a preschool setting and having turned three a few months ago he still has difficulty attending, except briefly, to a storybook or a quiet task such as coloring or drawing.

In my professional opinion this child has Hyperactive Impulsive Disorder.

Signed: Ellis Baldwin, MD

## Play and Learn Registration Form

# Welcome to Play and Learn Child Care Center! Please read the following, provide the requested information and sign on the last page.

Parent(s)'s or Guardian's Name(s): Shawn Wright Date: July 17, 2000

Child's Name: Tyrone Wright

Child's Nickname: Junior Child's Age: 3

Home Address: 315 East St SE Billing Address if Different:

Olympia, C.D. 39117

Home telephone: 501-789-6363 Work Telephone: 501-278-3001

Emergency Contact Name: Robin Sterling

Emergency Contact Telephone: 501-394-4899

Does your child have any allergies? If so, please list them.

No.

Is your child on any medications? If so, please list them.

No.

Is your child allergic to any medications? If so, please list them.

Yes. Bendadrol.

Does your family have any dietary restrictions (Kosher, vegetarian, etc.)?

Is your child free to attend all field trips or do you prefer to have permission slips sent home for each outing?

He is free to attend all field trips.

## Page 2 – Play and Learn Registration: Learning Information

Is your child reading yet? (All children are grouped in reading circles.)

Not really. He knows the alphabet and can write all of the letters. And he knows most of the words in his favorite Dr. Seuss books.

Does your child have any physical problems (e.g. hearing impairment, visual impairment, asthma, etc.)?

Does your child have any learning disabilities of which you are aware? If so, please list them. If you are concerned that your child has any learning problems, please indicate those in the space below.

No.

Does your child have any behavioral problems (e.g. hyperactivity)? If so, please list them. No.

### All About My Child

Does your child have any imaginary friends?

Nο

Does your child have any favorite objects which he or she will want to keep with him/her at school? No.

Is there anything about your child we should know that would not be obvious? Is there anything we should know about your child's personalities or idiosyncracies, likes or dislikes? (Feel free to tell us something that makes your little one special!)

He is the sweetest child in the world!

Play and Learn is a child care center devoted to the education and nurturing of all children. We want to establish a partnership between this center and your family. To do so, we must have accurate information about your child. Please review your answers and verify their accuracy. Sign below if you have answered everything to the best of your ability. Thank you.

Parent or Guardian Signature:

Shawn R. Wright

#### Play and Learn Newsletter (excerpt from page 1, July 26, 2000 edition)

Because of a bad outbreak of pink eye, many students and several staff members have become ill. Therefore, the Center will be operating without its full staff. Parents, if your children are suffering from pink eye and other ailments, please keep your children home.

Although the Center may have some staffing problems, we will still be able to provide the appropriate care for the identified special needs students. Any parents with other concerns about their child should speak directly to the lead teacher in their child's class.

Insert Map!

#### 2001 DISTRICT OF COLUMBIA MOCK TRIAL

#### **PROGRAM RULES**

The annual Mock Trial Program is governed by the rules set forth below. These rules are designed to ensure excellence in presentation and fairness in judging all trials.

#### **TEAM PRESENTATIONS**

- 1. The official mock trial materials, consisting of the Statement of Stipulated Facts, Applicable Law, Witness Statements, and Documents, comprise the sole source of information for testimony. The Stipulated Facts and any additional stipulations may not be disputed at trial.
- 2. Each witness is bound by the facts in the given witness statement. All participants agree that the witness statements are signed and sworn affidavits. Witness Statements may not be introduced as evidence, but may be used for impeachment.

Fair additions which (a) are consistent with facts contained in the witness affidavits and (b) do not materially affect the witness's testimony are permitted. If a witness is asked a question on cross-examination which is not dealt with in the witness's statement, the witness may invent an answer favorable to that witness's position.

Students may read other cases, materials, or articles in preparation for the mock trial. However, they may only cite the materials given, and they may only introduce into evidence those documents given in the official mock trial packet.

- 3. If a witness testifies in contradiction of a fact in the witness statement, the opposition must show this on cross-examination through correct use of the affidavit for impeachment. This procedure is spelled out in the Rules of Evidence.
- 4. If on direct examination witness invents an answer which is likely to affect the outcome of the trial, the opposition should show this on cross-examination through correct use of the affidavit for impeachment. This procedure is spelled out in the Rules of Evidence. The scoring panel should consider such inventions of facts in scoring the witness' presentation.
- 5. Witnesses are not permitted to use notes in testifying during the trial.
- 6. All participants are expected to display proper courtroom decorum and collegial sportsmanlike conduct. The decisions of the judges with regard to rules, challenges, and all other decisions are final.
  - 7. The trial proceedings are governed by the Mock Trial Simplified Rules of Evidence. Other more complex rules may <u>not</u> be raised in the trial.
  - 8. During the actual trial, teachers, attorneys, other coaches, affiliated non-participating team members, parents and all other observers may not talk to, signal, or otherwise communicate with or coach their teams. Team members may communicate with each other during the trial. Instructors from opposing teams are advised to sit next to one another, if possible, and be reasonable. The purpose of this rule is to prevent last minute coaching; it is not intended as a device to disqualify an opposing team.
  - 9. Neither team may introduce surprise witnesses nor call witnesses from the other side. All witnesses (three for each side) must take the stand, in whatever order or sequence determined by the party calling them.
- 10. Witnesses will not be excluded from the courtroom during the trial.
- 11. Tape recordings, photographing, or videotaping of trials is not permitted by the D.C. Superior Court.
- 12. All teams in the tournament must consist of from three to eight attorneys, and three witnesses. Exceptions may be made by the Street Law Clinic after consultation.
- 13. Only students registered in their high school for the Street Law class as of February 22, 2001 will be eligible to participate in the Mock Trial Tournament unless otherwise

- approved by the Program Director.
- 14. Teams are expected to be present at the Superior Court for the District of Columbia by 5:30 p.m. the days of the trials. Trials will begin at 6 p.m.
- 15. The starting time of any trial will not be delayed for longer than 15 minutes. Incomplete teams will have to begin without their other members, or with alternates.

#### **JUDGING**

- 1. Presiding judges for Mock Trials may include Judges and Commissioners of the District of Columbia, law school faculty, members of the D.C. Bar, other attorneys, or others approved by the Program Director.
- 2. All judges receive the Guidelines for Judges, Judge's Score Sheet, the Simplified Rules of Evidence and Procedure, and the Mock Trial Packet.
- 3. Presiding judges are asked to make a legal decision on the merits of the case, but this does not affect a team's score. The decision on team scores is made by a scoring panel consisting of two or more scorers selected by the Street Law Staff and, in some instances, the presiding judge. The criteria for scoring are discussed in the Guidelines for Judges and Scoresheet.
- 4. All decisions of the judges are final.

## DISTRICT OF COLUMBIA 2001 MOCK TRIAL

## Simplified Rules of Evidence

To assure each side a fair trial, certain rules have been developed to govern the types of evidence that may be introduced, as well as the manner in which evidence may be presented. These rules are called the "rules of evidence." The attorneys and the judge are responsible for enforcing these rules. Before the judge can apply a rule of evidence, an attorney must ask the judge to do so. Attorneys do this by making "objections" to the evidence or procedure employed by the opposing side. When an objection is raised, the attorney who asked the question that is being challenged will usually be asked by the judge why the question was not in violation of the rules of evidence.

The rules of evidence used in real trials can be very complicated. A few of the most important rules of evidence have been adapted for mock trial purposes, and these are presented below.

# Rule 1. Leading Questions:

A "leading" question is one that suggests the answer desired by the questioner, usually by stating some facts not previously discussed and then asking the witness to give a yes or no answer.

**Example:** "So, Mr. Smith, you took Ms. Jones to a movie that night, didn't you?"

Leading questions may not be asked on direct or redirect examination. Leading questions may be used on cross-examination.

**Objection:** "Objection, Your Honor, counsel is leading the witness."

Possible Response: "Your Honor, leading is per-

missible on cross-examination," or "I'll rephrase the question." For example, the question can be rephrased: "Mr. Smith, where did you go that night? Who did you go with?" (This would not suggest the answer the attorney desires.)

### **Rule 2. Narration:**

Narration occurs when the witness provides more information than the question called for.

Example:

Question - "What did you do when you reached the front door of the house?"

Witness - "I opened the door and walked into the kitchen. I was afraid that he was in the house -- you know, he had been acting quite strangely the day before."

Witnesses' answers must respond to the questions. A narrative answer is objectionable.

**Objection:** "Objection, Your Honor, the witness

is narrating."

**Response:** "Your Honor, the witness is telling us

a complete sequence of events."

## Rule 3. Relevance:

Questions and answers must relate to the subject

matter of the case; this is called "relevance." Questions or answers that do not relate to the case are "irrelevant."

**Example:** (In a traffic accident case) "Mrs.

Smith, how many times have you

been married?"

Irrelevant questions or answers are objectionable.

**Objection:** "Your Honor, this question is

irrelevant to this case."

**Response:** "Your Honor, this series of questions

will show that Mrs. Smith's first husband was killed in an auto accident, and this fact has increased her mental suffering in this case."

## Rule 4. Hearsay:

"Hearsay" is something the witness has heard someone say outside the courtroom. Also, any written statement made outside the courtroom is hearsay.

**Example:** "Harry told me that he was going to visit Mr. Brown."

Hearsay evidence is objectionable. However, there are two exceptions to the hearsay rule for purposes of the mock trial. If an exception applies, the court will allow hearsay evidence to be introduced. Exception: In a mock trial, hearsay evidence is allowed when the witness is repeating a statement made directly to the witness by one of the witnesses in the case. Hearsay is also allowed if one of the witnesses is repeating a statement made by an individual who is no longer alive.

Note that this exception to the hearsay rule does not extend to witness testimony about what another person heard a witness say. This is "double hearsay."

**Example:** Mary, the plaintiff, told me that

Harry, the defendant was drunk the

night of the accident.

Objection: "Objection, Your Honor, this is

double hearsay."

Response: "Your Honor, since Harry is the

defendant, the witness can testify to a statement he heard Harry make."

For mock trials, other exceptions to the hearsay rule are not used.

drunk, so I'm sure he was drunk that night, too."

#### Rule **Firsthand** 5. **Knowledge:**

Witnesses must have directly seen, heard, or experienced whatever it is they are testifying about.

**Example:** "I know Harry well enough to know

that two beers usually make him

## **Rule 6. Opinions:**

Unless a witness is qualified as an expert in the appropriate field, such as medicine or ballistics, the witness may not give an opinion about matters relating to that field.

**Example:** (Said by a witness who is not a

doctor) "The doctor put my cast on wrong. That's why I have a limp

now."

Opinions are objectionable unless given by an expert qualified in the appropriate field.

As an exception to this rule, a lay witness may give an opinion based on common experience.

**Objection:** "Objection, Your Honor, the witness

is giving an opinion."

**Response:** "Your Honor, the witness may answer the question because

ordinary persons can judge whether

a cast was put on correctly."

## Rule 7. Opinions on the **Ultimate Issue:**

Witnesses, including experts, cannot give opinions on the ultimate issue of the case: the guilt or innocence of the defendant or the liability of the parties. These are matters for the trier of fact to decide.

**Example:** "I believe that Mr. Smith was negligent in driving too fast in this case."

Opinions on the ultimate issue in a case are objectionable.

**Objection:** "Your Honor, the witness is giving an

#### A lack of firsthand knowledge is objectionable.

**Objection:** "Your Honor, the witness has no

firsthand knowledge of Harry's

condition that night."

"The witness is just generally **Response:** 

describing her usual experience with

Harry."

an opinion on the ultimate issue -- the

negligence of Mr. Smith."

Response: "The witness is commenting that the

driver was speeding. This is not the

ultimate issue in this case."

## Rule 8. Additional Rules of Evidence:

- Objections during the testimony of a witness must be made only by the direct examining and cross-examining attorneys for that witness.
- Cross-examination is not limited to the scope of direct questioning.
- A short redirect examination, limited to no more than two questions, will be allowed following cross-examination, if an attorney desires. Questions on redirection are limited to the scope of the cross-examination.

## Rule 9. Special Procedures:

#### <u>Procedure 1. Introduction of Documents or Physical</u> Evidence:

Sometimes the parties wish to offer as evidence letters, affidavits, contracts, or other documents, or even physical evidence such as a murder weapon, broken consumer goods, etc. Special procedures must be followed before these items can be used in trial.

#### Step 1: Introducing the Item for Identification

a. An attorney says to the judge, "Your Honor, I wish to have this (letter, document, item) marked for identification as (Plaintiff's Exhibit

- A, Defense Exhibit A, etc.)."
- b. The attorney takes the item to the clerk, who marks it appropriately.
- c. The attorney shows the item to the opposing counsel.
- d. The attorney shows the item to the witness and says, "Do you recognize this item marked as Plaintiff's Exhibit A?"

Witness: "Yes."

Attorney: "Can you please identify this

item?"

Witness: "This is a letter I wrote to John Doe

on September 1." (Or witness gives other appropriate identification.)

e. The attorney may then proceed to ask the witness questions about the document or item.

#### Step 2. Moving the Document or Item into Evidence.

If the attorney wishes the judge or jury to consider the document or item itself as part of the evidence and not just as testimony about it, the attorney must ask to move the item into evidence at the end of the witness examination. The attorney proceeds as follows:

- a. The attorney says, "Your Honor, I offer this (document/item) into evidence as Plaintiff's Exhibit A, and ask that the court so admit it."
- b. Opposing counsel may look at the evidence and make objections at this time
- c. The judge rules on whether the item may be admitted into evidence.

#### **Procedure 2. Impeachment**

On cross-examination, an attorney wants to show that the witness should not be believed. This is best accomplished through a process "impeachment," which may use one of the following tactics: (1) asking questions about prior conduct of the witness that makes the witness' truthfulness doubtful (e.g., "Isn't it true that you once lost a job because you falsified expense reports?"); (2) asking about evidence of certain types of criminal convictions (e.g., "You were convicted of shoplifting, weren't you?"); or (3) showing that the witness has contradicted a prior statement, particularly one made by the witness in an affidavit. Witness statements in the Mock Trials Materials are considered to be affidavits.

In order to impeach the witness by comparing information in the affidavit to the witness' testimony, attorneys should use this procedure:

Step 1: Repeat the statement the witness made on direct or cross-examination that contradicts the affidavit.

**Example:** "Now, Mrs. Burke, on direct examination you testified that you were out of town on the night in question, didn't you?" (Witness responds, "Yes.")

**Step 2:** Introduce the affidavit for identification, using the procedure described in Procedure 1.

Step 3: Ask the witness to read from his or her affidavit the part that contradicts the statement made on direct examination.

**Example:** "All right, Mrs. Burke,will you read paragraph three?" (Witness reads, "Harry and I decided to stay in town and go to the theater.")

Step 4: Dramatize the conflict in the statements. (Remember, the point of this line of questioning is to demonstrate the contradiction in the statements, not to determine whether Mrs. Burke was in town or out of town.)

Example: "So, Mrs. Burke, youtestified that you were out of town on the night in question, didn't you?" "Yes." "Yet, in your affidavit you said you were in town, didn't you?" "Yes."

#### Procedure 3. Qualifying an Expert

Only a witness who is qualified as an expert may give an opinion as to scientific, technical, or other specialized knowledge in the area of his/her expertise. (Note: A lay witness may give an opinion about something related to one's common experience (see Rule 6).) Experts **cannot** give opinions on the **ultimate issue** of the case.

Before an expert gives his/her expert opinion on a matter, the lawyer must first **qualify** the expert. There are two steps to qualify an expert. First, the lawyer must **lay a foundation** that shows the expert is qualified to testify on issues related to that expert's

field of expertise. To lay a foundation, the lawyer asks the expert to describe factors such as schooling, professional training, work experience and books he/she has written that make a person an expert regarding a particular field. Second, once the witness has testified about his/her qualifications, the lawyer asks the judge to qualify the witness as an expert in a particular field.

**Example:** The wife of Harold Hart is suing Dr. Smith and General Hospital for malpractice. She claims they did not treat Mr. Hart for an obvious heart attack when he was brought to the hospital. Mrs. Hart's lawyer is examining his expert witness, Dr. Jones:

- Q: Dr. Jones, what is your occupation?
- A: I am a heart surgeon. I am Chief of Staff at the Howard University Medical Center.
- Q: What medical school did you attend?
- A: I graduated from Georgetown Medical School in 1978.
- Q: Where did you do your internship?
- A: I did a two year internship in cardiology at John Hopkins University from 1978-1980.
- Q: Did you afterwards specialize in any particular field of medicine?
- A: Yes, I specialized in heart attack treatment and heart surgery.
- Q: Have you published any articles or books?
- A: I wrote a chapter in a medical text on heart surgery procedures after heart attacks.
- Q: Describe the chapter.
- A: I set out the steps for identifying heart attacks and doing open heart surgery.
- Q: What professional licenses do you have?
- A: I am certified by the D.C. Board of Medical Examiners to practice medicine in D.C.

Attorney #1: Your Honor, I ask that Dr. Jones be qualified as an expert in the field of medicine.

Judge: Any objection?

Attorney #2: We object. No foundation has been laid regarding Dr. Jones's ability to render an opinion as to all fields of medicine.

Judge: Objection sustained. Dr. Jones's expertise seems to be limited to certain areas of medicine.

Attorney #1: Thank you, your Honor. We ask that Dr. Jones be qualified as an expert in the field

of heart surgery.

Judge: Any objections?

Attorney #2: No, your Honor.

Judge: Let the record reflect that Dr. Jones is

qualified to testify as an expert in the field

of heart surgery.

Once qualified, an expert may give opinions relating <u>only</u> to the expert's area of expertise. That is, an expert cannot give an opinion in an area outside his/her expertise.

**Example:** (Dr. Jones has been qualified as an expert on heart surgery.)

- Q: Dr. Jones, what is your opinion as to Mr. Hart's cause of death?
- A: The patient suffered a massive heart attack caused by clogged arteries.
- Q: Dr. Jones, in your opinion was the patient also suffering from a rare lung disease transmitted through contact with the North American mongoose as the defense contends?

Objection: The witness is testifying outside her area of expertise.

Judge: Sustained. Please confine your opinion to matters related to care and treatment of the heart.

- Q: Dr. Jones, in your opinion, how should the patient's doctors have treated him?
- A: They should have recognized that the patient was having a heart attack based on his chest pains, purple face, difficulty breathing, and numbness in his left arm. They should have given him the proper medication and treated him in the emergency room right away.
- Q: Who was at fault in this matter?
- A: Dr. Smith and General Hospital were definitely negligent.

Objection: The witness is testifying to the ultimate issue of the case, which is whether Dr. Smith and General Hospital are liable for malpractice. That is a question of fact for the judge (or jury, when the case is tried before a jury) to decide.

Judge: Sustained.

## **Giraffe Classroom**

