*Checklist/Table of Contents for Attorney Volunteers Working with Jurors*

**Civil Discourse and Difficult Decisions**

*Legal Skills as Life Skills*

**Volunteer attorneys working with student jurors****should have the following materials.**

**Background**

1. **Program Description –** Advance Handout for the Judge, All Volunteers, and the Teacher

**Agendas**

1. **Agenda/Generic – Courtroom Program:** Handout for All Participants
2. **Agenda/Detailed –** Step-by-Step Guidance for the Judge, Facilitator, and All Volunteers

**Courtroom Introduction to *Elonis v. U.S. –*** Presented by Volunteer Attorneys

*All participants and volunteers have copies of the following:*

1. **Elonis Facts and Case Summary**
2. **Fictional Scenario**
3. **Emojis for the Fictional Scenario –** Skull and Winking Smiley Face

**Student Attorney Preparation – Background for Attorneys Working with Jurors**

1. **Talking Points –**  For the Judge, Coaches and Student Attorneys

*Student Jurors Do Not Receive this Handout*

**Student Juror Preparation – Activity Facilitated by Attorneys Working with Jurors**

1. **Jury Worksheet** *(Blank – No Answers)* **–** Handout for Student Jurors and Jury Coaches
2. **Jury Worksheet Answer Key –** Only for the Jury Coaches

*Program Description for the Judge, Attorney Volunteers, and Teachers*

**Civil Discourse and Difficult Decisions**

Legal Skills as Life Skills

**Civil Discourse and Difficult Decisions** is a national initiative of the federal courts that brings high school and college students into federal courthouses for legal proceedings that stem from situations that law-abiding young people can find themselves. These court hearings (not mock trials) are realistic simulations that showcase jury deliberations in which all students and learning styles participate in civil discourse.

Proceedings are conducted in courtrooms presided over by federal judges who are assisted by volunteer attorneys, including members of local chapters of the Federal Bar Association. Although student attorneys argue the case, student jurors and their deliberations are at the centerpiece of the courtroom event.

**Learning Objectives – Benefits to Students**

Students leave these three-hour programs with sharpened tools for civil discourse and decision making and a heightened awareness of situations they may not realize can have legal and long-term consequences. They also experience the differences between media portrayals of the court system and what happens in real life. Participants interact with the human face of the justice system – judges, attorneys, and other professionals – and their courtroom experience motivates them to serve willingly on juries when called.

**Roles and Resources**

The roles for the adults are presiding judge and volunteer attorneys who coach the student attorneys and work with the student jurors. Each role has an online folder with detailed guidance. The program facilitator manages the courtroom program and guides the jury deliberations. The judge presides over the simulation and talks with the students in the courtroom after the event.

* **Volunteer Attorney Coaches Who Work with the Two Student Attorney Teams** *(one volunteer per team or two per team, according to local preference)* They present the case information and prepare the student attorneys. Eight student attorneys – four on each side – present oral arguments before the judge and jury.
* **Volunteer Attorneys Who Work with the Student Jurors** *(one or two, according to**local preference)*They prepare the jurors for the centerpiece of the program – analyzing all sides of the issues during jury deliberations. All students who are not attorneys serve as jurors.

**What Happens in the Courtroom Program?**

**1. Reality Check Quiz and Civility Self Reflection Sheet**

Students start by taking an attention-getting Reality Check Quiz that tests their knowledge of situations that can put them in legal jeopardy. At the end of the program, they discuss the issues with the host judge and leave with insights that have practical applications in their lives. As part of the program icebreaker, they also fill out a civility self-reflection sheet on how they measure up in using civil discourse skills.

**2. Civil Discourse Skill Building**

This activity has two parts: 1) Students discuss their own civil discourse attitudes, behaviors, and language. 2) Students establish their own ground rules and group norms for civil discussion.

**3. Courtroom Simulation**

Student jurors are featured in the program as they decide a contemporary Supreme Court case that is modified with a fictional scenario that is applied to their lives. The jurors base their verdict on arguments made by the student attorneys. Not a mock trial, this abbreviated hearing helps participants differentiate between what they see in the media and what they experience in a real courtroom.

**4. Reality Check Discussion**

The program concludes with a candid conversation with the host judge about the real-life scenarios in the Reality Check Quiz that can have legal and long-term consequences.

**Time Commitment**

**Judge and Lawyers:** Spend 30**-**45 minutes reading the courtroom-ready program materials; participate in one orientation meeting with the Judge; and commit two hours to 3.5 hours to the courtroom event.

**Teachers’ Time Commitment:** No classroom preparation or pre-reading for the students or teachers.

**Courtroom Program:** An average of three hours for the students – from orientation to adjournment.

**Generic Agenda:** *Courtroom Handout for All Participants and Observers*

**Civil Discourse and Difficult Decisions**

Legal Skills as Life Skills

**8:00 – 8:25 a.m**. **Students Arrive and Complete**

*(25 minutes)*  **1) Reality Check Quiz**

**2) Civility Self-Reflection Sheet**

**8:25 —8:35 a.m.** **Welcome and Interactive Courtroom Tour**

*(10 minutes)*

**8:35—9:05 a.m. Introductions and Civil Discourse Activity**

*(30 minutes)*Attorneys Introduce Themselves: *Why I Chose the Law*

* **Discussion:** *Civility Self Reflection*
* **Handout**: *Setting Civil Discourse Ground Rules*

**9:05 – 9:15 a.m. Attorney Coaches #1 and #2 Present**

*(10 minutes)*  **1)** *Elonis v. U.S.* Facts and Case Summary **2)** Fictional Scenario

**In Advance**: **Teacher Selects Eight Students to be Attorneys**

**9:15 –9:40 a.m. Student Attorneys and Student Jurors Prepare for the Simulation**

*(25 minutes)* **In two rooms outside the courtroom:** One attorney coach works with Andy Jackson’s lawyers. One attorney coach works with the Government’s lawyers.

**In the courtroom:** An attorney volunteer works with the student jurors to identify possible arguments for both sides. The volunteer talks about jury service and the importance of civility in jury deliberations.

**9:40 – 9:45 a.m. Stretch Break in the Courtroom**

*(5 minutes) Student attorneys and coaches may continue preparing, if they wish.*

**9:45 – 10:45 amSimulation: *Elonis v. U.S.***

*Total: 60 minutes*

*(~30 minutes)* **Oral Arguments**

Student attorneys present their arguments to the Judge and student jury.

*(~30 minutes)* **Jury Deliberations in the Gallery of the Courtroom**

The facilitator guidesthe deliberations. Only student jurors participate.

**The Judge Asks for a Show-of -Hands Verdict**

If there is time, the Judge might ask one juror on each side to volunteer to explain their rationale.

**10:45 – 11:30 p.m. The Judge Leads a Discussion on the Reality Check Quiz**

*(45 minutes)*  **Students Complete Feedback Forms**

**Group Photo and Informal Socializing with the Judge and Attorneys**

**Adjournment**

**Detailed Agenda** *-- Guidance for the Judge, Facilitator, and Other Attorney Volunteers*

**Civil Discourse and Difficult Decisions**

Legal Skills as Life Skills:

**Key Responsibilities of the Facilitator**

* Make sure that your folder contains everything listed in the checklist/table of contents.
* Keep the program moving.
* Manage and adjust the timing of the program elements, as necessary.
* Involve as many students as possible. Don’t hesitate to call on students who don’t raise their hand. Read facial expressions, body language, and note side conversations to draw in students.

**I. WARM UP**

**8:00 – 8:25 a.m. Students Arrive, Go Through Security, and Settle in the Courtroom**

*(25minutes)* **Facilitator:** While waiting in the courtroom, have students take complete the two handouts:

1. **Reality Check Quiz** *(Exhibit A)*

Reality Check Answer Key *(Exhibit A-1)* is for the Judge Only

1. **Civility Self Reflection Sheet** *(Exhibit B)*

**8:25 —8:35 Facilitator Welcomes Group and Explains Program**

*(10 minutes) The Facilitator involves students in* **Courtroom Tour** *(Exhibit C)*

**8:35 – 9:05 All Volunteer Attorney Coaches Briefly Introduce Themselves**

*(30 minutes)*The coaches introduce themselves by telling: *Why I Chose the Law.*

This is an opportunity to tell students your “heart” reason.

**Facilitator or Another Attorney Leads the Civil Discourse Activity Using the Following Handouts:**

* **Discussion:** *Civility Self Reflection Discussion Prompts (Exhibit B-1)*
* **Activity**: *Setting Civil Discourse Ground Rules (Exhibit D)*

**Questions to Stimulate Discussion About Ground Rules**

**Effective Discussion Starter**: What are some of your pet peeves when you’re having a contentious conversation with someone? What do people do that gets on your nerves? What ground rules might address your pet peeves?

* + - How do nonverbal cues (rolling your eyes, sighing, etc.) have an impact on the climate of civility? How would you phrase a ground rule for that?
    - Why are side conversations inappropriate? How could this be addressed in a ground rule?
    - What ground rules would encourage positive behavior and not just condemn bad behavior?
    - Is listening a form of participation? What is active listening?

**II. PREPARATION FOR THE COURTROOM SIMULATION**

**9:05 – 9:15 Attorney Coaches #1 and #2 Present**

*(10 minutes)* Attorney #1 Tells the Story of the **Facts and Case Summary** *(Exhibit E)*

Attorney #2 Tells the Story of the **Fictional Scenario** *(Exhibit F)*

**Attorney Coaches:** Use a simple, storytelling style. The students have the s, so it is preferable not to read to them. See the students as jurors – not as law school students, or CLE participants. Choose one or two clean, primary issues in the Supreme Court case and apply them to the fictional scenario. Don’t get into exceptions, nuances, or complexities. The limited amount of time will help you zero in on the key points. Avoid a lecture style. Ask questions and encourage the students’ questions.

**9:15 – 9:40 Student Attorneys and Student Jurors Prepare for the Simulation**

*(25 minutes)* **Note to the Facilitator:**The student attorneys and their coaches leave the courtroom to prepare. To maintain order, have the student jurors remain seated until the attorney teams exit.

**Attorney Coaches Take the Teams to Two Nearby Rooms.**

Each team goes with its coach to separate practice rooms – one for each team -- where they read and talk through the handouts. **First order of business**: Go through the folders and make sure that they contain the following:

* Opening Protocol *(Exhibit G)*
* Talking Points *(Exhibit H)*
* Closing Arguments Worksheet *(Exhibit I)*

**Go over them with you team in this order:**

1. Talking Points
2. Closing Arguments
3. Opening Protocol, just before they go to the courtroom.

**Tips for the Attorney Coaches: What to Do in the Practice Room**

**About the Talking Points Handout**

Students can use it any combination of the following when presenting to the Judge and jury:

* Read the fully scripted talking points as they are.
* Use selected content from the talking points and add their own arguments.
* Develop their own arguments that might include key points from the script.

**Preparing the Student Attorneys**

1. Have all four students read out loud the three **questions (only)** in the **Talking Points** **Handout.** Ask the students to volunteer for which question they want to argue in the courtroom. The first read- through makes them just familiar enough with the questions to be able to choose the one they want to present.

All four students should look at the **Closing Arguments Worksheet** for student attorney #4. Point out that this student attorney does not have scripted talking points. He/she needs to be comfortable making the closing arguments by filling out the worksheet as the arguments are presented in court. The job of student attorney #4 is to summarize his/her team’s arguments and rebut the arguments of the other team.

1. Now, have the students volunteer for the student attorney roles for questions #1, #2, #3, and for closing arguments—student attorney #4.
2. Give the student attorneys time to read, underline, and make notes on their copies. They will have questions for the coaches.
3. Prepare them for the Judge’s questions. In court, after each student attorney presents, the Judge will ask questions of the presenter. Show them examples of questions at the end of each talking points. Reassure them that the Judge wants them to succeed and to look good in front of their peers in the courtroom. The Judge won’t ask trick questions or try to embarrass them. In fact, the Judge will help them if they get stuck.
4. Have the students talk about how they might anticipate and respond to the Judge’s questions.
5. End the preparation session by having them read out loud and practice the **Opening Protocol**

before they go back to the courtroom*.*

**Preparing the Student Jurors.** They stay in the courtroom with the attorney volunteer who is the jury coach. Their task is to identify and discuss possible arguments that will come up on the hearing and jury deliberations. This segment also is a practice time for the civil discourse skills they have learned.

Student jurors move into two, random (but roughly equal) groups. The coach guides the student jurors through the **Arguments Worksheet** **for Jurors** *(Exhibit J).* Student jurors read each statement and discuss it. The coach may ask them to start by talking with their neighbor, then in groups of four, then with the large group. Coaches may use the Socratic Method to draw out more comments. **See Arguments Worksheet Answer Key for the Juror Coaches** *(Exhibit J-1).*

**If there is time, the attorney volunteer talks about jury service and the importance of civility in jury deliberations.** Here are some discussion questions to stimulate conversation about what can happen during jury deliberations that might require civil discourse skills.

**Discussion Questions**

* + - What can you say to keep the conversation civil if someone’s comment is insulting or untrue?
    - What can you say if someone’s nonverbal cues are disrespectful?
    - What can you say if someone is engaging in a distracting side conversation?
    - What can you say to keep the conversation positive when it gets tense?
    - What can you say and do to show respect for someone’s statements and opinions?

If you agree with them? If you disagree with them?

**9:40—9:45 Stretch Break in Courtroom**

*(5 minutes)*Student attorneys may use this time to continue their preparation.

**III. COURTROOM SIMULATION**

**9:45 – 10:45 Judge Takes the Bench**

*Total 60 min.* **Courtroom Simulation**

*(~30 minutes)* **Student Attorneys Present Before the Judge and Jury**

**Student Attorneys #1, #2, #3:** They use the scripted **Opening Protocol** and semi- scripted **Talking Points.**

**Student Attorney #4**: Takes notes on the **Closing Arguments Worksheet** and presents.

*(~30 minutes)* **Jury Deliberations are Conducted in the Courtroom. Only Jurors Participate.**

**Tips for Facilitating Jury Deliberations**

* After closing arguments, the facilitator guides student jurors in the deliberations to ensure that everyone has the opportunity to speak. The facilitator also helps enforce the civil discourse rules.
* During deliberations, the Judge remains seated on the bench and all student attorneys and attorney coaches remain seated at the counsel tables. Only the student jurors may participate in the deliberations and jurors may not ask questions of anyone in the well.
* The facilitator has student jurors form two groups. Student jurors initially favoring one side sit in the gallery behind that counsel table. Those initially favoring the other side sit in the gallery behind that counsel table. Stress that this is not a commitment. It is a straw poll.
* Student jurors sit down while in each section, however, they stand to express their opinions – and they must use a microphone (even if they prefer not to) so that the Judge and everyone (of varying hearing abilities) can hear all comments.

**Logistics.** As the deliberations progress, students stand up and move between the section behind one party and the section behind the other party in the gallery as their opinions change in response to points made by fellow jurors.

**Expectations.** Set the expectation that students will move back and forth throughout the discussion. Frequently create that opportunity and use it as an example of the courage required to go against the crowd.

**Involve Everyone.** Call on as many students as possible, not just those who raise their hand. The techniques below, and others, can encourage all students to speak. Read the students’ body language and give them an opportunity to share their thoughts, reassuring them that all views are valid.

**Here are examples of questions and comments that can keep the deliberations interactive.** These questions are not designed to be sequential. They can be peppered in any order throughout the deliberations after a student juror makes a statement.

* I can see that people are very animated about what was just said and there is a lot of energy around it. Who else wants to speak up in support of the argument? Who has an argument on the other side?
* Let’s get everyone involved. Raise your hand if you disagree with the argument that was just made. How many of you want to explain your position?
* On the other side, what aspect of that argument do you agree with?
* Hmm, you look like you have an opinion. You’ve just heard the argument, what is faulty about it?
* Who agrees with that statement? Let’s hear from two people who will tell us why that’s valid.
* Who is unsure about your position? If you are in between the two positions, come stand in the center aisle between them. Let’s hear a round of applause. Tell us what you are thinking.
* Who has unanswered questions – on either side? Let’s make a list of them. Now, I’ll give each side the opportunity to respond to the open issues.
* It’s time to show that you have courage and an open mind. Everyone who needs to move to the other side of the argument, should do so now. Let’s give them a round of applause.
* What persuaded you to change your mind and move to the other side? How difficult was it to go public with your change of mind? Another round of applause, please.
* After considering all the arguments, who feels even stronger about your original position and is staying where you are? What arguments made you question your strong opinion?

**When the time expires, the facilitator closes the deliberations and returns the program to the Judge.**

**Judge Asks for a Show-of-Hands Verdict.**  The facilitator counts the hands. Due to time constraints, it’s not unanimous. If there is time, the Judge asks one student juror from each side to explain his/her side’s rationale. The judge congratulates the student attorneys and student jurors.

**IV. WRAP UP The Judge Enters the Well**

**10:45 – 11:30**

*Total 45 minutes* **Judge Leads** **Reality Check Discussion Using the Answer Key** *(Exhibit A-1)*

* **Note to the Judge:** Instead of going through the situations in numerical order, have students raise the issues that are of interest to them first. There may not be time to go through all scenarios.
* **Open Floor Q/A Session with the Judge and Attorney Volunteers**
* **Students Fill Out Feedback Forms (***Exhibit K)*

*Must be collected before group photo.*

* + - **Group Photo**

**BACKGROUND FOR ATTORNEY VOLUNTEERS WORKING WITH JURORS**

**Exhibit B** *Civility Self-Reflection for Students to Fill Out While Waiting for the Program to Start*

**Civil Discourse Self Reflection and Discussion Starter**

**Instructions:** Circle the option that best applies to you when you are with your peers.

**1. When a conversation gets heated, I contribute to the conversation.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**2. When peers disagree about an issue, I remain silent.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**3. I take an active role in creating a welcoming environment for differing opinions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**4. I give my peers eye contact and my full attention when they speak, even when I disagree.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**5. When I disagree with someone, I keep an open mind and, momentarily, put aside what I plan to say next.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**6. I can’t control others’ behavior or opinions, so I focus on my own actions and civility.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**7. When I’m speaking, sometimes, I use silence to get the attention of others.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**8. I speak respectfully to people with whom I disagree, even if they disrespect me.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**9. I ask clarifying questions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**10. I am careful not to take over a conversation by talking longer than others**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**11. When I get excited, I interrupt the person speaking.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**12. I have side conversations that distract the person I’m talking with – and others -- from the person who has the floor.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**13. I listen for what people mean – not just what they say -- when I disagree with them.** Very Frequently • Frequently • Occasionally • Rarely • Never

**14. When peers disagree, I find common ground and call attention to areas of agreement.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**15. Sometimes I tune out, then realize I’ve repeated something that already has been said.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**16. I roll my eyes, or make subtle faces when I disagree with someone’s opinion.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**BACKGROUND FOR ATTORNEY VOLUNTEERS WORKING WITH JURORS**

**Exhibit B-1** *Civility Self-Reflection and Discussion Prompts for a Volunteer*

**Civil Discourse Self Reflection: Discussion Starter**

*Volunteer’s Copy with Possible Follow-Up Questions*

**Instructions:** Circle the option that best applies to you when you are with your peers.

**1. When a conversation gets heated, I contribute to the conversation.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Would people say you, typically, are an inflamer, an informer, an inquirer, an influencer, a good listener, a comedian? What other roles do people take in heated conversations?***

**2. When peers disagree about an issue, I remain silent.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Why do you tend to remain silent? Can that be a good thing? What makes you comfortable enough to speak?***

**3. I take an active role in creating a welcoming environment for differing opinions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What do you say and do?***

**4. I give my peers eye contact and my full attention when they speak, even when I disagree.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***When people are really listening to you, what difference does that behavior make to you? What difference does it make in the conversation?***

**5. When I disagree with someone, I keep an open mind and, momentarily, put aside what I plan to say next.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What do you say to yourself so that you really listen, not just wait for your turn to speak?***

**6. I can’t control others’ behavior or opinions, so I focus on my own actions and civility.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What does that mean? How does it work?***

**7. When I’m speaking, sometimes, I use silence to get the attention of others.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***How do you use silence? How effective is it?***

**8. I speak respectfully to people with whom I disagree, even if they disrespect me.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Why? Give an example of what you can say or do/not do when someone is disrespectful to you.***

**9. I ask clarifying questions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Give examples of clarifying questions.***

**10. I am careful not to take over a conversation by talking longer than others**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What limits do you put on yourself to keep from talking too much? On the other hand, what do you do/say when you can’t get a word in edgewise?***

**11. When I get excited, I interrupt the person speaking.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***When you feel strongly about a subject, how do you monitor yourself so that you don’t interrupt?***

**12. I have side conversations that distract the person I’m talking with – and others -- from the person who has the floor.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***How do you feel when someone is whispering while you’re talking, even when they’re trying not to be disruptive?***

**13. I listen for what people mean – not just what they say -- when I disagree with them.** Very Frequently • Frequently • Occasionally • Rarely • Never

***What do people do/say when they are listening just to the words? What do they do/say when they are listening for what the person means?***

**14. When peers disagree, I find common ground and call attention to areas of agreement.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What are some phrases you can use to bridge the gap when you are trying to find common ground?***

**15. Sometimes I tune out, then realize I’ve repeated something that already has been said.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***How do you feel when someone repeats a point that already has been made?***

**16. I roll my eyes, or make subtle faces when I disagree with someone’s opinion.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***How do nonverbals detract from the civility of the conversation, even when the speaker doesn’t see you rolling your eyes or making faces?***

**Exhibit E** *Handout: Facts and Case Summary for Everyone (Volunteers and Participants)*

**Facts and Case Summary**

***Anthony Douglas* *Elonis v. United States, 135 S. Ct. 2001 (2015)***

Anthony Elonis was arrested on December 8, 2010 and charged with five counts of violating a federal anti-threat statute, 18 U.S.C. § 875(c).  Specifically, he was charged with threatening his ex-wife, co-workers, a kindergarten class, the local police, and an FBI agent.

Elonis had posted statements on his Facebook page that appeared to threaten his ex-wife and other people in his life.  Prior to the postings, his wife and family had left him and he had lost his job at an amusement park. Shortly after this chain of events, Elonis posted several statements on his Facebook page that were interpreted as threats.

At his trial, Elonis asked the court to dismiss the charges, stating that his Facebook comments were not true threats.  He argued that he was an aspiring rap artist and that his comments were merely a form of artistic expression and a therapeutic release to help him deal with the events in his life.

In an apparent attempt to underscore that his comments should not be taken seriously, he posted links to YouTube videos that he parodied, and noted that a popular rap artist often uses similar language in his lyrics.  For several of his comments, he also posted a disclaimer stating: “This is not a threat.”

Despite the fact that his ex-wife, an FBI agent, and others viewing his comments might have perceived his statements as threats, Elonis argued that he could not be convicted of making a threat because he did not intend to threaten anyone with his postings. In other words, he claimed that he didn’t mean what he said in a literal sense. In legal terms, he said that he did not have a subjective intent to threaten anyone.

The trial court denied his motion to dismiss the case.  The court held that the proper legal test for determining whether someone made a threat is an objective one:  whether reasonable people hearing the comment would perceive it to be a threat.  Elonis was convicted of four of the five counts.  He was sentenced to 44 months imprisonment, and three years of supervised release. [1] He appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed his conviction.  The U.S. Supreme Court, granted certiorari (agreed to hear the case).  Oral arguments were heard on Monday, December 1, 2014.

*[1]Please Note:  After the trial, Elonis, through his lawyers, filed post-trial motions with the trial court in an attempt to overturn the conviction.  These attempts also were unsuccessful.*

On June 1, 2015, the Supreme Court reversed the lower courts and held that the reasonable person standard is not sufficient for a criminal statute and that for a person to be criminally charged, he or she must be aware of his or her wrongdoing. The case was remanded to the lower court

**THE FIRST AMENDMENT PROVIDES THAT**

“Congress shall make no law . . . abridging the freedom of speech [.]”

**APPLICABLE LAW**

It is a federal crime to “transmit [ ] in interstate or foreign commerce any communication containing…any threat to injure the person of another, 18 U.S.C. § 875(c). Numerous states have adopted similar statutes.

**PROCEDURE**

**Lower Court 1:** U.S. District Court for the Eastern District of Pennsylvania

**Lower Court Ruling 1:** The U.S. District Court rejected Elonis’ argument that a subjective (i.e., individual) intent to threaten is required to secure a conviction under the federal anti-threat statute.

**Lower Court 2:** U.S. Court of Appeals for the Third Circuit

**Lower Court Ruling 2:** The Court of Appeals affirmed the U.S. District Court. It held that a reasonable person (i.e., objective) standard is the correct legal test for determining whether Elonis could be convicted of communicating a threat under federal law.

**ISSUE BEFORE THE SUPREME COURT OF THE UNITED STATES**

Does a conviction of threatening another person under federal anti-threat statute18 U.S.C. § 875(c) require proof that the defendant meant what he said in a literal sense?

**STATUS**

**Oral Arguments:** Heard at the Supreme Court of the United States on Monday, December 1, 2014.

**Judgment**: [Reversed and remanded](http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf), 8-1, in an opinion by Chief Justice Roberts on June 1, 2015. Justice Alito filed an opinion concurring in part and dissenting in part. Justice Thomas filed a dissenting opinion.

**Exhibit F** *Handout: Fictional Scenario for Everyone (Volunteers and Students)*

***Elonis v. U.S.* Applied to Teen Facebook Postings**

Fictional Scenario: Facebook Postings – Artistic Expression or True Threats?

Andy Jackson is a 19-year-old sophomore at Bay State College. He and Sarah Somers have gone through a difficult breakup, after which he says she started rumors alleging inappropriate behavior that could jeopardize his basketball scholarship. Friends tell Andy what she is saying, and he sees on the Whisper app a series of damaging photos and videos that only Sarah could have posted. Andy is afraid that the allegations could cost him his place on the basketball team, which has a zero-tolerance policy regarding academic ethics, sexual misconduct, and illegal behavior.

Andy, who is known as “The Gunner” for his ripped biceps and aggressive style of play, also is a DJ and rapper whose lyrics get attention for their controversial double meanings. He posts on Facebook a creative parody of some well-known rap lyrics implying that Sarah is a pathological liar who has gotten so wasted at parties that she has passed out.

In the meantime, Sarah starts dating Sam Bennett, a high-profile point guard on a rival basketball team. In another post, Andy’s lyrics claim that if Sarah keeps up the attacks on his reputation, she’ll “regret this day” because the next time she drinks too much at a party, she’ll learn a “new meaning of unconscious.” He also says that Sam should watch himself on the court because “The Gunner is locked and loaded.” Andy ends the post with a series of skull emojis and wink emojis.

Sarah feels threatened and is concerned enough about the posts that she goes to the campus police and asks how to get a restraining order against Andy. She also reports the posts to the director of campus life.

Ultimately, Andy is charged with two counts of violating 18 U.S.C. § 875(c), which makes it a federal crime to “transmit [ ] in interstate or foreign commerce any communication containing…any threat to injure the person of another.”

At today’s hearing in federal court, Andy’s attorneys will argue that Andy’s statements were not true threats but free speech protected by the Constitution.

**Whisper** is a free mobile app. It is a form of [anonymous social media](https://en.wikipedia.org/wiki/Anonymous_social_media), allowing users to post and share photo and video messages [anonymously](https://en.wikipedia.org/wiki/Anonymously). The postings, called "whispers,” consist of text superimposed over an image.

**BACKGROUND FOR ATTORNEY VOLUNTEERS WORKING WITH JURORS**

**STUDENT JURORS TO NOT RECEIVE THIS**

**Exhibit H** *Talking Points: ONLY for the Judge, Attorney Coaches, and the Eight Student Attorneys*

***Elonis v. United States* Applied to Teen Facebook Postings** *Talking Points – Can be Modified by Student Attorneys.*

**Judge: The issue before us today is – Does the First Amendment require proof that a defendant is serious about following through on a threat before the defendant may be convicted of threatening another person?**

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| **Judge: We will start with Question #1.**  **Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting? Because Mr. Andy Jackson is the Petitioner bringing this case, his attorney will go first.** | **Judge: Now we will hear from the Respondent. Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting?** |
| **Andy’s Attorney #1** | **Government’s Attorney #1** |
| **YES**   * The First Amendment protects unpopular and offensive speech. A bedrock principle of the First Amendment is that speech cannot be prohibited simply because it is uncomfortable or offensive. * Andy’s speech is no different from other speech that has been recognized as constitutionally protected. Angry and even offensive lyrics are constitutionally protected artistic expression. * Andy was simply expressing his anger in an artistic, therapeutic, and constitutionally protected manner. His comments were based on the lyrics of his favorite artist. He also put out a disclaimer that he was not threatening anyone.   **The Judge asks follow-up questions.**  Examples of the kinds of follow-up questions the Judge may ask:   * Should the First Amendment protect all forms of artistic expression? Why/Why not? * What artistic expression should not be protected? * Should there be limits on First Amendment protections of emotional expressions? * What emotional expressions should be limited? * Should it matter if someone uses a disclaimer saying the expression is not a threat? * Does it matter that the statement is anonymous? | **NO**   * Not all speech is protected by the First Amendment. The First Amendment protects political discourse and the free flow of ideas. However, the courts have determined that obscenity, fighting words, and true threats are not protected speech. * Andy’s online statements are unprotected true threats. Among other things, he tells Sarah that she will “regret this day.” He says Sam should watch himself because “The Gunner is locked and loaded” -- a reference to shooting a firearm. * Andy cannot avoid criminal liability for his threats simply by imitating the lyrics of a musical artist. He can’t avoid responsibility for threats just by putting a disclaimer on them. Defendants who issue true threats can’t get off the hook by simply by saying they didn’t mean it or by adding ambiguous emojis.   **The Judge asks follow-up questions.** |
| **Judge: Let’s turn our attention to Question 2**  **Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?** | **Judge: Same question for the Government.**  **Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?** |
| **Andy’s Attorney #2** | **Government’s Attorney #2** |
| **YES**   * When a threat is judged by a subjective standard, the idea is to determine if the speaker means what is said. When a threat is judged by an objective standard, the question is asked: “How would a reasonable person interpret it?” That standard is too vague because reasonable people can disagree. * An objective or “reasonable person” standard allows the majority to silence dissenting or minority views. It also has a chilling effect that might silence offensive, unpopular, or controversial statements to avoid the risk of criminal prosecution. The posts include a skull and winking smiley face emoji. They clearly convey that the sender is just kidding. * The objective standard, based on what a “reasonable person” would think, is too ambiguous. What is meant by “a reasonable person?” Would the standard be based on a reasonable adult? A reasonable teenager? A reasonable person with average knowledge of pop culture? This standard simply leaves too much ambiguity to adequately protect freedom of speech.   **The Judge asks follow-up questions:**  Examples of the kinds of follow-up questions the Judge may ask:   * What impact should the skull and winking emojis have on our understanding of Mr. Jackson’s intent? * How would a “reasonable person” interpret the skull in this post? * Does it make a difference that the skull is paired with the winking smiley face? | **NO**   * Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether or not he actually intended to carry out the threat. * Even if the individual makes the threat as some sort of warped joke with no intention of doing damage, he could still be prosecuted. Anti-bomb threat laws are meant, in part, to protect the public from the fear that such threats cause, regardless of whether the threat turns out to be credible. Andy’s posts include a skull emoji and winking smiley face emoji. The skull is a recognized symbol of death. The wink indicates that the sender gets pleasure from issuing the threat. * When a threatening statement is made, the damage is done when the victim hears the statement and takes it seriously. A perceived threat can be just as emotionally damaging as a real threat. In light of that, the Government may legitimately prohibit such threatening statements. * Employing an objective standard would not automatically subject every unpopular or offensive utterance to criminal prosecution. The context of the statement would help the finder of fact determine whether or not s statement is a true threat.   **The Judge asks follow-up questions:** |
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| |  |  | | --- | --- | | **Judge: We turn our attention now to Question #3. Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?** | **Judge: Question #3 for the Government is the same. Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?** | | **Andy’s Attorney #3** | **Government’s Attorney #3** | | **YES**   * People make all kinds of exaggerated statements that, if taken out of context, can be construed as threats. This is particularly true for statements posted on social media. The person making the statements cannot control who sees them or how they are interpreted. Someone unfamiliar with the context could perceive an innocent statement as a threat. * There are many examples in the law where the legality of an action depends upon context. For instance, the Government may outlaw speech that is intended to incite imminent lawless action. However, the Government may not prohibit offensive speech if it is not a direct incitement to unlawful action. * If the government tries to interpret the intentions behind speech, people will self-censor rather than risk criminal prosecution. In addition, people may be prosecuted for comments that were not intended as threats.   **The Judge asks follow-up questions. Examples:**   * Should online content have the same protections as news media content? * Should the government try to interpret people’s intentions and decide if the content is meant to threaten or entertain the reader or audience? * How important is context when determining if speech is a threat or not? Could you say the same thing in two different settings and have two different interpretations? | **NO**   * There is no reason to give added protection to comments made on social media. Anti-threat laws address statements that arouse fear and intimidation, regardless of the forum in which they appear. Existing laws are adequate. There is no need to carve out an exception for online social media. * Individuals should not be allowed to engage in threatening and/or otherwise illegal behavior simply because it is done online. A threat is a threat no matter how it is communicated. Government has a legitimate right to combat online harassment and bullying. * If reasonable people construe statement s as threats, then they may be prosecuted as threats. Regardless of the intent of the person making them, such statements can cause intimidation and fear. If the possibility of prosecution causes individuals to think twice before making threats online, that is the price to be paid for living in a safe and civilized society.   **The Judge asks follow-up questions.** |   **Judge: And now we will have closing arguments from each side. After closing arguments, I will turn the program over to the moderator who will facilitate the jury deliberations.** | |

**Exhibit J** *Jury Preparation Handout: Arguments Worksheet for Student Jurors*

**Civil Discourse and Difficult Decisions**

Legal and Life Skills for Civil Discussion and Decision Making

***Elonis v. United States* Applied to Teen Facebook Postings**

**Directions:** Put an **A** byarguments for Andy and a **G** by arguments for the Government.

1. The First Amendment protects unpopular and even offensive speech. Such protections are necessary to preserve the free flow of ideas in a democracy.
2. The First Amendment does not protect all types of speech. For instance, obscenity, fighting words, and true threats are not protected and may be prosecuted.
3. To be considered a threat, a person must have the internal, subjective intent to make the threat. If threats are judged by an external, objective standard, this could lead to the prosecution of unpopular ideas simply because they offend the majority.
4. Using an objective standard to analyze threats would result in even more vagueness in the law. How is the objective standard to be determined? Is the standard a reasonable adult, or child, or some expert? An objective standard is too ambiguous.
5. Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether the caller ever actually intended to follow through with the threat.
6. Defendants should not be permitted to escape criminal responsibility for making threats simply by hiding behind disclaimers or saying that their threats are simply artistic expression or emotional venting.
7. When a threatening statement is made, the damage is done when the intended victim hears the statement. The defendant should still be punished for this type of conduct whether the defendant intends to carry out the threat or not.
8. People make all kinds of exaggerated statements that, if taken out of context, can be construed as threats. This is particularly true for anonymous statements that are made on the Internet and social media. People should not have to choose either to remain silent or run the risk of a criminal conviction.
9. The context of a statement can be used to determine whether or not it is a true threat. When deciding a case, the jury will review all of the facts and put them in the proper context to make this decision.
10. Free expression is about pushing limits. If the majority can determine what speech is a threat and what speech is not, this could have a chilling effect on First Amendment freedoms by leading to self-censorship.

**Exhibit J-1** *Jury Preparation Handout: Arguments Worksheet Answer Key – ONLY for Jury Coaches*

**Civil Discourse and Difficult Decisions**

Legal and Life Skills for Civil Discussion and Decision Making

***Elonis v. United States* Applied to Teen Facebook Postings**

**Directions:** Put an **A** by arguments for Andy and a **G** by arguments for the Government

1. The First Amendment protects unpopular and even offensive speech. Such protections are necessary to preserve the free flow of ideas in a democracy. **A**
2. The First Amendment does not protect all types of speech. For instance, obscenity, fighting words, and true threats are not protected and may be prosecuted. **G**
3. To be considered a threat, a person must have the internal, subjective intent to make the threat. If threats are judged by an external, objective standard, this could lead to the prosecution of unpopular ideas simply because they offend the majority. **A**
4. Using an objective standard to analyze threats would result in even more vagueness in the law. How is the objective standard to be determined? Is a reasonable adult, or child, or some expert the standard? An objective standard is too ambiguous. **A**
5. Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether the caller ever actually intended to follow through with the threat. **G**
6. Defendants should not be permitted to escape criminal responsibility for making threats simply by hiding behind disclaimers or saying that their threats are simply artistic expression or emotional venting. **G**
7. When a threatening statement is made, the damage is done when the intended victim hears or reads the statement. The defendant should still be punished for this type of conduct whether the defendant intends to carry out the threat or not. **G**
8. People make all kinds of exaggerated statements that, if taken out of context, can be construed as threats. This is particularly true for anonymous statements that are made on the Internet and social media. People should not have to choose either to remain silent or run the risk of a criminal conviction. **A**
9. The context of a statement can be used to determine whether or not it is a true threat. When deciding a case, the jury will review all of the facts and put them in the proper context to make this decision. The emojis in this case – especially, the knife -- are convincing evidence that this is a true threat. **G**

10. Free expression is about pushing limits. If the majority can determine what speech is a threat and what speech is not, this could have a chilling effect on First Amendment freedoms by leading to self-censorship**. A**

