*For the Presiding Judge: Table of Contents*

**Civil Discourse and Difficult Decisions**

Legal and Life Skills for Civil Discussion and Decision Making

**Presiding Judges should have the following materials in their program folder.**

**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 the Volunteer Attorneys

*All participants have copies of the following:*

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

 **Courtroom Simulation Materials –** Only for the Judge, Attorney Coaches, Student Attorneys

1. **Opening Protocol**
2. **Talking Points**
3. **Closing Arguments Worksheet**

**Reality Check Quiz and Discussion Prompts**

1. **Quiz –** Handout for All Students
2. **Answer Key --** Discussion Prompts Only for the Judge

 **Evaluation**

1. **Feedback Form –** Handout for All Students

*Job Description: Presiding Judge. See the Detailed Agenda.*

**Civil Discourse and Difficult Decisions**

Legal and Life Skills for Civil Discussion and Decision Making:

**Role and Responsibilities of the Facilitator:**

* Make sure that your folder contains everything listed in the folder’s table of contents.
* Preside over the simulation.
* Point out, encourage, and guide civil discourse techniques.
* Open the floor to questions on any topic during the Q/A session.
* Lead the discussion and share life advice on the topics raised in the Reality Check Quiz.

**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:** Use the scripted *(Exhibit G)* **Opening Protocol** and semi- scripted *(Exhibit H)* **Talking Points.**

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

*(30 minutes)* **The Facilitator Guides the Jury Deliberations in the Courtroom. Only Jurors Participate.** Jurors may not ask for input or ask questions of the Judge or coaches or student attorneys. Even though they are in the gallery, they are operating as if in a jury room.

**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. **The facilitator turns the program over to the Judge.**

**IV. WRAP UP**

**10:45 – 11:30 Judge Goes into the Well and Opens the Q/A Session on Any Topic.** When

*(Total 45 min)* the questions wind down, the Judge leads a discussion on the Reality Check Quiz the students filled out at the beginning of the event.

*(~ 15 minutes)* **Q/A Session:** The Judge Takes Questions on Any Topic

*(~30 minutes)* The Judge uses the *(Exhibit A-1)* **Reality Check Quiz Question Answer Key** as a discussion prompt.

**Note to the Host Judge:** Instead of going through the Reality Check 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 of the scenarios

**11:30 – 11:45 Group Photo**

*(15 minutes)* The Facilitator makes sure that the students fill out *(Exhibit K)* **Feedback Form***.* They give it to an adult on their way to the bench for the photo with the Judge. Group photo is followed by informal conversations with the Judge and attorneys.

**Note to the Judge and Volunteers:** The attorney volunteers (and law clerks, if they are involved) join the Judge in the well. Each volunteer stands alone in a different area of the well so that it is easier for students to approach them in small groups to ask questions. If all of the adults are standing together, it is intimidating for students to approach them.

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

**Civil Discourse and Difficult Decisions**

Legal and Life Skills for Civil Discussion and Decision Making

**8:00 – 8:30 a.m**. **Students Arrive and Complete Reality Check Quiz**

*(30 minutes)*

**8:30—9:00 a.m. Civil Discourse Activity**

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

* **Handout**: *Setting Ground Rules*
* **Handout:** *Identifying the Language of Civil Discourse*

**9:00 – 9:10 a.m. Attorney Coaches #1 and #2 Present**

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

**9:10 –9:35 a.m. Student Attorneys and Student Jurors Prepare for the Simulation**

*(25 minutes)* **In two rooms outside the courtroom:**Two attorney coaches prepare each student attorney team. **Handouts:** *Opening Protocol, Talking Points,* *Closing Arguments.* **In the courtroom:** Two law clerks or attorney volunteers lead the student jurors in a discussion of the arguments for both sides. **Handout:**  *Arguments Worksheet.*  Student jurors practice civil discourse skills.

**9:35 – 9:45 a.m. Break**

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

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

*(60 minutes)* Students use theprepared opening protocol and talking points to make their arguments before the Judge and student jury.

 **Jury Deliberations in the Gallery of the Courtroom**

Facilitator guidesfull participation in the 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 – 11:45 p.m. The Judge Leads a Discussion on Key Points from the Reality Quiz**

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

 **Group Photo**

 **Adjournment**

**Detailed Agenda** *-- Guidance for the Judge and Attorney Coaches*

**Civil Discourse and Difficult Decisions**

Legal and Life Skills for Civil Discussion and Decision Making:

*The guidance found here is in the individual job description for each role.*

**I. WARM UP**

**8:00 – 8:30 a.m. Students Arrive, Go Through Security, and Settle in the Courtroom**

*(30 minutes)* **Facilitator:** Have students take the *(Exhibit A)* **Reality Check Quiz** while waiting in the courtroom*. (Exhibit A-1) The A-1 Answer Key and Discussion Prompts sheet is for the Judge/Discussion Leader to use with the students at the end of the program.*

**8:30 —8:45 Facilitator Welcomes Group and Explains Program**

*(15 minutes) The Facilitator involves students in a (Exhibit B)* **Courtroom Tour***.*

**Attorney Coaches Introduce Themselves**

The coaches introduce themselves by telling: *Why I Chose the Law.*

**Note to the Attorney Coaches:** This section isn’t about the attorneys’ resumes. It is about establishing rapport with the students and giving them insight into the true motivations of lawyers. Lawyers briefly mention what they were like in high school as it related to their ultimate career choice and they give the “heart reason” they chose the law. For example: “I was very shy in high school. I couldn’t have imagined then, that I would be comfortable speaking in a courtroom like this. But I had an experience that made me want to fight for people who have been wronged. I was falsely accused of shoplifting in high school. It was scary and it almost ruined my future.”

**8:45 – 9:00 Facilitator Leads Warm-Up Activity: Getting to Civility -- What Does It Take?**

*(15 minutes) (Exhibit C)* **Handout:** **Setting Ground Rules** **for a Civil Discussion**

*(Exhibit D)* **Handout: Identifying the Language of Civil Discussion**

**Note to the Facilitator:** Walk students through the handouts. Here are examples of questions that can draw out students when setting ground rules and identifying language:

**Setting Ground Rules for Civil Discourse**

* 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? How can you show someone you are listening? How could this be incorporated into a ground rule – either what not to do, or what to do proactively to demonstrate attention?

**Identifying the Language of Civil Discussion**

* + - 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?

**II. PREPARATION FOR THE COURTROOM SIMULATION**

**9:00 – 9:10 Attorney Coaches #1 and #2 Present**

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

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

**Note to the Attorney Coaches:** Use a simple, storytelling style. Don’t read the material. 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 questions.

**Note to the Facilitator about Disappointed Students Not Selected as Attorneys:** The Facilitator has the teachers ask for volunteer student attorneys. The teachers select eight students from the volunteers – four on each side. Not all students who want to serve as attorneys can have that role. The Facilitator should tell them that the student jurors will have an opportunity to speak in open court during the jury deliberations. Also tell them that they will have time to talk with the attorney coaches after the program.

**Note to the Facilitator:** Attorney coaches #3 and #4 introduce themselves now -- following the pattern for brevity and rapport building established by Attorney coaches #1 and #2.

**9:10 – 9:35 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.

**Student Attorneys.** *In two nearby rooms:* Each team goes with its two coaches 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:

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

When using the Exhibits, start with Exhibit H Talking Points; then go to Exhibit I, the Closing Arguments and end with **Exhibit G** the Opening Protocol, just before they go to the courtroom.

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

**Start with Exhibit H – How to Use the Talking Points Handout**

Students can use it any combination of the following when presenting in the courtroom before the Judge and jury:

* Read the fully scripted talking points as they are.
* Use selected content from the talking points and make their own arguments to support them.
* 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)** on *(Exhibit H)* **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 *(Exhibit I)* **the Closing Arguments Worksheet** for student attorney #4 together. 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 or rebut the arguments of the other student attorneys.

1. Now, have the students volunteer for the student attorney roles for questions (#1, #2, #3) and closing (#4). Of the two attorney coaches, one should work with 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. Tell them that after each one makes his/her arguments to the Judge and jury, the Judge will ask each of them a couple of clarifying questions to better understand their arguments. Show them examples of questions at the end of each talking points section in the handout. The purpose of the sample questions is to expose them to the idea of thinking on their feet. 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.
3. After they have gone over their big question and reviewed the talking points for it, get the students talking about how they might anticipate and respond to the Judge’s questions.
4. End the preparation session by having them read out loud and practice ***(Exhibit G)* the Opening Protocol** before they go back to the courtroom.

**Preparing the Student Jurors.** Student Jurorsstay in the courtroom with the two jury coaches to identify and discuss possible arguments that will come up during the hearing and that they might raise during the jury deliberations. This segment also is an opportunity to practice the civil discourse skills they have learned.

Student jurors move into two, random (but roughly equal) groups – Group One and Group Two. The coaches guide the student jurors through the *(Exhibit J)* handout called**Arguments Worksheet** **for Jurors.** Student jurors read each statement and discuss it. See the suggested methods below. Coaches explain the Socratic Method and how it is used in law school. They use this method to draw out comments from the jurors and give them an idea of what a law school class is like. **See** *(Exhibit J-1*) **Arguments Worksheet Answer Key for the Jury Coaches.**

**Ways to get the Student Jurors to Interact with the Material**

**Objective:** Get every student involved in sharing their thoughts and opinions with, at least, one person.

1. Start by having students **pair up with a neighbor** and discuss the first two statements.
2. Next, have students work in **groups of about four** to discuss the next four statements.
3. Have everyone in your group – **Group One or Group Two** – discuss the next two statements.

**Jury Coaches:** Use the Socratic Method to draw out your group.

1. Have the entire group – **Group One and Group Two together** – discuss the last two statements, specifically, and then discuss all of the statements as a whole.

**Jury Coaches**: Use the Socratic Method to draw out the entire group.

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

1. As we go along, let’s make a list of arguments that aren’t in the handout. We’ll analyze each one.
2. 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?
3. 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?
4. Those of you who oppose that argument, what aspect of the argument do you agree with?
5. Hmm, I can see from your facial expression that you have an opinion. What do you agree with or disagree with?
6. Who agrees with that statement? Let’s hear from two people who will tell us why that’s valid.
7. Who is unsure about your position on that statement? Tell us what you are thinking.
8. I see a couple of side conversations. Give us the benefit of your thinking. What is your opinion?
9. Who has changed your mind on any of the statements made so far? Explain your thought process.
10. Who agrees with the statement you just heard? How would you poke holes in the argument?
11. After considering all the arguments, which way are you leaning? How will you keep an open mind during the arguments made by the attorneys?

**9:35—9:45 Break. Student attorneys may use this time to continue their preparation.**

*(10 minutes)*

**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:** Use the scripted *(Exhibit G)* **Opening Protocol** and semi- scripted *(Exhibit H)* **Talking Points.**

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

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

**Note to the Facilitator:** After closing arguments, the Facilitator guides student jurors in the deliberations to ensure that everyone has the opportunity to speak. The Facilitator also helps ensure the civil discourse rules are practiced and encourages use of the civil discourse language that the students identified.

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 leaning toward 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.

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

**Note to the Facilitator:** 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. Important: Involve 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.

1. 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?
2. 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?
3. On the other side, what aspect of that argument do you agree with?
4. Hmm, you look like you have an opinion. You’ve just heard the argument, what is faulty about it?
5. Who agrees with that statement? Let’s hear from two people who will tell us why that’s valid.
6. 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.
7. 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.
8. 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.
9. 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.
10. 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**

**10:45 – 11:30 Goes into the Well and Opens the Q/A Session on Any Topic.** When

*(Total 45 min)* the questions wind down, the Judge leads a discussion on the Reality Check Quiz the students filled out at the beginning of the event.

*(~ 15 minutes)* **Q/A Session:** The Judge Takes Questions on Any Topic

*(~30 minutes)* The Judge uses the **Reality Check Quiz Question Answer Key** *(Exhibit A-1)*as a discussion prompt.

**Note to the Host Judge:** Instead of going through the Reality Check 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 of the scenario.

**11:30 – 11:45 Group Photo**

*(15 minutes)* **Feedback Form** *(Exhibit K)* The Facilitator makes sure that the students fill out the form. They give it to an adult on their way to the bench for the photo with the Judge. Group photo is followed by informal conversations with the Judge and attorneys.

**Note to the Judge and Volunteers:** The attorney volunteers (and law clerks, if they are involved) join the Judge in the well. Each volunteer stands alone in a different area of the well so that it is easier for students to approach them in small groups to ask questions. If all of the adults are standing together, it is intimidating for students to approach them.

**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: Students Face Off on Facebook

Andy Jackson is an 18-year-old senior at Northwoods High School. At the movies on Saturday, he sees his girlfriend Sarah Somers holding hands with their classmate, Sam Bennett. Andy becomes irate and leaves without speaking to them.

Andy is so mad that he vents his feelings to his friends, who drive him home to cool off. There is already bad blood between Andy and Sam. Both are on the varsity baseball team, and yesterday at practice, Andy hit Sam with a pitch.

Andy, who calls himself a rapper, often posts his lyrics on Facebook. In the past, he has posted lyrics raging about the school and his classmates. That night, he decides to express his feelings about Sam publicly. He posts these lyrics: “Hey, guy, better get ready for a scare, ‘cuz the next thing you know you’ll disappear in thin air.” In other posts, he says Sarah will regret the day she was sneaking around behind his back. **He ends the post with a series of skull emojis and wink emojis.**

Some of Andy’s posted lyrics suggest that he’s “gonna make them pay” and that no college will recruit someone who “can only play in the Paralympics.” Sam and Sarah are concerned about what they say are Andy’s “explicit” raps on Facebook. With this information in hand, their parents alert the school and the authorities.

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.”

Today’s hearing is in federal court, where Andy’s attorneys will argue that the charges should be dismissed because Andy’s statements were not true threats but free speech protected by the Constitution.

**Exhibit G** – *Opening Protocol: ONLY for the Judge, Attorney Coaches, and 8 Student Attorneys*

***Elonis v. United States* Applied to Students Facing Off on Facebook**

**Note:** Always stand when addressing the Judge.

**A Law Clerk Announces the Judge.**

**The Judge takes the bench, welcomes the group, and says:** 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?

**Judge: Is Counsel for the Defendant ready?**

**Andy Jackson’s Attorney #1** *(Stands at counsel table)* Yes, Your Honor.

**Judge : Is Counsel for the Government ready?**

**Government’s Attorney #1** *(Stands at counsel table)* Yes, Your Honor.

**Judge:**  **Counsel for the Defendant may proceed.**

**Attorneys for Andy Jackson, the Defendant**

**Attorney #1 *(Goes to the lectern)***

"May it please the Court. My name is \_\_\_\_\_\_\_\_\_\_\_\_. I am from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. My colleagues and I are counsel for Mr. Andy Jackson, the Defendant before this Court today. There are three issues before the Court. I will argue the first issue. Seated at the Defendant’s counsel table are my colleagues who will handle the other issues and closing arguments. They will introduce themselves and tell you where they are from. *(Attorney #1 sits down)*

**Attorney #2 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #2.

*(Sits down)*

**Attorney #3 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #3. *(Sits down)*

**Attorney #4 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_ and I will be handling the closing arguments for the Defendant. *(Sits down)*

**Judge: Counsel for the Government may proceed with your introductions.**

**Attorneys for the Government**

**Attorney #1** ***(Goes to the lectern)***

"May it please the Court. My name is \_\_\_\_\_\_\_\_\_\_\_\_. I am from \_\_\_\_\_\_\_\_\_\_\_ and I will be arguing the first issue on behalf of the Government, the United States. Seated at the Government’s counsel table are my colleagues who will handle the other issues and closing arguments. They will introduce themselves and tell you where they are from. *(Sits down)*

**Attorney #2 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #2. *(Sits down*)

**Attorney #3 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #3. *(Sits down*)

**Attorney #4 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_ and I will handle the closing arguments for the Government. *(Sits down)*

**Judge: Now we will turn to the major questions about this issue. The attorneys will make their arguments, then we will open the floor to you, in the audience, to join in the debate as jurors. The moderator will facilitate your deliberations so that everyone has the opportunity to speak. At the end, we will take a vote to determine the verdict.**

**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?**

|  |  |
| --- | --- |
| **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? If so, why? If not, why?
* 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?
 | **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 will disappear into “thin air” – a reference to the afterlife.
* 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 saying “I didn’t mean it.”

**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. 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 computer skills? 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 and winking smiley face. 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 newspaper and broadcast 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 a statement as a threat, then it may be prosecuted as a threat. 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 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.** |

**ATTORNEY #4 FOR EACH SIDE PRESENTS CLOSING ARGUMENTS**

Attorney #4 on each side refers to his/her worksheet and notes to deliver the closing arguments summarizing the key points for Elonis and for the Government.

**After the Last Closing Argument**

**Judge***:* **Now that you’ve heard the closing arguments, I will turn over the program to the moderator who will facilitate the jury deliberations.**

**Exhibit I –** *Closing Arguments Worksheet: ONLY for Judge, Attorney Coaches, and 8 Student Attorneys*

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

Worksheet Specifically for Student Attorney #4

**Purpose of Closing Arguments:** To persuade the jurors to adopt your view of the significant points favoring your teams position on each issue. Attorneys **argue the merits** of their case.

**Each Student Attorney Addresses the Judge and Jurors, Starting with:**

I would like to review with you the key points presented today.

**Read Aloud: Issue #1** -- **Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting**?

*Write the key word from the main point that you want to emphasize.*

*Why should the jury support your position on this point?*

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**Read Aloud: Issue #2—Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?**

*Write a key word from the main point that you want to emphasize.*

Why should the jury support your position on this point?

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**Read Aloud: Issue #3 -- Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?**

*Write the key word from the point that you want to emphasize.*

Why should the jury support your position on this point?

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**Exhibit A --** *Quiz Questions for Participants to Fill Out as They Wait for the Program to Start*

**Reality Check: Sometimes There Are No Do-Overs**

*Today’s Decisions Can Have Legal and Long-Term Consequences*

1. Because I’m 18, any federal crime I’m convicted of won’t have an impact on the rest of my life.

**True False**

2. My parents know that my friends and I are going to drink and they want to keep us off the road, so they buy the beer and take us to a federal park where we party and camp overnight. Law enforcement will definitely get involved even if we have parental supervision.

**True False**

3. I’ve been driving for two years. I’ve never been caught speeding and I’ve never had an accident. I do have quite a few parking tickets in my glove compartment that I’ve never paid. If I ever got stopped, say, on a federal parkway, the worst that could happen is that my insurance rates would go up.

**True False**

4. When I go to a bar, I use the fake ID that I bought on the Internet. I have heard that the site could be part of a national ring, but I’m not going to get caught. Even if I do, the worst that will happen is that they’ll take my I.D. and kick me out of the bar.

**True False**

5. I don’t drink or do drugs, but I go to parties where other guys do. Last Saturday, my best friend’s uncle bought us a keg and brought it across state lines to the party. I may have a problem even though I’m not actually doing the distributing or drinking.

**True False**

6. I’m on vacation in Colorado, where pot is legal. I bring some home to my state where pot is not legal. If I get caught with it, there is no problem because I bought it in a state where it is legal.

**True False**

7. Putting graffiti on a government building – like a federal courthouse – is my First Amendment right, even if some people consider my message politically incorrect speech. If I ever did get caught, I would just have to clean it off.

**True False**

8. I order nutritional supplements off the Internet that I get in the mail. I use them to improve my athletic performance. I need every edge I can get to win a college scholarship. These are pharmaceuticals and not illegal drugs that I’m getting from some street dealer, so I’m okay.

**True False**

9. I like to take videos at parties and share them on Vimeo. One time we staged a food fight that was a takeoff on the World Wrestling Smack Down. The parents thought we were really fighting. We called the video “Food Fight Club”. I may have legal troubles.

**True False**

**10.** If I ever did get convicted of something in federal court, I would just get probation. Probation in the federal system is just a matter of meeting with my probation officer and, maybe, doing drug testing for a few weeks. **True False**

**Exhibit A-1** *-- Quiz Answer Key and Discussion Prompts for the Judge or Discussion Leader*

**Reality Check: Sometimes There Are No Do-Overs**

*Today’s Decisions Can Have Legal and Long-Term Consequences*

1. Because I’m 18, any federal crime I’m convicted of won’t have an impact on the rest of my life.

**FALSE**

**A felony conviction affects several important civil rights: you lose the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any type of firearm. In addition, if you are not a U.S. citizen, you may be subject to deportation or exclusion from the United States and the conviction affects your ability to obtain U.S. citizenship. There are also collateral consequences that can affect your driving privileges and certain employment and business opportunities; deny access to government benefits, professional licenses in nursing, transportation or teaching, and program participation, such as receiving student loans or public housing.**

1. My parents know that my friends and I are going to drink and they want to keep us off the road, so they buy the beer and take us to a federal park where we party and camp overnight. Law enforcement will definitely get involved even if we have parental supervision.

**TRUE**

**Parents can be charged with contributing to the delinquency of a minor or hosting an “open house” party, both criminal offenses.**

1. I’ve been driving for two years. I’ve never been caught speeding and I’ve never had an accident. I do have quite a few parking tickets in my glove compartment that I’ve never paid. If I ever got stopped, say, on a federal parkway, the worst that could happen is that my insurance rates would go up.

**FALSE**

**Your license will be suspended until the tickets are paid and your car may be impounded.**

1. Sure, when I go to a bar, I use the fake I.D. I bought it on the Internet. I’ve heard that the site could be part of a national ring, but I’m not going to get caught. Besides, if I do, the worst that will happen is that they’ll take my I.D. and kick me out of the bar.

**FALSE**

**Possession of a fake ID is a third-degree felony in Florida and use of another person’s identifying information is a federal offense of aggravated identity theft that carries a mandatory 24 months in federal prison.**

1. I don’t drink or do drugs, but I go to parties where other guys do. Last Saturday, my best friend’s uncle bought us a keg and brought it across state lines to the party. I may have a problem even though I’m not actually doing the distributing or drinking.

**TRUE**

**Travelling across state lines while possessing alcohol by a person under age 21 is not only illegal but triggers the FBI’s division of Alcohol, Tobacco and Firearms and subjects you to a possible conviction for the federal crime of illegal transport of alcohol across state lines.**

1. I’m on vacation in Colorado, where pot is legal. I bring some home to my state where pot is not legal. If I get caught with it, there’s no problem because I bought it in a state where it’s legal.

**FALSE**

**The federal government and most states prohibit the possession of marijuana. Transporting marijuana across state lines is a federal offense.**

1. Putting graffiti on a government building – like a federal courthouse – is my First Amendment right, even if some people consider my message politically incorrect speech. If I ever did get caught, I would just have to clean it off.

**FALSE**

**You do not have a first amendment right to deface public property, including government buildings. This constitutes a federal offense of trespassing, tampering and vandalism. It may also subject you to similar state charges, including criminal mischief.**

1. I order nutritional supplements off the Internet that I get in the mail. I use them to improve my athletic performance. I need every edge I can get to win a college scholarship. These are pharmaceuticals and not illegal drugs that I’m getting from some street dealer, so I’m okay.

**FALSE**

**The distribution and transport of a controlled substance is a serious criminal offense. Depending on the quantity of the controlled substance, there may be mandatory minimum penalties that will be imposed. A controlled substance includes any anabolic steroid, narcotic, hallucinogenic, stimulant or depressant drug**

1. I like to take videos at parties and share them on Vimeo. One time we staged a food fight that was a takeoff on the World Wrestling Smack Down. The parents thought we were really fighting. Come on. We called the video “Food Fight Club”. I may have legal troubles.

**TRUE**

**Recording videos of fights has serious consequences; it can lead to disciplinary action in school, including expulsion, and criminal consequences as evidence of violence or bullying.**

1. If I ever did get convicted of something in federal court, I’d get probation. Probation in the federal system is just a matter of meeting with my probation officer and, maybe, doing drug testing for a few weeks.

**FALSE**

**For most federal offenses, probation or supervised release is mandatory and limits your ability to travel, restricts employment opportunities and supervision is on a weekly basis and may be over the course of several years.**

**Exhibit K** *-- Feedback Form for Students*

**Civil Discourse and Difficult Decisions**

*Student Feedback*

**Judge’s Name \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date \_\_\_\_\_\_\_\_\_\_\_\_\_**

**Your Name** \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*(first) (last)*

**School \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ City \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Your Grade \_\_\_\_\_\_\_**

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

*Feel free to use the back for additional comments.*

**1. Setting.** What was it like to have the program in a courtroom?

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**2. Judge.** How is this judge different from television/movie judges?

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**3. Volunteer Attorneys.** How were the attorneys different from television/movie lawyers?

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**4. Student Attorneys:** If you were a student attorney, what was the experience like for you?

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**5. Student Jurors:** If you were a student juror, what were the deliberations like for you?

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**6. As a result of this program:**  How do feel about serving on a real jury?

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**7. What will you remember from the Reality Check discussion?**

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**8. What civility skill do you plan to practice in class?**

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 **9. Would you recommend the program?** Yes \_ No \_ What will you tell your peers about it?

