



The Game Within The Game

By Justin Bernstein

It used to be simple. Before each trial, the student leaders from each team would attend a captains meeting, pick their witnesses, grab two ballots, and head to the courtroom. Witness selection was fairly predictable: other than a few “swing witnesses” -- witnesses available to both teams -- teams could essentially guarantee their witness lineups. But in the last decade, captains’ meetings have become far more strategic and complex, and witness lineups have become far less predictable. As a result, today’s competitors have to be ready for more contingencies in trial.

The modern era of case complexity began in 2007, with *Jeffries v. Polk City Police Department*, a civil lawsuit alleging systematic police brutality. By Nationals, the case featured 14 witnesses -- still an AMTA record. Only three of those witnesses were side-constrained, meaning 11 were available to either party. By our math, that created more than 25,000 possible witness combinations!

In 2011, mock trial gained a choose-your-own-adventure element. *Davis v. HappyLand Toy Company* was a wrongful death civil suit brought by the parent of a three-year-old boy. At captains’ meeting, the plaintiff could choose which of two complaints it “filed” -- a complaint alleging negligence per se, or a complaint for strict liability. This choice affected the admissible evidence, the applicable legal standards, and the available witnesses. In the negligence per se version, the plaintiff was required to call Dr. Zimmer, the former health department commissioner. In the strict liability version, Dr. Zimmer became unavailable to both parties. The *Davis* case also introduced the concept of “priority” witnesses: for example, if the plaintiff wanted to snag the toxicologist, it could do so immediately -- and without using its first selection in the captains’ meeting. But if the plaintiff didn’t exercise that priority, the toxicologist became available to the defense.

State v. Dawson (2012), a DUI-homicide case, featured the first conditional mandatory witnesses. If the prosecution called a blood-alcohol expert, Dr. Smith, then the defense was required to call its own rebuttal witness on the same subject, Dr. Norton. But if the prosecution elected to leave Dr. Smith on the sidelines, then Dr. Norton was barred too -

- and the defendant was assumed to have refused the BAC test. For the first time, the prosecution was able to guarantee one of its cross-examinations.

Allen v. Neptune (2013), a wrongful death case stemming from a scuba diving accident, had straightforward witness selection rules -- until Nationals. For most of the season, each side had five side-locked witnesses. But for Nationals, two of those witnesses flipped sides. Bailey Johnson, a rival dive instructor, switched from criticizing the defendant as a plaintiff witness to singing the defendant's praises as a defense witness. Meanwhile, defense-only oceanographer Jordan Nelson changed her conclusion and began testifying exclusively for the plaintiff. Teams had only a couple weeks to deal with the changes.

The last two seasons have been a choose-your-adventure roller coaster. *Park v. Duran* (2015) involved a wrongful death lawsuit after an 11-year-old shot a classmate. The plaintiff could choose to sue the shooter's parent based on either a theory of negligent parental supervision (the parent should have done more to prevent the accident) or a theory of intentional misconduct (the shooter was psychopathic, and the parent was automatically liable for the intentional conduct of his child). The defense also had some choices to make. It could choose which of three depositions the shooter gave: one claiming an accident, another claiming a Russian Roulette game, and a third in which she pled the Fifth. And that's not all: *Park v. Duran* introduced the first "witness strike": before the prosecution made its first pick, the defense could eliminate one witness, who would then be unavailable to either side.

This season, case strategy reached new heights in *State v. Bancroft and Covington* (2016). The prosecution team decided which of two defendants it wanted to prosecute: gaming commissioner Chase Covington for taking a bribe, or casino owner Avery Bancroft for giving it. Each defendant raised different defenses. Covington claimed innocence, while Bancroft claimed entrapment, thus requiring defense teams to prepare two entirely different defenses.

Yet, in some ways, AMTA's most challenging cases have been among its simplest. Recently, AMTA introduced brand new cases exclusively for the National Championship Tournament -- a civil case in 2015 and a criminal case in 2016. The cases more closely resemble the complexity of AMTA's pre-2007 cases: fewer total witnesses, fewer swing witnesses, and no choose-your-own-adventure theory selections. But with just 26 days to prepare an entirely new case -- instead of the usual seven months -- students competing for the National Championship have enough challenge as it is.