Seeing Through the M.I.S.T.
Trying Soft Tissue Injury Cases

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Soft tissue cases are a staple in personal injury law. Among the most common cases for the plaintiff's attorney, these cases can also be the most problematic in terms of convincing a jury to side with the client's cause. The minimal impact soft tissue (MIST) case is perhaps the most problematic because jurors have difficulty believing that such a minor impact can cause injury; this is so because the injury is one that typically cannot be seen on an x-ray or other diagnostic imaging test.

A soft tissue injury arises whenever an individual suffers an injury that does not involve a fractured bone or significant neurological defect. The most common type is the strain and sprain injury. Jurors and insurance companies alike often view these injuries with a skeptical eye given the lack of objective diagnostic findings to support them. Often still, the physician's objective findings during the client's physical examination typically involve a subjective component (e.g., painful range of motion testing) that leads to speculation of exaggeration and/or malingering on the part of your client.

Despite these obstacles, soft tissue cases can be won even in venues harboring the most defense-oriented jury pools. A favorable verdict rests in large part upon properly preparing your client for their testimony, effective use of your client's medical records, properly humanizing your client to the jury, and the utilization of effective trial techniques to aid in advocating the client's cause.

I. Preparing Your Plaintiff for Testimony

A common mistake made by many attorneys is the failure on their part to properly prepare their client for testimony. Often, witness preparation is left until the last minute and consists of a barrage of instructions on what to do and what not to do. Proper witness preparation takes time, commitment, and patience on the part of both the attorney and the client. While this manuscript focuses more on preparing the client to testify at trial, the attorney would do well to utilize many of the same preparation techniques in preparing their client for depositions. After all, depositions can be critical in terms of case development, case value, and can either restrict or enhance your client's testimony at trial.

a) Preparing to Prepare Your Client

In preparing your Plaintiff for testimony, you should not be an advocate. Your primary role is that of coach. This does not mean that you coach, or tell, your client what to say. Rather, it means that your job is to create a positive learning experience that allows your client to recognize and utilize their strengths, as well as recognize and compensate for their weaknesses. All plaintiffs, regardless of their level of education, how well they articulate, and no matter how personable they may be must meticulously prepare to testify at trial.

This meticulous preparation begins even before your pre-trial preparation session. Approximately one to two weeks before the session, you should send your client a copy of their deposition and discovery responses with explicit instructions to review them at least once beforehand. Make sure you do the same. Accompanying these materials should be a letter explaining to the client what to expect from the session so they are prepared and mentally ready to work when they arrive at your office. By providing your client with this homework, you avoid having to waste time covering old ground in the preparation session because your client's memory has been refreshed and they are prepared to go over their direct testimony.

b) Prepare Your Client for the Courtroom

You should begin your preparation session by educating the client on what to expect at the trial. Often, their only exposure to the courtroom setting has been vicarious in nature through television or movies. They may have been unfortunate enough to deal with small criminal matters or traffic infractions in district court, but the world of superior court is much different.

Make sure the client understands the steps of the trial and how the case will progress. Make sure they understand why there will be times when you and opposing counsel are in the judge's chambers while they are sitting at the table by themselves. Prepare them for obligatory procedural motions such as a motion for directed verdict. This prevents your client being confused and surprised in the courtroom and will help calm their nerves during trial.

You should also educate the client on proper courtroom decorum. Your plaintiff can testify to the jury by their actions in the courtroom, as well as through their statements on the stand. Thus, you want to be sure they send the right message. Stress the seriousness of the process and the need to follow your instructions. Tell your client to behave naturally. The trial is largely about them so it's okay to show the jury who they are. Make sure the client understands that they are not to show disrespect for the court by not standing when appropriate or chewing gum. Make sure they understand why it's important not to be late and why they should pay attention to all the testimony and evidence being presented. Jurors tend not to care about the case if they feel that your client also does not care. Let your client know that it's okay to look at the jury during the trial. Some clients are afraid to look at them or do not know they can. Make sure the client understands that it's not only okay, but that you actually encourage it. Let them know that they should actually look at the jury rather than shoot them shifty glances from the corner of their eyes that may diminish their credibility in the jury's mind. Eye contact helps the jury relate to the client and thus enhances the client's credibility.

Your client should also be informed that what may be appropriate in their normal everyday work life is not necessarily so in the courtroom. They cannot get up to use the restroom whenever they want. Plan ahead. They cannot go outside to smoke whenever they want. Use a nicotine replacement or quit. Their phones should be off and out of sight. They should have water and nothing else on the table. The jurors cannot have Starbucks and will resent your client for having it. It is particularly important to make sure that your client knows that they cannot converse with the jury during the trial. Do not take for granted that your client's normal and perfectly good common sense will be functioning during the week of trial. As lawyers, we are trained and conditioned on how to act in the courtroom and such behavior has become routine practice. Your client most likely has never been through a process like this before or even seen the inside of a courtroom.

c) Practice Makes Perfect

You *must* practice your client's testimony before trial. Simply going through a list of topics that you plan to discuss with them, along with a long list of instructions on how to discuss it is ineffective and unfruitful. The bulk of your preparation session should be devoted to practice and you should go through the direct examination at least twice. This obviously depends on your client, and you should be cognizant of their learning style and ability. If your client takes a little longer to learn the direct, or if they learn better by taking it piece by piece rather than an entire run-through, then you should do whatever accommodates your client. You *must* be patient. You are a coach, not a military drill instructor.

You should also practice in a manner that is conducive to a courtroom setting. If an actual courtroom or simulated courtroom is not available, then use your office's largest and most intimidating conference room. Sit at one end of the conference table and place your client on the opposite end. This will not only help them work on speaking loudly and clearly to communicate with the jury effectively (and avoid the court stenographer interrupting), but will also simulate the formality of the courtroom. The distance between the two of you will get the client used to not having you by their side the entire time and simulate the foreboding witness stand. Take breaks when a judge would typically take a recess to get your client used to the schedule. It is also recommended that you have your client dress in what they intend to wear in court. This allows you an opportunity to ensure that your client is appropriately dressed before it's too late.[1] Make sure they are stripped of all flashy jewelry. Jewelry in the courtroom should be limited to functional watches and wedding bands.[2]

Make sure that your client is not memorizing the questions you are asking them during practice. It is also advisable that you prevent them from taking notes. Your client's direct will sound rehearsed and your client will be left unable to adapt to any problems that may arise the courtroom's unpredictable environment if they study their notes and memorize what they are to say. Memorization and the study of notes on the part of the client invite only disaster in their courtroom testimony. A good technique to help avoid memorization is to ask your questions in a slightly different manner, or in a slightly different order, each time you go through the client's testimony with them. The goal is to develop a conservational tone and quality to the testimony and not a scripted question and answer interview.

You should not fill your client with dire warnings and a long list of instructions on what to do and not to do during the first run-through of their testimony.[3] This enhances their nervousness and puts their focus on your instructions rather than their testimony. Instead, let them talk while you listen and take notes (sparingly). The form in Appendix A will help you take quick, organized notes. This method allows you to see where their true strengths and weaknesses lie because it is the closest to your client's natural way of speaking. Adapt your examination to incorporate more of those strengths. Give constructive and positive suggestions to overcome their weaknesses and practice implementing your suggestions until they become a habit rather than an instruction to try to remember on top of everything else. Your first critique should consist of all positives and few, if any, negatives. This will bolster your client's confidence and motivate them to keep trying.

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[1] David Ball, Theater Tips and Strategies for Jury Trials 43 (3d ed. 2003)[hereinafter Theater Tips].
[2] James W. McElhaney, McElhaney's Trial Notebook 101 (4th ed. 2006).
[3] Theater Tips, supra, at 42.

In the subsequent run-throughs, you can begin to incorporate constructive criticisms in your critique. Take care not to deflate your client's confidence and be sure to still incorporate a large number of positives. On each subsequent run-through, pick only a few constructive critiques and work on them before moving on to others. You do not want to give your client a laundry list of fifteen to twenty things they are doing incorrectly. On each run-through, you will want to view the client both as an attorney and as a potential juror to make sure they appear credible and able to relate to the jury.

You should also pay attention to your client's bad habits. We all have idiosyncrasies that distract others from devoting their full attention to our message when speaking. These idiosyncrasies are especially pronounced when the individual has a fear of speaking in public. Gently point out these habits and offer your client a replacement as you progress through the testimony.[4] For example, if your client has a habit of twirling their hair when they are nervous and speaking, then tell them to instead twirl their thumbs under the stand out of the jury's sight. Assist your client with poor language habits as well. Active voice, rather than passive voice, should be used. Vivid imagery should be used rather than plain and ordinary language. For example, "The impact caused me to go forward then back against my seat" is much more effective with a jury as, "I was thrust forward then jerked back into my seat upon impact." In the soft tissue case, it is also a "collision" and not an "accident." Accidents just happen; collisions are caused by the Defendant.

You should continue to do run-throughs and practice the direct testimony until both you and your client are comfortable with it. Practice, Constructively Critique, Repeat. This may, depending on the client, require a half-day or even the entire day. These practice sessions should be done no more than two to three days before the actual trial to ensure your client does not forget important points. For example, if you are scheduled to start trial on a Monday then shoot for a Thursday or Friday preparation session. Proper practice will not only ensure your client's direct testimony is the most effective it can be, but will also provide your client the confidence necessary to be successful on the stand.

d) Cross-Examination

It is important that you spend a significant portion of your preparation session on cross-examination. The law school proverb states that a jury will forgive you for a boring direct, but never for a boring cross. Your goal with your plaintiff is to have them well-prepared so the cross is as boring as it can be. Prior to the preparation session, review your client's discovery answers and deposition and identify those topics which are particularly harmful to your case and that the defense is likely to question them on. In a soft tissue injury case, this will likely be a delay in presentment of symptoms or treatment. It may also be no record of any complaint of injury on the scene and barely discernable damage to the rear bumper of your client's vehicle. Develop an explanation for these with your client: "That's correct, I didn't go to a doctor for the first week after the collision, but I was using over the counter medications at home and taking it easy hoping to avoid medical bills," or, "No, there's not a lot of visible damage to my bumper, but it cost $1,000.00 to fix and everything in my front passenger seat flew onto the floor all the way up under the dash." Let your client know that they are not limited to "Yes" or "No." It is okay for them to explain their answers to the leading questions if appropriate and can be done in a way

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[4] Theater Tips, supra, at 46.

that does not make it look evasive. Probe your client's memory for the reasons behind their actions as most people do not act randomly.

Developing a list of possible cross-examination topics and questions can be particularly easy to do if opposing counsel is somebody you frequently deal with. Often, trial attorneys fall into a "if it ain't broke, don't fix it" pattern which results in the same analogies, questions, and arguments being used over and over again in every similar case. Use this lack of creativity and planning against them. Pull out old trial notes and deposition transcripts and prepare your client with them. Despite your extensive prep, there will almost always be a question the client is not prepared for. It is important to inform your client that they should not look to their lawyer for help answering the question.[5]

Your preparation session is largely about building trust and confidence with your client. Nothing erodes trust and confidence more than suddenly having the same lawyer who moments ago was a champion of the cause tear the case apart as if it were a seal and the lawyer a large shark. Have another attorney from your office ask them the questions on cross.[6]

e) Quit Whining – Developing the Pain & Suffering Argument

Jurors, like most people, do not want a laundry list of complaints from someone else. All of us have problems and stresses in our everyday lives. We tend to shut down and think "big deal" or "stuff happens" or "get over it" when we hear somebody begin to complain about their problems. You do not want your plaintiff to come off as a whiner.

Instead, show the plaintiff to be somebody who takes responsibility for their own life and tries to overcome the situation. In the pre-trial session (or even before), sit down with your client and brainstorm a list of items that they could not do after the collision or that were made more difficult. This is your laundry list of complaints. Now, for each one, ask the client why they wrote it down. Your typical response will be, "because." Explore why, however, it was important enough to write down. How did it make them feel? How difficult was it? Why do they remember this rather than something else?

Once you have a list of reasons to coincide with the client's laundry list, ask about each of the complaints: "How did you cope with that?" The answer to that question is the one you want the jury to hear. Have another person testify as to the complaint and how it affected your client. This technique will instill admiration in the jury for your client because he tried to make the best of a difficult situation, while at the same time allowing them to understand his suffering through another person. In short, your client is no longer a whiner but rather someone who deserves respect and compensation.

Let's say your client's cervical and lumbar strain prevented him from raking the yard and taking out the trash last fall. Instead, John's wife Jane did these things for him in addition to her normal household duties of helping the children with school, cleaning, and cooking. Jane noticed that John's inability to do these things around the house made him more irritable and put a strain on his relationship with her and their children. He yelled at them and seemed depressed. But, Jane also tells you that John did help the kids with their homework more than usual because she now had to rake the yard and take out the trash. At trial, have John testify about not being able to rake the yard and take out the trash and how he instead compensated by helping his children. Show that John wanted to be fair to his family and chose not to just

[5] McElhaney, supra , at 108.
[6] Theater Tips, supra.

lie around the house moping about his pain, placing a burden on Jane. Then call Jane to the stand and have her talk about how John's inability to do those "manly" chores caused a strain between them and the children. Have Jane testify as to how it seemed to make John feel like less of a man because he couldn't take care of his family as well as before in his eyes. The jury can now understand both John's pain and his suffering without making it look like John is whining about it.

This technique works well in the MIST case where jurors sometime feel that the injury is not that bad. For example, a juror may attribute your client's minor strain and sprain as feeling like they would the morning after a strenuous gym workout. Show them they're wrong.

II. Effective Use of Your Client's Medical Records

The contents of the plaintiff's medical records are often the most critical facts in a soft tissue case. MIST cases are typically not liability cases, but rather the defense hangs their hat on some causation argument such as peculiar susceptibility. Your client's medical records not only contain information concerning their medical history and any pre-existing condition, but can also be ripe with details useful in demonstrating a more forceful impact than may first appear. Thus, you must be intimately familiar with your client's records and must utilize effective techniques to assist you in proving your case to the often skeptical jury.

a) Preparing for Medical Record Use at Trial

The attorney cannot effectively use their client's medical records if they are unfamiliar with their content. It is essential that the attorney creates a quick-reference guide to their client's records in order to support their claims on a moments notice in trial. A properly prepared medical chronology is one of the most important tools an attorney can use to understand the soft tissue case.

A medical chronology should be created for both the plaintiff's related medical treatment and their prior medical history. Ideally, the chronology should be created using spreadsheet software so that the data can easily be sorted to fit the attorney's need. It should also be created shortly after the client has stopped treating. Used properly, it is an invaluable tool for the attorney in discovery, depositions, mediation, and especially at trial.

The related medical chronology should consist of the dates of service for each visit, the name of the provider being seen, the charges incurred, the type of treatment rendered, notes about the record itself, and any attorney comments that are relevant. The attorney comments section can be particularly useful as a quick-reference to unfamiliar medical terms and/or important notes that could raise issues at trial. You may choose to bold helpful facts in the records and use red text to highlight harmful facts for quicker reference. During your pre-trial preparation, or even before mediation, use the spreadsheet's sort function to ensure you have all of your client's medical records and bills to present as evidence. During trial, you have a quick reference guide to use when opposing counsel refers to specific information. This avoids the awkward and distracting moments of flipping through what can at times be hundreds of pages of records to find the office note referenced.

The prior medical chronology need not be as detailed. There is not much, if any, benefit achieved by doing a detailed summary of your client's emergency room visit for a sinus infection

four years ago when their injuries today consist of a neck strain. Rather, focus on the relevant prior medical records and do detailed entries. The attorney comments section is best used in the prior medical chronology to highlight the amount of time that has elapsed since their last similar complaint, or any differences in their subjective complaints and objective findings. For example, a useful entry may be: "Client's last complaint of neck pain prior to collision was 4 years prior and in the left trapezius region (4/10 VAS). Client complains of pain in right trapezius region post-collision (8/10 VAS)."

Creating an effective medical chronology can be time consuming, but reaps great rewards for the attorney. The chronologies save time in the long run and assist in safeguarding against missing important details buried deep in the records. The attorney would do well to create the chronology themselves rather than assigning the task to a paralegal. This ensures that the attorney is extremely familiar with the contents of the records and assists the attorney in effectively using them at trial. Sample medical chronologies are located in Appendix B.

Effective use of your client's medical records also cannot be achieved if they cannot be admitted into evidence. Prior to the trial, talk with opposing counsel and see if they will stipulate to the authenticity of the records. This will avoid having to subpoena the records custodian of every provider your client saw and can streamline the process of getting the records introduced into evidence. It has been this author's experience that most civil defense attorneys will stipulate to the authenticity of the records and allow them to be introduced as evidence in the trial without objection. There are, however, a few attorneys who refuse to stipulate and allow this streamlined method.

In this situation, if your client has only treated with one medical provider, such as a chiropractor, then the records can still be authenticated and introduced through the testimony of that provider. You will have to have the provider testify anyway to explain the treatment to the jury and to give an opinion on causation. The records can then be admitted into evidence through that physician's testimony because they will necessarily be used by the physician in forming their opinion about causation. If your client treated with more than one physician, the physician you choose to call at trial can still testify as to the record content of other providers and the other records can still be admitted as evidence if the doctor has reviewed the records of those other providers, the records contain information upon which he bases his causation opinion, and the information is such that others in his field rely on in forming their opinions, among other necessary elements. [7] However, the records cannot at this point be introduced as substantive evidence to prove the truth of the matters asserted in the records.[8] To introduce records in this manner, be sure to send a notebook containing your client's organized medical records to the expert physician well in advance of trial so they have time to review the information.

Authentication and hearsay issues can also be overcome by use of a subpoena issued pursuant to Rule 45(c) of the North Carolina Rules of Civil Procedure. This rule allows the records custodian to attach to the records a certificate and a copy of the subpoena in lieu of appearing at the trial of the matter. The records should be sent to the court prior to trial and not to your office. It is important to note, however, that Rule 45(c) specifically provides this procedure for "hospital medical records." This term is defined in N.C. Gen. Stat. § 8-44.1. Serve the subpoenas as soon as the final trial calendar comes out and provide the medical provider with envelopes in which to send the records to the court. Write "Trial Exhibits to Remain Sealed" on

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[7] State v. Wade, 296 N.C. 454, 251 S.E.2d 641 (1972)

[8] Brandis & Broun, North Carolina Evidence § 188. *Examination of experts in general.*

the envelope along with the case caption and docket number so the clerk does not rip it open upon receipt and instead files it appropriately.

b) Medical Record Use at Trial

Your client's medical records are perhaps the most important evidence in a soft tissue case. Therefore, you should be prepared to use them at trial for other purposes than just eliciting testimony from your expert physician. The medical records can be used to demonstrate important points, compare your client's prior health to their post-collision health, and can be effective aids in illustrating an expert's testimony.

Often, your client will have a relevant prior medical history either because of their physical constitution or a prior injury. This can make causation in the soft tissue case even more complicated because the defense may attempt to make it appear as though your client's current health problems are a continuance of the prior issue rather than related to the current collision. They may also try to persuade the jury that the past injuries have given your client a peculiar susceptibility which makes them prone to injury in minor collisions, where a person of average physical constitution would not have been injured.

In this situation, compare and contrast your client's related and prior medical records in depth. Look for portions of the records that highlight the differences before and after the collision. For example, on the intake sheet your client may have indicated a different pain scale, location, intensity, and effects of a prior injury to the neck than after the current collision. Enlarge these intake sheets and use them as an illustrative exhibit. Place them side by side in front of the jury to illustrate the differences in order to help show that your client has a new, legitimate injury. It is important to use creativity in assessing how best to use your client's records at trial. Make sure, however, that if you publish a portion of the medical records to the jury that you preserve collateral source and redact (inconspicuously) any mention in the record of health insurance or liability insurance as a primary guarantor on the account.

The effective use of your client's medical records can also be enhanced by use of the provisions of N.C. Gen. Stat. § 8-58.1. This statute allows the plaintiff to testify about the amount of the charges they incurred and establishes a rebuttable presumption that the amount of the charges is reasonable. It does not, however, eliminate the necessity of testimony by the physician that the treatment was reasonably necessary to treat injuries arising from the collision. Some charges, such as future medical expenses due to a permanent injury, are also not covered under the statute. Additionally, the jury can still determine that the expenses were not reasonably related to the collision. The statute does, however, greatly assist the plaintiff's attorney in advocating for medical bill damages to the jury in cases where the amount of the charges is often disputed by opposing counsel.

Ineffective use of your client's medical records at trial comes with publishing all the records to the jury. This often proves to be boring to the jurors and they are often confused by what they are reading because they do not have a medical background. It is this author's belief that they will grow to resent you for it and just casually flip through the pages without reading much of anything. You also run a serious risk of jurors seeing something harmful in the records while skimming through them in the jury box and then harping on those points in deliberations.

III. Personalizing Your Plaintiff

It is essential that the jury gets a sense of who your client is. Many of those jurors will be skeptical that your client could be injured in a minor collision. They may expect the defense to pull out a *Dateline* hidden camera video of your client playing tennis in a neck brace at any moment during the trial. In order to dispel these often unfounded stereotypes, it is up to the attorney to show the jury who the client really is and remind the jury that the client is a person instead of just "Plaintiff."

The humanizing process begins with how you refer to your client. In front of the jury they are neither "my client" nor "the plaintiff." To a juror, a client is a business transaction that pays for your Lexus. A plaintiff is an overly litigious person who drives mom and pops out of business and their insurance premiums skyward. Even worse, a plaintiff may be a person who spills coffee in their lap and expects to retire because of it. Rather, your plaintiff is "John" or "Jane" in front of a jury. They are not "Mr. Doe." The use of titles such as "Mr." and "Mrs." convey formality and unfamiliarity to the juror and should not be used. Of course, social custom may dictate an exception to this rule. If your client is significantly older than you are, or if they have achieved a title, such as "Dr.," then you will want to use the title and your client's surname. Otherwise, the use of your client's first name conveys familiarity to the jury and helps humanize them in the jurors' eyes. To effectively use this technique, begin jury selection by using your client's full name ("John Doe") and gradually begin to refer to them only by their first name throughout the beginning stages of the trial. This prevents familiarity from being thrust upon the jury who may find it uncomfortable or inappropriate in the very beginning.[9]

Your client should also look at the jury throughout the trial. The jury cannot get to know your client if he or she does not look at them. In voir dire, both you and your client should turn your chairs to face the jury. Both of you should be listening to what the jurors have to say intently rather than staring off into space or furiously scribbling notes. If the jurors think you and your client care about what they are saying and are listening, then they are likely to return the favor when you are presenting your evidence and making your arguments. During trial, your client should also periodically glance over and make eye contact with the jury. They should look at the jury, not the lawyer, when answering questions during their examination.

Throughout the trial show the jury who your client is outside of the case. At the start of their direct examination, have your client introduce themselves to the jury. This does not mean doing the following: "Your honor, we call the Plaintiff, John Doe, to the stand as our next witness…… Good morning Mr. Doe, can you please introduce yourself to the jury by stating your name for the record?" The jurors know your client's name and this law school textbook technique bores them and sets a bad tone for the rest of the examination. Rather, introduce your client to the jury by showing the jurors that your client has lived in the area of many years, is married, has children, goes to church, and works a regular job just like the jurors. If the client has a particularly compelling life story, find a way to bring aspects of that out in their testimony. You may wish to have the client's family attend the trial and sit in the gallery so the jury can see that the client has a family that cares about them. Talk with your client during recesses and share a laugh. Show the juror that the plaintiff is a person worth knowing and pulling for. You should do this with care, however. An overt plea for sympathy (or something that can be interpreted by the jury as such) is likely to backfire on you and turn the jury against you and your client.[10]

During your client's direct examination you should continue to show the jury who your client is rather than what happened to them. Do not use your client as the main source of

[9] McElhaney, supra , at 154.
[10] Id. at 159.

testimony about their pain and suffering after the collision. To do so will turn your client into a whiner. Instead, use friends, family members, and co-workers to discuss the suffering your client has endured. Your client's testimony should be focused on how they overcame the challenges everyone else has described.[11] This shows the jury that your client takes responsibility for their own lives and tried to make the best of the bad situation caused by the Defendant. People generally tend to have admiration for those who overcome the odds.[12]

IV. Effective Trial Techniques

An effective soft tissue trial begins with effective pre-trial organization. Too many times this author has seen attorneys march into court to argue a motion or try a case without being fully prepared. During trial, exhibits should be ready and easily accessible. Keep your counsel table as uncluttered as possible and use the bench behind counsel table to organize and lay out your exhibits carefully. The attorney should utilize a well-organized trial notebook rather than an expandable file to keep track of motions, the pre-trial order, their case-in-chief, opposing counsel's case-in-chief, and any other documents that may be needed. See Appendix C for an example of how to organize a trial notebook. No matter how it is done, organize your case materials carefully and meticulously.

Only so much can be learned about trial practice from law school study and books. To develop effective trial techniques, the attorney must glean from their own courtroom experiences. No matter what techniques are utilized, a large part of being effective in trial is dependent on your gut. If something doesn't feel like it's working, it probably isn't. Adapt. The following are techniques this author has found to be effective in trying soft tissue and other cases.

a) Opening Statements

Opening statements are perhaps the most important part of the trial aside from voir dire. The statements help frame the jurors' impressions of the evidence to be presented and can begin to solidify their positions. Most jurors have already made up their mind about the evidence by the time closing arguments occur. Thus, the opening statement should be creative and memorable to the jury. It should construct a mental model for the jurors to use in analyzing and evaluating the evidence presented during the course of the trial.

A good opening statement does not merely forecast the evidence to be presented. It should creatively tell the story of your client's ordeal. Stories are compelling and allow us to remember key points. The use of the story method in opening statements will instill in the jury your client's view of the evidence.

Entertainment is a key requirement of a good story. To use the story method effectively, the attorney must erase the canned phrases that law school has taught us. In your opening, there is no need to tell the jury: "You will hear testimony…" They know this already. "On the night of" or "on the day in question" is boring and passive. As is, "the evidence will show." A typical ineffective opening statement may include something similar to the following paragraph:

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[11] David Ball, David Ball on Damages: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases 89 (2001).
[12] Theater Tips, supra, at 195.

> The plaintiff in this case is seeking damages for pain and suffering and lost income. You will see medical bills offered into evidence which date from the day of the accident through four months later. These medical bills total $5,000.00. You will also see documents verifying the wages she lost and notes from her physician authorizing the time she missed. You will hear the plaintiff tell you that every morning for a month she woke up and had difficulty getting out of bed. She will tell you that simple tasks, such as washing her hair, became difficult as a proximate result of her injuries. The evidence will show the plaintiff would not have suffered these damages had it not been for the accident…

The jurors begin to get frustrated after several minutes of listening to the attorney talk about the case in this manner. They stop caring and get bored. They will not remember what the evidence was suppose to show or what the plaintiff had difficulty with five minutes after the attorney sits down. While they may look interested, the odds are good that they are day dreaming about something more interesting. This is a skill all of us have mastered by adulthood. Therefore, the attorney would do well to use the story method to keep the jurors engaged and actively listening. This can be done in a non-argumentative way that still forecasts the evidence. For example, using the story method the opening above can be rephrased as follows:

> Jane's desk became piled with medical bills in the months following the collision. $5,000.00 worth of bills. Jane looked at this pile of bills everyday for two weeks. Her injuries caused Jane to struggle with basic tasks like getting out of bed. She rose every morning gingerly and with sharp pain in her neck. Jane grimaced in the shower as she struggled to raise her arms above her tender shoulders to wash her hair. With simple tasks rendered difficult and painful from being slammed in the rear by the Defendant, Dr. Smith told Jane to stay out of work and take it easy so her bruised body could heal. Jane missed deadlines and alienated co-workers over that two week period in addition to losing those wages.

The jury is more likely to remember this opening statement because it is entertaining, devoid of legal jargon, and is easier to listen to. It personalizes the Plaintiff and creates mental images for the jury.

To enhance the effectiveness of the story method, the attorney should be creative. The author of a story need not tell the events of a story in chronological order. Neither, then, does the attorney. You are free to choose where your story begins and ends and you should choose to present the facts in an order that holds the jurors' attention and enhances your themes. The attorney may also find it effective to tell the story from the first person perspective of their client or another witness. While we cannot tell the jury to put themselves in our client's shoes, there is nothing that prevents us from telling our client's story in a way that has the jury do just that on their own. As long as it is non-argumentative, fair, and an accurate forecast of the evidence, a first person narrative should be safe from objection. Even if you do not utilize the first person, you should always tell the client's story in the present tense to make it more memorable and real to the jury.

Telling a good story requires good language skills. Forget legalese and recall the English language. We are not seeking "damages." We are seeking "compensation" or simply "money." It

is not a "vehicle." It is a car, truck, Honda, or Ford. The doctor did not "have occasion to treat the Plaintiff, John Doe." The doctor treated John. Invoke the use of imagery to create snapshots, or verbal pictures, in the jury's mind. The Defendant did not collide with the rear of your client's vehicle. Rather, the Defendant slammed into the rear bumper of Jane's Honda Accord. The Defendant did not fail to reduce his speed because he was following too close and not keeping a proper lookout. Rather, the Defendant slammed into Jane's Honda because he was tailgating her while texting on his cell phone. Use parallelism and repetition to enhance your key themes and points. Structure your story so that the facts create a rising action and climax that keeps the jury attentive and "hooked." Use the active rather than the passive voice to keep the action of the story moving. Use short, simple sentences to make points clear. The attorney can develop these techniques by reading popular stories to get a sense of how the authors utilize these language tools. A creative writing class can also prove beneficial.

Good storytelling does not end with the story's writing. Delivery is a critical aspect as well. Pay attention to the tone and cadence of your voice to maximize delivery and juror understanding. Rehearse your openings and closing prior to the trial at least twice in a mirror. This will help you identify and eliminate distracting body moments (e.g., swaying, shifting weight from one leg to another, etc.) and verbal habits (e.g., "uh," "uhm"). Use your hands to add emphasis to the story and assist the jury in creating a mental image of the facts. Most importantly, however, good story telling requires the attorney to step out from behind the podium. A podium creates a barrier between you and the jury which diminishes the effectiveness of your delivery. If you must use a podium, place it off to the side and use it only for a place to put your notes for quick reference.[13]

b) Witnesses and Examinations

A common and sometimes determinative issue in a MIST case is the amount of damage done to the vehicles involved. A jury finds it difficult to believe that an injury could result from a collision that caused barely discernable scratches or just a small dent to the bumpers. To combat this issue, make sure to devote a good amount of time in your plaintiff's direct examination to the force of the impact. You may also find it effective to use the Defendant as your own harms and losses witness.

Often in a MIST case where liability has been admitted, the Defendant will not testify. Defense attorneys will often not prepare their client to testify as they should because they have no intention of calling them to the stand to put on evidence. This is especially so when the Defendant will make a less than stellar witness due to credibility issues or their general personality. However, discovery sometimes produces evidence from the Defendant that tends to show the impact was more severe than what your photographs may show. For example, the Defendant may have testified in their deposition that upon impact they were flung forward and everything in their car fell to the floor. In one case this author tried, the Defendant stated in their deposition that when they slammed on their brakes seconds before impact, the front bumper of their car when downward and underneath the bumper of my client's truck. The Defendant also testified that her coffee mug and purse flew to the floor upon impact. This tended to show the impact was more jarring than what the pictures led one to believe. This particular Defendant also had a personality that made her seem flippant and incredible. When this situation arises and when you do not think the Defendant will testify on their behalf, consider calling them as your

[13] Id. at 15.

own adverse witness. Catching the Defendant off-guard to discuss these matters when they have not been prepared or only minimally prepared to testify can be an effective method in persuading the jury to side with your cause. Take care to use this method sparingly, or the Defense will see it coming and be prepared for it.

Expert testimony is another area in trial where jurors tend to loose focus and begin day dreaming. In this author's experience, most physicians are not dynamic speakers. Therefore, make sure you have the expert physician use visual aids to illustrate their testimony. Have them step down from the stand when using the aid to add some action to the examination. It may be useful to have them demonstrate what kind of testing they performed during their physical examinations and how they were able to tell that there was an injury to your plaintiff. Also be sure to have the expert use lay terms so that the jury can understand the testimony.

Expert testimony can be an expensive proposition for the attorney and client. This author has been charged in one instance $2,000.00 an hour for the physician to testify. Prepare your examination to utilize your time effectively. The best method of expert testimony is live testimony in court. This is especially so with chiropractic physicians. However, if this is cost prohibitive, then consider using a well-produced video deposition in lieu of live testimony. You should rarely, if ever, just read your expert's deposition transcript into the record.

c) Closing Arguments

Many of the same techniques employed to make an opening statement more effective also apply to closing arguments. Done correctly, the closing can make an even more effective story because argument is permitted and more leeway is given to the attorney in how best to present the story. In addition, the attorney would do well to explain complicated or unfamiliar concepts of law using much of the same language as the jury instructions. A key area that many jurors do not understand is the burden of proof in a civil case. Explain what "greater weight of the evidence" means and show how you have met that burden through your evidence (also remind them that testimony is evidence as well). Explain that it's about the quality of the evidence and not the quantity.

Try to preserve closing argument in a MIST case. The defense in these cases will often not introduce any of their own evidence. Do what you can to make sure they do so to allow you last closing. If they question a witness with a document, make sure they have marked it and introduce it as an exhibit if they have the witness read from that document. If the defense does not produce any evidence, then point this out to the jury in your closing. Opposing counsel in voir dire will often say something to the effect of, "You realize, ladies and gentlemen, that we do not have the burden of proof and are not required to put on evidence in this case. It is the Plaintiff's responsibility to prove their case by the greater weight of the evidence and to present such evidence to you. Will you hold it against my client if he does not present evidence?" The jury almost always says they will not hold it against them. Make them do so anyway. Throughout your case make the case about responsibility and use the defendant's lack of evidence and hole-poking tactics a demonstration of his continued avoidance of responsibility. The goal is to dispel any sympathy the jury may hold for the Defendant by making him look to be someone avoiding responsibility for injuring another person, rather than having him look as a person that is being sued by a greedy ambulance chaser.

d) You and the Jury

Your credibility is an issue with the jury along with your client's. Jurors today tend to think there are too many frivolous lawsuits and look at trial lawyers through a kaleidoscope of unfounded stereotypes. These stereotypes are often fueled by special interests groups in the mainstream media to push for tort reform and other issues. Therefore, you must act in a manner which shows the jury that you are not the "greedy ambulance chaser" and to enhance your credibility.

If the jury thinks you are trying to hide something, your credibility will be irreversibly tarnished and the jury will be less likely to side with your client's cause. If your client has a long, pre-existing history of neck and back pain from before the collision then bring it out in your opening and in direct. This not only takes the sting out of the defense's cross examination, but the jury will see that you have been open and honest about this harmful fact. Additionally, have your client testify and describe at the outset the minimal damage done to the vehicles. Then have them explain force of impact. While you do not want to hide the minimal property damage, you may wish to not show the jury photographs of the vehicles. Instead, force the defense to introduce the photographs if you think it helps you preserve last closing.

You should also take care with objecting. Jurors understand the need for objections, but too many objections can make them think the attorney is trying to hide something. The jurors know they are tasked with making a decision in the case and want all the information they can get to make a fair one. Too many objections prevent the jurors from doing so and tarnish the attorney's credibility. Instead, objections should be made sparingly and thoughtfully. Go through the evidence before trial and examine the admissibility of all the facts. If something is hearsay, do not object to it at trial if it easily meets an exception. Also, do not object if the statement or evidence will not seriously damage your case. Objections that are overruled can backfire and actually have the jury pay more attention than they normally would to the testimony.[14]

Pay attention to the jury and show them that you care about them. After all, they are the most important people during the trial because they make the decisions that directly impact your client. Earn their favor by keeping an eye out for their time. For example, you may wish to say, "Your Honor, I have more questions for this witness but I'm at the end of a section now. Even though we're about 5 minutes before our scheduled lunch break, this might be a good time to recess so the jury can beat the lunch crowd." Your efforts will be appreciated by the jury even if the judge says no.[15]

Do not treat the jurors like they are idiots. Avoid unintended insults in your statements. Also, do not tell the jury what to think. Set up your arguments in such a way that naturally leads the jury to the obvious conclusion. Let them think the inferences they draw from the evidence are their own ideas rather than yours. People like their ideas and are less likely to deviate from them.

V. How to See Through the M.I.S.T. – The Benefit of Trial

The MIST case is easy for the plaintiff's attorney to discount. The damages at issue and potential fee from these cases are small compared to cases involving more serious harms and losses. It is important, however, for the attorney to remember that while these cases may be small

[14] Id. at 203.
[15] Id. at 105.

to them, it is often the most important and only case their client will ever have. MIST cases can be won, and can be money makers, if extensive preparation and effective techniques like those discussed here are utilized by the attorney. Even if lost at trial, the case is still won if the client is satisfied that the attorney has done everything they can to win the case. This leaves client satisfaction high, which increases the likelihood of referrals down the road.

Most auto insurers have taken a hardball approach to these types of cases since the early 1990s. The largest and most profitable companies, such as Allstate and State Farm, have adopted tough take-it-or-leave-it strategies when dealing with MIST claims.[16] In this author's experience, these companies routinely extend settlement offers that are either well below the medical expenses incurred and/or offer only nominal amounts to compensate the plaintiff for their pain and suffering. This leaves the client in the unfortunate position of either gambling with a jury or accepting an offer that could potentially leave them owing medical bills through what is often no fault of their own. It leaves the attorney in the unfortunate position of having to expend serious time and cost to take the case to trial with uncertain outcome, or recommend a settlement that may not be beneficial to the client. Unfortunately, some cases tend to settle for these inadequate offers when the attorney does not wish to take the case to court because the trial may not prove cost-effective or profitable.

It is this author's belief that offers on MIST cases do not increase by argument with opposing counsel or the insurance adjuster. The offers do not increase by developing a reputation as a trial lawyer who will not try MIST cases. Offers on MIST cases increase by trial. Develop a reputation as a trial lawyer who will actually take these cases to trial; who will prepare extensively for the trial of these cases, and who uses the effective techniques discussed here, and your offers will increase on your other cases. This is especially so when you get a favorable verdict.

MIST cases are also perfect cases to be creative and try new trial techniques. The issues involved are often uncomplicated and the trial is usually comparatively short. Even if a defense verdict is rendered, you will learn more by losing the case than you will by winning. We gain ego from success, but we gain knowledge and insight from failure. Talk to your jury after the trial and get their opinion on your techniques and which arguments they found most persuasive. Do not forget to ask them about opposing counsel's techniques and arguments as well.

Despite the obstacles, soft tissue cases can be won. Proper preparation of your client for their testimony, effective use of your client's medical records, properly humanizing your client to the jury, and the utilization of effective trial techniques increase your chances of success in the courtroom. Gaining a reputation for trying these cases, rather than a reputation for always settling these cases, increases your chances of success outside of the courtroom in negotiations.

[16] Drew Griffin and Kathleen Johnson. Auto Insurers Play Hardball in Minor-Crash Claims. CNN, February 9, 2007. http://www.cnn.com/2007/US/02/09/insurance.hardball/index.html