

# **“Preparing for Alternative Dispute Resolution and Trial”**

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## **I. PREPARING FOR ARBITRATION**

### **A. Pre Hearing Agreements for Arbitration**

- a. Informal Agreements
  - i. Evaluate working relationship you have with opposing counsel
  - ii. Attempt to work out agreement as to any discovery issues
  - iii. Agree on deadlines and time frames; confirm with letter
- b. Written Agreements
  - i. Work out deadlines and time frames; confirm with formal written agreement signed by all parties
  - ii. See attached Exhibit \* - *Pre Hearing Agreement*
- c. Scheduling Order

### **B. Witnesses/Exhibits**

- a. Professional Exhibits versus Homemade
- b. When to call witnesses

### **C. Medical testimony versus medical records**

- a. Evaluate causation issues
- b. Know your medical records
- c. Depose doctors as necessary

### **D. Reaching the Arbitrators**

- a. What are arbitrators looking for?
- b. Will they actually read your documents?
- c. What will ultimately sway them to your side?

## **II. PREPARING FOR TRIAL**

### **A. Pre Trial Preparation – Filing Suit to Mediation**

- a. Evaluating the Auto Accident Case for Litigation: In deciding whether to file a lawsuit in an auto accident case, there are many factors to look at. You must do a thorough and objective evaluation of your case. This includes an intensive study of your client and making determinations of what type of witness your client will make. Before filing a lawsuit:
  - i. Explore your client’s background. *See attached Exhibit \* - Trial Preparation Worksheet.*
  - ii. Meet with your client to analyze them. Ask them open-ended questions with no preparation and see how they respond.
    1. Example: “Describe the impact?”
    2. Example: “Describe how your injuries have affected your life?”

- a. If your client is not able to fully articulate answers to these questions, chances are they will not impress a jury.
  - iii. Prepare a written evaluation of your case to help organize your thoughts, theories and themes, and identify the problems with your case. See attached Exhibit \* - *Litigation Evaluation*
  - iv. Fully advise your client of the pitfalls and perils of litigation. See attached Exhibit \* - *Informational Sheet on Process of Litigation*
  - v. If you are comfortable filing a lawsuit after completing the above, get your client's firm commitment to the case. Demand prompt attention to your requests for information and impress upon your client the importance of cooperation in their own case.
  - vi. Complete a Pre Suit Review of your file before filing the lawsuit. Get in all information you need to complete your discovery answers before filing your lawsuit. Try to have your lawsuit filed at least 6 months before the statute expires. See attached Exhibit \* - *Pre Suit Review Checklist*
- b. Filing a Lawsuit: The following is a simple procedure review on how to file a lawsuit in North Carolina:
- i. The Complaint: When the decision is made to file a lawsuit, the first step is to draft a Complaint.
    - 1. See attached Exhibit \* - *Basic Complaint*
    - 2. NCGS 7A-243 Proper division for trial of civil actions generally determined by amount in controversy.
      - a. \$10K or less, District, More than \$10K, Superior
      - b. Amount is computed without regards to interest and costs
      - c. Rule 8(a)(2) is silent to penalty of pleading a specific amount over \$10,000, but be aware, earlier decisions suggested dismissal with prejudice under Rule 41 was proper. However, later cases state that this was too drastic and lesser remedies should be tried first (ie, dismissal with leave to refile after payment of costs, reprimand, order striking offending portion of the complaint, fines, etc)
      - d. Trial divisions between district and superior are administrative, not jurisdictional so a party can file suit for one dollar in district court and recover a million. Only jurisdictional limitation lies before a magistrate whose small claims court falls within the district division, where the amt in controversy cannot exceed \$4000.

3. Before the Rules of Civil Procedure were enacted, North Carolina proscribed to the theory of “factual” pleading. Rule 8 now only requires “notice” pleading.
  - a. A pleading complies with Rule 8 if it gives sufficient notice of the events or transactions which lets the adverse party understand the nature and basis of the claim, to file a responsive pleading to the claim and – by using the rules provided for obtaining pre-trial discovery – to get any additional facts he may need to prepare for trial
4. Punitive damages need not be specifically pleaded by that name in a complaint. All that is necessary is that the plaintiff place the defendant on notice as to the aggravating circumstances which would justify an award of punitive damages
  - ii. The Summons: A Summons needs to be completed and issued with your Complaint. The summons will list out the county/venue where case is filed, Plaintiff’s name, Defendant’s name, Defendant’s address and the filing attorney’s name/address information. The body of the Summons basically tells the Defendant he has been sued and that he needs to file Answer within 30 days.
  - iii. The Cover Sheet: The Courts require that a Cover Sheet be completed to initiate a lawsuit. You no longer have to complete covers sheets for additional pleadings, but you must list the AOC form number in the caption of your pleading.
  - iv. Checklist Help for Staff: See attached Exhibit \* - *Checklist to File a Lawsuit*.
- c. Service of Your Lawsuit: Rule 4(j) of the North Carolina Rules of Civil Procedure mandates how service is to be obtained upon the Defendant. If the Defendant resides in the State of North Carolina, service can be done in the following ways:
  - i. Personal Service (by Sheriff)
  - ii. Certified Mail, Restricted Delivery to Addressee
  - iii. Minor Defendant – Through Guardian Ad Litem.
  - iv. Out of State Defendant –Through Commissioner of Motor Vehicles.
  - v. Insurance Company –Through Commissioner of Insurance.
  - vi. Corporations – Through Secretary of State or Registered Agent
  - vii. Notice to Insurers - Both the liability carrier and UIM carrier must receive service of the suit package. This is also done by certified mail, return receipt requested upon the carrier. Restricted delivery is not required.

1. Note: Service upon an insurance company in a UM claim must be done through the Commissioner of Insurance.
- viii. Checklist Help for Staff: See attached Exhibit \* - *Service Checklist*
- d. DISCOVERY: Discovery is a term used to denote a phase in litigation where each side has an opportunity to pose questions to the other side and receive answers to said questions.
  - i. Whenever you file suit, send your Interrogatories and Requests for Production of Documents with the Complaint to the Defendant. If they are served with the Complaint, the Defendant has 45 days to answer. If they are not served with the complaint, the Defendant has only 30 days to answer. However, the Defendant can request an additional thirty days extension within which to answer the Interrogatories and Request for Production of Documents.
    1. See attached Exhibit \* - *Standard Interrogatories* and Exhibit \* - *Standard Requests for Production of Documents*
    2. NOTE: Call opposing counsel and ask them to email the discovery to you to put into your computer system.
  - ii. The following are some basic objections to lodge when answering discovery. Often you will make a standard objection to certain questions, and then answer the question, without waiving our objection.
    1. Attorney work product and materials prepared in anticipation of litigation
    2. Vague
    3. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence
    4. Overbroad and unduly burdensome
    5. Doctor/patient privilege
    6. Attorney/client privilege

The following are scenario questions and the corresponding objection:

Question Asking For

Photographs

Objection/Answer

Objection; attorney work product and materials prepared in anticipation of litigation. Without waiving said objection, see attached photographs marked as Exhibit \*.

Prior Medical Records

Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of

admissible evidence; doctor/patient privilege. Without waiving these objections, Plaintiff provides the following medical records for the past ten years **(or)** Without waiving these objections, Plaintiff will provide Defendant with a release to obtain the following medical records of the Plaintiff for the past ten years:

(List out prior providers)

Prior personnel records

Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection and limiting his answer to the past 10 years, Plaintiff provides...

NOTE: If you are not making a lost wage claim, personnel records are absolutely irrelevant and should not be produced.

Prior applications for insurance

Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; doctor/patient privilege.

Complete Criminal History

Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection and limiting his answer to the past 10 years, Plaintiff states....

- e. DEPOSITIONS: Depositions are governed by Rule 30 of the North Carolina Rules of Civil Procedure.
  - i. In brief summary, the rules say:
    1. the party wishing to take the deposition must give written notice (Notice of Deposition) to every other party in the action
    2. The Notice must state the date, time and place of the deposition and the person to be deposed
    3. 10 days notice is required for anyone to be deposed in our State

4. Out of state requires 15 days notice
  5. A subpoena is not required to compel the attendance of one of the parties (ie, the Plaintiff or the Defendant)
  6. A subpoena is required to get a non party witness to attend the deposition
- ii. Strike a Rapport with the Witness
1. Remember the old adage; you will attract more flies with sugar than you will with vinegar!
  2. Adopt an attitude or demeanor that will encourage a witness to talk. It is always best to adopt an open and friendly style.
    - a. Be interested in what they have to say
    - b. Maintain eye contact; not copious notes
    - c. Nod your head along with them to encourage them to keep talking
    - d. Show the witness you understand and sympathize with what he is saying
    - e. Different witnesses may demand different styles in how they are handled:
      - i. A non party witness – be more assertive and official; they have no stake in the matter and generally want to just tell the truth.
      - ii. A party witness – friendly and warm will encourage trust; they will have been thoroughly prepared by their attorney to be distrustful of you and you need to break that perception immediately.
    - f. Remember: You want to strive for a conversational exchange.
  - f. Funneling Technique: You are a reporter covering an exciting news story that just surfaced. You really don't know the details, just a general idea of what is going on. Your job, should you choose to accept, is to get all of the details so you can flash your smile as the first to bring this breaking news. You, of course, are going to ask:

Who, what, where, when, why

How, describe, explain, tell me about

Then you are going to pin down the details that make the story exciting.

This is how you do it.

**Who, what, where, when, why**

How, describe, explain, tell me about

**Follow up questions**

What do you mean? Give me details

**Exhaust**

What else? Is that it? Always? Never?

**Fill in gaps**

What about \_\_\_\_? Did you?  
Was there? Have you? Is it?

**Recap/Lock Testimony**

As I understand it? Is that right?  
Nothing more?

**Make Statements**

**Leading Questions**

**Theory Test**

Agree with me that  
Do not dispute  
It's true that  
You admit that

- g. MEDIATION: Who do you have to convince at mediation to get the best settlement?

Mediator: When you convince the mediator, he will twist the other side's arm harder.

Defense Attorney: Show the defense attorney you could try the case tomorrow if need be.

Adjuster: To he who controls the purse strings, impress him the way you will impress the jury.

Defendant: Encourage the defendant to demand to his company to pay up.

If you go into your mediation, and give a short presentation of your facts by:

- Fumbling through your file
- Reading from a few, hastily jotted notes on a yellow pad

- Continuously consulting your client for the correct information

. . . you will convince no one of your case, least of all yourself. By your actions, you are communicating to the other side that you are not committed and will not go the distance.

h. Ideas for Mediation Presentation:

- i. Mediation Notebook: Prepare a notebook that includes all of your exhibits. Number the exhibits in the order to be viewed corresponding with your presentation. Prepare a notebook for all involved. Show courtesy to even the Defendant by having one for him. You should make a notebook for the mediator, adjuster and the defense attorney. Most importantly, create one for your client as well. This shows that your client is your team member and it impresses the hell out of your client!

Add to the Notebook such things as:

- color copies of photographs
- medical chronologies
- copies of key documents (ie, medical records, bills, out of work documentation)

A Mediation Notebook is your best bet for the smaller personal injury case. You can have a staff member do the work and the cost of color copies is minimal.

- ii. Medical chronologies: Most defense attorneys and adjusters will probably ignore a medical chronology unless there are complicated medical issues. However, they are invaluable in helping the mediator understand the case and a mediator who doesn't understand, has a hard time arguing to the other side why they should pay up. They are also helpful in helping you to understand your medical issues; they force you to understand the chronology of your client's treatment.
- iii. Flowcharts: Flow charts are abbreviated information to help understand chronologies of events, volume of events or pattern of events. You can use flowcharts to show your client's medical treatment rather than a comprehensive chronology. Along the same lines, you can also use a calendar flow chart to show pattern of medical visits (ie, inpatient stays, physical therapy, etc).
- iv. Photographs: Use photographs of the vehicle damage and accident scene. You can blow these photographs up to an 8 ½ x 11 fairly cheaply and mount on foam board (price \$3.00). You can provide color copies in each participant's Mediation

Notebook (\$1.29 per copy). If you have a client whose lifestyle is obviously affected from the injuries, show photographs of activities your client did before the accident.

- v. X-rays: If you have a clearly obvious injury on x-rays, you can make a copy of the x-ray and show it for impact value at mediation. If you don't have an x-ray light box, tape your x-ray to a window with light shining through. Take a digital picture of the x-ray. Import it into your computer and edit as necessary. Print on high gloss paper and mount.
- vi. Power Pointe: This program is probably the most effective way to present your case at mediation. You get the benefit of having something visual to look at through the entire presentation. You can import photographs and x-rays into the presentation. With the right equipment, you can show video clips. Most importantly, it lets you effectively structure your presentation and by making your spoken presentation from the slides, you can speak without needing to refer to notes.
- vii. Highlighted Key Documents: If you have a medical record or other written document that is beneficial to your case, highlight it and present it as an exhibit. You can either do that in a Mediation Notebook, or import it into your Power Pointe presentation. You will want to do this with any statements from the doctor stating causation, giving an impairment rating or explaining future medical needs. These are the same medical opinions you will get from the doctor on the stand. You may want to highlight key deposition testimony or helpful statements from the investigating officer on the accident report (although make sure you can overcome evidentiary objections)
- viii. Blow Ups: Carefully analyze whether you want to use blow ups in mediation, because often you have limited space within which to set up and present these blow ups. If you are in a spacious enough conference room, you may want to consider using a blow up. Otherwise, I would stick to putting copies of your exhibits in a Mediation Notebook or using Power Pointe to show the exhibits.
- ix. Orthopaedic Appliances: If your client had to use crutches, wear a neck brace, use knee support or any other type of orthopaedic device or appliance, bring it to the mediation and talk about it.
- x. Hardware: A more stunning exhibit is showing the hardware that was once inside your client's body. Make sure you tell you client to ask the doctor for the hardware when they remove it.
- xi. Items Showing Your Client's Pre-Accident Activity: If you had a client that was a very active individual, show physical items that represented such lifestyle. If your client quilted,

have her bring in quilts to show what she used to do. If your client built his own house, bring in the photos that showed the progress of the work he did before the accident. Such items will have a clear impact on a jury, so you know an adjuster and defense attorney will take it serious at mediation.

- xii. Video Interviews: Interview family and friends on video to have them talk about how the accident has affected your client. If the circumstances warrant, pay your client's doctor for 10 minutes of his time and video his opinions. Have your reconstructionist talk on video as to his opinions. Take video of the accident scene. Take video of your client's hunting trophy room to show how active he was before. If you really bash the defendant's expert in deposition, show parts of the video so they know what a waste of money he is.
- xiii. Accident Diagrams: You have the tools with most word processing programs to create your own accident diagrams. With Microsoft Word's drawing program, you can do fairly detailed accident diagrams.
- xiv. Spinal Models: Show the other side that you know your medical and you know what you are talking about. You can buy spinal models which can be used over and over again in your cases. Or, if you want, go to your local chiropractor and ask to borrow his.
- xv. Medical Illustrations: Many of us have some type of medical library. Use medical illustrations to show what your case is about. Borrow from other attorneys if need be. The internet can be a useful tool in finding illustrations.

## **B. Effective Trial Preparation**

### a. Trial Notebook

#### i. Voir Dire

##### 1. **Standard v. Case Specific Questions**

- a. **Standard**: In every soft tissue injury case, you are going to have standard questions that you ask. You should have these saved on your computer for use over and over again.
- b. **Case Specific**: You need to reflect on your case and ask yourself, "What am I afraid of in this case?" List out all your fears. You need to discuss these with the jury. Create questions surrounding these fears.

- c. Do Not Be Afraid to Ask Questions! You must know everything, even if it hurts to hear it. You would rather the prejudice or bias of a juror come out during voir dire than during deliberations.

## 2. **Build Trust With the Jury**

- a. Be open and honest with the jury, and they will be open and honest with you. Carry on a dialog with the jurors. If you have something in common with a juror, share that with them and form a bond.
- b. If something smells really bad, air it out! If there is something that is harmful to your case that is going to come out in evidence, discuss it with the jury. Let the jury know that you are not hiding anything.

## 3. **Soft Tissue Issues**

- a. Chiropractors: Discuss with the jury their feelings on chiropractors. Explain that your chiropractor is not a medical doctor, but still has specialized training in anatomy, orthopaedics, neurology, radiology and is going to be accepted as an Expert Witness by the Judge. Weed out any jurors that say they could not accept an expert opinion from a chiropractor.
- b. Advertising: Many defense attorneys are now starting to cross-examine chiropractors with their advertising practices. Ask the jury: Has anyone seen any chiropractic advertising? What do you think of it? Would that advertising cause you to give less weight to their opinion and testimony.
- c. Low Impact: Be up front! Tell them, “The evidence is going to show that there is absolutely no visible damage to my client’s car, and I’m afraid that you, the jury, may believe it’s impossible to be injured if there is no property damage to the vehicles?”
- d. Injury That You Can’t See: Try to educate the jury what we mean by “soft tissue”, “connective tissue”, “sprain/strain”. Is this as much a real injury as a broken bone? Even if you can’t see it? Can they accept it as a real injury?

## 4. **Miscellaneous Voir Dire Advice**

- a. Don’t use lawyer language! Be down to earth, smile, show sympathy, laugh at the appropriate

moment. Show that you are not above them; but that you are one of them.

- b. Taking Notes: If at all possible, have an associate, law clerk or paralegal there to take notes for you. Focus your attention on the jury and make them feel special by keeping your attentions directed towards them. Engage in conversation, not a question and answer session.
- c. Deflect Defense Attorney's Tactics:
  - i. Length of time it took for Plaintiff's counsel to question the jury; discuss this with jury before starting.
  - ii. Attacks on chiropractor's credibility; head it off.

ii. Opening

1. **What Do Jurors Want?**

- a. Jurors want to be entertained. They do not want to be bored. They do not want to be lied to. Make sure everything that you say in Opening is going to be backed up by your evidence.
- b. Jurors want to be convinced. Because it's an injury they can't see, make sure they know that there is strong evidence to support your client's injury. Get that in their head from the start. Tell them about the "objective signs" of injury (swelling/spasms). Make sure they know that your client has NEVER been in another accident and has NEVER had treatment on their neck and back before this accident.
- c. Keep your opening statement short, but effective. Watch the jurors as you are speaking. If you lose their eye contact, or if they have that "glazed over" look in their eyes, wrap it up!

2. **Be Creative!**

- a. Opening statement does not have to be a boring recitation of the facts in the case. As long as what comes out of your mouth is going to be brought into evidence, then you are not limited to saying every few minutes, "And the evidence will show..."
- b. Attack what the defendant did wrong as a starting point. Not only do you want the jury to like your client, you want the jury to dislike the defendant. If the circumstances to the accident were egregious in anyway, make sure the jury knows it.

### 3. Preparation

- a. Do not throw opening statements by the wayside when doing your trial prep. Try this for preparation: Literally write out your opening statement, word for word. Do it on the computer or in long hand. Go through and pep it up! Delete your lawyer language that subconsciously came out while you were writing. Add more descriptive words and phrases. After you have a wonderful story that you can't wait to share with the jury, do an outline of it. When practicing, read the long version over a few times (but, do not memorize – you don't want to be rehearsed). When delivering your opening statement, use the outline if needed.

#### iii. Direct/Cross

1. **Plaintiff:** You must prepare your client for his or her testimony. Do not think just because your client is outgoing and personable that they can wing their entire testimony.
  - a. Meet with your client. Go over the entire direct exam. Pay particular homage to the really good statements or phrases by your client. Practice, practice, practice! Go through the direct examination until both you and your client are comfortable, but not rehearsed. Some clients take more work than others.
  - b. Bring out in direct all of the things that go to proving your soft tissue case.
  - c. Client's past health: Play up the fact that your client was very healthy before the accident (ie, never been to a doctor in 10 years prior to the accident, or never injured neck and back before this accident)
  - d. Address past accidents/injuries: Make sure your client is clear that although they had had a similar injury in the past, it had completely healed up. Point out the activities that they were doing at the time this accident occurred with no problems.
  - e. Show how active your client was at the time of the accident. Talk about all their hobbies and interests; point out their abilities to do physical activities.

- f. Show that your client had a great work attendance history (ie, never missed a day up until this accident) You client isn't the type to lay out of work.
  - g. If the property damage is minimal, show the severity of the impact in other ways. Have your client explain in detail what happened to their body upon impact. Explain if anything in the car flew about upon impact. How far was the car pushed forward. Was your client surprised or aware of the impending impact. Which way was your client's head turned.
  - h. Lecture your client on decorum. Be polite, open and honest. Admit your low points while looking the jury in the eye. Do not exaggerate symptoms in a soft tissue injury case. Do not fight with defense counsel; be polite but firm in your statements. Don't get stuck in the rut of supplying yes and no answers to the defense attorney; explain!
  - i. Prepare for Cross Examination: Have your client read, re-read and then read again their deposition transcript. Let them know that if their testimony differs at trial from the transcript, the defense attorney is going to beat your client over the head with it. Get another attorney from your office to cross examine your client as practice. Have your client prepared thoroughly for whatever attacks are going to come from the defense attorney.
  - j. Develop Pain and Suffering: If you want the jury to give you anything over the medical expenses, then you better have a decent pain and suffering claim. This is particularly important in soft tissue cases. Develop pain and suffering with your client and work with your client so that they are descriptive storytellers. When your client testifies about something they couldn't do, ask, "And how does that make you feel?"
2. **Investigating Officer:** To testify, or not to testify, that is the question. If liability is contested, you must call the investigating officer so authority is on your side.
- a. Speak with the officer ahead of time, in person if possible. Ask to see any written notes by the officer, or written statements by the parties.

- b. Explain the evidence that is inadmissible to the officer so they are not shocked that they can't testify about a certain thing.
  - c. Find out if the officer particularly remembers things the Defendant said, especially about speed and distances, etc.
  - d. Discuss complaints of pain at the scene.
3. **Expert Witnesses:** Thoroughly prepare for your expert witness.
- a. Medical Doctors:
    - i. Meet with your expert ahead of time. Don't waste the doctor's time by going over every question, but explain the general layout of your direct examination.
    - ii. Discuss in detail with the doctor all issues and questions surrounding causation
    - iii. Explain to your expert how the defense attorney is going to attack him
    - iv. During his testimony, have him teach the jury with drawings, diagrams or models. Get him out of the witness chair and in front of the jury.
    - v. For direct examination, don't go into agonizing detail about every single visit your client made. Boring! Rather, go through your meds and highlight the important stuff; then carry on a conversation with the doctor about that.
    - vi. Be careful of the correspondence you send to your doctor.
    - vii. If your client passed malingering tests, discuss in testimony
    - viii. Discuss property damage; ask your doctor if he diagnoses and treats someone based upon the damage to the vehicles.
  - b. Chiropractors:
    - i. Use all of the above ideas on your chiropractor.
    - ii. In establishing your chiropractor as an expert, go into detail about the courses they take in chiropractic college (ie, orthopaedics, neurology, radiology, anatomy)

- iii. If your chiropractor can say it, bring out the fact that medical doctors refer to him
- iv. If your chiropractor did a thorough and documented physical exam, go through it in some moderate detail. Have the chiropractor explain the testing he does and have him describe whether the test is an orthopaedic test or a neurologic test, etc.
- v. Have chiropractor describe what is a soft tissue injury; tearing of fibers and scarring when they repair. You can't see these on an x-ray.
- vi. So, how do you know a person has a soft tissue injury? Have your chiropractor explain his objective findings. For example, when he examined your client and he has muscle spasms in his neck, have your chiropractor testify that muscle spasms are objective signs of injury; that they are involuntary muscle reactions that cannot be controlled or faked by the patient. X-rays that show reversal of the lordotic curve can mean muscle spasming.
- vii. Have your chiropractor describe his treatment, the purpose behind it, and how it helps promote healing.

#### **4. Lay Witnesses**

- a. First accept that everything your client says in direct examination is disregarded by the jury. You need supportive witnesses who have no interest in the outcome.
- b. Meet with your supportive lay witnesses ahead of time. Have a conversation with them about your client. Find out what they know.
- c. Evaluate your lay witness; you want them confident, articulate, down to earth and open. If you ask them a question about your client and they can discuss the answer for several minutes, you've probably got yourself a winner.
- d. Look for the story tellers; those witnesses that can tell charming stories about your client. Particular stories paint better images for the jury. Show photographs if you can.

#### **5. Preparation to Cross the Defendant:**

- a. Preparation for your cross examination of the Defendant begins during the discovery deposition of the Defendant. It is important to ask ALL of the right questions and be complete in getting the Defendant's story. You can't ask too many questions, nor can you get too detailed. Go back and ask the same question over to see if their testimony changes.
- b. In preparing your cross, carefully read the Defendant's deposition. Highlight and organize all of the statements the Defendant said that help prove your side of the case. You may want to do a deposition summary. Base your cross off of the helpful things the Defendant will say.

#### 6. **Crossing the Defendant**

- a. Be prepared to impeach when the Defendant's testimony differs from the deposition transcript. All those numerous and detailed questions you asked during the deposition tend to be hard for the Defendant to keep track of and remember.
- b. Be polite but strong in discrediting the Defendant. There is no need for dripping sarcasm or facial grimaces for the jury to get it when the Defendant is lying or coating the truth.
- c. Save the greatest statement by the Defendant for last. Confirm they are not calling their own expert doctor, or biomechanical engineer to testify on the defendant's behalf.
- d. Consider calling the Defendant as an adverse witness in your case, especially if they are easy to ruffle and you want to throw them really off balance.

#### iv. Closing

- 1. **Is having last argument that important?** Yes! It is very important the jurors hear you last, especially so you can rebut the defense attorney.
  - a. Try to force the defense attorney to put on evidence. If there is a low impact issue, don't put the photographs into evidence; force the defense attorney to do it.
- 2. **Burden of Proof:** Proving our case by the greater weight of the evidence is a great argument tool, especially in soft tissue injury cases.

3. **Take the Wind Out of the Defense Attorney's Sails:** You know the biggest point that the defense attorney is going to harp on. Bring it up first and address it.
4. **Be Reasonable:** Your request for money has got to fit the case. Jurors are already expecting you to ask for a ridiculous amount so please them with a reasonable request. However, if your facts dictate a large recovery, don't be afraid to ask for it either. Remember: Some defense attorneys are waiving your Response to Monetary Relief Sought in front of the jury so make sure it is a reasonable amount.
5. **Before and After Evidence:** Jurors relate to examples that are given during testimony. During your direct examinations, you should have brought out plenty of evidence to show how your client was before the accident, and how they suffered after. Remember: Because the jury can't see your client's soft tissue injury, they need to see something else. Remind the jury of example after example that was given to them and hopefully they will conclude that no person in their right mind would suffer these things unless they were truly hurt.

v. Directed Verdict: Going on the Offensive:

1. Directed verdict is not solely the province of the Defendant. The Plaintiff is equally entitled to move for directed verdict. Plaintiff can move for directed verdict in a number of situations:
  - a. regarding the Defendant's negligence
  - b. finding the Plaintiff was not contributorily negligence
  - c. regarding a counterclaim Defendant has made against the Plaintiff
2. Prior to 1979, the Courts were very reluctant to grant directed verdict in favor of the party with the burden of proof. Particularly, the Court in *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297, (1971) held that directed verdict cannot be entered in favor of the party with the burden of proof if the Plaintiff's right to recover depends upon the credibility of his witnesses. This ruling severely limited the Plaintiff's ability to pursue directed verdict, as there is almost always some type of credibility issue to be argued.

3. Fortunately, eight years later, the Supreme Court handed down its decision in *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388, (1979) and the holding of the *Cutts* case was limited to its facts. The Court (quoting from *Kidd v. Early*)<sup>15</sup> stated that the standard for determining if the evidence of the party with the burden of proof is credible as a matter of law should be “whether the fact in issue is so clearly established that no reasonable inference to the contrary can be drawn.
4. The Court then annunciated three particular situations where credibility would be manifest as a matter of law:
  - a. Where non movant establishes the movant’s claim by admitting the truth of the basic facts of movant’s claim
  - b. Where non movant does not deny the authenticity or accuracy of controlling documentary evidence
  - c. Where the non movant failed to indicate specific areas of impeachment and contradictions when there are only latent doubts as to the credibility of oral testimony. (NOTE: there is an affirmative duty on the non movant to point out the areas of impeachment and contradictions. This means Plaintiff can rely on his own oral evidence if the Defendant fails to impeach or contradict him).(Latent doubt was defined by the *Kidd* Court as doubts which result from the fact that the affiant is an interested party).
5. When confronted with the need to determine if a directed verdict is proper in favor of the party with the burden of proof, the standard is essentially the same for both Plaintiff and Defendant, summarized simply as this: Whether a reasonable person could reach only one conclusion as to the verdict. As you might imagine, this is a very tough hill to crest for either side. And while the standard is essentially the same, the Courts do look at the motion differently depending upon who makes the motion. When the Defendant makes the motion, the Court looks at the evidence for insufficiency; when the Plaintiff makes the motion, the Court looks to the overwhelming effect of the evidence.<sup>16</sup> The *Burnette* Court still cautioned that directed verdicts should rarely be granted in favor of the party with the burden of proof because the credibility will normally remain an issue, even though

the movant may have established an uncontradicted prima facie case.

6. The case law is heartening and discouraging. The case law is heartening if we are defending against a motion made by the defendant. It is discouraging if we are making the motion. You might say that it is futile to even make the motion, if they are rarely granted. While this may be true, you should be prepared in case the circumstances arise where a directed verdict motion would be proper.
7. For example, there are instances that occur when the defense counsel will not admit liability, even though it is seemingly clear. This often happens in contributory negligence cases. If the facts show that the Defendant was clearly negligent (without regard at this time for the contrib. issue), then a motion will probably be beneficial, at least to the issue of duty and breach of duty. This scenario happened in the *Lassiter v. English* case. In that situation, the Defendant made admissions that made negligence on the part of the Defendant clear. The Plaintiff moved for directed verdict on the issue of “negligence” and argued that the Defendant admitted to not seeing the Plaintiff, even though her field of vision was unobstructed. The court granted directed verdict on the issue of negligence, and sent the case to the jury on the issue of proximate cause and damages.
  - a. The *Lassiter* jury entered verdict in favor of the Defendant, finding that the Plaintiff was not injured as a result of the Defendant’s negligence. The Plaintiff then moved for judgment notwithstanding the verdict under Rule 50 and this was granted on the issue of proximate cause. The Court of Appeals said this was improper as proximate cause was not the basis for the motion for directed verdict.
  - b. Although *Lassiter* was later overruled on other grounds (dealing with a new trial issue), the case is important for two reasons. The first reason is that it is clear that the Courts will entertain a motion for directed verdict by splitting the issues of negligence. That is, if the duty and breach of duty elements of negligence are proven, the case can go to the jury on the remaining negligence issue of causation. The second important thing about *Lassiter* was that it summarized the proper procedure for directed

verdict and JNOV. That is, in order for JNOV to be properly considered by the Court, the basis for your JNOV motion must be stated in your directed verdict motion. That is, grounds for your directed verdict motion must encompass everything that you may wish to later argue on JNOV.

8. Don't forget! You can also go on the offensive by making a motion for directed verdict to find that Plaintiff was not contributorily negligent as a matter of law. Remember: the Defendant has the burden of proof in this instance. Contributory negligence is an affirmative defense. The Courts have said that "motion for directed verdict is properly granted against the Defendant where the Defendant fails to present more than a scintilla of evidence in support of each element of his defense" This was the finding of the Court of Appeals in *Snead v. Holloman*, 101 N.C.App. 462, 400 S.E.2d 91 (1991).
  - a. The facts of *Snead* were simple. The Plaintiff and Defendant were traveling in opposite directions. The Defendant made a left hand turn in front of the Plaintiff, and the vehicles collided. The Defendant did not put on any evidence. At the close of the evidence, Plaintiff moved for directed verdict on the issue of Plaintiff's contributory negligence and the trial court granted said motion. The Court of Appeals upheld the trial court, stating that there was not a scintilla of evidence produced that the Plaintiff failed to keep a proper lookout and failed to avoid the accident. The Court also reiterated the proposition that evidence which merely raises conjecture on the issue of contributory negligence is insufficient to go the jury. Based upon Plaintiff's evidence, which was uncontradicted by the Defendant, the Court held that reasonable minds could not have differed on the issue of Plaintiff's contributory negligence.
9. Other Things You Need to Know: As a short summary of procedure and other points of law concerning directed verdict, I offer you the following:
  - a. PROCEDURE:

- i. Directed verdict motion is made at the close of the opposing party's evidence or at the close of all evidence
- ii. If the Defendant introduces evidence after having made a motion for directed verdict at the close of Plaintiff's evidence, he has waived that motion. He must then make a new motion for directed verdict at the close of all evidence
- iii. It is not proper for Defendant to make a motion for directed verdict at the close of his own evidence as the Plaintiff may have rebuttal evidence
- iv. It is mandatory that you state the specific grounds for your motion for directed verdict. Failure to do so is enough basis to have the motion denied. Note: Purpose of this rule is to allow the opponent to the motion the opportunity to correct the defect in their evidence with further proof
- v. If the Plaintiff fails to object to the fact that no specific grounds were offered in support of Defendant's motion for directed verdict, the Plaintiff loses that objection on appeal

#### 10. Did You Know?

- a. Directed verdict made at the close of evidence is an absolute pre-requisite to a motion for JNOV. *Smith v. Price, 74 N.C.App. 413, 328 S.E.2d 811 (1985)*
- b. Standard for JNOV is the same as directed verdict *Smith v. Price*
- c. Whether the presumption that a child between the ages of 7 and 14 was not contributorily negligent has been rebutted, is a question for the jury and directed verdict on the basis that the presumption has been rebutted is improper *Johnson v. Clay, 38 N.C.App. 542, 248 S.E.2d 382 (1978)*
- d. In reviewing the trial court's decision to grant directed verdict, the scope of review is limited to those grounds asserted by the moving party at trial *Crane v. Caldwell, 113 N.C.App. 362, 438 S.E.2d 449 (1994)*

#### 11. If Directed Verdict is Granted Against You:

- a. Ask the judge to allow the evidence to be re-opened so that you can correct the defect in your evidence
- b. Ask the judge for a voluntary dismissal under N.C. Rules of Civil Procedure 41(a)(2) in the interests of justice. Remember, your dismissal as a matter of right under 41(a)(1) is gone once you have rested your case.

vi. Charge Conference

- b. Using Multimedia courtroom presentations