

## Chapter 10

### PREPARATION FOR TRIAL

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### AUTOMOBILE CIVIL CASE

*PRESENTED BY:*

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#### I. INTRODUCTION

You open your morning mail and learn that you have an auto case set for trial in 3 months. After 30 years, I still have a moment of panic. However, now is the best time to plan a successful strategy to have the case ready for trial.

The first step is to call your secretary, paralegal or associate who is going to work with you on the case, and set up a time to meet. At the meeting, lay the file out on the table, and start brainstorming on what has been done, what needs to be done, and who is going to do it. With a large pad, write out the assignments, and assign them to a member of the team, even if you are the team. Set deadlines for each thing that needs to be accomplished. Place your "To Do" list somewhere accessible to the team. Each week, check off the items that have been done, and make new assignments as things come to mind.

Following are some of the things that you should consider including on your "To Do" list. Each case, of course, presents additional things that make for a successful presentation. Convert your list to a form that resides in each case for trial. Maybe then you will be able to avoid those moments of panic.

## II. SELECTION OF FACTS, WORDS AND PHRASES

### A. Identify Real Words to Describe Your Case

Since you took the case into your office, you have had ideas floating around in your head concerning what the case is about. You may have talked about the case with friends and family at home or at a cocktail party. While explaining the case, you have started using certain words and phrases that seem to epitomize what the case is about. You have been in court arguing motions, and have found yourself repeating the same phrases in describing the facts of the case to the judge.

What you have been doing is selecting those facts, words and phrases that speak the emotional and factual truth about your case. Sometimes when we get into the trial mode, we forget this “cocktail party talk” and become formal and legalistic. The jury understands and appreciates the cocktail party talk. At this time, if you have not already done so, write down the facts, the words, the phrases that make the case work for you. Think of ways to incorporate this summary into your work product for the trial.

### B. All Facts are Not Equal

Also, while you are selecting the facts that you want, remember that all facts are not equal. Some facts are powerful, some facts are distracting, and some facts destroy your case. You need to choose the facts that you want to introduce into evidence, and make sure that you have the witnesses and exhibits that will introduce those facts. There are several requirements for which facts you need to prove: facts that establish the foundation for admitting evidence, facts that meet the burden of proof, facts that answer any unanswered questions which might distract the jury, and facts that produce the desired emotional response from the jury. Once you identify all these facts, make sure that you have them in a usable, admissible form.

### C. Proof Chart

In this regard, it is very helpful to do a “proof chart.” I write the proof chart on that large pad and keep it beside the “To Do” list. First, I identify the elements that have to be proven to avoid a directed verdict; that is, what are the elements of the tort that I am trying to prove? I usually go first to the Pattern Jury Instructions for these elements. I will also look at treatises on torts, the General Statutes on auto law, and other research material. Once I feel that I have a good outline of the elements of the case, I identify the evidence that I have to prove each element. Once I identify the facts that I need, I identify the source of proof for those facts, such as particular witnesses, documents, depositions, or public records. I write all of this information on my proof chart. Hopefully, during this process you will take comfort that you have all you need to prove your case, or you know where to get it.

## III. OPENING

As part of the process of identifying facts, words and phrases which have power, start thinking about your opening statement. Most of us put off preparing the opening

statement until, well, just before it is time to give it. Rather than wait until the last minute, start putting down concepts in advance. Remember that you are creating the mental picture for the jurors with the words that you use. The jury will not remember the words in every case, but they will come away with the picture. You are the artist, words are your medium, and the collective psyche of the jury is the canvas. Words really start to have a ring of truth if they have been heard in the opening, and then are repeated in the direct and cross-examination. Therefore, you need to be very careful that the words you use create the type of picture you want.

A. The Jury's Two-Minute Summary

When the jurors go home at night after the trial starts, notwithstanding the court's admonition, they talk to their spouses about the case they are sitting on. When they talk about the case, they have a one or two minute summary that they use to describe the case. If you could hear this summary, you would know whether to settle right then or ask for a big verdict. This summary may change over the trial, but studies have shown that it is unlikely. This summary is derived from all the jury sees and hears from the moment they walk into the court room. The opening is one of the most important ingredients in fleshing out the summary.

B. Create an Observable Structure

You need to have an observable structure, whether chronological, transactional, story line, or witness by witness. This is essential for the jury, because it is easier to follow and it gives the appearance of being easier to follow. All of us have had the experience of listening to instructions, and realizing that we were lost and could not find the thread, and, therefore, shut down. If we knew there was a logical organization to the instructions, we would try to get back into the instructions. Another example of giving the appearance of organization is by structuring the opening in an outline, and then telling the jury the outline.

Of all these techniques, I prefer the story line approach. Most of us grew up listening to stories being read to us by our parents, grandparents or other people in our households. Tonight, if I could get my nine-year-old to sit down with me long enough for me to read a story, within minutes his demeanor would change, and he would settle into a warm fuzzy trance. This is even more true for the folks on the jury who weren't raised on TV.

If you can tell the jury about your case using the story framework, you will work a similar transition over the panel. I do not know what causes it, but I know that it works. It is great for building a connection between you and the jury, and also it is a good memory aid. The story line is told as if you are the omnipresent story teller. You start with "once upon a time", and tell the story from your client's perspective, as if you were looking at the accident unfold and the events that follow. You also use the chronological approach, which is the easiest way to recall a series of events.

C. Dual Story Line

I think you will also find that it is very effective in a criminal defense where you have an alibi defense. You use the dual story line describing what your client was doing as the crime was unfolding at some other location. You do a split screen for the jury, where you move from one story to the next. This may be the first time the jury really understands that there are two sides to the case. Also, it stops you from just reacting to the state's case.

#### D. Credibility Through Word Choice

Again, as with every other step in the trial process, you are trying to establish credibility and connection with the jurors. Do not let your vocabulary interfere with this effort. Use simple, everyday words. By all means, avoid using any lawyer words, unless they are essential and then are explained. Also, avoid words that may have a negative impact, such as "pain and suffering", "emotional distress", "medical malpractice" or "whiplash."

Another way to establish credibility is by sharing your weaknesses. Making fun of yourself is the easiest way to make the audience identify with you. The same rule applies when you share some weaknesses with the jury about your case.

In order to make an impact, avoid the weasel words, such as "we intend" "we may", "we hope" "we expect" to prove xyz. Rather, say "we will" prove to you. Do not remind the jury that what you say is not evidence - the judge will do this. Do not start every paragraph with "the evidence will show."

#### E. Outline Other Techniques

Use techniques like headlining and closing sentences to move you along, such as "Ladies and Gentlemen we have discussed the issues of liability..now lets turn our attention to damages." Also, remember other standard oratorical gimmicks, such as talking about things in threes. People remember three things. It is in their psyche. Everything comes in threes from God, the son and the holy ghost, to three tennis balls in a can. Also, use gimmicks like "let me list for you the key points on the questions of liability." If you ever do that in front of a class of students, that is the time they pick up their pens and start to take notes. It is also the time the jury picks up their mental pencils, and tries to remember what you are going to say.

### IV. JURY SELECTION

This is also a good time to start preparing for jury selection. As you focus on the facts that are important, the witnesses you anticipate being called and the evidence that will be offered, you can start identifying the type of juror to whom the case will have appeal. This is a process that should be ongoing throughout the 90 day period. Often, you can get a feel for what type of juror you want from talking about the case with other people who are not prejudiced in favor of the side you are representing.

#### A. Prepare the Court's Opening Remarks

Most trial judges make opening remarks to the jury at the beginning of jury selection. Some introduce the parties, and make a brief statement about the type of case the jury will be asked to try, and some examine the jury to a limited degree. While you are thinking about your opening, try to draft a short summary to give to the judge to use to describe the parties and the case at the beginning of jury selection. You, of course, want to be objective so that the judge will adopt your suggestion. However, even an objective statement can be an advocacy tool, if carefully drafted.

## B. Prepare Your Factual Statements

Also, recall that, during jury selection, you can make a brief introductory statement by way of introducing yourself and your client and giving an objective summary of the case. The longer the statement is, the more likely you will draw an objection from the opposing attorney that you are making an opening statement, and the more likely the objection will be sustained. Also, as the process continues, you will be allowed to make short factual statements from time to time, to give the next series of questions some context and relevancy. These factual statements need to also sound objective, but again they can start building a mental picture that you want.

## C. Jury Research

Depending on the size of your budget, there are steps that you should consider at this stage in preparation for jury selection. In most counties, the list of the potential juries is available to you in advance of the day of trial. With this list, you can start familiarizing yourself with the potential jurors. You can be highly sophisticated, and employ investigators to gather data on each juror, or you can be as simple as sitting down with your client, friends and employees and going over the list. In smaller counties, time spent with the jury list can be very insightful.

## V. REVIEW OF THE FACTS AND REAL EVIDENCE

Because of the nature of auto practice, you may have left the field work to others. Now that the case is going to trial, you should find time to review the physical evidence and examine the data that has been collected.

### A. Visit the Scene

Try to visit the scene at the same time of day, so you can see the angle of the sun, the foliage on the trees and the level of traffic at the scene. You should measure distances and angles yourself. Also, do the math on the speed and distance traveled to make sure that your theory is consistent with the evidence on the ground. Consider whether you should take your own photographs of the intersection, because as the trial lawyer presenting the case, you will know what is the best angle for the jury to see.

B. Review the Other Information That Has Been Collected

Although you have accumulated information in the case, it is often surprising to go back to the sources one more time now that there is a sense of urgency. Sometimes the information has new meaning because of other information you have gathered since the case came in. There are increasingly more and more informational sources available to the trial lawyer to supplement formal discovery. The use of computer databases is but one example. However, the old information sources are still as helpful, such as your county sheriff or courthouse personnel. Without attempting an exhaustive list, the following are examples of the types of informational sources available to you:

Register of Deeds (title holdings, security agreements, liens, corporate records, marriage licenses, assumed names, birth certificates)

Clerk of Superior Court (prior or pending lawsuits, criminal record)

Local Governments (maps, aerial surveys)

Police Information Network (prior criminal record)

Secretary of State (corporate filings, disclosure statements)

Department of Motor Vehicles (driver's license record, automobile title information)

OSHA Records and Reports (previous violations)

Trade Associations (voluntary standards of practice)

Securities and Exchange Commission (corporate filings)

Voluntary compliance organizations (JCOAH)

Patent or Patent Applications

Databases (stock reports, Dunn and Bradstreet, profit and loss, Medline)

Miscellaneous (courthouse personnel, newspaper morgues, index of newspaper articles, government publications, credit reports, advertising publications)

C. Final Requests for Information

Although you have been updating the information on wage and medical expenses, check with your client to make sure that all the data is current. Also, this is a good time to meet with the client to go over the potential witness list to make sure that all the key witnesses are still available and friendly to your side.

A supplemental request should go out to the medical providers to make sure you have the current medical records and statements of the medical charges. Also, any other source of data that you have previously used should be contacted, such as the employer.

## VI. DISCOVERY CLEAN UP

It is still not too late to clean up some of the discovery that you have already done in the case. There are probably details that were overlooked as the case went forward that each side should clean up.

### A. Collect on Promises

Review the file to see what you have not received from the opposing party that was promised in depositions and in motions. A telephone call at this stage will produce more results than a formal request. Of course, it also helps if you have information that the other side requested that you can trade.

### B. Supplement Discovery

Make sure that you supplement all your written discovery so that there are no claims of surprise by the other side. If there are additional medical records or medical bills that have been generated since the earlier response, you need to provide this additional information in a formal supplemental response. Also, if there are additional lost wages, you should provide this information. Supplementation is particularly important for expert witnesses, so that their disclosures are complete when they take the stand.

Also, during your deposition reviews discussed below, make sure that you look for any inconsistencies in the testimony and other statements, such as in answers to interrogatories. Now is the time to try to correct the problems, either with a supplementation to the paper discovery or a supplement to the errata sheet in the deposition.

### C. Last Minute Requests and Depositions

If you are not precluded by a discovery scheduling order, see if there are any last minute requests for admissions that you can send out to authenticate documents. Also, consider requests for those elements of proof that are not disputed but would be cumbersome to prove, such as that the traffic control signals were working at the time of the collision and the defendant was actually driving the car.

You should check with the key witnesses to make sure they are available for the trial. If anyone is not available because of a legitimate reason, schedule a “for trial” deposition. If the other side refuses to respond appropriately to a request for admission on an issue which is necessary to carry your burden of proof, schedule the deposition of a witness from the other side who can establish that fact.

## VII. EXHIBITS

Over the last few months, you have been accumulating the documentary evidence that is essential to your case. At this stage, you should begin looking at this evidence as props in a play. Aside from those exhibits that are required to prove the case, identify exhibits that create an image, and, thus, serve for memory retention. Also, look for exhibits that will create and sustain interest for a jury with a TV mentality. In addition, the exhibit gives you a chance to move and position yourself in the courtroom to better connect with the witness.

In selecting which exhibits to use, recall that you want to avoid repetition, delay, and loss of momentum. Also, exclude those exhibits that can be distracting and create conflicts with witnesses or other exhibits. Finally, analyze each exhibit to make sure that it does not offer a needed piece of evidence for the other side.

A. Prepare to Introduce Your Exhibits

Once you have selected your exhibits, consider how you are going to get them into evidence. One of the easiest methods is by stipulation. It is not uncommon for the Pretrial Order to contain a standard stipulation that all exhibits are “genuine and, if material and relevant, may be received into evidence without further identification and proof.” The problem with this stipulation is that you are also agreeing that all of the other side’s exhibits are coming into evidence. Therefore, do not agree to this stipulation without careful consideration.

If you count on this stipulation, you may not get it from the other side, and, thus, may be caught short at trial. Therefore, you should make sure that you have all your bases covered to get your exhibits into evidence without the stipulation.

B. Requests for Admissions

One of the best methods to rely on is requests for admissions which provide the proper authentication for the exhibit. You may not be too late at this point in time to send out a last set of requests to authenticate the exhibits that you need. Also, by reviewing the depositions that you have taken, you may find that you have the foundations that you need. If so, make sure you have the original of the deposition, and are prepared to offer that portion necessary to lay the foundation.

C. Identify Witnesses

You should also identify witnesses that can lay the foundations for the necessary exhibits. You may need more than one witness for an exhibit. Also, examine the exhibit with the witness to make sure that the witness can lay the necessary foundation. A classic problem is offering a photograph of the scene through a witness who did not see the scene at the time of the collision, or a photograph of the scene taken after the scene has been changed through road construction.

As you are selecting your exhibits, make sure that the witness you select to offer the exhibit can use it effectively. If you are going to ask the witness to draw, make the witness practice the drawing in advance. If the witness is going to be asked to lay the foundation for a learned treatise, make sure he agrees that the treatise is authoritative.

D. Plan for When You Will Introduce Your Exhibits

This is also the time to script out when is the best time to use the exhibits in the trial of the case. Some exhibits are necessary to meet your burden of proof, but are not dramatic and may even stall your momentum. Other exhibits are necessary, but may send the jury off into collateral issues that distract them. These exhibits should be offered in bulk and during lulls in the presentation.

Other exhibits may be very dramatic and forceful evidence. Therefore, careful attention should be paid to laying the foundation so that when it is time to offer the exhibit, use it with the witness or pass it to the jury, it comes in without a hitch and with the greatest flare.

As you are scripting out when to offer your exhibits, make sure to consider the strategy of when to offer it. Most trial judges will not allow the defense to offer exhibits into evidence in the plaintiff's case. However, often the defense can lay the foundation for the introduction of the exhibit in the defense case. Of course, if you are trying the case with a judge that limits the defense cross to the scope of direct, you may have to recall the witness in the defense case.

E. Specific Examples of Exhibits for an Auto Case

There are several exhibits that appear in almost every auto case. Although these exhibits are routine, make sure that they come in without a hitch and without creating any adverse confusion. The medical expense summary is a prime example where a slight mistake can color the jury's perspective of your client's intentions. In preparing the summary, first match up the clinical note with the actual bill. Make sure the dates on the bills and the records correspond. Next, examine the clinical note to make sure the history, present complaints, treatment and prognosis are directly related to the injury suffered in the accident. Only include those treatments that are related to the injury which was caused by the defendant. You may have to sacrifice some of your medical expenses in order to preserve the credibility of your claim.

Medical records are routinely moved into evidence in bulk with little thought by either side. Unfortunately, medical records can sidetrack your case with a number of problems. Universally, the medical provider makes mistakes with the history of the client's condition and the injury caused by the collision. The more of these records that you offer into evidence, the more fertile the ground for cross examination. Also, medical records generally contain information that is inadmissible, such as insurance data, Medicare information, and hearsay that does not qualify under an exception.

Before you offer the medical records, decide what you really need. Your client can testify to the number and frequency of visits to the hospital and doctor. Absent a challenge to the reasonableness of the medical charges, the medical records are not essential to your client testifying to what he paid for medical care. You will want to use some of the records with your medical provider, but only the records that are necessary to refresh recollection or to form the basis of the provider's opinion. Otherwise, keep out the rest of the records, because you are only adding another source of confusion to the case.

An alternative to offering the medical records is to offer a medical treatment summary. This summary document is prepared by you, based on the medical records, and approved by your medical provider. This exhibit is particularly helpful in a case with voluminous medical records. Of course, the medical records are available as required by Rules of Evidence, Rule 1006.

Another common exhibit is the police accident report. There are numerous appellate decisions on whether, when, and what of an accident report can be admitted into evidence. However, over the last 30 years, I have seen accident reports come in, be kept out and redacted in many different ways. Generally, accident reports are more trouble than they are worth. However, accident reports can play a dramatic role in the trial of the case. If you have the patrolman supporting your version of the facts of the accident, you want to refer to, refresh with and copy from the accident report as much as possible. You want to use the diagram as your working diagram with the witnesses.

Prepare mini briefs for those exhibits that you think may be objected to by opposing counsel. Carefully review all the exhibits to make sure that they do not contain objectionable material, such as medical records that contain insurance information or medical bills that contain mention of Medicare.

#### F. Preparation of Demonstrative Evidence

With the techniques available for using demonstrative exhibits, almost every presentation can be enhanced with demonstrative exhibits. At this stage, you should start planning for which exhibits you will use. For example, if you plan to use a chart showing the body parts that have been injured, there are a number of companies that can produce, mount and deliver charts for your use. Also, if you want to select portions of the testimony from a deposition, this can be enlarged and highlighted for a professional presentation.

If you want to go "low tech," such as using an overhead projector to display a transparency of the accident scene, check your photos to make sure that you have a clear picture of the scene. Also, if you think a video might be helpful, arrange for a video to be prepared.

#### G. Exhibits for Closing

In determining which exhibits you want to use, do not forget to select exhibits for use in your closing. Generally, all exhibits that have been introduced into evidence can be used with the jury in closing arguments. A question may arise when you try to use an enlargement of the exhibit during closing, to the extent that the enlargement may appear different than the original. To avoid this problem, have the witness who authenticates the exhibit also testify that the enlargement is true and accurate. Also, if you are going to use the exhibit in a Power Point presentation, make sure that counsel for the other side has seen the exhibit as shown in the presentation, and does not object.

There are other exhibits that you should consider for closing which will help accentuate your argument. The judge's charge to the jury will contain provisions that should be emphasized. If these provisions are shared with the jury during your argument, they will, hopefully, be understood and appreciated when the court repeats the charge. Also, there are statements of the law that may not be read to the jury in the instructions, but still help to substantiate your position. If you present these to the jury in an overhead, it allows you to spend time with the jury on language of the court. There are a number of different techniques that can be used to highlight the evidence for the jury. Finally, summary charts can be very effective to show the damages that your client has suffered.

#### VIII. WITNESS PREPARATION

At this point, it is critical that you begin your witness preparation. The first step is to identify each witness that you anticipate you might call in the trial of the case. If you have done a proof chart, you will know exactly who you will have to call.

Make sure the witness is aware of the trial date, the location of the court and the anticipated timetable, so that he can adjust his work schedule accordingly. Also, give the witness a contact person with whom the witness can check in as the trial progresses.

You should also conduct a criminal background check for your witnesses, in order to avoid any surprises at trial. Also, if the witness has made any statements in deposition testimony that can be verified, look at that information, if available.

A. Prepare a Witness Folder

For each witness you may call, set up a witness folder or file. The file should contain a witness information sheet. The sheet should include all the contact information for the witness such as addresses, telephone numbers, and e-mail addresses, in order that you are able to contact them quickly and easily when they are needed. The sheet should have a checklist with information that shows that the witness has been notified of the trial date, has been subpoenaed, if there was a deposition, where the original is located, and other pertinent things to do for the witness preparation.

B. Gather all Pertinent Information

The witness file should also contain a summary of the testimony that you hope to obtain from the witness. Also, if the witness has been deposed, have a copy of the deposition in the file, and also a summary or other short index of the deposition. Make sure the witness has a copy of the deposition for review.

If the witness has authored or received any correspondence or other documents, make sure that the witness has a copy of these documents. Also, if the witness has been discussed by any other witness, provide a copy of this statement.

C. Issue the Subpoenas Now

Issue subpoenas for all of your witnesses NOW. When you issue the subpoena, write the witness, and tell him why you have to issue a subpoena. Also, at that time, make sure you send all the documents for the witness to review, such as depositions, documents prepared by the witness, diagrams or other items to refresh the witness's recollection. Make sure the witness does not bring anything to the court that could be produced under Rule 612 of the Rules of Evidence.

D. General Instructions for Witnesses

The preparation of the favorable witness for trial is a crucial part of pretrial preparation. Consider providing the witness a sheet of instructions for proper behavior as a witness, such as the one attached as Form A. Also, provide the witness with a chronology of events that the witness should know. The witness should also be prepared by undergoing a question and answer session, where he is provided some insight into the type of questions that will be asked of him in the trial. You should also consider having another attorney role play the opposing counsel at the trial, using the standard cross-examination techniques.

You should convince your witnesses that it is not their job to persuade the opposing counsel of the merits of your case. Invariably, clients or other favorable witnesses will attempt to provide additional information, unrequested by opposing counsel, in an effort to win the lawsuit. You should also advise your witness, regardless of his perceived role in the case, that he should tell the truth. He should only tell what he knows, and if he did not perceive the facts, but is basing his opinion on assumptions, he should not provide that to the opposing attorney.

Coaching a witness to not tell the truth is unethical and illegal. Secondly, today's client may be tomorrow's plaintiff in a malpractice action against you.

If the case involves particular factual issues such as distances, do not hesitate to rehearse the questions and answers concerning these factual issues. Make sure the witness understands that he is not to guess. Also, review any previous statements by the witness, such as in an accident report or insurance adjustment interview.

Work with the witness on the use of words which might better describe the incident. For example, the witness might consider using "crash" rather than "accident." Insure that the witness focuses on one question at a time, and does not engage in a fencing match with the opposing attorney. Have the witness answer "yes" or "no", if appropriate to do so. But be sure the witness knows he cannot be held to a "yes" or "no" response if this answer will not adequately answer the question or explain the answer.

Make sure the witness understands the importance of the trial. Advise the witness that the jury will be judging his demeanor in answering questions. Encourage the witness to dress in business attire with minimal jewelry. Make sure the witness wears his glasses or hearing aid if necessary. Discourage the witness from drinking or using medication prior to the trial, or chewing gum, or taking medications during the trial which could affect his thinking.

E. Rule 612 Production of Documents

Beware that information provided to a witness to prepare him for a trial may be produced upon request pursuant to Rule 612 of the Rules of Evidence. Also, under cross-examination at trial, the witness may be made to appear coached if he was provided too much material. This is particularly true where the witness reviews deposition of prior witnesses. It is the general consensus, however, that a witness should be prepared, even at the expense of this potential prejudice.

F. Prepare the Witness for Cross-Examination

Many of the tactics used by the opposing attorney are predictable, and should be discussed with the witness in advance. With some advance preparation, the other side will lose some cheap theatrics, which otherwise they gain, to disrupt the flow of the evidence. Some of the classic traps are when the witness is asked to venture into areas where he lacks expertise. A classic example of this is where the witness is asked to draw the scene. Often the witness may have a reasonable memory of the scene, but is not expert at drafting. Also, the witness may be "tested" on terminology outside the witnesses background, such as legal, medical or regulatory jargon. Often, the other attorney will attempt to create inconsistencies between the witness and other witnesses in the case. Also, the witness may be lured into criticizing another witness. Or, the witness may be forced to guess at distances and times. Additionally, the witness will be tested on the statements in the pleadings.

In your preparation with the witness, you should cover each of the following:

1. Review with the witness all previous statements by the witness and legal documents such as the complaint
2. Review all statements or actions attributed to the witness
3. Review the statements of other favorable witnesses which may be in conflict with the statement of the witness
4. Consider areas of conflict and see if these conflicts can be resolved
5. Acknowledge that there will be conflicts in the testimony and not to worry
6. Have a practice session with the witness, consider videotaping the session
7. Consider having a joint session with several witnesses
8. Discuss with the witness the theories of the case and the defense, and talk about the facts of the case and how the witness fits in
9. Talk about trick questions, tactics of abuse and ways to resolve these problems
10. Consider videotapes that help instruct the witness

G. Prepare Your Redirect

Advise the witness that you will likely do redirect after the cross- examination. The witness might be flustered and confused at that time. Also, the witness may even appear hostile to you because they are angry at the situation. If you give the witness advance warning, you may defuse a difficult situation.

You should be able to anticipate the cross-examination while you are preparing the witness. If you write out the anticipated redirect, it may help the witness feel more comfortable. Otherwise, the witness may feel the need to “defend the case” while on cross, and come across as defensive.

H. Protecting the Expert

One of the most difficult tasks for the attorney is to "protect" his expert. Experts normally consider themselves above the fray, and are reticent to take instructions from the attorney. Often,

they like to expound on the issues in the case, often unresponsive to any questions asked by opposing counsel.

Many experts serve regularly for plaintiffs and defendants in the local community. It is not uncommon for them to have been previously employed by the opposing attorney. Discourage the expert from having private conversations with opposing counsel at the trial. Information may be provided which otherwise might not be discovered.

Encourage the expert to use plain English, and avoid technical terms. The expert should not be patronizing, should not be hesitant to explain that he has been paid for his analysis and time, and should not volunteer any information.

Pursuant to Rule 612 and Rule 703 of the Rules of Evidence, the expert may be compelled to produce information provided to him to prepare for the deposition or to formulate his opinions. Thus, reports, data compilations, and opinions of counsel, which would normally be covered by the work product privilege, may become the subject of production when provided to an expert.

## IX. USE OF THE DEPOSITION AT TRIAL

Because of the wide range of opportunities to use depositions in the trial, it is important at this time that you review all the deposition testimony. For some depositions, it is recommended that you summarize and index the depositions so that you have ready access to what you need in the deposition at trial. Review the depositions to see what elements of your proof are available to you without the need to call a witness, what material is there to refresh recollection and to impeach the opposing witness.

### A. Rules That Govern the Use of the Deposition at Trial

It is critical that you have an understanding of the rules as they apply to depositions. As the trial goes forward, you will need to be facile with the use of the deposition testimony. Rule 32 provides for the use of depositions at the trial of the case or upon the hearing of a motion or other interlocutory proceeding. There are several issues that you should consider. The first is whether the deposition transcript is admissible “under the rules of evidence applied as though the witness were then present and testifying.” It is not uncommon for evidence contained in a deposition to be unusable because the questions and answers are not admissible due to a failure by the examiner. An example is where the examiner failed to lay the foundation that would otherwise make the Q&A admissible.

Another issue is whether the person against whom you are offering the evidence “was present or represented at the taking of the deposition or who had reasonable notice thereof.” Generally, the rule provides that the party objecting can prevent the deposition

from being used against him if he proves that he was not properly served, or could not hire counsel in a timely fashion.

There are multiple problems presented by this provision. First, it is not uncommon to file an action with the intent of doing some discovery, identifying additional defendants and then adding them as parties to the action. This can present a problem with depositions that were taken before the other parties were added to the law suit. Depending on the importance of the deposition testimony, you may have to retake the deposition.

Another collateral problem is whether the deposition testimony taken in one case can be used in another. The general rule is that the deposition can be used in the collateral action, so long as there was sufficient similarity of interest that the cross-examination would have fully developed all the facts favorable to the party objecting.

B. When You Can Use the Deposition

Rule 32(a)(1) provides “[a]ny deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.”

Therefore, even if you have called the witness, as your witness, you can impeach them with their deposition testimony if it is inconsistent with the trial testimony, and is hurting your case. Now, usually you would try to use the deposition to refresh the recollection of a favorable witness first.

Rule 32(a)(2) provides “[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.”

This rule allows you to offer the deposition testimony of the adverse party for any purpose. This is, arguably, different from the prior rule which allowed you to use the deposition to impeach, because evidence offered to impeach, and for that matter to refresh, is not received as substantive evidence. What does this mean? When you have the burden of establishing elements of the cause of action, you have to do this by offering and having received evidence which establishes the elements in question. If you do not offer and have received sufficient evidence, you will suffer from a directed verdict dismissing your claim. If you offer evidence for the

purpose of impeaching the witness, this is not evidence received for substantive evidence or evidence to prove the element.

An example is in a red light/green light accident case. You have the burden of proving that your client had a green light. Your client is dead, and cannot testify what color the light was. You have a witness who testified by deposition that the light was green for your client. At the trial of the case, you call the witness to testify that the light was green. The witness testifies that the light was red for your client. You pull out the deposition, and impeach the witness with the deposition, pointing out that he testified differently at an earlier time. Have you carried your burden of proof? No. The impeaching testimony does not come in as substantive evidence. What do you have to do? You have to use the deposition to make the witness change his testimony, having now been refreshed, that in fact the light was green for your client.

Under Rule 32(a)(2), you do not have to do that exercise. If the party said the light was green for your client at an earlier deposition, you can offer the deposition transcript into evidence as substantive evidence proving that the light was green. Under many state evidence codes or common law, Rule 32(a)(2) is not available. Therefore, be mindful.

A deposition can also be used for substantive purposes when the witness (whether a party or not) is not available. Rule 32(a)(3) provides:

- (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
  - (A) that the witness is dead; or
  - (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
  - (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
  - (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

- (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 804 of the Rules of Evidence provides a broad definition of "unavailability as a witness" to include situations in which the declarant persists in refusing to testify concerning the subject matter of a statement, testifies to a lack of memory or is exempted by ruling of the court on the ground of privilege.

Rule 32 also provides that a deposition can be used for any other purpose allowed by the Federal Rules of Evidence. Examples of this are:

- (A) FRE- Rule 801(d)(1)(A) - Inconsistent deposition statement
- (B) FRE - Rule 801(d)(1)(B) - Prior consistent statement
- (C) FRE- Rule 804(b)(1) - Former testimony of "unavailable witness"
- (D) FRE- Rule 612 - Writing used to refresh for testimony
- (E) FRE- Rule 703 - Basis of an expert's opinion
- (F) FRE - 804(b)(3) - Declaration against interest

Also, the deposition can always be used to refresh recollection of the witness. Even the deposition of another witness can be shown to a witness, and the witness can be asked if that deposition provision refreshes his recollection.

Finally, under Rule 106 of the Federal Rules of Evidence, if a party introduces a recorded statement or part thereof, an adverse party may require him, at that time, to introduce any other part of the recorded statement or any other recorded statement which ought in fairness to be considered contemporaneously with it. Thus, if a party offers a deposition of a witness, arguably the transcript of another deposition or other recorded statement of the same witness can be offered into evidence by the adverse party, if it ought "in fairness" be considered contemporaneously with it.

In addition to using the deposition affirmatively, you can use it defensively. Rule 32(a)(4) provides that "[i]f only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts."

The pertinent language is "in fairness." Thus, the right to offer another part of the deposition is dependent on a finding by the court that the portion you want to offer is necessary to put the other portion in context. This is not a rule that allows you to offer portions that you could not otherwise offer.

C. Available Objections to Deposition Testimony

Under Rule 32(b), subject to the provisions of Rule 28(b) and subdivision (d)(3) of the rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Rule 32(d)(3) provides for two major rules for objecting:

- (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
- (B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

X. **PREPARE AIDS FOR THE COURT AND JURY**

At this stage, you should consider what aids you want to use with the court and the jury. These aids can give the appearance of professionalism. If you start the preparation of these aids early, they will fall in place as you move to trial. If you wait until the last minute, you will usually not have the time to do them.

A. Bench Books

A bench book is a notebook to be presented to the trial judge at the beginning of the trial. The bench book generally should contain materials which will be used by you during the trial of the case, which the court can have tabbed and available for a preview. Typically, a bench book will contain such things as the complaint and answer, trial brief, proposed jury instructions, briefs and motions in limine, plaintiff's exhibits and copies of important cases. The bench book is generally in a looseleaf binder, separated by numbered tabs. The front of the book should contain a table of contents, which will identify the items contained in the bench book for easy reference.

The bench book provides the court with those materials which will be helpful in understanding the case as it unfolds. If properly done, the trial judge generally begins the trial with a favorable impression of counsel.

Obviously, the bench book requires the attorney to be very organized as the trial approaches. A selection of exhibits and the anticipated evidentiary objections requires a thorough understanding of the case. Also, selecting the pertinent instructions requires counsel to anticipate

those issues which will be submitted to the jury. This process, although onerous, results in a professional presentation which is not lost on the court.

#### B. Jury Notebooks

A jury notebook is a looseleaf binder with tabs numbered to correspond to the exhibits to be offered at trial. Generally, the notebook is handed to the jury at the beginning of the case, in order that they can keep in an organized fashion all of the exhibits received during the presentation.

In those cases where the parties have stipulated to the admissibility of the exhibits in the pre-trial order, the jury notebook can contain all of the exhibits that you intend to offer. In those cases where there are going to be contested issues about certain exhibits, you might not place an exhibit behind that tab. As the exhibit is offered and received into evidence, you can then pass twelve three-hole-punched copies to the jury.

The advantage of the jury notebook is that it demonstrates to the jury that counsel is organized. Also, if the exhibits are already placed in the notebook, it saves time and confusion in that you do not have to pass the exhibits to the jury. Some judges will not allow you to publish an exhibit until a particular time during the day. As a result, sometimes the jury is listening to testimony about an exhibit that they do not have in front of them. If the exhibit is already available, most courts will permit the jury to review it as you are discussing it with the witness.

Finally, because the exhibits are nicely kept in the binder, juries are generally more attentive to each exhibit, because it is not misplaced, wrinkled, or cast aside.

For those exhibits that are going to be represented by demonstrative aids, counsel might consider having a smaller version in the jury notebook which is the same as the enlarged version to be placed before the jury for its review with the witness. This technique is particularly useful during closing arguments, because the jury can quickly turn to the exhibit during summation, rather than have to leaf through pages and distract themselves and their fellow jurors.

#### C. Proposed Jury Instructions

Proposed jury instructions should be completed and presented to the judge in the bench book at the beginning of the trial. Generally, the trial court will rely upon the North Carolina Pattern Jury Instructions. If the instructions do not conclusively control an issue in your case, you should offer additional instructions clearly delineated as additions to the pattern instructions. Also, to the extent that there has been a change in the case law since the publication of the pattern instructions, you should incorporate this as well.

Many trial judges do not include contentions in reading the instructions. However, if your contentions are carefully worded, concise and applicable, the court might be inclined to read your contentions. This can be very effective if you include them in your closing arguments toward the end just prior to the jury hearing the contentions again from the court.

Generally, it is recommended that you give a comprehensive set of instructions to the court, in order that it can essentially read from your set, rather than to cut and paste from the instruction book. For those judges that use a laptop at the bench, it would be recommended that these instructions be available to the court on a floppy disk.

D. Motions in Limine

The practice of motions in limine has grown over the last twenty years, and is traditional at this point, whether this is a distrust of opposing counsel or a recognition of jury psychology that says you can not unring the bell. Although you can offer and argue all your motions in limine before the trial starts, I prefer to offer the motions as the trial progresses when I anticipate that the court's involvement might be needed. For example, I would save the motions involving closings just before they are to be given by the parties.

Attached as Form B is a standard motion in limine in an auto case. Also, standard motions in automobile cases include such things as:

1. The plaintiff's medical or hospital insurance applicable to the injuries suffered in the accident;
2. The defendant has liability insurance or the plaintiff has underinsurance coverage for the injuries suffered in the accident;
3. The plaintiff's wage continuation insurance or payments from sick leave;
4. Any other "collateral source" for the payment of damages in the claim;
5. Terms of any offers or demands, including settlement documents, settlement responses;
6. Whether anyone was charged with the traffic offense which is the basis of the claim;
7. Closing arguments commenting on or arguing the possible effects or results of a claim, lawsuit or judgment upon the defendant, insurance rates, premiums or charges, including the financial situation of the defendants, so far as capacity to respond in damages;
8. Closing arguments contending that the Plaintiff is motivated by greed;
9. Closing argument that defense counsel believes plaintiff to be untruthful;
10. Closing argument that a punitive damage award would penalize the insurance carrier;
11. Closing argument that a verdict for the defendant would help to hold down automobile insurance costs, and to curb the "lawsuit crisis";
12. Closing argument that counsel for the plaintiff had an agenda of obtaining money.

## XI. THE WEEKEND BEFORE THE TRIAL

You are following up on all the other assignments in preparation for the trial to start. There are a few last minute tasks that may make all the difference. The first is that you need to gain some local knowledge about the county where you will be trying your case. Your client may be able to give you some insight, or a local lawyer can fill you in. Your primary concern may be where to eat lunch. However, you might also consider whether to shave that goatee, what suits you want to wear, or whether to drive the Mercedes or take the family station wagon. You should also consider how long it will take to get to the courthouse without getting a speeding ticket and adding to your nervous condition.

Prepare a brief summary for the judge to use when he first introduces the case to the jury panel. The summary should be a brief, objective statement of who your client is and the nature of the case. Also, make sure you look one more time at the statute, so that you know how many peremptory jury strikes you have. Also, you should prepare a set of questions that you can use to challenge a juror for cause, using the appropriate language.

This is also a good time to check your equipment. If you are going to use an overhead projector, make sure that you have a spare bulb, an extension cord and a pointer. Check to see that the retractable screen is working flawlessly. Check and replenish your supply kit of spare legal pads, pens, tape, stapler and highlighters. If you are planning to have a witness draw on a board, make sure you have a camera so that you can photograph the drawing once it is complete. If the witness is going to state a distance from the witness stand to a point in the court room, make sure you have a tape measurer to have the distance in the record.

Print out all the forms you will need, such as your chart for jury selection. Also, do a chart for listing the evidence as it comes in, so that you can check off when it is identified and finally accepted by the court as an exhibit.

## XII. THE DAY OF THE TRIAL

You have gotten to the court room with time to spare. Take a few minutes to familiarize yourself with the courtroom. Walk around a little so you feel comfortable in the space. Spend some time thinking about the layout of the courtroom. Determine the location on the floor from which you can speak that does not encroach on the juror's space, but is not too distant as to cause the sense of distance from the jurors. Generally, for me the spot is 8 feet from the jury rail. For larger people, it may be 10 feet and for smaller folks, 6 feet. Then, determine a good distance for when you want to move closer, drop your voice and be confidential. Also, determine where you want to go back to, when you want to be louder and even angry.

Plan where you are going to plant your easel to mount your exhibits. Check with the Clerk to make sure that there is an overhead projector, or bring yours in from the car. Locate

the electrical outlets. Make sure the sun will not wash out your exhibits when you use the overhead projector. Also, see if you can find a table to set the projector on.

Familiarize yourself with what the jury will have read or seen before they come into the courtroom. Acquaint yourself with the courtroom family. Create a neat, orderly work place. Place your client near you so that you appear connected. Examine the panel as it enters the courtroom. Look for telltale signs, such as who is aligned with whom, reading material, limps, backaches or clothing. Stand when introduced, and have your client stand as well. And have a good time.

## **MEMORANDUM FOR CLIENTS AND WITNESSES<sup>1</sup>**

Following are suggestions for how to testify at trial or at a deposition. It is intended to assist you in being a better witness. It is a set of general suggestions and may not apply to your case in every respect. If you have any questions about these suggestions, please talk to me about your concerns.

### **TELL THE TRUTH**

The most important thing is to tell the truth. Witnesses who tell the truth have nothing to fear. As a witness, under oath, you have an absolute duty to tell the truth to the best of your ability - whether it may "help" our side's case or "hurt" our case. Perjury is a crime.

I hope you haven't held back anything in our previous conversations. Some clients and witnesses feel that if they don't tell everything to their lawyer, through some miracle, the other side will not be able to find out the concealed facts. The danger in such a situation is that the other side may know these detrimental facts, but your lawyer may not. The only way your lawyer can properly be prepared to explain, and, perhaps, overcome the impact of these facts is for you to tell him the worst in advance, before the testimony is offered in the trial or deposition.

### **TRIAL AND DEPOSITION**

Testimony at trial takes place in the presence of a judge. A "trial before the court" is a trial where the judge decides both the law and the facts. A "trial before the jury" is a trial where the judge decides the law, and the jury decides the facts. At a trial, also present are a court reporter, a bailiff, and the parties and their lawyers. The parties are those persons or companies or governmental entities that are suing or being sued.

Testimony by deposition occurs before trial. The parties are usually present, and have a right to be present. The parties' lawyers are present. A court reporter is present. The judge and bailiff are not present. (In rare cases, a judge could be present - I would tell you in advance.) The deposition occurs at a lawyer's office or in a courthouse conference room. Testimony by deposition will be printed, and filed with the court papers. It can be trial evidence that is just as important as testimony given "live" from the witness stand at trial.

When depositions are taken, this is at the request of the other party. Usually, in your deposition, I will not ask you any questions. The other lawyer asks the questions. I'll usually save my questions for the trial.

In a deposition, first the witness is sworn in, just as in trial. So he will tell the truth, just as though he is at the courthouse in trial before the judge and jury.

Remember, testimony which is given at a deposition can be read aloud at the trial, whether you're present or not. A lawyer can read your testimony in the courtroom while you are out in the hall, unable to

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<sup>1</sup> Trial Diplomacy Journal, Fall 1985, Vol. 8 Num. 3.

hear what he reads. He can read your testimony to you while you are on the stand, in an attempt to prove that you are saying something different in the trial from what you said in the earlier deposition.

If you do well in the deposition, it will have a good effect on the case, and may even cause the other side to settle the case. Most cases are compromised - settled - without the need of a trial. Our chances of working out a settlement will be greatly improved if your testimony in a deposition is impressive.

Remember, during a deposition, if you pause, that fact will not show in the transcript of your testimony. If the other side asks you a question, and you need a moment to think about it, take that moment. We can talk more about this later.

## **TWO BASIC RULES OF TESTIMONY**

First, **never volunteer information.** Second, **be careful about the "leading questions" the other lawyer will ask you.**

You do not testify in order to "tell your story." You testify to answer the questions you are given.

For example, if you are asked how many children are in your family, simply give the number. Do not give an answer like this: "We have two children. I would have liked many more, but due to the fact that my spouse spent five years in the penitentiary, we were unable to have a larger family." This is what I mean by do not volunteer information.

**The best answer to any question is the shortest honest answer.**

As you read on, I will share other ideas with you about how to follow the Two Basic Rules.

## **PREPARATION**

A word about clothing. Dress for trial as properly as you would dress going to church. A woman should wear darker clothing, should not wear anything expensive, and should be conservative in the use of makeup. A man should dress in a suit or at least a tie. A witness should be well groomed, should not chew gum, should not smoke, and should not have anything to drink on the day of, or the day before, giving testimony. Please decide now what you think you should wear, and tell me about it the next time we talk. I'll share some other ideas with you about dress at that time.

**Never "fortify" yourself for testimony by taking tranquilizers, drinking alcohol or having anything else which will either slow down or speed up your nervous system.**

I recommend visiting a courtroom in order to listen to testimony in other cases. If this idea appeals to you, let me know, and we will arrange it. You can also sit for an hour or two in a courtroom to observe how the judge handles his cases. A runner knows it's best to check out the course before the race begins.

Please don't try to memorize what you are going to say. Your answers would sound memorized, and would be far less believable than if they were spontaneous. You should have an idea what you are going to say, but to memorize your testimony would usually result in a sing-song parroting. It might not be believed.

If you have given a deposition in these proceedings, and are now preparing to give testimony at the trial itself, naturally the testimony you are giving at the courthouse will happen some weeks or months after you have given the deposition. Don't worry about giving exactly the same answers at trial that you gave in the deposition. Don't take the deposition and try to memorize the answers you gave. Don't try to remember

all of the statements that you made during the deposition. When a question is asked at the trial, think of a clear, truthful answer, and give the facts without exaggeration.

If you have given any statement before, such as to an insurance company adjuster or to the police, whether the statement was oral or written, tell me about it. We are entitled to have a copy of any written statement, so that you can review it just as you would review prior deposition testimony.

**Whenever you testify, you should talk with your lawyer about everything you ever wrote down or signed or said in the past concerning the same subject matter.**

If you will testify about what property you own, or what your monthly expenses are, or the like, we may prepare a financial statement. If so, we will review it carefully before you testify and you will be allowed to take it with you during your testimony. So do not worry that you may forget how much your electric bill is.

The other lawyer may ask you a question like this: "Who have you talked to about this case?" What the other lawyer sometimes tries to suggest is that some person has prepared you for testimony, and sometimes he goes even farther and suggests that somebody told you what answers to give. If a lawyer asks you with whom you have discussed your testimony, you should say that you have discussed it with me. If you have talked with members of your family, or your doctor, or your pastor, or anyone else, say so. There is absolutely nothing wrong with talking about your testimony with other persons, as long as you do not violate The Witness Rule that I will tell you about later in this memorandum. People who say they never talked to anybody about their testimony usually will not be believed.

The important point here is that no one should ever be allowed to tell you what your testimony should be. I will never tell you what evidence to give. I will never tell you to cover the facts in a certain way, or to lie, or to distort the truth. What you and I will discuss before you testify is simply the most effective manner in which to tell the truth.

Some people find it easy to speak in public. Most people do not. Most of us are embarrassed, intimidated, nervous. We are not ourselves. When we are not ourselves, we sometimes say things we do not mean, or which can be misunderstood. This is the reason we prepare for testimony. Your testimony is very important, and a person needs to be trained to be a good witness just as he needs to be trained to do anything else which is important.

Therefore, do not hesitate to say that you have discussed your testimony with me, or with anyone else with whom you have spoken.

Beware of acquaintances of yours who may be ready and anxious to give you advice regarding your case or your testimony. Sometimes there are people around who will be more than happy to tell you what happened to them in their case, or in a case they have heard of, to give you ideas which may not be good advice. If somebody talks with you in that way, be sure to let me know.

## **SUBPOENAS**

Sometimes a witness will ask, "Why am I being subpoenaed to testify, though I have cooperated fully?" Please do not feel offended when a subpoena is served by this office for you to appear in court or at a deposition. Our law does not assure that we may have a case postponed, despite the illness or incapacitation of a witness, unless the witness has been served a subpoena. We issue a subpoena to protect our client's case, in the unlikely event that you or some other witness experiences difficulties in appearing.

When a subpoena is served, all you need to do is appear at the time and place specified.

**Please call my office the day before reporting, to prevent an unnecessary trip in case of a last minute schedule change.**

We cannot schedule witness testimony precisely. The judge conducts the trials of many matters each day. Our case may be his primary, but not his only, concern. The order of testimony is also affected by strategy decisions made by the lawyers. And there are other factors. I will do all I can to minimize the amount of time you spend waiting to give evidence. Please tell me, as soon as you know, about your scheduling needs. There usually are ways I can accommodate you.

### HOW TO SPEAK

At trial or in deposition, first you will be sworn in. You will be asked whether you swear to tell the truth. (Sometimes you will be asked whether you "affirm," rather than swear, that you will tell the truth.) Do not mumble your answer. Raise your right hand and answer, "I do." Say it loudly and clearly so that everyone will know you mean it. This should be the key to the way you act throughout your testimony. Be straight-forward and clear.

There are certain expressions to watch out for. For instance, do not say, "I'll tell you the truth," or, "Well, to tell you the truth." Judges and jurors are sometimes suspicious of witnesses who say things like, "Well, to be perfectly frank," or, "Honestly," before they give their answers. A witness who has to keep telling you that something is the truth may not be telling the truth.

Avoid saying, "You know," or similar mannerisms.

Remember that your testimony, as well as the questions asked of you, will be taken down by the court reporter. When all is reduced to writing, we end up with a series of questions and answers, each question and each answer following each other. So it will be very confusing if you and the lawyer talk at the same time. When a question is being asked, don't interrupt the question to start your answer. And try to avoid saying things like, "Uh Huh." Do not nod your head. We want to be sure that everything you say can be understood easily by somebody who later reads the written transcript of your testimony. So say "Yes," say "No," and wait for the lawyer to finish the question before beginning your answer.

What I've just told you about overlapping speech may be difficult advice to follow. In everyday conversation, we overlap one another's statements without confusion or rudeness. But here is an example from a transcript. When read aloud, it's ragged:

Q: How long have you been majoring in \_\_\_\_\_

A: For \_\_\_\_\_

Q: \_\_\_\_\_ Engineering?

A: This is my second year, my third semester.

At trial, while you are on the witness stand, look at the members of the jury or at the judge. Talk to them. Speak to them frankly and openly, as you would to a neighbor or friend.

Never cover your mouth with your hand.

Many people do not speak distinctly, and may have difficulty overcoming a lifelong habit. But it will help if you speak as clearly as you can, loudly enough so that the juror who is the farthest away can hear you. If there is no jury, be sure that the judge can hear your testimony. Find the person in the room who is farthest from you, and speak loudly enough for him to hear you.

Listen carefully to each question you are asked. This is particularly important when the questions are asked by the opposing lawyer.

No answer should be given without thinking. Don't rush into your answers. Some witnesses start an answer before the question is finished. It gets them in trouble.

Many times a witness will worry whether he did a good job in giving his testimony. If you are worried, do not show it. It is natural for a witness to be concerned, even if he has done a good job. After you have testified a hundred times, if you still worry, then perhaps you are not doing a good job. Until then, do not trust your reactions. If you think that you have been hurt, or that your testimony hurt the other side, or if you were embarrassed or angry, do not show it. Never leave the witness stand with a downcast expression. Never permit a smile or smirk to contaminate your facial expression. We will talk about your testimony after you've completed it.

Occasionally, you will be asked a formal question that follows exactly the wording of a statute. An example is the following question, asked in divorce cases: "Has your marriage become insupportable due to discord or conflict of personalities between the parties that has destroyed the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation?" Another example is a question asked of reputation witnesses: "Are you familiar with the reputation of Mr. X in this community for being a truthful man?" It is required of lawyers that we ask certain questions in a particular form, though it feels unnatural. If I have to ask you such a question, give me enough time to ask the whole question before you begin your answer. Obviously, by the time we go to trial you will know the answer to such a question.

### **HOW TO ACT IN THE COURTHOUSE**

When you are at the courthouse for trial, you are not only observed while you are on the stand. The judge and the jury can also see you out in the hall, and in the courtroom listening to the proceedings, and in the elevator or on the stairway or in the restroom or on the street. They may even see you driving through town in your car. Therefore, be sure to conduct yourself in a courteous manner at all times. A witness will not make a good impression on the stand if he has had an unfriendly encounter with a juror in traffic, or if, after his testimony, he goes into the hall and laughs at a humorous remark. He will do the case a lot of harm.

If you are a smoker, I recommend abstinence at the courthouse.

Don't wear dark glasses indoors.

Avoid the jurors. A friendly smile to a juror is all right if it is not forced. You might even say, "Good morning." But under no circumstances ever enter into any conversation with any juror for any reason at any time, period.

Most clients and witnesses are far too intelligent to attempt to communicate with the judge, even if personally acquainted with him. It would be harmful to the case, and embarrassing and likely cause legal problems, for you to talk with the judge or to telephone him.

### **NOTES TO ME**

This applies only to clients, while others are testifying: If you want to communicate with me, write a note. Don't whisper to me. Don't give me a nudge. A simple written note will do. I can listen and read and write at the same time, but I can't listen to the witness and the other lawyer and my client all at the same time.

If you are testifying at trial, you can't pass me a note or confer with me. If I sense that you're in trouble on the stand I know what to do. Usually a witness who fears he is in trouble is doing just fine.

### **"DIRECT" and "CROSS"**

The questions I ask you are "direct examination." The questions the other lawyer asks you are cross-examination."

When the other lawyer is asking you questions, it is all right to look at my client or me occasionally, but do not look to me for help. For the most part, look at the judge or at the jury, and tell your story in a straight-forward manner.

On cross-examination, the other lawyer may appear to be very nice to you. But you should still be careful he does not lead you into saying something you do not believe. Remember that it is his job to bring out the client's side of the case. **The lawyer for the other side is not your friend**, particularly if he tries to make you believe he is your friend. Therefore, please do not answer any question until you understand the question. Have it repeated if necessary, then give a thoughtful, considered answer.

I cannot ask you leading questions but the other side can. Here is a leading question: "You didn't see Mr. X sign that check, did you?" Here is a direct question: "Did you see Mr. X sign the check?" We will discuss leading questions, and direct questions, and how you can respond to them, when we meet in person before you testify.

If a question begins, "Isn't it a fact . . .," you're being asked a leading question. Or it may begin, "It is true that . . ." If you sense that the answer is in the question, be careful. Such questions may contain implications that are only partly true, and that require an explanation.

### **YES OR NO**

While you should never volunteer information, there may be times when you have to give an explanation. There are some questions which cannot be answered "Yes" or "No." A question such as "Have you stopped beating your wife?" cannot be answered with a Yes or a No answer, because either answer would imply guilt. A short answer setting forth the facts may be called for.

Remember that the opposing lawyer is highly motivated to make your answers fit his case. Sometimes a lawyer may even try to force your answers to be what he wants to hear. He may try to intimidate you with commands like, "Just answer Yes or No." Remember that you do not take orders from the other lawyer. If you cannot answer Yes or No, say so. Insist that the question cannot be answered with a simple Yes or No. Insist that a complete answer requires some explanation. I'll be there to help you get a complete answer into the record.

### **GUESSES AND OPINIONS**

When you give an answer, usually do not say, "I think," or "I believe," or "In my opinion." If you don't know, say so. Don't guess. Don't make up an answer. Naturally, one can remember important things,

but small things are often forgotten. If you don't remember, say so, but don't let the other lawyer get you into the trap of answering question after question after question with "I don't know."

Opinion testimony is usually by "expert witnesses." If you're being called as an expert witness, we'll discuss the rules that apply to you.

There are many areas in which non-experts can give opinions, such as about value of their property, or speed, or emotional states or sobriety. We'll discuss these if they apply to you.

### **COMPOUND QUESTIONS**

A question may contain several questions. For example: "When you talked to Elliott, didn't you say that you were in Dallas, and didn't have time to drive to Tyler to meet with John that afternoon?" It may not be possible to give an accurate answer unless you answer the questions one at a time. In such a case you may say: "The question has several parts, and I'll try to answer each. When I spoke to Elliott, I don't believe I told him I was in Dallas. I said it would be difficult to meet with John that afternoon, but I don't think I told Elliott about meeting John in Tyler." Or if the question is too long, you may say: "Can you please break the question down so I can answer one question at a time?"

### **INTERRUPTIONS**

Sometimes the other lawyer may interrupt you while you are answering. Let him finish his new question, then you may say: "Before I answer I need to finish my answer to the last question." If you haven't finished an answer - that is, if your answer to a question is not complete - you must say so. Don't count on the judge or the lawyers to know your answer was cut off.

### **REPUTATION EVIDENCE**

A reputation witness is called to testify about the reputation of another witness. He may be asked about the good reputation of a witness on our side, or about the bad reputation of a witness on the other side.

Reputation evidence is always hearsay. Our law provides that this sort of hearsay evidence is proper.

Though you may have heard that hearsay evidence is not admissible, much hearsay evidence is admissible. We'll discuss this fully before you testify, if hearsay issues are expected.

Reputation evidence cannot be solely what the witness believes about the person. It must be based upon what others in the community have said about the person.

If you are asked whether you know a certain person's reputation - for being peaceable and law-abiding, for being truthful and honest, for being a person of sober and moderate habits - you are being asked if you have heard what others have said about the person. Your own opinion is not sufficient.

If you are asked about reputation, you'll be asked whether you are familiar with the person's reputation, then you'll be asked if the reputation is good or bad. You must be ready, on cross-examination, to name those who have spoken about the person's reputation.

If you have personal knowledge about the person which is inconsistent with his reputation, be sure to let me know before you testify.

## OBJECTIONS

During trial, lawyers object. When an objection is made, stop instantly, particularly when I make the objection. Do not try to give an answer before the judge rules on the objection. Wait until the judge has ruled.

If an objection is "sustained," the judge believes the objection is correct. If an objection is "overruled," the judge believes the objection is not correct. Do not try to decide what the effect of an objection is upon your testimony. When the objection is being made, and the judge is giving his ruling, wait silently. After the judge has ruled, either you will be asked another question, or you will be told what to do next.

Whenever the judge tells you something, of course you will follow his instructions. One common instruction is, "Please just tell us what you observed; don't tell us what anybody else told you." We'll go over these rules before your testimony begins, so do not be concerned about having to learn the rules of evidence. Whatever you need to know at the courthouse, either the judge or I will tell you.

If you give testimony in a deposition, there will be no judge present, so usually there are no objections made during depositions. If objections are made, a lawyer is simply stating his point of view for the record, but you do not have to say or do anything differently just because a lawyer makes an objection.

**You are not obliged to follow any instructions the other lawyer tries to give you. Don't let any lawyer "control" you.** If another lawyer tries to tell you to do something, or not to do something, during a deposition, look at me and wait a moment for any suggestions I may have to offer.

If a question is asked that you do not wish to answer, do not turn to the judge and ask, "Judge, do I have to answer that question?" If the question is improper, I will make an objection. If I do not make an objection, answer the question. If there are any questions that you do not want to answer, tell me now, before you give your testimony, so that we can protect you from having to answer any improper question.

## IMPEACHMENT

The other side may try to "impeach" your testimony, to harm our case and help their case. One way is by trying to prove you have done something wrong in the past. If you have any arrests, criminal convictions or other allegations of wrongdoing or misdeeds made against you - whether fairly or not - it is important for me to be aware of it. Nobody likes to be surprised with bad news.

## BE NICE

Even if something should happen during your testimony that makes you angry or embarrassed, always be courteous to everyone, including the judge and the jury, and particularly the other lawyer. Many times it is appropriate in life to "talk back," or make a wisecrack, but it is never appropriate when you are giving testimony. The verdict of the jury or the judge will usually reflect a definite dislike for the witness who is vicious or flippant in his answer. Please make every effort to be restrained, even if you do not like the other lawyer or the other side.

For example, a woman would be simply stating the facts, and would be a very effective witness if she were to say, reluctantly, that her husband slept until noon every day. But if she were to go on and add that he was "a worthless, shiftless, lazy person who slept every day until noon," her vindictiveness might even help the cause of her husband.

Never answer a question with a question. For example, if the other lawyer asks you how old are you, don't answer with "How old do you think I am?"

Watch the tone of your voice.

Avoid "side bar remarks." A side bar remark is something like saying, "That's a lie," while another witness is testifying, loudly enough for the judge or the jury to hear. This will hurt our case.

Remember, one way to look at lawsuits is that each side tries to put a white hat on itself and a black hat on the other side, like on television. If the other side wants to use small-minded tactics, be vindictive, underhanded, sarcastic, pushy and the like, give thanks: they are helping us. They are putting the black hat on themselves. All you have to do is to be honest and kind, telling the truth in such a way that it is bound to shine through. Those who hear it will know that you are a truthful and sympathetic person.

**If you want to lose the case, lose your temper.** Let the judge and jury see that you have lost your temper. The more angry you get, the more certain it is that you will lose. Since you do not want to lose the case, retain your composure.



Any references to the former defendant may lead the jury to conclude that the plaintiff settled his claims against Joan Doe, and has received some amount of compensation for his personal injuries. Such evidence is not relevant under Rules 401-402, under Rule 408 (“Compromises and Offers of Compromise”), and contravenes the strong public policy of favoring the settlement of controversies out of court. See Cates v. Wilson, 83 N.C. App. 488, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

3. That the defendant be prohibited from offering evidence or arguing to the jury that the plaintiff is a malingerer, or has exaggerated his personal injury claims for the purpose of secondary gain.

Argument:

The terms “malingerer” or “secondary gain” are medical diagnoses which suggest that a person has fabricated or exaggerated his or her personal injury claims. Such evidence has only been allowed by the North Carolina appellate courts when supported by medical testimony. Johnson v. Johnson, 23 N.C. App. 449, 209 S.E.2d 420, cert. denied, 286 N.C. 335, 211 S.E.2d 212 (1974). There is no medical testimony or other evidence to support any claim or argument by the defendant that the plaintiff is either a malingerer or that his claims are motivated by secondary gain. In the absence of medical testimony, the evidence is neither relevant nor reliable, and should be excluded under Rules 401-402.

Furthermore, any probative value which the evidence may have is substantially outweighed by the dangers of unfair prejudice to the plaintiff, that it will mislead the jury, and confuse the issues for determination. Any arguments of secondary gain and malingering without supporting evidence demeans the judicial process. Thus, our Supreme Court has noted that “[w]hen the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere.” In re Will of Farr, 277 N.C. 86, 93, 175 S.E.2d 578 (1970); see also, O'Carroll v. Texasgulf, Inc., 132 N.C. App. 307, 511 S.E.2d 311, cert. denied, 350 N.C. 834, 538 S.E.2d 198 (1999) (Holding that it was improper for defense counsel to argue that the plaintiff’s attorney had an agenda of obtaining money through litigation). The plaintiff submits that the defendant should be prohibited from offering evidence or arguing that he is a malingerer, or that his claims are motivated by reasons of secondary gain.

4. That the defendant be prohibited from offering evidence that the plaintiff contacted legal counsel three to four days after this motor vehicle accident.

Argument:

The plaintiff testified in his deposition that he saw a doctor on the day following the motor vehicle accident. The plaintiff further testified that three to four days after the accident, he contacted an attorney about possible legal representation.

This evidence is not relevant to a determination of the outstanding issues concerning liability and damages for personal injury. The North Carolina Court of Appeals has stated that evidence concerning when a litigant seeks legal counsel is relevant only in those circumstances when the party contacts an attorney before his or her doctor. See Thompson v. James, 80 N.C. App. 535, 342 S.E.2d 577 (1986) (plaintiff contacted attorney before doctor); Williams v. McCoy, 145 N.C. App. 111, 550 S.E.2d 796 (2001) (plaintiff saw attorney before chiropractor). These facts are not present in this case, and, consequently, this evidence should be excluded under Rule 402.

In the alternative, if this evidence is relevant, its probative value is substantially outweighed by the dangers that its admission will substantially prejudice the plaintiff and/or mislead the jury. Therefore, it may be excluded under Rule 403.

Furthermore, this evidence violates the public policy of North Carolina, which favors allowing an injured party to contact an attorney in order to fully understand one's rights, and to make inquiry about possible legal representation.

If this evidence is not excluded, plaintiff requests the opportunity to present evidence concerning when he was contacted by the defendant's insurance company following this accident, under Williams v. McCoy.

5. That the Defendant be prohibited from offering evidence that no one was criminally charged in connection with the collision at issue.

Argument:

The North Carolina Court of Appeals has held that a driver's testimony that he has never been convicted of a traffic offense is inadmissible in a civil action for negligence arising out of an automobile collision. Hinnant v. Holland, 92 N.C. App. 142, 150, 374 S.E.2d 152, 157 (1988). The Court stated that "a danger exists that the jury in a

civil action will give undue weight to evidence that the defendant was never criminally charged or convicted for his role in the incident at issue.” Id. (citing Beanblossom v. Thomas, 266 N.C. 181, 185-86, 146 S.E.2d 36, 40 (1966)). “It is error to admit such evidence since it is ‘incompetent . . . to exonerate [the defendant] of negligence in [a] civil action.’” Id.

Under these rulings by the North Carolina appellate courts, any evidence relating to the absence of criminal charges, or convictions arising out of this collision, is inadmissible. Defendant’s attorneys should not be permitted to question any witnesses regarding whether or not they were cited, charged, or convicted of any criminal offense in relation to this collision.

6. That the Defendant be prohibited from offering evidence of the defendant’s wealth, or making any arguments to the jury concerning the wealth or poverty of the defendant.

Argument:

The wealth or poverty of the defendant is not an issue before the Court. The argument that the defendant would be obligated to pay every single dollar of the damage award may be interpreted by the jury as meaning that the defendant was not protected by an automobile liability insurance. The presence or absence of insurance is not an issue before the Court, and any argument concerning the defendant’s wealth or poverty would be unfair and prejudicial to the plaintiff and improper under existing case law. Scallon v. Hooper, 293 S.E.2d 843, 58 N.C.App. 551, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

Furthermore, the North Carolina appellate courts have held that, in a court of justice, neither the wealth of one party nor the poverty of the other should be permitted to affect the administration of the law. Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); Yost v. Hall, 233 N.C. 463, 64 S.E.2d 554 (1951). Thus, it has been held that it was error as a matter of law for a trial court to permit remarks which injected extraneous considerations concerning a defendants’ financial situation, so far as their capacity to respond to damages was concerned. Watson v. White, 308 S.E.2d 268, 309 N.C. 498 (1983). The plaintiff requests that the defendant not be permitted to offer evidence or make any arguments concerning the defendant’s ability to satisfy a judgment.

7. That the defendant be prohibited from offering evidence that the medical records of the plaintiff, dated March 17, 1989, note that he had muscle spasms in his lower back. The notes are attached hereto as Exhibit A.

Argument:

The plaintiff suffered musculoskeletal injuries (strain) to his neck, left shoulder, upper left arm, and upper back as a result of this accident.

The probative value of these records is substantially outweighed by the dangers of undue prejudice to the plaintiff. These records are fifteen years old. They were created by a Dr. Johnson in the course of a new patient examination concerning a variety of physical complaints expressed by the plaintiff. Furthermore, this plaintiff has never claimed lower back injuries from this accident. This evidence is remote in time, will unduly prejudice this plaintiff, and will mislead the jury.

This evidence is not proper impeachment evidence as well. At his deposition, Mr. Doe truthfully testified that he had experienced lower back problems in the past. Consequently, there has been no inconsistent testimony.

In a similar case, Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739 (1999), the plaintiff was seeking damages for an injury to her thoracic spine from a motor vehicle accident in 1995. At trial, the plaintiff claimed that the accident caused her injury, and that, before the accident, she had never experienced any problems with her thoracic spine. The defendant sought to introduce a 1988 medical record which noted that the plaintiff had long-standing mid-thoracic pain and paraspinal muscle pain. The trial court excluded this evidence under Rule 403 finding that any probative value was substantially outweighed by the danger of prejudice to the plaintiff. The court also did not allow the evidence to be offered for impeachment purposes. The Court of Appeals upheld the trial court's rulings. With regard to the interplay between Rule 403 and Rule 608, the Court of Appeals stated that "[i]t is clear, however, that 'impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.'" Sitton v. Cole, 135 N.C. App. at 627, 521 S.E.2d at 741 (quoting, State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989)).

Therefore, this evidence should be properly excluded under Rule 403 and the controlling appellate decisions.

WHEREFORE, the plaintiff requests that the Court issue an Order as to each of the evidentiary issues raised above.

This the \_\_\_\_ day of May, 2004.

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YOUR NAME AND ADDRESS