Trial from Start to Finish for Paralegals

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William E. Moore, Jr. is a partner in the Gastonia law firm of Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., where his main area of practice consists of prosecuting, defending and/or resolving disputes in state and federal courts. His trial practice is concentrated in civil litigation, including employment law, complex business and exceptional cases, commercial and corporate litigation, real estate disputes, medical malpractice and civil rights. Mr. Moore also has a strong appellate practice in the North Carolina and Federal Courts. He is admitted to practice and has appeared at all levels of courts in North Carolina, the United States District Courts for the Eastern, Middle and Western districts of North Carolina and the United States Courts of Appeal for the 4th Circuit and Federal Circuit. Mr. Moore has lectured for the North Carolina State Bar Association and various business and professional groups on a variety of topics dealing with civil litigation. He received his B.A. degree in 1978, with high honors, from the University of Florida (Phi Beta Kappa), and his J.D. degree from Duke University School of Law in 1981. Mr. Moore is a member of the Gaston County, North Carolina and American Bar Associations, and the N.C. Advocates of Justice. In addition to his heavy litigation practice, Mr. Moore is a North Carolina State Certified Mediator, helping to settle routine lawsuits and facilitating the resolution of complex, multi-party litigation.

Mr. Moore also serves his community by participating with, and sitting on the boards of several non-profit agencies. He is a Board Member of Gastonia Sister Cities, an Officer and Board Member in the Gastonia East Rotary Club, a Board Member of Family Promise (formally Interfaith) and President of the Gastonia String Orchestra. In addition, he is also an active member of First United Methodist Church in Gastonia, (Contemporary Choir and the Peanut Project Committee Member).

When he is not practicing law, driving his paralegal crazy, or sitting at a board meeting, Mr. Moore is likely to be found practicing the banjo, guitar, violin or harmonica. (God help his wife of 34 years, who knows no silence!)

TRIAL FROM START TO FINISH FOR PARALEGALS

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USEFUL DISCOVERY FOR TRIAL

A. The Complaint

Although the Complaint is not technically a "discovery" tool, it is the first substantive document from which the case emerges. The Complaint sets forth both the facts and the law upon which the Plaintiff's claims are based, and along with the Answer (and Reply to Counterclaims) forms the framework upon which the trial will hang. These documents (formally called the "pleadings") form the logical starting point for the litigation, and much farther down the road, following discovery and dispositive motions, should be the revisited as the logical starting point for trial preparation.

Rule 8 of the North Carolina Rules of Civil procedure sets forth the requirements for pleadings as follows:

> (a) Claims for relief. - A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain
>
> > (1) A short and plain **statement of the claim** sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, **and**
> >
> > (2) A **demand for judgment for the relief** to which he deems himself entitled. Relief in the alternative or of several different types may be demanded....
> >
> > > (b) Defenses; form of denials. - A party shall state in **short and plain terms his defenses to each claim asserted** and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he

expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses. - In pleading to a preceding pleading, **a party shall set forth affirmatively** accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and **any other matter constituting an avoidance or affirmative defense.** Such pleading shall contain a **short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice** of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of failure to deny. - **Averments in a pleading** to which a responsive pleading is required, other than those as to the amount of damage, **are admitted when not denied** in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

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N.C.Gen.Stat. § 1A-1, Rule 8 (emphasis added).

Pleadings are what "join issue" (where factual allegations are denied, so that proof at trial is necessary) and contain "admissions" (where allegations are admitted, possibly establishing elements of certain claims and requiring no proof at trial.) The issues (both legal and factual) are the questions we ask the judge and jury to decide at trial. (The judge rules on the legal issues; the jury decides the factual issues.)

The "short and plain" statement of facts in the Complaint may help you discern a "theme" to be used during trial. The numbered "Causes of Action" or "claims" determine the law involved in the case – and should form the outline for jury instructions, along with any affirmative defenses set forth in the Answer. Any exhibits attached to the pleadings should comprise your first set of trial exhibits (although if also used as deposition exhibits, you may choose to

renumber them.) Indeed, perhaps the two most critical components of trial preparation – The Pre-Trial Order and Trial Notebook – should first be derived from the pleadings, before sifting through discovery, the legal motions, and the court rulings that define the case.

Rule 16 of the North Carolina Rules of Civil Procedure and Rule 7 of the General Rules of Practice address required pre-trial procedures and should be consulted prior to actually preparing for a trial. Rule 16 allows for a discretionary pre-trial conference:

> (a) In any action, the court may in its discretion direct the attorneys for the parties to appear before the court for a conference to consider
>
> (1) The simplification and formulation of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability or necessity of a reference of the case, either in whole or in part;
>
> (6) Matters of which the court is to be asked to take judicial notice;
>
> (7) Such other matters as may aid in the disposition of the action.
>
> **If a conference is held, the judge shall make an order which** recites the action taken at the conference, any amendments allowed to the pleadings, and any agreements made by the parties as to any of the matters considered, and which **may limit the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action,** unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings.

Rules Civ.Proc., G.S. § 1A-1, Rule 16 (emphasis added.)

A pre-trial conference under Rule 7, on the other hand, is mandatory:

> **There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the**

> **stipulation**. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order. ...
>
> A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held.
>
> At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held **not later than seven days before trial date**. At such conference **a pre-trial order shall be prepared and signed by the attorneys**.
>
> If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney.
>
> The pre-trial order shall be in substance as shown on the attached sample form.

General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, Rule 7. Here is the sample form:

IN THE GENERAL COURT OF JUSTICE _____ COURT DIVISION

_____	)	
Plaintiff(s)	)	File #: _____
-v-	)	Film #: _____
_____	)	
Defendant(s)	)	

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pretrial conference was held in the above-entitled cause on the _____ day of _____, ___. _____, Esquire, appeared as counsel for the plaintiff(s); _____, Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.

Note: If the facts are otherwise they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

Note: If the facts are otherwise, they should be accurately stated.

(3) If any of the parties is appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).

(5) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

Note: Here set out all facts not in genuine dispute. [FN1]

[This is a good place to include all significant factual allegations admitted in the Pleadings or Discovery.]

[FN1] IN CONTRACT CASES, the parties may stipulate upon, or state fair contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substance of the contract, if oral; (d) the terms of the contract which are relied upon and the portions in

controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.
IN MOTOR VEHICLE NEGLIGENCE CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including nature and extent thereof; (*l*) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (*o*) if loss of earnings is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHOULD, NEVERTHELESS, SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE

(6) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:

(a)

(b)

Note: Here list the pre-trial identification numbers and a brief description of each exhibit.

[This is where your exhibits from the Complaint and Discovery, especially Deposition Exhibits should be organized and listed.]

(7) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(8) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits.

It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(9) The following is a list of all known exhibits the defendant(s) may offer at the trial:

(a)

(b)

Note: Here list the pre-trial identification and a brief description of each exhibit.

[This is where your exhibits from the Answer and Discovery, especially Deposition Exhibits should be organized and listed.]

(10) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(11) It is stipulated and agreed that each of the exhibits identified by the defendant(s) is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(12) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(13) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial:

[This is where individuals with personal knowledge of the facts as disclosed in the Pleadings and Discovery, and particularly all Deposition Witnesses should be organized and listed.]

Note: If either plaintiff or defendant's attorney discover additional witnesses after this listing, attention is called to obligation to notify opposing counsel. There shall be no requirement that all

witnesses listed by a party be used, and the court may after satisfactory explanation, in his discretion, permit the use of a witness not listed.

The trial judge may, for good cause made known to him, relieve a party of the requirement of disclosing the name of any witness.

(14) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial:

(15) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s). Counsel shall immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(16) There are no pending motions, and neither party desires further amendments to the pleadings, except:

Note: Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pretrial conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(17) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

(18) The plaintiff(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

[This is where the issues from the Complaint's Causes of Action or Claims should be filtered and listed – Pattern Jury Instructions typically word these issues for you at the top of each instruction.]

(19) The defendant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

[This is where the issues from the Answer's Affirmative Defenses should be filtered and listed – Pattern Jury Instructions typically word these issues for you at the top of each instruction.]

(20) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

Note: In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(21) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be _____ days.

(22) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

Note: Counsel shall be required to conduct a frank discussion concerning settlement possibilities at the time of the conference of attorneys, and clients shall either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of trial as to whether this requirement was strictly observed.

_____
Counsel for Plaintiff(s)

_____
Counsel for Defendant(s)
Approved and Ordered Filed.

Date: _____

_____
Judge Presiding

Trial Notebooks are unique to each case and to each attorney trying a case. There are numerous forms, styles, and types of "trial notebooks" and you must consult the attorneys who will try the case to conform to their particular needs and preferences in any given case. Typically, however, and regardless of the form of organization (by topic, by issue, by date) the following elements are often useful in a trial notebook:

Trial Notebooks:

Exhibit & Pleading: ___ books plus original + 12-14 copies (as specified) for jury (stapled & paper clipped in groups of 6 or 7 for ease in handing out the copies)

Use alphabetical and numerical tabs interchangeably for exhibit organization and sub-exhibits

Need report type folders w/pocket for Jury; or three-hole punched paper with ring binders.

Pleadings Book

Pre Trial Order
Complaint
Answer (Counterclaims)
Reply
Motions
Orders
Appellate opinions (if case has been remanded)

Exhibits Book

(Keep an AOC/Courtroom Clerk's form for tracking exhibits during trial, and for ease in comparing and updating from the Courtroom Clerk's official list, all exhibits that were tendered during trial w/ ☐☐☐ marked for each exhibit that was Tendered, Received, Excluded, Conditionally Admitted, etc).

Use Exhibit Lists from the final Pre Trial Order as the Exhibit index

Exhibits stamped and/or numbered

Depositions in alphabetical order (use condensed version)

Witness Folders (alphabetical order)

Witness list needs name, address, work phone number (Your Attorney's copy should include cell # & home #, with any special notes such as dates available/unavailable to testify.)

Affidavits

Depositions (original sealed if possible) with copies & summaries/abstracts

Subpoenas

Special information- copy of exhibits to be used with that witness etc.

May include atty. notes, taped statements, Interrogs (as specified by the attorney)

Direct/Cross-Examination Outline

Exhibit Folders

Jury copies – 12-14 copies
Stapled (for pocket folders) or paper clipped and three-hole punched (for ring binders) in groups of 6-7

Put each exhibit in individual folder marked w/Exhibit number/letter. Put Jury copies (stapled & paper clipped in groups of 6-7) behind the Exhibit w/the original Exhibit number. Unless, the exhibits have been pre-approved by the Court or stipulated, in which case you can tender completed notebooks with the exhibits in place. Some judges will allow the jurors to have complete notebooks and will simply admonish them not to look at any exhibit in the notebook until it has been received at trial.

Jury Instructions (required in Writing)

Research/Legal authorities

Other needs:

pads, pencils/pens, post-it notes (various sizes) white out, stapler, staple pull, highlighters, hanging & manila folders, markers, pads, projectors, laptops, portable hard drives or thumbdrives, easles, posters, calculator (printing calculator),

The elements of the plaintiff's claims (as shown in the statutes, case law or jury instructions) should all be laid out in the Complaint, especially if the "Causes of Action" were drafted using the applicable statutes, cases, or jury instructions. In any event, the legal claims stated in the Complaint (but only those which have not been dismissed upon motions or at summary judgment) will require the submission of jury instructions, and you should gather the pattern instructions, statutes and applicable cases for use at trial. These will be included in the Trial Notebook and will be referenced in the Pre-Trial Order. The legal elements of each surviving claim (as listed in the Complaint and/or derived from your pre-trial legal research) must all be supported by evidence in the form of witness testimony or documents. The Complaint is your initial source for the documents ("trial exhibits") and persons involved ("witnesses") needed for trial.

B. Requests for Admission, Requests for Production and Interrogatories

Discovery, in it various forms, is designed and intended to prepare a case for trial (to literally "discover" the evidence known to the other side, and to eliminate unnecessary disputes over matters that can be admitted or explained). It is only natural then, that whatever devices have been utilized during the discovery period will be of paramount importance in preparing for trial. Each discovery response must be reviewed, analyzed, sorted and grouped according to the individual witness connected to the information, and the factual or legal issue to which it pertains.

Responses to Requests for Admission are binding for the purpose of the lawsuit, and may eliminate factual or legal issues just like statements in the Complaint, Answer or Reply. Similarly, answers to interrogatories may provide the basis for a stipulation that reduces the elements of a claim or defense that must otherwise be proven. (Admissions in the pleadings or in response to Requests for Admission may constitute "judicial admissions" which may entitle a party to relief on an issue; answers to interrogatories and deposition testimony are typically treated as mere "evidentiary admissions," which may be quite persuasive, but are not binding, *i.e.* they can be later explained or disavowed by the witness, and serve as some evidence against them without actually deciding the issue.) In either case, you will want to have sorted the answers to Requests for Admission and Interrogatories to present those "admissions" to your attorney for use at dispositive motions and/or trial.

Likewise, the substance of certain documents produced in discovery may eliminate the need for proof of certain elements, and should be categorized in accordance with the legal or factual issues involved. Each document should be "assigned" to a particular witness (whether favorable or adverse) who can identify or authenticate such exhibit, and should be grouped with

the legal or factual issues which it tends to prove or disprove. The "discovery" undertaken in a case will largely determine what is available for use as evidence in a trial.

1. Requests for Admission

Rule 36 provides that:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

N.C.GEN.STAT. § 1A-1, Rule 36(a). Clearly this discovery tool is invaluable for eliminating the need to prove matters that the other side must admit. This form of discovery has real teeth, and can be lethal in that many cases have been won or lost based on Requests for Admission. Here is why: Each requested matter is admitted unless, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney within 30 days after service of the request, or within such shorter or longer time as the court may allow. If an objection is made, the reasons must be stated; "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny."

> "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . Any admission made by a party under this rule is for the purpose of pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding."

Id. Rule 36(b).

If a request for admission is denied, necessitating proof of the matter requested, the prevailing party may be entitled to his or her reasonable expenses in proving the matter, including reasonable attorney's fees. See Rule 37(c). Consequently, if a matter is denied, and

proof is required to establish such matter, the denying party may be made to pay the cost of such proof, if the requesting party prevails. This can be particularly expensive if the matter is the subject of expert testimony, for example.

In preparing for trial, all matters admitted should be listed, screened for relevance or weight, and if useful, included in the Pre-Trial Order as conclusive facts (typically under "Stipulations", *see Pre-Trial Order Form ¶ 5, infra.*) The Response to Requests for Admission (showing both the request and the admission or denial) may also be tendered as an exhibit, and can be included in the Trial Notebook under either "pleadings" or "exhibits," depending on the preference and intended use by the trial attorney.

All matters admitted should be included as a stipulation (or judicial admission); all matters denied should be tracked for the witnesses, exhibits and "proof" required to establish such facts. The cost of such proof must be marshaled and itemized for submission as "costs" at the end of the trial (if successful.)

2. Requests For Production of Documents

Rule 34 permits the production of documents and things, and entry upon land for inspection and other purposes.

Technically, the Rule does not require the production of copied records, but rather grants

> permission to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (ii) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served

> for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

N.C.GEN.STAT. § 1A-1, Rule 34. The documents produced (or admittedly not existent or available) pursuant to a request, provides fertile ground for exhibits to be admitted at trial (or for introduction of the absence of the "business record" as part of a proof.) *See*, N.C Gen.Stat. 8C-1 Rule 803(6) and (7) [North Carolina Rules of Evidence].)

These days, documents are more often copied or scanned and simply delivered in response to requests for production (rather than locking some poor paralegal or young associate in a room with a hand scanner or tabs for marking pages to be copied) although in many large documents cases you may be required to sift through the documents produced for inspection and request copies of those you wish to obtain. In either event, once the documents are produced it is appropriate to give each page a unique identifier (often referred to as a Bates stamp), which can also now be done electronically, if the documents have been scanned. (*See*, Section I. C. *infra.*)

The management of documents (particularly in a complex case) is a topic unto itself. For the purpose of trial preparation, it will be necessary for the universe of documents to have been organized, indexed (bates stamped) and categorized, so that the attorneys can select those that should be utilized as trial exhibits. This process is performed throughout discovery and is exceedingly difficult to complete at the end of the discovery trail (especially where voluminous documents are involved) and should be performed in anticipation of depositions as well as trial, but must be kept up with throughout the litigation. Nonetheless, the production of documents provides a huge source for exhibits to be used in depositions, for motions practice, and, of course, for the trial of the case. By the time you are preparing for trial, most of the "smoking

gun" documents may have already been identified and used (in depositions or as exhibits to motions or affidavits), but a good organization and indexing system for all documents produced in discovery will make it possible to find, mark and list the available exhibits before and during the trial as they are needed. A spreadsheet (showing the description of the document, the identification number or bates stamp, the date, and possibly the issue or witness connected to such document) can be an invaluable tool in preparing for trial, and sorting through the mountain of paper that may accumulate during discovery.

3. Interrogatories

Rule 33 provides for Interrogatories to parties, and states in pertinent part that any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. Id.

Rule 33(c) provides a sort of hybrid answer to an interrogatory that allows the responding party to identify and produce documents in lieu of a narrative answer:

> Option to produce business records. - Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity

> to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

N.C.GEN.STAT. § 1A-1, Rule 33(c). *See*, Section B.2. *supra*, regarding Requests for Production of Documents as to the use of such responses in preparing for trial.)

The use of interrogatories in preparing for trial will depend on the extent to which interrogatories were used during the discovery process. Typical interrogatories include such topics as identifying "all persons with knowledge of the facts" alleged/admitted/denied in the pleadings. Clearly such a question is a great addition to the "witness list" required for a Pre-Trial Order (whether you have asked or answered that interrogatory). Rule 26 specifically allows for the disclosure of expert witnesses, which should have precipitated depositions (in most cases) and often includes experts' reports (which would be included in the "exhibit lists"). Additionally, documents in support of allegations or denials are frequently requested to be identified and such documents should similarly be screened for inclusion on the exhibit lists. (If you find documents that were identified but not produced and you are out of time to request their production before trial, you can subpoena the documents/custodian for use at trial. Consequently, the need for issuing subpoenas for use at trial may be derived from a review of the interrogatories, as well. Interrogatories, like depositions may also be summarized or abstracted to provide your trial attorney with a summary of information from which he may make a host of decisions in preparation for trial. The opponent's answers to interrogatories make great cross-examination points; your client's answers should be reviewed by them (but not memorized) prior to deposition or trial testimony. Moreover, the failure to identify certain persons with knowledge in interrogatories may form the basis for pre-trial motions to exclude witnesses; the substantive answers may be useful for pre-trial "motions in limine" to admit or exclude certain evidence;

and, the evidentiary admissions contained in the answers to interrogatories can help shape the examination/cross-examination of witnesses, or even provide inspiration for a "theme" or closing argument. In short, the interrogatories (as well as other discovery tools) are essential in boiling down the essence of the case, and in identifying witnesses and exhibits for use at trial.

II. PREPARING YOUR WITNESSES

A. Creating Witness Lists – Stephanie

B. Trial vs. Deposition Preparation

Rule 30. Depositions upon oral examination

> After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, is not required unless the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), or unless a defendant has served a notice of taking deposition or otherwise sought discovery.

NC Gen.Stat. § 1A-1, Rule 30(a); but see, the special notice provisions of Rule 30(b)(2) (exception where party is about to go out of the country or move more than 100 miles away). The attendance of witnesses may be compelled by subpoena under Rule 45, provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice.

Preparation for taking a deposition and preparation for trial may vary widely depending on the role of the witness in the case and the purpose of the deposition (purely for discovery, to preserve testimony for trial, to establish certain facts or elements, to stake out an opponent). Party-witnesses will usually entail more extensive preparation than fact witnesses. For instance, you should prepare your client to give deposition testimony, re-familiarizing the client (as a party to the lawsuit) with any pleading filed on that person's behalf (especially if verified by the party/witness); with any affidavit or prior recorded statement made by that witness; with any discovery responses served for the party (especially Interrogatories which must be signed under oath by the responding party); and any documents bearing their signature, or with which such person should be familiar. Preparing for the opposing party's deposition is similarly intensive: the same set of documents should be presented to the attorney, along with an index and deposition outline for use in preparing the adverse examination.

A friendly "eye-witness" typically requires slightly less preparation, in that a fact witness's role is typically more limited than that of a party. You should still provide a forecast of the procedure and the general "rules of the game" along with any known documents or statements related to the witness (including, for instance, a police report narrating the witness's statements). There is no attorney-client privilege to invoke with the non-party witness, so your conversations are fair game for cross-examination. Consequently, you should only discuss that which you wouldn't mind hearing repeated on the record of a deposition or at trial. Likewise you should be cautious in sharing documents with a witness, as you may be required to share those documents with the other side. If you use a document to refresh recollection during testimony, the other side automatically gets to inspect, cross-examine and introduce the document; if the document is shown before testifying, the court may order production of the document:

> If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice require, an adverse party is entitled to have those portions of any writing or of the object which related to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

N.C.G.S. 8C-1, Rule 612(b) (Rules of Evidence).

Adverse or uncooperative witnesses are not likely to accept your advice on preparation, nonetheless, the preparation (as for adverse parties) should include the same documents or statements you would gather for favorable witnesses.

General rules applicable to all witnesses (such as stick to the truth; stick to what you know; listen to the entire question before forming an answer; ask to see any document about which you are being examined; do not argue with the person asking questions; wait until the lawyers have quit arguing or objecting before giving any answer; listen to the lawyer (or if at

trial, the judge) who may instruct you whether or not to answer a question following objections; etc.) should be used in both "dep prep" and "trial prep." Once discovery is completed, however, and you are in the throes of trial preparation, depositions are invaluable tools for use in getting ready to try a case. In addition to re-visiting all of the other "prior statements" used in preparing for a deposition, that person's deposition is a "must read" for any friendly witness before taking the stand to testify at trial. The opposing party's deposition (as well as those of adverse witnesses) are helpful in preparing your own client's testimony (which your client can certainly read to refresh what the other side has to say about any given issue or fact), as well as in preparing for cross-examination of that opposing party/adverse witness.

The preparation for trial is necessarily more extensive than preparation for a deposition, because, presumably, discovery has been completed and you have a lot more information to process and consider, (including the depositions themselves). Moreover, in preparing to take an adverse deposition, you may want to amass all the relevant documents to use with that witness, and to derive questions from, but without actually ever asking the "ultimate question." Remember, you should elicit as much information from the witness as possible during a deposition, even allowing the witness to "ramble on" in some self-serving speech. The witness is liable to talk themselves right into an admission, or disclose valuable information that you had not actually asked about. There is no need to tighten the noose at a deposition with the *coup de grace* question. If you have led the witness to the brink of the cliff in the deposition, you can nudge that witness over the edge at trial, in front of the jury, where it counts. Spring that trap during discovery and the witness may have a practiced explanation by the time of trial testimony. At other times, however, your attorney may wish to lock down the admission for use at summary judgment, or to play back (read back) in front of the jury. (Sometimes, the attorney simply

cannot resist the temptation to close the loop while he has a witness on the ropes.) These tactical and strategic decisions will necessarily have to be made by the attorney taking the deposition or calling the witness at trial. Nonetheless, your thorough preparation of the attorney (or your client as a witness) with the relevant pleadings, discovery disclosures, and documents amassed to date, can maximize the benefit of deposition testimony, whichever route the attorney chooses to take. Generally speaking, you should prepare for deposition testimony to "set them up" and prepare for trial testimony to "knock them down."

In preparing for trial, all persons who have given depositions should likely appear on the "long list" of witnesses. (There are always exceptions to this rule, as some witnesses may prove to know nothing of value, or may actually hurt your case; you may want to exclude them from even the long list; or may want to include them on the long list and bury the name in the mix, but not designate them on the shorter list of those expected to testify in your case in chief.) You may not intend to call all such persons as live witnesses (so they may not show up on the "short list" of witnesses and you may not have to issues a subpoena for their appearance at trial), but their names should all be on the initial list of those who *may* be called as witnesses at trial. The trial attorney should then pare down the "long list" to those who need to be subpoenaed for trial. In many instances, however, if you have not timely issued a subpoena for a witness on either list, you may be precluded from calling them as witnesses (unless they voluntarily cooperate and the other side consents or the judge permits the testimony.) Other witnesses may be eligible to testify by means of their deposition transcript or video, and again, the trial attorney must decide whether to use the witness's deposition (if permissible) or to call them as a live witness, if available. Your preparation for trial (including deposition summaries or abstracts) will be crucial in assisting the trial attorney to make a well-informed decision. (Your preparation for the

deposition, likewise, may end up determining whether the deposition is sufficient for use at trial, or whether the witness must be called to fill in data not covered at the deposition.)

All exhibits identified in depositions should be added to the potential exhibit list, and the trial attorney can then eliminate any deposition exhibits that will not be used as part of the initial presentation of evidence. Nonetheless, it is a good idea to include all deposition witnesses and all deposition exhibits in a "catch-all" designation in the pre-trial order (because one never knows what may evolve during the trial of a case.) [*Discovery Tip: it is often helpful to stipulate, or obtain a discovery scheduling order requiring that all deposition exhibits to be numbered sequentially throughout discovery. This makes the compilation of the initial exhibit list easier, and eliminates some confusion between exhibits bearing one number as attached to the deposition, and another [exhibit] number when identified at trial. You can then add the other documents to be used as exhibits at the end of the list, including those attached to the pleadings or obtained in response to Requests for Production.]*

Rule 32 of the North Carolina Rules of Civil Procedure is entitled "Use of depositions in court proceedings" and defines when and how depositions may be used at trial:

> (a) Use of depositions. -- At the trial ... **any part or all of a deposition**, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, **may be used against any party who was present or represented** at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
>
> (2) The deposition of a person called as a witness may also be used as substantive evidence by any party adverse to the party who called the deponent as a witness and it may be used by the party calling deponent as a witness as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.

(3) The deposition of a party or of any one 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, whether or not the deponent testifies at the trial or hearing.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or 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 that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 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 testimony of witnesses orally in open court, to allow the deposition to be used; or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4).

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce any other parts.

(b) Subject to the provisions of Rules 28(b) and subsection (d)(3) of this 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.

NC Gen.Stat. § 1A-1, Rule 32. Thus, depositions should be reviewed in preparing for trial with a view toward its possible usage; opposing witness's depositions must also be abstracted with respect to objectionable questions asked by the opposing side in anticipation of the possible tender for use at trial. Often a judge will require proposed deposition testimony and all objections to be disclosed before use at trial (typically at a final pre-trial conference), so the judge can make evidentiary rulings in advance, and the transcript or video can be edited for uninterrupted presentation before a jury.

C. How Preparation Varies Between Clients, Non-Expert Witnesses and Experts

The differences in preparation for clients (party-witnesses) and non-expert witnesses (fact witnesses) have been discussed in Section B *infra*, with respect to deposition versus trial prep. Similarly we have examined the differences between friendly and adverse witnesses (whether parties or fact witnesses). *Id.* Preparation for examination of these witnesses should also be distinguished from preparation for Expert Witnesses (opinion testimony), both favorable and adverse, whether for deposition or trial.

Preparation for an Expert Witness deposition is first controlled by Rule 26, which technically limits expert discovery to the information required to be disclosed under Rule 26(b)(6) without motion and court approval, although common practice allows for such depositions in addition to the required disclosures mandated by the rule. The required disclosures are a necessary starting point in preparation of any expert deposition. Additionally, any reports, notes, and correspondence may be subject to disclosure prior to or during a deposition. The Curriculum Vitae ("C.V." or "bio") of each expert should be investigated, particularly examining any similar reported cases in which the expert has been involved, and any related articles published by the expert witness, which my provide abundant data from which to bolster or attack the credibility of the expert. Again, the pleadings and written discovery responses should be fully explored for any related admissions/disclosures/documents to be found.

In preparing Your Expert for deposition or trial (in fact, upon engagement) you should provide as much information as possible, including all pleadings, discovery (including depositions, affidavits, and statements) and relevant documents for review and consideration

prior to forming any opinion and rendering an analysis or report. If the universe of documents is too voluminous to copy, at least provide a comprehensive index and allow the expert to "cherry-pick" any desired documents. Alternatively, a portable hard drive or thumb-drive permits a vast amount of information to be shared. The expert can (and should) disregard any documents or information that does not appear to be helpful to the analysis, but at least you will have provided the known universe of data for objective consideration. Include documents and data that are unfavorable (or more favorable to the other side) as it is always preferable to have your expert's opinion include a consideration (and hopefully, a rejection) of adverse facts, even if it qualifies the opinion. What you want to avoid is having the other side spring unfamiliar information on your expert during his testimony at deposition or trial, where, at a minimum, the expert will have to concede that he had not considered such (previously unknown) facts.

In preparing your attorney to examine the Opposing Expert at deposition or trial, it is important to conduct a thorough background check – by reading prior cases in which the expert has testified, prior publications, licensing history/professional discipline, all reports tendered in the case of course, and all other disclosures, as well as your own (countervailing) expert's opinions. You may find that a judge in prior cases has criticized the opposing expert's credentials, denied, or more likely qualified and limited, the tender as an "expert" in a given field or sub-specialty. Prior opinions or publications may include statements favorable to your side of the case, despite the current opinion in the case under consideration. (It is hard for the expert to deny a previous position, but most are smart enough to distinguish their prior opinions, so be careful not to match wits in his area of expertise, unless you are well-versed in the jargon and nomenclature of that field.) The expert may have been censured, disciplined, or even had his credentials suspended or curtailed by his peers or licensing board. And, you may find tidbits

even within the expert's written report, marginalia, or interview notes, that can help your side of the case and which the expert will have to acknowledge when confronted.

For depositions, be sure to include a checklist of necessary broad-based questions, including "all opinions which you expect to testify about in this case." This is true of Your Expert as well as the Opposing Expert. If the expert fails to disclose an opinion during a deposition, the judge may not let that expert testify to such matters at trial. (This can be true, even if the examining attorney fails to ask about it, so you should prepare your attorney to conduct a follow-up examination of your own expert to disclose all anticipated opinions, even if the attorney on the other side fails to ask!) Be sure to request or subpoena all materials and authorities considered by the expert in forming and supporting the opinion, as well as all notes, and marginalia. Be sure to review the originals of the documents, for marginal notes that can be very revealing. Better to know all of the information that may be presented at trial, especially if it is adverse to your side, so that you have time to minimize the impact, or discredit the opinion before trial.\

Finally, be sure to review the law in your jurisdiction for the qualification of an expert (or opinion) witness. The North Carolina and federal courts have applied different tests over recent years regarding the standard required for qualification of expert witnesses:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),FN10 whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.FN11 This entails a preliminary assessment of whether the reasoning or methodology*593 underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 592-593, 113 S.Ct. 2786, 2796 (U.S.Cal.,1993).

> Under Daubert, then, the trial court is instructed to preliminarily determine "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93, 113 S.Ct. at 2796, 125 L.Ed.2d at 482. The focus of the trial court's inquiry in this regard "must be solely on principles and methodology, not on the conclusions that they generate." Id. at 595, 113 S.Ct. at 2797, 125 L.Ed.2d at 484. In particular, the Supreme Court articulated five factors it considered important measures of scientific reliability: (1) Whether the scientific theory or technique upon which the expert's opinion is based "can be (and has been) **tested**." Id. at 593, 113 S.Ct. at 2796, 125 L.Ed.2d at 483. (2) Whether the theory or technique employed by the expert "has been subjected to **peer review and publication**." Id., 113 S.Ct. at 2797 (3) The "known or potential **rate of error**" of the scientific technique. Id. at 594, 113 S.Ct. at 2797, 125 L.Ed.2d at 483. (4) The "existence and maintenance of **standards** controlling the *457 technique's operation." Id. (5) Whether the theory or technique is **generally accepted** within its relevant scientific community. Id. The Court noted that use of these factors was to be " flexible." Id. at 594, 113 S.Ct. at 2797, 125 L.Ed.2d at 483-84.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 456-457, 597 S.E.2d 674, 685 (N.C.,2004) (emphasis added.)

> In *Howerton*, our Supreme Court set out a "three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?"

Day v. Brant, 721 S.E.2d 238, 247 (N.C.App.,2012), *citing, Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). Be sure to prepare your attorney for the deposition or trial examination based on the applicable standard for qualification of expert (opinion) testimony.

Additionally, the deposition taken for discovery will differ from the deposition taken for use at trial in both form and substance. In the discovery deposition, the attorney must be free to explore the opinions, the basis of the opinions, the supporting or contradictory information in the record upon which the expert witness relies (or of which he is unaware). There are innumerable

questions that would not be asked of the expert in front of the jury (or at a "for trial" deposition.) The *de bene esse* deposition must be prepared and taken as a direct and cross-examination in front of the jury (or fact-finder). Typically the deposition taken for use at trial will be videotaped in today's litigation. Often two depositions will therefore be necessary. The first in discovery by opposing counsel; the second, as a *de bene esse* or "for trial" deposition, conducted by the attorney who has designated the expert witness. The first may precede the designation of countervailing experts by the opposing counsel; the second should be after your expert has had the benefit of reviewing the countervailing expert's discovery deposition, to shore up the criticisms or questions raised in this "battle of the experts." (Sometimes these depositions may be taken back-to-back for the sake of expediency or economy, but that will usually require the consent of counsel.)

The Rules of Civil Procedure and of Evidence concerning expert witnesses should always be considered in preparing for expert testimony (both at deposition and trial). Rule 26 of the Rules of Civil Procedure provides as follows:

> (4) Trial Preparation; Experts.--Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> a. 1. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> 2. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to sub-subdivision (b)(4)b. of this rule, concerning fees and expenses as the court may deem appropriate.

b. Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (b)(4)a.2. of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)a.2. of this rule the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Rules Civ.Proc., G.S. § 1A-1, Rule 26. Rule 702 of the North Carolina Rules of Evidence states in pertinent part:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

> (e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.
>
> (f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.
>
> (g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.
>
> (h) Notwithstanding subsection (b) of this section, in a medical malpractice action as defined in G.S. 90-21.11(2)b. against a hospital, or other health care or medical facility, a person shall not give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues unless the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.
>
> (i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Rules of Evid., G.S. § 8C-1, Rule 702. Rule 703 expands the scope of evidence that may be presented in connection with an expert witness, even if such evidence would not come in on its own:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rules of Evid., G.S. § 8C-1, Rule 703. Consequently, you must be prepared to support Your Expert witnesses (and have all such underlying facts or data available for sharing, if asked) and to criticize (or at least explore) the underlying facts and data upon which an Opposing Expert will rely, in order to avoid any unpleasant surprises at trial. These items may form the basis for a motion to exclude the testimony (as not being of the type reasonably relied upon by experts in the field) or, at least, to provide a qualifying jury instruction as to the limited consideration permitted for such testimony. *See, e.g.*, Evidence Rules 401, 402, or 403 (relevance/prejudicial effect outweighing probative value.) By preparing your attorney to obtain such information before or during the expert witness depositions, and by incorporating all such materials in your trial preparation, you can anticipate and minimize the effect of an expert opinion that allows for otherwise inadmissible evidence to be presented in front of the jury; that shoe fits the other foot as well, and may allow you to introduce through your expert witness information and documents that would otherwise be excluded from the jury's consideration altogether.

Of course some principles apply to any type of witness (whether a party, fact witness, or expert.) You want to prepare all of your witnesses to communicate clearly, to present a favorable appearance, to seem intelligent, fair and respectful, and to be appropriately responsive, forthright and discreet, disclosing only the information that you anticipate and elicit and not volunteering unsolicited information, or avoiding answering the difficult questions. Conversely, you want your attorney to be prepared to cross-examine adverse witnesses effectively, discrediting the other side's position, without being unnecessarily rude or abrasive. Preparation for depositions or trial utilizing all of the information available, including pleadings, discovery, depositions and disclosures, and conducting diligent factual and legal investigation, will enable such effective representation and ensures the best result possible in the uncertain world of litigation.

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
GASTON COUNTY	FILE NO. 06 CVS 3657
PATRICK COWELL, and wife, TERRIE COWELL, Plaintiffs, vs. GASTON COUNTY. Defendant.	**SAMPLE** **PRE-TRIAL ORDER**

Pursuant to the provisions of Rule 16 of the North Carolina Rules of Civil Procedure and Rule 7 of the General Rules of Practice, a pre-trial conference was held in the above referenced matter. William E. Moore, Jr. appeared as counsel for Plaintiffs _____; _____ appeared as counsel for Defendant _____.

1. It is stipulated that all parties are properly before the court and that the court has jurisdiction of the parties and of the subject matter.

2. In addition to the other stipulations contained herein, the parties hereto stipulate and agree with the following:

   a. ...

   b. ...

3. All parties agree that if a member of the jury becomes ill, or is otherwise disqualified, that they will proceed with the trial with the remaining number of jurors, and accept the unanimous decision of the jury of at least _____ jurors.

4. Counsel estimate that the trial will last two weeks.

5. The following is a list of all known exhibits the parties may offer at trial. The exhibits may not be introduced in the order shown and the parties reserve the right

to supplement, redact or augment the exhibit list prior to entry of this pretrial order:

a. Plaintiffs:

1	...
2	...
21	Any document presented pursuant to trial subpoena
22	All Demonstrative or Illustrative Exhibits created for use at trial
23	Any exhibit listed or tendered by defendants
24	Plaintiffs reserve the right to mark and introduce any document, exhibit or thing produced in discovery in this or any prior related action.

b. Defendant:

1.

2.

6. Opposing counsel has been furnished with a copy of each exhibit jointly identified by the Parties.

7. The following is a list of all witnesses the Plaintiffs may offer at trial:

   a. Any witness whose deposition has been taken in this or any prior related action;
   b. Any witness called or subpoenaed by Defendant(s)
   c. Rebuttal witnesses (to be determined)

8. The following is a list of all witnesses the Defendant may offer at trial:

   a. Any witnesses identified or called by Plaintiffs
   b. Such witnesses as necessary for rebuttal.

11. The following motions are pending:

    a. Plaintiffs' Motion to Take Judicial Notice;

    b. Defendant's Motion to Quash Subpoena

    c. Parties' motions in limine

    d. Joint motion for a Final Pre-Trial Conference.

12. Additional consideration has been given to a separation of the triable issues and counsel for the parties are of the opinion that a separation of issues in this particular case would not be feasible.

13. Plaintiffs contend that the contested issues to be tried by the jury are as follows:

    a. Was Defendant negligent?

    b. What amount, if any, are Plaintiffs entitled to recover from Defendant for negligence?

    c. Were the Plaintiffs damaged by willful or wanton conduct of the Defendant?

    d. What amount, if any, are Plaintiffs entitled to recover as a result of the willful and wanton conduct of the Defendant?

14. Defendant contends that the contested issues to be tried by the jury are as follows:

    a. Did either or both of the Plaintiffs by their own negligence, contribute to their damages?

The parties reserve the right to amend this Pretrial Order at any time prior to the trial of this matter.

This the _____day of _____, 2012.

_____	_____
Plaintiff's Attorney	Defendant's Attorney
N.C. State Bar No. _____	N.C. State Bar No. _____
[ADDRESS]	[ADDRESS]
Counsel for Plaintiffs	**Counsel for Defendant**

Approved and Ordered Filed, this the ___ day of _____, 2012.

_____
Honorable Judge A. Judge,
Superior Court Judge Presiding