INITIAL FILING AND DISCOVERY, EXPERTS AND EVIDENCE

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AUTO INJURY LITIGATION FROM START TO FINISH

III. INITIAL FILING AND DISCOVERY, EXPERTS AND EVIDENCE

A. FILING PROCEDURE AND CASE SCHEDULING

1. Complaint in Circuit Court - General Rules

- Generally for an amount greater than $25,000.00.

Rules for Drafting Complaint

- Complaint need only comply with notice pleading requirements.
- Need not be particularly detailed.
- Rule 1:4(d): state the facts in numbered paragraph

- Rule 1:4(d): sufficient if it clearly informs the opposite party of the true nature of the claim.
- Rule 1:4(j): brevity is encouraged.
- A simple statement, in numbered paragraphs, of the essential facts is sufficient.

Signing and Formatting Complaint

- Rule 1:4(l): include office address, email, telephone and fax numbers.
- Rule 1:4(c). Counsel must sign the pleading.
- Rule 1:4(h) The clerk shall note and attest the filing date on every pleading.
- A date stamp is proof you beat the statute of limitations.
- Rules 1:16 and 1:17: filing requirements for paper filing and electronic filings.
- Only courts in No Va accepting electronic filings is Arlington County.
- All typed material shall be double spaced except for quotations.
- No paper shall be refused for failure to comply with the provisions of this Rule.

Taking the Complaint to Clerk of Court

- Rule 3:2: Do not forget the filing fee and service fee if using Sheriff.
- Rule 3:2: A civil action is commenced by filing a complaint in the clerk's office.
- Rule 3:2: Upon filing of the pleading, the action is then instituted and pending as to all parties defendant thereto.

Caption of Complaint

- Rule 3:2(b): The complaint shall be captioned.
- Caption shall include the name of the court and the full style of the action.
- Style means include the names of all the parties.
- Provide the address or other data after the name of each defendant (*Va. Code § 8.01-290*).

PRACTICE POINTER:

Rule 3:2(c)(ii): If you are asking for money damages, be sure to include the amount requested in the *ad damnum* clause of the Complaint. You will be limited to the amount claimed in *ad damnum* clause of your complaint. Unlike federal court, you cannot amend the complaint to increase the amount sued for after the judgment or verdict.

Attached to Appendix as Exhibit A is a sample Complaint.

Rule 1:20. Scheduling Civil Cases for Trial.

Circuit courts shall adopt one the following procedures for setting cases for trial.

- Counsel may agree to a trial date and call or email court to confirm.
- Counsel may agree to a trial date as a part of a Pretrial Scheduling Order.
- At the request of counsel, court may ask counsel to appear to set a trial date.
- Court may set civil cases for trial at a docket call held on a term day.
- Circuit Court will schedule at least 4 term days per year (*Va. Code § 17.1-517*)
- Executive Secretary shall make these procedures accessible on the Internet.
- Clerk of each district and circuit court shall make their respective procedures available in the office of the clerk of that court.

Rule 1:18 Pretrial Scheduling Order

- Governs deadlines.
- This Order records the trial dates + number of trial days.
- Includes filing deadlines for expert opinions, witness & exhibit lists, etc.
- A sample Uniform Scheduling Order can be found in the rules or with chambers.

PRACTICE POINTER:

The Uniform Pretrial Scheduling Order requires that written discovery be completed no later than 30 days before trial. This means that interrogatories, requests for production of documents and requests for admissions must all be served no later than 51 days prior to trial, which falls about one week after the defendants experts' opinions are filed**.**

2. **Warrant in Debt or Complaint in General District Court** (GDC)

Filing in GDC

- If claim does not exceed $25,000, file in the general district court.
- GDC has exclusive jurisdiction over any claim of $4,500.00 or less.
- Chances of a reasonable recovery in a smaller accident may be better in GDC.
- Claim will be heard by a judge, not a jury.
- You may file a warrant in debt, which is a pre-printed form.
- The warrant in debt will not allow space for more than a simple line entry.
- Expect a request by the defendant for a "bill of particulars."
- Bill of Particulars lays out more specifically the facts of the accident.

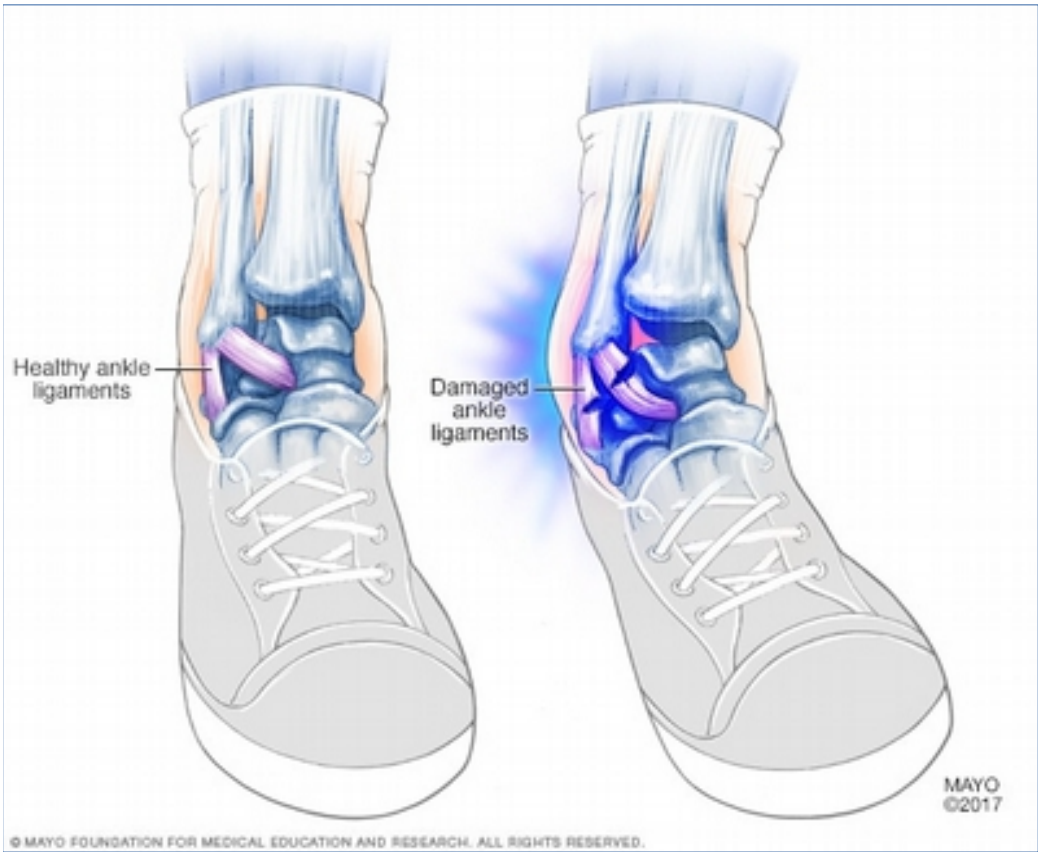
Trial in GDC - Rule 7B:1 et. seq.

- See Rule 7B:4. Trial of Action.
- Rule 7B:4(a): Civil action in a general district court may be brought by warrant, summons or complaint.
- Serve initial pleading by sheriff or any other person authorized to serve process.
- Rule 7B:4(b): If all parties appear and are ready for trial on the return date of the warrant, summons or complaint, the court may proceed with the trial of the case.
- Either party can appeal "de novo" to Circuit Court within 10 days of judgment.
- If the defendant appeals, he/she may have to post a bond in the amount of the judgment prior to perfecting the appeal. *Va. Code § 8.01-129*.

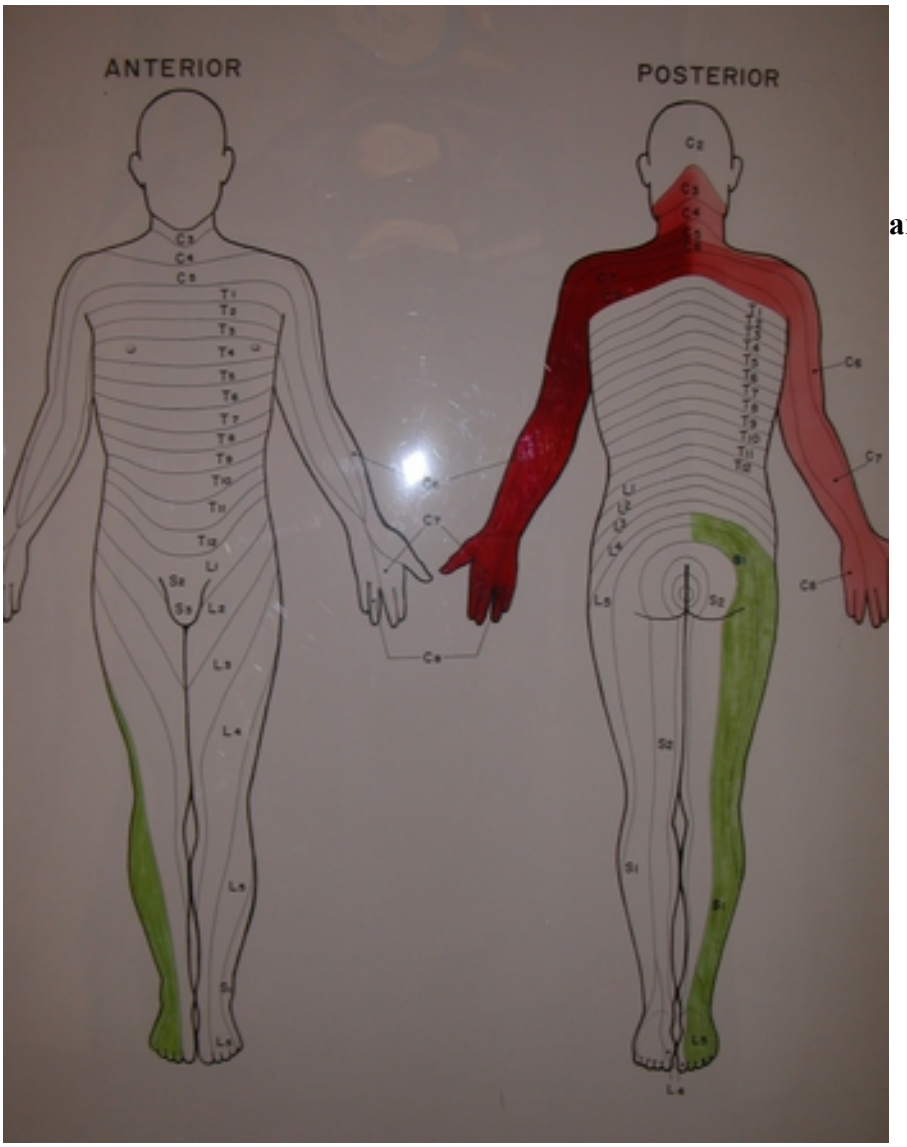
B. ANATOMY OF COMMON INJURIES

A detailed discussion of anatomy is beyond the syllabus of this outline. Below are illustrations of some of the most common injuries which can be used as demonstrative evidence.

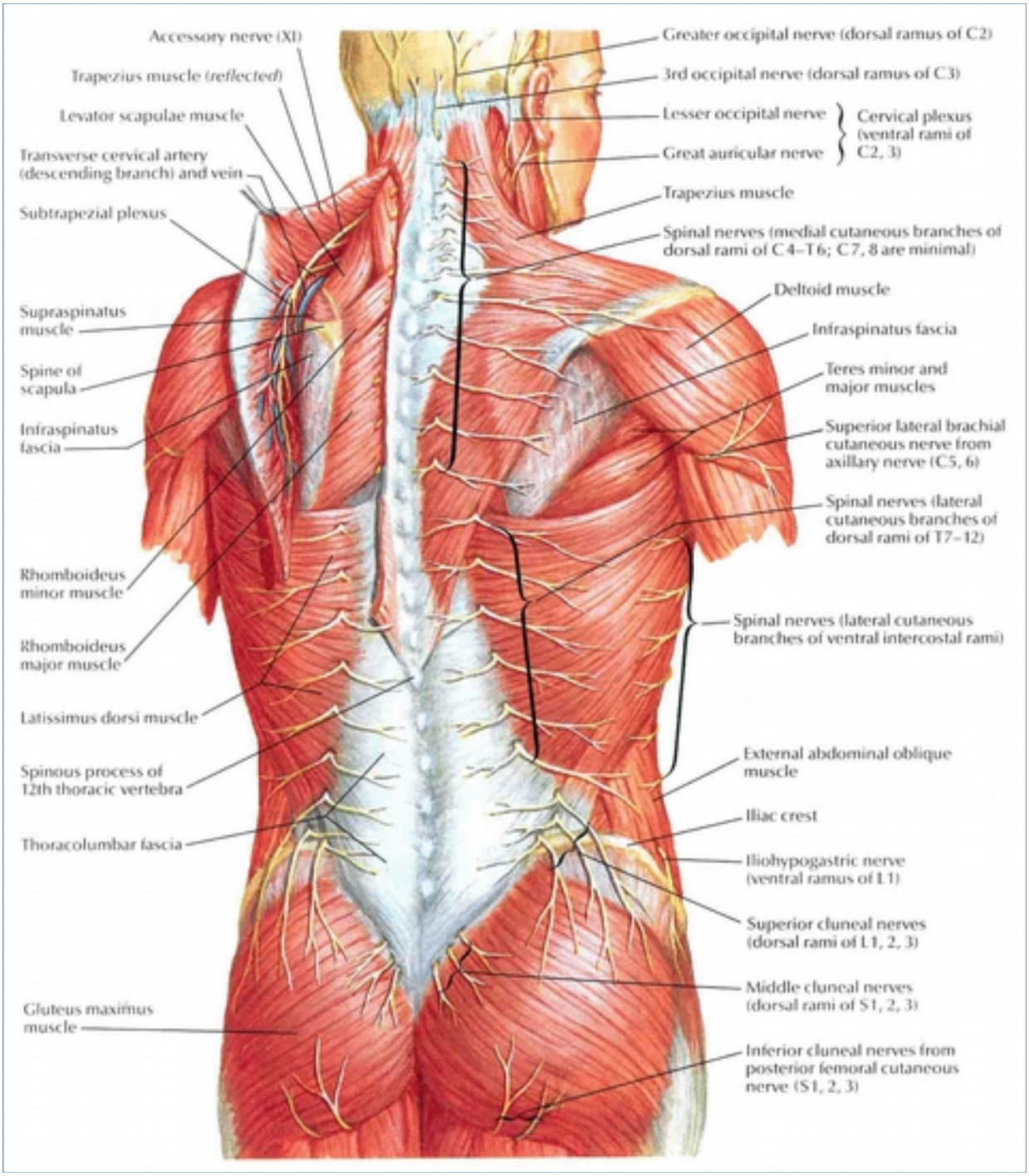
- Strains and sprains are probably the most common injury after mva.
- A strain is a stretching or tearing of muscle or tendon.
- Tendon is the fibrous cord of tissue that connects muscles to bones.
- A sprain is a stretching or tearing of ligaments.
- Ligament is tough bands of fibrous tissue that connect bones to form joints.
- Most common location for a sprain is in your ankle.



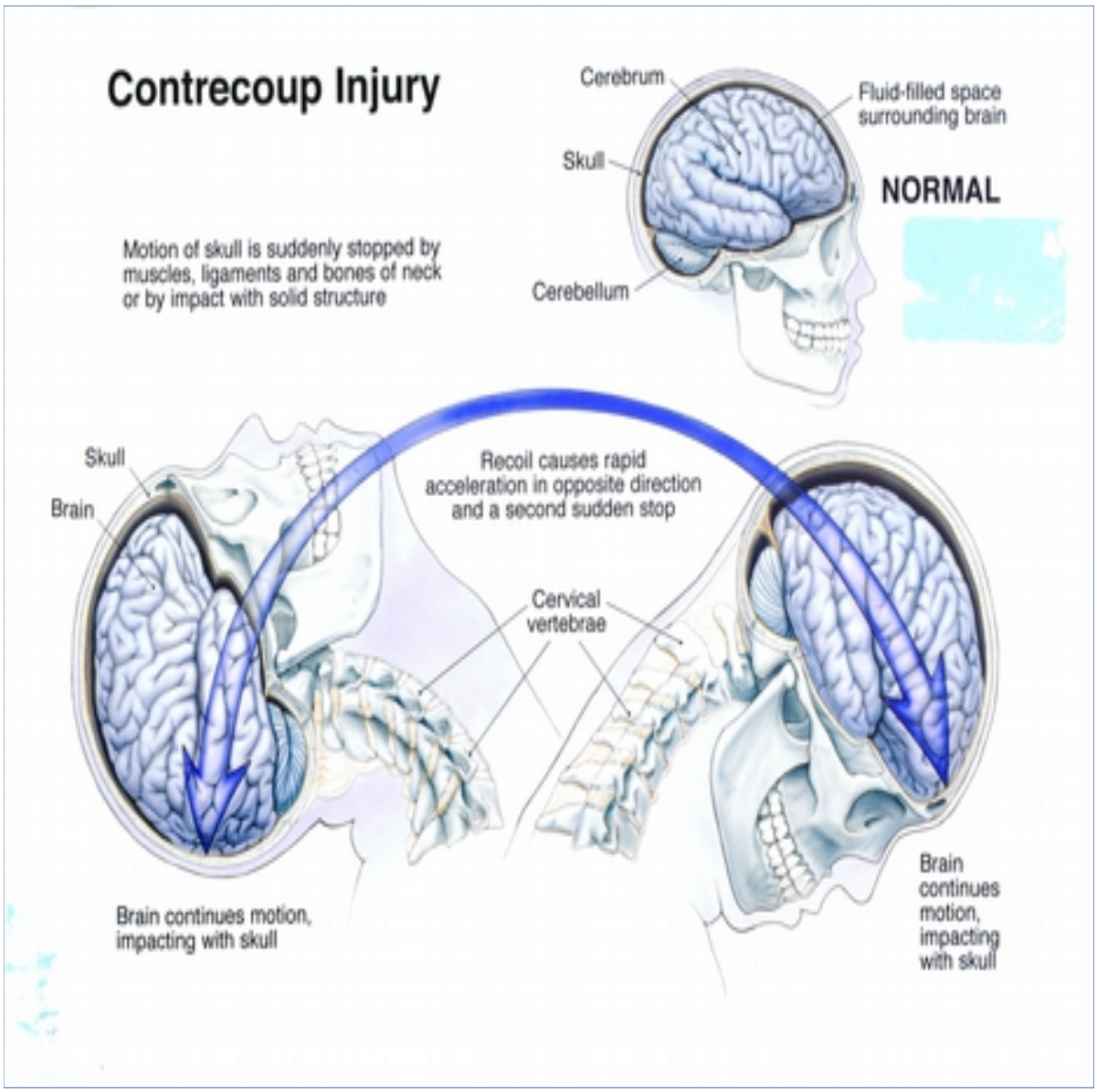
Nerve roots and their pathways -



Radiculopathy



NERVES IN THE BACK



Coup Contrecoup Injury

- More commonly known as “whiplash”.
- Whipping or snapping your head can injure the neck but also cause a concussion.
- A concussion which lingers is a called a mild traumatic brain injury.

C. WITNESS DEPOSITIONS (PARTY AND NON-PARTY DEPOSITIONS)

Virginia Supreme Court Rule 4:5

- Allows for depositions upon oral examination.
- Depositions are necessary to fully explore claims and defenses.
- Deposition may also provide ammunition for cross examination and impeachment.

Party Depositions - Rule 4:5(a)(a1)(i)

- Taken in the city or county where the suit is pending, or
- Taken in an adjacent city or county, or
- Taken where the parties agree, or where a court may designate.

Non-Party Depositions - Rule 4:5(a)(a1)(ii)

- Must be taken in the city or county where the non-party resides, or
- Where non-party is employed or has a principal place of business.
- Typically, a non-party has to be subpoenaed to appear for deposition.

Objections at Deposition- Rule 4:5(c)(2)

- State objections concisely.
- Objections are to stated in a non-argumentative and non-suggestive manner.
- May instruct a deponent not to answer only
  a. to preserve a privilege or protect attorney work-product - see Rule 4:1(b)(3).
  b. to enforce a limitation ordered by the court, or
  c. to present a motion under 4:5(d) to terminate or limit the deposition.

Should you Depose the Opposing Expert Witnesses?

- Maybe, but not always.
- Skilled trial lawyers disagree on this issue.
- Pluses: The more information you have pretrial, the more effective will be cross.
- Minuses: Depo prep may strengthen opposing expert at trial.
  Unintentionally enlarge the parameters of the expert's opinion.

PRACTICE POINTER:

But more recent VSC cases have thrown cold water on that theory. See, *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384 (2017), holding that opinions disclosed for the first time after the 90 day filing deadline were inadmissable despite the fact the opinions were offered in a pretrial deposition.

Use Of Depositions At Trial - Rule 4:7(a)

- Rule 4:7(a)(2) Depositions of witnesses, whether or not a party, may be used at trial to contradict or impeach during cross examination.

- Rule 4:7(a)(4) Depositions of witnesses, whether or not a party, may be used at trial to introduce testimony in that party's case if:

A) the witness is dead,

B) the witness is more than 100 miles from the courthouse,

C) the witness is unable to attend due to illness, age or imprisonment,

D) the witness cannot be produced by subpoena,

E) the witness is a physician, surgeon, dentist, chiropractor or registered nurse who treated or examined any party.

PRACTICE POINTER:

If either party uses a physician to conduct only a record review, the rule does not allow that expert to appear by deposition.

Depositions of Business Entities - Rule 4:5(b)(6)

- Allows a party to depose a corporation or partnership or governmental agency.
- Business entity my designate a representative to speak and bind the entity.
- The notice of deposition shall set forth the topics to be questioned at deposition.
- Rule's subparts discuss how to require production of documents at the deposition.
- Rule authorizes use of subpoena duces tecum if a non-party.
- Rule authorizes attaching a list of requested documents if a party - Rule 4:5 (b)(1).
- If opponent's conduct is outrageous, call judge during the depo - Rule 4:5(d).
- It is sanctionable to fail to attend a properly noticed deposition - Rule 4:5 (g).

PRACTICE POINTER:

If you fail to subpoena a non-party witness who you noticed for deposition, and such witness does not appear, you may be required to pay for the time of

your opponent - Rule 4:5 (g)(2).

Out of State Depositions - Rule 4:5(a)(a1)(iii)

- Use a person authorized to administer an oath where the deposition will be held.
- May use a letter rogatory.
- A letter rogatory will include a list of questions to be answered under oath.

Depositions Before Filing a Lawsuit - Rule 4:2

- Depo is available even before a law suit is filed.
- But only under limited circumstances.
- Most commonly where a party or witness may become unavailable.
- Unavailability must be due to illness, death or other exigent circumstance.
- Notice and service of the notice on the opposition are required.
- If providing notice is not feasible, secure court order. Rule 4:2(a)(1)-(3).

Errata Sheet - Rule 4:5(e)

- Witness may change his testimony, not merely correct typographic errors.
- Witness must provide a reason for doing so.
- Your opponent can use original transcript and errata sheet to cross examine.
- Best advice is to thoroughly prepare the witness to minimize errata sheet entries.
- Witness has 21 days to provide reasons for changes in form or substance.
- Unless both parties so stipulate, a deponent can be required to read his deposition.

D. OBTAINING MEDICAL RECORDS

1. Secure the Client's Bills and Records

- The first step in securing the records is to identify the relevant healthcare providers.
- Thoroughly interview the client.
- Start with the day of the crash and move forward chronologically though to present.

- Common for healthcare providers to subcontract the billing to a separate company.
- You may have to write or fax separate requests.
- A single visit to the ER will generate multiple requests for bills and records.
- ER has subcontractors, including the ER physician and the radiologist.
- An inpatient admission will likely include visits by consulting experts .
- Consulting experts also bill separately from the hospital.

2. HIPAA Requirements

a. Federal HIPAA

- HIPAA stands for The Health Insurance Portability and Accountability Act of 1996.
- Federal law which requires confidential handling of protected health information.
- See, 42 U.S.C. § 1320d et seq.

Citing from the HHS government website, e*very health care provider, regardless of size, who electronically transmits health information in connection with certain transactions, is a covered entity.*

- Privacy rules are spelled out at 45 CFR Part 160 and Subparts A and E of Part 164.
- HIPAA mandates an individual's right to access his or her own medical records.
- HIPAA allows a patient to request corrections or to add information to his records.

b. Virginia Privacy Rules - Virginia Code § 32.1-127.1:03

- Recognizes an individual's right of privacy in the content of his health records.
- Health records are the property of the healthcare entity maintaining them.
- Laws control and restrict how records are maintained, disclosed and re-disclosed.
- Subsection H requires that a subpoena duces tecum for medical records be served on the opposing counsel or patient where not represented.
- Subpoena return date shall not be less than 15 days from date on the subpoena.
- Patient or his attorney has 15 days to file a motion to quash.

Va Code § 32.1-127.1:03 (H)(6) lists factors to consider for motion to quash:

(I) the particular purpose for which the information was collected;

(ii) the degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual;

(iii) the effect of the disclosure on the individual's future health care;

(iv) the importance of the information to the lawsuit or proceeding; and

(v) any other relevant factor.

c. Method & Cost of Requesting &Producing Medical Records & Admissibility

Virginia Code 8.01-413.

- Copies of records are admissible as if they were originals.
- Copies shall be produced within 30 days of the date of the request.
- Records can be produced either as hard copies or electronically.
- Providers can charge up to $0.50 per page for up to 50 pages and $0.25 per page thereafter and a search and handling fee not to exceed $20, plus postage.
- When records are produced in electronic format the provider may charge a $0.37 for up to 50 pages and $0.18 per page and the $20 search and handling fee plus postage.

PRACTICE POINTER:

Request the medical records be provided in electronic format. It will likely save you a lot of money. Also consider requesting an ABSTRACT of a multi-day inpatient hospital stay, which should produce the most important records.

- Itemized bills must be provided without charge (up to 3 requests per 12 months).
- Willful refusal to comply with a request for bills or records is sanctionable.
- Willful refusal (failing to respond to a second written request, or by overcharging).
- Sanctions include a refund of fees, plus court costs and **reasonable attorney fees.**

3. Read the Records to Understand The Injury

- Claims send medical records for review by someone with a medical background.
- The days of quickly negotiating settlement of 2 x the bills are gone.
- The claims adjuster will likely have a memo prepared by his medical reviewer.
- You must be able to discuss the injuries and treatment in detail.

PRACTICE POINTER:

> You must read every word of the medical reports and records. Some attorneys fail to take the time needed to understand the nature and extent of injury because they fail to secure and read all the records.

- Today, many claims adjusters are offering a settlement of only the medical bills.
- Offer may include a few hundred dollars for pain and suffering.
- Most adjusters are simply ordered to offer these low sums.
- Carriers hope most claimants will not want to take the time and expense to litigate.

4. Argue Pain and Suffering Directly From the Medical Records

- Review the medical records for objective findings consistent with a painful injury.
- Look for terms such as “spasm”, “trigger points” and “restricted range of motion.”
- These findings are reproducible and not solely dependent on the word of the patient.
- Also look for the type and amount of prescription strength medication purchased.
- The use of prescription medication is also consistent with a painful injury.
- It is common to find references to pain on a scale of 1-10 in the medical records.

5. Evaluate for Pre-existing Conditions and Prior Claims

- Some injuries, like a mild traumatic brain injury are not easily verifiable.
- The claims adjuster will likely demand at least 3 years of prior medical records.
- Pre-existing conditions, like prior claims, are fertile grounds for inquiry.

- Always ask client about prior injuries, prior claims and pre-existing conditions.
- Where possible, secure the prior medical records before they are read by the adjuster
- Most prior claims are entered into a master data bank accessible by insurer.
- You need to know at least as much about your client's history of prior injuries and claims as the claims adjuster.

PRACTICE POINTER:

Many people obtain care known as "maintenance" from chiropractors and other practitioners. This can reduce the value of a claim if the maintenance was close in time to the collision and involved the same body part injured in the collision.

E. SELECTING AND WORKING WITH EXPERTS

1. Selecting and Retaining Frequently Used Experts

a. Medical Experts.

- Medical witnesses can be either retained experts or treating providers, or both.
- The difference my seem subtle.
- Gain credibility with jury by using the treating physician.
- More difficult if jury learns medical expert is not a treating provider.
- Both retained experts and treating providers will need to be paid for their time.
- Request a W-9 and an invoice.

- You may have to answer interrogatories before meeting your treating expert.
- If so, respond that the answer anticipates what the treating physicians will say.

The following language is used by this author:

Dr. Smith has not been retained as expert witnesses in this case. Nonetheless, Ms. Client may call said physician to testify about her care and treatment in Plaintiff's case-in-chief and/or rebuttal. Pursuant to Virginia Code § 8.01-399, said physician will testify consistent with the medical records and bills from his practice which are provided in discovery and are incorporated into this designation, as well as with this designation. To the extent said physician offers opinions, they will be stated to a reasonable degree of probability. To the extent any such testimony is considered "expert" and therefore requires disclosure

pursuant to the Rules of the Supreme Court of Virginia or the Court's Scheduling Order, the Plaintiff provides the following: (Here I outline the expected testimony including opinions on causation and future damages which are not ordinarily included in the medical records).

- Treating physician may be unable or unwilling to assist. If so, retain a physician.
- Be sure to request opinions on causation and past and future medical expenses.
- There is no magic to finding and retaining an expert.
- It seems that every year fewer physicians are willing to participate in litigation.
- Word of mouth and organizations such as VTLA, VADA and AAJ can be useful.

b. Experts Other Than Medical Experts

As stated elsewhere in this outline, other experts may be of assistance or even necessary to establish a prima facie case. For example, consider the following possible experts:

I. Auto Appraiser

- Hire an appraiser or other automotive expert to look for hidden damage.
- For example, the frame can be measured to determine if it has been bent.
- Shock absorbers behind the bumper cover can be examined for force and impact.
- Measure gaps between the doors and body of the car to confirm frame damage.

ii. Accident Reconstruction/Trucking Expert

- Download the event data recorder.
- Retain expert on tractor trailer practices and procedures.

iii. Vocational Rehabilitation

iv. Economist

vi. Medical Billing Coder (Useful if Client is a Kaiser member).

2. Securing Draft Reports From Your Expert or Treating Physician

- It is better to be safe than sorry
- Make sure you know opinions of expert or treating physician before a report is final.

- Many experts do not understand how to phrase their conclusions to satisfy the court.
- Best to avoid a paper trail with drafts going back and forth.
- In state court, claim your comments to an expert are protected work product.
- Avoid problems in state court by arranging for telephone conferences or in person meetings.
- Your consultations and work product are explicitly protected under the federal rules.

- If you must email or transmit a draft with your thoughts and mental impressions, add a statement to the document such as ***"This document contains attorney work produce including the thoughts and mental impressions of counsel and is not to be produced, even with a subpoena, without a court order. If you receive a subpoena which asks for this document, please notify me immediately so that I can file a motion to quash."***

3. **Evidentiary Aspects of Expert Testimony** - Virginia SCR 2:701- 2:706.

- Rule 2:701. Opinion Testimony by Lay Witnesses derived from Code *§ 8.01-401.3(B)*.
- Rule 2:702. Testimony by Experts (Rule 2:702(a)(I) derived from Code *§ 8.01-401.3(A)*.
- Rule 2:703. Basis of Expert Testimony (Rule 2:703(a) derived from Code *§ 8.01-401.1)*.
- Rule 2:704. Opinion on Ultimate Issue (Rule 2:704(a) derived from Code *§ 8.01-401.3(B)* □ *& (C)*.
- Rule 2:705. Facts or Data Used in Testimony (Rule 2:705(a) derived from Code *§ 8.01-401.1*.
- Rule 2:706. Use of Learned Treatises With Experts (Rule 2:706(a) derived from Code *§ 8.01-401.1*.

Expert testimony proper when the subject matter of the inquiry is of such character that only persons of skill or experience in that area are capable of forming a correct judgment. *Bradley v. Poole*, 187 Va. 432 (1948); *Neblett v. Hunter*, 207 Va. 335 (1966).

4. **Lay Testimony To Establish Causation and Extent of Injury -** Va Evidence Rule 2:701

- Depending on the facts of your case, you may not need an expert witness.
- Rule 2:701, Opinion Testimony by Lay Witnesses is derived from *Code § 8.01-401.3(B).*

- *Code § 8.01-401.3(B).* allows opinion testimony by a lay witness if*:*

a. It is reasonably based upon the personal experience or observations of the witness.

b. And it will aid the trier of fact in understanding the witness' perceptions.

c. Lay opinion may relate to any matter, such as -- but not limited to -- sanity, capacity, physical condition or disability, speed of a vehicle, the value of property, identity, causation, time, the meaning of words, similarity of objects, handwriting, visibility or the general physical situation at a particular location.

d. Lay witness testimony that amounts only to an opinion of law is inadmissible.

- Cases support use of lay testimony to establish causation and nature and extent of injury in certain cases.
- *Peterson v. Neme*, 222 Va. 477, 483, 281 S.E.2d 869, 872 (1981) a doctor testified about the nature and extent of the injuries, but failed to offer any opinion as to causation.
- *Peterson* holds lay testimony of causal connection between an automobile accident and injury is admissible for whatever weight the fact finder may choose to give it.

- This is true even when medical testimony fails to establish causal connection expressly.
- Citing *Peterson*, the VSC rejected the contention that the inability to perform ordinary labors as a housewife, mother, and waitress could only be established by expert medical testimony. *Todt v. Shaw*, 223 Va. 123; 286 S.E.2d 211(1982).

5. Discovery of Expert Opinions - What You Can Get and What You Must Give

- The discovery of expert opinions is controlled by Supreme Court Rule 4:1(b)(4)(A).
- Rule 4:1 allows interrogatories identifying the opponent's experts .
- Opponents must divulge:

  (1) the subject matter about which the expert is to testify;

  (2) the substance of the facts and opinions to which the expert is expected to testify, and

  (3) a summary of the grounds for each opinion.
- Subject to paying a reasonable fee, counsel may depose his opponent's testifying expert.
- A party may not discover the opinions of a retained expert who is not expected to testify absent *exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.* 4:1(b)(4)(B).
- Parties may also seek **Lombard** information from the opposing expert.
- Named after *Lombard v Rohrbaugh, 262 Va. 484, 551 S.E.2nd 349* (2001).
- The information sought includes income earned by expert from the insurance carrier retaining the expert.
- The theory is that significant earnings will show bias. In *Lombard*, the amount earned by Dr. Ammerman was over $100,000.00 per year in both 1998 and 1999.
- Court ruled 100k constituted a substantial connection between the doc and Allstate.

6. Rule 4:10 Examinations of the Plaintiff - Can You Help Your Client?

- Rule authorizes defendant, with leave of court, to require the plaintiff to attend exam.
- Defendant can select the health care provider.
- Defendants request a 4:10 exam if the plaintiff is claiming permanent or ongoing injury.
- Rule 4:10 is titled *Physical and Mental Examination of Persons.*
- Rule states if physical or mental condition of a party is in issue, upon motion of the adverse party, the court **may** order the party to submit to an examination.
- Exam must be by a healthcare provider as defined in *§8.01-581.1.*
- Healthcare provider is employed by the moving party.
- Order shall specify the time, place, **manner, conditions, and scope** of the examination.
- Order shall identify the person or persons by whom it is to be made.
- Order shall fix the time for filing the report and furnishing the copies.

Attached to the Appendix as Exhibit B is a Sample Rule 4:10 Order

Rule 4:10 has been the subject of much litigation.

- What constitutes "good cause" to seek the examination.
- Can the Defendant tell the jury the examination is "independent".
- What constitutes a "mental examination".
- Can the defendant force the plaintiff to be examined by a vocation rehabilitation expert.
- What controls on defense doc will court allow.

Recommendations to the Plaintiff's Counsel

- Plaintiff's counsel should attempt to protect the client.
- First, you must always prepare the plaintiff for the examination.
- Plaintiff should be advised to be polite, but not overly friendly.
- Plaintiff should be familiar with his medical history.
- Plaintiff should be able to explain where he has pain and how it affects his daily activities.
- Plaintiff should understand the examination is for the defendant and the doc is not neutral.
- Plaintiff should understand the examination is not for treatment.
- The exam does not create a physician-patient relationship.
- Do not agree to the examination if your client is not claiming a permanent injury.
- If no claim of permanency, it is doubtful the defendant can show "good cause".

PRACTICE POINTER:

> If the claims adjuster asks for a medical examination before suit is filed, agree only on the condition that there will be no further requests. Most judges will enforce such an agreement.

- If your client's employment is in issue, do not agree to have your client examined by a vocational rehabilitation counselor.
- Some vocational rehabilitation counselors are not licensed professional counselors.
- If not a licensed professional counselor, excluded under 8.01-581.1.
- Even where the vocational counselor is licensed, argue the purpose of the examination is improper because it focuses on employment issues, not mental health counseling.

F. EVIDENCE PRESERVATION

Counsel must understand the importance of preserving evidence after an injury involving a motor vehicle or other machinery.

1. Accident Scene and Vehicle Inspection and Damage Photographs

- Take photographs of the accident scene.
- Damage to the rear of your vehicle may not be impressive, but the damage to front of the at fault party vehicle is more visible.
- Accident scene may be the only opportunity before litigation to secure photos of the other person's vehicle.
- At least secure photos of your client's damaged vehicle.
- Do so particularly if the damage is obvious, even if the injuries are not life threatening.
- If you wait too long, the vehicle may be disposed of as salvage or repaired.
- Good photos of vehicle damage enhance your client's bodily injury claim.
- However, even if you learn your client's vehicle has been sold for "salvage", you may be able to call the salvage yard, locate the vehicle through the "lot number" and send an appraiser to take photographs.

PRACTICE POINTER:

> Never accept your client's representation that the other party's insurer took photographs to dissuade you from taking your own. In the author's experience you have no better then a 50-50 chance of securing valuable photographs from the defendant's insurer.

- Consider examining the headlight filaments to determine if the lights were on.
- Look for tire tread and markings to match what is found at the scene.
- Use color film to determine if paint transfers can help your case.
- Examine brakes to determine braking distances, worn drums or pads, or other defects.
- Data from EDR's can be downloaded to determine speed, braking events, etc.

2. Tractor Trailer Manifests and Event Data Recorder

- Secure the truck driver's manifests to determine hours of driver.
- If accident involves fatal or life altering injury, hiring an expert to download data from EDR.
- Event data recorders (EDR) routinely record data such as speed and braking events.
- Many cars will also record data such as vehicle speed at the time of impact.

PRACTICE POINTER::

Crash data can be lost by simply turning the ignition after a crash. For serious collisions where liability could be an issue, consider hiring an expert to retrieve the data stored in the vehicle's EDR. Counsel should also consider filing suit immediately if cooperation regarding preservation of evidence is not forthcoming.

- Drivers of tractor trailers traveling interstate are required to maintain manifests.
- Manifests must record hours driving, hours off duty but awake and hours sleeping.
- These manifests can be of great importance to counsel after a collision.
- Pursuant to *49 C.F.R. §395.8*, manifests are retained by the employer for only 6 months.

3. Documentation of Lost Earnings

- Wage loss claims can be simplified if the client keeps track of the time lost from work.
- Many employers cannot reconstruct hours lost for medical appointments, etc.
- Total hours lost may depend on your client's record keeping.

4. Crashworthiness Claims

- Sometimes seatbelt failure or structural defects are alleged
- If so, thorough evaluation, appraisal and inspection of the vehicles involved is required.
- Counsel may need to purchase and preserve the wrecked vehicles.
- If counsel does not have access to the defendant's vehicle, write a letter to the defendant requesting the vehicle be preserved for examination by the experts.

5. Spoliation

- If evidence is lost by one of the parties, the opposing party may claim spoliation.

- A spoliation instruction allows the jury to infer that the lost evidence would have supported the case of the opponent.
- Until 2017, there was no opinion from the VSC as to proof necessary to support spoliation.
- For example, could the loss have been inadvertent, did there have to be evidence of intent?
- Questions were answered in *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384.
- *Emerald Point* held evidence must support a finding of intentional loss or destruction.

  "In short, we agree that to allow such a severe sanction as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate**."**

- For that reason, while the adjuster will strive to settle the case for as little as possible, eventually an offer that could meet the definition of fair" should be forthcoming. Unfortunately, that offer may not be forthcoming until the Plaintiff files suit.
- Plaintiff's counsel should always set the stage for a possible bad faith suit.
- But given the burden of proof for a common law bad faith liability claim (clear and convincing) and the fact that common law bad faith requires a finding that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured, such claims will frequently be difficult to win.

APPENDIX

EXHIBIT A - PERSONAL INJURY SAMPLE COMPLAINT

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____

	:	
Plaintiff,	:	
	:	
v.	:	Case #:

:

Defendant. :

COMPLAINT

1. Plaintiff (insert name) is an adult resident of , Virginia.
2. Upon information and belief, defendant (insert name) is an adult resident of , Virginia.
3. On or about , at approximately .m., plaintiff was proceeding in the right lane of westbound of Old Keene Mill Road.
4. At that time and place defendant pulled out of a shopping mall and attempted to cross plaintiff=s westbound lane=s to travel east on Old Keene Mill Road.
5. At said time and place plaintiff blew her horn and attempted to worn defendant proceeding into her lane of travel.
6. Despite blowing her horn, defendant proceeded into the path of plaintiff=s vehicle.
7. Plaintiff was unable to avoid colliding with defendant=s vehicle.
8. Defendant had a duty to operate her vehicle with due care and regard for others using the highway, including plaintiff.
9. Notwithstanding said duty, defendant did then and there operate her automobile in a careless, negligent and reckless manner in that she:
    a) failed to pay full time attention to her driving duties;
    b) operated her vehicle at an excessive speed under the circumstances and conditions then and there existing;
    c) failed to keep a proper lookout;
    d) failed to yield the right of way;
    e) failed to keep his automobile under proper control;
    f) followed too closely behind Plaintiff; and
    g) was otherwise negligent.
10. As a direct and proximate result of defendant=s joint and several negligence, plaintiff has suffered property damage and permanent bodily injury, and has suffered and will continue to suffer pain of body and mind and inconvenience, has incurred and will continue to incur medical expenses and has suffered and will continue to suffer loss of earnings and earning capacity.

WHEREFORE, plaintiff _____ demands judgment against defendant _____ , in the amount of ____DOLLARS ($___) compensatory damages, costs, interest, prejudgment interest and such other relief this Court deems just and proper.

Plaintiff demands trial by jury on all issues in this case.

Respectfully submitted,

By:_____

Name, address, telephone and bar #

Counsel for Plaintiff

APPENDIX
EXHIBIT B - SAMPLE RULE 4:10 ORDER

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____:

Plaintiff, :
:
v. : LAW NO.
Defendants. :

ORDER ON MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF

Defendant's Motion of Physical Examination of Plaintiff is GRANTED as follows:

1) Time:

2) Place:

3) Manner of the examination:(I) The physical examination shall consist of visual assessment by the examiner, manual palpation or measurement, if desired by the examiner, and directed questioning by the examiner about the results of in-session physical tests. (ii) There shall not be any invasive testing, films, nerve conduction studies or other intrusive or painful requirements or stimuli.

4) Conditions to the examination: (I) Counsel for the Defendant are responsible for all Plaintiff's transportation costs [if the examination is not conducted in the city where Plaintiff is currently residing/ within __ miles of Pl's residence], which costs shall be paid in advance if requested by Plaintiff. (ii)
Counsel for Defendant is responsible for providing the examiner with any medical history, medical records, or radiographic studies requested by the examiner. Plaintiff shall have no responsibility to furnish any such materials. Plaintiff need not complete any questionnaire or history forms upon arrival at the examiner's office. (iii) The examiner is not permitted to conduct interview of Plaintiff. Rule 4:10 is not a substitute for a deposition. The oral exchange shall be limited to affirmative or negative responses to elicited testing questions. (iv) Plaintiff is permitted to have a court reporter and/or videographer present during any interchange between Plaintiff and the examiner in connection with the examination. (v) Plaintiff's counsel or his designee is allowed to be present to object to any attempted oral exchange initiated by the examiner that exceed the scope of this Order. (vi) This examination is by agreement. Plaintiff is voluntarily appearing for the examination. Neither the examiner nor defense counsel will be permitted to state, suggest, argue or imply during the examination, in the report, or at trial that the examination was in any way limited by the Plaintiff's refusal to allow an examination.

5) Scope of the examination: The examination is limited to the plaintiff's physical condition as raised by the pleadings in this action and as authorized by this Order. The examiner shall be provided a copy of the Order at least 72 hours in advance of the examination, and must agree to abide by its terms.

6) The person or persons by whom it is made: (Name of examiner), a physician who has been

selected by the defendant(s); and

7) The time for filing the report and furnishing the copies: A copy of Dr. [insert name of DME doc] report, his CV, all raw data generated by the examination, including any x-rays, and a copy of his charges will be furnished to counsel for plaintiff (I) five (5) days after the examination or (ii) the first date than any information about the examination is furnished to the defendants' counsel. The results of the examination and a copy of the Rule 4:10 report shall be filed with the Clerk . "Raw data" shall include all clinical notes and other documents generated by the examination of plaintiff.

_____ _____

ENTERED JUDGE

WE ASK FOR THIS:

_____

Counsel for Defendant

_____

Counsel for Plaintiff