



AUTO INJURY LITIGATION FROM START TO FINISH

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PART III

INITIAL FILING, DISCOVERY, EXPERTS AND EVIDENCE



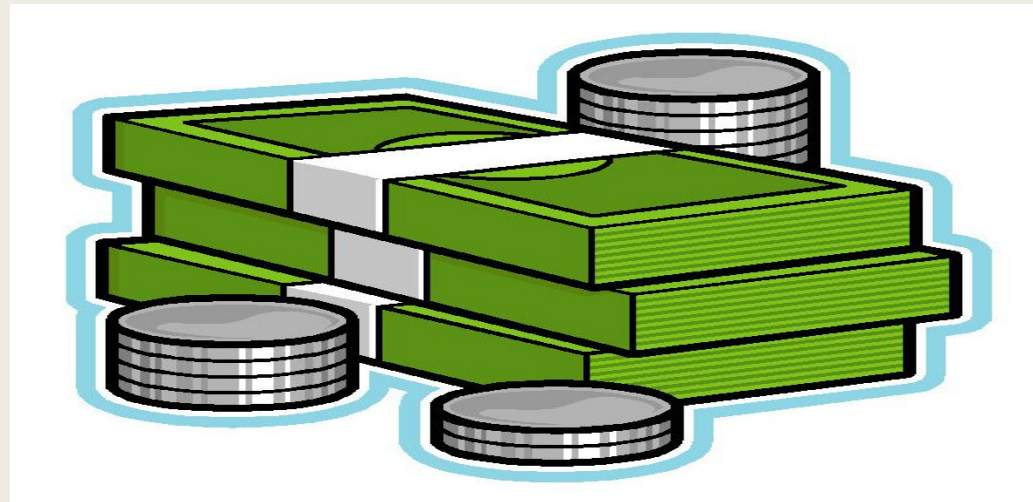
FILING A COMPLAINT IN CIRCUIT COURT: RULE 1:4

- Claims greater than \$25,000.00
- State facts in numbered paragraphs
- Informs opposite party of the nature of the claim
- Date stamp required for proof of beating SOL
- Electronic filings only available in Arlington



PRACTICE POINTER: RULE 3:2(c)(ii)

- If asking for money damages, include the amount requested in the ad damnum clause of the complaint
- Unlike federal court, you cannot amend the complaint to increase the amount sued for after the judgment or verdict



SCHEDULING TRIALS IN CIRCUIT COURT: RULE 1:20

- Counsel may agree to trial date on their own
- Court may set civil cases for trial on a term day
- Usually at least four term days per year

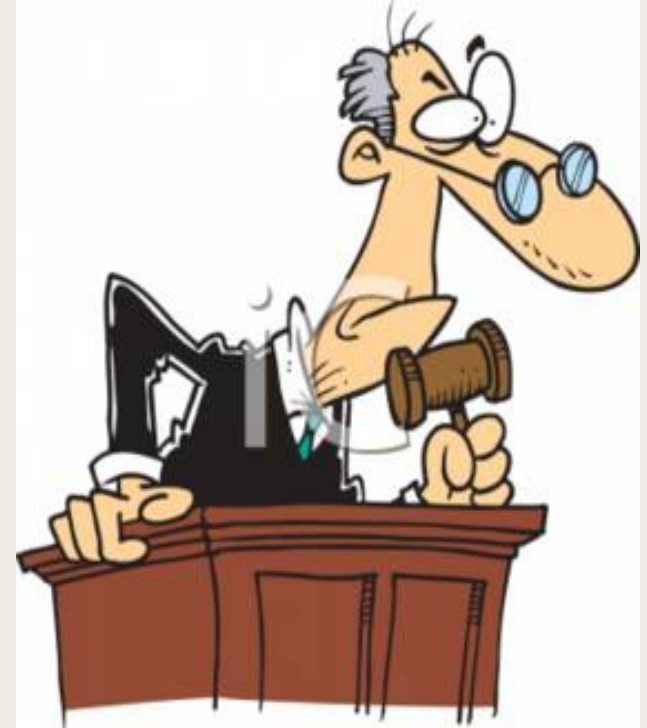


PRACTICE POINTER

- Uniform Pretrial Scheduling Order requires written discovery be completed no later than 30 days before trial
- Interrogatories, RFPDs, and RFAs must all be served no later than 51 days prior to trial

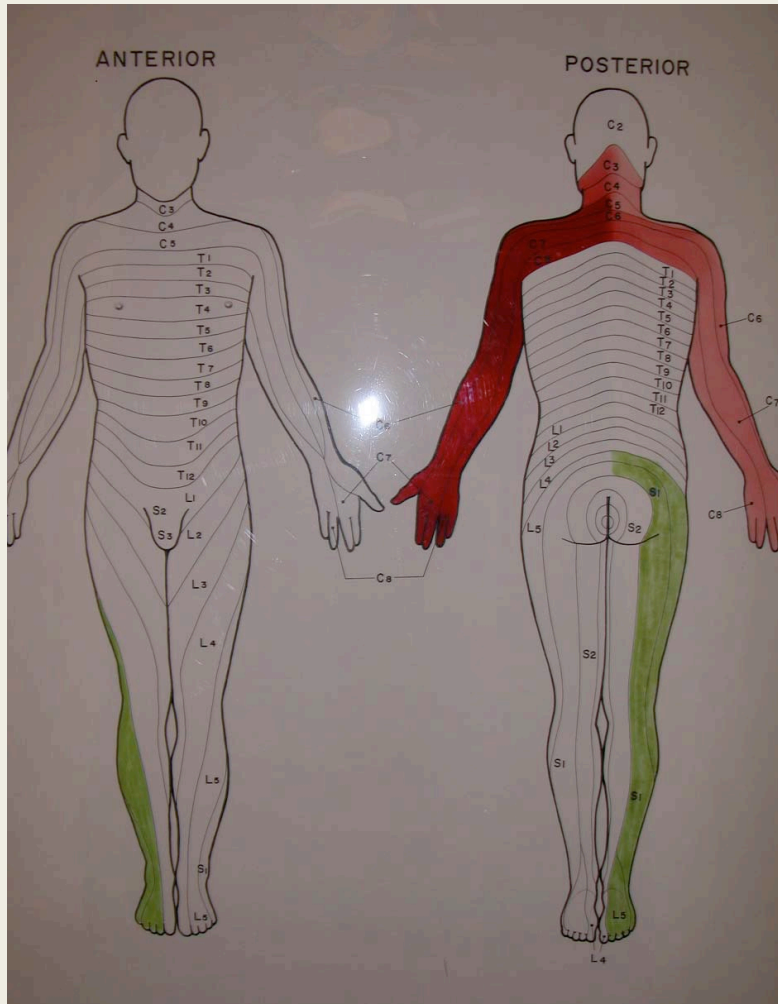
GENERAL DISTRICT COURT: RULE 7B

- If claim less than \$25,000, file in GDC
- Exclusive jurisdiction over claims of \$4,500 or less
- Claim will be heard by a judge, not a jury
- Either party can appeal “de novo” to circuit court within 10 days of judgment
- If defendant appeals, he/she must post bond
 - Exception exists for defendant with indemnity coverage through liability policy that is sufficient to satisfy judgment

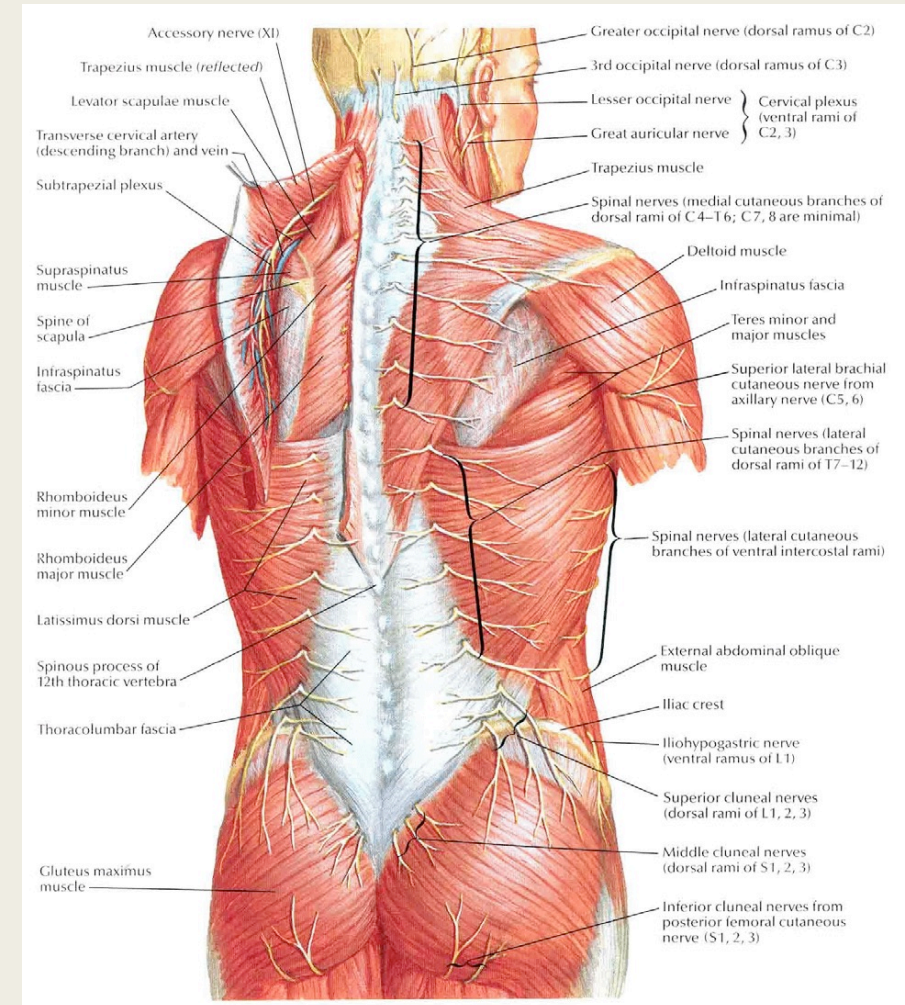


ANATOMY OF COMMON INJURIES

Nerve roots and their pathways – radiculopathy



Nerves in the back



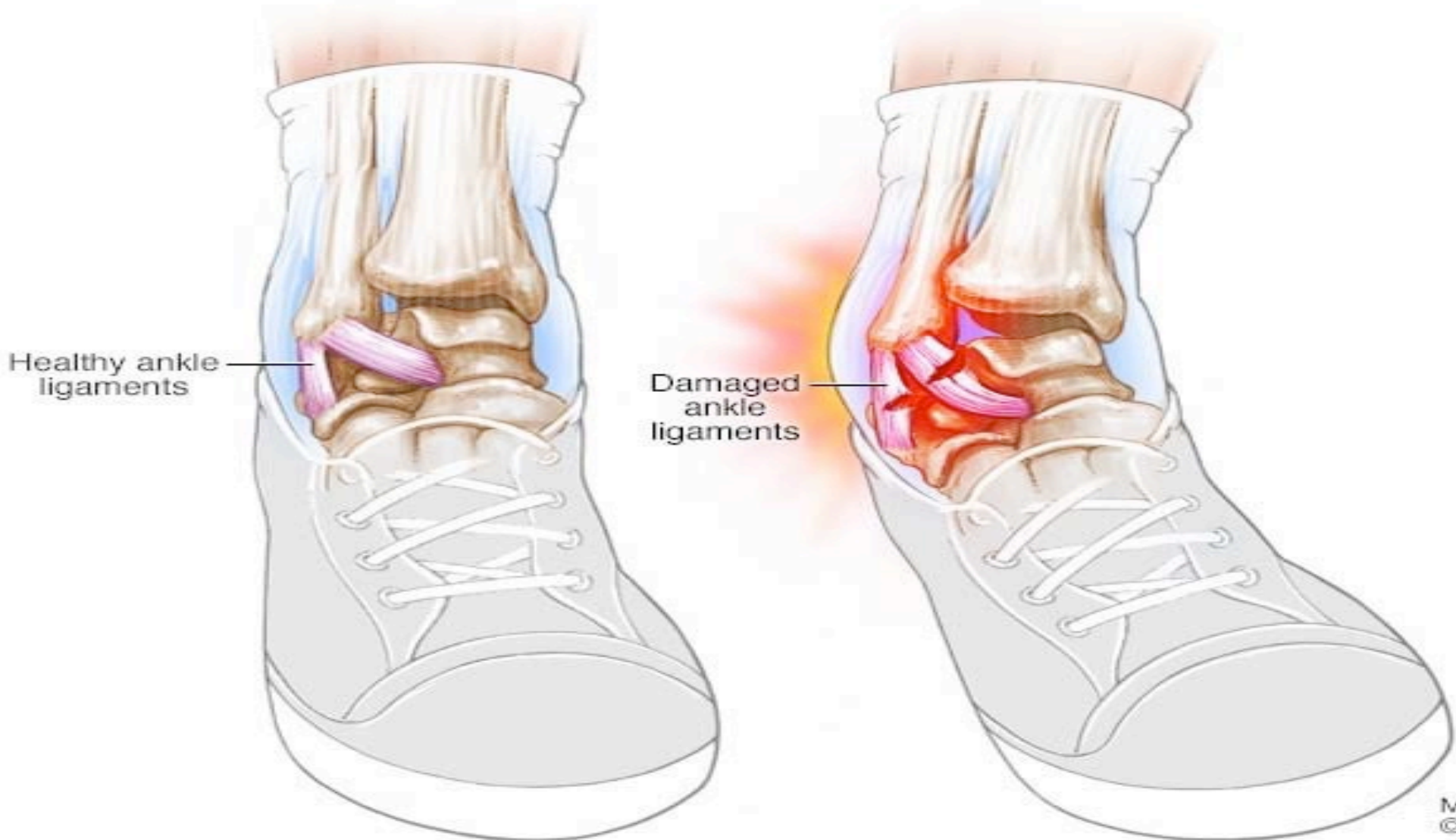
STRAINS & SPRAINS

- Strains and sprains probably most common injury after a motor vehicle accident
- 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



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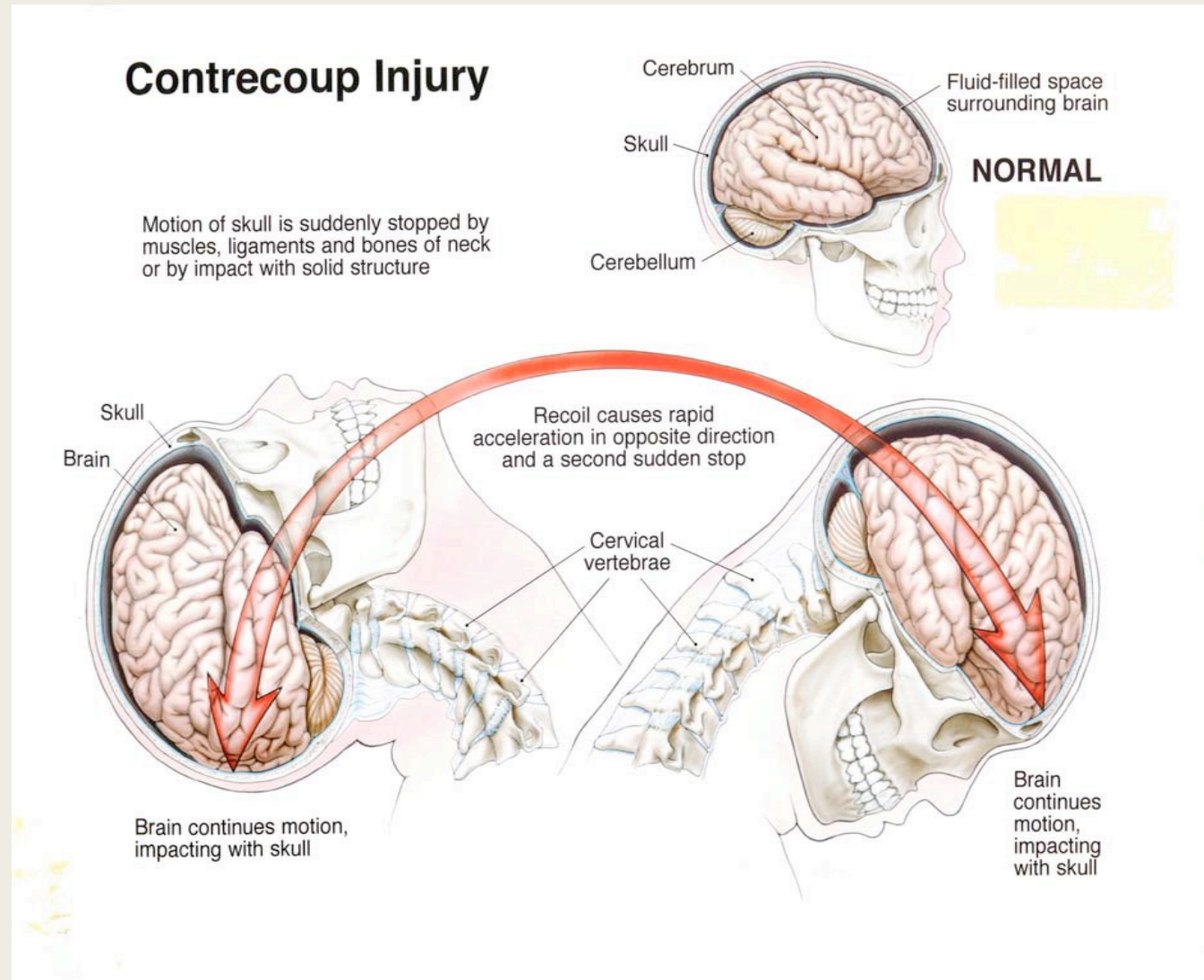
ANKLE SPRAIN



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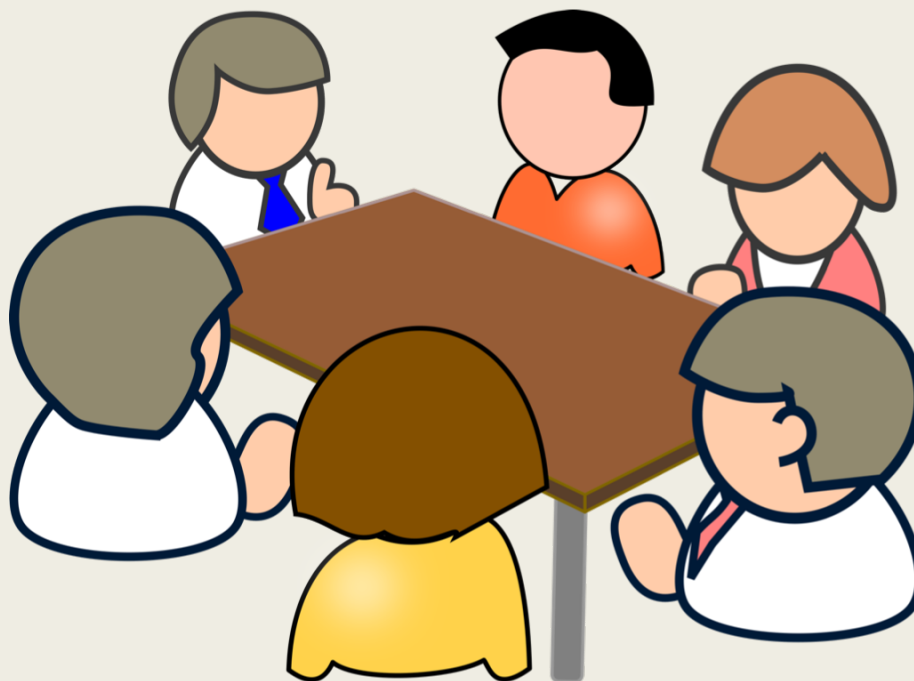
COUP CONTRECOUP INJURY (“WHIPLASH”)

- Motion of the skull is suddenly stopped by muscles, ligaments, and bones of the neck or by impact with solid structure
- Severe whiplash, with or without the head striking an object, can cause a concussion and a mild traumatic brain injury (MTBI)



WITNESS DEPOSITIONS – RULE 4:5

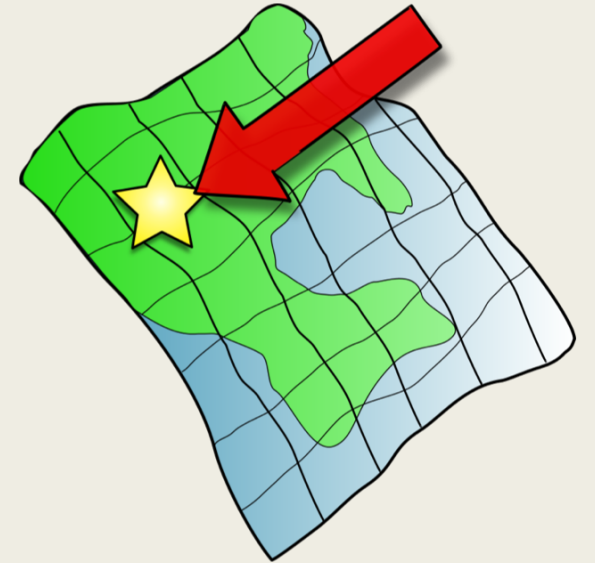
- Depositions are necessary to fully explore claims and defenses
- Depositions may provide ammunition for cross examination and impeachment



LOCATION OF DEPOSITIONS OF A PARTY

- Party depositions may be taken;
 - In the city or county where the suit is pending; or
 - In an adjacent city or county; or
 - Where the parties agree; or
 - Taken where a court may designate

LOCATION OF DEPOSITIONS OF A NON-PARTY: RULE 4:5(a)(a1)(ii)



- Non-party depositions must be taken;
 - In the city or county where the non-party resides; or
 - Where the non-party is employed or has a principal place of business
 - Typically, a non-party has to be subpoenaed to appear for a deposition

OBJECTIONS DURING WITNESS DEPOSITIONS: RULE 4:5(c)(2)

- Objections stated in non-argumentative manner
- May instruct a deponent not to answer only:
 - To preserve a privilege; or
 - To protect attorney work-product; or
 - To enforce a limitation ordered by the court; or
 - To present a motion to terminate or limit deposition



SHOULD YOU DEPOSE THE OPPOSING EXPERT WITNESS?

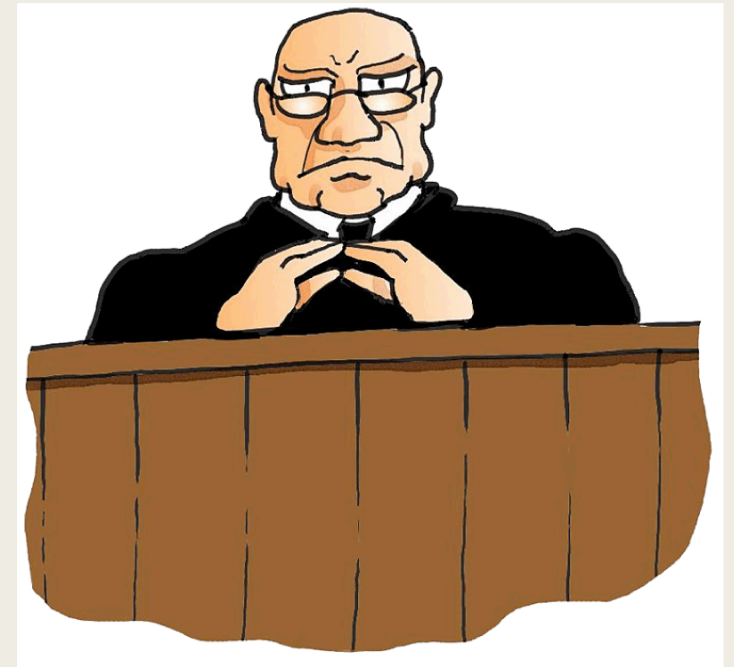
- Skilled trial lawyers disagree on this issue
- Pluses: the more information you have pretrial, the more effective cross will be
- Minuses: deposition prep may strengthen opposing expert at trial and unintentionally enlarge parameters of the expert's opinion

PRACTICE POINTER

In 2017, the Court in *Emerald Point, LLC v. Hawkins* held that opinions disclosed for the first time after 90-day filing deadline were inadmissible, despite the fact the opinions were offered in a pretrial deposition.

USE OF DEPOSITIONS AT TRIAL: RULE 4:7(a)

Depositions of witnesses, whether or not a party, may be used to contradict testimony or impeach during cross.



RULE 4:7(a)(3)

Deposition of party or corporate designee may be used
by an adverse party for any purpose

DEPOSITION OF UNAVAILABLE WITNESS: RULE 4:7(a)(4)

- May be used at trial to introduce testimony in the party's case if:
 - A) Witness is deceased; or
 - B) Witness > 100 miles from courthouse; or
 - C) Witness unable to attend due to illness, age or imprisonment; or
 - D) Witness cannot be produced by subpoena; or
 - E) 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 the expert to appear by deposition.



DEPOSITIONS OF BUSINESS ENTITIES: RULE 4:5(b)(6)

- Allows a party to depose a corporation, partnership or governmental agency
- Notice of Deposition sets forth topics at deposition
- Subpoena Duces Tecum used for a non-party
- Attached list of requested documents used for a party



OUT-OF-STATE AND PRE-LAWSUIT DEPOSITIONS

- Out-of-state depositions: Rule 4:5(a)(a1)(iii)
 - Use a person authorized to administer oath where the deposition will be held
 - May use letter rogatory, which includes list of questions to answer under oath
- Depositions before filing lawsuit: Rule 4:2
 - Most commonly used where party or witness may become unavailable
 - Unavailability must be due to illness, death or other exigent circumstance
 - If providing notice not feasible, secure court order

ERRATA SHEET: RULE 4:5(e)

- Witness may change testimony, but must provide reason
- Thoroughly prepare witness to minimize errata sheet entries
- Witness has 21 days to provide reasons for changes
- Unless both parties so stipulate, a deponent can be required to read his/her deposition



OBTAINING MEDICAL BILLS & RECORDS

- First step is identifying relevant healthcare providers
- Interview client, starting with day of crash and move chronologically
- Common for healthcare providers to subcontract billing
- Single visit to the ER will generate multiple requests for bills and records
- ER has subcontractors, including ER physician and the radiologist



FEDERAL HIPPA REQUIREMENTS:

42 U.S.C. § 1320d et seq.

- Health Insurance Portability and Accountability Act of 1996
- Requires confidential handling of protected health information
- Mandates individual's right to access own medical records

VIRGINIA HIPPA REQUIREMENTS: § 32.1-127.1:03

- Health records are property of entity maintaining them
- Requires SDT for medical records be served on opposing counsel or the patient when he is not represented



MOTION TO QUASH IN VIRGINIA: § 32.1-127.1:03 (H)(6)

- Patient or attorney has 15 days to file motion to quash
- Factors to consider for motion to quash:
 - The particular purpose for which the information was collected;
 - The degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual;
 - The effect of the disclosure on the individual's future healthcare;
 - The importance of the information to the lawsuit or proceeding; and
 - Any other relevant factor

REQUESTING/PRODUCING MEDICAL RECORDS & ADMISSIBILITY: VA CODE 8.01-413

- Copies of records are admissible as if they were originals
- Copies shall be produced within 30 days of date of the request
- Records can be produced either as hard copies or electronically
- Itemized bills must be provided without charge
- Willful refusal to comply with request for bills or records is sanctionable
- Sanctions include refund of fees, plus court costs and attorney fees

PRACTICE POINTER

Request that medical records be provided in electronic format, it's cheaper! Consider requesting **ABSTRACT** of multi-day inpatient hospital stay, which should produce most important records.



READ CLIENT'S MEDICAL BILLS & RECORDS CAREFULLY

- Days of quickly negotiating settlement of $2\frac{1}{2}$ x the bills are gone
- Must be able to discuss injuries and treatment in detail
- Today, many adjusters offering settlement barely exceeding medical bills
- Carriers hope most claimants will not take the time and expense to litigate



ARGUE PAIN & SUFFERING DIRECTLY FROM MEDICAL RECORDS

- Review medical records for objective findings consistent with painful injury
- Look for terms such as “spasm,” “trigger points” and “restricted range of motion”
- Also look for the type and amount of prescription strength medication purchased
- It is common to find references to pain on a scale of 1-10 in the medical records

EVALUATE FOR PRE-EXISTING CONDITIONS AND PRIOR CLAIMS

- Adjuster will likely demand at least 3 years of prior medical records
- Always ask client about prior injuries, prior claims and pre-existing conditions
- You need to know at least as much about client's history as the adjuster
- Most prior claims are entered into a master data bank accessible by insurer

PRACTICE POINTER

Many obtain care known as “maintenance.” This can reduce the value of a claim if the maintenance was close in time to the collision and involved the same body part that was injured.



MEDICAL EXPERTS

- Can be retained experts or treating providers, or both
- Gain credibility with jury by using treating physician
- Request opinions on causation and past and future medical expenses
- Organizations such as VTLA, VADA and AAJ can be useful for finding experts



"I know nothing about the subject,
but I'm happy to give you my expert opinion."

NON-MEDICAL EXPERTS

- Auto Appraiser
 - Hire an appraiser to look for hidden damage
- Accident reconstruction/trucking expert
- Vocational rehabilitation
- Economist
- Medical billing coder



SECURING DRAFT REPORT FROM EXPERT

- Make sure you know opinions of expert or treating physician before 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
 - See *Turner v. Thiel*, 262 Va. 597 (2001), where VSC held that counsel's communications with expert were confidential
- Your consultations and work product are explicitly protected under the federal rules

EXPERT & LAY TESTIMONY

- Expert testimony is proper when the subject matter is of such character that only persons of certain skill or experience are capable of forming a correct judgment
- Opinion testimony by lay witness is allowed if:
 - It's reasonably based upon personal experience or observations of witness; and
 - It will aid the trier of fact in understanding the witness' perceptions
- Examples of admissible lay opinion:
 - Speed of a vehicle
 - Handwriting



EVIDENTIARY ASPECTS OF EXPERT TESTIMONY

- Rule 2:701: Opinion testimony by lay witnesses
- Rule 2:702: Testimony by experts
- Rule 2:703: Basis of expert testimony
- Rule 2:704: Opinion on ultimate issue
- Rule 2:705: Facts or data used in testimony
- Rule 2:706: Use of learned treatises with experts

DISCOVERY OF EXPERT OPINIONS: RULE 4:1(b)(4)(A)

- Can use interrogatories to identify the opponent's experts
- Opposing party must divulge:
 - Subject matter about which expert is to testify,
 - Substance of facts and opinions to which expert is expected to testify, and
 - Summary of the grounds for each opinion



DISCOVERY OF EXPERT OPINIONS: RULE 4:1(b)(4)(A)

- Subject to paying a reasonable fee, counsel may depose opposing testifying expert
- Can't discover opinions of non-testifying expert, absent exceptional circumstances
- May also seek *Lombard* information, which allows for discovery of an expert's income earned from opposing counsel. *Lombard v. Rohrbaugh*, 262 Va. 484 (2001)

MEDICAL EXAMINATIONS OF PLAINTIFF: RULE 4:10

- Authorizes defendant to require plaintiff to attend exam
- Defendant can select authorized healthcare provider
- Defendants request exam if plaintiff claiming permanent/ongoing injury
- If physical/mental condition of party is in issue, upon motion, court may order exam
- Rule 4:10 has been the subject of much litigation:
 - What constitutes “good cause” to seek the examination?
 - Can Defendant tell the jury the examination is “independent?”



PHYSICAL AND MENTAL EXAMINATION OF PERSONS

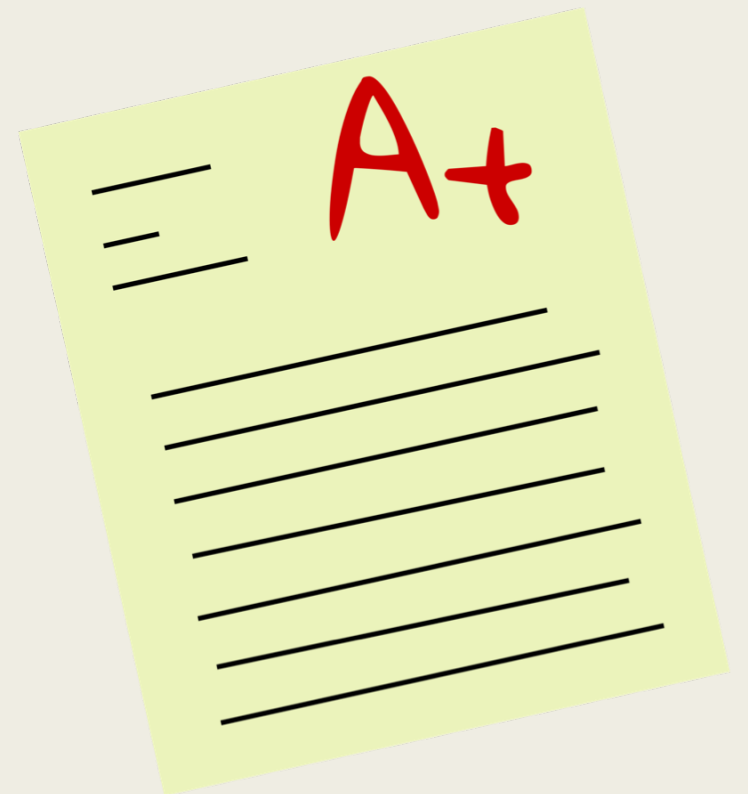
- Rule 4:10 requires an Order
 - Order to be made only on motion for good cause shown
 - Specifies time, place, manner, **CONDITIONS AND SCOPE OF EXAMINATION**
 - Names examiner & fixes time for filing report
- Do not agree to the examination if your client is not claiming a permanent injury

DEFENSE MEDICAL EXAM: ADVICE TO PLAINTIFF

- Plaintiff should be advised to be polite, but not overly friendly
- Plaintiff should:
 - Be familiar with his/her medical history
 - Be able to explain where he has pain and how it affects him/her
 - Understand the doctor is not neutral
 - Understand the examination is not for treatment
 - Understand the examination does not create doctor-patient relationship

PRACTICE POINTER: RULE 4:10(c)(2)

If the results of the defense exam are favorable, the plaintiff can read the report to the jury.



SECURING EVIDENCE



- Take photographs of the accident scene
- Accident scene may be only opportunity before litigation to secure photos of the other person's vehicle
- Secure photos of client's vehicle, even if injuries aren't life-threatening
- If you wait too long, vehicle may be disposed of or repaired
- Good photos of vehicle damage enhance client's bodily injury claim

PRACTICE POINTER

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



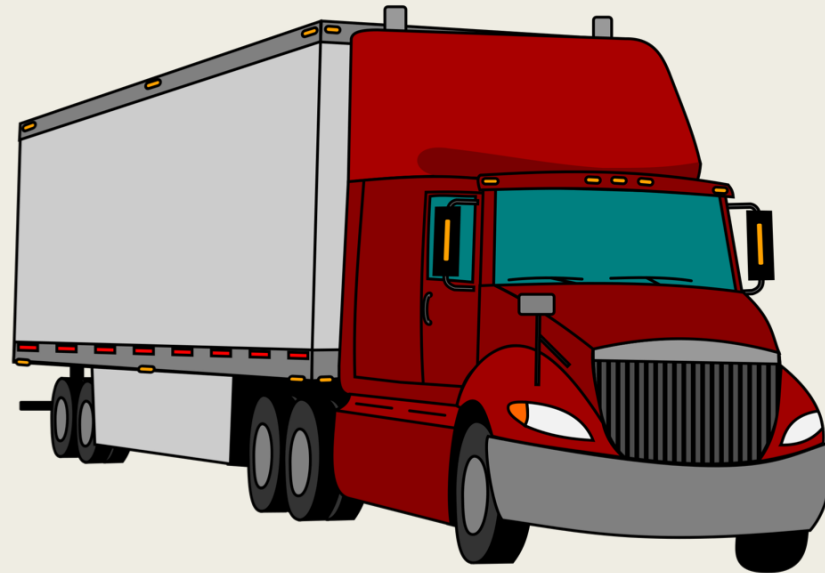
EVENT DATA RECORDER (EDR) AND MANIFEST

- If accident involves serious injury, hire an expert to download data from EDR
- EDRs record data such as speed and braking events
- Secure truck driver's manifest to determine hours of driver
- Tractor-trailer drivers traveling interstate required to maintain manifests
- Manifests must record hours driving, hours off-duty but awake, and hours sleeping
- Employers are required to maintain manifests for at least 6 months



PRACTICE POINTER

Hiring an expert may be critical because crash data can be lost by simply turning on the ignition after a crash. Counsel should consider filing suit immediately if cooperation regarding preservation of evidence is not forthcoming.



SPOILIATION

- If evidence lost by one of the parties, opposing party may claim spoliation
- Allows jury to infer that lost evidence would have supported opponent's case
- See *Emerald Point*, 294 Va. 544 (loss or destruction of evidence must be intentional)

DOCUMENTATION OF LOST EARNINGS

Can be simplified if the client keeps
track of the time lost from work



CRASHWORTHINESS CLAIMS

- Sometimes seatbelt failure or structural defects are alleged
- Thorough evaluation, appraisal and inspection of vehicles involved required