

**THE PROSECUTION/DEFENSE OF A MALPRACTICE CASE:
PLAINTIFF'S PERSPECTIVE**

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A. Burden of Proof

Both the common law and N.C.G.S. §90-21.11 *et seq.* place the burden of proof on the plaintiff to prove, by the greater weight of the evidence

“ . . . that the care of [defendant] was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.”

N.C.G.S. §90-21.12. Plaintiff must, by appropriate expert testimony, establish or define the applicable standard of care, prove a deviation or departure from that standard of care by defendant, prove that as a proximate result of the breach he/she suffered injury and damages.

As seen elsewhere in these course materials, the applicable standard of care is that which prevails in the locality where the negligence occurred (or in a similar community) and must be that to which a health care provider with similar training and experience should be expected to meet. *Wiggins v. Piver*, 276 N.C. 134, 171 S.E.2d 393 (1970). Since it is covered elsewhere, we will not further discuss the “ins and outs” of the “locality rule” and preparing the expert to testify regarding it.

It is incumbent on the plaintiff's lawyer to get the expert qualified by the court. This is done on direct examination by a series of questions designed to establish the witness's qualifications by education, training and experience. The witness must then be asked questions about his/her familiarity with the specific or similar locality. Some degree of thoroughness is suggested. If the witness has not practiced in the same or a similar

community, he/she must be able to demonstrate a sufficient degree of familiarity. For example, if the witness holds a faculty appointment at a medical school, he/she could be asked if he/she prepares students to practice medicine in communities such as that where the claim arose. He/She could be asked whether he/she knows practitioners in the same or similar communities and whether he/she has discussed medical care with those colleagues. He/She should be asked what information about a community is important in forming a picture of the standards of practice in a community. Some of these some lines of questioning could apply with equal force to a non-academic witness.

Remember that while an expert's opinions must be stated to a "reasonable degree of medical certainty," this does not mean absolute certainty. Make sure the expert understands this before testifying. The use of the word "guess," in some circumstances, will not render the opinion inadmissible. In *State v. West*, 103 N.C. App. 1, 404 S.E.2d 191 (1991) the state's expert physician stated that a figure was a relatively educated guess. The court found this choice of words merely to indicate that there was a margin of error between ten and twenty percent in his calculations.

An opinion which amounts only to speculation or conjecture will not be allowed. Ordinarily, testimony that "its possible" that a heart attack could have been prevented with hospital admission would be inadmissible. However, if the witness's testimony, considered as a whole, raises more than "mere possibility or conjecture," the opinion will be admitted. *Felts v. Liberty Emergency Services, P.A.*, 97 N.C. App. 381, 388 S.E.2d 619 (1990).

The best practice is to avoid the use of words like "maybe," "possible," "perhaps," or "I guess" to avoid the kind of parsing of the testimony that will inevitably ensue.

B. Proximate Cause

Plaintiff must not only prove that the defendant was negligent, he/she must also prove that his/her injuries were proximately caused by that negligence. Proximate cause is defined in the Pattern Jury Instructions (N.C.P.I. - Civil 809.00) as "a cause which in a natural and continuous sequence produces a person's injury, and is a cause which a

reasonable and prudent health care provider could have foreseen would probably produce such injury or some similar injurious result.” There may be more than one proximate cause and defendant’s negligence must be only one of them.

Proof of medical causation can be a millstone around the neck of plaintiff’s case. It should NEVER be overlooked in preparing and presenting the case and should be reasonably established before the case is filed. It can be the crucial element in the case. If a jury finds negligence, but no causation, there will be a defense verdict. “No harm, no foul.”

In the ideal case, causation can be established by the testimony of treating physicians. This is not always possible, especially where they practice in the same community as the defendant and are reluctant to get involved beyond merely stating the obvious as to what the plaintiff’s condition was following treatment by defendant. In that case, one or more experts will have to testify regarding causation.

Causation is particularly important in cancer cases. If plaintiff cannot prove that the outcome would have been different but for defendant’s negligence, the case is likely to be lost, no matter how negligent defendant was in his/her treatment of the patient. Likewise, a bad result does not equate to negligent. Sometimes “stuff” happens.

By way of illustration, in *Bridges v. Shelby Women’s Clinic, P.A., et al.*, 72 N.C. App. 15, 323 S.E.2d 372 (1984), disc. review denied, 313 N.C. 596, 330 S.E.2d 605 (1985), plaintiff-mother, while pregnant, was diagnosed (without actually being examined by a doctor) with an infection when she began spotting. When the spotting increased despite medication, she talked to the doctor, who reiterated that she had a kidney infection and that if she wanted to come to the hospital to see him she had better not “wait around until midnight or he wouldn’t be there, he had a long day.” Plaintiff and her husband went to the hospital (before midnight) and she was examined and found to be in premature labor. She was referred to Charlotte Memorial Hospital. In 1980, when this occurred, there were no drugs available for the suppression of premature labor. However, CMC had recently been involved in an experimental program with the drug Terbutaline. Since the drug study was in the experimental stages, participants in the study had to be screened and meet

specific guidelines. Plaintiff-mother did not qualify for the program because of her fever due to infection. The study was stopped shortly after these events due to an insufficient number of participants. The results were never tabulated. No attempt to suppress labor was made and there was a premature birth with many complications.

The question on appeal was whether plaintiffs' evidence was sufficient to establish causation. Plaintiffs argued that the jury could have found the following chain of causation:

“ . . . that had Dr. Farrior examined Mrs. Bridges at 11:30 a.m. on 18 July 1980, he would have, or should have in the exercise of reasonable care, diagnosed her as being in premature labor; that given such diagnosis, Mrs. Bridges would have been sent to Charlotte Memorial Hospital at an earlier time; that had she arrived at Charlotte Memorial Hospital at an earlier time, she would have been eligible for the Terbutaline experiment; that had she been given Terbutaline, she would have been able to tolerate the drug and would not have suffered side effects which would have required discontinuance of usage of the drug; that the drug would have suppressed Mrs. Bridges' labor thereby delaying Jason's birth; and that a delay in Jason's birth could have altered his condition.”

The court found this “house that Jack built” argument unpersuasive and affirmed the lower court's directed verdict.

C. Organizing the Case

There are a number of very useful software programs on the market to help organize the case. CaseMap for example, is a program that allows the user to organize and evaluate critical case knowledge. Facts can be arranged according to witnesses who will testify to them. Witnesses, conversely, can be organized according to the facts they support. Likewise, issues can be arranged according to the facts that support them, bolstered by the witnesses who supply the facts. These programs can also prepare chronologies that interrelate with issues in the case. CaseMap is a data base program to help the trial lawyer keep track of facts, people, documents, and issues in a case. It will link important facts to issues and the sources of the facts, whether people, documents, or statutes.

If you want to use technology to present information to a jury, consider presentation software such as Sanction II. This program is not like Power Point, which is fine for pre-planned presentations. Sanction allows the user to load documents, photographs, video and audio and access them individually in any order. The program allows highlighting, enlarging, and changing an exhibit “on the fly.”

Even if you don’t use technology, you can still organize your case. A trial notebook allows you to keep, in some kind of order, the information and documents you will need for trial. Prepare a witness sheet (see Appendix A) for each witness. This sheet will have vital information about the witness and his/her expected testimony, along with a notation of the key questions the witness is to be asked and a brief statement of what you expect to prove with the witness.. Behind that sheet will be an outline of the examination of the witness and copies of any documents to be used as exhibits with the witness.

The trial notebook will also contain your notes about voir dire, opening statement and closing arguments. If you anticipate having to make some legal arguments during the case, notes or memoranda of law can also be kept in the trial notebook.

Avoid cluttering the courtroom, or at least your side of it, with boxes and piles of paper. You will not look organized.

If you are really technologically advanced, there are programs that allow you to mark documents with bar codes so they can be projected on a television screen or “Smart Board” during a witness’s testimony. If you use a lap top computer to store documents, use a remote mouse so you will have freedom of movement. Also, have a back up plan in case there is a problem with the computer.

D. Order of Evidence/Witnesses/Proof

Just about everyone adheres to the conventional wisdom that you should begin your case with a strong witness, and end with a strong witness. There are also times during the trial, such as a Friday afternoon, when you want to close with a strong witness who may have a lasting effect on jurors over a weekend. Less impressive, weak, but otherwise necessary witnesses are usually sandwiched somewhere in mid-week. Having said all this,

reality is that the order of witnesses more often than not is dictated by the availability of experts. If your prime expert is available only on Wednesday, then that's when he/she is going to testify.

Some plaintiff lawyers like to call the defendant doctor as a first, adverse, witness, under Rule 43, Rules of Civil Procedure. If the doctor will not make a good impression, or if there is some dynamite material in his/her deposition, this can be a good idea as it may well leave the jury with a negative impression of the defendant. There is danger there, however. The doctor who didn't do well in his/her deposition may have spent a lot of time "in the woodshed" since the deposition and may will make a better impression that anticipated. If there are damaging admissions in a deposition, it may be the safer practice to read those admissions to the jury, rather than call the doctor as an adverse witness and take the chance that he/she will win over the jury.

The injured plaintiff may not be the best person to lead off the evidence. You need to carefully assess how he/she may be perceived by a jury and act accordingly. A knowledgeable spouse or family member might be preferable. On the other hand, if the plaintiff will make a strong witness, proceed with him/her.

If the plaintiff is profoundly injured, for example in a wheelchair or gurney, it is not a good idea to keep him/her in the courtroom very long. Certainly at the outset of the case, for purposes of "introducing" the plaintiff to the jury, he/she should be there, but probably not otherwise. If the profoundly injured plaintiff cannot actively participate in the trial, the only justification for having him/her present is an attempt to appeal to sympathy. It won't work. The jury will resent it, and will likely become inured to the plaintiff's condition before the end of the trial.

There will inevitably be times during the trial when you are finished with a witness and an hour or more of court time remains, but your next witness won't be available until the next morning. Sometimes the court will allow an early recess, but don't count on it. Use these lulls to read deposition extracts into the record or ask the court to take judicial notice of certain matters (some judges require plaintiff to introduce the mortuary tables, N.C.G.S. §8-46 and plaintiff's life expectancy, others will take judicial notice without any

formality).

E. Use of Experts

Ideally, the expert should be able to give a definition of the standard of care along with his/her opinion as to whether defendant breached it. The expert's definition should coincide with the definition in the Pattern Jury Instructions. It is not sufficient for the expert merely to testify that he/she would have done something different. If there are two alternative methods of treatment and defendant elects one which, under the magnification of the "retrospectroscope" proves to be unsuccessful, this does not equate with malpractice. An error in judgment is likewise insufficient as long as the judgment exercised is defendant's "best judgment" and is, I believe, reasonably exercised.

Because medical malpractice cases can often involve complex medical issues, plaintiff's lawyer and experts should make every effort to simplify matters, without being patronizing or condescending. Explain the medical terms used during the witness's testimony.

Through discovery, the defense theory of the case and expert opinions should be known. These theories and opinions should be anticipated during the direct examination of plaintiff's experts. Not only will this minimize the chance that you will have to get an expert back into court at a later date for rebuttal, done properly it should also defuse the effect of those theories and opinions. Use the discovery process to arm your experts with convincing arguments. For example, one of the common defenses encountered, particularly in surgical cases, is the "known or recognized complication." Infection is a recognized complication of surgery and most surgeons will tell you that infections will happen, even if all possible care is used. Of course, a MRSA infection is typically spread by touching, so if hospital staff don't wash their hands after treating one patient and before treating another, the infection can be spread. Most surgeons will also tell you that accidentally cutting a nerve is a "recognized complication." It can happen as a result of lack of due care, but some surgeons will say it can happen despite due care. If, however, the risk of cutting nerve is "well recognized," then shouldn't the surgeon be aware of the

danger to the patient and take special care to avoid cutting the nerve? If the nerve is cut about 0.6% of the time, does the fact that defendant's surgery fell within that tiny bracket indicate negligence? After all, 994 times out of 1,000, the nerve isn't cut.

We have already discussed the necessity of "standard of care" experts in the case. There may be need for other experts as well.

Causation experts are necessary when local treating physicians are unwilling to offer opinions on causation either from lack of expertise or from reluctance to offend their colleagues. A cancer case may need not only an expert mammographer (if the issue is the failure to detect the cancer on a mammogram), but also an oncologist or perhaps a hematologist along with a pathologist. If the case involves significant, life-altering injury, a vocational consultant may be necessary to establish plaintiff's total disability. Such a case might also involve a life care planner who will, in consultation with plaintiff's physicians, prepare an inventory of the needs of products and services caused by the impairment, along with the cost of those products and services. Future lost earnings, future lost earning capacity, and future medical expenses need to be reduced to present value, requiring the services of an economist. If a claim involves hospital procedures, a hospital administrator might be helpful, even though no "standard of care" expert would likely be required.

F. The Medical Record and Exhibits as Tools of the Trade

The medical record is an inherent part of the case. It will usually be placed into evidence, but only portions of it may be published to the jury. The plaintiff will want to make sure that all references to collateral sources are expunged from any portion of the record published to the jury. The use of a pre-trial Motion in Limine addressed to that problem will usually result in an appropriate order.

Pages from the record that will be published to the jury should be marked as exhibits. If appropriate, blow-ups of especially useful records for use during examination of witnesses should be made before trial.

It is difficult to imagine the trial of a medical malpractice case without numerous

illustrative exhibits. These can range from “day in the life videos” to simple photographs of plaintiff and his/her family on vacation. Anatomical illustrations are indispensable in a medical malpractice trial. X-rays or other radiographs can be reproduced, enlarged and “colorized” to present a vivid, and more accurate, representation of injury. Time lines are especially helpful in medical malpractice cases, particularly when there are issues of timeliness of diagnosis and/or treatment.

When using demonstrative or illustrative evidence you should follow these guidelines:

1. Keep it simple.
2. Use images and contexts familiar to the audience.
3. Pay attention to scale, color and contrast.
4. Anchor key points and issues with a common visual theme.
5. Test your evidence on men and women of different ages and backgrounds.
6. Develop one or two key visuals early, and use them consistently in deposition.
7. Prepare your witnesses and experts using demonstrative evidence.
8. Use a demonstrative aid with every witness, but don't overdo it.
9. If you hope to get it into evidence, don't spring it on your opponent at the last minute.
10. Never just tell, when you can show and tell.

Studies have shown that people will retain more if they are both told and shown something.

G. Statutory and Case Law Requirements

Most of the statutory and case law requirements applicable to medical malpractice litigation have been discussed in detail elsewhere in these course materials, and will not be regurgitated here. Any lawyer handling a malpractice case, whether for plaintiff or defense, must have a working knowledge of:

- N.C.G.S. §90-21.12, which defines the standard of care
- Rule 702, Rules of Evidence, which defines who may qualify as a standard of care expert
- Rule 9(j), Rules of Civil Procedure, which requires certification that an expert reasonably expected to qualify has reviewed the pertinent materials and is willing to testify as to a breach of the standard of care
- N.C.G.S. §§1-15(c), 1-17(b), and 1-53(4) establishing the limitations periods

Throughout these course materials there are case citations.

H. Defenses and Closing Argument

1. Affirmative defenses

There are some statutes which afford immunity to health care providers in certain circumstances. N.C.G.S. §90-21.14 protects a health care provider acting as a “good Samaritan” from liability in providing emergency first aid or medical treatment, absent intentional injury or willful misconduct.

N.C.G.S. §122C-210.1 affords immunity from civil liability for any state or private psychiatric practitioner or facility arising out of the discharge of a psychiatric inpatient from treatment. However, this statute affords protection only where the defendant “follows accepted professional judgment, practice and standards.” In other words, there is no violation of the standard of care unless there is a violation of the standard of care!

Occasionally, the defense of contributory negligence of the patient is interposed. In North Carolina, any degree of contributory negligence will completely bar recovery except in cases of gross negligence. Both lawyers and the courts often confuse contributory negligence with a failure to mitigate damages.

The use of contributory negligence in medical malpractice cases became more available to the defense after *McGill v. French*, 333 N.C. 209, 424 S.E.2d 108 (1993). The court held that a patient’s failure to follow his/her physician’s instructions or advice by not

keeping scheduled appointments may constitute contributory negligence, barring recovery. The facts of the case involved an initial diagnosis of mild prostate enlargement for which tests were run. The physician, Dr. French, was unable to contact plaintiff McGill following the testing to communicate the results of the test. The doctor did not see the patient for a year, when McGill was admitted to the hospital for a urinary tract infection and the defendant doctor was called. A prostatectomy revealed prostate cancer. However, this diagnosis was not revealed in the hospital chart and the patient was not advised of this fact at the time of his discharge. The next month, when the patient presented for follow up, he was told he had malignant prostate cancer. No treatment was offered at this time and he was scheduled for a follow up appointment. He was actually seen in the office prior to the follow up appointment, but did not come at the time scheduled for follow up. When he was next seen, he was counseled regarding what to do if he began experiencing symptoms. He was told that it did not matter when treatment began because it would not change his life expectancy or quality of life since he was asymptomatic and in an advanced stage of carcinoma. He then missed his next appointment and the doctor's office sent a notice.

Plaintiff's testimony was that he was never told of the diagnosis until a subsequent admission to the hospital for stomach pain, at which time the admitting doctor noticed the diagnosis in the chart and called defendant for a consult. The cancer metastasized and McGill subsequently died.

At trial the jury found Dr. French negligent, and found McGill contributorily negligent. On appeal, the Court of Appeals found error in the submission of the contributory negligence issue to the jury on two grounds. First, the court presumed that Dr. French's negligence was based on the failure to inform McGill of the diagnosis, one of several allegations of negligence in the case. The court concluded that if McGill had no knowledge of the diagnosis, he could not have been negligent. Second, the court found that Dr. French failed to prove McGill's injuries were proximately caused by his own negligence. The missing link was the absence of medical testimony establishing a nexus between the missed opportunities and the injuries.

On discretionary review, the Supreme Court stated three conclusions. First, the appeals court erred in assuming the basis of the finding of negligence at trial. The Court of Appeals was not in a position to make that finding without a clear showing in the record. Second, the court held that proximate cause does not require the defendant to present medical expert testimony in all cases of contributory negligence. Finally, the court held that there was sufficient evidence for a jury to find a causal connection between missed appointments and the spread or increased rate of spread of cancer.

Cobo v. Raba, 347 N.C. 541, 495 S.E.2d 362 (1998) dealt with a claim by a psychiatric patient against his psychiatrist. The patient, Cobo, had a history of psychiatric problems for which medication had not been, to him, satisfactory. Dr. Cobo also had engaged in high-risk behavior including drug abuse, alcohol abuse and unprotected homosexual sex with paid prostitutes. Defendant had discussed all of this with Cobo, who acknowledged the risky nature of his life style. Nevertheless, he continued these activities and, in addition, he ignored defendant's recommendation that he seek medical attention for HIV. In the suit, Cobo alleged that defendant had negligently failed to prescribe medication and continued him in psychotherapy which was ineffective. It is important to note that plaintiff was, himself, a psychiatrist and, independently of anything defendant said or did was well aware of the risks inherent in his behavior. The court noted that in *McGill* it had held that plaintiff's passive conduct in failing to keep appointments was sufficient to constitute contributory negligence and in *Cobo* the plaintiff's negligence was active and sufficient to support a jury verdict of contributory negligence.

Finally, in *Andrews v. Carr*, 135 N.C. App. 463, 521 S.E.2d 269 (1999), the court again dealt with the defense of contributory negligence. Here, defendant Carr performed hernia surgery on plaintiff. During the surgery, defendant lost his anatomical point of reference, confusing the penis for the spermatic cord and dissected along the shaft of the penis, cutting it. Then, instead of pulling the spermatic cord away for placement of a drain, he pulled the penis away, pulling the penile structure out of the dissected skin. Realizing the error, Carr replaced the penis and closed the wound. Following the surgery, Carr told plaintiff he had injured the penis, but did not tell him that the cut was from the

inside out and did not tell him some other things about the surgery. He then told plaintiff to refrain from sexual activity and heavy lifting for six weeks.

At a subsequent visit, plaintiff told defendant that the swelling in his scrotum was doing much better when he did sit ups. He also told the doctor he had engaged in sexual relations approximately 8 or 9 weeks post-op. The doctor told him he should continue to refrain from heavy lifting, exercise, and sexual activity until his wounds were healed.

Scar tissue and infection necessitated further surgery. While the release of scar tissue improved his condition, plaintiff suffered from erectile dysfunction and pain. At trial, the court directed a verdict for plaintiff on the contributory negligence claim - that the exercising and sexual relations prior to full healing probably caused the infection which created the condition in question. The trial court did instruct the jury on mitigation of damages. On appeal, the court noted that the activities allegedly constituting contributory negligence took place after the negligence complained of (which had been admitted by defendant) and therefore could not be contributory negligence. These activities were properly considered in mitigation of damages, but would not bar the claim.

There are other cases in which the plaintiff's post-negligent act activities gave rise to a failure to mitigate damages, but not to contributory negligence. See, *McCracken v. Smathers*, 122 N.C. 799, 29 S.E. 354 (1898), [when liability for malpractice is established, proof that the patient disobeyed doctor's orders and aggravated the injury, after the negligent act, does not discharge liability, but simply goes to mitigation of damages], *Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259, disc. review denied, 306 N.C. 743, 295 S.E.2d 479 (1982) [patient's failure to keep appointments was not contributory negligence when the failure occurred after the negligent treatment].

Note that in *McGill* and *Cobo* the patient's conduct occurred contemporaneously with, or during, a course of treatment alleged to be negligence. In *Andrews* the patient's conduct was not a proximate cause of the negligently inflicted injury, but could amount to a failure to properly mitigate damages because it occurred subsequent to the negligence.

2. Closing Argument

I am of the opinion that it is the rare case that is won on closing argument.

Probably more frequently a case can be lost on closing. I strongly urge the use of both the opening and final argument, with the opening argument being the major one. This takes full advantage of both the doctrines of primacy (people tend to believe that which they learn first) and recency (people tend to remember what they hear last).

Preparation for the argument begins when the case is accepted and themes are developed.

Closing arguments are subject to statutory regulation. N.C.G.S. §7A-97 limits each party to two arguments (except in capital murder cases) and, in personal injury actions, allows *not less than two hours* per side. Both the law and facts may be argued to the jury. If defendant presents no evidence, Rule 10 of the Rules of Practice allows him/her to open and close. If there are multiple defendants, plaintiff is entitled to the open and close if any one of them has presented evidence.

North Carolina allows wide latitude to argue the facts and any inferences which may be drawn from them. This includes the reported decisions of the courts, *Howard v. Western Union Tel. Co.*, 170 N.C. 495, 87 S.E. 313 (1915); the statutory law applicable to the case, *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); the pleadings as they appeared at the beginning of the trial, *Kennedy v. Tarlton*, 12 N.C. App. 397, 183 S.E.2d 276 (1971); the testimony of a witness, *In Re: Will of Farr*, 7 N.C. App. 250, 172 S.E.2d 78, *rev'd on other grounds*, 277 N.C. 86, 175 S.E.2d 578 (1970).

Specifically prohibited are reading from a dissenting opinion, *State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986); the expression of personal beliefs of counsel which travel outside the evidence in the record, *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977); placing before the jury incompetent and prejudicial material which was not admissible into evidence, *State v. Cousins*, 289 N.C. 540, 223 S.E.2d 338 (1976).

When making introductory remarks, avoid a lot of apologetic-sounding statements about what argument is or isn't. The court will do that for you. Instead, get right to the point, emphasizing the theme of your case.

"Members of the jury, in this case, when seconds mattered, minutes were taken."

Define the issues. Couch the discussion of the formal issues in the case with the real issue - who is telling the truth here?

Discuss the burden of proof.

Summarize the evidence. Don't try to repeat all the testimony, just remind the jury of the important testimony. Hit hard those facts that entitle you to win. Use exhibits to make your points. Tell the story in a logical fashion. Comment on the credibility of the witnesses. Use the issues and the jury instructions to frame your discussion.

Attack the defense. Don't spend too much time on the defense theory of the case lest you lend it credibility. Acknowledge weaknesses in your case and explain why they don't matter.

Comment on the applicable law as it applies to the issues the jury will consider.

Discuss the client's injuries and damages. Break damages down into their components and suggest to the jury what they are expected to do. Explain how the injuries have affected the client's life. Emphasize what is left, not what has been taken away. Use the medical evidence that supports the case. Don't include questionable medical bills, be as conservative as you can. Remind the jury that this is your client's only chance.

Conclude by returning to your theme. Return to the client's needs.

The Ten Commandments of Jury Argument:

1. Thou shalt talk *with* the jury, not at them.
2. Thou shalt use a logical outline.
3. Thou shalt speak the truth at all times.
4. Thou shalt enlarge the issues.
5. Thou shalt lean on the law.
6. Thou shalt use exhibits and make visual points.
7. Thou shalt undermine the opposition.
8. Thou shalt tell stories and use analogies.
9. Thou shalt listen to the jury.
10. Thou shalt be yourself.

Witness Summary

Client:

File No.

Subpoena Data: Witness

Name:

Issued _____

Address:

Served/Accepted _____ Phone

(H)

(W) _____

Scheduled Appearance Date _____ Time _____

Purpose:

1. Liability
2. Freedom from Neg.
3. Cause
4. Damages
5. Other _____

Type Witness:

1. Eyewitness	5. Lay
2. Expert	6. Police
3. Before/After	7. At Scene
4. Link in Chain	8. Medical

Date of Injury:

What Witness Can Prove:

Key Questions:

