Pretrial Outline

I. Steps of litigation
   a. Establish relationship w/ client
   b. Determine client's needs and priorities
   c. Determine elements of potential claims, defenses, or remedies
      i. Good places to look include
         1. Jury instructions
         2. Treatises
         3. Bar association causes of action
   d. Identify likely sources of proof
      i. These are witnesses who have some knowledge of events or exhibits that contain information about the events
   e. Determine what informal fact investigation is necessary
   f. Determine what formal discovery is necessary
   g. Identify solutions
      i. Options include
         1. Do nothing
         2. Informal negotiation
         3. Mediation
         4. Remediation
         5. Summary jury trial
         6. Focus group capacity
         7. Litigate
   h. Develop a litigation strategy
   i. Make litigation cost and timetable estimates
   j. Develop a litigation file system

II. Witnesses
   a. Types of evidence
      i. Witnesses
      ii. Documents videos pictures
      iii. Real (a physical thing)
      iv. Expert witnesses
      v. The client
   b. Witnesses
      i. Types of witnesses
         1. Friendly (2 types)
            a. Type one has lots of info about case
               i. You interview
               ii. Record verbatim account
            b. Type two – only has one important data point
               i. You interview
               ii. Just get important piece in notes
         2. Neutral
            a. Cops, paramedics, etc

b. You interview
c. W/ cops & paramedics you take notes while talking w/ them then type them, send them to person and say if this summary/ account isn't correct let me know (they can't give you a written statement so that's how you get around it)

3. Hostile
    a. If you can get your foot in the door make sure you ask most important questions first

ii. 3 things to answer about each witness
1. Who is going to interview them?
2. Retention (do they accurately remember the events & memory is solid until 24 hours after event)
3. Retrieval (can they explain what they remember and how best for them to do that)

iii. 4 things required for a lay witness
1. Oath
2. Perception – must have seen heard etc
3. Memory – must be able to remember what they saw
4. Communication must be able to tell you about what they perceived

iv. 9 minefields for witness testimony (3 groups based on requirements, bias & prejudices, and
1. Oath – attacking witness honesty
2. Perception – person did not perceive accurately (my cousin Vinny)
3. Memory – its been a long time
4. Communication – like if witness uses language from police then they can be attacked based on that
5. Prior inconsistent statements
    a. Difference in thinking harder/clarifying vs bias/prejudice
6. Bad acts (non-criminal like you're a bad parent or alcoholic)
7. Criminal records
8. Character
9. Reputation

v. Types of expert witnesses
1. Testifying experts
    a. Always discoverable
2. Consulting experts
    a. Not discoverable unless there are exceptional circumstances that prevent them from getting the info from any other means
3. Informally consulted experts (some kind of undue burden if they couldn't discover their info)
    a. Never discoverable

vi. Interviewing witnesses
1. Recording interviews (most important/relevant w/ client)
    a. Take notes yourself (con you miss some details)
    b. Using a recording device (con is it distracts ppl)

c. Having another person take notes (con they can worry about this person)

vii. Ethical implications/ malpractice issues
1. Doctors
a. Defendants lawyer may not get info from plaintiff's treating physician without permission from the plaintiff's attorney
2. Businesses/Corporations
a. Majority rule – corporate control test = you can't talk to anyone who would bind the corporation
b. Minority rule forbids talking to anyone @ corporation
c. Former employees don't count unless they were part of the legal defense to a substanial degree

III. Standing to sue
a. Preliminary to pleading
i. Real party in interest
ii. Capacity to sue
1. Issues here with infants & incompetents they need a guardian or representative
b. Standing
i. 3 criteria
1. Injury
a. Actual concrete and particularized
2. The injury must be fairly traceable to action of D
3. Injury can be redressed by court
ii. Mootness (live controversy)
iii. Ripeness (can't be anticipatory)
iv. Political question
1. Court must have ability to solve vs issue that should be remedied by legislative branch
v. Abstention – some reason the fed court should abstain from hearing suit
1. Bc it's better resolved by states
2. Court wants to wait for admin changes
3. Current state claim is working its' way up so we should wait
vi. Arbitration
1. If there's a clause in the contract you have to start here

IV. Civ pro
a. Fed Subject matter jurisdiction (whether the case can be in federal court)
1. Need Constitutional & statutory authority
ii. Federal Question – two prongs
1. Federal Ingredient – Constitutional requirement – Osborne
2. Well pleaded complaint – Statutory Requirement – Motely
a. Holmes a suit arises under the law that creates the cause of action
iii. Diversity + AIC
1. Complete diversity + 75,000
a. Must be diverse at time of filing

b. Strawbridge no overlap across the V
2. Domicile test for…
    a. Real Persons
        i. residency with (subjective) intent to remain indefinitely
        ii. You do not lose your old domicile until you gain a new one
        iii. Your home is somewhere and you don't affirmatively intend to go anywhere else Gordon
    b. Corporations
        i. Nerve Center or PPB Hertz
            1. The place where a corporation's officers direct, control, and coordinate the corporation's activities
        ii. Place of incorporation
3. AIC
    a. St. Paul Mercury Amount in controversy is met unless there is a legal certainty that the plaintiff's claim is for less
    b. To meet AIC you can aggregate claims but not parties

b. Federal personal jurisdiction
    i. In rem jurisdiction
    ii. Quasi in Rem
    iii. In personam – Whether a court has territorial authority over the parties or property
        1. State lines matter – A due process interest in not being subjected to a gov't that you have no contacts with
            a. Constitutional (5th Amend) to be subjected to a fed court you just need contacts anywhere within the US (the pantry – broad)
            b. Statutory authority with 4(k)(1)(a) only uses tiny part of the constitutional power saying states long arm statues apply to fed jurisdiction (narrow)
        2. 5 Ways to have PJ (constitutional authority)
            a. General Juris – Court has juris over party even if case isn't related to the state (quantity of contacts)
                i. Continuous, pervasive, and systematic contacts with the state, essentially if the party is "at home" Int'l Shoe
                ii. Same domicile tests as SMJ
                iii. Also, is jurisdiction fair and reasonable
            b. Specific – D's physical presence is no longer required – 3 Step analysis (actions w/ in the state itself)
                i. Does the defendant have minimum contacts in the forum state?
                    1. Hanson – There must be some act by which the D purposefully availed itself of the privileges of conducting activities within the state, thus invoking benefits of it's laws

a. Hess – if you are traveling thru a state and get in a wreck, you can be suedthere
2. WWV mere foreseeability that consumers would take a product into a state is not enough
3. Stream of commerce 3 opinions

ii. Does the underlying claim [i.e., lawsuit] arise out of the Δ's contacts with the forum state? (If contacts completely unrelated to underlying claim, specific PJ does not apply):
1. Evidence" and "But for" tests

iii. Is personal jurisdiction "fair and reasonable"?
1. Reasonableness Factors (McGee and WWV)
a. Burden the Δ
b. The forum state's interest
c. Plaintiff's interest in convenient and effective relief
d. Interstate judicial system's interest in efficient dispute resolution
e. The shared interest of the states in furthering substantive social policies

c. Joinder/Supplemental jurisdiction
i. Aggregate claims
1. You can aggregate claims if the claims are related/joint
2. You generally cannot if claims are separate at distinct

ii. Joinder
1. Claim joinder Rule 18
a. **(a) In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party. (can assert any claim whether related or unrelated)
b. **(b) Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.
2. Party joinder Rule 20(a)
a. a) Persons Who May Join or Be Joined.
i. (1) *Plaintiffs*. Persons may join in one action as plaintiffs if: (allows but does not require p's to joinder)
1. (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

2. (B) any question of law or fact common to all plaintiffs will arise in the action.

ii. (2) *Defendants*. Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

1. (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
2. (B) any question of law or fact common to all defendants will arise in the action.

iii. (3) *Extent of Relief.* Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities

b. 20a does require joinder of certain parties if a case cannot be fully adjudicated without their participation

3. Rule 21
   a. "Misjoinder of parties is not a ground for dismissing an action.
   b. "On motion or on its own, the court may at any time, on just terms, add or drop a party.
   c. "The court may also sever any claim against a party."

d. Counter claims 13(a)(1) & (b)
   i. 13(a)(1) Compulsory (under supplemental jurisdiction)
      1. (a) Compulsory Counterclaim.
         a. (1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:
            i. (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
            ii. (B) does not require adding another party over whom the court cannot acquire jurisdiction. . . .
         b. Consequence of not asserting a compulsory counterclaim when you could have is that the claim is then barred in a later lawsuit
         c. Does not need an independent jurisdictional basis because it's an ancillary claim
         d. Must denominate it/label it as a counterclaim in the answer
         e. Must be filed under the appropriate SOL
   ii. Test for one transaction or occurrence – "common nucleus" test
      1. Are the issues of fact and law raised in the claim and the counterclaim largely the same?
      2. Would claim preclusion bar a later lawsuit on the party's counterclaim, absent the compulsory-counterclaim rule?

3. Will substantially the same evidence support or refute the claim and the counterclaim?
4. Is there a logical relationship between the claim and the counterclaim?

iii. Supplemental jurisdiction reminder 28 U.S.C. § 1367(b)
1. (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
2. Checklist
   a. Do you need supplemental jurisdiction at all? Is there federal-question or diversity jurisdiction over every claim anyway?
   b. Congress giveth? (s. 1367(a))
      i. Does the anchor claim come within any form of federal subject-matter jurisdiction?
      ii. Does the added claim share a common nucleus of operative fact with the anchor claim? (this is the relevant part for 13(a) compulsory counterclaim)
   c. Congress taketh away? (s. 1367(b))
      i. Is the anchor claim diversity only?
      ii. Is the added claim one by a plaintiff?
      iii. Was the defendant on the added claim joined under Rule 14, 20, 19, or 24?
   d. Is there a discretionary reason not to exercise jurisdiction? (s. 1367(c))
3. (b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory; must have its own independent jurisdictional basis unlike compulsory claims – must state the basis in the answer

e. Cross claims
   i. Claim against person on the same side of the v as you "co-party"
      1. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
      2. Does not need its own jurisdictional basis; this is an ancillary to the plaintiff's complaint
      3. Offensive claim against a co-defendant; the co-defendant must reply and if they don't, it is an admission

ii. Additional parties 13(h)
    1. **Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
iii. Impleader 14(a)(1)-(2)
    1. (a) When a Defending Party May Bring in a Third Party.
        a. (1) *Timing of the Summons and Complaint.* A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.
        b. (2) *Third-Party Defendant's Claims and Defenses.* The person served with the summons and third-party complaint—the "third-party defendant":
            i. (A) must assert any defense against the third-party plaintiff's claim under Rule 12;
            ii. (B) must assert any counterclaim against the third-party plaintiff under Rule 13a, and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);
            iii. (C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and
            iv. (D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
    2. Key points
        a. It's not enough for impleader that the plaintiff herself might have a claim against the third-party defendant.
        b. The <u>original defendant</u> (third-party plaintiff) has to have a claim over against the third-party defendant.
        c. A "claim over" means a claim by the third-party plaintiff to get reimbursed for <u>what it spends on the original plaintiff's claim</u>.
    3. Types of impleaders
        a. Contribution
        b. Indemnification
f. 4 quadrants of jurisdiction

V. Fees & contracts
a. Contingency
    i. Normally 1/3 or 25% of settlement
b. Flat rate
    i. This one thing costs $
c. Hourly
    i. Bill off of a deposit or charge after the case is done
d. Contingency

e. Contract for representation
    i. State what the matter is you're representing them for (be very specific)
    ii. Describe work you're going to do
        1. Describe also what you're not going to do
    iii. What type of fee
    iv. Schedule for payment
    v. Clause for representation termination
    vi. No guarantee of success or outcome
    vii. Signature from client and I have read and understand all of the terms etc.

VI. Discovery
a. Proportionality
    i. Discovery costs should be proportional to claim cost
b. Fed rule that discovery conference must occur as soon practicable but at least 21 days before a scheduling conference is to be held or a scheduling order is due
c. Formal discovery tools
d. Both fed and state court have a duty to supplement discovery w/in reasonable time
e. Tools of formal discovery
    i. Depositions
    ii. Interrogatories
    iii. Request for physical examination (entry into property or to see the thing)
    iv. Request to produce documents, electronically stored info, and things
    v. Requests for admission
    vi. Required disclosures
f. NC Rule 26. General provisions governing discovery.
    i. Discovery methods. – Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.
    ii. Discovery scope and limits. – Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
        1. In General. – Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought. For the purposes of these rules regarding discovery, the phrase "electronically stored information" includes reasonably accessible metadata that will enable the discovering party

to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata

a. Specific Limitations on Electronically Stored Information. – In addition to any limitations imposed by subdivision (b)(1a) of this rule, discovery of electronically stored information is subject to the limitations set forth in Rule 34(b). The court may specify conditions for the discovery, including allocation of discovery costs.

iii. Insurance Agreements. – A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is G.S. 1A-26 Page 2 not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

- Policy: helps decide damages and/or if the case should even go forward based on the insurance's coverage
- You can get the coverage and the policy but not the application

g. Federal law FRCP Rule 26 – General provisions governing discovery

i. (a) Required Disclosures.

ii. (1) *Initial Disclosure.*

1. (A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

a. (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

b. (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

c. (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

d. (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

iii. *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

iv. (B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

1. (i) an action for review on an administrative record;
2. (ii) a forfeiture action in rem arising from a federal statute;
3. (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
4. (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
5. (v) an action to enforce or quash an administrative summons or subpoena;
6. (vi) an action by the United States to recover benefit payments;
7. (vii) an action by the United States to collect on a student loan guaranteed by the United States;
8. (viii) a proceeding ancillary to a proceeding in another court; and
9. (ix) an action to enforce an arbitration award.

h. Discovery on experts

i. NC law

1. Trial Preparation; Discovery of Experts. – Discovery of facts known and opinions held by experts, that are otherwise discoverable under the provisions of subdivision (1) of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as provided by this subdivision: a.
2. In general. – In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence.

ii. Federal law FRCP 26(b)(4)(a)

1. *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
2. *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert

testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

a. (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
b. (ii) the facts or data considered by the witness in forming them;
c. (iii) any exhibits that will be used to summarize or support them;
d. (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
e. (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
f. (vi) a statement of the compensation to be paid for the study and testimony in the case.
g. (C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
h. (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
i. (ii) a summary of the facts and opinions to which the witness is expected to testify.
j. *(D) Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
k. (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
l. (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

iii. Pre-trial disclosure
    1. 30-60 days out from trial
    2. 3 things to disclose
        a. witnesses you intend to call (and a list b of possible ppl)
        b. Depos or discovery for trial
        c. All docs for trial or maybes (a list b like above)
    3. Must disclose objections
        a. Rule 32(a)
        b. Rule 26(a)(3)(A)(iii)
            i. If you don't object in these disclosures then they're waived (except under 402 or 403)

i. Work product doctrine
    i. NC law

1. a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or **work product** of the attorney or attorneys of record in the particular action.
2. *Because of*. One highly-respected treatise on civil procedure explains "anticipation of litigation" this way: "The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained **because of the prospect of litigation**. But the converse of this is that even though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation."

ii. Federal law FRCP 26(b)(3)(a)
1. *Trial Preparation: Materials.*
    a. (A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
        i. (i) they are otherwise discoverable under Rule 26(b)(1); and
        ii. (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
    b. (B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.
    c. (C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

i. (i) a written statement that the person has signed or otherwise adopted or approved; or
ii. (ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

➔ Rule 45 subpoena
➔ 3 types of statements
- witness statements: written statement made by a non-party is discoverable
- party statements said to their own lawyer
- party statement said to someone else: party is always entitled to their own statement if it falls into the hands of the opposing party
➔ 3 types of experts
- testifying expert: testifies
- consulting expert: the person who educates the lawyer about a specific field like medicine in anticipating of litigation but not expected to be used at trial
- informally consulting expert: educates the lawyer in preparation of trial but is not retained or specifically employed by the lawyer to testify

VII. Complaints/ pleadings
- a. 4 purposes of a complaint
  - i. sets outer bounds of permissible discovery
  - ii. First requests for admissions
    1. Conciseness in pleading prompts narrow responses
  - iii. Public document when you file (press can access)
  - iv. It's your first presentation to judge & opposing counsel
- b. Notice pleading (applies to reg claims & cross claims, counter, etc)
  - i. Short and plain statement for jurisdiction
  - ii. Short and plain statement of claim for relief
  - iii. Short and plain statement of entitlement to relief

VIII. Answers
- a. 4 parts
  - i. Defense
    1. Truth or falsity of allegations
       a. You must answer each, if you don't you admit to the allegation
  - ii. Affirmative defenses
    1. Statue of frauds etc.
    2. Motions to dismiss
       a. You don't include facts, just the D name
  - iii. Counter claims
  - iv. Prayer for relief
- b. Practicalities
  - i. You must include all affirm defenses because if you don't then they're waived
  - ii. In fed court you need to make a motion w/ a brief or memo to get this heard
  - iii. In state court you must file notice for hearing on motion w/ calendar request
    1. If you want an oral argument you have to ask for it
    2. You also need to serve the other side

c. Replies (mini answers)
    i. If D makes a counter claim then P has to file an answer
        1. But if D doesn't lay out that it's a counter claim (vs an affirm defense) then P doesn't have to reply
    ii. Cannot bring any new info

IX. Relief/remedies
a. General damages
    i. "Damages that are the usual result of the defendant's tort, which flowed naturally and necessarily (automatically) from the tort."
    ii. Normally harder to quantify for example pain and suffering
        1. General rule your general damages will normally be 3-5 times the amount of your special damages
b. Special Damages (consequential damages/ indirect damages)
    i. Damages that resulted naturally, but not necessarily (automatically), from the defendant's tortious conduct.
        1. Can often more quantifiable = medical bills & lost wages
    ii. These should be foreseeable or expected/probable
    iii. Standard of proof is reasonable certainty
    iv. To recover for consequential damages the D's actions must be the proximate cause of P's damage (but for cause)
c. Punitive
    i. Haslip factors for recovery (these go on jury instructions)
        1. How reprehensible was conduct?
        2. How likely was the harm/degree of harm?
        3. What was D's awareness of potential harm?
        4. How long has bad conduct been happening?
        5. Did the D try to hide wrongdoing?
        6. Has the D committed similar wrong conduct in the past?
        7. Did the D profit?
        8. The ability of the D to pay?
    ii. Constitutional guideposts for "punitive reasonableness"
        1. Reprehensibility
        2. Ratio of punitives to potential harm
        3. Disparity between punitive award and civil/crim penalties for similar conduct
    iii. Punitive damages that are greater than 1:10 ratio comp to punitive are presumptively unreasonable
    iv. NC Laws on punitive damages
        1. General rules
        2. Capped at 1:3 ratio or 250,000 (whichever is greater)
            a. Exception for DWI's
        3. Punitive damages aren't recoverable for breach of contract
        4. NC doesn't allow punitives for vicarious liability
        5. Be able to get compensatory damages (don't have to actually receive them though)

6. And one of the following must be present (you must specifically plead these)
    a. Fraud, malice, willful & wonton conduct (almost reckless)

v. Statutory/liquidated
vi. Nominal/ injunctive/declaratory

X. Motions

Request to admit

- Party on party device
- Often comes later in discovery, can be early but more often comes later to get some fact/issue of proof handled. You can lock in evidence
- A tool to streamline proof at trial
    - It's conclusive, not rebuttable as evidentiary admission at trial. It's similar to a stipulation
- You have a duty to amend and supplement these just like you do other forms of discovery (these apply to all pleadings); once as a matter of right (must do so before a responsive pleading is filed or 21 days in fed. ct. or 30 days in NC court, whichever comes first) without anyone else's consent, and then after that time period ends you must amend by either getting the other party's consent (if they do consent, write that into the amended pleading; if they don't, same thing) or with permission from the ct.
- 3 bases for denying an amendment: bad faith, prejudice, and futility
    1. Futility: when NC law does not recognize this cause of action or some kind of relief, it is futile
    2. Bad faith: where it is being offered to harass the other side; using the litigation process to embarrass the other party
    3. Prejudice: when the amendment comes very late in the discovery process and usually requires an extension of discovery that it would be unfair to the other party
- Relation back doctrine: the new Δ that you're bringing in must have both received sufficient notice of pendency of the action AND they must have/should have known but for a mistake of identity, they were the real party/Δ in interest
    - How to show?
    - Communication btw. the two parties

Q: What is common when amending a pleading?
A: evidence (factual findings have changed), changing the relief, changing the causes of action, changing parties

- Difference btw. amended pleading & supplemental pleading: supp. is something that came to your knowledge after the filing of the OG pleading, amended is just working with the same info you had while writing the OG pleading
- A party has 30 days to respond and must either
    - Admit
    - Deny
    - Object
        - Privilege, relevance, could be unduly burdensome,
    - Neither admit or deny because after reasonable inquiry you still don't have the info to answer

        - But remember the later this comes in discovery the harder it is to argue in good faith that you don't know
            - If you use this last option not in good faith, it's sanction-able
    - If you don't answer in a timely manner you admit it
- Strategic issues
    - Be careful what you have asked for, sometimes you don't want to have other party conclusively admit something
        - Also if D for instance admits that the victim suffered 30% of body burned, then at trial the stipulation is admitted in a clinical sterile way and you the P can't introduce evidence (pictures & testimony) that would get more sympathy from the jury
- Procedural
    - One fact per request to admit
        - If you have multiple things in one, if any of the things is wrong then they can deny the whole thing
- Genuineness of document
    - The document is what it purports to be
    - Signed by the person it appears to have been signed by
    - Document made by the person(s) who appear to have made it
        - Admitting these things does not mean you have admitted the document meets the hearsay rule etc. genuineness does not equal other admissibility rules

Motions generally

- Must be in writing (unless local rules permit otherwise)
- Must include grounds for relief
- Must include what relief are you seeking
- Local rules (there are a ton)
    - How long it can be
    - Consent from other party
    - Etc.
- If you're going to seek a trial/ hearing on your motion
    - In federal court simply filing a motion gets it going but you should put on your memo and motion that you would like an oral argument
    - In state court, your motion doesn't go anywhere until you put it on the calendar
- Common motions
    - Motion to strike – unnecessary info because it's futile or insufficient; a way to get rid of a bad defense; "disfavored" motion; must be very targeted in what you're wanting to strike and WHY
    - Motion for a more definite statement – when the complaint is so vague and ambiguous that the Δ doesn't know what they're being sued for; if it's pro se and basically gibberish, just file a 12b6
    - Rule 6B Extensions of time and continuance
        - If you file before the expiration of the initial time limit, then you can get it for good cause shown
            - do this well in advance of expiration

        - If you file AFTER expiration of the initial time limit, you can only get it for "excusable neglect"
            - This basically means you better have had covid and have been hospitalized during the time
- Motions to consolidate and bifurcate 42a and 42b
    - Consolidate
        - Multiple actions with same facts and parties
        - Discretionary for court, almost never overturned on repeal
        - Burden of proof on party making motion
    - Bifurcate
        - Convenience or to avoid prejudice
        - Can be cases as a whole or issues within cases
            - Issues for example can be bifurcating liability and damages
                - This is good when there is close call of liability and horrible damages
- Motions in limine
    - Motion where you are seeking to get an advanced ruling from the court that piece of evidence will be admitted
        - Can come at pre-trial or during trial or it can come earlier if that could help strategy to settle
    - Federal rule
        - You don't have to renew the motion at trial, once pre-trial is enough
    - NC Court
        - You must renew motion or you lose it
            - If your renewed motion is denied you must offer proof for the record or else, it can't be appealed because there's no evidence to argue that it should have been granted
- Motion for Temporary restraining order
    - Motion must be by rule, you must provide an affidavit and you must show if I don't get this permanent and irreparable harm will occur
        - Ex parte TRO you must also provide affidavit detailing how you notified other party OR why you shouldn't have to notify them
    - Things you need for TRO
        - Motion and briefing
        - Verified complaint or affidavit detailing what will happen if this TRO doesn't issue
        - If ex parte, affidavit why you are not notifying other party
        - Security for if the TRO is issued wrongly
        - Draft TRO order (you write the order then the judge signs it)
    - Limits
        - 14 days max
        - You can get one 14 day extension if judge allows
        - TRO needs to have what the specifics of the injury they're trying to prevent is and the irreparable nature of injury

        - Why should it be issued without notice?
        - Acts its enjoining in detail
    - Preliminary injunction (balancing of harms, courts must balance one hardship against other)
        - These don't have 14 day time limits unlike TRO
        - Sometimes this is the only relief P is seeking (not damages)
            - Because of the nature sometimes the permanent and Prelim Injunction are rolled into one (I think he said)
        - 4 factors a court must consider when deciding to issue one of these
            - Likelihood of irreparable harm to the plaintiff
            - Likelihood of injury to D if P succeeds
            - Likelihood of merit of the claim that P will it work
            - Likelihood
        - If P can really show that they will be hurt, then normally court rules for P doesn't look as much at merits
        - If D is likely to be harmed or it's a toss-up then P must show they're likely to win
    - Summary judgement motion – Rule 56
        - No genuine issue of material fact
        - Often made after discovery because these are all about the evidence
        - Defined elements
            - Genuine-ness
                - If all party can go show is just a little bit next to a whole bunch of evidence
                - "minimal possibility" it could go your way is not enough
            - Material fact
                - Outcome determinative, the issue that's disputed must matter for how the case goes
    - 12b motions
        - Rule: must bring all 12b motion together; can't piecemeal
        - Biggest exception of SMJ (courts must always have SMJ, otherwise they can't act)
        - Other exceptions include 12b6 and indispensable party motions; can be made up until the verdict
    - Issues of first impression
        - Relying on sister jurisdiction's rulings & case law, treatises, provisions from a uniform law commission, law review articles

<u>Depositions</u>

Q: Who can be present at depos?

A: both sides of counsel and parties EXCEPT ➔

- Some parties do not have the right to be present (ex. improper purpose, protective order)
- Written notice is required to all parties in the case
- Types of depos
- Stenographic

- Video
- Phone

Q: Why don't we allow a bunch of interruptions during depos?
A: too costly (because we're paying the ct. reporter); nobody there to rule on objections; a so what? problem; a time problem

- Counsel can object to form but you cannot instruct the witness to not answer the question unless it's a privileged matter; neither counsel can EVER instruct a non-party witness to not answer a question