MOTION PRACTICE FOR PARALEGALS

A. YOUR ROLE IN MOTION PRACTICE

The first thing to understand is what a Motion is. A Motion is an application made to a court or judge for the purpose of obtaining a Rule or Order directing some act to be done in favor of the applicant. Simply put, a Motion is a form of request for a court to do something. Usually, Motions are made in writing and with notice both to the court and to any opposing counsel or parties. The Motion is usually decided after argument by all parties involved in the action, either by written memorandum or by oral argument. The oral argument of a Motion is typically called a "Motion Hearing" or "Hearing." Judges, both in strict adherence to Notice provisions, and the interests of efficient judicial process, usually only allow a Hearing on the exact Motion or Motions that have been raised. Therefore, it is usually a requirement that any action done by a judge must first be preceded by a Motion.

Researching a Motion

The first step is to determine what exactly you want the court to do. You must then determine what your grounds for relief are. Under North Carolina Rules of Civil Procedure, Motions are covered in Rule 7. The Rule states that every Motion should state with particularity the grounds therefore, and shall set forth the relief or Order sought. Therefore, a simple one line Motion will seldom be appropriate. In addition, you should know the North Carolina Rules of Civil Procedure and cite specifically to the Civil Procedure Rule under which you are operating. For example, a Summary Judgment Motion should be made pursuant to Rule 56 or as a Motion Compelling Discovery would be made pursuant to Rule 37. The General Rules of Practice for Superior and District Courts for North Carolina require that the Rule number or numbers be cited.

As a Motion is a court document that is signed by the attorney, it is important that it be accurate, as the attorney herself may be liable and sanctioned pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

Most Motions have been made numerous times in your office previously. It is wise not to try and "reinvent the wheel" but use the preexisting Motions as templates for your particular Motion. However, you should still review the Rule and any other law that is being cited by the Motion to be sure that it has not been modified or overruled.

Fees

Depending on the jurisdiction, some courts charge filing fees for Motions. Therefore, prior to filing any Motion you should contact the applicable Clerk of Court and determine whether or not any filing fees are required in that jurisdiction.

Civil Index Form

In addition to filing fees, some local jurisdictions also require a cover sheet or civil index form indicating the case and a brief description of the Motion. Again, the local clerk should be happy to help provide you with the forms you need.

Motion Hearing

In the Superior and District Courts of North Carolina, typically no Motion will be heard until an oral hearing has been noticed. A notice may be sent out with the Motion or following the Motion. Under Rule 6 of the North Carolina Rules of Civil Procedure the Motion and notice must be served no later than five (5) days before the time specified for the hearing. The notice and Motion should be served pursuant to Rule 5(b) of the North Carolina Rules of Civil Procedure either by handing it to the attorney or a party being in the attorney's office, sending it to the attorney's office by fax for receipt by 5:00 p.m. on a regular business day, or upon deposit at the U.S. post office.

The best practice for obtaining a date and time for the Motion Hearing is to contact the Clerk or Trial Court Administrator for a list of dates and times available. Some jurisdictions allow requests and permit the Trial Court Administrators to schedule Motions at a specific day throughout a week-long session. In other jurisdictions the court may only give the Trial Court Administrator authority to schedule the Motion for a week-long session. On Monday morning (or the beginning of that particular session), the presiding Judge will call the calendar. Based on oral presentations of the attorneys present at the calendar call, he will set a more certain date and time for the Motion.

After you've contacted the Trial Court Administrator for a list of available dates or session weeks, you should coordinate with the opposing counsel's office for a time convenient for all attorneys to be able to argue.

This process is a common courtesy extended by attorneys to each other; however, it is not required under the Rules. The only rule is that opposing counsel have five (5) days notice.

It is also important once you have noticed the Motion to determine who the presiding judge will be. This is usually set in advance of the hearing date, however, last minute changes in the schedule may always be made. North Carolina judges "ride circuit," which means although each local district elects a certain number of resident judges, the Chief Justice requires those judges to sit out of district a certain percent of the time. The purpose of this procedure is to ensure uniform application of the law throughout the state of North Carolina.

There are several reasons to determine who the judge is that will hear the Motion. First, the particular judge may have a reputation either for the plaintiff or for the defendant. Second, the judge may have a conflict, for example, his brother is one of the parties at issue, and he would have to recuse himself. It does no good to notice and schedule a hearing if no judge is available who is able to rule. Third, the judge may have a reputation or procedure concerning oral argument. Some judges will allow both parties to argue as long as they want without interruption. Other judges will severely limit the time allowed and will frequently interject with their own thoughts and questions. An oral argument based upon your Motion should be tailored to the individual judge's preferences. The judge may have a reputation concerning memorandum and briefs.

Unlike the Federal Court, judges in North Carolina do not have paid legal clerks

to review, research, and help them decide the law of North Carolina. Therefore, North Carolina judges are entirely dependant upon the attorneys and their own personal experiences in ruling on a Motion. Any Motion filed also allows for a detailed factual and legal memorandum to be filed prior to the Motion. (In Federal Court it is required.) Some judges have the time and inclination to review in detail briefs and memoranda prior to the hearing. Other judges prefer to have the oral hearing be the first information they gather concerning the issue and then refer to briefs or memoranda submitted by the attorneys as needed. Therefore, for some judges, it is critical that the memorandum and other exhibits be provided to the judge prior to the oral hearing. As the judge is riding circuit this may entail a bit of detective work. The best practice is to contact the judge's office in his or her resident county to see if you can determine if the judge is sitting there the week before your hearing. If he is, then you should send the documents directly to her. On the other hand, usually the judge's secretary will know if the judge is out of county, where he will be, and will instruct you where to send the documents. If at all possible you should have the documents to the judge as early as possible the week before the hearing. This will give the judge the opportunity to review the materials, and to also guard against the possibility that the session that week may run short and the judge not even be in on Thursday afternoon or Friday to receive your documents.

Some cases, most frequently medical malpractice cases, will have scheduling Orders entered by the court. A frequent fixture of the scheduling Order is a deadline for "Dispositive Motions." A Dispositive Motion is a Motion that will completely dispose of the claim or the issue. Dispositive Motions are usually Motions for Summary Judgment. Dispositive Motions are contrasted with Nondispositive Motions such as Motions for Discovery, Motions Compelling Discovery or Motions made for evidentiary issues at trial. Careful reading of the exact language of the scheduling Order is also important, as some scheduling Orders will have a deadline date for <u>filing</u> Motions while others may have a deadline date for the <u>hearing</u> of Motions.

Additionally in noticing a Motion, keep in mind that your opponent can notice your own Motion for hearing. Therefore, even if you do not intend to argue the Motion immediately or soon after filing, you should be prepared to have your opponent jump the gun and notice the Motion. Again, your opponent only needs the same notice requirements as you do.

Order

The judge will usually direct the prevailing party on the Motion Hearing to submit an Order. It is a good idea to get a jump on this process by preparing a draft Order and either submitting it with the Motion or providing the attorney with it to hand up to the Judge during the hearing. These Orders are valuable particularly for simple matters that do not require the Judge to make extensive findings of fact or conclusions of law.

The Order should contain the Rule number, the hearing date, and a signature blank for the judge. The Order should clearly state the relief granted, and should also, where appropriate, indicate a deadline for the application of the Order. For example, if a judge has awarded costs, the Order should state not only the amount, but when the costs must be paid. The opposing counsel should be given an opportunity to review the Order either at the hearing or afterwards. After both sides have agreed, or you've had no

response from opposing counsel, you should submit the Order to the Judge indicating in the cover letter whether or not you've obtained consent to the wording of the Order. After the Judge signs the Order he will typically present it to the Clerk in the county where the case is filed for filing and you will receive in the mail a filed copy. Occasionally, the judge will send back the signed Order unfiled, particularly when he is no longer in the county where the case was heard and you must copy and mail to the Clerk for filing. It is important that you follow up with this process, particularly when time is of the essence for the relief, as typically any deadline set by the Order does not begin tolling until the Order is signed and filed.

In the event that the Order is not agreed upon, the Judge must resolve any issues in the drafting of the Order. In Order to resolve this situation, the Judge who conducted the Hearing and made the ruling must be the Judge to rule on the contents of the Order. The easiest way is for both parties to submit their own versions of the Order and allow the Judge to pick which he prefers. Other times, the issue may be important enough to notice a second Hearing before that same Judge in Order for him to rule on the contents of the Order. The date of the second hearing should be requested directly with the Judge, as it will frequently be outside of the county where the Judge initially heard the Motion and where the case is filed. The Judge will then conduct the hearing out of session out of county for ruling. Because he's already ruled on the issue, the Judge still has jurisdiction, which is why he is able to hear the case in a different county.

B. USING MOTIONS DURING THE PRE-TRIAL STAGE

Motion To Dismiss

One of the most frequent Motions made in civil litigation is the Rule 12(b)(6) Motion to dismiss. Upon a Motion to dismiss for failure to state a claim upon which relief can be granted, allegations of the complaint must be viewed as admitted. This Motion will be denied unless it affirmatively appears that the plaintiff is entitled to no relief under any stated facts which could be presented in support of the claim. This Motion is rarely granted; however, it is almost always plead. Typically, this Motion will be plead in the answer strictly as a failsafe Motion. Seldom, however, are these Motions actually noticed and heard. Therefore, you should consult with your attorney before determining whether this is a Motion which should be noticed and heard.

The 12(b)(4) and the 12(b)(5) are Motions to dismiss for insufficiency of process, and insufficiency of service of process. The rules for service are Rules 4 and 5 of the North Carolina Rules of Civil Procedure. You probably will not see these Motions on a consistent basis as they are usually only filed when there is a definite issue involved. Unlike most other pre-trial Motions, these Motions must be made prior to or in the answer, or they are waived. As many times lack of service can be corrected, if this Motion was filed against you or your client, even in an answer, you should check service or have your attorney call the other attorney to determine the basis.

Motions To Compel and Motion for Sanctions

Rule 37 of the North Carolina Rules of Civil Procedure concerns the rules for discovery and rules for Motions to compel and Motions for sanctions. You should keep track not only of when your answers to an opponent's discovery are due, but also when your opponent's answers to your discovery are due. Any extension of time that you obtained or you grant should be memorialized in writing. Motions to Compel are not looked upon with favor by judges who think (with a large amount of justification) that most, if not all of discovery disputes can be worked out between the parties. In fact, typically, after calendar call for hearing, the judges will Order the attorneys to go out in the hall and work out as many issues as they can and only bring him ones that they cannot reach agreement on. Therefore, it is usually better to participate in this process before actually having to attend a hearing. Motions to Compel should, therefore, be specific and refer individually to each interrogatory or request to produce which has not been answered or has not been answered in full.

Even where the attorneys have worked out issues, you should prepare an Order memorializing their agreements as well as the judge's ruling for the judge to enter and sign.

North Carolina Rules of Civil Procedure 37, allows sanctions to be had for failing to answer discovery and to obey court Orders. Although the judge has a discretionary power to award sanctions even without an initial Order, they frequently will decline to do this, or at best, award costs of preparing the Motion. However, a pattern of breaches along with failing to comply with earlier Orders of a court, would incline a judge to award further and greater sanctions up to and including dismissing their case. This is why even where discovery disputes are agreed to between the parties, it should be memorialized in a court Order.

Summary Judgment Motions

Summary judgment Motions are made pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Summary judgment allows the court to "look behind the pleadings" to determine whether any genuine issue of fact exist for trial. If not, the movant is entitled to a final judgment as a matter of law without trial. Summary judgment Motions are different from Motions to dismiss in that they consider materials beyond the pleadings. A Motion to dismiss under Rule 12(b)(6) attacks a case for failing to allege a particular element required of a particular tort. A Motion for Summary Judgment, however, looks to the evidence that is presented by the non-moving party concerning each element. While Rule 56 allows the defendant to move for summary judgment at any time, the better practice is to wait until completion of discovery. Any summary judgment Motion that is made prior to this will risk being denied simply on that basis. The Motion must be served at least ten days before the hearing, but the opposing party may serve its affidavits two days before the hearing.

To support or oppose a Motion, the parties submit affidavits which must set forth facts admissible in evidence, must be made on personal knowledge, and must show affirmatively that the affiant is competent in testifying on these matters. The parties may also submit depositions and answers to interrogatories and other papers. The court may also allow oral testimony. The opposing party must introduce the affidavits or other

proof to show that there is a genuine issue for trial. He cannot rely merely upon the pleadings.

Summary judgment will be granted only if there is no genuine issue as to any material fact. Thus, if the only issue at trial would be the legal effect of the facts, summary judgment can be granted. However, if there are disputed material facts, they must be resolved by trial. For example, plaintiff moves for summary judgment on a promissory note presenting the affidavit of a witness who swears he saw defendant sign the note. If defendant files no opposing affidavit, no fact question remains and summary judgment is proper. However, if defendant files an affidavit swearing that his alleged signature was a forgery, genuine issue as to the material fact is raised, and summary judgment cannot be decided. On a summary judgment Motion, the court cannot decide whether the plaintiff's witness or defendant is more believable; it can only decide whether there are issues to be tried.

If there is controversy as to some material facts but not to others, the court may enter an Order that uncontraverted effects will be deemed established at the trial. Frequently, a partial summary judgment is made on separate claims which have been plead arising out of the same transactions of occurrences; issues of liability while leaving issues of damages open for trial; and issues of separate defendants.

C. DRAFTING TIPS FOR PARALEGALS

Drafting A Motion

Again, most Motions have been made previously and, therefore, it is helpful to obtain an old Motion that your firm has done to use as a template. You should check not only the substance of the Motion, but also make sure that the county and jurisdiction is correct, case number is correct, and that the attorney has included his bar number. In addition, frequently there are multiple defendants in a civil action and, therefore, in making a Motion you should be sure to identify only your client or the entities that you are requesting relief from the court. As stated previously, you must, pursuant to the General Rules of Practice and Procedure, state the Rule number, state the relief, and state the grounds with specificity. Each Motion should be done on a separate document, even if several Motions need to be made at the same time and noticed for the same day.

Exhibits

Particularly in summary judgment and Motions to compel, a large amount of exhibits may be included. As noted previously, for some judges, these exhibits along with the Motion should be sent to him the week before. In addition, on the day of the hearing, you should prepare a second copy for the judge, a copy for opposing counsel, and one for your attorney. Any case law that is supplied should be highlighted and tabbed. Your exhibit notebook should be indexed and tabbed.

Drafting The Memorandum

The Federal Court requires that every Motion have a supporting memorandum of law. In North Carolina, memorandums of law are optional; however, if a memorandum is submitted, it must be submitted two days before the hearing.

In drafting the memo, adhere to the basic concepts of legal writing. Avoid quasi-legal language, simply say what you mean. Don't entirely rely on the computer for spelling. Some errors will not be caught (their and there). Again, use the good grammar that your high school English teacher taught you.

Argument

You will have far more knowledge concerning your case than the judge, therefore, remember to define technical non-legal terms. For example, you may instantly know what a backer rod is in a stucco litigation due to your experience, but you need to define that to the judge in your memorandum.

Don't go outside the case, or make any kind of personal attack on the other attorney, or bring up issues in other cases that you may have had with the opposing attorney. Don't give the judge the impression that you are filing this Motion in this case merely because the opposing attorney filed one against you in a previous case.

Stay away from inflammatory or other over-the-top language. Don't give a jury argument to a judge. Judges are not typically impressed by inflammatory language.

D. HOW TO ASSIST AT TRIAL

Motions in Limine

Motions in Limine are typically non-dispositive Motions that are made at the beginning of the trial. Typically, prior notice is not required; however, you should identify that you have some Motions in limine to be heard in the pre-trial Order. You should have a standard list of Motions in limine, for example, Motions excluding any mention of insurance.

You should also determine what, if any, of the Motions need to be heard prior to jury selection. For example, a Motion to exclude any mention of insurance, typically can be dealt with after jury selection, the issue would not be raised at that time. Most Motions in limine, such as insurance, can be stipulated to; however, it is still a good idea to again raise those Motions as it prevents an attorney from asking a question even though he is certain it will be objected to and sustained by the judge.

Directed Verdict Motions

Directed Verdict Motions under Rule 50 of the North Carolina Rules of Civil Procedure, are based on the same grounds as summary judgment Motions. Directed Verdict Motions must be made after the close of the plaintiff's case and then again at the close of the defendant's case, otherwise they are waived. Therefore, it is important that you and your attorney remember to make the direct verdict Motions before you rest your case.

E. POST-TRIAL MOTION PRACTICE

Motion for New Trial and JNOV

The two main post-trial Motions are Motions for new trial under Rule 59 and for judgment notwithstanding the verdict under Rule 50. Not later than ten days after an entry of judgment, a party who moved for a directed verdict at the close of the evidence, may file a Motion for judgment notwithstanding the verdict. The party is moving the court to have the verdict set aside and to have judgment entered in accordance with his Motion for directed verdict.

The Motion for judgment notwithstanding the verdict raises a question of the legal sufficiency of the evidence. Upon a Motion for judgment notwithstanding the verdict, the sufficiency of the evidence upon which the jury based its verdict is considered. All the evidence favorable to the non-moving party must be taken strongly considering the light most favorable to him, giving him the benefit of every reasonable inference which may be legitimately drawn therefrom. Contradictions, conflicts and any inconsistencies must be resolved in the non-movant's favor. If there was more than a scintilla of evidence supporting the verdict, the Motion must be denied.

Frequently, the Motion for judgment notwithstanding the verdict is joined with a Motion in the alternative for a new trial under Rule 50(b)(1). If the Motion for judgment notwithstanding the verdict is granted, the trial court must still make a conditional ruling on the Motion for a new trial, specifying the grounds for granting or denying the Motion. If the judgment notwithstanding the verdict is granted but reversed on appeal, and the Motion for a new trial was conditionally granted, the new trial will proceed automatically unless the Appellate Court orders otherwise. If the judgment notwithstanding the verdict is granted but reversed and the Motion for a new trial is conditionally denied, subsequent proceedings shall be in accordance with the Order of the appellate division.

The party who won the jury verdict, must be careful to preserve her rights. If the trial court grants defendant's Motion for judgment notwithstanding the verdict, the plaintiff must serve Motion for a new trial pursuant to Rule 59 within ten days after the entry of the judgment notwithstanding the verdict. If defendant's Motion for judgment notwithstanding the verdict is denied and defendant appeals the jury verdict, plaintiff should assert in the alternative any grounds she may have for a new trial. If the appellate division reverses the jury verdict, nothing in the Rule precludes them from determining that plaintiff is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

A judge has broad discretion to order a new trial on all or part of the issues on various grounds. Like the JNOV, Motion for a new trial must be served not later than ten days after entry of the judgment. If the Motion is based upon affidavits, the affidavits must be served with a Motion. Rule 59(a) provides that a new trial may be granted for the following causes or rounds:

1. Any irregularity which prevented any party from having a fair trial;
2. Misconduct of the jury or prevailing parties;
3. Accident or surprise which ordinary prudence could not have been guarded against;

4. Newly discovered evidence material for the party making the Motion which he could not, with reasonable diligence, have discovered and produced at the trial;
5. Manifest disregard by the jury of the judge's instructions;
6. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
7. Evidence insufficiency to justify the verdict or that verdict that is contrary to law;
8. Error in law occurring at the trial and objected to by the party making a Motion and not any other reason heretofore recognized as grounds for a new trial.

The most common ground for a new trial cited is Number 6, or in the event that the damages awarded by the jury is either extremely low or extremely high, so as to "shock the conscious" of the judge, the judge will Order a new trial. The other frequent ground used is Number 7, which you will frequently hear referred to as a verdict given by the jury "against the greater weight of the evidence." Again, judges are extremely cognizant of the constitutional right of a jury trial and, therefore, only in extreme cases will they remove the case from a properly sitting and convened jury.

Motion For Relief From Judgment

Under Rule 60, if through oversight or omission, a clerical mistake is made in entering the judgment, the mistake may be corrected by the court at any time, either upon Motion or on its own initiative.

On Motion the court may also relieve a party from judgment on the following grounds:

1. Mistake, inadvertence, surprise, or excusable neglect;
2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) (i.e. within ten days after entry of judgment).
3. Fraud intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;
4. The judgment is void (no subject matter jurisdiction);
5. The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
6. Any other reason justifying relief from the operation of the judgment.

A Motion for relief from judgment must be made within a reasonable time after entry of judgment. A Motion on grounds 1, 2, or 3 must be made within one year. Again, these Motions are seldom granted, a judge will not grant a Rule 60(b) unless the error complained affects substantial rights of a party.