

PRE-MEDIATION PREPARATION



GETTING YOUR DUCKS IN ROW: WHAT CAN A PARTY DO TO GET READY FOR MEDIATION?

First, identify the parties.

This is slightly more complicated than it sounds. What we're really looking for is: who is entitled to make the claim? (Who is the "claimant"?). And, is there someone else that the person making the claim wants to involve? Usually, there is a lawyer representing the claimant. But in addition, for example if the claimant is married, perhaps the claimant would like her or his spouse to be involved in discussions to resolve the dispute. Sometimes a claimant does much better at mediation if he or she brings along a good friend for "moral support."

On the other side, the question is: against whom is the claim properly made? Is there any question about whether the person identified as the defendant or respondent to the claim is really the proper party? Could this person be held legally liable for the claim? Is there anyone else that also might be held legally liable for the claim? What we want to avoid is getting to mediation and having the respondent refuse to pay the claim on the grounds that "somebody else" is supposed to pay this claim. The best example is a respondent who believes that she or he has insurance coverage for the claim. In such cases a representative of the insurer needs to be involved before the claim can get resolved.

A related issue is whether some party claims a lien or subrogation right. For example, if the claimant has been injured and has had medical bills paid by a health insurer, the health insurer may claim a right to be reimbursed out of settlement proceeds. In such cases either the health insurer's representative needs to be involved at mediation or else the claimant's lawyer needs to have an agreement with that insurer going into mediation so the claimant knows what portion of any amount offered in settlement will need to be paid to the health insurer.

So make certain you have "on board" everyone needed to resolve all aspects of the dispute.

Second, identify the issues.

This usually needs to be more complicated than the parties initially make it. For example, if Party A claims that Party B ought to pay Party A the sum of one million dollars (\$1,000,000.00) and Party B's response is: "I disagree," we aren't going to get anywhere in mediation until we break up the case into smaller issues.

So: **as part of identifying the issues, first split the issues into “liability issues” and “damages issues.”** I think it’s helpful when identifying issues to think about where the claim is going if it isn’t settled at mediation. It’s going to trial. And after a jury is selected and evidence is presented and instructions have been given by the presiding judge and the lawyers have argued their clients’ respective positions, the jury decides the issues in the case by answering questions on a **“special verdict form.”** [Why the term “special verdict”? Why not just “verdict”? There is something called a “general verdict.” I only recall once in the hundred jury cases I tried where we used a “general verdict.” I believe that many years ago the practice was to give the jury two verdict forms. One said: “we find for the plaintiff.” The other said: “we find for the defendant.” These were “general verdict” forms, and the jury foreperson signed one or the other. Special verdict forms have become fairly standard because they allow for more specific questions to be asked of the jury.]

The special verdict form has a **caption** that usually looks like this:

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF <u> [County] </u>	[Number of District*] JUDICIAL DISTRICT
Case Type No. <u> [†] </u>	
<hr/>	
<u> [name1] </u> ,	
Plaintiff,	
vs.	Court File No. <u> [○] </u>
<u> [name2] </u> ,	
Defendant.	SPECIAL VERDICT FORM
<hr/>	

We, the jury in this case, answer the questions from the Court as follows:

*Which judicial district? First, Second, Third, Fourth, et cetera. Each of the counties in Minnesota is in one of ten judicial districts. Hennepin County, for example, is in the Fourth Judicial District; Stearns County is in the Seventh Judicial District. To find out which district a particular county is in, go to [<http://www.courts.state.mn.us/?page=238>].

†For personal injury cases, on this line I put "11/Personal Injury." The list of civil "case types" and their numbers may be found at Form 23 in the Appendix of Forms following the Minnesota Rules of Civil Procedure. The last time I checked the Rules of Civil Procedure were available online [<http://www.courts.state.mn.us/?page=511#civil>], but the appendix of forms following the rules was not; it may be available online by now.

°The "Court File Number" for the case is assigned by the Court Administrator's Office for the county in which the case is venued.

The "end" of the special verdict form: signature lines for the foreperson or for "concurring jurors":

I'll come back to the questions on a special verdict form, but first I'll show you **what the "end" of the verdict form looks like:**

Dated: _____, 20__, at _____ .m.

Foreperson

CONCURRING JURORS [Use only if 6/7 verdict]

- | | |
|----------|----------|
| 1. _____ | 4. _____ |
| 2. _____ | 5. _____ |
| 3. _____ | 6. _____ |

In Minnesota, if the jury's verdict is unanimous, then only the "Foreperson" fills in the answers to the questions on the verdict form, fills in the date and time when the jury reached the verdict, and signs the verdict form. If the jury deliberates for six hours and has not reached a unanimous verdict the jury then has the possibility of either a 5/6ths (if the total number of jurors deliberating is six) or a 6/7ths (if the total number of jurors deliberating is seven) verdict. What that means is that if, after six hours of deliberation, either five of six or six of seven jurors can all agree on a set of answers to the questions on the verdict form, then those jurors agreeing with the answers all sign the verdict form at the end.

Verdict form questions: Typically in Minnesota, if there are both *liability* and *damages* issues, the questions relating to liability appear first on the verdict form. The exact wording of the questions is up to the presiding judge. Usually the judge asks the lawyers for the parties to each submit a "proposed" special verdict form. Sometimes the lawyers agree on the wording of the questions. If that happens the judge usually goes along with that wording unless the judge believes that it is legally incorrect. In Minnesota there are published "Jury Instruction Guides." These are written, and periodically revised, by a committee of district court judges with input from several lawyers. Incorporated into these published instructions are rulings of the Minnesota appellate courts declaring whether a particular instruction either is or is not correct.

The **liability questions** on a Minnesota verdict form are usually split into two parts: (1) negligence or fault; and (2) cause or causation. This split is because in most cases a person or party is not **liable** (or responsible) unless that person or party acted wrongfully *and* the wrongful conduct was a "direct cause" of harm to someone else. Conduct may be wrongful because it was negligent, or unreasonable, or in violation of law. Sometimes wrongful conduct is referred to as "fault," but "fault" usually implies *both* wrongful conduct *and* causation, so "fault" is more like "liability" than "negligence."

A "direct cause" is typically something that had a "substantial part" in bringing about harm. There may be more than one "direct cause" of a particular injury or harm.

In a typical motor vehicle accident case, **the liability questions for a defendant** would likely be:

1. Was defendant [name2] negligent at the time of the [date] accident?

 Yes or No

2. *If your answer to Question 1 is "yes," then answer this question:* Was defendant [name2] 's negligence a direct cause of the [date] accident?

 Yes or No

In some cases there are also **questions about whether the plaintiff or claimant is liable** for the accident because she or he was negligent and that negligence was a direct cause of the accident. This happens, for example, in motor vehicle accident cases where the defendant claims that the plaintiff was negligent and a cause of the accident. Sometimes the defendant says: "I know that I was negligent and that my negligence was a direct cause of the accident, but the plaintiff was also negligent and the plaintiff's negligence was also a direct cause of the accident." Other times the defendant says: "I disagree with plaintiff's claim that I was negligent; I contend that the accident happened because the plaintiff, not me, was negligent, and the plaintiff's negligence directly caused the accident." In either case, the liability questions pertaining to the claimant or plaintiff would likely look like this:

3. Was plaintiff [name1] negligent at the time of the [date] accident?

 Yes or No

4. *If your answer to Question 3 is "yes," then answer this question:* Was plaintiff [name1] 's negligence a direct cause of the [date] accident?

 Yes or No

Allocating liability or responsibility where the negligence of more than one person caused the accident or incident resulting in harm or injury: Whenever the jury determines that an accident was directly caused by the negligence of more than one person the jury must also "allocate" the "causal negligence" among those parties found to have been "causally negligent." The allocation question, sometimes referred to as the "comparative fault question," usually looks like this:

[If your answers to Questions 2 and 4 are "yes," then answer question 5.]

5. Taking all of the negligence that contributed as a direct cause of the [date] accident to be 100%, what percentage do you attribute to:

Defendant [name2] (if you answered "yes" to questions 1 and 2) _____ %

Plaintiff [name1] (if you answered "yes" to questions 3 and 4) _____ %

TOTAL: 100 %

Why bother with trying to figure out the questions on a verdict form before mediation?

Because in doing so you are breaking up the liability issues into the same parts that they would be broken for a jury. And if the respondent or defendant argues at mediation: "I'm not liable," I can break that up and ask: "Do you think you're not liable because you don't think a jury will find that you were negligent?" "Or do you think you're not liable because a jury will not find that your negligence was a direct cause of the accident?" "Or, do you think you're not liable because the claimant or plaintiff was negligent and caused the accident?" Similarly, with the claimant or plaintiff at mediation I can say: "The defendant seems to think that a jury won't find her negligent. Let's talk about why that may or may not be true."

Damages questions: If the verdict form has both liability and damages questions, there is usually ***an instruction*** that appears between them and it looks like this:

[You must answer Question 6 and Question 7—regardless of your answers to any of the other Questions on this Special Verdict Form.]

What is that for? It's there because our appellate courts have ruled that in some cases it is possible that a jury's verdict on liability is valid while its verdict on damages is not (or the jury's verdict on damages is valid while its verdict on liability is not). That (one part being valid and another invalid) can happen if, for example, the trial court gave the jury an incorrect instruction relating only to liability; or if the trial court incorrectly allowed certain evidence to be presented to the jury but that evidence pertained only to damages. In such instances, the appellate court will remand the case for retrial of only the part that was affected by the error.

Personally, I don't like this rule. Jurors don't understand the reasoning behind it and in a typical trial the lawyers may either be barred from explaining it or may not have sufficient time to explain it. And I believe that jurors may in some cases read more into this instruction than they should. For example, in car accident cases the lawyers usually aren't allowed to explain to the jury how either no-fault insurance or liability insurance may be involved in the case. And jurors all know that people who drive cars in Minnesota are required by law to have several types of insurance—liability, no-fault, uninsured motorist, underinsured motorist. I think a lot of jurors hearing about a car accident case think: "Why doesn't the injured person make a claim for insurance benefits? Why is she (he) suing the person in the other car instead of the insurer?"

And when the jury gets the verdict form after they've heard all the evidence, arguments and instructions, the form has some questions about negligence and cause and some questions about damages. But why fill in information about damages if the "defendant" wasn't negligent? I believe some, perhaps many, jurors think that if they find the defendant was negligent and a cause of the accident then the defendant will have to personally pay whatever damages they find were sustained by the plaintiff as a result of the accident; and they think that if they find the defendant was "not negligent" then the damages will be paid by some insurance company [maybe a "no-fault" insurer; because the jury found "no fault" on the part of the defendant].

I have heard of a couple of "premises liability" cases [these are cases where the injury is alleged to result from some defect of the premises where the injury occurred, such as an unexpected slippery floor in a place known to be used by elderly people] where a jury wrote in significant

amounts on the verdict form in response to the damages questions but also wrote that the defendant was not negligent. In one such case, several days after the trial a juror ran into the plaintiff at a shopping mall. The juror said something like: "I hope you were satisfied with the damages we awarded; it wasn't quite as much as your lawyer suggested but we thought it was fair." The plaintiff responded: "I didn't receive any money because you jurors said the defendant wasn't negligent." The juror then said: "But we thought you'd receive the money we awarded as damages; we wanted you to have that compensation." And the plaintiff then called his lawyer and the lawyer asked the judge to order a new trial but the judge denied the request. The legal rule that applies in that situation is this: if the jury was properly instructed on the law then their verdict is binding even if they didn't realize the effect of their answers.

But getting back to the subject of **damages questions** on a verdict form, many lawyers and judges refer to medical expenses and wage loss as "**special damages**" and "pain," "disability," "disfigurement," "embarrassment," and "emotional distress" as "**general damages**." Another way to consider it is that damages that are measured "objectively" are "special damages" and damages that are measured "subjectively" are "general damages." Notice that in Minnesota "general damages" are categorized in five ways: pain, disability, disfigurement, embarrassment and emotional distress. Other states might refer to things like "loss of enjoyment of life" or "pain and suffering" as types of general damages.

In Minnesota, the actual damages questions usually look like this:

6. What amount of money will fairly and adequately compensate Plaintiff _____ [name1] _____ for damages directly caused by the _____ [date] _____ accident, up to the time of this verdict, for:

- a. Past pain, disability, disfigurement, embarrassment, and emotional distress? \$ _____
- b. Past wage loss? \$ _____
- c. Past health care expenses? \$ _____

7. What amount of money will fairly and adequately compensate Plaintiff _____ [name1] _____ for damages reasonably certain to occur in the future, directly caused by the _____ [date] _____ accident, for:

- a. Future pain, disability, disfigurement, embarrassment, and emotional distress? \$_____
- b. Loss of future earning capacity? \$_____
- c. Future health care expenses? \$_____

Notice that damages are broken into *one question for **past damages*** (from the date of the accident or injury to the date of the verdict) and *one question for **future damages*** (from the date of the verdict through "the future"-**more on what "the future" means elsewhere**).

Notice, also, that there are three categories of damages recognized in Minnesota: (1) health care expenses; (2) wage loss or loss of the ability to earn wages (more on that in a minute); and (3) damages for "pain, disability, disfigurement, embarrassment, and emotional distress," also frequently referred to by many lawyers and judges (including me) as "general damages."

General damages may be split into two parts. When they are, the past damages question usually looks like this:

6. What amount of money will fairly and adequately compensate Plaintiff [name1] for damages directly caused by the [date] accident, up to the time of this verdict, for:

- a. Past pain, disability, and emotional distress? \$_____
 - b. Past disfigurement and embarrassment? \$_____
 - c. Past wage loss? \$_____
 - d. Past health care expenses? \$_____
-

The jury is told to consider the plaintiff's likely life expectancy because, for example, if the jury decides that the plaintiff has a permanent disability as a result of the accident, the jury also needs to decide how long the plaintiff will live with that disability (how long does "permanent" mean for *this* plaintiff?). A jury is also free to decide that the plaintiff will likely suffer from a condition for a limited period of time and then have surgery to correct the condition and no longer live with it.

Reducing future "special damages" to "present cash value": In Minnesota juries are usually told to reduce future special damages, but not future general damages, to "present cash value." For example, if a jury decides that a plaintiff will likely need surgery in five years and the surgery will cost \$10,000, the jury is supposed to decide what amount to award the plaintiff today that will enable the plaintiff to pay for the surgery in five years. Plaintiff's lawyers sometimes argue that jurors should consider inflation and the fact that a surgical procedure that costs \$10,000 today will likely cost \$15,000 or more in five years. Defendant's lawyers sometimes argue that if the surgery will cost \$10,000 five years from now the jury only needs to award the plaintiff \$8,000 and the \$8,000 reasonably invested will grow to \$10,000 in five years.

This whole area of reducing future special damages to present cash value has always troubled me. In some cases the parties have experts testify about likely future rates of inflation and likely future rates of return on investments. But even in cases that don't have that sort of evidence, the judge typically instructs the jury to reduce future special damages to present cash value. As part of preliminary instructions regarding damages, the judge typically tells the jury that they "must not decide damages based upon speculation or guess." But then later the judge essentially instructs the jury to speculate and guess about future inflation and investment rates.

Putting it all together: a sample verdict form with both "liability" and "damages" issues:
Here is a fairly typical special verdict form in a motor vehicle case where the plaintiff and defendant were both driving and each claims the other caused the accident; also, with respect to damages there is no "embarrassment" or "disfigurement" in this example:

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF [County] **[Number of District*]** **JUDICIAL DISTRICT**

_____ Case Type No. [†]

[name1] ,
Plaintiff,

vs. Court File No. [°]

[name2] ,
Defendant. **SPECIAL VERDICT FORM**

We, the jury in this case, answer the questions from the Court as follows:

1. Was defendant [name2] negligent at the time of the [date] accident?

Yes or No

3. *If your answer to Question 1 is "yes," then answer this question:* Was defendant [name2] 's negligence a direct cause of the [date] accident?

Yes or No

3. Was plaintiff [name1] negligent at the time of the [date] accident?

Yes or No

4. *If your answer to Question 3 is "yes," then answer this question:* Was plaintiff [name1] 's negligence a direct cause of the [date] accident?

Yes or No

[If your answers to Questions 2 and 4 are "yes," then answer question 5.]

5. Taking all of the negligence that contributed as a direct cause of the [date] accident to be 100%, what percentage do you attribute to:

Defendant [name2] (if you answered "yes" to questions 1 and 2) _____ %

Plaintiff [name1] (if you answered "yes" to questions 3 and 4) _____ %

TOTAL: 100%

[You must answer Question 6 and Question 7—regardless of your answers to any of the other Questions on this Special Verdict Form.]

6. What amount of money will fairly and adequately compensate Plaintiff [name1] for damages directly caused by the [date] accident, up to the time of this verdict, for:

- a. Past pain, disability, and emotional distress? \$ _____
- b. Past wage loss? \$ _____
- c. Past health care expenses? \$ _____

7. What amount of money will fairly and adequately compensate Plaintiff _____ [name1] _____ for damages reasonably certain to occur in the future, directly caused by the _____ [date] _____ accident, for:

- a. Future pain, disability, and emotional distress? \$ _____
- b. Loss of future earning capacity? \$ _____
- c. Future health care expenses? \$ _____

Dated: _____, 20__, at _____ .m.

Foreperson

CONCURRING JURORS [Use only if 6/7 verdict]

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____

Click [HERE](#) to [Download the sample Basic Verdict Form](#) shown above.

Variations in special verdict forms:

(1) Sometimes liability is admitted and the only questions that will be on the verdict form are the damages questions. When that happens the verdict form will usually look like this:

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF [County]

[Number of District*] JUDICIAL DISTRICT

Case Type No. [†]

[name1],
Plaintiff,

vs.

Court File No. [°]

[name2],
Defendant.

SPECIAL VERDICT FORM

We, the jury in this case, answer the questions from the Court as follows:

1. What amount of money will fairly and adequately compensate Plaintiff [name1] for damages directly caused by the [date] accident, up to the time of this verdict, for:

- a. Past pain, disability, disfigurement, embarrassment, and emotional distress? \$ _____
- b. Past wage loss? \$ _____
- c. Past health care expenses? \$ _____

2. What amount of money will fairly and adequately compensate Plaintiff _____ [name1] _____ for damages reasonably certain to occur in the future, directly caused by the _____ [date] _____ accident, for:

- a. Future pain, disability, disfigurement, embarrassment, and emotional distress? \$ _____
- b. Loss of future earning capacity? \$ _____
- c. Future health care expenses? \$ _____

Dated: _____, 20____, at _____ .m.

Foreperson

CONCURRING JURORS [Use only if 6/7 verdict]

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____

(2) "**Vicarious liability**": In some situations one person is liable for someone else's conduct. For example, in Minnesota usually the owner of a motor vehicle is liable for the conduct of the driver of that vehicle (a notable exception is if the vehicle has been stolen). In those cases (where the owner of the car wasn't driving it and is liable for the conduct of the driver), the jury is only asked whether the driver was negligent and a cause of the accident; but if the driver was negligent and a cause, and is therefore liable, then the owner is also liable. It's handled by the presiding judge. After the verdict is returned by the jury the judge orders that the same judgment that is entered against the driver is also entered against the owner. The caption of the case would probably look like this:

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF [County]

[Number of District*] JUDICIAL DISTRICT

Case Type No. [†]

[name1] ,
Plaintiff,

vs.

Court File No. [°]

[name2] and

[name3] ,
Defendants.

SPECIAL VERDICT FORM

We, the jury in this case, answer the questions from the Court as follows:

In the above caption, the name of the defendant driver would be inserted at [name2] and the name of the defendant owner would be inserted at [name 3]. The questions on the verdict form would be the same as they are when only the driver is named as a defendant.

(3) **More than one respondent or defendant:** if the claimant claims that more than one person was negligent and a cause of the injury, then the verdict form has two questions for each such person. If there are additional defendants, there would be two questions for each, and the "allocation" question would have each defendant listed. Here is how the verdict form would look in a case where three different defendants are all alleged to be liable and one or more of the defendants alleges that the plaintiff is liable:

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF [County]

[Number of District*] JUDICIAL DISTRICT

Case Type No. [†]

_____[name1]_____,
Plaintiff,

vs.

Court File No. _____ [o] _____

_____[name2]_____ and

_____[name3]_____ and

_____[name4]_____,
Defendants.

SPECIAL VERDICT FORM

We, the jury in this case, answer the questions from the Court as follows:

1. Was defendant _____ [name2] _____ negligent
at the time of the _____ [date] _____ accident?

Yes or No

2. *If your answer to Question 1 is "yes," then answer
this question:* Was defendant _____ [name2] _____'s
negligence a direct cause of the _____ [date] _____ accident?

Yes or No

3. Was defendant _____ [name3] _____ negligent
at the time of the _____ [date] _____ accident?

Yes or No

4. *If your answer to Question 3 is "yes," then answer
this question:* Was defendant _____ [name3] _____'s
negligence a direct cause of the _____ [date] _____ accident?

Yes or No

5. Was defendant _____ [name4] _____ negligent
at the time of the _____ [date] _____ accident?

Yes or No

6. *If your answer to Question 5 is "yes," then answer
this question:* Was defendant _____ [name4] _____'s
negligence a direct cause of the _____ [date] _____ accident?

Yes or No

7. Was plaintiff [name1] negligent at the time of the [date] accident?

Yes or No

8. *If your answer to Question 7 is "yes," then answer this question:* Was plaintiff [name1] 's negligence a direct cause of the [date] accident?

Yes or No

[If your answers to any two of Questions 2, 4, 6 and 8 are "yes," then answer question 9.]

9. Taking all of the negligence that contributed as a direct cause of the [date] accident to be 100%, what percentage do you attribute to:

Defendant [name2] (if you answered "yes" to questions 1 and 2) _____ %

Defendant [name3] (if you answered "yes" to questions 3 and 4) _____ %

Defendant [name4] (if you answered "yes" to questions 5 and 6) _____ %

Plaintiff [name1] (if you answered "yes" to questions 7 and 8) _____ %

TOTAL: _____ 100 %

Dated: _____, 20____, at _____ .m.

Foreperson

CONCURRING JURORS [Use only if 6/7 verdict]

- | | |
|----------|----------|
| 1. _____ | 4. _____ |
| 2. _____ | 5. _____ |
| 3. _____ | 6. _____ |

(4) Another example: "No-fault threshold questions" in a car accident case: Minnesota law provides that someone whose negligence causes a car accident may not be held liable for another person's bodily injury unless the person claiming injury meets one of several statutory "thresholds." The reason for this is that one aspect of the No-Fault laws is to keep injury claims from going to court unless they are "serious." With claims that are less "serious," the injured person may collect medical expense benefits, part of lost wages, and a few other types of damages covered by no-fault insurance; but if the injured person does not meet at least ONE threshold then the injured person may NOT make a claim against the "at fault" driver, no matter how wrongful that driver's conduct was at the time of the accident.

The five thresholds are found at Minnesota Statutes, § (←that symbol is called the "section mark," and it means "section"; two of it, §§, means "sections") 65B.51, subdivision 3. One threshold is to be dead. That's usually a pretty obvious condition so we don't ever need to ask a jury: "does plaintiff A meet a threshold because she's dead?" The other thresholds are: to have a permanent disfigurement (such as a facial scar); to have a permanent injury; to have a disability for 60 days or more; or to have \$4,000 in expenses for medical treatment, but the \$4,000 cannot include amounts paid for diagnostic x-rays, MRIs, CT scans, or rehabilitation.

A threshold issue is one possible defense to a personal injury claim. If it is raised it means that the alleged "at fault" driver is asserting: "I'm not liable because the plaintiff doesn't meet a threshold." It's a bit of a wild card because, as noted, it allows the defendant to escape liability no matter how bad her/his driving conduct. And just because a threshold is met it doesn't mean that the defendant is liable (if no threshold is met it simply means that the plaintiff can't recover); but the defendant may still assert that he or she isn't liable because either she/he wasn't negligent at the time of the accident or her/his negligence was not a direct cause of the accident.

How do we put these "threshold" questions to a jury? Do we tell them that the plaintiff cannot recover from the defendant unless the jury finds that the plaintiff meets one of these thresholds? No. If plaintiff claims the threshold she/he meets is the \$4,000 medical expense threshold, then we modify the first damages question on the car accident verdict form so it looks like this:

6. What amount of money will fairly and adequately compensate Plaintiff [name1] for damages directly caused by the [date] accident, up to the time of this verdict, for:

- a. Past pain, disability, disfigurement, embarrassment, and emotional distress? \$_____
- b. Past wage loss? \$_____
- c. Past health care expenses for x-rays, CT scans, MRIs and rehabilitation services? \$_____
- d. Past health care expenses not included in your answer to (c) above? \$_____

If plaintiff claims she/he meets one of the other three non-death thresholds, depending upon which threshold it is, the jury will likely be asked one or more of the following questions:

8. Did Plaintiff [name2] sustain a permanent disfigurement as a direct result of the [date] accident?

Yes or No

9. Did Plaintiff [name2] sustain a permanent injury as a direct result of the [date] accident?

Yes or No

10. Did Plaintiff [name2] sustain a sixty (60)

day disability as a direct result of the [date] accident?

Yes or No

NOTE: the plaintiff may assert that she/he meets more than one threshold. The presiding judge will ask the jury the question relating to any claimed threshold, provided that there is some evidence to support the claim (for example, the jury won't be asked whether the plaintiff sustained a permanent disfigurement unless there is some evidence of a disfiguring injury as a result of the accident). The plaintiff just has to meet any one threshold in order to recover damages from the "at fault" driver.

If we can identify the issues in the case before I actually meet with people on the day scheduled for mediation, it speeds things up considerably. My current preference is to use e-mails to the involved lawyers before we meet to see if we can narrowly define the issues that need to be resolved in order to settle the dispute.

I encourage people who are thinking about using Carpenter Mediation, or who have scheduled mediation with Carpenter Mediation, to review the information at this web site. I welcome e-mail and telephone inquiries from both lawyers and non-lawyers; though I must note that I cannot ethically talk with, or correspond with, someone represented by a lawyer unless the lawyer consents to such communication, and even if a lawyer consents to me communicating directly with a client I prefer to keep the lawyer involved in the communication.

SO ... after you've defined or identified the issues to the point of stating them as questions on a verdict form, what

Other Pre-Mediation Preparation might you do?

If you are the claimant, itemize your "special damages." [Remember, "special damages" are medical expenses or lost earnings; as opposed to "general damages," which are damages for pain, disability, disfigurement, embarrassment or emotional distress].

What medical expenses do you claim to have as a result of the incident in which you were injured? What lost earnings? If these have been disputed by the opposition, take the expenses that are in dispute and break them down. What medical services were provided on which dates and how much was charged? What days did you miss work; what was your rate of pay for those days; and how did the injury cause you to miss work?

Also with respect to "special damages," if you are the respondent or defendant, itemize which claimed "special damages" you dispute with some notes about why you don't think a jury will include them in its answers on the special verdict.

In preparation for mediation, both sides might also **give some thought to who will decide the disputed issues if you don't resolve them in mediation.** Who will you likely get on your likely jury? What will their attitudes likely be toward the various issues in dispute?

Before you come to mediation **give some thought to your "bottom line."** If you're the plaintiff, what would be the lowest figure you would take to settle? If you're the defendant, what is the most you would pay? But

also take some time to think about how you arrived at your figure. What answers would you need from a jury to get to your "bottom line" or to do better than that?

Finally, in preparation for mediation, get some rest. Plan to come and have a good discussion about the case, what the strengths and weaknesses might be on both sides. Expect that even if you don't get the case resolved you will likely get a lot more information about why it isn't getting settled, why the opposition doesn't see it the way you do.