

Litigating the Uninsured & Underinsured Motorist Claim

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V. ETHICAL TRAPS TO AVOID

The Preamble of the Virginia Rules of Professional Conduct (hereafter the “Rules”) states “[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.” Lawyers are never immune from federal and state laws and the rules of professional responsibility, although some may occasionally act otherwise. When faced with a dilemma of potentially unethical proportions, a lawyer should remember that ‘money talks, but ethics walks.’ Most ethical lessons are applicable to all fields of law, however, uninsured motorist (UM) and underinsured motorist (UIM) claims have additional ethical considerations due to the intricate relationship between the injured party, the at-fault driver, and the UM insurance insurer.

A. Who is the Client?

When soliciting a potential client, an attorney cannot communicate any “false, fraudulent, misleading, or deceptive” statements or claims. Rule 7.3. An attorney also cannot attempt to circumvent this Rule by having a paralegal, secretary, etc. communicate the false information on behalf of the attorney. *Id.* An attorney must be mindful of the confidentiality owed to prospective clients that never come to fruition. Although no duty is owed to a person who unilaterally submits unsolicited confidential information to an attorney, if it is “reason for a prospective client to believe that the information he/she provides will be maintained as

confidential” then that information should be protected. *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass’n Legal Ethics Op. 1842 (2008).

The typical car accident lawsuit involves two parties- the injured driver (plaintiff) and the at-fault driver (defendant). But when the plaintiff has more UM/UIM coverage than the defendant has liability coverage, the plaintiff’s insurance company (the UM insurance insurer) becomes an interested third-party. When representing a party involved in an UM claim, an attorney must remember who his client *is*, and who his client *is not*, since the parties are so interrelated.

1. Injured Driver (Plaintiff)

Regardless of whether the at-fault driver is known, the injured driver in an UM claim is required to obtain a judgment against the driver before requesting payment from the UM insurance insurer. VA. CODE ANN. § 38.2-2206. (Cases involving unknown drivers state “John Doe” as the defendant. VA. CODE ANN. § 38.2-2206(E).) It is important for the plaintiff’s attorney to timely review the plaintiff’s and the defendant’s auto insurance policies (if applicable) and determine whether an UM claim exists because Virginia law requires the plaintiff to serve the defendant *and* the UM insurance insurer with process. VA. CODE ANN. §§ 38.2-2206(E)-(F). Plaintiffs must serve UM insurance insurers as soon as it is ‘practicable’, as this vague time standard tends to account for much UM claim litigation. Although UM insurance insurers are not formally listed as parties, they are able to file pleadings and take other actions that the defendant is entitled to. VA. CODE ANN. §§ 38.2-2206(E)-(F). A plaintiff cannot reach an agreement with a liability insurer without the permission of the UM insurance insurer or risk voiding the plaintiff’s right to payment from the UM insurance insurer, therefore, communication between the plaintiff and the UM insurance insurer is crucial. Plaintiffs must also

be aware if the defendant is proceeding pro se or with counsel, because plaintiffs are not allowed to directly communicate with the defendant or the defendant's insurance insurer if the defendant is represented by counsel. *See* Rule 4.2 and Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1326 (1990). Determining whether the defendant has retained counsel can be a particularly tricky task since the attorney representing the UM insurance insurer may also be advising the defendant, however, this can be resolved by simply asking the defendant. It is recommended to either submit all communications in writing, or to confirm the content of any oral communications in writing.

2. At-Fault Driver (Defendant)

In an UM case, the defendant typically has two goals: to keep the judgment/settlement as low as possible and to obtain a waiver from the UM insurance insurer whereby the insurer agrees to waive its subrogation rights against the defendant. Although the defendant's position may seem the most straight-forward, there may be other facts about the defendant that complicate the situation, for example, if the defendant is an interstate truck driver or an employee driving a company car, and there are scope of employment issues. Waiver of subrogation may not be feasible if the defendant has substantial assets.

3. UM Insurance Insurer

The UM insurance insurer is in a unique position in UM claims because it is an interested party from whom the plaintiff can recover, however, the UM insurance insurer is not formally listed as a defendant. Its liability is limited to its policy coverage. After an UM insurance insurer has been served with a copy of the suit papers, it can file pleadings and take other actions allowable by law. VA. CODE ANN. §§ 38.2-2206(E)-(F). The plaintiff cannot settle with the liability insurance insurer until the UM insurance insurer has approved of the settlement or the

plaintiff will be forced to forfeit his right to recover against the UM insurer, so it's important to the plaintiff to communicate with the UM insurer. The UM insurance insurer and the defendant have similar goals for the outcome of the claim, but they aren't completely aligned because the insurer has the ability to file a subrogation claim against the defendant after the UM claim has been settled. VA. CODE ANN. § 38.2-2206(G). Due to the potential future action against the defendant, the attorney representing the UM insurance insurer cannot state or imply to the defendant that he is a disinterested attorney. Rule 4.3. *See also* Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1592 (1994). This disclosure is especially important when the defendant is handling his case pro se because he may not understand that the UM insurance insurer's attorney is not also his attorney, which can result in accidental multiple representation.

4. Other Potential Clients

Beyond the three typical parties in an UM case (injured plaintiff, at-fault defendant, and UM insurance insurer), there may be other interested parties who may require representation, such as passengers in the injured driver's car. If there are multiple passengers, they may jointly seek one attorney to represent their collective interest, however, there are many potential conflicts of interest involved with multiple representation (e.g., contributory negligence by the passenger).

B. Multiple Representation

Multiple representation occurs when one attorney or law firm represents more than one client. Rule 1.7 prohibits multiple representation when a "concurrent conflict of interest" exists, such as when the representation of one client will directly adversely affect the best interest of

another client. Due to the high potential of conflicting interests involved with multiple representation, an attorney should provide full disclosure and obtain a knowing written consent and waiver from clients whenever possible.

Multiple representation can occur on purpose, such as when an attorney agrees to represent two different clients, or on accident, such as when an attorney advises a pro se litigant to the extent that an attorney-client relationship is established. Multiple representation can only occur in a limited number of variations of an UM claim since the plaintiff typically cannot be represented by the same attorney as the defendant or the UM insurance insurer (due to conflicting interests).

1. Purposeful Multiple Representation

According to Disciplinary Rule 5-105(c), “a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.” *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass’n Legal Ethics Op. 1592 (1994). Purposeful multiple representation in the context of an UM claim may occur in the form of representing the at-fault defendant and the UM insurance insurer, representing multiple injured passengers from the plaintiff’s car, etc.

In Virginia, automobile insurance companies are required to provide uninsured/underinsured motorist coverage for at least \$25,000 for one person injured in a car accident and \$50,000 for accidents involving multiple injured people. If multiple passengers are injured in the plaintiff’s car and the at-fault defendant has minimum coverage, there may be a race between the injured plaintiffs to obtain judgments before the insurance coverage is exhausted. If an attorney chooses to represent multiple injured passengers, a written waiver and

an agreement on how to divide the available insurance should be agreed upon and signed *before* proceeding with the lawsuit.

Multiple representation of both the defendant and the UM insurance insurer is ethical and legal as long as there is full disclosure to both parties and no conflict of interests. The UM insurance insurer's attorney can also represent the defendant where the liability insurance insurer offers to pay its policy limits, waives its subrogation rights, and tenders the defense to the UM insurer. VA. CODE ANN. § 38.2-2206(L). An attorney in this position must be mindful that information offered by the defendant during this attorney-client relationship cannot be used against the defendant in a later subrogation claim filed by the UM insurance insurer. Potential conflicts of interest can be eliminated if the UM insurance insurer provides a written waiver of its subrogation rights against the defendant.

When a lawyer determines that he can no longer represent multiple clients without impeding upon the best interest of one or more clients, he should cease multiple employment; acting otherwise would be illegal, unethical, and subject the attorney, and potentially the attorney's law firm, to multiple malpractice lawsuits. *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1410 (1991). Withdrawal of counsel requires that it occur without prejudice to the client. Rule 1.16(b).

2. Accidental Multiple Representation

Lawyers should be aware (and beware) that multiple representation can also occur by accident. A common example occurs when the attorney of the UM insurance insurer provides excessive advice and assistance to the pro se defendant to the extent that an attorney-client relationship is formed. According to Virginia Disciplinary Rule 7-103(A)(2), a lawyer is prohibited from giving advice to an unrepresented person, other than the advice to secure

counsel, if “the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.” *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass’n Legal Ethics Op. 1592 (1994).

Since the defendant and the UM insurance insurer have a similar goals for the outcome of an UM claim, the UM insurer’s attorney may provide limited assistance and advice to the defendant to ensure that the defendant is proceeding properly with the lawsuit. However, the UM insurance insurer’s attorney must abide by very strict guidelines. The attorney cannot state or imply to the defendant that he is disinterested, he must clearly explain to the defendant that he is not the defendant’s lawyer, and he cannot allow the defendant to continue to represent to the court that the defendant is appearing completely pro se (*see* Virginia Disciplinary Rule 1-102(A)(4)). For example, in Virginia Legal Ethics Opinion 1592 (1994), the committee opined that an attorney-client relationship was created between the attorney for the UM insurance insurer and the defendant after the attorney (1) raised objections of privilege on behalf of the defendant during his deposition, (2) instructed the defendant not to produce certain physical evidence for the plaintiff, (3) opposed the plaintiff’s motion to compel discovery responses from the defendant, and (4) assisted the defendant in responding to the plaintiff’s interrogatories, request for production, and request for admission. Failing to follow these rules can result in the establishment of an attorney-client relationship and potential disciplinary action against the attorney.

C. Fee Agreements and Retention

Fee agreements and retention keep an attorney’s lights on, so they should always be in writing. The agreement should state very clearly when payments are due and in what form. Rule

1.5(a)-(b) state that attorneys' fees should be reasonable and adequately explained to the client. Before a client signs a fee agreement, the attorney should go over the entire document and ensure that the client understands the fees, payment schedule, preferred forms of payment, and any special clauses, such as mandatory arbitration clauses. Rule 1.5(b). There are no mandatory billing rates for the legal community, so clients and attorneys are free to negotiate a fee that is appropriate for the situation. However, an attorney cannot be less zealous for a client who is paying less than other clients, so an attorney should never consent to a fee agreement that he is not comfortable with.

Virginia Legal Ethics Opinion 1723 (1998) addresses billing requirements imposed by third parties, such as insurance companies. The fee agreement must be free from undue influence by third parties.

There are three basic types of fees that an attorney can charge for his services- contingency fees, hourly fees, and fixed fees.

1. Contingency Fees

A contingency fee is a percentage of the plaintiff's monetary award from the judgment/settlement that is paid to the attorney for his services. "Contingency fees are generally ethically permissible in any legal matter that generates a res from which the fee can be paid, unless otherwise prohibited." *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1606 (1994). Contingency fee agreements must be in writing. Rule 1.5(c). Contingency fees generally range from 10-50%, and they are commonly used in personal injury cases because the lawyer is not paid unless he wins (or settles) the plaintiff's case. Costs are often advanced by the attorney. It is important that the client understands the contingency fee agreement from the outset of the case because it can be quite jarring for a client to win a

\$100,000 judgment and then receive only \$50,000. It is also important that the client understands when the contingency fee is to be calculated (i.e., before or after court costs and additional fees are paid). For example, if the lawyer's 40% contingency fee is applied before additional costs (\$10,000) are deducted and the client is awarded a \$100,000 judgment, the lawyer will receive \$40,000 and the client will receive \$50,000. But if the lawyer's contingency fee was calculated after all additional fees had been deducted, the lawyer would receive \$36,000 and the client would receive \$54,000. Another matter a lawyer should consider is whether his contingency fee will take from "any and all" amounts funding the plaintiff's monetary award, which may include the plaintiff's Medical Payment Coverage (Med Pay) or Personal Injury Protection (PIP). Med Pay and PIP are additional auto insurance coverage options that cover medical expenses, lost wages, and other damages, regardless of whether the insurance holder was at fault. While it is permissible for attorney's contingency fees to apply to Med Pay and PIP, it is a factor to be considered since not all attorneys are comfortable recovering from this fund.

Although a contingency fee agreement typically does not require an attorney to keep track of the time spent working on the legal matter, it is prudent for the attorney to do so in case the client fires him, in which case the contingency fee contract is gone and an attorney's lien is required to recover money owed. *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1606 (1994). The lien is determined by the reasonable value of the services rendered by the attorney, not by the fee agreement contract. *See* Heinzman v. Fine, Fine, Legum and Fine, 217 Va. 958, 234 S.E.2d 282 (1977).

2. Hourly Fees

An hourly fee is a fee that is charged for the amount of time the attorney has performed work for the client. For example, if an attorney's hourly fee is \$300/hour and the lawyer

performs three hours of work for a client, the bill will total \$900. Lawyers sometimes charge a higher fee for time spent in court for the client and a lower fee for research and preparation work. A bill to the client should clearly delineate the different fees and amounts of time being charged. Third party fee agreements should not subject the attorney's independent professional judgment to undue influence, and this potential problem is increased where the attorney is defending an underinsured motorist. The attorney's duty to the client is identical to the duties imposed upon an attorney who is privately retained. Norman v. Insurance Co., 218 Va. 718, 727, 239 S.E. 2d 902, 907 (1978).

3. Fixed Fees

A fixed fee is a predetermined monetary amount that the attorney will charge the client for work performed for the legal matter no matter the time expended. For example, an attorney may charge a fixed fee of \$15,000.00 to represent a client in a personal injury matter. Fixed fees are typically used in less complex legal matters, such as writing a basic will. The fee agreement needs to be clear and specify whether there are circumstances for the attorney to withdraw or "kick-out" clauses for designated contingencies.

4. Retention

After a fee contract has been signed, it is prudent for an attorney to send a letter of retention to the client to ensure that the client is aware of the retention and the scope of services the attorney has agreed to perform. The attorney must also be aware of the law applicable to the client's matter because the attorney may be legally obligated to provide more information or services to the client than he is contractually obligated to. If the lawyer consults with a potential client and is not retained, then it is usually advisable to send a letter confirming the non-retention, and advising of any limitations periods.

In addition to a letter of retention, attorneys often require a retainer in order to secure employment with the client. A retainer is “a payment by a client to an attorney to insure the attorney’s availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future.” *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass’n Legal Ethics Op. 1606 (1994). “A retainer is not a pre-payment for legal services to be rendered in the future, and is thus distinguished from advanced legal fees.” *Id.* Retainers are earned when paid and become property of the attorney, whereas advanced legal fees are still owned by the client until earned and should be held in an identifiable account separate from the attorney’s. The terms ‘retainer’ and ‘advanced legal fees’ are often mistakenly used interchangeably, and it is important to use the correct terminology in fee and retention agreements so the attorney does not accidentally deposit client money into a personal account.

D. Guarding Against Malpractice

Although no one expects to be sued for malpractice, the old adage applies: failing to plan is planning to fail. Lawyers sometimes include mandatory arbitration clauses for malpractice claims in their client engagement agreement, which is ethical as long as the lawyer provides adequate written disclosure, advises the client to seek independent counsel in regard to the provision, and receives informed consent from the client. *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass’n Legal Ethics Op. 1707 (1998).

Here are four tips to guard against malpractice: consider purchasing malpractice insurance, know the extent of your legal abilities and your schedule, keep your client informed of all developments, and make all necessary disclosures.

1. Consider Purchasing Malpractice Insurance

The first step in proactively guarding against malpractice is considering whether to purchase malpractice insurance. Every attorney should spend adequate time and consideration on this decision. Malpractice can occur at the associate-, partner-, or firm-level, and no one is immune from liability. Legal malpractice claims are not reserved for “bad lawyers,” and obtaining malpractice insurance does not make you more likely to get sued. Even if you believe no malpractice was committed, defending a malpractice lawsuit can be expensive and time-consuming. Just like other types of insurance, malpractice insurance is available in a variety of plans to fit each attorney’s specific needs. Malpractice insurance provides coverage for the defense of the claim, and that benefit alone can justify the expenses of the policy.

2. Know the Extent of Your Abilities and Your Schedule

Before taking on a new client or legal matter, an attorney should consider the extent of his legal abilities and his schedule. An attorney should not accept cases or clients whose requirements are beyond the attorney’s capabilities or amount of available time. The easiest way to commit malpractice is to miss an important deadline; or to undertake legal representation in a specialized area outside of the attorney’s areas of practice. If an attorney takes on too many clients or too many projects, it becomes much easier to miss a deadline, or neglect a client’s case. For example, in Wilder v. Third Dist. Committee of Va. St. Bar, 219 Va. 175, 247 S.E.2d 355 (1978), an attorney was reprimanded by the Virginia State Bar for “inexcusable procrastination” after he offered no valid excuse for delaying his client’s case for over two years. Although turning down a client or case may reduce future income, there may be much greater benefits by avoiding the time, expense and aggravation of a malpractice claim.

3. Keep Your Clients Informed of All Developments

It should go without saying that maintaining communication with a client is of the utmost importance, but it's worth repeating because uninformed clients can quickly become unhappy clients who are more likely to file bar complaints and malpractice lawsuits. It may be unnecessary to inform your client about every email you send, however, clients should be kept aware of developments in the case. The risks arising from over-informing a client are usually much smaller than those arising from under-informing the client. A client wants to feel that his attorney has done everything within legal and ethical bounds to advance his best interests. Timely email or phone call updates will promote usually increase client confidence, and reduce anxieties. Very few clients will be upset if you return their call on an evening or a weekend.

4. Make All Necessary Disclosures

Attorneys are required to make disclosures to clients, non-clients, and the courts, and it's important to realize when each disclosure should be made. *See* Rule 1.6. Whenever a disclosure can be made in writing, it should be; adequate documentation can become crucial evidence if the disclosure's occurrence is ever questioned. Lawyers should make potential clients aware of the details of their fee plans to avoid potential fee disputes. *See* Rule 1.5. A lawyer should never imply or state that he is disinterested where the attorney has a personal or business interest. For example, when the attorney of a UM insurance insurer is speaking with a pro se defendant for a car accident claim, the attorney cannot imply or state that he is disinterested since the attorney's client may eventually sue the defendant in a subrogation claim. If a lawyer advises or helps a pro se litigant, the lawyer must ensure that he is given credit for his work so that the pro se litigant does not mislead the court. Before accepting a new client, an attorney should run a conflicts check and disclose any potential conflicts of interest.

One of the most important required disclosures arises from Rule 3.3(a)(3), that requires an attorney to disclose to the court “controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.” If the court finds the controlling adverse authority that you did not disclose, then that is likely to cause substantial, if not irreparable damage to your case, and reputation.

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Pre-Litigation Activity

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VI. PRE-LITIGATION ACTIVITY

A. Choice of Venue

After deciding to file a UM claim, venue is the first important decision that a plaintiff must make. Plaintiffs should first look to Va. Code Ann. § 8.01-261, which lists the specific preferred venue situations, although they typically do not apply in UM cases. Va. Code Ann. § 8.01-262 contains the provisions that are most commonly used to establish venue in UM cases. According to Va. Code Ann. § 8.01-262(4), venue is permissible “wherein the cause of action, or any part thereof, arose.” For example, if the car accident occurred in Fairfax County, VA, it would be permissible to file an UM claim in Fairfax County Circuit Court. If the defendant is unknown, and therefore a ‘John Doe,’ or he does not reside in Virginia, the plaintiff may use Va. Code Ann. § 8.01-262(10) to establish proper venue “wherein any of the plaintiffs reside if (i) all of the defendants are unknown or are nonresidents of the Commonwealth or if (ii) there is no other forum available under any other provision of § 8.01-261 or this section.” If the defendant is not an individual, for example, an employer of the negligent driver, venue is permissible “wherein its principal office or principal place of business is located.” VA. CODE ANN. § 8.01-262(1). So in an UM claim, the plaintiff may file suit in the location where the car accident occurred, and if the defendant is unknown, the plaintiff also had the option of filing where the plaintiff resides.

If the defendant believes that the venue is improper, he may file an objection according to Va. Code Ann. § 8.01-264. If venue would be proper in another forum within Virginia, the claim may not be dismissed, but will be transferred to the appropriate venue.

Although the UM insurance insurer is not actually a defendant, but rather an interested third party, it is still able to file pleadings and other actions allowable by law in its name or the defendant's name. VA. CODE ANN. § 38.2-2206(E)-(F). Although the UM insurance insurer may not agree with the plaintiff's chosen venue, Va. Code Ann. § 8.01-262(1) states that venue is permissive if the non-individual defendant has its principal office or principal place of business located within the venue. In addition, Va. Code Ann. § 8.01-262(3) permits venue where the defendant "regularly conducts substantial business activity."

It is important for any objection alleging improper venue to be timely. In Smith v. Doe, the UM insurance insurer's motion to transfer venue was denied because although it was filed in a timely manner, the UM insurance insurer failed to promptly schedule a hearing with the court. Smith v. Doe, 11 Va. Cir. 228 (1988). It is the burden of the moving party to bring the matter to the court's attention in a timely manner.

B. Discovery

1. Plaintiff

When representing the plaintiff in a UM case, discovery request needs to address liability and all sources of insurance coverage. If the plaintiff has suffered damages for \$100,000.00 and the defendant's liability and UM coverage is for \$75,000.00, then the high costs associated with a trial are not likely to be economically justified. If the plaintiff is covered under multiple automobile insurance policies, 'stacking' may apply. Stacking occurs when the insurance coverage of multiple automobiles is combined to benefit the single plaintiff. VA. Code Ann. § 38.2-2206(B) outlines Virginia's legally mandated order for applying different lines of coverage under the same plan, also known as 'intra-policy stacking.' Some automobile insurance contracts disallow or restrict the use of intra-policy stacking, so it is imperative to read the plaintiff's UM

insurer's policy. 'Inter-policy' stacking occurs when one plaintiff employs coverage from insurance policies from different insurance insurers. VA. Code Ann. § 38.2-2206(B) permits intra-policy stacking and inter-policy stacking, but such stacking can be excluded by the policy. See Erie Ins. Exchange v. Horton, 21 Va. Cir. 241 (1990).

The plaintiff's attorney should verify all available sources of coverage, including any reservation of rights or non-waiver agreement. It is also necessary to verify any defenses concerning proper parties or whether the UM claim is proper. The plaintiff is entitled to copies of written statements or transcriptions of verbal statements he previously made. VA. CODE ANN. § 8.01-417(A). Where special damages of \$12,500.00 or more are documented then the plaintiff is entitled to request in writing that an insurer "disclose the limits of liability of any motor vehicle liability or any personal injury liability insurance policy that may be applicable to the claim." VA. CODE ANN. § 8.01-417(C).

2. Defendant

For the defendant, discovery for an UM claim is most often no different than that of a typical automobile accident case, except that: (i) the defendant needs to verify that he is either uninsured or under-insured.

3. UM Insurance Insurer

As previously stated, the UM insurance insurer is not a legal defendant, but, instead, an interested third-party. VA. CODE ANN. §§ 38.2-2206(E)-(F). The UM insurer's attorney is not required to have an attorney-client relationship with the uninsured/under-insured defendant and the UM insurer should file answers based upon information known to the insurer. The UM insurer's attorney should not file answers on behalf of the uninsured/under-insured defendant or assist the defendant in filing answers, otherwise an attorney-client relationship might be

established. *See* Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1592 (1994). To avoid any misperceptions concerning the role of defense counsel, where the UM insurer has answered in the name of the uninsured/under-insured defendant, the answer should be signed "XYZ Insurance Company, Answering in the name of [uninsured/under-insured defendant]." However, an exception exists to this rule when to the defendant is unknown (a "John Doe"), in which case the UM insurer may file responses to discovery on behalf of John Doe. VA. CODE ANN. § 38.2-2206(E).

C. Locating and Preparing Experts

1. Plaintiff

Expert testimony beyond what is required in typical personal injury cases (e.g., medical expert and accident expert) is usually unnecessary in an UM claim. The plaintiff's attorney should always request through discovery the prior payments made by the defense attorney, UM insurer, or anyone acting on their behalf, to any expert retained to testify at trial. In Lombard v. Rohrbaugh, the Supreme Court of Virginia held that the plaintiff was entitled to cross-examine the defendant's expert witness about his relationship with the liability insurer, and the liability insurer's stipulation of the amount and allocation of payments to its physician witness was binding on the defendant and the UM insurer. Lombard v. Rohrbaugh, 262 Va. 484, 551 S.E.2d 349 (2001).

When locating experts, the plaintiff's attorney should try to find experts who are not considered "hired guns." It is important to research the credentials, advertising, and prior cases of a potential expert. The opposing party is likely to investigate and disclose any information that you may have overlooked.

2. Defendant

The most common expert for the defense is a physician selected for examination pursuant to Rule 4:10 of the Rules of the Supreme Court of Virginia (and Fed. R. Civ. P. 35). According to Rule 4:10, when the mental or physical condition of a party is in controversy, which often occurs in an UM claim, the adverse party may submit a motion to order the injured party to submit to a physical or mental examination by one or more health care providers employed by the moving party. This order should specify the terms and conditions of the examination, and include the date that the report will be submitted. If the expert is retained by the liability insurer but used for the benefit of the UM insurer, the court may prohibit or limit disclosures under Lombard v. Rohrbaugh on grounds that the expert was retained by another party who is not present for the trial. Lombard, 262 Va. at 484. The defense should try to avoid “hired gun” medical experts who have substantial prior financial relationships either with the insurer or defense counsel.

D. Establishing Damages

The presentation of damages evidence in an UM claim is usually no different than a typical personal injury case. The potentially recoverable damages are most often limited by the amount of liability and UM/UIM coverage. In some instances, the UM/UIM defendant will not be judgment proof. Interest, but not cost, can be recovered over and above the policy limits. Nationwide Mut. Ins. Co. v. Finley, 215 Va. 700, 214 S.E.2d 129 (1975).

For the plaintiff, it is extremely important to be aware of the available coverage; where there is a substantial probability of coverage being less than the provable damages, the plaintiff should consider seeking a declaratory judgment instead of trial. VA. CODE ANN. § 8.01-184. The

action can request attorneys fees and costs if there is evidence that the insurer was “not acting in good faith” when it denied coverage or failed to make payment under its policy.. VA. CODE ANN. 38.2-209.

Punitive damages are not contrary to the public policy of Virginia. VA. CODE ANN. § 38.2-227. The UM insurer may be liable to the plaintiff for punitive damages if the plaintiff is entitled to such damages against the defendant and the defendant cannot pay them. Before the plaintiff attempts to enforce its right to punitive damages against the UM insurer, it is wise to review the plaintiff’s automobile insurance contract, which may contains terms limiting or excluding such recovery. Where the coverage contract contains ambiguous language, the courts are inclined to construe such language in favor of coverage. United Services Auto Ass’n v. Webb, 235 Va. 655, 369 S.E.2d 196 (1988) (holding that the insurance company was required to pay punitive damages because the policy did not specifically exclude “punitive” damages).

E. Voluntary Disclosures

The Rules of the Supreme Court of Virginia do not require voluntary or mandatory disclosures. Voluntary disclosures in state and federal court should be addressed pursuant to a mutual agreement with opposing counsel. There may be situations where voluntary disclosures may be mutually beneficial (e.g., damage stipulations or early designation of expert witnesses).

Fed. R. Civ. P. 26(a) contains the various federally-required disclosures. Rule 26(a)(1)(c) requires initial disclosures to be made within 14 days after the parties’ Rule 26(f) conference, unless a different time is set by stipulation or court order. Initial disclosures include (i) the name and contact information of individuals likely to have discoverable information (Rule 26(a)(1)(A)(i)), (ii) a copy 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 (Rule 26(a)(1)(A)(ii)), (iii) a computation of each category of damages claimed by the disclosing party and the documents the computation is based upon (Rule 26(a)(1)(A)(iii)), and (iv) any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action (Rule 26(a)(1)(A)(iv)). A party is required to make its initial disclosures based on the information reasonably available to it. Fed. R. Civ. P. 26(a)(1)(E).

Requirements for the disclosure of expert witnesses are particularly stringent under the Federal Rules of Civil Procedure. According to Rule 26(a)(2), in addition to initial disclosures required by 26(a)(1), a party must disclose to other parties the identity of any expert witness it may use at trial. Witnesses retained as experts must provide a written report to opposing parties that contains (i) a complete statement of all opinions the witness will express and the basis for them, (ii) the facts or data considered by the witness in forming them, (iii) any exhibits that will be used to summarize or support them, (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years, (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 (vi) a statement of the compensation to be paid for the study and testimony in the case. Fed. R. Civ. P. 26(a)(2)(B). Witnesses who are not retained or specifically employed to provide expert testimony are not required to provide a written report, however, they must still disclose: (i) the subject matter on which the witness is expected to present evidence under and (ii) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). This rule usually applies to attending physician experts, but counsel should verify the local practice to avoid any potential disclosure traps. Some federal courts apply the disclosure

requirement for specially retained experts or attending physicians who offer opinions at trial. A party must disclose expert testimony at least 90 days before the date set for trial or for the case to be ready for trial, or on the date agreed upon in the scheduling order. Fed. R. Civ. P. 26(a)(2)(D).

An argument can be made that under the Rules of the Supreme Court of Virginia, discovery of an adverse party's expert witness is limited to the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds of each opinion. Rule 4:1(b)(4)(A) of the Supreme Court of Virginia. However, Va. Code Ann. §8.01-401.1 requires an expert to disclose the underlying facts or data the expert relied upon on cross-examination. If the underlying data is admissible at trial, the discovery of that data should be allowed because it is usually likely to be admissible at trial. *Id.* Any conflicts between a rule of the court and a statute is resolved in favor of the statute. VA. CONST. art. 6, § 5.

In addition to initial disclosures and witness disclosures, the parties are also required to make pre-trial disclosures at least 30 days before trial. Fed. R. Civ. P. 26(a)(3)(B). Such pre-trial disclosures (if not already provided) include (i) the name and contact information of each witness expected to be presented at trial, (ii) the designation of those witnesses whose testimony the party expects to present by deposition, and (iii) an identification of each document or other exhibit, including summaries of other evidence, that the party expects to offer at trial. Fed. R. Civ. P. 26(a)(2)(A)(i)-(iii).

Federal Rule 26 also provides important limitations upon pre-trial disclosure of communications between a party's attorney and any expert witness required to provide a report under Rule 26(a)(2)(b). Disclosure is not required unless such communications relate to the expert's compensation, identify any facts provided by the attorney for the expert's consideration,

or identify assumptions provided by the party's attorney for the expert to rely upon. Fed. R. Civ. P. 26(b)(4)(C).

F. Pre-Trial Motions Practice

Discovery issues should be resolved as early as possible, including, but not limited to, witness statements, coverage information, and payments to experts. Attorneys for all parties should beware when objections are provided with answers. When that occurs, the objections should be addressed by the court, or by a written order or stipulation concerning the admissibility of the information provided.

The July 1, 2013 amendment to Va. Code Ann. §8.01-420 and Rule 3:20 of the Rules of the Supreme Court of Virginia changed the blanket rule prohibiting motions for summary judgment based upon deposition testimony. Summary judgment can now be granted when based upon requests for admission, and those may include discovery depositions. A motion for summary judgment can also seek dismissal of any claim for punitive damages that is based in whole or in part upon discovery depositions, as long as the punitive damages are not based on the operation of a motor vehicle by a person impaired by alcohol, narcotics, or any other drug. VA. CODE ANN. §8.01-420.

The statutory amendments to Va. Code Ann. §8.01-420 may have changed the result in Parker v. Elco Elevator Corp., where the Virginia Supreme Court determined that an expert could not be excluded based solely upon a discovery deposition. Parker v. Elco Elevator Corp., 250 Va. 278, 462 S.E.2d 98 (1995).

When pleas in bar are an issue, counsel needs to be aware of the strong Virginia public policy in favor of jury trials for factual disputes. Article 1 §11 of the Constitution of Virginia states that “trial by jury is preferable to any other, and ought to be held sacred.” Va. Code Ann. §8.01-336(A) codifies that the right to a jury trial “shall be preserved inviolate to the parties. “

When opposing counsel asserts a plea in bar, counsel has the right to object and to request a jury trial for any factual dispute. See, e.g., Gilmore v. Basic Industries, 233 Va. 485,490,357 S.E. 2d 514, 517 (1987) (holding that a factual hearing was required to determine the merits of a claim for fraud, and that the claim should not have been summarily dismissed).

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