

GAINING THE BEST SETTLEMENT IN AUTO INJURY CASES

I. ADDRESS IMPORTANT INITIAL CONSIDERATIONS

A. How to Screen an Auto Accident Case

1. Secure a detailed statement of the facts to evaluate liability.

To evaluate an auto accident case, the attorney must secure a detailed statement of how the collision occurred. A simple tool to jump start this process would be to secure and review the police accident report.

Practice Pointer: Do not over rely on the police report. It is this author's experience that police reports commonly contain errors regarding the collision, including presenting only one driver's version of the collision. This can occur for several reasons, including the fact the officer only spoke to one driver and due to language difficulties with one of the drivers. Sometimes the officer simply chooses to disbelieve one of the drivers and ignores that version of the collision.

There can be no substitute for an in-depth interview of the client. If the client was not the driver, you may need to interview the driver, assuming he/she is not the at fault party. The interview should include the names of the streets/intersections, the direction of travel, a description of any traffic control devices, lane markings, speed of both vehicles, and the circumstances leading to the collision. I recommend asking where the client was coming from and where the client was going, including any stops along the way.

2. Evaluate for Damages

Always ask the potential client to describe the mechanism of injury, such as "my head hit the driver's side window." Also always ask what part of the body was injured and when the pain first began. The value of your claim will depend

upon the seriousness of injury, the length of treatment, the past medical expenses and any future injury and medical expenses.

Damages also take the form of a loss of earnings. A wage loss form should be presented and explained to the client early on, so the client understands the need to keep track of time missed due to injury and medical visits. The dates on the wage loss form should correspond with the disability slips provided by the treating doctor.

B. Weed Out Weak Cases in the Initial Interview and Assessment

1. Liability

Evaluate the facts of the collision with an eye towards whether you can establish negligence. The legal test is whether it is “more likely than not” that the other party caused the collision and further, whether the defense can also establish “more likely than not” that your client was also negligent (contributory negligence). However, do not give up on a case which may present a weak and unsubstantial argument for contributory negligence. The contributory negligence must be more than merely **trivial**. “ To bar plaintiff’s recovery on the grounds of contributory negligence, defendant had the burden of proving that the plaintiff’s negligence was **substantial** and such that without it the accident would not have occurred.” Lerwill v Regent Van & Storage, Inc., 217 Va. 490, 229 S.E.2d 880 (1976); Clinchfield Coal Corporation v. Osborne's Admr., 114 Va. 13, 75 S.E. 750, (1912).

2. Evaluate for Damages Sufficient to Justify Your Time

Not every collision will cause sufficient injury to justify legal representation.

Practice Pointer: Many insurers are fighting small claims, which are commonly referred to as MIST claims (minor impact - soft tissue injury) and you can find yourself spending far more hours than you expected. You may want to increase your attorney fee above the standard one-third to justify the time and effort expended on a small, but otherwise legitimate claim.

Always ask the potential client to describe the mechanism of injury, such as “my head hit the driver’s side window.” Also always ask what part of the body was injured and when the pain first began.

The key to the evaluation of damages in the initial interview is verifying that the injuries are serious enough to require more than just a few visits to healthcare providers. I look for cases where the potential client will require ongoing medical treatment, such as therapy, visits to medical doctors and diagnostic testing. Of course you can never be certain in the days immediately after a collision to what extent future treatment will be required, but you can at least confirm the client’s level of pain and disability makes it probable that the damages will exceed \$1,000.00. Anything less than such sum would certainly not be worth accepting, unless it is done as a favor or to promote your practice as a good-will gesture.

3. Pre-existing Conditions and Prior Claims

Pre-existing conditions and prior claims are fertile grounds for the defense bar. Inquire about prior injuries, prior claims and pre-existing conditions. It is important to learn up front to what extent the client has already had treatment and made prior claims which will diminish the value of your claim. Most prior claims are entered into a master data bank maintained by the insurance industry. The

claims adjuster with whom you will attempt to negotiate a settlement will have access to this data. You need to know at least as much about your client's history of prior injuries and claims as the claims adjuster.

Practice Pointer: Many people obtain regular care, also known as “maintenance”, from chiropractors and other practitioners. This can reduce the value of a claim if the maintenance was close in time to the collision and involved the same body part injured in the collision. This can negatively affect the claim, especially if suit is filed. Find out if this is the case.

4. Client's Criminal Record

Plaintiff's lawyers have learned, sometimes the hard way, that the client's past criminal record can affect the value of the case. Always ask if your client has ever been arrested. If the answer is yes, make sure you identify and felonies or misdemeanors involving moral turpitude (lying-cheating-stealing), all of which are admissible in a civil trial. Va. Code § 19.2-269; Payne v Carroll, 250 Va 336, 461 S.E.2d 837 (1995). Payne also clarifies that the fact the client was convicted is admissible, but the specifics of the conviction are not admissible. If it is to your advantage, you can bring out the circumstances of the conviction on direct or re-direct examination.

Practice Pointer: There are circumstances where the criminal conviction is so far removed in time or otherwise so irrelevant that it may be tactically to your advantage if the defense were to use the conviction to attack an otherwise credible client who has a solid case. For example, if you have a 50 year old government worker who was arrested at age 18 for selling 1 ounce of

marijuana, for which he pleaded to a felony, you may not have any problem with your case so long as the conviction is revealed when asked in discovery. Any thought that the client is hiding the conviction by failing to reveal it when first asked could lead to effective cross-examination of your client at trial.

C. CONCRETE TIPS FOR EVALUATING PAIN AND SUFFERING

1. Understand The Injury

The claims adjusters will have the medical records reviewed by someone with a medical background. The days of negotiating with a claims adjuster who will look at the bills and briefly read the records, and then offer you 2 ½ x the bills are gone. The claims adjuster will likely have a detailed memorandum prepared by his medical reviewer. You must be able to discuss the injuries and treatment in detail. In most cases, this should not present a problem, as you can look up medical terms online, and you can seek clarification from your client's physicians.

Practice Pointer: You must read every word of the medical reports and records. Many attorneys fail to take the time needed to understand the nature and extent of injury because they fail to secure and then read every record generated by the client's treatment.

Today, many claims adjusters are offering only the medical bills, with perhaps a few hundred dollars for pain and suffering, even when the bills total thousands. While a minority of adjusters may actually believe that the injury did not result in pain and suffering, most adjusters are simply ordered to offer these low sums, with the hope most claimants will not want to take the time and expense to litigate.

2. Argue Pain and Suffering Directly From the Medical Records

Review the medical records for objective findings which are consistent with a painful injury. It is common to find terms such as “spasm”, “trigger points” and “limited or restricted range of motion.” These findings are reproducible by any provider and are not solely dependent on the word of the patient. Also look for the type and amount of prescription strength medication consumed by the patient. The use of such medication is also consistent with a painful injury. It is common to find references to pain on a scale of 1-10 in the medical records. While the rating is from the patient, a high number that is consistent with other findings in the record can be useful.

3. Seek Facts About Activities of Daily Living (ADL)

It is important to discuss with the client how his/her daily affairs were affected by the injuries. For example, many clients have small children who require a great expenditure of energy, a serious issue for an injured client who cannot bend or turn her head or sleep. Other activities which are likely to cause pain are household chores, such as cooking, cleaning, vacuuming, laundry and grocery shopping. The author has found that physical therapy notes may be most helpful in identifying activities affected by the injury.

D. DETERMINING DAMAGES - LOOK AT THE BIG PICTURE BUT DON'T FORGET THE DETAILS

1. The Big Picture

You must assess the accident in terms of impact, force applied to the occupants, amount of property damage and the credibility of your client. A red flag should appear if your client now has pain from head to toe, but the client

made no or few complaints at the scene and the collision appears to be very low impact. The claim must pass the “smell test.” If it doesn’t smell right, there are usually problems under the surface. However, many otherwise legitimate claims will come with less than spectacular property damage. Do not give up on every claim where the property damage is modest or even minimal. A good physician will not be dissuaded from supporting an injury claim just because the rear of the car looks intact. The issue is the force applied to the occupant, and the stiffer the car and more it “holds its shape”, the more force is likely transferred to the occupants. This can be a tough sell, but lay witnesses (such as family members and co-workers) can be invaluable in establishing the credibility of the client. In the end, the judge or jury will likely decide the damages based on how they view the client.

Practice Pointer: Where you have reason to believe the client was truly injured, but the damage appears to be modest, consider hiring a damage appraiser to look at the car, measure the frame for bending, look for damage behind the bumper covers which are usually designed to pop back into place even in a significant impact, and look for uneven gaps around the doors and trunk, which also can reveal structural damage not readily apparent.

2. The Settlement Money Is In the Details

Do not forget about the law, which gives you the right to argue damages, such as mental anguish, which can be inferred from an injury. Even where the physical injury is slight, you may have a good argument for mental anguish and suffering. The following passage from a recent Virginia Supreme Court case is

instructive:

We have held, for well over a century, that mental anguish may be inferred from bodily injury and that it is not necessary to prove it with specificity. Norfolk & W. Ry. Co. v. Marpole, 97 Va. 594, 599-600, 34 S.E. 462, 464 (1899). Mental anguish, when fairly inferred from injuries sustained, is an element of damages. Bruce v. Madden, 208 Va. 636, 639-40, 160 S.E.2d 137, 139 (1968).

In the present case, the plaintiff suffered physical injury, albeit remarkably slight under the circumstances, as a proximate result of the defendants' negligence. Thus, mental anguish could be inferred by the jury and would constitute an element of damages. The plaintiff makes no claim, however, that her mental state after the accident, and the deterioration of her physical condition, resulted from her relatively slight bodily injuries. Her claimed damages relate almost entirely to emotional trauma suffered as a result of the accident. The question remains: What, if any, limitations apply to the sources of emotional distress for which the plaintiff may be compensated in damages?

*Here, the plaintiff was clearly entitled to be compensated in damages [***14] for any emotional distress she suffered as a consequence of the physical impact she sustained in the accident. Such distress might include shock and fright at being struck three times, turned over, left hanging upside down in her seatbelt and experiencing physical pain. It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living. It might include fear of disability, deformity, or death. Such factors were proper subjects for the jury's consideration because they might fairly be inferred from the physical impact of the collisions upon her person. They might also be taken into account as factors causing exacerbation of her pre-existing mental and physical conditions.*

Kondaurov v. Kerdasha, 271 Va. 646, 629 S.E.2d 181 (2006).

Of course, you must have the facts to take advantage of the law set forth above. A good attorney will consider the law at the same time he/she is arguing damages. Never draft a settlement demand letter which simply adds up the medical bills and asks for a large sum of money. This type of demand letter will usually tip the adjuster to fact you may not have read and digested the entire medical file, and it will leave you with little ammunition when the claims adjuster takes quotes and findings out of context in an effort to diminish the claim. Your settlement demand

letter should always include a summary of the treatment and findings.

Practice Pointer: A thorough review of the medical records prior to initiating settlement discussions will also enable you to catch, and correct, obvious factual errors in the medical records. Under HIPPA, the patient has the right to demand his physician correct an error, or insert the patient's statement of fact into the record. This provision in HIPPA does not pertain to the opinions of the physician.

3. Consider the Policy Limits

In most cases the settlement or verdict will be limited by the amount of available liability insurance. This insurance will usually come from the defendant's insurance policy, but not always. If the defendant is uninsured, underinsured or immune from simple negligence, the insurance money will come from your client's own policy through his uninsured or under-insured motorist coverage. In Virginia, minimum liability limits have been stuck at \$25,000.00 for at least 20 years. Until recently, you could not determine the amount of insurance carried by the defendant until you filed suit. After filing suit, the rules of discovery allow you to request by interrogatory the limits of insurance coverage. Va Supreme Ct Rule 4:1(b)(2).

Practice Pointer: Pursuant to a statute effective July 1, 2008, you can learn the limits of liability coverage by writing to the claims adjuster if the specials damages (medical bills and wage loss) total at least \$12,500.00. The statute is set forth below.

§ 8.01-417 (C) *After he gives written notice that he represents an injured person, an attorney, or an individual injured in a motor vehicle accident if he is not represented by counsel, may, prior to the filing of a civil action for personal injuries sustained as a result of a motor vehicle accident, request in writing that the 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. The requesting party shall provide the insurer with the date of the motor vehicle accident, the name and last known address of the alleged tortfeasor, a copy of the accident report, if any, and the claim number, if available. The requesting party shall also submit to the insurer the injured person's medical records, medical bills, and wage-loss documentation, if applicable, pertaining to the claimed injury. If the total of all such medical bills and wage losses equals or exceeds \$ 12,500, the insurer shall respond in writing within 30 days of receipt of the request and shall disclose the limits of liability at the time of the accident of all such policies, regardless of whether the insurer contests the applicability of the policy to the injured person's claim. Disclosure of the policy limits under this section shall not constitute an admission that alleged injury or damage is subject to the policy. Information concerning the insurance policy is not by reason of disclosure pursuant to this subsection admissible as evidence at trial.*

E. COMPLAINT FOR THE CIRCUIT COURT AND WARRANT IN DEBT OR COMPLAINT FOR THE GENERAL DISTRICT COURT

1. Complaint in Circuit Court

To file a motor vehicle accident lawsuit in the circuit court, usually for an amount greater than \$15,000.00, you must file a complaint. The complaint need only comply with notice pleading requirements, and need not be particularly detailed. Rule 1:4(d) states that “every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim. Rule 1:4(j) states that “brevity is enjoined as the outstanding characteristic of good pleading. In any pleading, a simple statement, in numbered paragraphs, of the essential facts is sufficient.” The pleading must contain the office address, telephone number and regular facsimile

number of counsel of record. Rule 1:4(l). Counsel must also sign the pleading.
Rule 1:4(c).

Further details are set forth in Rule 3:2. If you are asking for money damages, be sure to include the amount requested in the *ad damnum* clause of the Complaint.

Rule 3:2. Commencement of Civil Actions.

(a) Commencement. A civil action shall be commenced by filing a complaint in the clerk's office. When a statute or established practice requires, a proceeding may be commenced by a pleading styled "Petition." Upon filing of the pleading, the action is then instituted and pending as to all parties defendant thereto. The statutory writ tax and clerk's fees shall be paid before the summons is issued.

(b) Caption. The complaint shall be captioned with the name of the court and the full style of the action, which shall include the names of all the parties. The requirements of Code § 8.01-290 may be met by giving the address or other data after the name of each defendant.

(c) Form and Content of the Complaint. (i) It shall be sufficient for the complaint to ask for the specific relief sought. Without more it will be understood that all defendants mentioned in the caption are made parties defendant and required to answer the complaint; that proper process against them is requested; that answers under oath are waived, except when required by law, and that all relief authorized by law and demanded in the complaint may be granted. No formal conclusion is necessary.

*(ii) Every complaint requesting an award of money damages shall contain an *ad damnum* clause stating the amount of damages sought. Leave to amend the *ad damnum* clause shall be available under Rule 1:8.*

Attached as Exhibit A is a sample Complaint.

Practice Pointer: You will be limited to the amount claimed in *ad damnum* clause of your complaint. Unlike federal court, you cannot amend the complaint to increase the amount sued for after the judgment or verdict.

2. Warrant in Debt or Complaint in General District Court

You should consider filing in the general district court if you claim will not exceed \$15,000.00. The general district court also has exclusive jurisdiction over any claim of \$4,500.00 or less. Many attorneys believe your chances of a reasonable recovery in a smaller accident are better in the general district court, as the claim will be heard by a judge, not a jury. You may file a warrant in debt, which is a pre-printed form available at the clerk's office. The warrant in debt will not allow space for more than a simple line entry that the plaintiff was injured in a motor vehicle collision on a particular date. **Attached as Exhibit B is a Warrant in Debt.** Such a filing will usually generate a request by the defendant for a "bill of particulars" requiring counsel to outline more specifically the facts of the accident. For this reason, one should consider filing a complaint. The complaint will have facts sufficient to either convince the court to deny a request for a bill of particulars, or you will recopy the pleading and label it a "bill of particulars."

Rule 7B:4. Trial of Action.

(a) Method of bringing action. A civil action in a general district court may be brought by warrant, summons or complaint directed to the sheriff or to any other person authorized to serve process, requiring such individual to summon the person against whom the claim is asserted to appear before the court on a certain day to answer the complaint of the plaintiff set out in the warrant, summons or complaint.

(b) When action heard. If all parties appear and are ready for trial on the return date of the warrant, summons or complaint, the court may proceed with the trial of the case.

Practice Pointer: Despite the above cited statute, the clerks at the Fairfax County General District Court refuse to accept a pleading titled "Complaint" and insist you label it "Motion for Judgment."

Either party can appeal “de novo” to the Circuit Court within 10 days of the judgment, although the defendant may have to post a bond in the amount of the judgment prior to perfecting the appeal. Va. Code § 8.01-129.

II. CONDUCT DYNAMIC DISCOVERY AND CASE INVESTIGATION

F. Streamline Informal Discovery By Accessing Public Sources of Information

When evaluating and investigating a claim, you can secure a substantial amount of needed information through the internet.

Police Reports: Prince William County provides internet access to police reports.

<https://www.pwcgov.org/apps/crashrptb/login.aspx>

Guilty Pleas: All General District Courts allow access by computer to the status of traffic court charges. To determine if your defendant pleaded guilty, look him up.

<http://www.courts.state.va.us/courts/gd.html>

Map of Accident Scene: Google Earth <http://earth.google.com/> allows one to examine and print a satellite photograph of the intersection or roadway where the collision occurred.

People Finder: There are many free services on the internet which allow you to find and confirm the address of a defendant.

<http://www.whitepages.com/> If you have a telephone number you can use the reverse look-up to find the matching address

http://www.whitepages.com/reverse_phone

Registered Agents: Use the State Corporation Commission's web site to look up current registered agents.

http://s0302.vita.virginia.gov/servlet/resqportal/resqportal?&rs_custom_dir=scccisp1

Real Estate: You can look up real estate records to verify home ownership

and assessed values.

<http://icare.fairfaxcounty.gov/Main/Home.aspx>

ERISA: Free Erisa allows the practitioner to determine if a particular health insurer is entitled to any reimbursement from the injury settlement. <http://www.freeerisa.com/>

Doctors: Virginia keeps an on-line data base of all practicing medical professionals, which enables you to look them up and assess their credentials and whether there are any reported malpractice payouts <http://www.dhp.virginia.gov/>

Motor Vehicles: If you know the make and model of the vehicle operated by the defendant, you can google that vehicle and secure a photographic replica which can be useful when comparing the sizes of the vehicles. You can also access the National Highway Traffic Safety Administration (NHTSA) website www.nhtsa.gov for recalls and potential defects. The web can also provide you technical details (weight, safety features, engine and braking performance, etc.) of any model of motor vehicle.

Court Forms: Most of the forms you need for everyday practice can now be found online. For example, the following website has many of the forms you need.

<http://www.courts.state.va.us/forms/home.html>

G. Frequently Encountered Problems With Preservation of Evidence

Plaintiff's counsel must understand the importance of preserving evidence after an injury involving a motor vehicle or other machinery.

First, consider taking photographs of the damaged vehicle, if the damage is obvious, even if the injuries are not life threatening. If you wait too long, the vehicle may be disposed of as salvage or repaired. In either case, you will not be able to show the insurer or court photographs which can enhance your client's bodily injury claim. However, even if you learn your client's vehicle has been sold for "salvage", you may be able to call the salvage yard, locate the vehicle through the "lot number" and send an appraiser to take photographs.

Practice Pointer: Never accept your client's representation that the other party's insurer took photographs to dissuade you from taking your own. In the author's experience you have no better than a 50-50 chance of securing valuable photographs from the defendant's insurer.

If you represent a victim of a tractor trailer collision, you need to secure the truck driver's manifests to determine if he was working more hours than permitted. If the accident involves fatal or life altering injury, you should consider hiring an expert to download data from the truck's "black box". The black box is an electronic data recorder, or event data recorder (EDR). Such devices routinely record data such as speed and braking events. Many cars will also record data such as vehicle speed at the time of impact.

Practice Pointer: Crash data can be lost by simply turning the ignition after a crash. For serious collisions where liability could be an issue, consider hiring an expert to retrieve the data stored in the vehicle's EDR. Counsel should also consider filing suit immediately if cooperation

regarding preservation of evidence is not forthcoming.

Drivers of tractor trailers traveling interstate are required to maintain manifests recording hours driving, hours off duty but awake and hours sleeping. These manifests can be of great importance to counsel after a collision. Counsel must be aware that pursuant to 49 C.F.R. § 395.8, such manifests need be retained by the employer for only 6 months.

Wage loss claims can be simplified if the client keeps track of the time lost from work as it is lost. Many employers cannot reconstruct hours lost for medical appointments and will depend on your client for the raw data.

H. The Importance of Proper Evaluation of Property Damage

Many insurers are basing their offers on the extent to which they can prove or disprove the existence of visible damage.

First, consider taking photographs of the damaged vehicle, if the damage is obvious, even if the injuries are not life threatening. Similarly, do not take photographs and, consider advising your client to forgo an appraisal by the defendant's insurer, if the damage is not significant and does not affect the operation of the vehicle.

Other important areas of investigation include an examination of the headlight filaments which can determine if the lights were on at the time of the collision, an examination of the tires to look for tread and markings to match what is found at the scene, and use color film when taking photographs of the vehicles to determine if paint transfers can help your case. Brakes can be examined to determine braking distances, worn drums or pads, or other defects. As set forth above, data from EDR's can be downloaded to determine speed, braking events,

and other important data.

You may also want to hire an appraiser or other automotive expert to look for damage which is not obvious to the layman. For example, the frame can be measured to determine if it has been bent. Shock absorbers behind the bumper cover can be examined for force and impact. The gaps between the doors and body of the car can be measured and if “pinched” can reflect frame damage.

Counsel must be aware that cases involving severe injury or death where liability is contested, a thorough evaluation, appraisal and inspection of the vehicles involved must be accomplished. This will likely mean purchasing and preserving the wrecked vehicles, or if counsel does not have access to the defendant’s vehicle, writing a letter to the defendant requesting the vehicle be preserved for examination by the experts.

I. Discovery of Expert Opinions - What You Can Get and What You Must Give

The discovery of expert opinions is controlled by Supreme Court Rule 4:1(b)(4)(A) which allows interrogatories identifying the opponent’s experts and requiring the opponent to divulge:

- (1) the subject matter about which the expert is to testify;
- (2) the substance of the facts and opinions to which the expert is expected to testify, and
- (3) a summary of the grounds for each opinion.

Subject to paying a reasonable fee, counsel may depose his opponent’s testifying expert . However, a party may not discover the opinions of a retained expert who is not expected to testify absent *exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions*

on the same subject by other means. 4:1(b)(4)(B).

Parties may also seek **Lombard** information from the opposing expert. Named after *Lombard v Rohrbaugh*, 262 Va. 484, 551 S.E.2nd 349 (2001), the information sought includes income earned from the insurance carrier retaining the expert. The theory is that significant earnings will show bias. In *Lombard*, the amount earned by Dr. Ammerman was over \$100,000.00 per year in 1998 and 1999, which the Court ruled constituted a substantial connection between the doctor and Allstate.

J. Rule 4:10 Examinations of the Plaintiff - Can You Help Your Client?

This rule allow the defendant, with leave of court, to require the plaintiff to attend

an examination with a health care provider selected by the defendant. Generally, the defendant will request such an examination if the plaintiff is claiming permanent or ongoing injury. The Rule is set forth below.

Rule 4:10. Physical and Mental Examination of Persons.

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers, as defined in § 8.01-581.1, employed by the moving party or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties, shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and shall fix the time for filing the report and furnishing the copies.

(b) Out-of-State Examiners. -- Examiners named in such an order shall be licensed to practice in, and shall be residents of or have an office in, this Commonwealth. However, notwithstanding the reference to licensure by this Commonwealth in the definition of health care providers in § 8.01-581.1, the court may, in the exercise of its sound discretion and upon determining that the ends of justice will be served,

order an examination by one who is not licensed to practice in, is not a resident of, and does not have an office in, this Commonwealth but who is duly licensed in his or her jurisdiction.

(c) Report of Examiner.

(1) A written report of the examination shall be made by the examiner to the court and filed with the clerk thereof before the trial and a copy furnished to each party. The report shall be detailed, setting out the findings of the examiner, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition.

(2) The written report of the examination so filed with the clerk may be read into evidence if offered by the party who submitted to the examination. A party examined who takes the deposition of any examiner who shall have conducted an examination ordered pursuant to this Rule, waives any privilege that might have been asserted in that action or in any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

3) This subdivision applies to examination made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of a health care examiner or the taking of a deposition of such examiner in accordance with the provisions of any other Rule.

This Rule has been the subject of much litigation.

1. What constitutes “good cause” to seek the examination;
2. Can the Defendant tell the jury the examination is “independent”;
3. What constitutes a “mental examination”;
4. Can the defendant force the plaintiff to be examined by a vocation rehabilitation expert;’
5. What controls can plaintiff’s counsel insert into the order allowing the examination.

There is much plaintiff’s counsel can attempt to protect the client. First, you must always prepare the plaintiff for the examination. The plaintiff should be advised to be polite, but not overly friendly. The plaintiff should be familiar with his medical history and be able to explain where he has pain and how it affects his

daily activities. The plaintiff should understand the examination is for the defendant, the doctor is not neutral, and the examination is not for treatment. A doctor-patient relationship is never formed as a result of a Rule 4:10 examination.

Never sign an order which labels the examination as “independent” because it is a defense examination. Do not agree to multiple examinations, and be wary of some of the “usual suspects” who will always find that treatment beyond 6-10 weeks is excessive for a strain, sprain or other “soft tissue” injury. Do not agree to the examination if your client is not claiming a permanent injury. It is doubtful the defendant can show “good cause” under these circumstances.

Practice Pointer: If the claims adjuster asks for a medical examination before suit is filed, agree only on the condition that there will be no further requests. Most judges will enforce such an agreement.

If the ability of your client to find and keep employment is in issue, do not agree to have your client examined by a vocational rehabilitation counselor. Some vocational rehabilitation counselors are not licensed professional counselors, and therefore are excluded under 8.01-581.1. Even where the vocational counselor is a licensed professional counselor, argue the purpose of the examination is to focus on employment issues, not mental health counseling.

Brain injury cases present unique problems. The court will allow a brain injured victim to be examined by defense experts, including neuropsychologists. Such examinations typically involve hours of testing, some on a computer screen, some multiple choice and some in interview format. Consider inserting in the order language allowing the entire session be recorded by video, or at least that a witness be allowed to observe such sessions. Bias of the defense examiner can be

very difficult to establish if the jury has to decide only between the “brain injured” plaintiff or the defense neuropsychologist.

As sample order is attached as **Exhibit C**.

Finally, be wary of any report which concludes your client is not truthful or is exaggerating. File a motion in limine to prevent the expert or defense lawyer from commenting on such opinions, as they invade the province of the jury, and may also be outside the expertise of the physician. . Batzel v. Gault, et al., At Law 195596, Motions Hearing, pp. 31-32 (J. Roush, Fairfax County Circuit Court, April 12, 2002) (attached as Exhibit 4); House v. House, 102 Va. 235 (1904); Va. Code § 8.01-401.3(B). Expert testimony is proper only when the subject matter of the inquiry is of such character that only persons of skill or experience in that area are capable of forming a correct judgment. Bradley v. Poole, 187 Va. 432 (1948); Neblett v. Hunter, 207 Va. 335 (1966)

9. Notwithstanding said duty, defendant did then and there operate her automobile in a careless, negligent and reckless manner in that she:

- a) failed to pay full time attention to her driving duties;
- b) operated her vehicle at an excessive speed under the circumstances and conditions then and there existing;
- c) failed to keep a proper lookout;
- d) failed to yield the right of way;
- e) failed to keep his automobile under proper control;
- f) followed too closely behind Plaintiff; and
- g) was otherwise negligent.

10. As a direct and proximate result of defendant's joint and several negligence, plaintiff has suffered property damage and permanent bodily injury, and has suffered and will continue to suffer pain of body and mind and inconvenience, has incurred and will continue to incur medical expenses and has suffered and will continue to suffer loss of earnings and earning capacity.

WHEREFORE, plaintiff _____ demands judgment against defendant _____, in the amount of ____ DOLLARS (\$____) compensatory damages, costs, interest, prejudgment interest and such other relief this Court deems just and proper.

Plaintiff demands trial by jury on all issues in this case.

Respectfully submitted,

By: _____

Name, address, telephone and bar #

Counsel for Plaintiff

EXHIBIT C

VIRGINIA :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX:

Plaintiff, :

:

v. : LAW NO.

Defendants. :

ORDER ON MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF

Defendant's Motion of Physical Examination of Plaintiff is GRANTED as follows:

- 1) **Time:**
- 2) **Place:**
- 3) **Manner of the examination:**(i) The physical examination shall consist of visual assessment by the examiner, manual palpation or measurement, if desired by the examiner, and directed questioning by the examiner about the results of in-session physical tests. (ii) There shall not be any invasive testing, films, nerve conduction studies or other intrusive or painful requirements or stimuli.
- 4) **Conditions to the examination:** (i) Counsel for the Defendant are responsible for all Plaintiff's transportation costs [if the examination is not conducted in the city where Plaintiff is currently residing/ within __ miles of Pl's residence], which costs shall be paid in advance if requested by Plaintiff. (ii) Counsel for Defendant is responsible for providing the examiner with any medical history, medical records, or radiographic studies requested by the examiner.

Plaintiff shall have no responsibility to furnish any such materials. Plaintiff need not complete any questionnaire or history forms upon arrival at the examiner's office. (iii) The examiner is not permitted to conduct interview of Plaintiff. Rule 4:10 is not a substitute for a deposition. The oral exchange shall be limited to affirmative or negative responses to elicited testing questions. (iv) Plaintiff is permitted to have a court reporter and/or videographer present during any interchange between Plaintiff and the examiner in connection with the examination. (v) Plaintiff's counsel or his designee is allowed to be present to object to any attempted oral exchange initiated by the examiner that exceed the scope of this Order. (vi) This examination is by agreement. Plaintiff is voluntarily appearing for the examination. Neither the examiner nor defense counsel will be permitted to state, suggest, argue or imply during the examination, in the report, or at trial that the examination was in any way limited by the Plaintiff's refusal to allow an examination.

1) **Scope of the examination:** The examination is limited to the plaintiff's physical condition as raised by the pleadings in this action and as authorized by this Order. The examiner shall be provided a copy of the Order at least 72 hours in advance of the examination, and must agree to abide by its terms.

1) **The person or persons by whom it is made:** (Name of examiner), a physician who has been selected by the defendant(s); and

2) **The time for filing the report and furnishing the copies:** A copy of Dr. [insert name of DME doc] report, his CV, all raw data generated by the examination, including any x-rays, and a copy of his charges will be furnished to counsel for plaintiff (i) five (5) days after the examination or (ii) the first date than any information about the examination is furnished to the defendants' counsel. The results of the examination and a copy of the Rule 4:10 report shall be

filed with the Clerk . "Raw data" shall include all clinical notes and other documents generated by the examination of plaintiff.

ENTERED

JUDGE

WE ASK FOR THIS:

Counsel for Defendant

Counsel for Plaintiff