II. MAJOR ELEMENTS OF LOCAL PROCEDURE

A. DISCOVERY

Discovery includes various means of seeking information prior to trial. The most common discovery tools are interrogatories, requests for production of documents, depositions, requests for admission and requests for physical or mental examinations. A brief description of each follows below.

1. Interrogatories

Va. Supreme Court Rule 4:8 allows each party to submit not more than 30 interrogatories, including subparts Rule 4:8 (g). The format requires that the answers to be inserted after restating the questions, following the word "Answer." The answers must be under oath. Rule 4:8(a). The interrogatories should be crafted only after thinking about facts of the case. It is important that one of the interrogatories request the amount of liability insurance available to pay any judgment against the defendant. Interrogatories should seek to learn the details of the defendant's version of the case and any defenses asserted in the litigation.

Practice Pointer: Request that the Defendant provide the factual and legal basis for any affirmative defenses or any denials of your factual and legal assertions in the Complaint.

You must also ask for the identity of any experts who will testify for the defense, along with the opinions and underlying facts which support such opinions. You should also inquire about the defendant's education, employment history and any criminal convictions. Other important subject matters include statements made by either party, paying fines or pleading guilty to a traffic charge from the collision and the identity of witnesses. A sample set of interrogatories is attached.

Each party is allotted 21 days within which to file any objections and within which to respond to the discovery. Objections may be considered waived if not noted within 21 days after receipt. Do not file the answers or objections with the court unless you are filing a motion to compel discovery. Rule 4:8(c).

2. Requests For Production of Documents

Rule 4:9 allows for a party to request documents or things from the defendant.

This rule also permits the inspection of tangible items and entry onto the land or property of a party to inspect. From a plaintiff's perspective, the requests should include asking for copies of any liability insurance policies which might pay a judgment, photographs of the parties or anything at scene of the accident or incident, damage estimates or repair documents, written statements from parties or witnesses, and information about the motor vehicle or product which caused the injury. If the proper operation or functioning of a vehicle or product is at issue, you must request repair logs, repair schedules, inspections and other relevant information. Also request any document subpoenaed by the defense where the subpoena is returnable to the defendant. This Request is made pursuant to Virginia Code §8.01-417(B). If the subpoena is returnable to the court, you will likely have to get the documents from the court.

If the operation of a vehicle is at issue, you may also want to inspect the vehicle through a request under this rule.

3. Depositions

Virginia Supreme Court Rule 4:5 allows for depositions upon oral examination. Depositions are commonly used to in litigation to secure needed information about the parties' claims and to develop the areas for cross examination and impeachment. Party depositions may be taken in the city or county where the suit is pending, in an adjacent city or county , where the parties agree, or where a court may designate after finding good cause. Rule 4:5(a)(a1)(i). Non-party depositions must be taken in the city or county where the non-party resides, is employed or has a principal place of business. Of course the non-party can agree to another location and for good cause, the court can always order a non-party to appear at another location. Rule 4:5(a)(a1)(ii). You will typically have to subpoena a non-party to appear for deposition.

Depositions taken out of state are controlled by Rule 4:5(a)(a1)(iii) and allow for depositions before a person authorized to administer an oath where the deposition will be held, or before a person appointed or commissioned by the court in which the action is pending or pursuant to a letter rogatory. A letter rogatory will include a list of questions which are to be answered under oath.

Practice Pointer: A party always depose the opposing expert witness, subject to paying the experts fees and expenses. Rule 4:1(b)(4)(A)(ii). It has become common for some experts to charge outrageous fees, usually in an effort to discourage contact with the lawyers and litigation. An expert's fees are always subject to review for reasonableness by the court. Nevertheless, fees of $1000.00 per hour for highly paid experts are

approved.

Rule 4:5(b)(6) allows a party to depose a corporation or partnership or governmental agency through the testimony of a representative designated to speak for and bind the entity. The notice of deposition for such designated representative shall set forth the topics to be questioned at deposition.

Rule 4:5 also contains subparts discussing how to require the production of documents at the deposition (use a subpoena duces tecum if a nonparty or list the documents if a party -Rule 4:5 (b)(1), how to defend against oppressive or embarrassing conduct (see a court order and where feasible, call for a judge during the deposition -Rule 4:5(d), how to change the transcript (make edits on the errata sheet within 21 days of receipt of the transcript - Rule 4:5(e). There are also sanctions for failure to attend a deposition. Rule 4:5 (g).

Practice Pointer: If you fail to subpoena a non-party witness who you noticed for deposition, and such witness does not appear, you may be required to pay for the time of your opponent. (Rule 4:5 (g)(2).

Rule 4:2 permits deposition even before a law suit is filed under limited circumstances, most commonly where a party or witness may become unavailable due to illness, death or other exigent circumstance. Notice and service of the notice on the opposition are required, and if not feasible, a court order may be secured to further the ends of justice. Rule 4:2(a)(1)-(3).

Depositions may be used at trial for impeachment during cross examination.

4. Requests For Admissions

Rule 4:11 allows Requests For Admissions that relate to statements or opinions of fact or of the application of law to fact. There is no limit to the number of requests unlike the limit of 30 interrogatories. Failure to admit or deny within 21 days may result in the requests being deemed admitted. Rule 4:11(a). A denial may be qualified if good faith requires that a party admit only part of an request. An answering party may not give lack of information or knowledge as a reason for failure to admit unless he also states that he has made a reasonable inquiry and the information known or readily obtainable is insufficient to enable him to admit or deny.

Practice Pointer: Requests for admissions are invaluable to force an opponent to admit liability through concessions about how the collision occurred and what roles

each party played in the incident. Requests are also very helpful in ensuring documents which could be admitted as business records under the "shopbook rule" are properly authenticated prior to trial.

5. Physical and Mental Examination of Persons

Rule 4:10 provides for medical evaluations of the plaintiff at the request of the defendant. Theoretically, for good cause, a plaintiff could request the defendant be evaluated. The examiner must be a health care provider as defined in Va. Code 8.01-581.1. For good cause, the court may order the examination take place out of state and where require, the court may waive the rule that the examiner be licensed by and have an office in Virginia . Rule 4:10(b). The examiner shall submit a report which must contain his findings, including the results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations for the same condition. Rule 4:10(c)(1). The report shall be served on counsel and filed with the court.

Practice Pointer: Only the party submitting to the examination (usually the plaintiff) may offer the report into evidence. Rule 4:10(c)(2).

Where you have minors, persons under mental disability such as a brain injured client, or where the subject matter may involve psychiatric issues, Rule 4:10 provides that a court order may limit the examination and may provide for other terms and conditions.

Practice Pointer: Consider requesting the court allow observers such as other family members or a nurse, as well as request the right to audio or videotape the examination. The Plaintiff such only agree to an order which states that there shall no obligation to fill out questionnaires or respond to questions about liability or other matter collateral to the physical or mental condition of the party.

6. Duty to Supplement Discovery

A party who has responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosures or response to include information thereafter acquired in the following circumstances:

(1) A party is under a duty to supplement promptly its disclosures if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty to amend promptly a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional information has not otherwise been made known to the other parties during the discovery process or in writing. Rule 4:1(e)

Rule 1:18 provides for the trial court, after notice, to enter a Pretrial Scheduling Order. The Scheduling Order provides in that "[t]he parties have a duty to seasonably supplement and amend discovery responses pursuant to Rule 4:1(e). Seasonably means as soon as practical." By amendment effective January 1, 2001, the word "promptly" was substituted for "seasonably" in Rule 4:1(e)(1)&(2). This amendment suggests an intention to add a sense of urgency to the obligation to supplement. Furthermore, the Uniform Pretrial Order states that "[n]o provision of the Order supercedes the Rules of the Supreme Court of Virginia governing discovery." To the extent the Pretrial Order conflicts with Rule 4:1(e), the Rule will control.

B. PRE-TRIAL MOTIONS AND PLEADINGS

1. Motions *In Limine*

Most pre-trial motions will be motions *in limine*. *In limine* is Latin for "at the outset." These motions are presented to the judge before or during trial. Motions *in limine* are usually filed to secure a pre-trial ruling to exclude or limit evidence. Such motions are as varied as are tort claims and the conduct of the actors involved. Some of the more common motions *in limine* are listed below.

a. Collateral Sources

Exclude reference to any sources of payment collateral to the tortfeasor. This may include reimbursement for medical bills such as payment by health insurance, medical expense coverage, medicaid, medicare or workers compensation. *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316 (2000) (quoting *Schickling v. Aspinall*, 235 Va. 472, 474, 369 S.E.2d 172 (1988). It also may include reimbursement for loss of income, such as sick leave, vacation pay, and short or long term disability. *Va. Code 8.01-35*.

b. Prior or Subsequent Accidents or Injuries

Where the plaintiff has the misfortune to been injured before or after the incident which is the subject of the litigation, and where there medical treatment is unrelated or

irrelevant to the injuries at issue, counsel should move to exclude any mention of the prior or subsequent injuries. For example, where there exists no evidence that the plaintiff had ongoing complaints or treated with any physician for injuries after his recovery in the prior accident, the evidence of prior accidents should be excluded because any probative value is substantially outweighed by danger of unfair prejudice, waste of time, confusion of the issues and needless presentation of misleading facts. *Smith v. Ellis*, 22 Va. Cir. 422 (Judge Ledbetter) (1991); *Seilheimer v. Melville*, 224 Va. 323 (1982).

Evidence of prior claims is inadmissible if not linked to evidence establishing relevance and probative value. *Carter v. Shoemaker*, 214 Va. 16, 197 S.E.2d 181 (1973).

c. Prior Drug Use

This motion is most pertinent to a brain injury claim. If no expert can testify to a reasonable medical probability that the prior drug use caused the brain injury, the evidence must be excluded. *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 266 Va. 188, 205, 585 S.E.2d 557, 566-67 (2003) (prohibiting cross-examination of plaintiff's expert witness on subject of plaintiff's prior drug use where there was no evidence that the prior drug use caused plaintiff's brain injury). This same argument should be used even more forcefully where the claim does not involve a brain injury as any probative value is obviously outweighed by the prejudice to the party.

d. Prior Depression

Move *in limine* to prohibit the any reference to pre-injury depression where either there is no claim for depression or where it is clear that the depression resolved prior to the injury at issue. For example, where the history reflects that the plaintiff had a two-year history of untreated depressive episodes but where the evidence establishes that pre-injury depression was successfully treated and that the depression had resolved several years before this accident, the evidence would be excluded. Even if the evidence establishes that the party continued to treat for depression, cross examination would be improper where evidence of depression is not elicited in the plaintiff's direct examination. *Velocity Express Mid-Atlantic, Inc. v. Hugen,* 266 Va. 188, 205-06, 585 S.E.2d 557, 567 (2003).

e. Nature of Prior Felony Conviction

Unless the conviction is for perjury, the court should prohibit any cross examination which elicits anything other than the fact there was a felony conviction.

For purposes of impeachment, the fact of a prior conviction of a felony may be shown against a party-witness in a civil case, but that the name of the felony, other than perjury, and the details thereof may not be shown. *Payne v Carroll*, 250 Va. 336, 340; 461 S.E.2d 837, 839 (1995).

f. Attorney Referral To Physician

Although there is scant case law in Virginia on the topic, it is suggested that a motion *in limine* be filed to prohibit any reference to any attorney referral to a treating physician. Such evidence is irrelevant and may invade the attorney client privilege. The fact there was an attorney referral is only elicited to suggest that the plaintiff, his attorney and the treating physician are engaged in misconduct or efforts to improperly inflate an injury claim. The courts should not allow such argument or innuendo. In most instances, the client is uninsured and has requested help from his attorney. Counsel should argue the attorney would be remiss in not helping his client find a physician.

g. Photographs Prove No Injury

Where the property damage photographs fail to depict significant visible damage, the defense counsel will invariably argue that the photographs "prove" the plaintiff was not injured. Despite the fact this argument is made in the absence of any expert testimony, and therefore represents little more than the opinion of counsel, Virginia circuit courts have routinely allowed such argument. While the plaintiff can hire an expert to review the property damage estimates and photographs to blunt such argument, it is advisable to file a motion *in limine* to exclude the photographs or at least limit such argument. This issue is ripe for a ruling from the Virginia Supreme Court. The argument that the property damage correlates to the degree of bodily injury is speculative and requires expert testimony on the force applied and how it affected the plaintiff. This requires the consideration of a myriad of variables which make it unlikely the defendant could ever provide an expert with the factual predicate needed for expert testimony. *See*, 8.01-401.1 & 8.01-401.3; *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co*., 250 Va. 161, 166, 458 S.E.2d 462, 465-466 (1995). *Gilbert v. Summers,* 240 Va. 155, 159-160, 393 S.E.2d 213, 215 (1990)]; *Swiney v. Overby,* 237 Va. 231, 233-34, 377 S.E.2d 372, 374 (1989). *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996). Unfortunately, the juries frequently accept the invitation to speculate and usually fail to award sufficient damages. The Supreme Court of Delaware held that in the absence of expert testimony, a party may not directly argue that there exists a correlation between the degree of personal injuries and the damage to the automobiles. *Davis v. Maute*, 770 A.2d 36, 40 (2001).

2. Other Pre-Trial Pleadings

Other pre-trial pleadings include motions to increase the *ad damnum* clause, to consolidate or sever claims or parties, to take and compel discovery, to strike defenses or claims, to compel production of a recorded statement, to request a default as to liability, and to assert claims of immunity, including sovereign and charitable immunity.

C. SETTLEMENT PROCEDURE

Settlement procedure does not follow any set pattern in Virginia. The circuit courts are reluctant to get involved in assisting the parties with settlements. Therefore the parties are well advised to enter discussions about alternative dispute resolution early in the litigation. The two most popular forms of alternative dispute resolution are binding arbitration and mediation. The mediator and arbitrator will charge by the hour and the parties usually split the costs 50/50. Whether mediation or binding arbitration, the parties should prepare as if the hearing was a trial. The witnesses should be prepped and the exhibits and evidence should be prepared as if it were a trial.

1. Binding Arbitration

Binding arbitration will conclude the claim and parties will be bound by the award, subject to any "high-low" agreement. To start binding arbitration the parties must agree on an arbitrator. Also, the form of alternative dispute resolution is usually accompanied by an agreement on the "high" and "low", meaning the ceiling and floor of the award. The high will (almost) always be within the limits of insurance coverage. The agreement to use binding arbitration should recite whether witnesses can be called live, whether the arbitrator will have the power to enforce subpoenas, whether hearsay is admissible, including the medical records, whether depositions will be used in lieu of live witnesses and when the award will be paid.

2. Mediation

Mediation differs from binding arbitration in that the mediator does not make an award. Instead, the mediator attempts to get the parties to reach a settlement by listening to witnesses, reviewing evidence and conferring with the lawyers. There are no hard and fast rules for mediation. The mediator usually requests a submission of the parties claims and defenses prior to the hearing. The mediator cannot force the parties to accept a settlement and instead uses his power or persuasion to convince the parties that a sure thing is better than a roll of the dice with a jury.

3. Negotiation with the Claims Adjuster or Defense Counsel

A settlement demand package should be prepared when the full extent of the treatment, damages and injuries are able to be quantified or predicted by the treating physicians and other experts. Where possible, prepare your settlement demand package well before the two (2) year statute of limitations will expire. Otherwise, suit must be filed. If suit is filed, service of process can be delayed for up to a year to allow more time to settle the claim. If the claim has not settled and a year post filing is about to expire, the suit papers must be served on the defendant or the claim may be dismissed with prejudice. *Va. Supreme Court Rule 3:5(e).*

A settlement demand letter which contains little more than a tally of the medical bills and wage loss, and then demands a large sum of money is likely to be ineffective. 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.

The settlement demand package should include a list of all the medical bills and other specials damages. The wage loss should be computed and supported by a letter from the employer and disability slips from the treating physician. The medical records should be summarized. Where future medical expenses are expected, the treating physician should prepare a report which described the ongoing need for medical care and estimate the future medical costs. The same letter should comment on how the ongoing injuries will affect the plaintiff's employment. The demand letter should summarize the medical care and highlight the significant findings, such as muscle spasm or trigger points (considered "objective" findings) and positive films or scans or diagnostic tests like EMGs. Remember that the claims adjuster will likely send the medical records and bills to his own medical experts prior to making any settlement offer. The more you know about your client's treatment and medical needs, the better position you are in to negotiate a fair and favorable settlement.

D. POST-TRIAL MOTIONS (New Trial, *Additur* & *Remittitur)*

A new trial may be granted on the ground the verdict is contrary to the evidence. A party may also request that the trial court grant a new trial because the damages are too small or excessive. *Va. Code 8.01-383*. Therefore, the options available to the parties include asking for a new trial on liability and damages, damages only, or a motion that the trial court either add to the jury verdict (*additur)* or reduce the jury verdict (*remittitur*). The procedures for *additur* and *remittitur* are set forth in the Virginia Code 8.01-383.1.

1. New Trial on Liability and Damages

The trial court may grant a new trial where the verdict is plainly wrong or without credible evidence to support it. A judge is not permitted to substitute his judgment for that of the jury merely because he would have reached a different result. *Jenkins v Pyles, 269 Va. 383,388, 611 S.E.2d 404,407 (2005).* In determining whether an excessive damage award requires a new trial on all issues, a new trial limited to damages, an order of remittitur, or a judgment confirming the award, a trial judge is vested with broad discretion, and the Supreme Court will not reverse his ruling unless the record plainly shows an abuse of discretion. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982). Before a new trial should be limited to the amount of damages, it should be reasonably clear that the misconception of the jury has not extended to its determination of the question of liability as well as to its determination of the amount of damages. *Rutherford v. Zearfoss*, 221 Va. 685, 272 S.E.2d 225 (1980).

2. New Trial on Damages or *Additur* (Claim of Inadequate Verdict)

A motion for a new trial on damages, or additur is founded on a claim that the jury verdict is inadequate as a matter of law. Where the evidence overwhelmingly favored the plaintiff on the issue of liability (fault), the sole issue before the court is whether to grant plaintiff a new trial on the issue of damages or order *additur.* Glass v. Pender Grocery Company, 147 Va. 196, 5 S.E.2d 478 (1940);

Unfortunately for the plaintiff, case law has made is very difficult to seek a new trail or *additur* unless the jury awards the exact amount of the special damages. A jury award of the exact amount of uncontroverted special damages (medical bills and wage loss) without anything for pain and suffering (non-economic damages) will result in granting a motion for a new trial on damages. *Jenkins v. Pyles*, 269 Va. 383, 390, 611 S.E. 2d 404, 408 (2005); *Bowers v. Sprouce*, 254 Va. 428, 492 S.E. 2d 637 (1997). Anything other than an award of the exact amount of the uncontroverted special damages will likely result in a denial of the claim for a new trial. *Hundley v. Osborne,* 256 Va. 173; 500 S.E.2d 810 (1998). (Osborne's evidence regarding future medical expenses and loss of wages was not uncontroverted and so complete that no rational fact-finder could disregard it. *Id.* at 487, 362 S.E.2d at 720*). See also: Walker v. Mason*, 257 Va. 65 (1999). (Jury entitled to conclude that plaintiff not injured as severely as claimed based on conflicting testimony regarding impact "pretty hard" v. "light bump"). Jury verdict less than specials (and in exact amount of lost wages only) upheld and trial court additur overturned. *Richardson v. Braxton-Bailey*, 257 Va. 61, 64 (1999). (When the evidence

permits a jury to conclude that only some of the damages claimed resulted from the accident, a verdict in an amount less than or approximating a portion of the special damages does not justify the conclusion that the jury failed to consider other damage elements such as pain, suffering, and inconvenience.)

A new trial on damages, or additur, is available when the court finds as a matter of law that the damages awarded by the jury are inadequate. If either the plaintiff or the defendant declines to accept such additional award, the trial court shall award a new trial. If *additur* is accepted by either party under protest, it may be reviewed on appeal. *Va. Code 8.01-383.1(B).*

3. New Trial on Damages or *Remittitur* (Claim of Excessive Verdict)

A defendant may also seek a new trial on damages or request *remittitur*. A new trial on the claim the damages are excessive, as well as *remittitur,* are granted only where the award is so great as to shock the conscience of the court and to create the impression that the jury was motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law. *Shepard v Capitol Foundry of Va., Inc.,* 262 Va. 715, 720-21, 554 S.E.2d 72,75 (2001).

Should the trial court require a plaintiff to remit a part of his jury verdict, or else submit to a new trial, such plaintiff may remit and accept judgment for the reduced sum under protest. As with *additur*, if *remittitur* is accepted under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court upon an appeal. *Va. Code 8.01-383.1(A).*

E. USEFUL SAMPLE FORMS

The following forms are found in the appendix:

1. Interrogatories for the Plaintiff in a Motor Vehicle Case
2. Requests for Production of Documents for Plaintiff in a Motor Vehicle Case
3. Request for Admissions in a Motor Vehicle Case
4. Notice of Deposition of Corporate Designee in a Motor Vehicle Case
5. Motion in Limine to Bar Use of Photographs in Motor Vehicle Case
6. Motion to Amend the Ad Damnum Clause
7. Compel Production of Recorded Statement of Defendant
8. Sample Demand Letter With Claim for Punitive Damages Due to Drunk Driver

APPENDIX - FORMS

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff	)
vs	)
Defendant	)

PLAINTIFF'S INTERROGATORIES TO DEFENDANT

INSTRUCTIONS

A. These Interrogatories are propounded to you in accordance with Rule 4:8 of the Supreme Court of Virginia. Each Interrogatory must be answered separately, fully, in writing, under oath, and a copy served upon counsel for Plaintiff within twenty-one (21) days from the date of receipt of these Interrogatories.

B. These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

C. Where the name or "identity" of a person is requested, please state the full name,

home address, and social security number and telephone number (home and work) also business address, if known.

D. Unless otherwise indicated, these Interrogatories refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings.

E. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's agents, representatives and unless privileged, his attorneys.

F. The pronoun "you" refers to the party to whom these Interrogatories are addressed and the persons mentioned above.

INTERROGATORIES

1. State your name, address, martial status, date of birth, social security number, age and occupation.

ANSWER:

2. Were you the operator of the motor vehicle described in plaintiff's Complaint at the time of the collision? If not, please "identify" the operator.

ANSWER:

3. Were you the owner of the motor vehicle which collided with plaintiff? If not, please "identify" the owner.

ANSWER:

4. Please set forth the year, make, model, weight (usually recorded on registration), and color of the motor vehicle you were operating or you owned at the time of the collision. Please do the same for any other motor vehicle you owned or was owned by a resident relative at the time of the collision (the weight of such vehicle if not involved in the collision need not be provided).

ANSWER:

5. Were you at the time of the collision sick or ill in any way, or did you have any physical or mental illness or disability or impairment? If so, describe the sickness, illness or disability or impairment.

ANSWER:

6. Have you ever worn glasses or other corrective lenses prescribed for your use? If so, describe the condition requiring the glasses or corrective lenses. If so, were you wearing or using glasses or other corrective lenses at the time of the collision?

ANSWER:

7. On the date of this collision, how long did you have your driver's license, what was your driver's license number and state of issue?

ANSWER:

8. At the time of the collision, were your driving privileges restricted in any way? If so, state the reason for the restriction.

ANSWER:

9. What felonies or misdemeanors involving moral turpitude have you been convicted of (including guilty plea and nolo contendere) during your lifetime including approximate date of offense, nature of offense, name and address of court imposing judgment and approximate date court imposed judgment?

ANSWER:

10. Have you as the operator of a motor vehicle been involved in other motor vehicle collisions or accidents one (1) year before or one (1) year after the collision described in the Complaint? If so, state how many and on what dates.

ANSWER:

11. Did you plead guilty or nolo contendere to any traffic charge or other criminal offense arising out of this collision? If so, what was charge or charges to which you pleaded? Regardless of any plea, please provide the name of the county or city courthouse which disposed

of any such charges.

ANSWER:

12. Please set forth the time and place of your departure prior to the collision and your exact destination.

ANSWER:

13. Please explain the purpose or reason for your use of the motor vehicle at the time of the collision. (e.g., employment, personal errand, shopping, etc.) If you were in the scope of employment or on an errand for another person or entity, please identify that person or entity.

ANSWER:

14. Please set forth the time and place of any stops (except for traffic control devices) between commencement of the trip and the collision.

ANSWER:

15. Had you within twelve (12) hours before the collision occurred consumed or taken: a)any narcotic drug,

b) any other drug,

c) any medical remedy of any type or

d) any alcoholic or intoxicating beverage of any type?

If so, please identify the substance consumed and state the quantity of substance consumed, the time or times of consumption, and the location where the consumption took place.

ANSWER:

16. Give names, ages, locations within the vehicle and the addresses of all persons riding in the vehicle from the beginning of the trip until the collision.

ANSWER:

17. Give the names and addresses of all witnesses to the collision known to you.

ANSWER:

18. Please identify by name, home address and business address each and every person who has any knowledge of either damages or liability as they pertain to the instant case, including the identity of anyone arriving at the scene while you were present at the scene.

ANSWER:

19. Give the names and addresses of all persons to whom the Defendant or any witness has provided a statement regarding the collision described in the Plaintiff's Complaint or any injuries

or property damages arising out of this collision. To whom was the statement made and on what date? Give name and address. Was it a written statement? If not written, was it recorded?

ANSWER:

20. Give the name and address of each person known to you to whom the Plaintiff has made a statement or statements (oral or written) about the collision or about the damages sustained by the Plaintiff in the accident.

ANSWER:

21. a. At the time of the collision described in plaintiff's Complaint, was the motor vehicle you were operating covered by liability insurance? If so, give the name of the automobile liability insurance company and the amount of insurance coverage provided for bodily injury.

b. Also provide the same information about all policies in which you are a named insured or were issued to any resident relative at the time of the collision.

ANSWER:

a)

b)

22. At the time of the collision, were you covered by any umbrella policy or business policy?

If so, please give the name of the company issuing the policy, the policy number, and the limits of coverage.

ANSWER:

23. Please state, in detail, how you contend the collision occurred.

ANSWER:

24. State the name, address and qualifications of each expert whom you expect to call as an expert witness at the trial of this case. Include in your answer the subject matter of his testimony the substance of the facts and opinions to which he is expected to testify and a summary of the grounds for each such opinion. Please attach a copy of any report, including factual observations and opinions, which has been prepared by any such expert.

ANSWER:

25. State the name, address and phone number of the shop where your vehicle was repaired. If the vehicle was totaled, state this fact and attach copies of all paperwork relating to the total loss, including any estimates or appraisals.

ANSWER:

26. Please set forth whether there exist any measurements, drawings, photographs or

videotapes of plaintiff, defendant, plaintiff's vehicle, defendant's vehicle, the scene of the incident or any other matter relevant to the instant case. If the answer is yes, please identify the custodian and produce a color copy of each (Plaintiff will reimburse for the color copies).

ANSWER:

27. Please set forth the factual basis for your defenses of:

a) failure to state a claim;

b) statute of limitations;

c) assumption of risk;

d) failure to mitigate damages;

e) contributory negligence of plaintiff;

f) negligence of persons over whom defendant had no control; and

g) was otherwise negligent.

ANSWER:

_____
Defendant

STATE OF _____,
CITY/COUNTY OF _____, to wit:

SUBSCRIBED, SWORN and **ACKNOWLEDGED** to before me, the undersigned a Notary Public in and for the jurisdiction aforesaid, on this ____ day of _____, 2010.

_____
NOTARY PUBLIC

My commission expires:_____.

Respectfully Submitted,

By:_____

Law Offices of Jeremy Flachs
Jeremy Flachs, Esq.19193
7006 Little River Turnpike, Suite G
Annandale, Virginia 22003
(703) 354-7700
Counsel for Plaintiff

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff

vs

Defendant_____

PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT

TO:

A. This Request for Production of Documents is propounded to you in accordance with Rule 4:9 of the Supreme Court of Virginia. Each Request must be answered separately, fully, in writing, under oath, and a copy served upon counsel for Plaintiff within twenty-one (21) days from the date of receipt of these Requests.

B. Where the term document is used, document means, unless stated otherwise, the following: All original documents, and any non-identical copy thereof, of any kind of written or graphic matter, however, produced or reproduced, of any kind of description, whether sent or received, or neither, between the litigants or any agent, employee, servant or attorney thereof. The term document includes, but is not limited to the following: Papers, books letters, photographs, videotapes, correspondence, telegrams, cables, telex messages, memoranda, notes, notations, work papers, brochures, inter-office memoranda, notations, work sheets, drafts, notes on negotiations, intra-office communications, inter-departmental communications, transcripts, minutes of meetings, resolutions, reports, recordings of telephone and/or other conversations, or of interviews, conference meetings, affidavits, statements, opinions, court opinions, court pleadings, ledgers, leases, reports, studies, indices, analysis, evaluations contracts, sub-contracts, licenses, license agreements, statistical reports, questionnaires, answers to questionnaires, desk calendars, appointment books, diaries, telephone logs, lists, calendars, tabulations, charts, graphs, sound records, data sheets, computer tapes and disc, magnetic tapes, punch cards, computer programs, emails, computer disks, retrievable computer data, coding sheets, computer printouts, microfilm, receipts, canceled checks, and/or maintenance records.

REQUESTS

1. If you were the owner of the motor vehicle you were operating at the time of the collision, please attach a copy of the **complete policy** for:

a. the motor vehicle insurance policy for the motor vehicle you were operating on 05/17/2007 and

b. all other motor vehicles in which you were a named insured on said date.

RESPONSE:

2. If you were not the owner of said motor vehicle, please attach the **complete policy** for**:**

a. all motor vehicles you owned or were a named insured on 05/17/2007, and

b. all motor vehicles owned by a resident relative on said date.

RESPONSE:

3. Please attach the **complete policy** for all excess, business and/or umbrella policies which may provide coverage for this accident.

RESPONSE:

4. Please attach a copy of any statements, written or recorded, regarding the collision described in the plaintiff's Complaint or any injuries or property damage arising out of this collision. **This request includes any statements made by Plaintiff or Defendant.** If you or your counsel believe any such statements are privileged, please identify the statement and the

privilege relied upon.

RESPONSE:

5. Please produce or make available for inspection and copying the original of all photographs, drawings or measurements of anything or anyone at the scene of this collision or of any vehicle involved.

RESPONSE:

6. Please attach a copy of any reports, including factual observations and opinions, which have been prepared by your expert. If you or your attorney believe any such documents are privileged, please identify the document (name the author and describe the document, i.e. medical report) and the privilege relied upon.

RESPONSE:

7. Please produce or make available a copy of any medical reports, notes, intake or new patient registration sheets, medical records, x-rays, telephone logs subpoenaed by Defendant from any of Plaintiff's healthcare providers or which otherwise reflect medical treatment rendered plaintiff. (This Request is made pursuant to Virginia Code §8.01-417(B) and does not include those documents provided defendant by plaintiff.) Plaintiff will pay copying charges.

RESPONSE:

8. Please produce a copy of all estimates and appraisals of damage to each vehicle involved in the collision which are in your possession, custody or control.

RESPONSE:

9. Please attach a copy of each and every driver's license issued to

Defendant on the date of the incident, and any licenses issued thereafter through the present time.

RESPONSE:

10. Please attach a copy of the registration for the motor vehicle operated by Defendant at the time of the collision.

RESPONSE:

11. Please attach a copy of any videotape or other recording of the Plaintiff.

RESPONSE:

12. Please attach a copy of any document reflecting prepayment of a fine, or a plea of guilty or nolo contendere to any traffic charge arising out of the collision with Plaintiff.

RESPONSE:

13. Please attach a copy of any document in your possession which tends to establish that you were not at fault for this collision.

RESPONSE:

14. Please attach a copy of any document or record subpoenaed by Defendant. (This Request is made pursuant to Virginia Code §8.01-417(B) and does not include those documents provided defendant by plaintiff.) Plaintiff will reimburse the costs as required.

RESPONSE:

Respectfully Submitted,

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff,	:
v.	:
Defendant.	:

PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT

COMES NOW Plaintiff, by and through undersigned counsel, and pursuant to Virginia Rule 4:11, submits this request for admissions to Defendant.

INSTRUCTIONS

1. If objection is made, state the reasons.

2. The answer shall specifically deny the matter or set forth in detail the reasons why the Defendant cannot truthfully admit or deny the matter

3. A denial shall fairly meet the substance of the requested admission, and when good faith requires that Defendant qualify the answer or deny only a part of the matter of which an admission is requested, Defendant shall specify so much of it as is true and qualify or deny the remainder.

4. Defendant may not give lack of information or knowledge as a reason for failure to admit or deny unless Defendant states that Defendant has made reasonable inquiry and that the information known or readily obtainable by Defendant is insufficient to enable Defendant to admit or deny.

5. Even if Defendant considers that a matter of which an admission has been requested presents a genuine issue for trial, Defendant may not, on that ground alone, object to the request; Defendant may, subject to the provisions of Rule 4:12(c), deny the matter or set forth reasons why Defendant cannot admit or deny it.

ADMISSIONS

1. On July 21, 2003, Defendant was the driver of a motor vehicle involved in motor vehicle collision with Plaintiff on Chain Bridge Road (Route 123) at or near its intersection with Hunter Mill Road in Oakton, Virginia (Fairfax County).

Answer:

2. The collision occurred when Defendant struck Plaintiff from the rear.

Answer:

3. Plaintiff had been stopped for a red traffic signal when he was struck from the rear by Defendant.

Answer:

4. At the time of the collision there were no unusual or emergency conditions on the road.

Answer:

5. Plaintiff did nothing to cause or contribute to the happening of the collision.

Answer:

6. No other person not a party to this suit did anything to cause or contribute to the collision.

Answer:

7. Plaintiff was injured as a proximate result of the collision.

Answer:

8. Defendant is solely liable for causing the collision at issue in this case.

Answer:

9a. The bill or invoice of INOVA Fair Oaks Hospital for services rendered on July 22, 2003 to Plaintiff for $290.00, a copy of which was previously produced, is an authentic, accurate statement of charges actually made by those who provided the treatment, service or product to Plaintiff.

Answer:

9b. The bill or invoice of INOVA Fair Oaks Hospital for services rendered on July 22, 2003 to Plaintiff for $290.00, a copy of which was previously produced, is reasonable in amount, considering the prevailing cost of such treatment, service, or product in the community in which the services were rendered.

Answer:

9c. The bill or invoice of INOVA Fair Oaks Hospital for services rendered on July 22, 2003 to Plaintiff for $290.00, a copy of which was previously produced, was medically necessary to cure Plaintiff, ameliorate Plaintiff's injuries or relieve Plaintiff's suffering.

Answer:

9d. The bill or invoice of INOVA Fair Oaks Hospital for services rendered on July 22, 2003 to Plaintiff for $290.00, a copy of which was previously produced, was made necessary by the incident which is the subject of this action.

Answer:

9e. The medical records of INOVA Fair Oaks Hospital for services rendered on July 22, 2003 to Plaintiff a copy of which were previously produced, are authentic, accurate representations of the medical records of Plaintiff.

Answer:

Respectfully submitted,

Jeremy Flachs, #19193
LAW OFFICES OF JEREMY FLACHS
7006 Little River Turnpike, Suite G
Annandale, VA 22003-3218
703.354.7700
703.941.3291 (fax)

Counsel for Plaintiff

* * *

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff	:	
v.	:	Case No.
Defendants	:	

PLAINTIFF'S NOTICE OF DEPOSITIONS OF DRIVER AND CORPORATE REPRESENTATIVE

PLEASE TAKE NOTICE that the Plaintiff, by counsel, will take the following depositions **on March 3, 2010 starting at 11:30 AM** and continuing until they are concluded.

1. Defendant : 11:30 AM

2. Designated Representative of Corporate Defendant : 12:30 PM

Said deposition will take place at the Law Offices of Jeremy Flachs, Esq., Evergreen Office Park, 7006 Little River Turnpike, Suite G, Annandale, Virginia 22003 before an authorized court reporter and notary public.

The deponents **and their counsel** are directed to bring with them all documents relating to this cause, including but not limited to:

a. original photographs of the scene of the collision and/or the vehicles involved in the collision;

b. any appraisals or estimates of repair for any vehicle involved in the collision;

c. A copy of Defendant's registration for the vehicle involved in the collision with Plaintiff;

d. If not previously produced, a copy of the declaration pages for any liability or umbrella insurance policies covering defendant at the time of the collision with Plaintiff; and

e. Defendant's driver's license.

The **Designated Representative of Corporate Defendant** shall be prepared to testify about the following matters:

a. The collision of May 22, 2007 involving the vehicles operated by Plaintiff and Defendant Driver, including the reason for Defendant Driver's use of a car on the day of the collision, observations at the scene, statements made by any party or witness, the identify of any witnesses and any photographs of any person or thing involved in the collision;

b. The employment relationship between Corporate Defendant and Defendant Driver, including but not limited to the manner in which Defendant Driver was hired and compensated, tax records pertaining to any compensation paid to Defendant Driver, Defendant Driver's employment duties, work schedule and hours, and supervision of Defendant Driver;

c. Liability insurance coverage, including any umbrella or business policies providing coverage for the car driver by Defendant Driver or otherwise for the Corporate Defendant's business as a result of the collision occurring on 5/22/07;

d. The precise nature of the legal entity (e.g. corporation, sole proprietorship, partnership, etc.) which employed Defendant Driver on 5/22/07 and which operated as the Corporate Defendant. Also provide documentation of the legal structure of this entity;

e. The nature of the business (both in 2007 and at present) of Corporate Defendant, including but not limited to the products or services provided its customers, the number of employees and their duties, whether any vehicles were used to further the business, etc; and

f. The extent of Defendant Driver's prior driving experience and any investigation into his competence to operate a vehicle.

Said Designated Representative should produce at deposition the following documents:

1. all insurance policies requested above;
2. all documents relating to the legal structure of Corporate Defendant on 5/22/07, including tax and legal records confirming the legal nature of the entity operating as Corporate Defendant on 5/22/07;
3. all photographs of any person or thing involved in or relating to the collision; and
4. all documents which explain the employment relationship between Defendant Driver and Corporate Defendant.

Respectfully submitted,
Plaintiff

By:_____

Law Offices of Jeremy Flachs
Jeremy Flachs, Esq 19193
7006 Little River Turnpike #G
Annandale, Virginia 22003
703-354-7700 phone

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

		:
		:
	Plaintiff,	:
vs.		:
		:
	Defendant	:

PLAINTIFF'S NOTICE AND MOTIONS IN LIMINE REGARDING LACK OF VISIBLE PROPERTY DAMAGE AND MINOR IMPACT PHOTOGRAPHS

PLEASE TAKE NOTICE that on _____ at 10:00 a.m., or as soon thereafter as counsel may be heard, the Plaintiff, by counsel, will move this Court for hearing on the attached Motions in Limine.

Respectfully Submitted,

By: _____

Jeremy Flachs
Virginia State Bar No. 19193
7006 Little River Turnpike, Suite G
Annandale, Virginia 22003
(703) 354-7700
Attorneys for Plaintiff

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff,	:
	:
Defendants.	:

PLAINTIFF'S MOTIONS IN LIMINE REGARDING LACK OF VISIBLE PROPERTY DAMAGE AND MINOR IMPACT PHOTOGRAPHS

COMES NOW, Plaintiff, by counsel, and hereby moves this Court to grant her Motion in Limine.

Evidence and Argument Regarding Lack of Significant Property Damage and Lack of Significant Injury to the other Occupants of the Cars in the Accident Must be Excluded.

At the trial of this matter, Defendant should be prevented from arguing or offering any defense based on the proposition that Plaintiff could not have been seriously injured in this accident due to either the minor damage to the parties' automobiles or the limited personal injury of the other occupants of the automobiles in the accident.

Due to the relatively minor property damage to the parties' automobiles, and the fact that none of the other passengers in the automobiles were seriously injured, counsel for the defense will likely attempt to argue that plaintiff could not have been seriously injured in the accident. Such argument is improper in the absence of expert testimony.

Expert opinion is allowed when the witness offered expert has some particular knowledge or experience, not common to the world, which assists the fact finder in resolving an issue. *Bradley v. Poole*, 187 Va. 432 (1948). It follows then, that a lay witness must testify to facts, and cannot give opinions or conclusions. *Hot Springs Lumber & Mfg. Co. V. Revercomb,* 110 Va. 240

(1909). Correlating property damage to personal injury necessarily requires some particular knowledge or experience. None of defendant's expert designations indicate that an expert will correlate property damage to personal injury. Therefore, defendant cannot offer an argument or make a defense correlating the two at trial. Nor can he admit the photographs of the vehicles for such purpose.[1]

The Supreme Court of Delaware recently held, that in the absence of expert testimony, a party may not directly argue that there exists a correlation between the degree of personal injuries and the damage to the automobiles. *Davis v. Maute*, 770 A.2d 36, 40 (2001). *Davis* involved a low impact automobile accident and claims of substantial personal injury. *Davis* at 40. Defendant did not offer expert testimony to correlate the property damage to personal injury. *Davis* at 40. At trial, defense counsel argued that the accident was a "fender bender" and offered photographs of the parties' vehicles for the consideration of the jury. *Davis* at 40-41. The court held that as defense counsel could not correlate property damage to personal injury without expert testimony, both his characterization of the accident as a "fender bender" and his offer of the photographs for admission were improper. *Davis* at 41-42. The court held that the characterization and the offer were an attempt to argue by implication that which counsel could not argue directly. *Davis* at 41-42.

The facts of the present matter are analogous to those in Davis. Plaintiff claims a substantial injury following an accident with relatively minor property damage. Defendant cannot

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[1] The photographs of defendant's car shows little visible damage. Yet an estimate of $1,125.17 (attached hereto, Exhibit 1) was generated to repair the car. If the photos are admitted, the repair estimate should be admitted.

argue that the accident was a minor fender bender and offer the photographs in an attempt to prove it. In the de bene esse deposition of Plaintiff's physician, a defense expert, Dr. Bruno acknowledged that a number of factors beyond property damage are important to gauge the severity of an accident, including but not limited to: (1) the design of the bumper on each car, (2) the ability of the bumper to absorb the impact, (3) the type of headrest and support provided the upper torso by the seat, (4) the position of the body at impact, and (5) the extent to which the injured person was prepared for the impact.[2] The same analysis applies to any argument which attempts to correlate the injuries of others in the vehicles to plaintiff's injuries. Defendant's likely argument, that plaintiff could not have been seriously hurt if no one else was badly hurt, inherently requires an expert opinion.[3] However, none of defendant's expert designations indicate that defendant's experts will offer such an opinion. Consequently, the argument would be improper.

Therefore, defendant should be prevented from making any argument or offering any defense correlating plaintiff's injuries with either the property damage or the injuries of the other occupants of the automobiles, or otherwise referring to the collision as "minor" or a "fender bender."

But See: *Maybaum v Rakita,* 2002 Ohio 5338; 2002 Ohio App. LEXIS 5359 (2002) (unpublished) The damage to each vehicle was minimal, with the driver's expert testifying that the vehicle damage would have been consistent with a barrier impact of approximately two miles per

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[2] Significantly, one of the defense doctors also acknowledged that he had no information on any of these aspects of the accident and had not used them in developing his opinions.

[3] This is particularly relevant where plaintiff had a pre-existing degenerative condition which made her susceptible to injury.

hour. The appellate court found that the extent of damage to a vehicle was often an excellent indicator of the extent of injuries suffered. The admissibility of the photographs was within the sound discretion of the trial court. There was no concern that the jury could have been unduly prejudiced by the photographs, because there was ample expert testimony proffered by both parties.

WHEREFORE, Plaintiff respectfully requests that her Motions in Limine be granted, and that Defendant not be allowed, through the Court or otherwise, to give or make the arguments as outlined above.

Respectfully Submitted,

By: _____

Jeremy Flachs
Virginia State Bar No. 19193
7006 Little River Turnpike, Suite G
Annandale, Virginia 22003
(703) 354-7700

Attorneys for Plaintiff

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff	:	
v.	:	Case No.
Defendants	:	

PLAINTIFF'S MOTION TO AMEND *AD DAMNUM* CLAUSE

COMES NOW the plaintiff, by counsel, and moves this Court for leave to amend the complaint to increase the *ad damnum* from $400,000.00 to $800,000.00, and to add an allegation of willful and wanton negligence. Pursuant to Virginia Supreme Court Rule 1:8 and §8.01-377, leave to amend should be liberally granted in furtherance of the ends of justice.

THE AD DAMNUM NEEDS TO BE INCREASED IF PLAINTIFF IS TO BE FULLY COMPENSATED FOR HIS INJURIES

Plaintiff's treating health care providers have disclosed opinions that Plaintiff's back injuries are permanent, that he will require either surgery or a series of epidural injections every year for life, and that his future medical expenses will exceed $250,000.00. Plaintiff's rehabilitation counselor and life care planner has disclosed an opinion that Plaintiff's expected future wage loss exceeds $. Plaintiff's treating physicians

have expressed opinions that his past medical expenses of over $48,000.00 are reasonable and necessary expenses. Plaintiff is 31 years old and has a life expectancy of an additional 45.6 years. Virginia Code §8.01-419. The current *ad damnum* of $400,000.00 is clearly insufficient to fully compensate Plaintiff for his injuries.

The Virginia Supreme Court has held that:

> When deciding whether to grant a motion to amend a motion for judgment to increase an *ad damnum* clause, a circuit court must consider whether the defendant will be prejudiced and whether such prejudice will affect the defendant's ability to have a fair trial. The circuit court must also consider the plaintiff's right to be compensated fully for any damages caused by the defendant's acts or omissions.

Peterson v. Castano, 260 Va. 299, 303, 534 S.E.2d 736, 738 (2000). Given the facts of this case, the Defendants do not have good grounds to demonstrate prejudice. Trial is not until October 4, 2010. The basis for the amendment has already been disclosed to Defendants through Plaintiff's expert disclosures, which were filed on February 3, 2010.

The Virginia Supreme Court has previously held that it is not an abuse of discretion to grant such an amendment on the eve of trial. See *Bell v. Kirby*, 226 Va. 641, 646, 311 S.E.2d 799, 802 (1984) (holding no abuse of discretion to grant amendment to double *ad damnum* two days before trial). Certainly there is no abuse of discretion to grant such an amendment more than four months before trial. For these reasons, the motion should be granted and the *ad damnum* increased to $800,000.00.

WHEREFORE these premises considered, Plaintiff requests that this Court grant

the motion to amend, increase the *ad damnum*, and deem the attached proposed amended complaint to be filed as of the date of entry of the order granting the motion.

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff,	:	
v.	:	Case Number:
Defendant.	:	

MOTION TO COMPEL RECORDED STATEMENT OF DEFENDANT

Comes now the Plaintiff, by counsel, and in support of her Motion to Compel refers the Court to the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

On September 1, 2006, Plaintiff was struck by a minivan driven by the Defendant.

In discovery, Plaintiff requested that Defendant produce any written or recorded statements of the parties (Plaintiff's Request for Production of Documents #3). The Defendant provided a recorded statement to her insurance company on September 15, 2006, fourteen days after the accident. The Defendant has objected to producing the transcript of that statement.

I DEFENDANT'S RECORDED STATEMENT WAS NOT OBTAINED IN ANTICIPATION OF LITIGATION

Under Rule 4:1(b)(1), the statement is discoverable unless a privilege applies. The Defendant, as the party asserting the privilege, has the burden of establishing that privilege. *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943).

The majority of Virginia Circuit Courts have found that recorded statements provided by insureds to their insurance carriers are not protected as having been prepared in anticipation of

litigation.[45] In *Overton v. Dise*, 35 Va. Cir. 177 (Fairfax, 1994), Judge Wooldridge held that a statement taken day after the accident was taken in the ordinary course of business, and not subject to privilege. In *Estabrook v. Conley*, 42 Va. Cir. 512 (Rockingham, 1997), Judge McGrath held that the involvement of counsel was a prerequisite for the privilege to apply. "If the matter was not significant enough to involve counsel with an eye to preparing a litigation defense, it is not in this Court's view entitled to the protection afforded by Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia." 42 Va. Cir. at 513. See also *McKinnon v. Doman*, 72 Va. Cir. 547 (Norfolk, 2007); *Wood v. Barnhill*, 52 Va. Cir. 274 (Charlottesville, 2000); *Thompson v. Winn Dixie Raleigh, Inc.*, 49 Va. Cir. 115, 116 (Chesterfield, 1999) ("any statement taken prior to the date defense counsel was retained is discoverable").

While the Virginia Supreme Court has not addressed this specific issue, its ruling in *Riverside Hospital, Inc. v. Johnson*, 272 Va. 518 (2006) is instructive. In *Riverside*, the Court was asked to extend privilege to a hospital incident report. In declining to extend the privilege, the Court remarked:

> Factual patient care incident information that does not contain or reflect any committee discussion or action by the committee reviewing the information is not the type of information that must "necessarily be confidential" in order to allow participation in the peer or quality assurance review process. 272 Va. at 533. Likewise, a

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[4] See *Lopez v. Woolever*, 62 Va. Cir. 198, 201 (Fairfax, 2003) and discussion therein. Note however that Judge Alden took the minority view of applying a case-by-case analysis.

[5] A minority use a case-by-case analysis. See *McCullough v. Standard Pressing Machines Co.*, 39 Va. Cir. 191 (Fairfax, 1996) (J. Vieregg) (holding that if serious injuries are involved, then the insurance company is as a consequence necessarily anticipating litigation, and the privilege applies). See also *Veney v. Duke*, 69 Va. Cir. 209 (Fairfax, 2005) (J. Ney) (holding that all statements made by insureds to their insurance carriers were privileged as being taken in anticipation of litigation). In effect, Judge Ney equated the insured/carrier relationship with the attorney/client, doctor/patient, and penitent/priest relationships, thus going well beyond the minority view.

recorded factual statement provided by a driver to her insurance company shortly after an accident does not contain any strategic information that should be kept confidential. For these reasons the motion to compel should be granted.

II PLAINTIFF HAS A SUBSTANTIAL NEED FOR THE STATEMENT

Even if the recorded statement should be deemed to have been taken in anticipation of litigation, it is still discoverable under Rule 4:1(b)(3). Plaintiff has a substantial need for the statement and is unable to obtain the information contained therein without undue hardship.

Defendant has raised contributory negligence as a defense. In her answers to interrogatories, Defendant states:

> At the time of the accident I was backing out of a parking space. The plaintiff should have kept a proper lookout and should have noticed that I was backing out of my space and should have avoided walking into the path of my vehicle.

At her deposition of January 6, 2009, Defendant testified, on page 53, line 16, as follows:

> Q. Whose fault is it, Ms. Green?
> A. I can't respond to that.
> Q. Why?
> A. Because I have no answer to that.

She later testified on page 62, line 8 as follows:

> Q. But my question is do you have any evidence to suggest Ms. Moss didn't keep a proper lookout?
> A. I don't have evidence one way or the other.

In *Larson v. McGuire*, 42 Va. Cir. 40 (Loudoun, 1997), the Court was faced with a similar situation where the Defendant was relying on the defense of contributory negligence. In ruling that the Plaintiff met her burden under Rule 4:1(b)(3) and that the recorded statement provided by the Defendant to her insurer was discoverable, Judge Horne stated:

> These statements would have been taken shortly after the accident and would serve as a basis for understanding defendant's claim of contributory negligence, as that claim is now clouded by deposition testimony. In addition, it is important that the parties be able to fully explore inconsistencies and ambiguities in the testimony of the opposing party during the discovery process. Not only may such statements be used to prove an element of a party's claim but may also serve as a means of impeachment.

42 Va. Cir. at 45.

In *Massenburg v. Hawkins*, 70 Va. Cir. 13 (Greensville, 2005), the Court likewise found the recorded statement was discoverable. As the Court stated:

> Courts are unanimous in finding that a contemporaneous statement provides good cause for allowing discovery. This value is particularly evident in cases where the "witnesses' statements [are] approximately contemporaneous with the accident . . . [and] opposing counsel had no opportunity to question the witnesses until weeks or months later."

70 Va. Cir. at 16, quoting *Guilford Nat'l Bank v. Southern Ry. Co.*, 297 F.2d 921, 926 (4th Cir. 1962).

Defendant's statement, taken a mere fourteen days after the accident, possesses unique qualities that cannot be replicated by other means. For this reason, the motion to compel should be granted.

WHEREFORE these premises considered, Plaintiff requests that this Court grant the motion to compel and direct the Defendant to produce the transcript of the recorded statement provided by the Defendant to her insurer.

JEREMY FLACHS
LICENSED IN VA DC & PA

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1620 L STREET, N.W., SUITE 610
WASHINGTON, D.C. 20036
(202) 466-5272

Please Reply By Mail To Annandale Address

SETTLEMENT DEMAND CONTAINING PUNITIVE DAMAGE CLAIM
Date

Nationwide Insurance
7545 Midlothian Turnpike
Richmond, VA 23225

Re: My Client:
Your Insured:
Claim Number:
Date of Loss:

Dear Claims Adjuster:

I. Client Name

Enclosed please find the following exhibits submitted in support of this demand for client.

01	Fairfax County Fire & Rescue	$ 322.50
02	INOVA Mount Vernon Hospital	$ 1,161.55
03	Parker's Lane Emergency Physicians	$ 341.00
04	Association of Alexandria Radiologists	$ 132.00
05	Kaiser Permanente	$ 2,258.00
06a	Prescription - Nabumetone	$ 15.00
06b	Prescription - Methocarbamol	$ 15.00

06c	Prescription - Hydrocodone	$ 11.30

Total Medicals **$ 4,256.35**

Wage Loss: Attached are disability slips from Kaiser confirming that Client was disabled until June 30, 2008, a period of 9 days.

A. Inova Fair Oaks Hospital

Attached is a completed wage loss form documenting a loss of 5 days x 12 hrs x $18.39/hr.....$ 1,103.40

B. Nuture Care

Attached is a completed wage loss form documenting that she lost her assignment due to her injury. She was averaging 20 hrs/wk and earning $17.00/hr. Her wage loss for only two weeks is 40hrs x $17.00/hr.....$ 680.00

Total Wage Loss **$ 1,703.40**

(**Practice Pointer:** When possible, include photographs depicting significant property damage. If nothing dramatic appears from the photographs, do not include them with the demand.)

Client was injured when your insured rear-ended her car which was stopped at red light n southbound Richmond Highway. Following the impact, Client sat in her car with her hands on her face and leaned on the steering wheel. Following the collision, she experienced neck pain. An ambulance was called which transported her to Fairfax Hospital. She was carried into the hospital on a stretcher and with a neck collar. At the emergency room she was treated for neck injury. Her pain was 8/10 as recorded by the nurse, and she was sent for an x-ray. While in the emergency room, she was given pain relief medication, and upon discharge she was given prescriptions for narcotic pain relievers.

Defendant was convicted of Driving While Intoxicated and had a Blood Alcohol Content of .33, which is more than 4 x the legal limit. This was his second conviction for DWI within 5 years. Driving while drunk with a BAC over .15 permits Client to recover punitive damages. I have set forth the statute below.

§ 8.01-44.5. Exemplary damages for persons injured by intoxicated drivers

In any action for personal injury or death arising from the operation of a motor vehicle, engine or train, the finder of fact may, in its discretion, award exemplary damages to the plaintiff if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others.

A defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

Client came under the care of her physicians and therapists at Kaiser. Her first visit to Kaiser was June 23, 2008 at which time she was in considerable pain and was diagnosed with **muscle spasms in her neck and back.** She was prescribed Relafen, Vicodin and Robaxin and sent for physical therapy. The records reflect 10 physical therapy visits to treat the neck and back pain. The first therapy visit was June 28, 2008 at which time client was experiencing neck and back pain, **which affected her turning her head, sitting or lying down, and sleeping.**

The severe pain continued, and Client returned to her physician on June 29, 2008. At that time she was also experiencing headache, and she was unable to work due to the level of pain. She was given two additional prescriptions for pain relief (Naproxen and Cyclobenzaprene).

She continued with her physical therapy and at her visit on July 15, 2008, the therapist recorded improved neck and back pain (decrease from 7/10 to 5/10). Her last therapy visit was 8/12/08 at which time she was discharged to continue with a home exercise program. Client visited her doctor on September 5., 2008. It was noted that her **muscle spasms were gradually (albeit slowly) improving and there were days when the symptoms worsened. She was discharged with instructions to continue taking medication and apply heat.**

Considering the nature and extent of injury, medical expense and wage loss and drunk driving by your insured, I will recommend a settlement of **$ 65,000.00** .

Very truly yours,

encls.

Jeremy Flachs

III. DAMAGES

Compensatory Damages

Compensatory damages are designed to pay the injured party for his losses and make him whole to the extent money can do so. These damages may include property damage, medical bills, loss of earnings, bodily injury and pain and suffering. The value of your claim will depend upon the seriousness of injury, the length of treatment, the past medical expenses, the past wage loss and any future injury, wage loss or medical expenses.

The claim for compensatory damages are summarized in Virginia Model Jury Instruction 9.000.

General Personal Injury and Property Damage

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;

(2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future];

(3) any disfigurement or deformity and any associated humiliation or embarrassment;

(4) any inconvenience caused in the past [and any that probably will be caused in the future];

(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];

(6) any earnings he lost because he was unable to work at his calling;

(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;

(8) any property damage he sustained.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

Note that the model jury instruction makes provisions for past and future losses, including wages and medical bills.

Punitive Damages

Compensatory damages are to be contrasted with punitive damages. While not the subject of this seminar, a brief discussion of punitive damages is necessary to understand how such damages differ from compensatory damages. Punitive damages are awarded to punish the wrongdoer for egregious conduct (intentional or "willful or wanton") and to deter others from such conduct. Virginia Code § 8.01-38.1 provides that the jury shall determine the amount of the punitive award, but the cap on any punitive damage recovery is $350,000.00. Nor are punitive damages to be awarded when the defendant is deceased, as there is no purpose to be served under such circumstances. Punitive damages are most frequently encountered by the personal injury practitioner in drunk driving cases. Virginia Code § 8.01-44.5 authorizes a punitive damages claim if the greater weight of the evidence establishes that the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others. The defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard to the rights or others, and punitive damages may be awarded, when the evidence proves that (i) the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume when the incident causing the injury occurred, (ii) at the time he was, drinking alcohol, he knew that he was going to operate a motor vehicle, and (iii) the defendant's intoxication was a proximate cause of the injury to the plaintiff.

The jury must state separately in its verdict the amount awarded as compensatory damages and amount awarded as punitive damages.

A. BODILY INJURY (NATURE AND EXTENT)

The single most significant component of compensatory damages will usually be the nature and extend of the bodily injury. This will usually be determined from the medical records.

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.

The claims adjusters will have the medical records reviewed by someone with a medical background. 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.

You must also ask the treating physicians if your client's injuries are probably

permanent. If it is "more likely than not" (50.1% likely) that the injury is permanent, the physician should write a report describing the nature and extent of the permanent injury.

Be sure to look for errors in the medical records. Unfortunately, it is not uncommon for the medical history to omit any reference to the incident causing injury, to include an incorrect date of injury, or to refer to the wrong part of the body as being injured, such as referring to the client's right arm when it was the he left arm that was injured.

Practice Pointer: Under HIPAA, 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.

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 ask at the initial interview to what extent the client has already had treatment and made prior claims which might 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.

The client may testify to the causal connection between an automobile accident and injury even when medical testimony fails to establish causal connection expressly. Todt v. Shaw, 223 Va. 123; 286 S.E.2d 211 (1982).

B. MEDICAL BILLS (PAST AND FUTURE)

As stated above, medical bills are a component of the compensatory damages claim in any personal injury case. The bills represent an out of pocket expense which should be reimbursed by the defendant's insurance company. There is no provision in the law which requires the liability insurer to pay the medical bills as they are incurred. The bills will be totaled in a "demand letter" when the treatment is concluded. It is also

critical that the attorney assess the need for future treatment and secure an estimate from the treating physician as to the lifetime costs of the future medical bills. Many physicians will need to be educated about the need to estimate the future medical expenses. You must advise the physician that so long as he can state that the future medical expenses are "more likely than not" or "50.1% probable", the testimony is admissible.

Practice Pointer: Do not expect the defendant's liability insurer to pay for medical bills one by one as they are incurred and submitted. While occasionally a claims adjuster will offer an unrepresented (pro se) party a few thousand dollars for the compensatory damages and agree to pay another few thousand dollars for future medical bills, this is a very bad idea and unless the injuries are very minor, any such offer should be rejected. This presents the problem of what to do if the client does not have health insurance or significant medical expense coverage through his own motor vehicle insurer to pay his medical bills as they are incurred. First, try to find a doctor who will accept the case on an "Assignment" which results in the bills being paid from the settlement or verdict. It is becoming more difficult to find physicians willing to take cases without upfront payment, and the attorney accepting such cases must be willing to devote the necessary time to find proper treaters for the injured client.

The method of calculating a settlement by multiplying the medical bills by 3 are long gone. You must understand the injury to interpret the significance of the medical bills. For example, a single trip to the emergency room with several scans and tests and an overnight stay for observation can run up a medical bill of nearly $10,000.00. But if all the tests and scans are negative and if the client is discharged with no significant injury, the liability insurer will argue the medical bills do not represent much beyond dollar for dollar reimbursement. This analysis of case value by the insurance company is self-serving and must be countered by pointing out that human beings have fears and emotions for which compensation must be provided. On the other hand, a rib fracture is a very painful injury which can cause pain every time you exert yourself, even when you take a deep breath, cough or sneeze. Unfortunately, once diagnosed, there is little to offer in the way of treatment beyond prescription pain relief medication. Therefore, this very painful injury will have few medical bills to present in settlement. In both cases, you can counter the claims adjuster's contentions, but only if you are aware of what is contained in the medical records when arguing the value of the case.

C. LOST WAGES (PAST AND FUTURE)

It is recommended that you advise your client at the initial interview to keep a log

of the dates and hour missed from work due his injuries and medical visits. Unfortunately, visits to the attorneys office will not be reimbursed. A simple wage loss form can be provided the client, with a cover letter from you to the employer. It is important as well that the client understand the need to have his physician write disability slips for the time during which the client is disable from employment. The liability insurer will want to see that the treating doctor took the client out of work during the days the client is asking for reimbursement. The insurer will also want to see a signed wage loss form from the employer confirming the hours, rate of pay and days out of work. It is now very common for claims representatives to make telephone calls to verify the time out of work with the employer before adding in the lost wages.

At the time you write your settlement demand letter, you must also determine from the treating physician if he anticipates the client will continue to miss more time from work. This could be due to future medical care or result from an inability to return to his former employment due to permanent injuries resulting in restrictions on work activities. These opinions must be secured in writing and discussed with the client.

You must then calculate the amount of the future wage loss. If the future losses do not involve a loss of employment or change which causes a decrease in salary, you should be able to calculate the future wage loss yourself. If the injury will result in a need to change employment or results in a demotion with loss of salary or earnings, you may need to retain a vocational rehabilitation expert to compute the future losses.

PRACTICE POINTER: It is not uncommon for the treating doctors to be misinformed about the client's employment and the nature of any physical activity which may be affected by the injuries. Be sure you know from your client the full nature and extent of the employment activities and how the injury could affect his employment.

If the wage loss is substantial, the claims adjusters may ask for the client's tax returns. This is an issue for many self employed clients whose tax returns tend to under report income. Conventional wisdom has it that jurors will not appreciate a wage claim which is not supported by tax returns. Clients should be advised that it will be difficult to recover lost income which as not been reported to the IRS.

Illegal immigrants are legally entitled to make a personal injury claim and their legality or immigration status is irrelevant. If filing suit, you may attempt to make a wage claim for past wages even if the client is an undocumented alien. See: *Peterson v Neme*, 222 Va. 477, 281 S.E. 2nd 869 (1981). In *Peterson*, a 1981 decision, there was evidence the injured housekeeper was illegal, but such status was declared both irrelevant and

unduly prejudicial. *Peterson* noted the penalties for hiring an undocumented alien were civil and further held that excluding the past wage claim would not serve as a deterrent. But in 2001, the Unites States Supreme Court decided *Hoffman Plastic Compounds, Inc.v. National Labor Relations Board,* 535 U.S. 137 at 148-149; 122 S. Ct. 1275; 152 L. Ed. 2d 271 (March 27, 2002). The ruling held that the NLRB cannot award back pay to an undocumented alien because it is impossible for an undocumented alien to obtain employment in the United States without either the worker or employer directly contravening explicit congressional policies. The U.S. Supreme Court held that either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of Congress' enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its statutory obligations. In other words, when an undocumented alien is hired, someone is breaking the law, and Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. See: 18 USC § 1546. The Virginia Supreme Court has not yet ruled on how *Hoffman* and the Immigration Act of 1986 may affect its ruling in *Peterson.*

PRACTICE POINTER: The *Immigration Reform and Control Act of 1986* has expressly made it criminally punishable for an alien to obtain employment with false documents. Given that the *Peterson* decision predates this federal law, and also specifically deferred ruling on the propriety of a future wage loss by an undocumented alien, it is advisable to drop any claim for future wage losses when filing suit. You will also want to file a motion in limine regarding a past wage claim to ensure the trial court will exclude evidence of the Plaintiff's status as an undocumented alien.

D. LOSS OF CONSORTIUM

Virginia does not recognize a loss of consortium claim for either spouse. This claim existed for the husband under English statutory law and was designed to compensate the husband for the loss of family and household services due to injuries to his wife. A viable claim for loss of consortium in Virginia will require an act of the legislature to repeal Va. Code Ann. § 55-36 (2010) which holds:

> [I]n an action by a married woman to recover for a personal injury inflicted on her she may recover the entire damage sustained including the personal injury and expenses arising out of the injury, whether chargeable to her or her husband, notwithstanding the husband may be entitled to the benefit of her services about domestic affairs and consortium...and no action for such injury, expenses or loss of services or consortium shall be maintained by the husband.

Likewise, there is no existing right of action for loss of consortium which can be maintained by the wife for injuries inflicted upon the husband. *Carey v. Foster*, 221 F. Supp. 185 (E.D. Va. 1963), aff'd, 345 F.2d 772 (4th Cir. 1965).

E. PAIN AND SUFFERING (PAST AND FUTURE)

1. Pain & Suffering Awards Require the Attorney To Know The Case

Today, many claims adjusters are offering only the medical bills, with perhaps a few hundred dollars for pain and suffering, even when the medical bills total thousands of dollars. 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.

The first step in evaluating pain and suffering is to 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 to determine if the client reported injury at the accident scene. 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.

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.

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 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 his 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.

Be sure to ask of the injuries affected any holidays, birthdays, or special events. For example, an injury occurring before Christmas can disrupt long held plans for holiday trips, meals and events. Do not depend on the client to connect the disruption of these events to the injury claim. You must ferret out this aspect of the injury claim.

F. DETERMINING COMPENSATORY 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 property 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 truck, 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 a 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 form 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).

...[T]he 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 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 thorough review with the client and his witnesses, both lay and expert, can usually unearth facts which support credible arguments that the client really did suffer and really was injured. The jurors selected for your trial may come into the courthouse with the

feeling that most plaintiffs are uninjured and are merely milking the insurance companies in trivial cases.