INITIAL FILING AND DISCOVERY, EXPERTS AND EVIDENCE

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AUTO INJURY LITIGATION FROM START TO FINISH

III. INITIAL FILING AND DISCOVERY, EXPERTS AND EVIDENCE

A. FILING PROCEDURE AND CASE SCHEDULING

1. Complaint in Circuit Court - General Rules

- Generally for an amount greater than $25,000.00.

Rules for Drafting Complaint

- Complaint need only comply with notice pleading requirements.
- Need not be particularly detailed.
- Rule 1:4(d): state the facts in numbered paragraph

- Rule 1:4(d): sufficient if it clearly informs the opposite party of the true nature of the claim.
- Rule 1:4(j): brevity is encouraged.
- A simple statement, in numbered paragraphs, of the essential facts is sufficient.

Signing and Formatting Complaint

- Rule 1:4(l): include office address, email, telephone and fax numbers.
- Rule 1:4(c). Counsel must sign the pleading.
- Rule 1:4(h) The clerk shall note and attest the filing date on every pleading.
- A date stamp is proof you beat the statute of limitations.
- Rules 1:16 and 1:17: filing requirements for paper filing and electronic filings.
- Only courts in No Va accepting electronic filings is Arlington County.
- All typed material shall be double spaced except for quotations.
- No paper shall be refused for failure to comply with the provisions of this Rule.

Taking the Complaint to Clerk of Court

- Rule 3:2: Do not forget the filing fee and service fee if using Sheriff.
- Rule 3:2: A civil action is commenced by filing a complaint in the clerk's office.
- Rule 3:2: Upon filing of the pleading, the action is then instituted and pending as to all parties defendant thereto.

Caption of Complaint

- Rule 3:2(b): The complaint shall be captioned.
- Caption shall include the name of the court and the full style of the action.
- Style means include the names of all the parties.
- Provide the address or other data after the name of each defendant (*Va. Code § 8.01-290*).

PRACTICE POINTER:

Rule 3:2(c)(ii): If you are asking for money damages, be sure to include the amount requested in the *ad damnum* clause of the Complaint. You will be limited to the amount claimed in *ad damnum* clause of your complaint. Unlike federal court, you cannot amend the complaint to increase the amount sued for after the judgment or verdict.

Attached to Appendix as Exhibit A is a sample Complaint.

Rule 1:20. Scheduling Civil Cases for Trial.

Circuit courts shall adopt one the following procedures for setting cases for trial.

- Counsel may agree to a trial date and call or email court to confirm.
- Counsel may agree to a trial date as a part of a Pretrial Scheduling Order.
- At the request of counsel, court may ask counsel to appear to set a trial date.
- Court may set civil cases for trial at a docket call held on a term day.
- Circuit Court will schedule at least 4 term days per year (*Va. Code § 17.1-517*)
- Executive Secretary shall make these procedures accessible on the Internet.
- Clerk of each district and circuit court shall make their respective procedures available in the office of the clerk of that court.

Rule 1:18 Pretrial Scheduling Order

- Governs deadlines.
- This Order records the trial dates + number of trial days.
- Includes filing deadlines for expert opinions, witness & exhibit lists, etc.
- A sample Uniform Scheduling Order can be found in the rules or with chambers.

PRACTICE POINTER:

The Uniform Pretrial Scheduling Order requires that written discovery be completed no later than 30 days before trial. This means that interrogatories, requests for production of documents and requests for admissions must all be served no later than 51 days prior to trial, which falls about one week after the defendants experts' opinions are filed**.**

2. **Warrant in Debt or Complaint in General District Court** (GDC)

Filing in GDC

- If claim does not exceed $25,000, file in the general district court.
- GDC has exclusive jurisdiction over any claim of $4,500.00 or less.
- Chances of a reasonable recovery in a smaller accident may be better in GDC.
- Claim will be heard by a judge, not a jury.
- You may file a warrant in debt, which is a pre-printed form.
- The warrant in debt will not allow space for more than a simple line entry.
- Expect a request by the defendant for a "bill of particulars."
- Bill of Particulars lays out more specifically the facts of the accident.

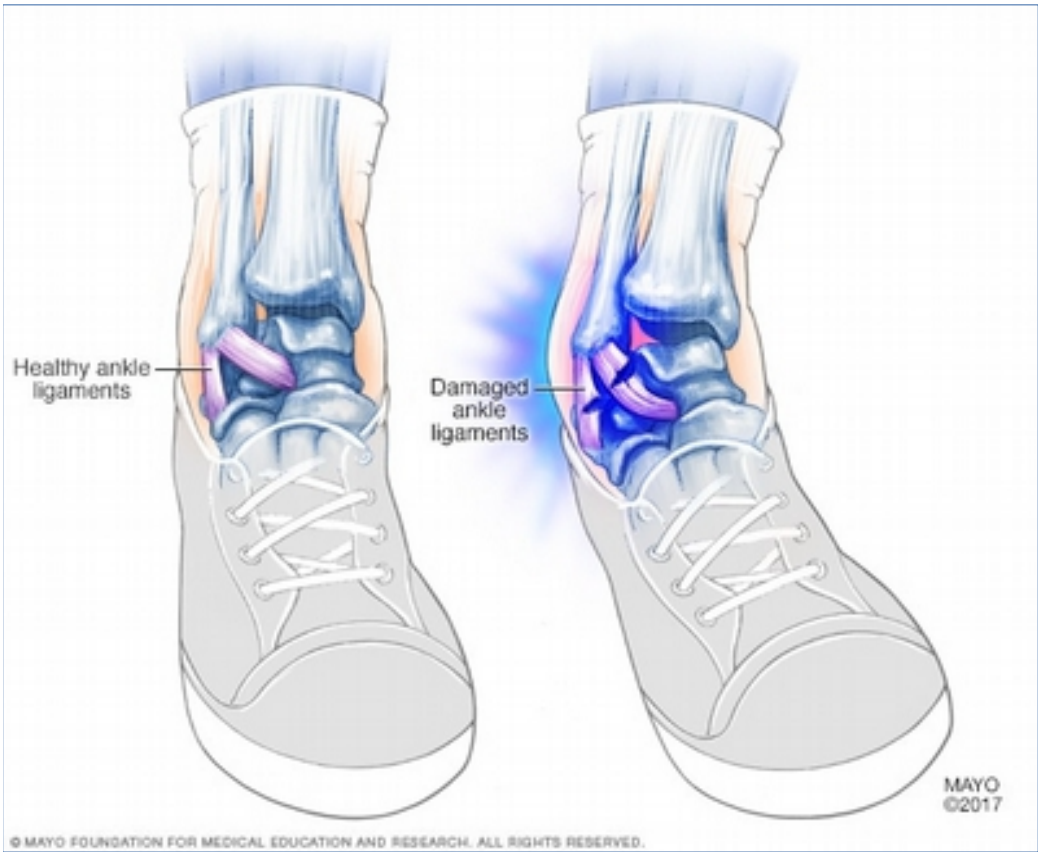
Trial in GDC - Rule 7B:1 et. seq.

- See Rule 7B:4. Trial of Action.
- Rule 7B:4(a): Civil action in a general district court may be brought by warrant, summons or complaint.
- Serve initial pleading by sheriff or any other person authorized to serve process.
- Rule 7B:4(b): If all parties appear and are ready for trial on the return date of the warrant, summons or complaint, the court may proceed with the trial of the case.
- Either party can appeal "de novo" to Circuit Court within 10 days of judgment.
- If the defendant appeals, he/she may have to post a bond in the amount of the judgment prior to perfecting the appeal. *Va. Code § 8.01-129.*

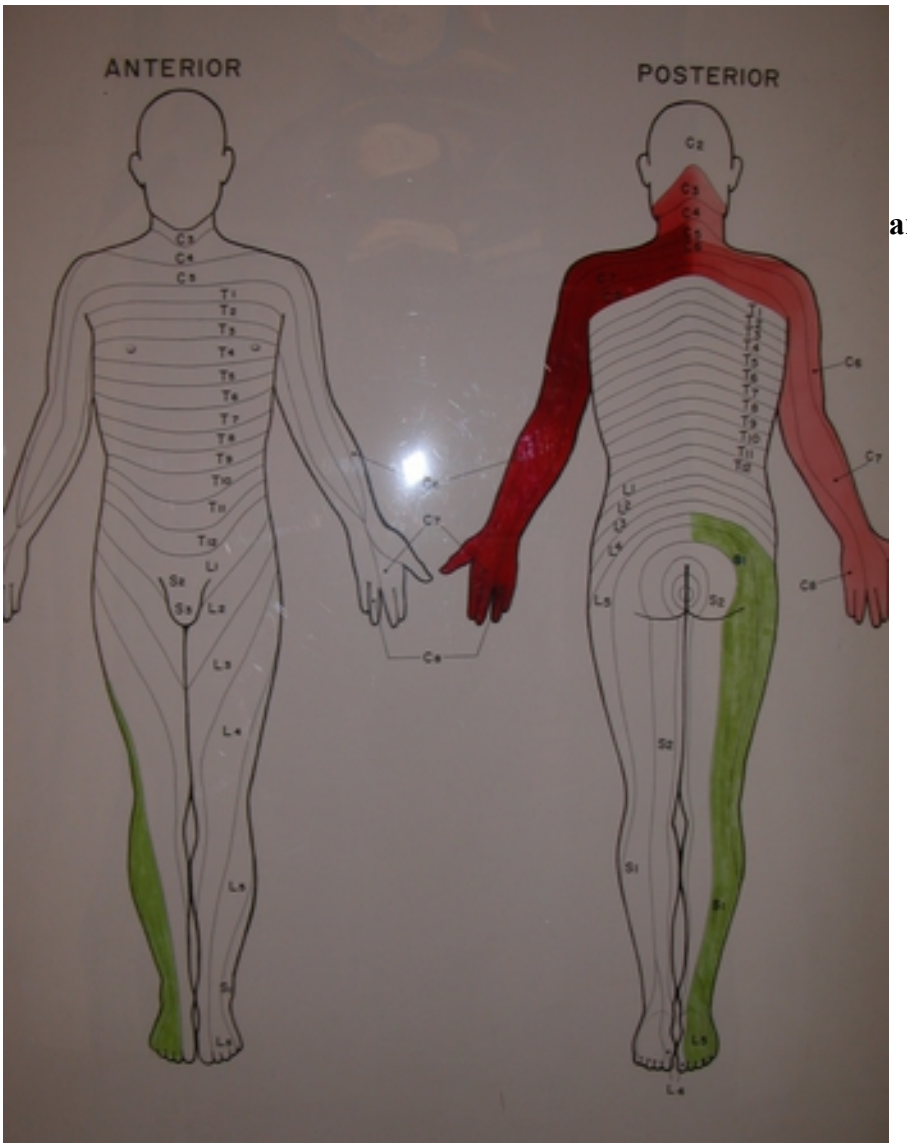
B. ANATOMY OF COMMON INJURIES

A detailed discussion of anatomy is beyond the syllabus of this outline. Below are illustrations of some of the most common injuries which can be used as demonstrative evidence.

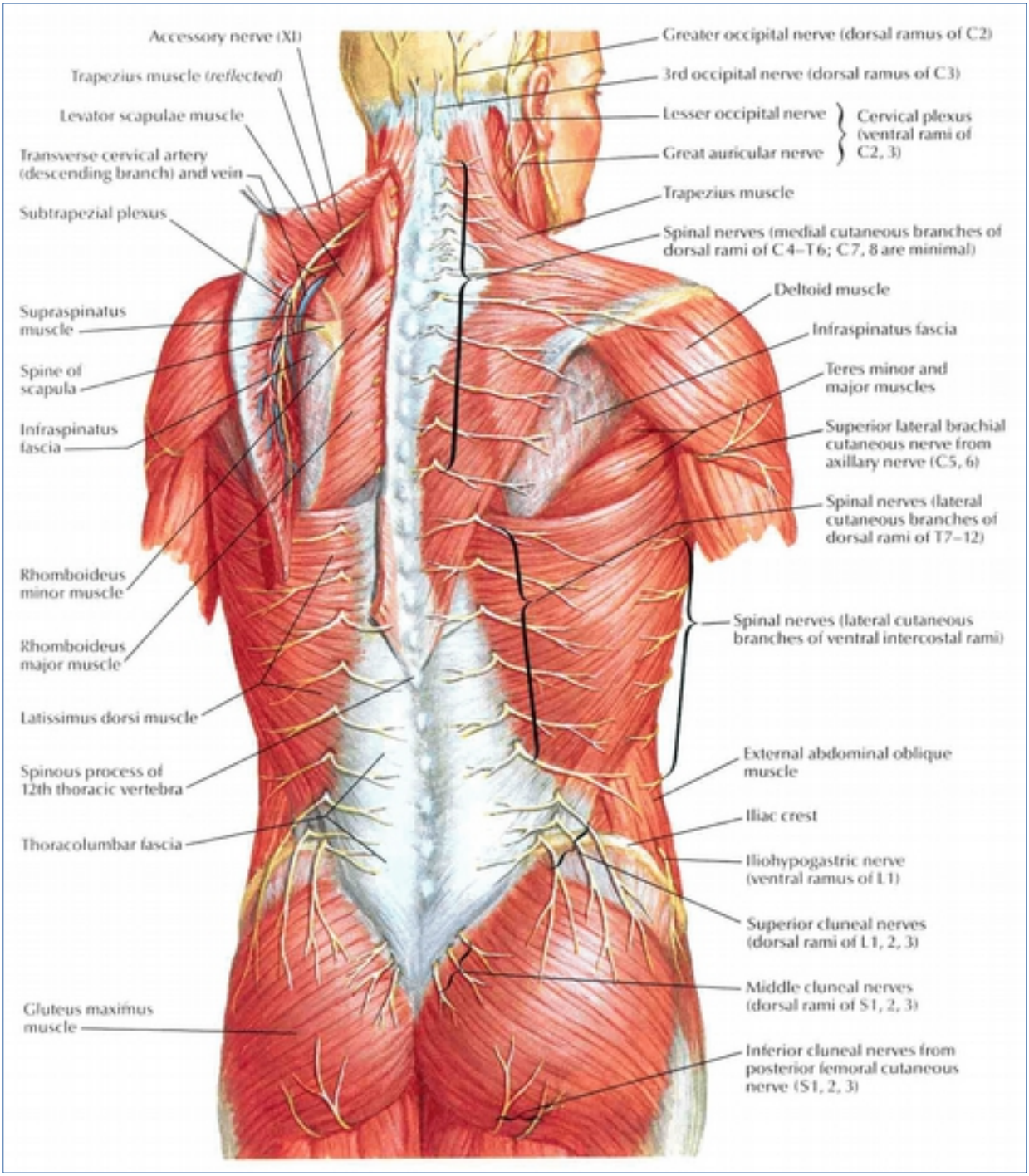
- Strains and sprains are probably the most common injury after mva.
- A strain is a stretching or tearing of muscle or tendon.
- Tendon is the fibrous cord of tissue that connects muscles to bones.
- A sprain is a stretching or tearing of ligaments.
- Ligament is tough bands of fibrous tissue that connect bones to form joints.
- Most common location for a sprain is in your ankle.



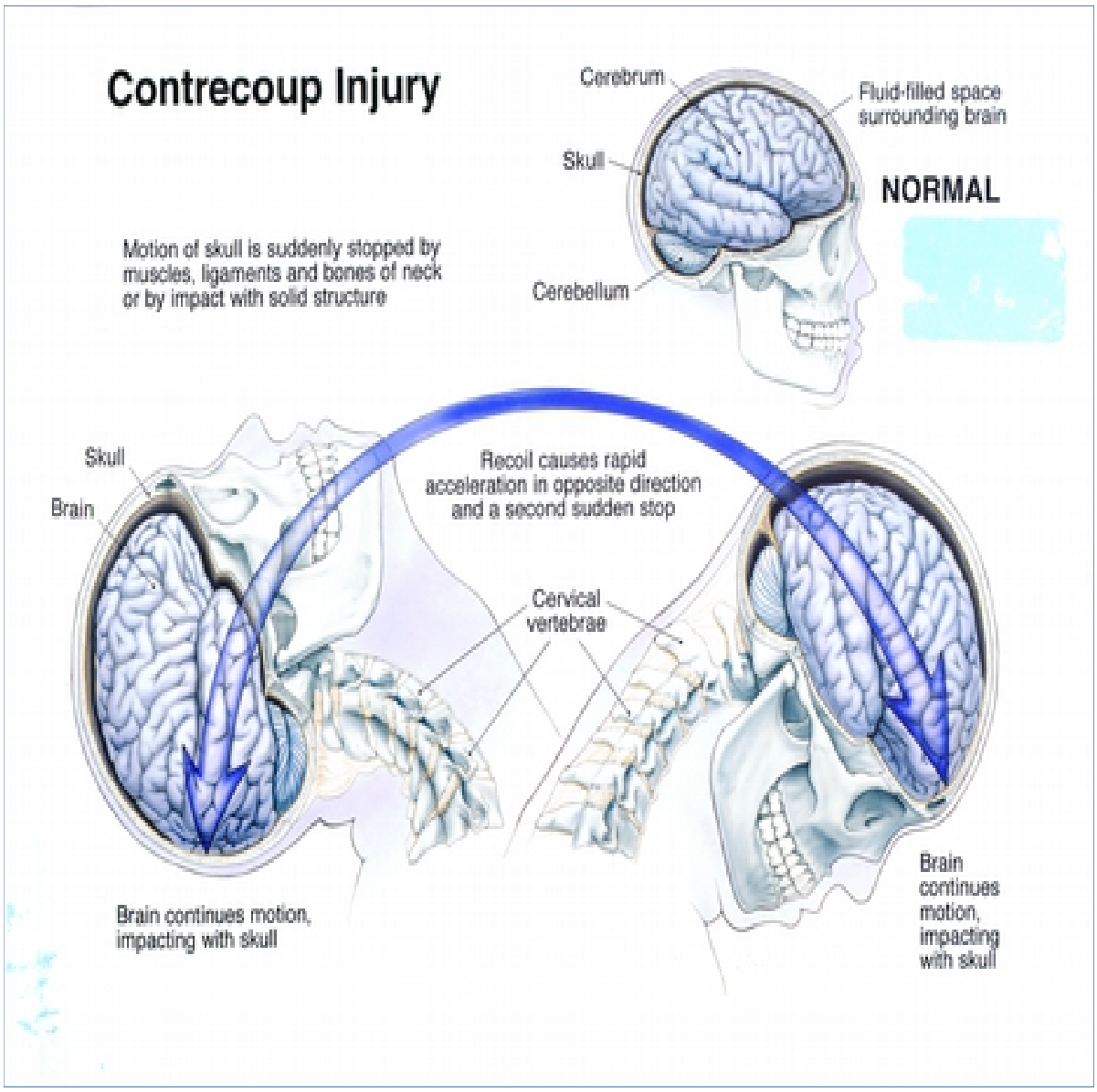
Nerve roots and their pathways -



Radiculopathy



NERVES IN THE BACK



Coup Contrecoup Injury

- More commonly known as “whiplash”.
- Whipping or snapping your head can injure the neck but also cause a concussion.
- A concussion which lingers is a called a mild traumatic brain injury.

C. WITNESS DEPOSITIONS (PARTY AND NON-PARTY DEPOSITIONS)

Virginia Supreme Court Rule 4:5

- Allows for depositions upon oral examination.
- Depositions are necessary to fully explore claims and defenses.
- Deposition may also provide ammunition for cross examination and impeachment.

Party Depositions - Rule 4:5(a)(a1)(i)

- Taken in the city or county where the suit is pending, or
- Taken in an adjacent city or county, or
- Taken where the parties agree, or where a court may designate.

Non-Party Depositions - Rule 4:5(a)(a1)(ii)

- Must be taken in the city or county where the non-party resides, or
- Where non-party is employed or has a principal place of business.
- Typically, a non-party has to be subpoenaed to appear for deposition.

Objections at Deposition- Rule 4:5(c)(2)

- State objections concisely.
- Objections are to stated in a non-argumentative and non-suggestive manner.
- May instruct a deponent not to answer only
  a. to preserve a privilege or protect attorney work-product - see Rule 4:1(b)(3).
  b. to enforce a limitation ordered by the court, or
  c. to present a motion under 4:5(d) to terminate or limit the deposition.

Should you Depose the Opposing Expert Witnesses?

- Maybe, but not always.
- Skilled trial lawyers disagree on this issue.
- Pluses: The more information you have pretrial, the more effective will be cross.
- Minuses: Depo prep may strengthen opposing expert at trial.
  Unintentionally enlarge the parameters of the expert's opinion.

PRACTICE POINTER:

But more recent VSC cases have thrown cold water on that theory. See, *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384 (2017), holding that opinions disclosed for the first time after the 90 day filing deadline were inadmissable despite the fact the opinions were offered in a pretrial deposition.

Use Of Depositions At Trial - Rule 4:7(a)

- Rule 4:7(a)(2) Depositions of witnesses, whether or not a party, may be used at trial to contradict or impeach during cross examination.

- Rule 4:7(a)(4) Depositions of witnesses, whether or not a party, may be used at trial to introduce testimony in that party's case if:

A) the witness is dead,

B) the witness is more than 100 miles from the courthouse,

C) the witness is unable to attend due to illness, age or imprisonment,

D) the witness cannot be produced by subpoena,

E) the witness is a physician, surgeon, dentist, chiropractor or registered nurse who treated or examined any party.

PRACTICE POINTER:

If either party uses a physician to conduct only a record review, the rule does not allow that expert to appear by deposition.

Depositions of Business Entities - Rule 4:5(b)(6)

- Allows a party to depose a corporation or partnership or governmental agency.
- Business entity my designate a representative to speak and bind the entity.
- The notice of deposition shall set forth the topics to be questioned at deposition.
- Rule's subparts discuss how to require production of documents at the deposition.
- Rule authorizes use of subpoena duces tecum if a non-party.
- Rule authorizes attaching a list of requested documents if a party - Rule 4:5 (b)(1).
- If opponent's conduct is outrageous, call judge during the depo - Rule 4:5(d).
- It is sanctionable to fail to attend a properly noticed 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).

Out of State Depositions - Rule 4:5(a)(a1)(iii)

- Use a person authorized to administer an oath where the deposition will be held.
- May use a letter rogatory.
- A letter rogatory will include a list of questions to be answered under oath.

Depositions Before Filing a Lawsuit - Rule 4:2

- Depo is available even before a law suit is filed.
- But only under limited circumstances.
- Most commonly where a party or witness may become unavailable.
- Unavailability must be due to illness, death or other exigent circumstance.
- Notice and service of the notice on the opposition are required.
- If providing notice is not feasible, secure court order. Rule 4:2(a)(1)-(3).

Errata Sheet - Rule 4:5(e)

- Witness may change his testimony, not merely correct typographic errors.
- Witness must provide a reason for doing so.
- Your opponent can use original transcript and errata sheet to cross examine.
- Best advice is to thoroughly prepare the witness to minimize errata sheet entries.
- Witness has 21 days to provide reasons for changes in form or substance.
- Unless both parties so stipulate, a deponent can be required to read his deposition.

D. OBTAINING MEDICAL RECORDS

1. Secure the Client's Bills and Records

- The first step in securing the records is to identify the relevant healthcare providers.
- Thoroughly interview the client.
- Start with the day of the crash and move forward chronologically though to present.

- Common for healthcare providers to subcontract the billing to a separate company.
- You may have to write or fax separate requests.
- A single visit to the ER will generate multiple requests for bills and records.
- ER has subcontractors, including the ER physician and the radiologist.
- An inpatient admission will likely include visits by consulting experts .
- Consulting experts also bill separately from the hospital.

2. HIPAA Requirements

a. Federal HIPAA

- HIPAA stands for The Health Insurance Portability and Accountability Act of 1996.
- Federal law which requires confidential handling of protected health information.
- See, 42 U.S.C. § 1320d et seq.

Citing from the HHS government website, e*very health care provider, regardless of size, who electronically transmits health information in connection with certain transactions, is a covered entity.*

- Privacy rules are spelled out at 45 CFR Part 160 and Subparts A and E of Part 164.
- HIPAA mandates an individual's right to access his or her own medical records.
- HIPAA allows a patient to request corrections or to add information to his records.

b. Virginia Privacy Rules - Virginia Code § 32.1-127.1:03

- Recognizes an individual's right of privacy in the content of his health records.
- Health records are the property of the healthcare entity maintaining them.
- Laws control and restrict how records are maintained, disclosed and re-disclosed.
- Subsection H requires that a subpoena duces tecum for medical records be served on the opposing counsel or patient where not represented.
- Subpoena return date shall not be less than 15 days from date on the subpoena.
- Patient or his attorney has 15 days to file a motion to quash.

Va Code § 32.1-127.1:03 (H)(6) lists factors to consider for motion to quash:

(I) the particular purpose for which the information was collected;

(ii) the degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual;

(iii) the effect of the disclosure on the individual's future health care;

(iv) the importance of the information to the lawsuit or proceeding; and

(v) any other relevant factor.

c. Method & Cost of Requesting &Producing Medical Records & Admissibility

Virginia Code 8.01-413.

- Copies of records are admissible as if they were originals.
- Copies shall be produced within 30 days of the date of the request.
- Records can be produced either as hard copies or electronically.
- Providers can charge up to $0.50 per page for up to 50 pages and $0.25 per page thereafter and a search and handling fee not to exceed $20, plus postage.
- When records are produced in electronic format the provider may charge a $0.37 for up to 50 pages and $0.18 per page and the $20 search and handling fee plus postage.

PRACTICE POINTER:

Request the medical records be provided in electronic format. It will likely save you a lot of money. Also consider requesting an ABSTRACT of a multi-day inpatient hospital stay, which should produce the most important records.

- Itemized bills must be provided without charge (up to 3 requests per 12 months).
- Willful refusal to comply with a request for bills or records is sanctionable.
- Willful refusal (failing to respond to a second written request, or by overcharging).
- Sanctions include a refund of fees, plus court costs and **reasonable attorney fees.**

3. Read the Records to Understand The Injury

- Claims send medical records for review by someone with a medical background.
- The days of quickly negotiating settlement of 2 x the bills are gone.
- The claims adjuster will likely have a memo prepared by his medical reviewer.
- You must be able to discuss the injuries and treatment in detail.

PRACTICE POINTER:

> You must read every word of the medical reports and records. Some attorneys fail to take the time needed to understand the nature and extent of injury because they fail to secure and read all the records.

- Today, many claims adjusters are offering a settlement of only the medical bills.
- Offer may include a few hundred dollars for pain and suffering.
- Most adjusters are simply ordered to offer these low sums.
- Carriers hope most claimants will not want to take the time and expense to litigate.

4. Argue Pain and Suffering Directly From the Medical Records

- Review the medical records for objective findings consistent with a painful injury.
- Look for terms such as “spasm”, “trigger points” and “restricted range of motion.”
- These findings are reproducible and not solely dependent on the word of the patient.
- Also look for the type and amount of prescription strength medication purchased.
- The use of prescription 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.

5. Evaluate for Pre-existing Conditions and Prior Claims

- Some injuries, like a mild traumatic brain injury are not easily verifiable.
- The claims adjuster will likely demand at least 3 years of prior medical records.
- Pre-existing conditions, like prior claims, are fertile grounds for inquiry.

- Always ask client about prior injuries, prior claims and pre-existing conditions.
- Where possible, secure the prior medical records before they are read by the adjuster
- Most prior claims are entered into a master data bank accessible by insurer.
- 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 care 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.

E. SELECTING AND WORKING WITH EXPERTS

1. Selecting and Retaining Frequently Used Experts

a. Medical Experts.

- Medical witnesses can be either retained experts or treating providers, or both.
- The difference my seem subtle.
- Gain credibility with jury by using the treating physician.
- More difficult if jury learns medical expert is not a treating provider.
- Both retained experts and treating providers will need to be paid for their time.
- Request a W-9 and an invoice.

- You may have to answer interrogatories before meeting your treating expert.
- If so, respond that the answer anticipates what the treating physicians will say.

The following language is used by this author:

Dr. Smith has not been retained as expert witnesses in this case. Nonetheless, Ms. Client may call said physician to testify about her care and treatment in Plaintiff's case-in-chief and/or rebuttal. Pursuant to Virginia Code § 8.01-399, said physician will testify consistent with the medical records and bills from his practice which are provided in discovery and are incorporated into this designation, as well as with this designation. To the extent said physician offers opinions, they will be stated to a reasonable degree of probability. To the extent any such testimony is considered "expert" and therefore requires disclosure

pursuant to the Rules of the Supreme Court of Virginia or the Court's Scheduling Order, the Plaintiff provides the following: (Here I outline the expected testimony including opinions on causation and future damages which are not ordinarily included in the medical records).

- Treating physician may be unable or unwilling to assist. If so, retain a physician.
- Be sure to request opinions on causation and past and future medical expenses.
- There is no magic to finding and retaining an expert.
- It seems that every year fewer physicians are willing to participate in litigation.
- Word of mouth and organizations such as VTLA, VADA and AAJ can be useful.

b. Experts Other Than Medical Experts

As stated elsewhere in this outline, other experts may be of assistance or even necessary to establish a prima facie case. For example, consider the following possible experts:

I. Auto Appraiser

- Hire an appraiser or other automotive expert to look for hidden damage.
- For example, the frame can be measured to determine if it has been bent.
- Shock absorbers behind the bumper cover can be examined for force and impact.
- Measure gaps between the doors and body of the car to confirm frame damage.

ii. Accident Reconstruction/Trucking Expert

- Download the event data recorder.
- Retain expert on tractor trailer practices and procedures.

iii. Vocational Rehabilitation

iv. Economist

vi. Medical Billing Coder (Useful if Client is a Kaiser member).

2. Securing Draft Reports From Your Expert or Treating Physician

- It is better to be safe than sorry
- Make sure you know opinions of expert or treating physician before a report is final.

- Many experts do not understand how to phrase their conclusions to satisfy the court.
- Best to avoid a paper trail with drafts going back and forth.
- In state court, claim your comments to an expert are protected work product.
- Avoid problems in state court by arranging for telephone conferences or in person meetings.
- Your consultations and work product are explicitly protected under the federal rules.

- If you must email or transmit a draft with your thoughts and mental impressions, add a statement to the document such as ***"This document contains attorney work produce including the thoughts and mental impressions of counsel and is not to be produced, even with a subpoena, without a court order. If you receive a subpoena which asks for this document, please notify me immediately so that I can file a motion to quash."***

3. **Evidentiary Aspects of Expert Testimony** - Virginia SCR 2:701- 2:706.

- Rule 2:701. Opinion Testimony by Lay Witnesses derived from Code *§ 8.01-401.3(B).*
- Rule 2:702. Testimony by Experts (Rule 2:702(a)(I) derived from Code *§ 8.01-401.3(A)*.
- Rule 2:703. Basis of Expert Testimony (Rule 2:703(a) derived from Code *§ 8.01-401.1).*
- Rule 2:704. Opinion on Ultimate Issue (Rule 2:704(a) derived from Code *§ 8.01-401.3(B) & (C).*
- Rule 2:705. Facts or Data Used in Testimony (Rule 2:705(a) derived from Code *§ 8.01-401.1.*
- Rule 2:706. Use of Learned Treatises With Experts (Rule 2:706(a) derived from Code *§ 8.01-401.1.*

Expert testimony proper when the subject matter of the inquiry is of such character that only persons of skill or experience in that area are capable of forming a correct judgment. *Bradley v. Poole*, 187 Va. 432 (1948); *Neblett v. Hunter*, 207 Va. 335 (1966).

4. **Lay Testimony To Establish Causation and Extent of Injury -** Va Evidence Rule 2:701

- Depending on the facts of your case, you may not need an expert witness.
- Rule 2:701, Opinion Testimony by Lay Witnesses is derived from *Code § 8.01-401.3(B).*

- *Code § 8.01-401.3(B).* allows opinion testimony by a lay witness if*:*

a. It is reasonably based upon the personal experience or observations of the witness.

b. And it will aid the trier of fact in understanding the witness' perceptions.

c. Lay opinion may relate to any matter, such as -- but not limited to -- sanity, capacity, physical condition or disability, speed of a vehicle, the value of property, identity, causation, time, the meaning of words, similarity of objects, handwriting, visibility or the general physical situation at a particular location.

d. Lay witness testimony that amounts only to an opinion of law is inadmissible.

- Cases support use of lay testimony to establish causation and nature and extent of injury in certain cases.
- *Peterson v. Neme*, 222 Va. 477, 483, 281 S.E.2d 869, 872 (1981) a doctor testified about the nature and extent of the injuries, but failed to offer any opinion as to causation.
- *Peterson* holds lay testimony of causal connection between an automobile accident and injury is admissible for whatever weight the fact finder may choose to give it.

- This is true even when medical testimony fails to establish causal connection expressly.
- Citing *Peterson*, the VSC rejected the contention that the inability to perform ordinary labors as a housewife, mother, and waitress could only be established by expert medical testimony. *Todt v. Shaw*, 223 Va. 123; 286 S.E.2d 211(1982).

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

- The discovery of expert opinions is controlled by Supreme Court Rule 4:1(b)(4)(A).
- Rule 4:1 allows interrogatories identifying the opponent's experts .
- Opponents must divulge:

  (1) the subject matter about which the expert is to testify;

  (2) the substance of the facts and opinions to which the expert is expected to testify, and

  (3) a summary of the grounds for each opinion.
- Subject to paying a reasonable fee, counsel may depose his opponent's testifying expert.
- A party may not discover the opinions of a retained expert who is not expected to testify absent *exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.* 4:1(b)(4)(B).
- Parties may also seek **Lombard** information from the opposing expert.
- Named after *Lombard v Rohrbaugh, 262 Va. 484, 551 S.E.2nd 349* (2001).
- The information sought includes income earned by expert from the insurance carrier retaining the expert.
- The theory is that significant earnings will show bias. In *Lombard*, the amount earned by Dr. Ammerman was over $100,000.00 per year in both 1998 and 1999.
- Court ruled 100k constituted a substantial connection between the doc and Allstate.

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

- Rule authorizes defendant, with leave of court, to require the plaintiff to attend exam.
- Defendant can select the health care provider.
- Defendants request a 4:10 exam if the plaintiff is claiming permanent or ongoing injury.
- Rule 4:10 is titled *Physical and Mental Examination of Persons.*
- Rule states if physical or mental condition of a party is in issue, upon motion of the adverse party, the court **may** order the party to submit to an examination.
- Exam must be by a healthcare provider as defined in *§8.01-581.1.*
- Healthcare provider is employed by the moving party.
- Order shall specify the time, place, **manner, conditions, and scope** of the examination.
- Order shall identify the person or persons by whom it is to be made.
- Order shall fix the time for filing the report and furnishing the copies.

Attached to the Appendix as Exhibit B is a Sample Rule 4:10 Order

Rule 4:10 has been the subject of much litigation.

- What constitutes "good cause" to seek the examination.
- Can the Defendant tell the jury the examination is "independent".
- What constitutes a "mental examination".
- Can the defendant force the plaintiff to be examined by a vocation rehabilitation expert.
- What controls on defense doc will court allow.

Recommendations to the Plaintiff's Counsel

- Plaintiff's counsel should attempt to protect the client.
- First, you must always prepare the plaintiff for the examination.
- Plaintiff should be advised to be polite, but not overly friendly.
- Plaintiff should be familiar with his medical history.
- Plaintiff should be able to explain where he has pain and how it affects his daily activities.
- Plaintiff should understand the examination is for the defendant and the doc is not neutral.
- Plaintiff should understand the examination is not for treatment.
- The exam does not create a physician-patient relationship.
- Do not agree to the examination if your client is not claiming a permanent injury.
- If no claim of permanency, it is doubtful the defendant can show "good cause".

PRACTICE POINTER:

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

- If your client's employment is in issue, do not agree to have your client examined by a vocational rehabilitation counselor.
- Some vocational rehabilitation counselors are not licensed professional counselors.
- If not a licensed professional counselor, excluded under 8.01-581.1.
- Even where the vocational counselor is licensed, argue the purpose of the examination is improper because it focuses on employment issues, not mental health counseling.

F. EVIDENCE PRESERVATION

Counsel must understand the importance of preserving evidence after an injury involving a motor vehicle or other machinery.

1. Accident Scene and Vehicle Inspection and Damage Photographs

- Take photographs of the accident scene.
- Damage to the rear of your vehicle may not be impressive, but the damage to front of the at fault party vehicle is more visible.
- Accident scene may be the only opportunity before litigation to secure photos of the other person's vehicle.
- At least secure photos of your client's damaged vehicle.
- Do so particularly if the damage is obvious, even if the injuries are not life threatening.
- If you wait too long, the vehicle may be disposed of as salvage or repaired.
- Good photos of vehicle damage enhance your client's bodily injury claim.
- However, even if you learn your client's vehicle has been sold for "salvage", you may be able to call the salvage yard, locate the vehicle through the "lot number" and send an appraiser to take photographs.

PRACTICE POINTER:

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

- Consider examining the headlight filaments to determine if the lights were on.
- Look for tire tread and markings to match what is found at the scene.
- Use color film to determine if paint transfers can help your case.
- Examine brakes to determine braking distances, worn drums or pads, or other defects.
- Data from EDR's can be downloaded to determine speed, braking events, etc.

2. Tractor Trailer Manifests and Event Data Recorder

- Secure the truck driver's manifests to determine hours of driver.
- If accident involves fatal or life altering injury, hiring an expert to download data from EDR.
- Event data recorders (EDR) routinely record data such as speed and braking events.
- Many cars will also record data such as vehicle speed at the time of impact.

PRACTICE POINTER::

Crash data can be lost by simply turning the ignition after a crash. For serious collisions where liability could be an issue, consider hiring an expert to retrieve the data stored in the vehicle's EDR. Counsel should also consider filing suit immediately if cooperation regarding preservation of evidence is not forthcoming.

- Drivers of tractor trailers traveling interstate are required to maintain manifests.
- Manifests must record hours driving, hours off duty but awake and hours sleeping.
- These manifests can be of great importance to counsel after a collision.
- Pursuant to *49 C.F.R. §395.8*, manifests are retained by the employer for only 6 months.

3. Documentation of Lost Earnings

- Wage loss claims can be simplified if the client keeps track of the time lost from work.
- Many employers cannot reconstruct hours lost for medical appointments, etc.
- Total hours lost may depend on your client's record keeping.

4. Crashworthiness Claims

- Sometimes seatbelt failure or structural defects are alleged
- If so, thorough evaluation, appraisal and inspection of the vehicles involved is required.
- Counsel may need to purchase and preserve the wrecked vehicles.
- If counsel does not have access to the defendant's vehicle, write a letter to the defendant requesting the vehicle be preserved for examination by the experts.

5. Spoliation

- If evidence is lost by one of the parties, the opposing party may claim spoliation.

- A spoliation instruction allows the jury to infer that the lost evidence would have supported the case of the opponent.
- Until 2017, there was no opinion from the VSC as to proof necessary to support spoliation.
- For example, could the loss have been inadvertent, did there have to be evidence of intent?
- Questions were answered in *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384.
- *Emerald Point* held evidence must support a finding of intentional loss or destruction.

  "In short, we agree that to allow such a severe sanction as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate**."**

DAMAGES, LIENS AND SUBROGATION IN SETTLEMENT NEGOTIATIONS

IV.

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DAMAGES, LIENS AND SUBROGATION IN SETTLEMENT NEGOTIATIONS

A. Assessing and Allocating Damages

1. Vehicle Damage and Diminished Value

- Vehicle Owner can claim vehicle lost value even after repair.
- Claim is based on diminished market value.
- If the vehicle is not a total loss (cost of repair is less than ~75% of the vehicle's value), the measure of damages is the difference between market value at the time of the crash and after the damaged vehicle has been repaired.
- Damages are measured by the cost of reasonable repairs necessary to restore the automobile to its original condition **together with the diminution in value of the injured property after repairs are made**. *Averett v. Shircliff*, 218 Va. 202, 206-208, 237 S.E.2d 92 (1977).
- Lay testimony is admissible to establish vehicle's value.
- By statute, value also established by NADA guide and "other published sources for vehicle values regularly used in the automobile industry".
- Expert testimony is a good idea if the claim is substantial. Va. Code Ann. *§ 8.01-419.1.*
- If vehicle is a total loss, damages are vehicle's fair market value immediately before crash.

2. Paid vs. Billed Medical Services - Collateral Source Rule

- Collateral Sources of payment are Inadmissible at Trial.
- Collateral sources are sources of payment other than the defendant or defendant's insurer.
- Collateral sources include health insurance, medicare, medicaid, worker's compensation, disability insurance, sick leave and vacation pay, comp time, personal time, and self-pay patients.
- For an opinion affirming the right of the plaintiff to submit the full bill despite health insurance write-offs, see *Radvany v. Davis*, 262 Va. 308, 551 S.E.2d 347, 348 (Va. 2001).
- Black letter law in Virginia that a party (usually the defendant) may not introduce evidence of sources of payment collateral to the tortfeasor.
- Collateral source rule excludes evidence of 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 is well-settled that an injured person is entitled to recover all damages caused by a defendant's negligence. See *Lawrence v. Wirth*, 226 Va. 408, 309 S.E.2d 315, 318 (Va. 1983) (citing *Blair v. Eblen*, 461 S.W.2d 370 (Ky. 1970)).

PRACTICE POINTER:

> For HMO's which do not generate a bill, hire a certified medical billing specialist to create a bill. See, Va Code 8.01-413.01(B). The bill is admissible if submitted in the form of an affidavit from the preparer and submitted to the opposing party within 30 days of trial.

- A loss of earnings claim may not be diminished by evidence of such as sick leave, vacation pay, and short or long term disability. *See, Va. Code 8.01-35.*

3. Medical Bills

a. Past Medical Bills

- Can the injured Plaintiff offer admissible testimony about need for future care?
- Yes, if defendant does not object.
- No, where defendant objects to the introduction of medical bills and defendant's evidence will raise a substantial contest as to either the question of medical necessity or the question of causal relationship.
- The court may admit the challenged medical bills only with foundation expert testimony tending to establish medical necessity or causal relationship, or both, as appropriate. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908, 914 (1989).
- *McMunn* held that proof of medical expenses by the introduction of bills through the sole testimony of the plaintiff requires consideration of four major components:

  (1) authenticity,

  (2) reasonableness in amount,

  (3) medical necessity, and

  (4) causal relationship.
- Whether a particular treatment is medically necessary and is causally related to a condition resulting from some act or omission on a defendant's part, can usually be determined only by a medical expert qualified in the appropriate field who has studied the plaintiff's particular case. See *McMunn*, 379 S.E.2d at 914.

b. Future Medical Bills

- See Virginia Model Jury Instruction 9:00(5) below.
- Best to use expert testimony to establish future medical bills.
- Can the injured Plaintiff offer admissible testimony about need for future care?
- I would not try unless the future care is *de minimus*.

4(a). Loss of Earning Capacity

- Earning capacity is to be distinguished from loss of earnings.

- Earning capacity is defined as the ability to earn money.
- One can experience an increase in earnings after an accident and still present viable evidence of lost earning capacity.
- This would be particularly true for someone whose education or experience would likely have lead to significant promotions or even a new career resulting in a significantly higher pay scale.
- Calculate loss of earning capacity by figuring out:
    a. Work life expectancy, and
    b. Loss of earnings over work life due to injury.
- Work-life expectancy is not measured by the date one departs from the labor market; instead, it examines the number of uninterrupted years an individual would be expected to participate in the labor force.
- Work-life expectancy considers contingencies for not working, including the probabilities of dying, becoming disabled, or leaving the labor market.

4(b). Factors to Consider in Quantifying Loss of Earning Capacity

i. Age and Life Expectancy of Plaintiff

- Age of the Plaintiff is an important consideration in many respects.
- The death of a young child, who is without a history of earnings, and whose earning capacity is speculative, is usually worth considerably less than the death of a working parent, particularly a high wage earner.
- But due to life expectancy and accumulation of healthcare expenses, a serious injury with lifetime medical needs is usually valued higher for a young person than for an older person.

8.01-419. Table of life expectancy

The following **table** (below is excerpted) shall be received in all courts and by all persons having

power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the following columns:

AGE	BOTH SEXES	MALE	FEMALE
20	58.4	55.8	60.8
25	53.6	51.2	56.0
75	11.7	10.5	12.5
90	4.8	4.3	5.0

- These tables are admissible in court where the plaintiff has made a claim for permanent injury and loss of future earnings and/or loss of earning capacity.
- Most judges prefer that you mark only the line entry for the age of the plaintiff as the exhibit, as the other data is irrelevant.
- You may be able to secure a stipulation from your opponent and therefore you will not need this table as an exhibit.
- The defendant can attack the life expectancy projection by showing that the plaintiff's health, constitution and habits result in a diminished life expectancy.

- Once the life expectancy is admitted, the plaintiff may then argue for loss of earnings and loss of earning capacity up to the end of the plaintiff's "work life".
- Loss of earning capacity is case by case basis because some workers may never retire.

ii. Evaluation of Education and Work History

- These are considerations in evaluating vocational capabilities of a client, both pre-injury and post-injury.

- The individual client's education and professional training, along with their employment history, provides a basis for evaluating their pre-injury worker traits.
- Theses traits include skills, abilities, aptitudes, and characteristics that are relevant to the work place.
- The physical and intellectual requirements of the individual's past work can be assessed by creating a worker trait profile utilized for a Transferrable Skills Analysis in the vocational assessment.

iii. Potential Vocational Re-Training Costs

- If an injured worker is a candidate for a retraining program, the costs associated with the completion of the program, along with lost wages during the duration of the program can be assessed as damages.
- This would be relevant when a retraining program would mitigate loss of earning capacity.

REAL WORLD EXAMPLE OF DAMAGE CALCULATION WITH RETRAINING

Due to injury, a hands on construction supervisor was physically limited from performing his prior work. But with enrollment into and completion of a 9 month computer assisted drafting (CAD) program, he was employable as a CAD technician. Because his earnings as a construction supervisor had been somewhat variable, but his employment as a CAD drafter was full time, he was able to return to employment as a CAD technician earning as much as he had earned previously as a construction supervisor. Damages would be include the cost of tuition and supplies and 9 months of lost wages.

- See Virginia Model Jury Instruction 9:00(7) below for loss of earnings instruction.

5. Pain and Suffering

- Read *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006).
- Plaintiff and her dog were in a vehicle which overturned.
- Plaintiff suffered little physical injury.

<u>OPINION</u> (Mental Anguish and Emotional Distress)

- *We have held, for well over a century that mental anguish may be inferred from bodily injury.*
- *It is not necessary to prove it with specificity.*
- *Mental anguish, when fairly inferred from injuries sustained, is an element of damages.*
- *In the present case, the plaintiff suffered physical injury, albeit remarkably slight.*
- *Plaintiff was clearly entitled to be compensated in damages for her emotional distress.*
- *Emotional distress can be inferred from 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.*
- See Virginia Model Jury Instruction 9:00(2) below for what the jury will hear in the case.

Virginia Model Jury Instruction 9.000 (*General Personal Injury and Property Damage*)

- This Virginia model jury instruction summarizes the claim for compensatory damages.

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.

- This model jury instruction makes provisions for past and future losses, including wages and medical bills and pain and suffering/mental anguish/emotional distress.

B. Medical Provider Liens - Va. Code Section 8.01-66.2

Statutory Liens for Medical Providers:

- If perfected, must be paid from third party recovery.
- Hospitals & Nursing Homes- $2500.00
- Physicians, Chiropractors, Nurses, Physical Therapists, Pharmacies - $750.00
- Ambulance Services - $200.00

- Medical provider liens are inferior to the lien of the attorney. See: 8.01-66.3.
- To perfect its lien, a provider must provide written notice to the injured person or his attorney and name the provider and assert a lien.
- Written notice is not required for Medicaid (8.01-66.9) or Medicare, which have what are considered "super liens".
- Must honor assignment even if attorney has not endorsed the assignment so long as client signed.

Query:

1. Can a hospital claim that each physician or nurse is entitled to $750 on top of the hospital's $2500?

2. And if one has two separate trips to the same emergency room for the same accident, does the hospital get to claim $5,000?

C. ERISA (Subrogation) Liens

- ERISA stands for Employee Retirement Income Security Act.
- Ascertain if client's health insurance is a qualified, self-funded healthcare plan.
- Self-funded means that the medical bills are paid from funds contributed by the company and its workers, and not by insurance purchased by either the company or the employee.
- Medical bills paid by qualifying self-funded plans are required to be reimbursed from a

personal injury settlement.

- Free Erisa assists in determining if plan is self funded http://www.freeerisa.com/.
- Best to secure the fund's plan documents from the plan administrator to verify plan is self funded.
- Ask for Summary Plan Description and relevant annual reports and form 5500 tax forms.
- Section 1024(b)(4) requires plan administrator to furnish plan documents on request
- Penalty for failure to provide plan documents when requested.
- Large employers like hospital corporations, banks and grocery store chains use self funded plans.
- Local government plans are excluded from ERISA.
- *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 133 S. Ct. 1537 (2013).
- *McCutchen* confirmed an ERISA compliant plan's right to collect from third party recovery.
- *McCutchen* also held that if the ERISA plan did not address attorney fees, as a matter of equity the plan must share in the costs of litigation, including counsel fees.
- Unfortunately, since *McCutchen,* almost every plan does address attorney fees and requires reimbursement without sharing cost of attorney fees.
- Self funded (ERISA) plans request reimbursement by letter to the insured.
- Advise client to look for a letter from a 3rd party collector, such as The Rawlings Company.

D. Mandatory Insurer Reporting - Medicare

- Federal law requires all insurance companies issuing settlement checks to secure the SSN of the plaintiff and report that information to Medicare. If the liability insurer does not report the SSN of the plaintiff to Medicare, the insurer can be liable to Medicare if the settling party thereafter wrongfully uses Medicare to pay for accident-related

medical care.

- Be on the lookout for a letter from the liability insurer requesting the SSN for Medicare.
- Complete the enclosed Medicare reporting form and return it to the insurer.
- But do not consent to adding Medicare as a payee on the settlement check, even if your client is an eligible recipient.

E. Tips for Successful Mediation

- Mediation is voluntary.
- Mediation involves a neutral person who attempts to convince the parties to reach a settlement.
- Prepare the client for a potentially frustrating "back and forth" over many hours.
- Insist that the claims adjuster with the money attends the Mediation. Best to have a pre-mediation settlement offer to gauge the position of the insurance company.
- Make sure you and your client are on the same page with the value of the case.
- Do not reveal everything up front to the Mediator. Keep some of your aces close to your vest.
- Understand that you may not reach a settlement.
- Make sure that you and your client are aware of any requests for confidentiality regarding the identity of the defendant and the amount paid BEFORE you conclude the settlement discussions.
- If you reach a settlement, draft a preliminary settlement confirmation and add that the check must be delivered within whatever time period you feel is reasonable.

F. Addressing Pending Liens in Settlement Negotiations

- Determine all of your client's outstanding bills and liens prior to the Mediation.
- Do not forget you may have to deal with Medicare, ERISA, FEHBA, Medicaid, and out of state providers who are not subject to Virginia's anti-subrogation statute.
- Calculate your costs.

- Using unpaid bills, your costs and attorney fee, review the realistic range of settlement with client prior to the Mediation.
- Calculate the client's "net" based on a range of numbers representing possible settlements.
- Once the claim settles, attempt to negotiate reductions of the unpaid amounts and liens.
- Make sure that you have written confirmation of any lien reduction.

G. Subrogation

- Subrogation is the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to the loss covered by the policy.
- Simply stated, it is the right of an insurer to claim reimbursement from a third party settlement or verdict for payments made to its insured.
- Subrogation is commonly encountered in auto litigation with uninsured (UM) and underinsured motorist (UIM) claims. Here, the at-fault party is either unknown, uninsured or has less insurance than the injured party ("underinsured"). If there is a known individual (not a John Doe), the UM or UIM carrier will make a payment to its insured, conditioned on the right to "subrogate" or stand in the shoes of the plaintiff and file suit against the uninsured or underinsured defendant. *See, Va. Code § 38.2-2206 (G)*.

PRACTICE POINTER:

Never settle a claim against an underinsured defendant without following the procedures set forth in *Va. Code § 38.2-2206 (K) and (L)*, which require communication and paperwork between the plaintiff, defendant and UIM insurance carrier. Likewise, never take any payment from an uninsured motorist without the consent of the UM carrier if you intend to make a UM claim.

- Virginia's anti-subrogation statute applies to health insurers - Virginia Code Section 38.2-3405.
- This statute prevents many health insurers from attempting to recoup monies paid for treatment related to a liability claim.
- Virginia also prevents the medical expense auto carrier from claiming subrogation rights.
- The anti-subrogation statute has limits - Medicaid, Medicare, ERISA, FEHBA or where the medical care was provided out of state are all excluded.
- The anti-subrogation statute also excludes disability policies.

H. Practical Tips for Restarting Stalled Negotiations

- If your demand did not include information about the defendant pleading guilty to a traffic charge stemming from the crash, review the traffic court records of the jurisdiction where the crash occurred. If indeed the defendant pleaded guilty, provide proof to the adjuster.
- If you have subpoena power, subpoena the other party's criminal record from the Va. State Police. If you do not have subpoena power, then search the criminal conviction records in the local courts to look for convictions and also prior alcohol-related offenses.
- Provide evidence of structural damage to you client's vehicle in cases where the visible damage appears minor.
- If the adjuster harps on the minor property damage or notes there were not many visits to doctors or therapists after the crash, provide the insurance adjuster with excerpts from *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006) cited above.
- If your client has incurred at least $12,500 in combined loss of earnings and medical bills, send them to the adjuster.
- Va. Code §8.01-417(C) requires the claims adjuster to provide you the defendant's policy limits and the current addresses of the driver.
- If the policy limits are low in relation to the damages, send a demand letter noting you

will settle within the policy limits.

- Include an extra copy the settlement demand letter for the defendant so that he/she is on notice that you will settle within the limits and if there is an excess verdict.
- Potentially, if the liability insurance company does settle within the policy limits, and you receive a verdict for more than the policy limits, the defendant will be on the hook for the excess. This opens the liability insurer to a claim of bad faith, which it will want to avoid.

I. Structuring Settlements

- A structured settlement is one that invests some or all of the settlement proceeds.
- There can be substantial tax benefits to structuring the settlement.
- The earnings on the amount invested in the structured settlement accumulate tax free.
- However, with the very low interest rates we have experienced in the recent past, the earnings on the structured settlement are modest.
- A structured settlement is good for clients, who for any number of reasons, cannot manage money.
- The financial entity which invests the settlement money should be triple rated for financial security.
- The financial entity which takes your money to invest in the structured settlement will usually sell the structure to a related entity which then holds it and must pay out as agreed.
- The payout can be structured any way you wish.
- You can combine periodic payments with lump sum payments and configure the payout schedule as works best for the client.
- Once the funds are invested, the client no longer controls the money.
- Once the client agrees to a structured settlement and the money is invested, it will be nearly impossible to then reverse course.

- There are firms which will purchase the client's stream of income for a discounted lump sum, a practice which is fraught with potential headaches.

AUTO INSURANCE BAD FAITH CLAIMS IN VIRGINIA

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A. COMMON LAW BAD FAITH LIABILITY CLAIM

With the 1966 decision in *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220, the VSC confirmed that an insured does indeed have a common law legal remedy for its insurer's bad faith refusal to settle third party claims within the policy limits.

- Weldon Price M.D. was a pediatrician practicing in Arlington, Virginia
- Dr. Price was insured for malpractice by Aetna with limits of 50/150.
- Dr. Prince injured a child as a result of the failure to conduct blood testing.
- After an investigation, Aetna's counsel deemed the case one of "no liability".
- A judgment in the District Court for the District of Columbia was awarded in favor of the child and his father. The judgment for the father was in excess of the $50,000 policy limits. Aetna paid the judgments up to its 50k limits.
- Thereafter Dr. Price sued Aetna in Virginia, alleging wrongful failure to communicate, investigate and then settle the claims within the policy limits.
- Dr. Price's lawsuit sought to force Aetna to pay the excess judgment.
- Dr. Price was successful with a Virginia jury and a verdict was entered against Aetna for the unpaid judgment.
- The opinion sets forth in detail the medical evidence and investigation performed by counsel hired by Aetna in defense of Dr. Price.
- Prior to the med mal trial, settlement negotiations were sponsored by the DC court and during those negotiations Aetna's counsel advised he would recommend a $45,000 settlement.
- The Plaintiff agreed to accept $45,000, but Aetna/Dr. Price's counsel then advised "his client would not pay that much".
- Trial ensued.
- During trial, Dr. Price wrote a letter to counsel hired by Aetna stating that he was aware of the settlement demand within policy limits and Aetna's refusal to pay. The letter

continued that he would hold Aetna responsible for any verdict in excess of the policy limits.

- Aetna's attorney wrote back that he understood that Dr. Price denied liability and asked for evidence or information which established liability. Dr. Price did not respond to that letter.
- *Aetna v Price* addressed whether an insured could sue its liability insurer for conduct which resulted in an excess verdict.
- Question of first impression in Virginia.
- The *Price v Aetna* court surveyed common law throughout nation and concluded the rule is firmly established that "the insurer may, under proper circumstances, be held liable to the insured for the whole amount of a judgment exceeding the policy limits."
- The Court went on to explain why the reason for the rule is obvious.

(1) control of the defense of any claim covered by the contract is vested in the insurer.

(2) the insurer is permitted to make "such investigation, negotiation and settlement … as it deems expedient.

(3) in such a situation, a relationship of confidence and trust is created between the insurer and insured which imposes upon the insurer the duty to deal fairly with the insured.

Components of "Bad Faith Rule"

- The *Aetna v Price* Court defined actionable conduct by the insurer.
- The Court adopted the "bad faith rule" over the "negligence rule".
- In enunciating the "bad faith rule" the court set forth the following standards:

1. A reasonably diligent effort must be made to ascertain the facts upon which a good faith judgment as to settlement can be formulated.

2. A decision not to settle must be an honest one; it must result from a weighing of probabilities in a fair manner.
3. To be a good faith decision, it must be an honest and intelligent one in light of the insurer's expertise in the field.
4. Where reasonable and probable cause exists for rejecting a settlement offer, the insurer will be vindicated.

Application of law to facts in *Aetna v Price*

- The Court then analyzed the evidence and found that even if Aetna could have settled the claim for an amount deemed appropriate by Dr. Price, Aetna was not guilty of bad faith.
- The factors deemed relevant to the Court's decision included:

1. Repudiation of the claim by Dr. Price of an inadequate investigation by Aetna. (Dr. Price admitted in his brief that no evidence was introduced of which he was unaware.
2. Repudiation of Dr. Price's claims that:
   a. Counsel hired by Aetna should have filed a motion *forum non conveniens* to move the underlying malpractice action from the District of Columbia to Virginia. (expert testimony in the bad faith action confirmed that such a motion would have failed), and

   b. Counsel hired by Aetna should have filed a third party complaint against another physician to reduce Dr. Price's exposure. VSC ruled there existed no evidence that such 3rd party physician could have been served with the Complaint. This is a curious response by the VSC given the ease with which parties outside the District of Columbia can be served with process. It might reflect an evidentiary mistake by Dr. Price's counsel in not introducing evidence on this point.
3. Repudiation of Dr. Price's claim that the lawyer hired by Aetna failed to advise him of the opportunity to settle within policy limits. (Dr. Price's letter to his counsel during the med-mal trial effectively establishes that he was aware of the previous discussion of a

$45,000.00 settlement).

4. Repudiation of the claim that Aetna was guilty of bad faith because it refused to accept the recommendation of its counsel to settle within the policy limits for $45,000.00. The VSC announced that the failure of an insurer to follow the settlement recommendation of its counsel, standing alone, is insufficient to sustain a claim of bad faith.

5. Dr. Price was unable to point to any evidence brought to light before or during trial which should have caused a reversal of Aetna's "no liability" position in the litigation, and throughout the case Dr. Price himself asserted he was not negligent.

Although Aetna was aware a verdict would exceed policy limits if liability was established:

a) Aetna conducted an accurate and complete investigation,

b) Aetna was heedful of its insured's interests as much as its own,

c) Aetna honestly and intelligently weighed the probabilities of success in a trial, and

d) Aetna was therefore not acting in bad faith in refusing to settle within policy limits.

Aetna v Price left several issues unresolved. The first issue was how to craft the jury instruction on what constitutes "bad faith" and second was whether bad faith must be established by a standard higher than a preponderance of the evidence. Both questions were answered in *State Farm Mutual Auto Insur. v. Floyd*, 235 Va. 136, 366 SE 2d 93 (1988).

1. *Floyd* Rejected both the plaintiff's definition based on "fairness" and State Farm's definition requiring fraud, deceit, dishonesty, malice or ill-will, *Floyd* held that bad faith required a showing that the "insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured." *Floyd*, 235 Va. 136,143-144.

2. *Floyd* states attorneys have a duty to convey settlement offers to the insured that may significantly affect settlement or resolution of the matter and the failure to do so is one important factor in evaluating for bad faith.

3. Standard of proof requires "clear and convincing evidence" of bad faith. *Floyd* 235 Va. 136, 144.

Although a statutory bad faith third party claim under Va. Code §8.01-66.1 is another option, such claims are limited to $3,500 or less. (see "B" below).

PRACTICE POINTER:

Bad Faith Letter. Prior to trial, counsel for plaintiff should always send a well-reasoned letter to defense counsel, with an extra copy for the defendant, setting forth a demand within the policy limits and explaining why the verdict or judgment will probably exceed the policy limits.

Assignment of Tortfeasor's Bad Faith Claim

An assignment is the mechanism enabling a plaintiff to collect on an excess verdict. The assignment calls for the insured tortfeasor to assign his bad faith claim to the plaintiff in exchange for a promise not to initiate post-judgment collection (garnishment, etc.) against the defendant. The assignment should recite that it does not operate as a release of the judgment. Instead, the amount collected pursuant to the assignment will be applied as a credit to reduce the excess verdict.

B. STATUTORY BAD FAITH CLAIMS - Virginia Code §8.01-66.1

1. Statutory Bad Faith Liability Claims

- Virginia Code §8.01-66.1(B) and (D)(2).
- Statutory bad faith liability claims are limited to a claim of $3,500 or less against a liability carrier.
- To be successful, a judge must find that such denial, refusal or failure to pay was not made in good faith.
- Damages include:

(I) The amount due.

(ii) Double the amount of the judgment awarded the third party claimant,

(iii) Reasonable attorney's fees, and

(iv) Expenses.

2. Statutory Bad Faith Failure to Pay Medical Expense Claim

- Virginia Code §8.01-66.1(A) and (D)(2) specifically mention medical expense claims.
- Subsection A refers to first party (including medical expense) claims of $3,500 or less.

Damages under subsection A include **double the amount due plus attorney fees and expenses**.

- Subsection (D)(2) refers to first party (including medical expense) claims in excess of $3500.

Damages under subsection (D)(2) include **the amount due (not double) plus attorney fees , expenses and interest at double the rate provided in §6.2-301.**

Claims under §8.01-66.1 must be heard by a judge and not a jury. The standard of proof is only a preponderance of the evidence. *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 524 S.E.2d 649 (2000).

C. DECLARATORY JUDGMENT TO DETERMINE COVERAGE

- The liability insurer has the option of filing a declaratory judgment action if it thinks the underlying facts are outside its coverage.
- In personal injury cases, this arises most frequently when it appears the insured engaged in intentional conduct which was excluded from coverage by the terms of the insurance policy.

Reison v Aetna Life & Casualty Co., 225 Va. 327,302 S.E 2d 529 (1983)

- Reison approached Goins on a street in Alexandria and claimed Goins owed him $33.00.
- After an argument Goins drove his truck over the sidewalk and injured Reison.
- Goins later pleaded guilty to hit and run and reckless driving.
- Reison filed suit against Goins and alleged both negligent and intentional conduct.
- Aetna was Goins' motor vehicle liability insurer.
- Aetna filed a declaratory judgment action alleging it had no duty to defend Goins because his actions were intentional and were excluded from coverage.
- The DJ action was heard two weeks before the personal injury trial, and a jury found that Goins did intend to injure Reison.
- The trial court entered an order declaring Aetna owed no duty to defend or afford coverage to Goins.
- Two weeks later a jury found Goins negligent and awarded $372k, an amount in excess of Aetna's liability policy.
- Prior to verdict Reison's counsel sent Aetna a letter offering to settle within the policy limits.
- An appeal followed.
- Reison argued that where the liability of Goins was a jury question in the tort action, it was improper to allow Aetna to make an end run around the tort trial with a DJ action.

- The VSC held that it was proper to hear the DJ action before the tort action.
- Aetna's duty to defend Goins and pay any judgment was dependent upon coverage under the policy.
- VSC held that "advance determination of the coverage question served to remove the clouds from the legal relations of the parties."
- Court decision left Reison without a claim against Aetna for bad faith failure to defend Goins and resulted in a mostly unpaid verdict (Reison had $25k in UM coverage).

VSC court, quoting from a 4th Circuit case, added the following:

> *Unless the insurer has this right (to file a DJ action prior to the tort action), it would be at the mercy of every unscrupulous litigant who, disregarding the facts, falsely alleges a claim on which the insurer would be liable, establishes another claim for which no insurance liability would attach, and then collects the judgment from the insurer because it could not show the true facts. Reison, 225 Va. 336, 302 SE2d 524.*

D. DOES VIRGINIA RECOGNIZE A BAD FAITH UM/UIM CLAIM?

This was decided in 2017 in ***Manu v. GEICO Cas. Co.*, 293 Va. 371 (2017).**

- Manu stemmed from a 4 car pile-up.
- Manu was a passenger in the 4th car.
- The crash was caused by a John Doe vehicle cutting off the lead car.
- Deposition testimony established that both cars #1 and #2 saw John Doe.
- Manu's driver was also negligent for rear-ending car #3, and his insurer, Allstate, paid its liability policy limits prior to trial.
- Geico was Manu's insurer and Manu demanded payment from Geico under the UM coverage for the negligence of John Doe.
- Manu demanded a sum within Geico's UM limits.

- Despite serious injury to Manu, Geico refused to offer more than $5,000.00.
- Geico defended on the ground the injury was not serious, the negligence of Manu's driver was an intervening and superseding cause, and that the evidence of a John Doe was not clearly established.
- Geico's defense (Manu's driver was an intervening and superseding cause of Manu's injury) was struck by the trial judge (Roush) before the case went to the jury.
- The jury returned an excess verdict for Mr. Manu against John Doe.
- Geico paid its policy limits and Manu filed a "bad faith" action against Geico. Manu relied on *Va. Code 8.01-66.1(D)(1)* and also cited to *Va. Code § 38.2-209.*
- Geico demurred and an appeal to the VSC followed.
- Manu argued Virginia *Code 8.01-66.1(D)(1)* is remedial and is to be broadly interpreted.
- Manu argued the legislative history included studies showing consumers were unhappy with their insurers.
- Manu argued that *8.01-66.1(D)(1)* unambiguously references first party claims, which include UM and UIM.

Decision in *Manu v. GEICO Cas. Co.*, 293 Va. 371 (2017).

- Va. Code *§ 38.2-2206(A)* is the Uninsured Motorist Statute.
- All liability insurance policies issued in Virginia shall include an endorsement undertaking to pay its insured all sums the insured is "legally entitled to recover" from an uninsured motorist.
- UM carrier is under no duty to pay until a judgment.
- Judgment is what triggers “legal entitlement to recover” from UM/UIM carrier.
- Geico cannot be sued bad faith for pre-judgment UM claims handling.
- *Manu* was a UM claim.
- Argued jointly with *Manu* was a claim against Liberty Mutual for failure to settle a UIM in good faith. *See: Conner v. Glasgow*, 2017 Va. Unpub. LEXIS 10 (decided April

27, 2017).

- *Conner* is an unpublished opinion issued the same day as *Manu*
- *Conner's* holding was identical to *Manu.*
- *Connor says* no claim for bad faith adjusting of a UIM claim prior to a judgment.

Remedy: New legislation to establish cause of action for bad faith handling of UM/UIM claims.

E. WHAT IS NECESSARY TO PROVE BAD FAITH IN VIRGINIA?

- A common law bad faith claim by a defendant against his **liability insurer** must be founded on more than a refusal of the insurer to follow counsel's advice to settle within the policy limits.
- A common law bad faith claim must establish by clear and convincing evidence that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured.

This will require evidence of at least some of the following:

1. Sloppy investigation, such as incomplete or inadequate witness interviews.
2. Inadequate discovery, such as the failure to depose relevant witnesses.
3. Ignoring expert testimony and failing to hire experts of its own.
4. Ignoring lay testimony.
5. Rolling the dice on either damages or liability determinations when a settlement demand was made within policy limits and the damages likely would result in an excess verdict.
6. Failing to communicate a settlement offer within policy limits.
7. Procedural mistakes concentrating liability where it could be diluted by bringing in other potentially liable defendants. See, *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220 (1966) and *State Farm Mutual Auto Insur. v. Floyd*, 235 Va. 136, 366 SE 2d 93 (1988).

Unfair Claim Settlement Practices Act - Va Code § 38.2-510.

- Contains a list of prohibited practices.
- May be relevant to a bad faith claim against an auto insurer.
- Unfortunately, subsection B of the act eliminates a private cause of action.
- The Act assigns enforcement to the State Corporation Commission.
- The predicate for sanctioning an insurer under this statute is showing that violations were committed with such frequency as to indicate a general business practice.

For Bad Faith Liability Claim, Go Statutory or Common Law?

With the lower burden of proof for statutory bad faith claims under 8.01-66.1(preponderance of the evidence), chances of success are greater than a common law action. Unfortunately, the jurisdictional limit for third party (liability) bad faith claims under 8.01-66.1 is capped at only $3,500.00.

F. ADJUSTER CASE EVALUATION STRATEGIES: EXCESS VERDICT

- Most claims adjusters are averse to being hit with an excess verdict.
- Should excess verdicts occur too often, the adjuster's employment could be in jeopardy.

- For that reason, while the adjuster will strive to settle the case for as little as possible, eventually an offer that could meet the definition of fair" should be forthcoming. Unfortunately, that offer may not be forthcoming until the Plaintiff files suit.
- Plaintiff's counsel should always set the stage for a possible bad faith suit.
- But given the burden of proof for a common law bad faith liability claim (clear and convincing) and the fact that common law bad faith requires a finding that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured, such claims will frequently be difficult to win.

APPENDIX

EXHIBIT A - PERSONAL INJURY SAMPLE COMPLAINT

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____

	:	
Plaintiff,	:	
	:	
v.	:	Case #:

:

Defendant. :

COMPLAINT

1. Plaintiff (insert name) is an adult resident of , Virginia.
2. Upon information and belief, defendant (insert name) is an adult resident of , Virginia.
3. On or about , at approximately .m., plaintiff was proceeding in the right lane of westbound of Old Keene Mill Road.
4. At that time and place defendant pulled out of a shopping mall and attempted to cross plaintiff=s westbound lane=s to travel east on Old Keene Mill Road.
5. At said time and place plaintiff blew her horn and attempted to worn defendant proceeding into her lane of travel.
6. Despite blowing her horn, defendant proceeded into the path of plaintiff=s vehicle.
7. Plaintiff was unable to avoid colliding with defendant=s vehicle.
8. Defendant had a duty to operate her vehicle with due care and regard for others using the highway, including plaintiff.
9. Notwithstanding said duty, defendant did then and there operate her automobile in a careless, negligent and reckless manner in that she:
    a) failed to pay full time attention to her driving duties;
    b) operated her vehicle at an excessive speed under the circumstances and conditions then and there existing;
    c) failed to keep a proper lookout;
    d) failed to yield the right of way;
    e) failed to keep his automobile under proper control;
    f) followed too closely behind Plaintiff; and
    g) was otherwise negligent.
10. As a direct and proximate result of defendant=s joint and several negligence, plaintiff has suffered property damage and permanent bodily injury, and has suffered and will continue to suffer pain of body and mind and inconvenience, has incurred and will continue to incur medical expenses and has suffered and will continue to suffer loss of earnings and earning capacity.

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

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

Respectfully submitted,

By:_____

Name, address, telephone and bar #

Counsel for Plaintiff

APPENDIX
EXHIBIT B - SAMPLE RULE 4:10 ORDER

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____:

Plaintiff,	:	
	:	
v.	:	LAW NO.
Defendants.	:	

ORDER ON MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF

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

1) Time:

2) Place:

3) Manner of the examination:(I) The physical examination shall consist of visual assessment by the examiner, manual palpation or measurement, if desired by the examiner, and directed questioning by the examiner about the results of in-session physical tests. (ii) There shall not be any invasive testing, films, nerve conduction studies or other intrusive or painful requirements or stimuli.

4) Conditions to the examination: (I) Counsel for the Defendant are responsible for all Plaintiff's transportation costs [if the examination is not conducted in the city where Plaintiff is currently residing/ within __ miles of Pl's residence], which costs shall be paid in advance if requested by Plaintiff. (ii)
Counsel for Defendant is responsible for providing the examiner with any medical history, medical records, or radiographic studies requested by the examiner. Plaintiff shall have no responsibility to furnish any such materials. Plaintiff need not complete any questionnaire or history forms upon arrival at the examiner's office. (iii) The examiner is not permitted to conduct interview of Plaintiff. Rule 4:10 is not a substitute for a deposition. The oral exchange shall be limited to affirmative or negative responses to elicited testing questions. (iv) Plaintiff is permitted to have a court reporter and/or videographer present during any interchange between Plaintiff and the examiner in connection with the examination. (v) Plaintiff's counsel or his designee is allowed to be present to object to any attempted oral exchange initiated by the examiner that exceed the scope of this Order. (vi) This examination is by agreement. Plaintiff is voluntarily appearing for the examination. Neither the examiner nor defense counsel will be permitted to state, suggest, argue or imply during the examination, in the report, or at trial that the examination was in any way limited by the Plaintiff's refusal to allow an examination.

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

6) The person or persons by whom it is made: (Name of examiner), a physician who has been

selected by the defendant(s); and

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

_____ _____

ENTERED JUDGE

WE ASK FOR THIS:

_____

Counsel for Defendant

_____

Counsel for Plaintiff