

## **Virginia Injury Practice Today**

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### **Part 1: Recent Insurance Law Changes Regarding Auto Accidents**

#### **A. Introduction**

Major updates have been in put in place in the world of Virginia automobile insurance law completely changing the landscape for personal injury litigation and claims handling. Nearly every case of injury from a car crash has been affected. The new analysis of claims coverage, especially as it relates to uninsured motorist insurance, creates traps for the unwary. The current regime is completely different from the practice of law just a few years ago. The changes went into effect on different dates and there are still differences depending on the date of the accident and the date the applicable insurance policy was issued. Automobile insurance law is statutory law, contract law, and common law.

In general, the changes made by the legislature in recent years are better for consumers and ultimately better for civil justice because they largely promote settlement of claims and allow for more expeditious resolution. The car crash plaintiff's attorney is looking for insurance coverage as one of the three legs of the stool for a successful case. You need liability, damages, and insurance coverage to have a viable claim. Insurance, though, often is the key component which can be limiting as to the damages and can sometimes carry the liability because of the increased exposure for the insurance carriers. The claimant lawyer's job involves finding all of the available insurance and making sure to maximize the client's recovery. The practice of law has become more and more specialized. With these changes, Virginia automobile insurance law has evolved in significant ways that every lawyer should be aware of, just as Virginia drivers even not injury litigators. The four changes discussed herein are changes to the minimum liability limits, the

underinsured motorist (UIM) insurance credit for available coverage, the release of the individual defendant without affecting UIM coverage, and the brand new UM bad faith law.

B. Increased Minimum Liability Limits to \$50,000

The new Virginia minimum limits for automobile insurance coverage are \$50,000/\$100,000 (\$50,000 per person and \$100,000 per accident). The new limits are set out in Virginia Code § 46.2–472:

§ 46.2-472. Coverage of owner's policy.

A. For all policies **effective** on or **after January 1, 2022, but prior to January 1, 2025**, every motor vehicle owner's policy shall:

1. Designate by explicit description or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted.

2. Insure as insured the person named and any other person using or responsible for the use of the motor vehicle or motor vehicles with the permission of the named insured.

3. Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use, or operation of such motor vehicle or motor vehicles within the Commonwealth, any other state in the United States, or Canada, subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of **\$30,000 because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of \$60,000 because of bodily injury to or death of two or more persons in any one accident**, and to a limit of \$20,000 because of injury to or destruction of property of others in any one accident.

B. For all policies **effective** on or after **January 1, 2025**, every motor vehicle owner's policy shall:

1. Designate, by explicit description or appropriate reference, all motor vehicles with respect to which coverage is intended to be granted.

2. Insure as insured the person named and any other person using or responsible for the use of the motor vehicle or vehicles with the permission of the named insured.

3. Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person, and injury to or destruction of property caused by an accident and arising out of the ownership, use, or operation of such motor vehicle or vehicles within the Commonwealth, any other state in the United States, or Canada, subject to a limit exclusive of interest and costs, with respect to each motor vehicle, **of \$50,000 because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of \$100,000 because of bodily injury to or death of two or more persons in any one accident**, and to a limit of \$25,000 because of injury to or destruction of property of others in any one accident.

Virginia Code § 46.2–472 (emphasis added).

The new limits of \$50,000 per person are required for policies issued after January 1, 2025. Policies issued prior to that in Virginia could have had minimum coverage of \$30,000 per person and \$60,000 per event. Insurance policies are typically reissued or renewed every six months or year.

The statutory scheme for Virginia automobile insurance sets forth what must be in a standard automobile accident policy. Virginia Code § 46.2–472. This relates to individual personal policies, not commercial coverage. The new \$50,000 per person puts Virginia in the higher range of minimum limits in the United States whereas it was for many years among the lower limit states.

The \$50,000 minimum limits now match the current General District Court jurisdictional limits. Many cases can be resolved for \$50,000 or less using the General District Court. There sometimes is a question about cases valued just above \$50,000 and whether they should be put in the Circuit Court or the General District Court. The General District Court, however, is much more efficient with case resolution on the order of four months. The General District Court is also faster

and less expensive because of the use of affidavits rather than live doctor testimony. Virginia Code 16.1 –88.2.

The General District Court with a bench trial offers a level of predictability for these smaller to medium sized cases. Generally, the judges in the General District Court are well known to the plaintiff and defense council who can fairly accurately predict outcomes on most cases. An average car crash case might involve medical bills of \$15,000 for healthcare providers like ambulance, emergency room, radiology, physical therapy, doctor visits, and perhaps an MRI. Most of these cases are able to be handled within the General District Court jurisdiction and liability insurance policy limits. Other advantages for the client in the General District Court are that it is somewhat less intimidating to present the case in front of one judge in a few hours rather than a seven-person jury over multiple days.

General District Court forms, including a warrant in debt, bill of particulars, and medical records affidavits are attached as Appendix A.

#### C. No UIM Offset for Amount of Liability Coverage

Under Virginia Code § 38.2-2206(A) there is no longer a credit for the UM/UIM carrier for the available liability coverage.

A. Except as provided in subsection J, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, **unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in**

**subsection B of § 38.2-2202.** This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy. The endorsement or provisions shall also provide underinsured motorist insurance coverage with limits that shall be equal to the uninsured motorist insurance coverage limits and shall obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured.

**The endorsement shall provide that underinsured motorist coverage shall be paid without any credit for the bodily injury** and property damage coverage available for payment, unless any one named insured signs an election to reduce any underinsured motorist coverage payments by the bodily injury liability or property damage liability coverage available for payment by notifying the insurer as provided in subsection C of § 38.2-2202. This election by any one named insured shall be binding upon all insureds under such policy.

The endorsement or provisions shall also provide for at least \$20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first \$200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

For the purposes of this section, "legally entitled to recover" has the same meaning as provided in § 8.01-66.1.

Virginia Code § 38.2-2206(A) (emphasis added). So even if the plaintiff has the same or lesser UM coverage than the defendant, the UM coverage stacks on top of the liability coverage. Previously the rule was that if the plaintiff had \$50,000 of coverage and the defendant had the same then there was no underinsured motorist exposure. Now there would be \$100,000 in available insurance coverage. This gives the consumer the benefit of the UM coverage they paid for.

The only exception to this is if the insurance company has gotten a waiver or rejection of this UM coverage from the injured insured. If the insurer claims that there has been a waiver or rejection of the UM coverage then the plaintiff should ask to see it in writing to be sure it is valid.

Obviously not every case is worth \$100,000 but the good news is there is now typically that amount of insurance in most car crash cases in Virginia starting this year.

UIM coverage protects your family and the occupants of your vehicle in the event of a car accident. It is so important because it's something that you control whereas you cannot control how much insurance the other driver has or does not have. So, you the consumer should keep your UM limits as high as you can afford and never waive this coverage. If there are multiple applicable UM policies, they all stack in similar fashion. Virginia Code § 38.2-2206.

Looking on the uninsured/underinsured motorist coverage, you start with the car that the plaintiff is in. Then look at whether the plaintiff had some additional car insurance. Last, look to see whether there are resident relatives with UM insurance. We often have to explain to the client's family that making a claim under their resident relative policy will not negatively affect their insurance rates because UM insurance is not based upon the fault of the insured. So, the insurance company should not increase the rates based upon making a UM claim. UM can make the difference between getting full and complete compensation or not. Attached as Appendix B are forms to confirm UM coverage and medical payments coverage.

If you are handling an automobile accident case with injuries you need to know these new rules. The methods for determining the amount of first party UM coverage include getting a copy of your client's own policy and declarations sheet and asking for the UM limits in writing from the carrier. The UM claim puts the plaintiff squarely adverse to their own insurance carrier.

D. You can now accept the liability coverage and release the defendant driver without voiding the right to go after the UIM coverage.

Virginia Code § 8.2-2206(K) says the liability carrier can obtain a release for their individual defendant without effecting the plaintiff's UIM claim.

K. An injured person, or in the case of death or disability his personal representative, may settle a claim with (i) a liability insurer, including any insurer providing liability coverage through an excess or umbrella insurance policy or contract and (ii) the liability insurer's insured for the available limits of the liability insurer's coverage. Upon settlement with the liability insurer, the injured party or personal representative shall proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and **finalize the proposed settlement without prejudice to any underinsured motorist benefits or claim. Any such release that states that it is being executed pursuant to or consistent with this subsection shall not operate to release any parties other than the liability insurer and underinsured motorist, regardless of the identities of the released parties set forth in the release, and any terms contained in the release that are inconsistent with, or in violation of, this section are null and void.** Upon payment of the liability insurer's available limits to the injured person or personal representative or his attorney, the liability insurer shall thereafter have no further duties to its insured, including the duty to defend its insured if an action has been or is brought against the liability insurer's insured, and the insurer providing applicable underinsured motorist coverage shall have no right of subrogation or claim against the underinsured motorist. However, if the underinsured motorist unreasonably fails to cooperate with the underinsured motorist benefits insurer in the defense of any lawsuit brought by the injured person or his personal representative, he may again be subjected to a claim for subrogation by the underinsured motorist benefits insurer pursuant to § 8.01-66.1:1. Nothing in this section or § 8.01-66.1:1 shall create any duty on the part of any underinsured motorist benefits insurer to defend any underinsured motorist. No attorney-client relationship is created between the underinsured motorist and counsel for the underinsured motorist benefits insurer without the express intent and agreement of the underinsured motorist, the underinsured motorist benefits insurer, and counsel for the underinsured motorist benefits insurer. This section provides an alternative means by which the parties may resolve claims and does not eliminate or restrict any other available means.

Virginia Code § 8.2-2206(K) (emphasis added). For many decades, permission of the UM insurer had to be obtained in Virginia before any settlement could be reached with the liability carrier. This allowed the UM carrier to hold the case hostage without even being required to fairly evaluate it. The new system allowing the liability carrier to dump their coverage and run creates efficiencies

where more cases will get resolved. In Appendix C we provide copies of the standard releases and cover letters to collect the liability money and release the individual defendant driver.

There are specialized rules that the defendant either sign or be provided with a copy of the release.

**L. Any settlement between the injured person or his personal representative, any insurer providing liability coverage applicable to the claim, and the underinsured motorist described in subsection K shall be in writing, signed by both the injured person or his personal representative and the underinsured motorist, and shall include the following notice to the underinsured motorist, which must be initialed by the underinsured motorist:**

"NOTICE TO RELEASED PARTY: Your insurance company has agreed to pay the available limits of its insurance to settle certain claims on your behalf. This settlement secures a full release of you for all claims the claimant/plaintiff has against you arising out of the subject accident, as well as ensures that no judgment can ever be entered against you by the claimant/plaintiff. In order to protect yourself from subrogation by any underinsured motorist insurer, you are agreeing to cooperate with the underinsured motorist benefits insurer(s). The underinsured motorist benefits insurer is not your insurer and has no duty to defend you.

Under this manner of settlement, the underinsured motorist benefits insurer(s) that is/are involved in this case has/have no right of subrogation against you unless you fail to reasonably cooperate in its/their defense of the claim by not (i) attending your deposition and trial, if subpoenaed, (ii) assisting in responding to discovery, (iii) meeting with defense counsel at reasonable times after commencement of this suit and before your testimony at a deposition and/or trial, and (iv) notifying the underinsured motorist benefits insurer or its defense counsel of any change in your address, provided that the underinsured motorist benefits insurer or its defense counsel has notified you of its existence and provided you with their contact information.

Upon payment of the agreed settlement amount by your insurance company(ies), such company shall no longer owe you any duties, including the duty to hire and pay for an attorney for you. You are not required to consent to settlement in this manner. If you do not consent to settlement in this manner, your insurance company will still defend you in any lawsuit brought against you by the

claimant/plaintiff, but you will not have the protections of a full release from the claimant/plaintiff, judgment could be entered against you and may exceed your available insurance coverage, and any underinsured motorist benefits insurer would have a right of subrogation against you to recover any moneys it pays to the claimant/plaintiff.

You are encouraged to discuss your rights and obligations related to settlement in this manner with your insurance company and/or an attorney. By signing this document, you agree to consent to this settlement and to reasonably cooperate with the underinsured motorist benefits insurer in the defense of any lawsuit brought by the claimant/plaintiff.

\_\_\_\_\_ (initial)"

**In the alternative to having the underinsured motorist sign the release and initial the notice, the liability insurer may send the notice and release to the underinsured motorist by certified mail return receipt requested to his last known address, which will be deemed to have satisfied the requirements of this subsection.**

Virginia Code § 8.2-2206(K) (emphasis added).

The defendant driver has to cooperate with the defense by the UM carrier, or the at-fault motorist risks being held responsible through subrogation to the UM carrier. If the defendant driver cooperates, he cannot be held personally responsible. The case still proceeds in the name of the individual defendant, so the jury is not aware that the defendant's liability carrier has already resolved the claim in part, as it goes forward as necessary against the UM carrier.

Strategic and tactical decisions need to be made by plaintiff's counsel about when to take the money from the liability carrier, before or after filing suit. There may be challenges with dispersing the liability money, before getting the rest from UM. Especially where there are large liens or paybacks which would make it hard putting money in the client's pocket based upon the initial settlement alone. Being able to take the liability settlement first gives the plaintiff some money to allow them to engage in the fight against the UM carrier. In this regard it also puts

pressure on the UM carrier who must now take over the cost of defense alone. The “pay and walk” option benefits the parties, the insurance carriers, and the courts. This rule had evolved over the past few years and is working well now.

E. New UM Bad Faith Law

There is now UM first party bad faith in Virginia under Virginia Code § 8.01-66.1(D) which creates a duty on the UM/UIM carrier to negotiate in good faith.

**D. Whenever any insurance company** licensed in the Commonwealth to write motor vehicle insurance as defined in § 38.2-124 (i) denies, refuses, fails to pay, or **fails to make a timely and reasonable settlement offer to its insured under the provisions of any uninsured or underinsured motorist benefits coverage** in a policy of motor vehicle insurance applicable to the insured after the insured has become legally entitled to recover **or** (ii) after all applicable liability policy limits and underlying uninsured and underinsured motorists benefits have been tendered or paid, **rejects a reasonable settlement demand made by the insured within the policy's coverage limits for uninsured or underinsured motorist benefits or fails to respond within a reasonable time after being presented with such demand** after the insured has become legally entitled to recover, and it is subsequently found by a court of proper jurisdiction that such denial, refusal, or failure to timely pay or failure to make a timely and reasonable settlement offer, rejection of a reasonable settlement demand, or failure to timely accept a reasonable settlement demand was not made in good faith, in addition to the amount due and owing by the insurance company to its insured on the judgment against the tortfeasor, **the insurance company shall also be liable to the insured in an amount up to double the amount of the judgment obtained** against the underinsured motorist, uninsured motorist, immune motorist, unknown owner or operator, or released defendant in the underlying personal injury or wrongful death action, **not to exceed \$500,000, together with reasonable attorney fees** for bringing a claim under this subsection, **and all costs and expenses** incurred by the insured to secure a judgment against the tortfeasor, **and interest from 30 days after the date of such denial or failure or the date the reasonable settlement demand was submitted in writing.** The insured or the insured's representative may seek adjudication of a claim that the insurance company did not act in good faith as a posttrial motion before the court in which the underlying personal injury or wrongful death judgment was

obtained or as a separate action against the company. If the insured or the insured's representative seeks adjudication as a separate action and the underlying judgment is appealed, any action filed under this subsection shall be stayed by the court pending final resolution of the appeal of the underlying judgment.

Virginia Code § 8.01-66.1(D) (emphasis added).

This rule went into effect on July 1, 2024, for accidents that occur after that date. The old rule put Virginia in a very small group of states where consumers did not have the ability to hold their own UM carrier responsible for unreasonable claims handling. Virginia has long had liability carrier bad faith. If the liability carrier unreasonably does not settle the case within policy limits, their own insured as defendant may have a claim against them for failing to get the case resolved when it should have been. Virginia Code § 8.01-66.1(B). However, until this new law, there was no such requirement of good faith treatment of the UM insured. Before this new UM bad faith law, the plaintiff had the problem of their own insurance carrier sandbagging them and ultimately asking for a discount to resolve many cases. The old rule meant the UM carrier did not have to do anything until there was actually a judgment entered against the at-fault driver. The new system promotes settlement and is a more efficient way to be sure that the insurance companies are doing what they're supposed to do in claims adjustment.

This new UM bad faith law does allow for damages under certain circumstances if the law is followed to the letter.

**E. Prior to making a demand under this section**, the claimant shall provide **notice** to the insurer **45 days prior** to making such demand along with information and documentation sufficient for the insurer to assess the liability and damages of the claimant.

Virginia Code § 8.01-66.1(E) (emphasis added). The system creates new deadlines and calls for new forms that have to be used to hold the carrier responsible for bad faith negotiations. Whether they delay, deny, or low ball a claim that they should have objectively resolved, the UM insurer at

least has an obligation to explain why. Whether there will be real teeth in this law will depend upon how it's applied in the future through individual court decisions. However, the current beneficial effect is it should deter a certain amount of bad conduct by the insurance companies. As the law is interpreted, there will be opportunities to make both new law as well as potentially get some big judgments against insurance carriers in the most egregious cases. The maximum penalty is \$500,000 as called for in the statute. Virginia Code § 8.01-66.1(D).

#### F. Searching for Coverage

The search for insurance coverage is always a key stock-in-trade of the automobile accident lawyer. The search for coverage is more complex than one might think. The insurance companies also do not go out of their way to make it easy. It often requires an experienced attorney who knows which stones to turn over to get the full picture of the available insurance. Insurance certainly is the tail that wags the dog of automobile torts. In the circumstance where there is a commercial policy or multiple levels of coverage there's a better chance of getting full and fair compensation for the client. Other ways to find insurance coverage is to find additional defendants. For instance, if the defendant driver was employed and within the scope of that employment at the time of the wreck, then his employer may also be responsible.

Sadly, we often see cases where you have an extreme injury like paraplegia and minimum coverage of \$50,000. For any significant injury, the finding of all available automobile coverage is critical.

## **Part 2: Injury Law Ethics**

### **A. Introduction**

There are a number of ethics considerations that come up frequently in the injury attorney's practice and we will cover a wide variety of those in this presentation. First, you need to be familiar with the rules related to money, including your obligations regarding third-party liens, attorney liens, referral fees, and trust accounts. Next, we will discuss your obligations when dealing with counsel and the courts, including your obligations upon the death of your client. Whether you can represent both the driver and a passenger in the same wreck is another common question we will address. Finally, we will touch on social media, the attorney discipline process, and confidentiality in injury releases.

### **B. Rules and Opinions Relating to Money**

#### *1. Legal Ethics Opinion 1865: Obligations of a Lawyer in Handling Settlement Funds When a Third-Party Lien or Claim is Asserted.*

At the conclusion of the plaintiff's injury claim there will likely be third-party liens that need to be addressed. These can include outstanding medical bills, short-term disability liens, workers compensation liens, ERISA qualified health insurance liens, and government funded health insurance (Medicare/Medicaid/Tricare/VA) liens. LEO 1865 clarifies a lawyer's ethical responsibilities relating to these third-party liens. Once you are on notice you have a duty to ensure the lien is properly addressed. LEO 1865 is attached as Appendix D.

Once the claimant's lawyer sends out the demand package, beginning the negotiations process, they should simultaneously be checking all medical bill account balances and investigating lien paybacks. Note, typically liens unrelated to the subject matter of the representation are not entitled to be paid from the settlement proceeds, absent a valid assignment. You have a duty to honor valid third-party liens, even over client objections. You can hire outside

lien resolution vendors to assist with this process. If any agreement cannot be reached with a lien holder, then your remedy is to interplead the money to the court.

2. *Legal Ethics Opinion 1878: Successor Counsel's Ethical Duty to Include in a Written Engagement Agreement Provisions Relating to Predecessor Counsel's Quantum Meruit Legal Fee Claim in a Contingent Fee Matter.*

If you take over representation of a client who was previously represented by another attorney in the same matter, then the predecessor attorney may have a contractual or quantum meruit claim for services rendered. "A lawyer discharged without cause from representation in a contingent fee matter may assert a lien upon the proceeds of a recovery ultimately obtained in the same matter by successor counsel." LEO 1878 at page 1. The successor attorney must explain to the client at the outset of representation the client's "potential" obligation to all counsel. *Id.* at page 2. Further, the total attorney's fee must be reasonable. LEO 1878 is attached as Appendix E.

The situation will vary widely depending on what stage the case is in. It is much different if the change in counsel occurs in the first several months of representation versus close to trial or mediation. Best practice is to attempt to reach an agreement between all parties at the outset of the representation and confirm the agreement in writing.

3. *Virginia Rules of Professional Conduct Rule 1.5 Fees*

Virginia Rules of Professional Conduct Rule 1.5 outlines the rules on attorney fees. In a personal injury context, the attorney fee charged is typically a contingency fee as permitted by Rule 1.5(c):

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the

contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

It is not uncommon for one attorney to refer an injury case to another attorney and receive a referral fee. This is permitted under Rule 1.5(e) as long as the requirements detailed below are met.

(e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) the client is advised of and consents to the participation of all the lawyers involved; (2) the terms of the division of the fee are disclosed to the client and the client consents thereto; (3) the total fee is reasonable; and (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

It is also important to confirm the expectations between the two attorneys so that there is no miscommunication about the scope of each attorney's work. You can detail these expectations and agreements in the fee contract if you prefer, but a side letter works just as well too. Sample forms confirming the referral relationship are attached as Appendix F.

#### *4. Virginia Rules of Professional Conduct Rule 1.15 Safekeeping Property*

Virginia Rules of Professional Conduct Rule 1.15 sets forth the rules for the safekeeping of client property, specifically client funds. Rule 1.15(a) covers the depositing of funds and requires that all client funds be held in a separate client trust account at a bank that is approved by the Virginia State Bar. Rule 1.15(b) requires the attorney to promptly notify the client of the receipt of client funds and to promptly disburse the funds to the client. A common example in the car accident case is promptly processing and disbursing money received under the client's medical payments coverage assuming all liens have been resolved. Rule 1.15(c) outlines the record keeping requirements.

## C. Dealing with Counsel and Courts

### 1. *Legal Ethics Opinion 1900: A Lawyer's Duty to Disclose the Death of a Client*

What do you do when you have a client die during the course of representation? LEO 1900 addresses this exact question:

The lawyer must disclose the client's death to opposing counsel or the opposing party if pro se before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court.

LEO 1900 is attached as Appendix G. This will also change the type of case into a survivor's action or wrongful death case depending on if the client died from conditions related to the wreck or not. Regardless of the type of case you will need to have either an administrator or executor of the estate appointed to take over the case.

### 2. *Virginia Rules of Professional Conduct Rule 3.3 Candor Toward the Tribunal*

Keep in mind you have a duty of candor toward the tribunal, which specifies that you shall not knowingly:

- (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

### 3. *Virginia Rules of Professional Conduct Rule 3.4 Fairness to Opposing Party and Counsel*

In addition to the duties you have to your clients and the court, you also have duties to the opposing party.

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act. and counsel.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay: (1) reasonable expenses incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying; (3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the

person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Rule 3.4 covers a broad range of topics. Note, although you cannot pay a witness for their testimony, section (c) allows you to pay a witness' reasonable expenses and lost wages incurred as a result of attending or testifying in a proceeding. This is similar to the federal rule. 28 U.S. Code § 1821. Section (i) states the prohibition against presenting or threatening criminal or disciplinary charges solely to gain a civil advantage. This rule does not prevent both processes from occurring simultaneously. For example, if the defendant is charged with DUI the client can participate in the criminal case as the victim, while also pursuing a civil injury case.

D. Can you represent a driver and a passenger in the same wreck?

The short answer is maybe. Even if the driver did not do anything to cause or contribute to the wreck there may still be a potential conflict. Virginia Rules of Professional Conduct Rule 1.7 sets out the general rule on conflicts of interest. Under Rule 1.7(a) a lawyer cannot represent a client if representing that client will be directly adverse to another client or if there is significant risk that the representation will materially limit the lawyer's responsibilities to another client. A lawyer may represent both clients if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) the consent from the client is memorialized in writing.

#### Virginia Rules of Professional Conduct Rule 1.7

This potential conflict often arises when married couples or other close relatives are in a car wreck together. These clients typically want the same attorney but that is not always advisable depending on the circumstances of the crash and the amount of available insurance coverage. Begin by counseling the potential clients about this rule. Then decide quickly if you need to send one of the potential clients to another attorney at a different firm. If you decide to keep both clients then obtain their consent in writing for representation despite the potential conflict. A sample conflict waiver form is attached as Appendix H. There are risks to handling both cases, particularly if the relationship between the clients deteriorates. That change of relationship could put you in an awkward position and possibly lead to you getting out of both cases. The better practice is to develop a relationship with another attorney that you can refer your conflict work to that will work cooperatively with you on the companion cases.

#### E. Virginia Rules of Professional Conduct Rule 1.1 Competence

Virginia Rules of Professional Conduct Rule 1.1 sets out the basic standard for attorney competence as having the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The comments to Rule 1.1 elaborate on these various characteristics and point out in comment 1 that typically the required proficiency is that of a general practitioner, but there are occasions on which expertise may be required. Most run-of-the-mill car accidents would likely not require any type of special expertise, but when dealing with a unique

injury or type of injury case it may be advisable to seek an attorney with expertise in that area through either a referral or co-counsel relationship.

F. Contacting Represented v. Unrepresented Parties

Under Rule 4.2 you “shall not” communicate with a represented party about the subject of the representation unless you have permission from their counsel. Rule 4.3 addresses unrepresented parties and provides:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Note the rules vary slightly in the Federal Courts. This typically comes up when you are making a claim against a business and want to speak with an ex-employee, which is normally allowed, unless that employee is the person you are accusing of committing negligence binding on the defendant company.

G. Social Media Advice to Clients

In today’s world social media can be a helpful place to gather evidence to help support your case. It is important to counsel your clients that they cannot delete anything on their social media. *Allied Concrete Co. v. Lester*, 285 Va. 295 (2013). Appendix F contains a letter with sample language we use warning clients about the use and preservation of social media during the course of their case.

#### H. Discipline Process Overview

- Complaint Made and Intake Process
- Referral to Bar Counsel and Investigation
- Referral to District Subcommittee
- Bar Counsel Recommendation
- District Subcommittee Meeting and Sanctions
- District Committee Meeting and Sanctions
- Disciplinary Board and/or Three Judge Circuit Court and Sanctions
- Res Judicata Only Applies to Action by Subcommittee, etc.

#### I. Confidentiality in Releases

Most insurance companies insist confidentiality be a term of any settlement, but the scope of the confidentiality is usually up for some negotiation. Plaintiff's counsel typically wants some leeway in the confidentiality terms to allow them to publish a settlement report. Both sides typically agree to reciprocal confidentiality for tax implications.

WARRANT IN DEBT (CIVIL CLAIM FOR MONEY)

Commonwealth of Virginia V.A. CODE § 16.1-79

General District Court

CITY OR COUNTY

STREET ADDRESS OF COURT

TO ANY AUTHORIZED OFFICER: You are hereby commanded to summons the Defendant(s).

TO THE DEFENDANT(S): You are summoned to appear before this Court at the above address on

RETURN DATE AND TIME to answer the Plaintiff(s)' civil claim (see below)

DATE ISSUED [ ] CLERK [ ] DEPUTY CLERK [ ] MAGISTRATE

CLAIM: Plaintiff(s) claim that Defendant(s) owe Plaintiff(s) a debt in the sum of

\$ net of any credits, with interest at % from date of until paid,

\$ costs and \$ attorney's fees with the basis of this claim being

[ ] Open Account [ ] Contract [ ] Note [ ] Other (EXPLAIN)

HOMESTEAD EXEMPTION WAIVED? [ ] YES [ ] NO [ ] cannot be demanded

DATE [ ] PLAINTIFF [ ] PLAINTIFF'S ATTORNEY [ ] PLAINTIFF'S EMPLOYEE/AGENT

CASE DISPOSITION

JUDGMENT against [ ] named Defendant(s) [ ]

for \$ net of any credits, with interest at % from date

of until paid, \$ costs and \$ attorney's fees

[ ] and \$ costs for Servicemember Civil Relief Act counsel fees

HOMESTEAD EXEMPTION WAIVED? [ ] YES [ ] NO [ ] CAN NOT BE DEMANDED

[ ] JUDGMENT FOR [ ] NAMED DEFENDANT(S) [ ]

[ ] NON-SUIT [ ] DISMISSED

Defendant(s) Present: [ ] NO [ ] YES

DATE

JUDGE

HEARING DATE  
AND TIME

PLAINTIFF(S) (LAST NAME, FIRST NAME, MIDDLE INITIAL)

ADDRESS

V.

DEFENDANT(S) (LAST NAME, FIRST NAME, MIDDLE INITIAL)

ADDRESS

WARRANT IN DEBT

TO DEFENDANT: You are not required to appear, however, if you fail to appear, judgment may be entered against you. See the additional notice of the reverse about requesting a change of trial location.

[ ] To dispute this claim, you must appear on the return date to try this case.

[ ] To dispute this claim, you must appear on the return date for the judge to set another date for trial.

Bill of Particulars

ORDERED

DUE

Grounds of Defense

ORDERED

DUE

ATTORNEY FOR PLAINTIFF(S)

ATTORNEY FOR DEFENDANT(S)

JUDGMENT PAID OR  
SATISFIED PURSUANT  
TO ATTACHED NOTICE  
OF SATISFACTION.

DATE

CLERK

DISABILITY

ACCOMMODATIONS

for loss of hearing,  
vision, mobility, etc.,  
contact the court ahead  
of time.

**RETURNS: Each defendant was served according to law, as indicated below, unless not found.**

|                                                                                                                                                                                                                                                                           |                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| NAME .....                                                                                                                                                                                                                                                                |                       |
| ADDRESS .....                                                                                                                                                                                                                                                             |                       |
| <input type="checkbox"/> PERSONAL SERVICE                                                                                                                                                                                                                                 | Tel. No. ....         |
| Being unable to make personal service, a copy was delivered in the following manner:                                                                                                                                                                                      |                       |
| <input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above. |                       |
| <input type="checkbox"/> Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)                                                                                |                       |
| <input type="checkbox"/> Served on Secretary of the Commonwealth                                                                                                                                                                                                          |                       |
| <input type="checkbox"/> NOT FOUND                                                                                                                                                                                                                                        | SERVING OFFICER ..... |
| ..... DATE .....                                                                                                                                                                                                                                                          | for .....             |

|                                                                                                                                                                                                                                                                           |                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| NAME .....                                                                                                                                                                                                                                                                |                       |
| ADDRESS .....                                                                                                                                                                                                                                                             |                       |
| <input type="checkbox"/> PERSONAL SERVICE                                                                                                                                                                                                                                 | Tel. No. ....         |
| Being unable to make personal service, a copy was delivered in the following manner:                                                                                                                                                                                      |                       |
| <input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above. |                       |
| <input type="checkbox"/> Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)                                                                                |                       |
| <input type="checkbox"/> Served on Secretary of the Commonwealth                                                                                                                                                                                                          |                       |
| <input type="checkbox"/> NOT FOUND                                                                                                                                                                                                                                        | SERVING OFFICER ..... |
| ..... DATE .....                                                                                                                                                                                                                                                          | for .....             |

|                                                                                                                                                                                                                                                                           |                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| NAME .....                                                                                                                                                                                                                                                                |                       |
| ADDRESS .....                                                                                                                                                                                                                                                             |                       |
| <input type="checkbox"/> PERSONAL SERVICE                                                                                                                                                                                                                                 | Tel. No. ....         |
| Being unable to make personal service, a copy was delivered in the following manner:                                                                                                                                                                                      |                       |
| <input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above. |                       |
| <input type="checkbox"/> Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)                                                                                |                       |
| <input type="checkbox"/> Served on Secretary of the Commonwealth                                                                                                                                                                                                          |                       |
| <input type="checkbox"/> NOT FOUND                                                                                                                                                                                                                                        | SERVING OFFICER ..... |
| ..... DATE .....                                                                                                                                                                                                                                                          | for .....             |

**OBJECTION TO VENUE:**

To the Defendant(s): If you believe that Plaintiff(s) should have filed this suit in a different city or county, you may file a written request to have the case moved for trial to the general district court of that city or county. To do so, you must do the following:

1. Prepare a written request which contains (a) this court's name, (b) the case number and the "return date" as shown on the other side of this form in the right corner, (c) Plaintiff(s)' name(s) and Defendant(s)' name(s), (d) the phrase "I move to object to venue of this case in this court because" and state the reasons for your objection and also state in which city or county the case should be tried, and (e) your signature and mailing address.
2. File the written request in the clerk's office before the trial date (use the mail at your own risk) or give it to the judge when your case is called on the return date. Also send or deliver a copy to plaintiff.
3. If you mail this request to the court, you will be notified of the judge's decision.

|                                                                                                                 |                                            |
|-----------------------------------------------------------------------------------------------------------------|--------------------------------------------|
| I certify that I mailed a copy of this document to the defendants named therein at the address shown therein on |                                            |
| DATE .....                                                                                                      | <input type="checkbox"/> Plaintiff         |
|                                                                                                                 | <input type="checkbox"/> Plaintiff's Atty. |
|                                                                                                                 | <input type="checkbox"/> Plaintiff's Agent |
| Fi. Fa. issued on .....                                                                                         |                                            |
| Interrogatories issued on: .....                                                                                |                                            |
| Garnishment issued on .....                                                                                     |                                            |

**AFFIDAVIT – DEFAULT JUDGMENT  
SERVICEMEMBERS CIVIL RELIEF ACT**

Commonwealth of Virginia VA. CODE § 8.01-15.2

Case No. ....

RETURN DATE AND TIME

☐ Circuit Court ☐ General District Court  
☐ Juvenile and Domestic Relations District Court

CITY OR COUNTY

v./In re: .....

I, ....., the undersigned affiant, states the following under oath:

PRINT NAME

☐ The defendant/respondent ☐ is in military service. ☐ is not in military service.  
☐ The affiant is unable to determine whether or not the defendant/respondent is in military service.

The following facts support the statement above:

Pursuant to 50 U.S.C. § 3931, if the court is unable to determine whether the defendant/respondent is in military service based upon the affiant's statement, the court, before entering judgment, may require the plaintiff/petitioner to file a bond in an amount approved by the court.

DATE

AFFIANT'S SIGNATURE

The above-named affiant personally appeared this day before the undersigned, and upon duly being sworn, made oath that the facts stated in this affidavit are true to the best of his or her knowledge, information and belief.

DATE

☐ CLERK ☐ DEPUTY CLERK ☐ MAGISTRATE ☐ JUDGE ☐ INTAKE OFFICER

**FOR NOTARY PUBLIC'S USE ONLY:**

State of ..... ☐ City ☐ County of .....

Acknowledged, subscribed and sworn to before me this ..... day of ....., 20 .....

NOTARY REGISTRATION NUMBER

NOTARY PUBLIC

(My commission expires: .....)

**NOTICE REGARDING APPOINTMENT OF COUNSEL TO REPRESENT ABSENT SERVICEMEMBER:**

Where appointment of counsel is required pursuant to 50 U.S.C. § 3931 or § 3932 or another section of the Servicemembers Civil Relief Act, the court may assess reasonable attorney fees and costs against any party as the court deems appropriate, including a party aggrieved by a violation of the Act, and shall direct in its order which of the parties to the case shall pay such fees and costs, except the Commonwealth unless it is the party that obtains the judgment. Further, counsel appointed pursuant to the Servicemembers Civil Relief Act shall not be selected by the plaintiff or have any affiliation with the plaintiff.

**FOR COURT USE ONLY:**

**☐ ORDER OF APPOINTMENT OF COUNSEL**

I find that appointment of counsel is required pursuant to 50 U.S.C. § 3931 or § 3932 or another section of the Servicemembers Civil Relief Act and therefore, I appoint the lawyer indicated below to represent the absent servicemember named as defendant/respondent above.

☐ The lawyer shall be paid a fee of \$ ..... for serving as counsel for the absent servicemember.

NAME, ADDRESS  
OF COURT  
APPOINTED  
LAWYER .....

NEXT HEARING DATE AND TIME

DATE

JUDGE

**☐ STAY OF PROCEEDINGS**

I find that a stay of proceedings is required pursuant to 50 U.S.C. § 3931 and, therefore, such a stay, for a minimum period of 90 days, is ordered until .....

NEXT HEARING DATE AND TIME

DATE

JUDGE

**VIRGINIA: IN THE GENERAL DISTRICT COURT FOR THE CITY OF NORFOLK**

[REDACTED]

**Plaintiff,**

**v.**

[REDACTED]

**SERVE:**

[REDACTED]

**Defendant.**

**BILL OF PARTICULARS**

COMES NOW the Plaintiff, [REDACTED], by counsel, and for the Bill of Particulars states the following:

1. On or about September 26, 2024, the Plaintiff, [REDACTED] (hereinafter "Plaintiff"), was operating a motor vehicle, entering the parking lot at Iron Asylum gym located at 1200 N Military Highway in Norfolk, Virginia.
2. On the aforementioned date, the Defendant, [REDACTED] (hereinafter "Defendant"), was operating a motor vehicle in the parking lot at Iron Asylum gym located at 1200 N Military Highway in Norfolk, Virginia.
3. At the same time and place, the motor vehicle operated by the Defendant was involved in a motor vehicle impact with the motor vehicle operated by the Plaintiff.
4. At the aforementioned time and place, the Defendant had a duty to operate his motor vehicle free from negligence and with due regard for the safety of others, including the Plaintiff.

5. Notwithstanding said duties, the Defendant did then and there so recklessly, carelessly, and negligently operate his motor vehicle so as to cause a motor vehicle collision involving the Plaintiff.

6. The aforementioned motor vehicle collision was directly and proximately caused by the Defendant's violation of his duties as aforesaid. The Defendant was further negligent in that he:

- a. failed to keep a proper lookout;
- b. failed to give full time and attention to the operation of his motor vehicle;
- c. failed to keep his motor vehicle under proper control;
- d. drove the vehicle at unsafe speed for the conditions;
- e. failed to stay in his lane of travel;
- f. improperly impeded the safe flow of traffic; and
- g. operated his motor vehicle in a reckless manner.

7. The Defendant was further negligent in that he violated the laws of the Commonwealth of Virginia and Norfolk, Virginia.

8. That as a direct and proximate result of the aforementioned acts and/or omission of the Defendant, which directly and proximately caused said collision, the Plaintiff's motor vehicle was violently impacted and the Plaintiff suffered personal injuries for which he was forced to expend sums of money for past hospital and medical care. More specifically, the Plaintiff incurred medical and out-of-pocket expenses totaling \$10,895.70, as itemized in Plaintiff's Exhibit A: Itemized List of Damages, and incorporated herein.

9. That as a direct and proximate result of said injuries, the Plaintiff has incurred lost wages in the amount of \$2,500.00.

10. That as a direct and proximate result of said injuries, the Plaintiff has undergone physical pain, suffered mental anguish and emotional distress, and may continue to suffer pain, mental anguish and emotional distress in the future, along with other damages.

11. The Plaintiff reserves the right to amend and/or supplement this Bill of Particulars at any time, up to and including the date of trial.

WHEREFORE, for the foregoing reasons, the Plaintiff, [REDACTED], moves for a judgment and an award of execution in his favor against the Defendant, [REDACTED], in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), for compensatory damages, plus interest from September 25, 2024, and the cost of these proceedings.

[REDACTED]

---

By Counsel

John M. Cooper, Esquire (VSB: 29064)  
jcooper@cooperhurley.com  
Bailey L. Gifford, Esquire (VSB: 96138)  
bgifford@cooperhurley.com  
**Cooper Hurley Injury Lawyers**  
125 St Paul's Blvd, Suite 510  
Norfolk, Virginia 23510  
(757) 333-3333 Telephone  
(757) 455-8274 Facsimile  
*Counsel for Plaintiff*

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

██████████,

Plaintiff,

v.

AT LAW NO.: ██████████

██████████,

Defendant.

**AFFIDAVIT RE: MEDICAL REPORTS AND/OR RECORDS**

THIS DAY, in the city of \_\_\_\_\_, \_\_\_\_\_, the Custodian of Records, \_\_\_\_\_, personally appeared before me, a Notary Public for the State of \_\_\_\_\_, at Large, and made oath as follows:

1. That she/he is the custodian of medical records for Chesapeake EMS whose office is located at:

Chesapeake EMS  
304 Albemarle Drive  
Chesapeake, VA 23322

2. That the above-named Plaintiff was examined and treated by Chesapeake EMS on August 31, 2020;

3. That the attached medical records are true and correct to the best of her/his knowledge and belief and are fully descriptive as to the nature and extent of Plaintiff's injury;

4. That the attached statement of medical expenses is true and accurate.

\_\_\_\_\_  
Custodian of Record

\_\_\_\_\_  
Date

Subscribed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_, 2024. In testimony whereof, I have hereunto set my hand the day and month aforesaid.

Notary Public: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

DATE

FACILITY  
ATTN: MEDICAL RECORDS/BILLING  
STREET  
CITY/STATE/ZIP

|     |                     |             |
|-----|---------------------|-------------|
| Re: | Your Patient:       | CLIENT NAME |
|     | Social Security No: | XXX-XX-XXXX |
|     | Date of Birth:      | 01/01/0000  |
|     | Hospital/Facility:  | FACILITY    |
|     | Dates of Service:   | 01/01/0000  |

Dear Sir/Madam:

Enclosed please find an Affidavit and medical records/bills for CLIENT NAME. Please complete the Affidavit with attached medical records/bills and return ONLY the Affidavit to me as soon as possible. I am enclosing a self-addressed, stamped envelope for your convenience.

Please call with any questions.

Sincerely,

NAME

Enclosures

February 25, 2025

State Farm  
State Farm  
P. O. Box 106171  
Atlanta, GA 30348-6171

Re: Our Client:  
Your Insured:  
Claim Number:  
Date of Accident:



***MEDICAL EXPENSE BENEFITS/ MEDPAY CLAIM LETTER***

Dear Sir or Madam:

Please be advised that this firm has been retained to represent the above-referenced client relating to injuries sustained in an automobile collision on the above date. At the time of the accident, our client qualified as an insured under the subject policy. **This letter serves to place you on notice of a possible claim for medical expense benefits or MEDPAY benefits under the subject policy.**

**Please advise in writing if my client has medical expense benefits and/or MEDPAY benefits, along with a copy of the declarations page.**

In addition, this letter will also place you on notice that this firm claims an attorney's lien against any proceeds disbursed relating to this claim pursuant to the pertinent section of the Code of Virginia.

Please advise as to the adjuster and claim number assigned to this matter. Thank you for your assistance in this claim. I look forward to your earliest response. Please note my representation in your file.

Sincerely,

A black rectangular redaction box covering the signature of the legal assistant.

Legal Assistant

February 25, 2025

**Sent via Facsimile**

Ms. Shantiea Hampton  
State Farm  
P. O. Box 106171  
Atlanta, GA 30348-6171

Re: Our Client:  
Your Insured:  
Claim Number:  
Date of Accident:



***UNINSURED/UNDERINSURED MOTORIST (UM/UIM) CLAIM LETTER***

Dear Sir or Madam:

Please be advised that this firm has been retained to represent the above-referenced client relating to injuries sustained in an automobile collision on the above date. At the time of the accident, our client qualified as an insured under the subject policy. **This letter serves to place you on notice of a possible uninsured/underinsured motorist claim.**

**Please also provide our firm with a copy of the (1) declaration page for the subject policy and (2) any UIM Selection/Election/Rejection form or notice.**

**Pursuant to Virginia Code §8.01-417, I ask that you provide a copy of any transcribed, written, or recorded statement involving my client.**

In addition, this letter will also place you on notice that this firm claims an attorney's lien against any proceeds disbursed relating to this claim pursuant to the pertinent section of the Code of Virginia.

Please advise as to the adjuster and claim number assigned to this matter. Thank you for your assistance in this claim. I look forward to your earliest response. Please note my representation in your file.

Sincerely,

, Legal Assistant

### PRIMARY CARRIER RELEASE

Pursuant to Code of Virginia Section 38.2-2206 (K) for the sole consideration of Thirty thousand dollars and zero cents dollars and zero cents (\$30,000), the receipt and sufficiency whereof is hereby acknowledged, ("Plaintiff/Claimant"), Commonwealth of Virginia, being at least of the age of majority, hereby releases and forever discharges ("Defendant/Insured") and Allstate Property and Casualty Insurance Company ("Primary Carrier"), of any claims for any damages, known and unknown, resulting from an automobile accident which occurred on or about 09/15/2022, in Norfolk, Virginia.

It is further agreed that Plaintiff/Claimant assumes all responsibility for payment of liens, benefits, or assignments out of proceeds of the settlement which is subject of this release, and Plaintiff/Claimant agrees to hold harmless and indemnify Defendant from any claims arising out of any nonpayment of liens, benefits, and assignments.

Plaintiff/Claimant expressly covenants and warrants that all Medicare, Medicare Advantage Organization, Medicare Advantage Plan, and/or Medicaid, hospital, medical provider, health care provider, medical supplier and other medical liens, subrogation rights, rights of payment, rights of reimbursement and claims of any nature whatsoever, arising now or in the future, as a result of health care services provided to Plaintiff/Claimant have been or will be satisfied, settled, compromised or paid by express agreement with Medicare, Medicare Advantage Organization, Medicare Advantage Plan, and/or Medicaid, each insurance carrier and each hospital, health care provider, medical provider or medical supplier by Plaintiff/Claimant prior to final disbursement of the settlement proceeds. Plaintiff/Claimant covenants and warrants that all such claims, liens, payment obligations and assignments have been disclosed in writing to the parties released prior to settlement. Plaintiff/Claimant agrees to indemnify, defend and hold harmless the parties released for any and all losses, claims, demands or causes of action, and any damages, judgments, fees, expenses, costs (including interest) of any nature whatsoever paid and incurred as a result of any breach of these warranties and covenants. Plaintiff/Claimant understands and agrees that the parties released have relied on these material representations as part of the consideration and inducement for this settlement.

Plaintiff/Claimant understands and agrees that such liability as he/she may or shall have incurred, arising now or in the future, as a result of health care services provided to Plaintiff/Claimant, including any health care lien, statutory or otherwise, is expressly reserved to each and every health care provider or payor based on such services, such liability not being in any way waived, agreed upon, discharged, released or settled or impacted in anyway, by this release. This specifically includes, but is not limited to, any liability Plaintiff/Claimant may have to any hospital, health care provider, medical provider, medical supplier, Medicare, Medicare Advantage Organization, Medicare Advantage Plan, and/or Medicaid. If any subrogation claims, liens or rights to payment of any kind against these settlement proceeds do in fact exist, Plaintiff/Claimant shall distribute these funds in accord with such claims, liens or rights to payment (or shall direct his/her attorney to do so). Plaintiff/Claimant agrees to indemnify, defend and hold harmless the parties released for any and all losses, claims, demands or causes of action, and any damages, judgments, fees, expenses, costs (including interest) of any nature whatsoever paid and incurred as a result of any breach of these agreements and covenants. Plaintiff/Claimant understands and agrees that the parties released have relied on these material representations as part of the consideration and inducement for this settlement.

Plaintiff/Claimant understands this settlement is not an admission of Defendant's/Insured's liability and is instead a compromise of a disputed claim.

It is further understood that pursuant to Section 38.2-2206(L) of the Code of Virginia, Defendant/Insured has been provided a Notice to Released Party, said Notice being provided on Page 2 of this Release. Defendant/Insured warrants that they have read said Notice, fully understands same, and by signing said Notice his understanding is confirmed.

It is further understood that pursuant to Section 38.2-2206(M) of the Code of Virginia, should Current Litigation lead to a verdict against Defendant/Insured, judgment shall not be entered against Defendant/Insured and instead

shall be entered in the name of "Released Defendant" and shall be enforceable against the underinsured motorist insurer up to its limits.

---

Plaintiff/Claimant

COMMONWEALTH OF VIRGINIA  
CITY/COUNTY OF  
Subscribed and sworn to before me this  
\_\_\_\_\_ day of 2022

Notary Public:  
My Commission Expires:

---

Defendant/Insured

COMMONWEALTH OF VIRGINIA  
CITY/COUNTY OF  
Subscribed and sworn to before me this  
\_\_\_\_\_ day of 2022

Notary Public:  
My Commission Expires:

NOTICE TO RELEASED PARTY PURSUANT TO CODE OF VIRGINIA 38.2-2206(L)

Your insurance company has agreed to pay the available limits of its insurance to settle certain claims on your behalf. This settlement secures a full release of you for all claims the claimant/plaintiff has against you arising out of the subject accident, as well as ensures that no judgment can ever be entered against you by the claimant/plaintiff. In order to protect yourself from subrogation by any underinsured motorist insurer, you are agreeing to cooperate with the underinsured motorist benefits insurer(s). The underinsured motorist benefit insurer is not your insurer and has no duty to defend you.

Under this manner of settlement, the underinsured motorist benefits insurer(s) that is/are involved in this case has/have no right of subrogation against you unless you fail to reasonably cooperate in its/their defense of the claim by not (i) attending your deposition and trial, if subpoenaed, (ii) assisting in responding to discovery, (iii) meeting with defense counsel at reasonable times after commencement of this suit and before your testimony at a deposition and/or trial, and (iv) notifying defense counsel of any change in your address, provided that the underinsured motorist benefits insurer or its defense counsel has notified you of its existence and provided you with their contact information.

Upon payment of the agreed settlement amount by your insurance company(ies), such company shall no longer owe you any duties, including the duty to hire and pay for an attorney for you. You are not required to consent to settlement in this manner. If you do not consent to settlement in this manner, your insurance company will still defend you in any lawsuit brought against you by the claimant/plaintiff, but you will not have the protections of a full release from the claimant/plaintiff, judgment could be entered against you and may exceed your available insurance coverage, and any underinsured motorist benefits insurer would have a right of subrogation against you to recover any moneys it pays to the claimant/plaintiff.

You are encouraged to discuss your rights and obligations related to settlement in this manner with your insurance company and/or an attorney. By signing this document, you agree to consent to this settlement and to reasonably cooperate with the underinsured motorist benefits insurer in the defense of any lawsuit brought by the claimant/plaintiff.

Defendant/Insured initials

## LEGAL ETHICS OPINION 1865

### OBLIGATIONS OF A LAWYER IN HANDLING SETTLEMENT FUNDS WHEN A THIRD PARTY LIEN OR CLAIM IS ASSERTED

In this opinion the Committee revisits a lawyer's ethical responsibilities when, in the course of representing a client, the lawyer receives funds for the client that may be subject to a third party's claim to a portion of the funds held by the lawyer. The applicable rule of conduct is Rule 1.15(b), which requires a lawyer to:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

Comment 4 to Rule 1.15 provides helpful guidance on the lawyer's ethical duty when faced with third party claims asserted against the funds that the lawyer is handling:

Paragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession. However, a lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person; for example, a previous lawyer of the client claiming a lien on the client's recovery or a person claiming that the property deposited with the lawyer was taken or withheld unlawfully from that person. Additionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorneys' lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust) the lawyer has a duty to secure the funds claimed by the third party. Under the above described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds or property to the third party or, if a dispute to the third party's claim exists, to safeguard the contested property or funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.

#### *When Is a Third Party "Entitled" to Funds Held By the Lawyer?*

Rule 1.15 (b) requires that a third party be "entitled" to funds in the lawyer's possession. Although Rule 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client.<sup>1</sup> As Comment 4 states, a third party must have a valid claim to an interest in the specific funds held by the lawyer. In the absence of a valid third party interest in the funds, the lawyer owes no duty to a creditor of the client and must act in the best interests of the client.<sup>2</sup> The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer.<sup>3</sup> Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds.<sup>4</sup> Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an interest in specific funds trigger a duty under Rules 1.15 (b)(4) and (5) *even though the lawyer is not a party*

to such agreement or has not signed any document, if the lawyer is aware that the client has signed such a document.<sup>5</sup> In other words, a third party's interest in specific funds held by the lawyer is created by some source of obligation other than Rule 1.15 itself.<sup>6</sup> Whether they create binding contractual obligations, assurance of payment from the lawyer may also create ethical duties to third parties under Rule 1.15.<sup>7</sup> The basis for such duties is the fundamental duty of lawyers to deal honestly with third parties. Rules 4.1 and 8.4(c). Before the lawyer may give a third party an assurance of payment, the lawyer should discuss the matter with the client, because it is ultimately a matter for the client to decide.<sup>8</sup> If the lawyer is asked to sign a document assuring payment, the lawyer should explain to the client the ramifications, including the lawyer's potential ethical and civil liability, ensure that the client is competent to understand the explanation, and obtain the client's informed consent.<sup>9</sup>

The Committee understands that there will be occasions when a lawyer may not be able to determine whether a third party is entitled to funds held by the lawyer, for example, when there exists a dispute between the client and the third party over the third party's entitlement. Legal and factual issues may make the third party's claim to entitlement or the amount claimed uncertain. *Rule 1.15 (b)(4) and (5) does not require the lawyer to make that determination.* When faced with competing demands from the client and third party the lawyer must be careful not to unilaterally arbitrate the dispute by releasing the disputed funds to the client.<sup>10</sup> Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party.<sup>11</sup> When the client and a third party have a dispute over entitlement to the funds, the lawyer should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court.<sup>12</sup> To avoid or reduce the occurrence of such conflicts, the Committee recommends that at the outset of the representation, preferably in the engagement letter or contract, the lawyer clearly explain that medical liens will be protected and paid out of the settlement proceeds or recovery.

#### *Does Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Lien or Claim to the Funds Held by the Lawyer?*

Rules 1.15(b)(4) and (5) and Comment 4 appear to require that a lawyer have "actual knowledge" of a third party's interest in funds held by the lawyer. Comment 4 states in pertinent part:

[a]dditionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has *actual knowledge* of a third party's *lawful* claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorney's lien, a valid assignment executed by the client, or a lien on the subject property created by a deed of trust), the lawyer has a duty to secure the funds claimed by the third party. (emphasis added)

Other authorities have likewise adopted the view that Rule 1.15(b)(4) and (5) requires that the lawyer have actual knowledge of a third party's lawful claim to an interest in the specific funds held by the lawyer. Arizona Ethics Op. 98-06; Conn. Bar. Op. 95-20. However, in some situations under federal and state law, the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan. In those instances, notice of lien or a lien letter may not be required in order for that third party to claim entitlement to funds held by lawyer.<sup>13</sup> The effect of such state and federal laws on a lawyer's obligation to a third party is a question of law beyond the purview of this Committee. The lawyer will need to know and understand the law in order to determine whether it creates a valid interest in the funds held by the lawyer.<sup>14</sup>

#### *Prior Opinions*

In Legal Ethics Opinion 1747 (rev. 2000), the Committee opined that if a third party has a legal interest in settlement funds by virtue of a statutory lien, consensual lien, contract or court order, the lawyer may not

ignore that third party's interest in the funds held by the lawyer and disburse those funds to the client, even if the client so directs.<sup>15</sup> As this Committee observed in Legal Ethics Opinion 1747:

Well before LEO 1413 was issued, the Virginia Supreme Court concluded, in the context of a settlement attorney handling a real estate closing, that the lawyer's fiduciary duties under Canon 9 extended to protecting funds owed to or claimed by third parties, and not simply the client. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986) (decided under former DR 9-102). *Pickus*, a new attorney, allowed a coercive client, the seller, to receive directly the settlement proceeds without having determined whether a prior deed of trust lien on the subject real estate had been released. As things turned out, the prior lien had not been satisfied. The Court upheld the disciplinary board's finding that DR 9-102 had been violated, holding that DR 9-102 was promulgated to protect third parties as well as clients. 232 Va. at 14.

On the other hand, if the third party has not taken the steps necessary in order to perfect its lien or claim to the funds in the lawyer's possession, or has no contract, order or statute establishing entitlement to the funds, the lawyer's primary duty is to the client. Under those circumstances, the lawyer may ethically follow the client's direction to disregard the third party claim and deliver the funds to the client.<sup>16</sup> Of course, if the lawyer releases the funds to the client, the lawyer should inform the client of the risks involved in disregarding a third person's claim.<sup>17</sup> For example, the lawyer should explain that while the lawyer may not have an *ethical* duty under the rules to deliver funds to the third party, the third party may nonetheless have a civil claim or other remedies against the client that may be pursued after the funds have been released to the client. With these basic principles in hand, the Committee turns to three hypothetical situations in which the ethical obligations of the lawyer in handling funds claimed by a third party are discussed.

#### *Hypothetical One – Duty to Investigate Potential Lien*

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan").<sup>18</sup> The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law.<sup>19</sup> The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether the Plan is entitled to assert a claim against the client's settlement?

Under the circumstances presented in Hypothetical 1, the Committee believes that the answer is a qualified "yes." The facts presented in the instant hypothetical are quite different from those in the cited authorities requiring the lawyer to protect a third party's claim to the funds being administered by the lawyer. A lien or claim has not been asserted and the lawyer has insufficient information to know whether a valid lien or claim even exists. Here, the lawyer would have to affirmatively investigate both the facts and the law to determine whether the Plan has a lien on or entitlement to a portion of the funds held by the lawyer. In so doing, it is likely that the lawyer would have to communicate with the Plan to determine if the Plan is exempt from Virginia's anti-subrogation statute. The lawyer would also have to find out if the Plan has a right of reimbursement and, if so, the amount to which the Plan claims to be entitled.<sup>20</sup> By having these communications with the Plan the lawyer would be disclosing to the Plan's agents that a Plan beneficiary is seeking a recovery or settlement against a third party. Communication with the Plan could remind or encourage the Plan to perfect a lien or claim to the client's settlement of which the Plan was not aware. Depending on the circumstances, such a disclosure could be detrimental to the client and contrary to the client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ."

A lawyer faced with the circumstances presented in Hypothetical 1 must first consult with the client about whether to have communications with the Plan, explaining to the client both the risks and benefits of having such communication and obtain the client's informed consent to affirmatively investigate the Plan's possible claim to an interest in the client's settlement. If after warning the client of the possible consequences of not reimbursing the Plan, the client directs the lawyer to not communicate or further investigate the Plan's right of reimbursement, the lawyer should confirm in writing the client's direction and the possible consequences of that course of action.<sup>21</sup> Although the lawyer will not violate Rules 1.15(b)(4) or (b)(5) and is therefore not subject to professional discipline by the bar, the lawyer and/or the client may suffer civil liability under federal law if the Plan seeks reimbursement of medical expenses that have not been paid out of the settlement. Therefore, the lawyer has an ethical duty to advise the client of the potential liability of disbursing the funds without preserving any funds to reimburse the Plan. *See* Rules 1.2 and 1.4.

While a lawyer may not knowingly disregard a lien or third party claim that has been properly asserted against the settlement funds, the question raised in this hypothetical is whether the lawyer has an ethical duty, without authorization from the client, to actively investigate a third party's potential claim against the settlement funds. The Committee believes that, under the circumstances presented in the first hypothetical involving ERISA Plan claims, the Rules of Professional Conduct do not impose such a duty on the lawyer unless the client has authorized further communication with the Plan and further investigation of the Plan's unasserted right of reimbursement.

#### *Hypothetical Two – Reasonable Effort to Determine Validity of Claim*

Assume now that the Plan administrator has sent to the lawyer a letter asserting subrogation rights. The lawyer has responded in writing requesting documents to determine whether the Plan has a meritorious claim to portions of the settlement funds. Specifically, the lawyer has requested documentation that the Plan is self-funded and documentation that the Plan has a right of reimbursement. The lawyer has requested the documentation in thirty days. After waiting thirty days with no response, the lawyer sends a second request to the health Plan administrator notifying the Plan administrator that if the requested documents are not received in fifteen days the lawyer will disburse the settlement without preserving any funds to reimburse the Plan.

If the Plan administrator does not respond to the lawyer's second request within fifteen days, do the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

A lawyer owes an ethical duty to act with reasonable diligence and competence in handling a client's legal matter. Rules 1.1 and 1.3. The Rules of Professional Conduct are rules of reason.<sup>22</sup> A lawyer cannot be reasonably expected to hold or preserve funds indefinitely on the possibility that the Plan might at some point in the future demonstrate its entitlement to the funds it claims. Most opinions hold that the lawyer may not sit on the funds for a prolonged period of time because of the lawyer's obligation to act diligently under Rule 1.3 and Rule 1.15(b)(4)'s requirement that the lawyer "promptly pay or deliver" funds to the client or third party.<sup>23</sup> As stated in Comment [4] to Rule 1.15, "[p]aragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession."

In this hypothetical, the lawyer has exercised reasonable diligence to determine whether the Plan has a valid subrogation claim or lien but the Plan has not responded to the lawyer's inquiries. The lawyer still does not know whether the Plan has a valid claim or lien. Comment [4] to Rule 1.15 provides further: "[a] lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien." As discussed in the Committee's analysis of Hypothetical 1, the lawyer must first consult with the client regarding the course of action to take, informing the client to the fullest extent possible of the risks and benefits of further communication with the Plan to determine the existence and extent of the Plan's claim; or, alternatively, disregarding the Plan's claim and releasing the funds to the client. Under the circumstances presented in hypothetical 2, the Committee believes that the

lawyer has acted reasonably and in good faith to determine if the Plan has a claim to or interest in the funds in the lawyer's custody or control and may, after consultation with the client, disburse the settlement funds to the client without holding back funds to reimburse the Plan.

### *Hypothetical Three – Reasonable Effort to Determine Validity and Amount of Claim*

Another question is raised by a different hypothetical. Lawyer represents an 80 year client who fell at a hospital and sustained a hip fracture. She had a Medicare Advantage (MA) Plan which paid most of the medical bills. The lawyer settled with the hospital in mediation. The lawyer sent the Plan's lawyer an email indicating that the lawyer does not believe it has subrogation rights, based on the written health Plan, which is silent on subrogation, and the relevant case law. Lawyer received a written response from the Plan's lawyer asserting subrogation rights and citing to the federal regulations.<sup>24</sup> The letter did not provide the lawyer with the amount of its claim. The letter invited the lawyer to provide cases and the Plan language the lawyer was relying upon to challenge the Plan's right of subrogation. The lawyer promptly emailed a letter back to the Plan, citing cases in support of the lawyer's position and referencing the absence of a subrogation provision in the health Plan. The lawyer specifically requested the amount of the claim and any legal authority the Plan relies upon to counter the cases cited by the lawyer. A month has now passed since the lawyer replied to the health Plan and the lawyer has not received a response back from the Plan's lawyer even though the lawyer has sent at least 3 follow-up emails and left a voicemail message with the Plan's lawyer.

Under these circumstances, has the lawyer exercised reasonable diligence and good faith to determine both the validity and amount of the Plan's claim such that the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

As in hypothetical 2, the Committee believes that the lawyer has exercised reasonable diligence and good faith to determine both the validity and the amount of the Plan's claim, such that the lawyer may, after consultation with the client, disburse the settlement funds to the client without preserving any funds to reimburse the health Plan.

### *Conclusion*

The mere assertion of a claim by a third party to funds held by the lawyer does not necessarily entitle the third party to such funds. A lawyer must exercise competence and reasonable diligence to determine whether a substantial basis exists for a claim asserted by a third party.<sup>25</sup> If no such basis exists, or if the third party has failed to take the steps required by law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.

If the lawyer reasonably believes that the third party has an interest in the funds held by the lawyer, the lawyer may not disburse to the client funds claimed by the third party, even if the client so directs. In prior opinions this Committee has held that a lawyer may not disregard the valid claims of a third party,<sup>26</sup> and lawyers have been subject to discipline for disbursing to the client funds to which a third party claimed entitlement.<sup>27</sup> When the client has a non-frivolous dispute over the third party's entitlement to funds, or the lawyer cannot determine, as between the client and the third party, who is entitled to the funds, the lawyer should hold the disputed funds in trust until the dispute is resolved or interplead them into court. A lawyer who chooses to hold or interplead the disputed funds instead of releasing the funds to the client does not violate Rule 1.15(b). A lawyer who acts in good faith and exercises reasonable diligence to determine the validity of a third party's claim or lien is not subject to discipline under Rule 1.15(b). Whether the lawyer faces civil liability for failing to protect a third party lien or claim is a legal issue beyond the purview of this Committee.<sup>28</sup>

This opinion is advisory only and not binding on any court or tribunal.

## Committee Opinion

November 16, 2012

<sup>1</sup> *Oklahoma Bar Assn. v. Taylor*, 4 P.3d 1242 (Okla. 2000); Utah Bar Advisory Op. No. 00-04; *Advance Finance Co. v. Trustees of Client's Security Trust Fund of Bar of Maryland*, 652 A.2d 660 (Md. App. 1995) (holding that since Rule 1.15 imposed fiduciary obligations to maintain funds for benefit of clients or creditors, the state fund that pays for lawyers' violations of fiduciary obligations was liable to a creditor).

<sup>2</sup> *Klancke v. Smith*, 829 P.2d 464 (Colo. App. 1991); Alaska Bar Assn. Ethics Comm. Op. 92-3.

<sup>3</sup> *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. 1996), *cert. dismissed*, 699 A.2d 151 (Conn. 1997).

<sup>4</sup> For example, a judgment lien creditor of a client may garnish funds held in a lawyer's trust account. *Marcus, Santoro & Kozak v. Wu*, 274 Va. 743, 652 S.E.2d 777 (2007) (lien of a writ of fieri facias validly executed against lawyers' trust accounts by client's judgment lien creditor to whom lawyers directed to pay funds).

<sup>5</sup> See, e.g., *Virginia State Bar v. Timothy O'Connor Johnson*, CL 09-2034-4 (August 11, 2009) (while Respondent did not sign the agreement, his client did, and Respondent was aware that his client had directed that his chiropractor be paid directly out of settlement proceeds administered by his lawyer). See also LEO 1747 and Comment 4.

<sup>6</sup> Alaska Bar Ass'n Ethics Comm., Op. 92-3 (1992); Colo. Bar Ass'n Ethics Comm., Op. 94-94 (1993); Conn. Comm. on Prof'l Ethics, Informal Op. 02-04 (2002) and Informal Op. 95-20 (1995); Utah Ethics Advisory Op. Comm., Op. 00-04 (2000).

<sup>7</sup> R.I. Ethics Advisory Panel, Op. 94-46 (1994) (lawyer's response to hospital's inquiry about status of the personal injury case that the payment of bills was "contingent upon a 'successful' outcome" was sufficient to raise Rule 1.15 duties).

<sup>8</sup> Colo. Bar Ass'n Ethics Comm., Op. 94-94 (1993). Va. Rule 1.2, Comment 1 (lawyer should defer to client regarding expenses to incurred).

<sup>9</sup> ABA Standing Comm. on Ethics and Prof'l Responsibility, Informal Op. 1295 (1974).

<sup>10</sup> *Virginia State Bar v. Timothy O'Connor Johnson*, *supra* (lawyer acted unethically by making unilateral decision to disburse to client's chiropractor funds less than the full amount of the lien); LEO 1747.

<sup>11</sup> See *In re Smith*, 625 So. 2d 476 (La. 1993) (lawyer disciplined for improperly withholding client's money to pay outstanding medical bills); see also Connecticut Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money to third person over client's objection); Pennsylvania Ethics Op. 92-89 (1992) (lawyer, whose client was ordered to pay arrearage in child support, cannot release escrow proceeds from real estate sale without client consent).

<sup>12</sup> Ariz. Comm. On Rules of Prof'l Conduct, Formal Op. 98-06 (1998); Ga. State Disciplinary Bd., Advisory Op. 94-2 (1994); Va. Standing Comm. on Legal Ethics, Op. 1747 (2000)

<sup>13</sup> A written notice of lien is not required if the lawyer is on notice that the client's medical care was provided or paid for by the Commonwealth of Virginia. Va. Code §8.01-66.5(A). Medicare liens do not require notice and there is no statute of limitations. See 42 U.S.C. §§ 1395y(b)(1) & (2), 2651-2653.

Beginning January 1, 2011, personal injury claims from Medicare-eligible claimants are required to be reported to Medicare. Further, Medicare is entitled to 100% recovery of the benefits it paid during treatment for the injury minus its pro rata share of the client's legal fees and expenses and will seek reimbursement from any settlement or payment for the claim. Failure to comply with the reporting or reimbursement requirements can result in a \$1,000 daily fine per claimant, interest, and double damages. For more information *see* 42 U.S.C. 1395y, 42 CFR § 411.37 (2009), and the webpage for the Centers for Medicare and Medicaid Services (CMS), the federal agency that oversees Medicare, at <http://www.cms.hhs.gov/MandatoryInsRep/>.

<sup>14</sup> Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2000-3 (2000).

<sup>15</sup> See *Aetna Cas. & Sur. Co. v. Gilreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer has duty to honor employer's statutory workers' compensation lien); Alaska Bar Ass'n Ethics Op. 92-3 (1992) (lawyer may not follow client's instruction to disregard facially valid assignment or statutory lien in favor of third party; lawyer should advise client that he will hold disputed funds in trust until dispute is resolved). California Formal Ethics Op. 1988-101 (lawyer whose client agreed to pay recovery proceeds to health care provider may not ignore agreement and disburse all money to client upon client's request); Connecticut Informal Ethics Op. 06-09 (2006) (firm that drafted promissory note in which client promised to pay third party out of settlement may not give all proceeds to client despite unsuccessful effort to locate third party; firm must continue to hold money in interest-bearing account until third party is found or until firm receives copy of judgment, stipulation, or binding decision stating that it shall release funds); Maryland Ethics Op. 94-19 (1993) (lawyer must disregard client instruction not to pay creditor where client had valid agreement with creditor); Ohio Supreme Court Ethics Op. 95-12 (1995) (lawyer must disregard client's instructions not to pay physician from proceeds when client entered earlier agreement to pay medical expenses from such proceeds); South Carolina Ethics Op. 94-20 (1994) (if lawyer knows client has executed valid doctor's lien he may not comply with client's instruction that lawyer disregard it; no principle of client loyalty or confidentiality permits lawyer to violate ethical obligations to third persons of notification and delivery).

<sup>16</sup> *Janson v. Cozen & O'Connor*, 676 A.2d 242 (Pa. Super. Ct. 1996) (lawyer who holds client's funds in escrow owes no special fiduciary duty to third person who makes claim against funds where there is no agreement between client and third person regarding those funds); *Farmers Ins. Exch. v. Zerin*, 61 Cal. Rptr.2d 707 (Cal. Ct. App. 1997) (lawyer who recovered tort settlement on clients' behalf is not legally obligated to clients' medical insurer to withhold portion of funds from distribution to ensure insurer's reimbursement); Maryland Ethics Op. 97-20 (1997) (lawyer may disburse entire settlement to client where hospital failed to timely submit bills to insurer and thus had no legally valid claim). See also Arizona Ethics Op. 88-6 (1988) (third-party claim that is not perfected lien or assignment does not affect client's right, and lawyer should advise claimant to take issue up with client); Colorado Ethics Op. 94 (1993) (lawyer must distribute promptly to client if third person's claim against client property does not arise out of statutory lien, contract, or court order); Connecticut Informal Ethics Op. 95-20 (1995) (lawyer has no duty to act on mere assertions of third-party interests or to investigate whether third persons have interests in client property); Maine Ethics Op. 116 (1991) (lawyer who represents client in both real estate transaction and divorce must turn real estate proceeds over to client even if lawyer reasonably believes that client does not intend to comply with divorce order); Maryland Ethics Op. 97-9 (1997) (settlement money may be disbursed to client even though two lawyers assert claim to proceeds for services in other, unrelated matters); Philadelphia Bar Ass'n Ethics Op. 86-134 (1986) (lawyer must disburse to client without retaining anything for physicians who are owed payment, provided that there is no agreement between doctors and client regarding proceeds from settlement); South Carolina Ethics Op. 89-13 (1989) (lawyer not required to pay half of injury settlement to client's ex-wife under divorce decree where lawyer was not served with process as required by decree). See generally 1 G. Hazard & W. Hodes, *The Law of Lawyering* §19.6 (3d ed. 2001 & Supp. 2005-2) (lawyer not a "neutral observer" and "must favor the client when the other party's claims are not solid").

<sup>17</sup> Cleveland Ethics Op. 87-3 (1988); South Carolina Ethics Op. 93-31 (1993).

<sup>18</sup> Most employer-sponsored health care Plans are governed by the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U. S. C. §1001 *et seq.*

<sup>19</sup> The pivotal issue is whether the client has received medical care paid under an insured Plan—in which case the Plan may be subject to the anti-subrogation statute, or a self-funded Plan—in which case the ERISA laws may preempt state law and the anti-subrogation statute may not apply. Thus, ascertaining the nature of the employer-sponsored Plan is a critical step in determining whether the Plan is entitled to funds held in settlement of the client’s case. If the Plan is self-funded, the terms of the Plan documents control the extent of its claimed right

of subrogation or reimbursement. If the Plan is not self-funded, but fully insured, the Virginia anti-subrogation statute bars subrogation in contracts of health insurance.

<sup>20</sup> In Hypotheticals 1 and 2 the Committee assumes that the client has not executed any writing creating a contractual obligation to reimburse the Plan.

<sup>21</sup> Possible consequences that the lawyer should consider discussing with the client include the fact that the Plan documents might contain a requirement that the client notify the Plan of third party recovery actions and that the Plan might have the right to refuse payment of future medical expenses if the Plan is not reimbursed, as well as to hold the client civilly liable for non-payment.

<sup>22</sup> Preamble to Virginia Rules of Professional Conduct (Scope).

<sup>23</sup> *The Dishonored Medical Lien: A New Trend in Bar Complaints*, 25 Ariz. Att’y 17 (1989) at 17; *Attorneys’ Ethical Obligations to the Clients’ Creditors*, 67 N.Y. St. B.J. 40 (1995); Phila. Bar Ass’n Prof’l Guidance Comm. Op. 91–6 (1991).

<sup>24</sup> 42 C.F.R. 422.108 (Medicare secondary payer (MSP) procedures).

<sup>25</sup> The Committee acknowledges with great concern the increasing complexity of the task a lawyer faces in resolving liens. This is caused in part by more recent state and federal laws and regulations in this area. The time and expense necessary to handle such matters properly has increased dramatically over the years. As one expert has noted:

The phenomenon has spawned a whole new industry with many companies taking on the task of “lien resolution” and providing an alternative to the personal injury bar. Personal injury attorneys may now hire experts in these complex areas. It may be cost effective and result in a better outcome for the client if these issues are contracted out to firms or companies with knowledge and expertise in these issues. Additionally, the increased recovery actions by governmental agencies has had another impact on this area. It has and will continue to delay the ability to settle the claims that exist as the government agencies become flooded with more and more of these claims. It can tie up the resources of plaintiffs’ attorneys and result in funds languishing in non-interest bearing or IOLTA accounts for extended periods of time.

Pi-Yi Mayo, *Medicare and Medicaid Claims*: State Bar of Texas Advanced Personal Injury Law Course (2011) at 3.

<sup>26</sup> Va. Legal Ethics Op. 1747 (2000) (unethical for lawyer to disburse funds to client when client had agreed to pay third party medical group out of the settlement proceeds held by lawyer; lawyer owed duty to hold funds if third party claim was in dispute or interplead the disputed funds into court if client would not authorize disbursement to medical group).

<sup>27</sup> *Virginia State Bar v. Timothy O’Connor Johnson*, Case No. CL09-2034 (Richmond Cir. Ct. August 11, 2009). Lawyer violates former Rule 1.15 (c)(4) when refusing to honor chiropractor’s consensual lien with

client, directing client's lawyer to pay total amount owed to chiropractor out of settlement of client's personal injury case. Although lawyer was not a party to the assignment of benefits, lawyer knew that client had contracted with chiropractor to pay the medical bill out of settlement. When the chiropractor refused to reduce his bill, lawyer unilaterally arbitrated the dispute by disbursing to chiropractor an amount less than what was owed. Lawyer owed a duty to either pay the full amount owed to chiropractor or hold the amount in dispute in trust until client and chiropractor could resolve their dispute, or interplead the disputed funds into court. The court cited with approval Legal Ethics Opinion 1747 and comment [4] to Rule 1.15 and affirmed the District Committee's finding of misconduct.

<sup>28</sup> For a lawyer's civil liability under such circumstances, *see, e.g., Kaiser Found. Health Plan, Inc. v. Aguiluz*, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (attorney who knew client had agreed to repay medical provider from settlement proceeds was liable for amount client owed provider); *Shelby Mut. Ins. Co. v. Della Ghelfa*, 513 A.2d 52 (Conn. 1986) (insurer could enforce lien against lawyer who disbursed proceeds to insured); *Unigard Ins. Co. v. Fremont*, 430 A.2d 30 (Conn. Super. Ct. 1981) (lawyer liable for conversion because of failure to honor a statutory insurer's lien); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Idaho Ct. App. 1983) (law firm liable for failing to honor assignment that client, but not firm, had signed); *W. States Ins. Co. v. Louise E. Olivero & Assocs.*, 670 N.E.2d 333 (Ill. App. Ct. 1996) (firm's failure to honor subrogation lien constituted conversion); *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998) (liability based on lawyer's knowledge of statutory lien or valid assignment); *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994) (if enforceable assignment is proven, lawyer is liable to pay the creditor the assigned amount); *Prewitt v. City of Dallas*, 713 S.W. 2d 720 (Tex. App. 1986) (a lawyer's constructive notice of the city's right to the first money paid to the firm's client rendered the law firm liable after it paid those monies out to its client).





April 17, 2025

**Re: Accident of 9/1/2024**

Dear [REDACTED]:

I look forward to representing you for your injury case. Since most people have little contact with the legal system, I wanted to let you know a few things that may help you with your case.

- Please keep any appointments with my office along with keeping my office updated with your current address and phone numbers.
- Do not give out any information on your case, unless it is to your health care providers or your insurance company, without talking to me first.
- In this new age of the internet and social networking, please be cautious of the things you mention about your personal injury accident on Facebook, Twitter or any other social networking website, as this information can negatively affect your case at anytime. If you have already discussed your accident on social media, that is fine but you must not delete or destroy these posts. I simply request that you post nothing related moving forward.
- Please have patience since delays do happen which are outside my control but we will try to finish your case as soon as possible.

I also wanted to remind you to use any and all health insurance coverage you have for all of your medical treatment resulting from the incident. This is why you have health insurance, so we strongly suggest you use it. Also, often times you may net more money at the end of a case when you use your health insurance because less money has to be used to pay your doctors.

Please check all applicable insurance policies as you may be entitled to "Medical Benefits" coverage. These benefits may be paid directly to you. The insurance company may require you to sign a medical authorization form and/or give a recorded statement in order to access these benefits. If you are not sure if you have this coverage on your policy, please contact the insurance company directly. Please collect these benefits directly with the insurance company.

Keep all medical information in one place as my office may need it to verify the scope and nature of the treatment. This includes any documentation in which the doctor keeps you out of

work. It is imperative we have these documents to support any claim for wage loss as a result of this accident. Also, please let us know if you are receiving any type of Social Security benefits or have any dependents that are receiving these benefits, as this is information we will need to know to help with your case. Moreover, while we are helping you with your case, if you are thinking of filing Bankruptcy we will need to be informed ahead of time, as this can also affect your case. Lastly, if a lawyer referred your case to us, then we will share any attorney fees with this lawyer, which will come out of our attorney fee. As such, this will not change the ultimate amount that we are able to recover for you, which is great news.

I have enclosed a list of Frequently Asked Questions that we often receive. Please read and save for future use. I look forward to working with you on this matter.

Sincerely,

Bailey L. Gifford

BLG/

January 10, 2025

Sent via email & 1<sup>st</sup> Class Mail

[REDACTED]

Re: [REDACTED]

Dear Mr. [REDACTED]:

I appreciate the opportunity to help [REDACTED]. I write to confirm our fee split in the above-referenced matter. I will send you 33 1/3% of the gross attorney's fee. My firm will serve as the primary counsel and will handle all costs advanced.

I will keep you informed of the status of the case. If you have any questions, please do not hesitate to give me a call. Thank you for the opportunity to assist in this matter.

Very truly yours,

John M. Cooper

JMC/ehd

[REDACTED]

Enclosures

## **VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of January, 2024.*

On November 8, 2023, came the Virginia State Bar, by Chidi I. James, its President, and Cameron M. Rountree, its Executive Director, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1900.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1900 be approved as follows, effective immediately:

### **LEGAL ETHICS OPINION 1900. LAWYER'S DUTY TO DISCLOSE DEATH OF CLIENT.**

#### **QUESTION PRESENTED**

When a lawyer's client dies during the representation, what duty does the lawyer have to disclose the client's death to opposing counsel or to the court?

#### **APPLICABLE RULES AND OPINIONS**

Rule 3.3. Candor Toward The Tribunal.

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

\*

\*

\*

Rule 4.1. Truthfulness In Statements To Others.

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of fact or law; or
- (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Legal Ethics Opinion: 952 (1987).

## ANSWER

The lawyer must disclose the client's death to opposing counsel or the opposing party if pro se before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court.

## ANALYSIS

The ethical duties begin with the legal conclusion that the death of the client terminates the representation and the lawyer's actual authority to act for the client. Restatement (Third) of the Law Governing Lawyers, § 31 Termination of a Lawyer's Authority, Comment *e*. Given that foundation, any act or omission that perpetuates the belief that the lawyer represents the client or has any authority to act on behalf of a client violates Rule 4.1 either by affirmatively misrepresenting the lawyer's authority or by failing to act and therefore passively misrepresenting the lawyer's authority.

In Formal Opinion 397, the American Bar Association Standing Committee on Ethics and Professional Responsibility concluded:

The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client. We therefore conclude that a failure to disclose that occurrence is tantamount to making a false statement of material fact within the meaning of Rule 4.1(a). . . . Prior to the death, the lawyer acted on behalf of an identified client. When, however, the death occurs, the lawyer ceases to represent that identified client. Accordingly, any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client.

The opinion also concludes that an appearance before a court without disclosing the client's death would violate Rule 3.3 by making a false statement of material fact to the court. Therefore, the ABA concluded, the lawyer must inform the opposing lawyer and the court of the client's death in her first communication after learning of that fact.

The committee agrees that the lawyer must disclose the client's death before any further substantive communication with opposing counsel and must disclose to the court no later than the first communication or appearance after learning of the client's death. The lawyer does not violate Rule 4.1 by simply avoiding any substantive communication with opposing counsel while, for example, determining whether there is a representative of the client's estate and whether that representative wishes to hire the lawyer to continue to pursue the client's claim.

LEO 952, which concluded that a lawyer can accept a settlement offer without disclosing the client's death absent a direct inquiry about the client's health, but that the lawyer should disclose the client's death when accepting the offer to "avoid an appearance of impropriety," is overruled by this opinion. The committee concludes that a lawyer cannot accept or make an offer of settlement on behalf of a deceased client, even if the lawyer discloses the client's death at the same time. As stated above, the lawyer has no client and no authority to accept or make a settlement after the client's death unless and until the administrator of the estate or other successor in interest retains the lawyer to pursue any remaining claim on behalf of the estate.

A Copy,

Teste:

  
Clerk

### **CONFLICT WAIVER**

I have been advised that a potential conflict of interest exists related to Cooper Hurley Injury Lawyers' representation of both [REDACTED] and [REDACTED], in relation to a car wreck which occurred on September 1, 2024, in which [REDACTED] was a passenger in a vehicle being driven by [REDACTED]. I understand and agree to allow Cooper Hurley Injury Lawyers to proceed with both cases. I have been advised of my rights and options. I understand that a claim will not be made by the passenger ([REDACTED]) against the host driver ([REDACTED]), as [REDACTED] has indicated that she does not believe that [REDACTED] did anything wrong to cause or contribute to the subject wreck.

Given the circumstances detailed above, by signing my name below, I agree to waive this potential conflict of interest pursuant to Virginia Rules of Professional Conduct Rule 1.7 and further agree to allow Cooper Hurley Injury Lawyers to proceed with my case.

#### **SEEN AND AGREED TO:**

\_\_\_\_\_  
[REDACTED]

\_\_\_\_\_  
Date

\_\_\_\_\_  
[REDACTED]

\_\_\_\_\_  
Date