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UIM Tactical Focus

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A frequent topic of inquiry on the WSTLA listserv from newer members has been who to select as arbitrator(s) and how to approach the matter of proving the case before the arbitrator(s). As one old lawyer (who has handled more UIM cases than I would care to admit) I have formed some strong impressions on the subject over the past 25 years and the purpose of this brief article is to share those impressions with the group.

UM/UIM Historically. In the 1970s and 1980s, virtually every arbitration clause in a UM/UIM endorsement provided for three arbitrators, consisting of individual party arbitrators and a swin/neutral arbitrator. The practice was virtually universal. The parties split the cost of the arbitration, including the arbitrators' fees. No one questioned this format and a UM/UIM arbitration almost always consisted of a three-person, professional attorney panel. The system worked well and very few on the plaintiff's side would have opted to change it. However, the insurers who provided for arbitration possessed serious leverage resulting from the fee- sharing provision in the policies, and many cases were settled less favorably to claimants because of the fear of having the award, particularly in small cases, diluted by the cost of the arbitration. Along came the Washington Supreme Court in the case of *Kenworthy v. Pennsylvania General Insurance Co.*, 113 Wn.2d 309 (1989), and suddenly the insurers were required as a matter of law to cover the entire cost of the arbitration. This eliminated the negotiating disparity (based upon the fear of substantial arbitration costs), and the UIM arbitration process at that time seemed perfect.

UIM in the 1990s. Some insurers took the *Kenworthy* decision with something less than full equanimity and began tinkering with their arbitration clauses. Allstate adopted the current clause in their policies, which provides that they will arbitrate unless they do not agree to arbitrate, in which case the claimant will be required to sue Allstate in Superior Court. Other insurers adopted clauses that have since been struck down, providing that they would arbitrate, but if they were dissatisfied with the result, could have a trial *de novo* in Superior Court. Still other insurers began providing for a single arbitrator selected by the parties. Many members will recall the Pemco clause of the early 1990s, which provided for arbitration by a member of Judicial Arbitration and Mediation Service.

Three-Lawyer Format Still Persists. While one might have assumed that all insurers would have done away with the three arbitrator format, that has not been the case. There are still insurers writing policies with three-arbitrator formats in their UIM endorsement, and of those insurers who have changed it, many have changed their endorsements only recently. There are still a significant number of cases governed by three-arbitrator format arbitration clauses.

Tactical Considerations: Go For a Panel of Three. Where a motor vehicle collision claim is governed by a three-arbitrator format in an arbitration clause today, frequently claimant's counsel will receive a call from the adjuster or the defense counsel suggesting, "Why don't we just do this with a single arbitrator?" Certainly a case based on economy alone can be made for this suggestion. As one who has tried countless MAR, UIM and other arbitrations, and who has sat on many three-arbitrator UIM panels, I would strongly urge against accepting that suggestion. In my very first UIM case many years ago, I was offered very little by Pemco in a case I thought was worth substantially more. The policy provided for a three-lawyer format. Never having done one of these, I

looked to the more experienced among us and someone suggested that Jan Peterson would be a good choice of plaintiff's arbitrator. At that time, I didn't know Jan, but I selected him and Pemco selected its own arbitrator, and the two selected a third. I put on my case, argued my view of damages, and then we left the conference room to allow the three arbitrators to deliberate. I learned a few days later from Jan that the panel had awarded much more than I had hoped for, and he described to me the dynamics that went on during the arbitration caucus. It was at that time that I realized again that three heads were better than one. Jan was able to convince the defense arbitrator to move up substantially based upon his arguments, which in turn freed the swing arbitrator somewhat in his view of damages. The three-arbitrator format assumes that the party arbitrators will advocate the evidence and the common sense that supports the side who selected them, and educate the swing to their view. In my very first case, that process worked to my client's advantage and I have never waived a three-arbitrator format since that time. I frequently sit as plaintiff's arbitrator these days and in fact have just completed two within the last week or so. In both cases, I was able to neutralize many of the arguments of the defense arbitrator, and provide the swing arbitrator with ammunition to use in arriving at a fair arbitration award. In my own cases, I have learned after the arbitration process of the journeyman-like work done by my party arbitrator.

Choosing Your Side's Arbitrator. This naturally leads into the importance of selecting the right party arbitrator. We all know that on the plaintiff's side as well as on the defense side, there are those who are regarded as "zealots." It is critical not to succumb to the temptation of selecting an arbitrator with the strongest plaintiff's bent, but rather to select someone who will maintain the respect and the cooperation of the other two arbitrators. I have sat on panels where the defense arbitrator was a true zealot and was left out of the loop in the serious deliberations to a large extent. We have all heard stories of UIM arbitration disasters, where an unnecessarily strident and overbearing plaintiff's arbitrator was left out of the loop and had little impact on the ultimate award. Your selection of party arbitrator of necessity should involve someone with good people skills, a cooperative style and worthy of respect by the defense side.

Choosing the Swing Arbitrator. Equally important is the selection of the swing, or neutral arbitrator. I sat on a panel in the last couple of years where the attorney who had selected me suggested as a swing arbitrator a lawyer I was wholly unfamiliar with. We went with that swing and the end result was very mediocre. Swing arbitrators are frequently defense counsel, and from my MAR experience, I have learned that a defense counsel with some compassion and true understanding of real damages makes a good swing arbitrator. Historically, swing arbitrators were frequently ones who worked both sides, but did primarily defense work. When I first started practicing in the 1970s, most swing arbitrators were picked from a group of four or five individuals who did perhaps 80% of the swing arbitration work in our area. With the same people being selected as swings over and over again, often by the same plaintiffs' and defendants' arbitrators, there would arise a familiarity which, while collegial, was probably not to the ultimate benefit of the claimant in terms of damages. Today, many different people are being selected as swing arbitrators, and while many of them are defense counsel, there is more new blood involved in this process, and in my opinion, this has redounded to the advantage of plaintiffs. An article like this would certainly not be the proper place to make suggestions for individual swing arbitrators. Counsel handling his or her first or second UIM arbitration would be best served by considering the recommendations of his or her party arbitrator in the selection of a swing. The selection of the swing, however, is critical to an award, which fully compensates the plaintiff.

Presenting Your Case. How does one best present his or her case to a three arbitrator panel? Again, a brief article such as this is not the appropriate place to provide training on the best way to present a UIM case to a panel. However, let me make some very brief observations. I strongly suggest the use of a Pre-Hearing Statement of Proof such as is used under the MAR rules, along with all of the documentary exhibits to be considered by the arbitrators presented in advance of the hearing. Most of us who sit on panels do not read the materials until a couple of days before the hearing, so there is no need to serve them 14 days in advance. I strongly suggest the use of an arbitration brief that argues the law on any liability issues and argues your case on damages. The more frequently the arbitrators see the basis for your damages calculations and the evidence that supports them, the more likely it is that you will be successful. The arbitration brief also gives your party arbitrator the ammunition that he or she needs in order to sell your damages case to the swing arbitrator.

I see many arbitration presentations where one side or the other simply dumps all of the medical records into a three-ring binder with very little consideration of what positive

impact this might have. I see cases repeatedly where the medical records contain duplicates and triplicates, contain material that is completely irrelevant to the case and frequently contain material which is deleterious to the party's own case. As you would with a jury, I think your exhibits must be examined and analyzed to determined whether their presentation is ultimately going to help or hurt. You should not assume that because these people are arbitrators, that they will disregard unfavorable material that you did not bother to eliminate.

I also strongly believe that there is a place for lay witnesses even in arbitrations. I am amazed at times when parties come before an arbitrator or arbitrators with an extremely abbreviated presentation that involves nothing more than a three-ring binder and their client's testimony. If the claimant has had a significant injury, there are undoubtedly friends, relatives and co-workers who can provide ten minutes of testimony or a three page declaration that lays out the details of their observations of the impact on the claimant. I think having a couple of lay witnesses who testify either live or by telephone and several more declarations, all of which provide different focuses on the plaintiff's injuries and the impact on the plaintiff's life, is appropriate.

What is the role of live medical testimony? Many claimant's arbitration presentations involve no live medical testimony by a treating doctor. Obviously, considerations of cost certainly come into play here. However, I have found in my own cases that I can present the testimony of my treating doctor on specific causation and prognosis issues in literally a half an hour or so, via telephone, at a cost of probably less than $600- 700. Even professional arbitrators appreciate the opportunity to hear the testimony of a treating doctor, subject to cross-examination. In a recent UIM case of my own, my party arbitrator informed me that my treating doctor's presentation was absolutely critical to the significant success we had. In that case, I had a treating chiropractor and a treating rehabilitation medicine doctor. The panel was not terribly impressed by the chiropractor, but was very impressed by the physiatrist's testimony. I think there is certainly a place for live medical testimony in a UIM case. An alternative would be to utilize what we refer to as "talking reports", where the treating doctor is interviewed at his office with a tape recorder and a transcript of the interviewer, sworn to under penalties of perjury, is utilized in lieu of a medical report.

Conclusions. If you are about to handle your first UIM case, or if your first UIM case turned out rather badly, I strongly suggest that you solicit a mentor with plenty of experience to serve as a guide. There are many WSTLA members with a great deal of experience who would be happy to serve in that capacity. In addition, I urge you to solicit the names of experienced plaintiff's party arbitrators. That is the first step to a successful result in arbitration. Your experienced party arbitrator will steer you in the direction of a good, experienced swing arbitrator and will be your advocate in the arbitration caucus when all of the evidence and argument is done. I wish you all well in that regard.

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