NRCP 16.1 Under Attack

BY RAHUL RAVIPUDI, IAN SAMPSON AND ADAM ELLIS

A dangerous trend is becoming increasingly prevalent in personal injury litigation: defendants withholding or concealing the amount of available insurance coverage applicable to a lawsuit. Though NRCP 16.1 (and its federal counterpart) makes clear parties have the duty to affirmatively disclose this information at the onset of discovery, some defendants seek to gain a strategic advantage by selectively withholding insurance information. Regardless of whether the motivation is an improper advantage or a unilateral determination that some insurance information is "irrelevant," these practices are improper. Plaintiffs' attorneys must be vigilant in fighting back against this practice and ensuring this important discovery rule is not eroded.

Primary Disclosure, Excess Concealed

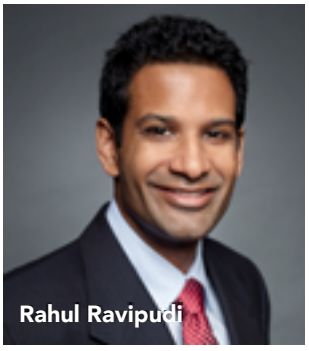
NRCP 16.1's requirements are simple and straightforward: a defendant must disclose "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action." NRCP 16.1(a)(1)(A)(v). The Rule means what it says: ***any*** insurance policy that ***may*** apply must be disclosed. *See, e.g.*, *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. 602 (2013). Nothing in the Rules permits a defendant to unilaterally determine some applicable policies are irrelevant.

But that is frequently what defendants attempt to do. Eager to avoid full disclosure, defendants may decide the value of a plaintiff's case does not merit disclosure of full insurance information. That determination is almost always uncommunicated to a plaintiff, who instead receives an NRCP 16.1 disclosure revealing some, but not all, of a defendant's insurance. Unequipped with an independent way to verify insurance information, like a statewide database, plaintiffs frequently assume the information defendants have told them is true and correct.

It often is not, especially in cases involving primary and excess policies, or multiple policies comprising a tower of insurance. Defendants may disclose only the primary policy, or only some excess layers—again, without revealing that some information has been withheld.

Why Does It Matter?

That insurance amounts are typically inadmissible at trial does not diminish their importance. Insurance information helps craft litigation strategy, often affects a plaintiff's medical decisions (especially those made on a cash-pay or lien basis) and impacts settlement decisions. Plaintiffs and their attorneys who lack adequate insurance information are at an inherent disadvantage.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That disadvantage grows when selective disclosure misleads plaintiffs and their counsel about the total amount of insurance. Of course, in settlement discussions, misstating the amount of available insurance can have profound consequences for a plaintiff's negotiation strategy. In many

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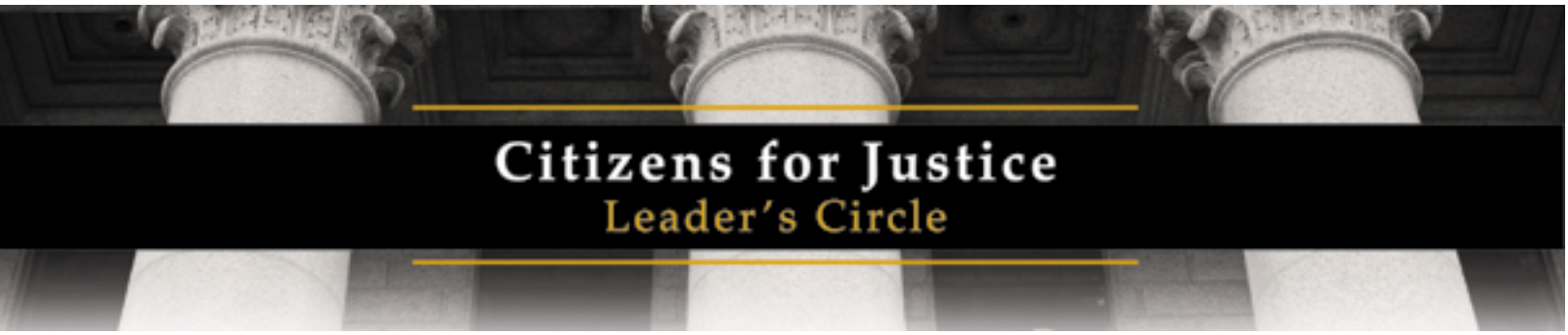

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cases, negotiations center around the amount of available insurance. A plaintiff may lower his or her demand to match the disclosed insurance amounts, even if that demand does not reflect the actual value of a plaintiff's case. If that plaintiff knew the true insurance limits—even if they were far above the plaintiff's demand—then that artificial downward pressure on the negotiations would not be present. In such cases, defendants gain an undeniable (and undue) advantage in settlement talks.

But the advantage need not be so direct. A defendant may not only leave a plaintiff in the dark for settlement, but change the nature of the case to the defendant's advantage. Consider an injured plaintiff's decision whether to undergo a medical procedure recommended by his or her doctor. In addition to the myriad considerations attendant to a major medical procedure, some plaintiffs must also decide whether they can afford to undertake the treatment on a lien basis. If the procedure is costly, like a surgery requiring an in-patient stay, it may exceed the amount of insurance disclosed to the plaintiff. A plaintiff is then forced into a dilemma: undergo the necessary procedure, incur bills larger than the insurance and potentially face large out-of-pocket amounts even with a limits payment; or forego the procedure, continue to suffer pain and provide defendants with a tailor-made damages argument that the plaintiff stopped treatment and therefore must not be as injured as he or she claims. The former risks financially ruinous consequences; the latter, the plaintiff is left in pain, and the defense gains ammunition to use against them at trial.

A plaintiff's medical decisions are not the only financial consideration insurance amounts may affect. Retaining a medical expert may not be cost-effective if a plaintiff believes his or her recovery will be capped at an arbitrary insurance amount. In such cases, plaintiff's counsel may choose to rely on treating physicians as experts rather than retain (expensive) medical experts to perform a comprehensive record review and provide a written report. Likewise, depending on insurance amounts, a plaintiff may forego depositions of each of the defendant's experts, who may charge thousands of dollars for deposition and eat into a plaintiff's eventual recovery.

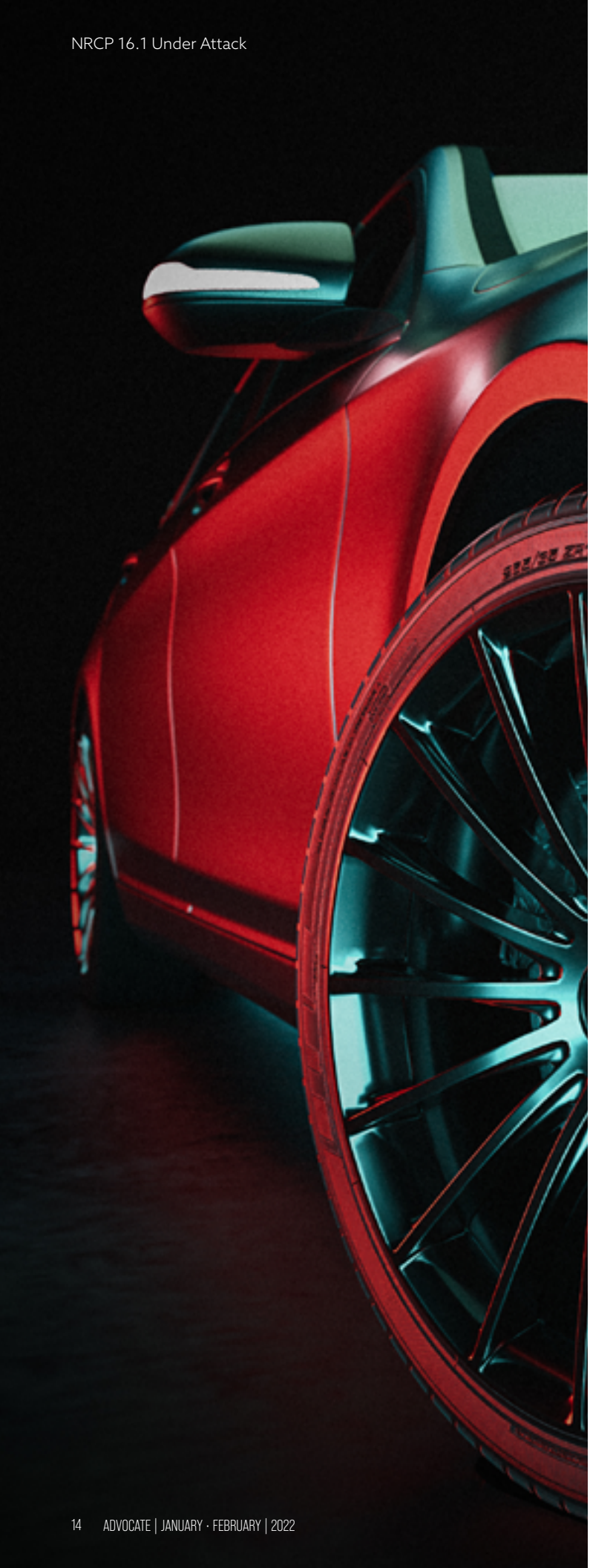
In each of the above examples, the defendant would gain a palpable advantage through ***noncompliance*** with NRCP 16.1's requirements. And, since NRCP 16.1 is self-executing and assumes parties will comply with their obligations, plaintiffs may assume the disclosed insurance information is true and correct, unaware that their litigation strategy has been severely affected by incorrect information.

What to Do?

So, how to avoid this problem? Early investigation into the total amounts of available insurance is essential. These efforts should start from the very first NRCP 16.1 disclosure, if not earlier through informal requests. Uncovering additional insurance should take a multi-pronged strategy designed to eliminate any doubt—either there is more insurance, or, if the defendant claims there is not, subsequent disclosure of that insurance is likely to carry serious and significant consequences.

The first step should be additional discovery. Although NRCP 16.1 obligates disclosure of insurance information "without awaiting a discovery request," nothing prohibits additional discovery on this topic. And, unlike NRCP 16.1, discovery responses must be verified. Serve an interrogatory requiring the defendant to identify, under oath, all potentially applicable insurance coverage. Such an interrogatory merely restates a defendant's NRCP 16.1 obligation, but requires them to affirm under penalty of perjury that the information disclosed is accurate and complete. And, if the defendant persists in concealing relevant information, the verification can serve as important evidence of ***intentional*** withholding should the insurance information be revealed later.

If the opposing party is an entity, consider taking a deposition of the employee who is the custodian of the company's insurance policies pursuant to NRCP 30(b)(1). This often-overlooked rule allows a party to identify a deponent whose name is unknown by "provid[ing] a general description sufficient to identify the person or the particular class or group to which the person belongs." *See* NRCP 30(b)(1); *see also* FRCP 30(b)(1). Noticing a deposition pursuant to NRCP 30(b)(6) on a single topic early in the case may result in an unintentional waiver of any subsequent 30(b)(6) depositions or topics; NRCP 30(b)(1), on the other hand, does not purport to bind the company, but merely to describe the person to be deposed. As with the interrogatory response, deposition testimony is under oath.



In our experience, previously undisclosed policies may appear once a defendant (or one of its employees) must either sign a verification or sit for a deposition. In many cases, merely asking for dates for a deposition under NRCP 30(b)(1) can lead to amended NRCP 16.1 disclosures revealing previously undisclosed policies.

Finally, utilize all the resources available to you, as an NJA member, to verify the insurance information you have been provided is accurate. The List Server is a great tool for this. So is the Member Directory, if you know another NJA member had a case against the same entity. Because some entities may disclose insurance information as "confidential" under a protective order, it is essential for plaintiff's attorneys to police over-designation of confidential information, including insurance information.

Sanctions for Failure to Disclose

In recent years, judges in the Eighth Judicial District Court have recognized the harm a defendant's failure to comply with NRCP 16.1 can create. In one case our office handled, the district court struck a defendant's answer for failing to disclose an excess insurance policy until the close of discovery.

At first glance, the late disclosure of insurance would not appear to rise to the level of discovery abuse justifying a terminating sanction. After all, our client learned of ***more*** insurance that could apply to her claim—how could that prejudice her? Timing, as noted above, is everything. Believing the defendant's representation that the available insurance coverage was far less than it actually was, our client decided to forego a recommended surgery that would have made her total incurred medical bills hundreds of thousands of dollars more than the disclosed limits. (At the evidentiary hearing, our client made a limited waiver of attorney-client privilege to discuss this issue, and retained the privilege for any other issue related to the case). But because our client could not explain this decision to the jury at trial—reference to insurance is, of course, forbidden—all the jury would learn is that the client was recommended a surgery and did not follow through. This would have allowed the defense to argue our client had stopped treating despite having been recommended surgery, implying her injuries were not

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Kristopher makes it a top priority at his firm to get to know the individual needs of each of his clients as they are recovering. He often makes trips to the hospital to check in on his clients and opens a line of communication with their family members to ensure that the road to recovery is as smooth as possible.

Kristopher has been a member of NJA since 2015 and is a Silver Level contributor to Citizens For Justice.

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nearly as bad as she claimed. And, to make matters worse, our client's condition went untreated for months because of her belief concerning insurance.

There was little doubt the defendant's failure to disclose insurance information irreversibly prejudiced our client and the evidence in her case. After an evidentiary hearing at which defendant's counsel and multiple employees of the insurance carrier testified, the district court found each of the *Johnny Ribeiro* factors in favor of our client. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88 (1990). As the defendant had previously conceded liability for the collision, the district court struck the defendant's answer and deemed the causation of our client's injuries and need for medical care established. The only issue left for the prove-up was the extent of our client's damages, for which our client needed only demonstrate a prima facie case. *See Foster v. Dingwall*, 126 Nev. 56, 67 (2010) ("[W]here default is entered as a result of a discovery sanction, the nonoffending party 'need only establish a prima facie case in order to obtain the default judgment.'"). The matter settled before the prove-up hearing.

Other types of sanctions are available, too. Significant monetary sanctions may be punitive to deter defendants from continuing to withhold insurance information. They may also be compensatory, in the event plaintiff can show an expense would not have been incurred if the defendant had not withheld insurance information (for example, if plaintiff would not have attended mediation if they knew there was additional insurance to be recovered at trial). And where the damage to a plaintiff's case is irreversible, counsel should request the court grant contested-issue sanctions to allow the parties to continue litigating on an equal playing field.

It Takes All of Us

Unfortunately, the practice of withholding or concealing insurance information is not without great cost. This includes unnecessary delay, expense and further strain on the court's precious judicial resources. We are confident, however, that if plaintiff's attorneys continue to hold defendants liable for their decision to withhold insurance, defendants will have no choice but to stop this practice altogether.

Rahul Ravipudi is a partner at Panish | Shea | Boyle | Ravipudi LLP. He handles catastrophic injury and wrongful death cases involving commercial vehicles, pedestrians, industrial or construction accidents, utility negligence, dangerous conditions of public and private property as well as cases of sexual abuse and sexual assault.

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