Barry P. Goldberg
BARRY P. GOLDBERG, A PROFESSIONAL LAW CORPORATION

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

Dive into your first uninsured/underinsured motorist arbitration

UM/UIM ARBITRATION OFFERS MANY ADVANTAGES OVER TRIAL, PARTICULARLY FOR NEW LAWYERS

Lawyers becoming familiar with the California UM/UIM arbitration process will find it is relatively simple and lawyer friendly. While it is difficult to get small-to-moderate-dollar cases into trial, the UM/UIM process was designed to be a relatively fast and low-cost, efficient, alternative to superior-court litigation and trial. Embrace it.

More and more cases are going to arbitration

The number of UM/UIM arbitrations has increased dramatically and will continue to increase going forward. Here's why. When California's Uninsured Motorist Law was enacted in 1959, it was supposed to be a fast, inexpensive, and informal way to resolve claims with one's own insurance company.

When the Financial Responsibility Act was enacted after UM coverage was introduced, it was anticipated that 1) Uninsured Motorist Claims would be rare, and 2) that UM arbitrations would be even more rare. By 1974, the State minimum liability insurance requirements were a "whopping" $15,000/$30,000/$5,000! (Keep in mind that the average cost of a brand-new car was less than $3,500 in 1974.) It was thought that few cases would achieve a value exceeding those limits. In addition, after the financial responsibility law was in place, California had a relatively small number of uninsured drivers on the road. Insurers estimated that .01% of UM claims would be arbitrated. Accordingly, no attention was paid to processing them.

Fast forward to 2022. California is one of the few states that has failed to raise its minimum liability limits – $15,000 since 1974 – for nearly 50 years. *(Limits are now scheduled to increase beginning in 2025 – editor.)* Furthermore, it is estimated that there are over two million uninsured drivers on California roads. Although exact statistics are unavailable, anecdotal evidence suggests that about half of all auto-liability claims are either uninsured or underinsured. Given the similar rise in health-care costs, most significant accident claims exceed the $15,000 liability minimum.

UM/UIM coverage has become even more important with so many uninsured or underinsured operators and owners. Values for compensation have also increased, but policy limits not so much, so that triggering UIM claims is more common where policyholders have kept pace. More UM/UIM claims make it inevitable there will be disputes about liability, causation and damages that will be arbitrable. Ironically, the poorly written Uninsured Motorist Law, which was unimportant and rarely employed for decades is a consideration and factor in many if not most motor-vehicle accident cases.

Why lawyers should like UM/UIM arbitrations

For many practitioners a UM/UIM arbitration is either the first full advocacy test or at least the most accessible and common advocacy hearing. UM/UIM arbitrations are relatively informal, and the format heavily favors the insured/claimant. Most arbitrations are concluded in less than a day.

Many arbitrators have implied biases that inure to inexperienced claimants' counsel. The root here is that most arbitrators yearn to be full-time *mediators*. They do arbitrations until they can reliably fill their schedules with mediation work. Why is that important? Many want to make it easy on inexperienced counsel in the hopes of courting future mediation business.

Thus, it is rare that an arbitrator will make harsh or dispositive rulings on the evidence or law, or make the hearing environment awkward or uncomfortable. In contrast to a civil courtroom jury trial (or bench), it is a breezy sojourn, not a battle royale. Arbitrators of this ilk will usually excuse technical evidentiary objections. Toward that end, most arbitrators will allow all the proffered evidence, even over objections, and declare, "I will conditionally allow the evidence and give it appropriate weight under the circumstances." This is the mantra helping lawyers hone their advocacy skills without harming their clients' claims while they make inevitable "rookie" mistakes in the process. In the end, even new lawyers who have erred along the way will receive kudos in front of their clients for preparedness and execution.

UM/UIM arbitrations present a unique weight in favor of the claimant because few carriers will mount a defense to liability. To do so, the insurer will require the testimony of an uncooperative and often uninsured third party. Unless it is a very large case with heavy comparative fault, the insurer eschews a third-party witness with emphasis on experts in medicine to wash-out the claim. In addition, it is rare that an insurer will depose any "damages witnesses" before the arbitration. That yields a savings in time and money that can be multiplied out over the docket.

How does the insured commence a UM/UIM arbitration?

Pursuant to Insurance Code section 11580.2, an arbitration must be "initiated." The clearest way to "initiate" an arbitration is to make a formal demand for arbitration. The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested. Notice

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

shall be sent to the insurer or to the agent for process designated by the insurer filed with the department. (Ins. Code, § 11580.2, subd. (i)(C).)

It is not uncommon for the insurer to "initiate" an arbitration when it is clear the case cannot be settled, and it is sent out to defense counsel. You will know that arbitration has been "initiated" because you will receive discovery documents (sometimes out of the blue) which reference that it is a UM or UIM arbitration. Beware, the claimant must respond even though they did not initiate the arbitration, and even though neither the claimant nor insurer have discussed, much less selected, a specific arbitrator.

Do not be lulled into a false sense that your arbitration is "on track" and officially "initiated" just because the insurer sent you discovery. It is not. The case will simply languish. The insurer will never start the process of selecting an arbitrator or of obtaining an arbitration date. Claimants' counsel must take the initiative.

The insurer does not want the arbitration to take place. Remember, this is a "first party" insurance contract. The insurer owes its insured a duty of good faith and fair dealing even though the claim is being litigated. However, there is no exposure over and above the policy limits, like there is in third-party claims, so there is no pressure to pay, just process. This environment fosters sloth on both sides so that energy is required to move the arbitration to fruition.

Likewise, the insurer does not want a record reflecting it offered a low sum to conclude the claim, forced an insured through contentious litigation, and then wind up with an adverse arbitration award. For that reason, few insurers serve statutory offers to compromise (Code Civ. Proc., § 998) even though it is the only way to recover costs.

Select an arbitrator as soon as possible

It is in the insured's best interests to select an arbitrator as soon as possible. Insurers avoid and delay selecting an arbitrator because it relieves time pressure. Most auto insurance policies contain a detailed paragraph on the process of selecting an arbitrator – read it! In most cases, a single arbitrator shall be selected by mutual agreement.

The insured should forward a list of three candidates that have good reputations for being unbiased. Request the insurer to select one within 10 days. If none of the candidates are acceptable, ask the insurer to forward an alternative list within that same time, and so on.

If the insurer fails to respond or there is no agreement on the single neutral, the insured should file a petition in the superior court (similar to a motion) to compel arbitration with an order to appoint an arbitrator. There is statutory authority for this process commencing at Code of Civil Procedure section 1280.

Once a petition is filed, most every insurer will agree upon an arbitrator before the matter is adjudicated (or opposed). The motivation to act promptly will continue to be found in first-party duties the insurer owes an insured (claimant). It looks very bad when the insured has to file the equivalent of a lawsuit to enforce clear and commonplace UM/UIM process.

Set an arbitration date

Following the appointment of an arbitrator, move quickly to set an arbitration date. Setting the arbitration can create a major logjam. Putting aside the calendars for popular arbitrators, the most common complaint is that the insurer refuses to actually set a date. Insurers delay arbitrating by contending they will only agree to set the arbitration once all discovery has been completed. However, no timeline is set for the completion of discovery. Inevitably, the claim languishes with no incentive to take depositions and conduct (defense) medical exams.

The insured's attorney is sometimes a willing participant in the delay because of their other cases and trials, so the insurer's argument seems reasonable at first. There is also the issue of an initial arbitrator's fee deposit, which everyone wants to avoid. However, this is bad practice because it flies in the face of the purpose of the UM/UIM laws.

If the insurer will not agree to a date, request a scheduling conference with the arbitrator, and set the arbitration at the earliest opportunity. The arbitrator has the right to schedule the matter as he or she sees fit. (Code Civ. Proc., § 1282.2, subd. (a)(1).) Because most UM/UIM arbitrations involve few witnesses and little discovery, an experienced arbitrator is likely to set the matter promptly, even over the objection of the insurer.

Preparing your case for arbitration

You will not find a uniform comprehensive set of rules and guidelines for UM/UIM arbitrations other than the Code of Civil Procedure for arbitrations in general. It is the "wild, wild West!" Therefore, it is best to have a plan that survives "a punch in the face."

Once the case has been accepted for arbitration, counsel should simply request in writing an agreement and signed acknowledgement that the proceedings will be governed by Code of Civil Procedure section 1282, Insurance Code section 11580.2, and California Rules of Court, rule 3.823. Acceptance of these rules by both parties will provide for an orderly and predictable sequence up to and including the arbitration.

In those instances where the insurer's (in-house) counsel will not accept that stipulation, it is the better course to abide these provisions. They provide a road map for putting in evidence at the arbitration and how and when to provide notice. If no one else, the arbitrator will appreciate your transparency and organization. Moreover, adherence will help in claims to come.

Commence discovery

Insurance Code section 11580.2, subdivision (f) mandates that civil discovery statutes, commencing with section 2016.010 of the Code of Civil Procedure apply to the proceedings.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

To be sure, there are odd exceptions, but they are rarely followed.

Take note that Code of Civil Procedure section 2025.010, requiring a party to appear for a deposition by notice, is not applicable, pursuant to Insurance Code section 11580.2, subdivision (f)(4). Thus, witnesses and parties must be subpoenaed to their depositions but most everyone ignores this rule and depositions are set by stipulation and notice.

Nonetheless, a deponent who is not subpoenaed cannot be compelled to appear at deposition or arbitration. This can create a serious problem if a party waits until the last minute to notice an important deposition. By the time a subpoena can be served, it may be too late to take the deposition prior to the discovery cut-off, 15 days before the arbitration.

In most cases, form Interrogatories and Requests to Produce Documents are all you need with requests for admissions of fact to eliminate factual disputes. If liability is not clear or if causation is muddled, counsel would do well to prepare and serve contention Interrogatories. This is superior to the oft-threatened "adjuster deposition," which is pointless. Counsel and client work on discovery answers, and arbitrators will address any boilerplate by orders to compel further responses. The bottom line is that you can and should force the insurer to explain the basis of any relevant factual dispute without wasting time and money.

Insurers typically follow minimalist discovery to avoid being accused of oppressive tactics. Most will send out very basic written pattern discovery, take the insured's deposition and send the insured to a defense medical exam. Although Code of Civil Procedure section 2034.260, regarding expert witness exchange is applicable, it is rarely used in UM/UIM arbitrations. Generally speaking, once you have the DME (defense medical examination) and associated reports (e.g., record review), you will not need to depose the defense expert. Arbitrators are savvy to much of what lawyers develop in front of juries, so getting to the core of the issues as quickly as time permits is essential.

Timely prepare your notices, witness lists and exhibit lists

It is worth repeating that when the parties do not have an agreement about the introduction of witnesses and evidence, it is best practice to follow Code of Civil Procedure section 1282, and California Rules of Court, rule 3.823.

Code of Civil Procedure section 1282.2, subdivision (a)(2)(A) permits either party to demand in writing that the other party provide a list of witnesses it intends to call designating which witnesses will be called as experts and a list of documents it intends to introduce at the hearing. The demand shall be served within 15 days of receipt of the notice of hearing. If the insured plans to utilize this process, they should take it upon themselves to serve the notice of hearing on behalf of the arbitrator.

The obligation to respond is bilateral, and responses shall be served either in person or by certified mail within 15 days after the demand. This means that the witnesses for the arbitration and other evidence (i.e., custodians of records if there are no agreements), must be in place as early as 30 days after the arbitration date is set. That is as expedited as any trial could be, but it remains much more informal. The listed documents must be made available for inspection prior to the arbitration. It is most expedient and orderly to attach the proffered documents to the response.

Section 1282.2, subdivision (a)(2)(E) of the Code of Civil Procedure allows the arbitrator to hear witnesses or receive evidence not listed in the response if they so choose. Best practices include carefully listing the witnesses and evidence you intend to use at the arbitration. This eliminates or mitigates against the risk that witnesses and evidence could be excluded. Simultaneously, it commands notice that the party is prepared and confident. It will certainly make the arbitrator's job easier.

Rules of evidence at arbitrations

Whether or not Code of Civil Procedure section 1282.2 is utilized, rule 3.823, relating to the rules of evidence at the arbitrations, is a must read-and-learn. Rule 3.823 (b)(1) allows introduction of written reports and other documents without any foundation. In most cases, this will allow the parties to "make their case" without significant extra expense.

With some limited conditions, an arbitrator must receive these documents into evidence, including expert reports, medical records and bills, documentary loss of income, property damage repair bills and estimates, police reports and similar documents. The proponent must deliver these documents to the opposing party at least 20 days before the hearing. The opposing party has the right to subpoena the author or custodian of the document and conduct a cross-examination. The arbitrator is not to consider the opinion as to the ultimate fault expressed in the police report. Lawyers who try civil cases can see how simplified this approach is and with it, how younger associates will not imperil clients' interests by advocating for them.

Witness statements

Rule 3.823 (b)(2) allows a party to introduce witness statements at the arbitration in lieu of a live appearance if they are made under penalty of perjury and have been delivered to the opposing party within 20 days before the hearing. Because of the "penalty of perjury" requirement, counsel should work with the witnesses early on and not rely on a mere letter or handwritten statement that may or may not be signed under penalty of perjury. Remember that any letter can be referenced in a declaration and reiterated as true (under penalty of felony or perjury), to avoid rephrasing witnesses' impressions and prose. There is an earthy quality to this testimony that many will find refreshing. By the same token ambiguity and innuendo will not suffice as solid evidence. Clarifications can also be offered.

Witness statements are an excellent and efficient way to proffer the testimony

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

of supporting liability and damages witnesses. Many find "helping" or just participating an onerous imposition. Many will be more inclined to provide a statement, rather than appear, to help explain how the injury has affected the insured's life and ability to participate in various activities of daily living. Simply prepared declarations can accomplish this end.

Although the opposing party may demand within 10 days that the witness appear in person, such a demand could and will actually "backfire," because the witness will know the opposing party refused to accept his or her statement. In addition, and no small consideration, is that the arbitrator may not appreciate the opposing party's insistence inconveniencing peripheral, non-party witnesses and wasting valuable (read, expensive) arbitration time to oppose supporting testimony that is essentially undisputed. For instance, insisting on an appearance to show the witness was biased will probably yield unspoken derision, particularly if some bias was obvious and expected.

Finally, rule 3.823 (b)(3) allows the use of a deposition transcript without the need to show the deponent is "unavailable as a witness," if the proponent provides 20 days' notice of his intention to offer the deposition into evidence. Notice should be provided for every deposition in the claim.

In the unlikely event the deponent fails to appear at the hearing, the testimony can be used and it will not prejudice the claim or award. Once a party serves notice a deposition transcript will be used, the opposing party has the option to subpoena the deponent to the arbitration to cross-examine them in person. Here again, the arbitrator may not appreciate the opposing party's insistence inconveniencing witnesses and wasting valuable arbitration time for deposition testimony that is essentially undisputed and can be dealt with by designations, counter-designations and rejoinders.

Videotaped depositions

Claimants should consider using a videotaped deposition of a treating physician or other expert at the arbitration pursuant to section 2025.620, subdivision (d) of the Code of Civil Procedure. Videotaped depositions are extremely cost effective when it is reasonably certain the case will be arbitrated. In those instances, attempt to have the carrier videotape these depositions.

Rule 3.823 (b)(3) operates to proscribe a party from subpoenaing an expert whose deposition was videotaped to the arbitration. The videotaped deposition must be admitted even if the opposing party does not have any additional opportunity to cross-examine the expert at the arbitration.

Comprehensive arbitration briefs should not be considered optional. Spending extra quality time on prose explaining the facts and medicine will help the arbitrator – and counsel to familiarize themselves with the important issues and not collateral miscellany. It should be so complete that you could introduce your "statement of facts," as the insured's direct examination. This will provide the claimant with every legal advantage to perfecting and concluding the claim.

Attend the hearing

The arbitration hearing is generally very informal, running the gamut from a quasi-mediation-style to a mini-trial. Ironically, Zoom arbitration hearings or witnesses tend to be more formal and organized. Always inform the arbitrator in advance about witness issues and if any experts actually appear, yield to their schedules and fees, to get them *in and out*.

It is recommended that opening statements be brief or referenced to the arbitration brief. Do not repeat the brief, but give emphasis to the two or three most significant points of the claim. Do not waste time on any conceded point. Do not exaggerate. Conclude the opening statement with the specific sums insured claimant will be asking for economic and non-economic damages, and *not* "policy limits."

Once the claimant is in the evidence phase of the arbitration, simply offer all of the evidence in the notice that was served, and determine what remains in dispute for testimony. The arbitrator may ask for an offer and a few sentences should suffice for each item. For example, "This witness saw the insured in bed for two weeks and helped him with grooming and showering." Ask permission to read (or play) the selected deposition segments into evidence.

Doctors' reports are admissible without foundation. If you do not have a live doctor to testify at the arbitration, point out the important findings and conclusions in the report. If you have an expert witness, allow them to explain everything to the arbitrator with open-ended exam questions. Let them take the helm if they can. Invite the arbitrator to make inquiry at the conclusion. Often, the arbitrator must judge credibility between competing doctors. Whether you have a live doctor testifying or not, ask your doctor to read the defense medical report and make any appropriate comments in response.

After the insurer's case, which is usually short, remember to highlight the strongest points and offer a pocket brief on any remaining issues that would assist the arbitrator.

Arbitrations are not the highest peaks to scale for new lawyers. They foster growth by experience, and rarely is it the case that a UM/UIM award will be imperiled by an inexperienced lawyer, who can build on their competence, confidence and caseloads. Embrace it.

Barry P. Goldberg is the principal of Barry P. Goldberg, A Professional Law Corporation, *located in Woodland Hills. He has been in practice since 1984 and attended the University of California, Los Angeles undergraduate and obtained his law degree from Loyola Law School, Los Angeles. Mr. Goldberg is an experienced trial attorney and has handled hundreds of UM/UIM arbitrations.*