NEVADA

J. Bruce Alverson
Karie N. Wilson
ALVERSON TAYLOR & SANDERS
6605 Grand Montecito Pkwy, Suite 200
Las Vegas, Nevada 89149
Phone: (702) 384-7000
Fax: (702) 385-7000
E-Mail: balverson@alversontaylor.com
E-Mail: kwilson@alversontaylor.com

1. Identify the venues/areas in your State that are considered dangerous or liberal.

Las Vegas, Clark County, Nevada, is home to the Eighth Judicial District Court and the Southern Division of the United States District Court for the District of Nevada. The United States Census Bureau estimated that in 2017, Clark County had 2,204,079 residents.

Juries in Clark County are generally believed to be more liberal than juries in Nevada's more rural counties. This may be, in part, a result of Las Vegas' more transient population. While juries may be more liberal in their awards, defense verdicts are not uncommon.

Additionally, a review of published arbitration awards and subsequent appeals to Nevada's Short Trial Program indicates that arbitration awards in Clark County tend to be plaintiff friendly. Often, however, the plaintiff's arbitration award, if challenged, is reduced or negated on appeal. *See*, *e.g.*, *Wallace v. Estrella*, CV A746262, April 13, 2018 (The plaintiff received an arbitration award of $36,060.00 and the defendant appealed to Nevada's Short Trial Program. The Short Trial jury returned a verdict for the defendant); *Sandoval & Cabrera v. Corona*, CV A720786, March 20, 2018 (The plaintiff was awarded $20,000.00 at arbitration. On appeal, the Short Trial jury unanimously found in favor of the defendant); *Gutierrez, Caceres, & Cruz v. Gutierrez*, CV A752436, April 13, 2018 (The defendant appealed the plaintiffs' arbitration awards and the Short Trial jury returned a complete defense verdict.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

Sielaw v. McCandless Rental and Leasing, Inc.

A non-party hired the defendant to provide service, repair, maintenance, inspections, and certifications for its trucks and trailers. The plaintiff was employed by the trucking company as a driver of end-dump trailers. The plaintiff noted various deficiencies and safety problems with the end-dump trailer and brought them to his employer's attention. At the time of the accident at issue, the plaintiff, within the scope of his occupational duties, was operating a truck and end-dump trailer loaded with soil, boulders, and rocks. The plaintiff alleged that after he located and stabilized the truck and end-dump trailer, he engaged the hydraulics of the end-dump in order to raise the trailer. Before the trailer was fully raised, the plaintiff heard and felt a loud snap

coming from the trailer and immediately attempted to stop the trailer from rising further. However, the end-dump trailer tilted and rolled over onto its side, dragging the truck onto its side with the plaintiff still inside the truck cab. The plaintiff reportedly sustained injuries resulting in permanent disability.

The plaintiff called a commercial trucking expert who was of the opinion that the truck rolled due to faulty or inadequate maintenance in the trailer's hydraulic ram, which caused the trunnion mount to fail during operation. The expert further opined that the defendant's annual inspections fell below the standard of care. The defendant denied liability and asserted that the plaintiff located the truck and end-dump trailer on unleveled ground, on a side slope in soft dirt, which caused it to tip. The defendant further argued that its maintenance and annual inspections of the end-dump trailer were more than adequate, and the hydraulic ram trunnion mount did not fail. After a six day trial and approximately one hour of deliberation, the jury returned a verdict for the defendant.

Estate of Khiabani v. Motor Coach Industries, Inc.

The decedent, a 51-year-old reconstructive hand surgeon was survived by his spouse and two teenage children who brought suit for the decedent's wrongful death. The plaintiffs alleged at the time of the accident, the decedent was riding his bicycle in a designated bicycle lane. The driver of a bus allegedly overtook and struck the decedent on his bicycle. The decedent sustained catastrophic internal injuries and died as a result of the incident. The plaintiffs alleged that defendant's bus was defective and unreasonably dangerous, and that the defendant failed to provide adequate instructions for the safe and proper use of the bus. The defendant denied liability. After a twenty-three day trial and four hours of deliberations of over four hours, the jury unanimously found for the plaintiffs. The jury awarded the surviving spouse a total of $1.5 million, representing $1 million for loss of consortium, grief and sorrow, and $500,000.00 for loss of support. The jury also awarded the surviving children a total of $16.2 million, including damages for past and future grief, sorrow, and loss of companionship, and loss of support. The decedent's estate was also awarded $1 million for pain and suffering and $46,003.62 for medical and funeral expenses.

Cobos v. Tri-State Towing, et al.

The plaintiff, employed as a courier, alleged that the defendant, who was in the course and scope of his occupational duties operating a 1998 International 4700 flatbed tow truck, parked the tow truck in the parking lot of a gas station. The defendant driver was allegedly distracted, drowsy, or under the influence of drugs or alcohol, which caused him to place the tow truck in an improper gear when he exited, causing it to roll backwards out of the parking lot and onto the roadway.

As the tow truck rolled across the median into the travel lanes it collided with the plaintiff's vehicle, allegedly propelling her into other vehicles. As a result of the impact, the plaintiff allegedly sustained bilateral rotator cuffs tears of the shoulders and developed lumbar facet syndrome.

At trial, the defendants relied on the testimony of a biomechanical trauma specialist and injury causation expert, who opined that the plaintiff's injuries were not casually related to the accident. Rather, the plaintiff's pain was caused by pre-existing degenerative conditions.

After a seventeen day trial and eight hours of deliberation, the jury unanimously awarded the plaintiff $3,382,000.00 in damages, representing $282,000.00 for past medical expenses, $600,000.00 for future medical expenses, $1,000,000 for past pain and suffering, and $1,500,000.00 for future pain and suffering.

3. Are accident animations and/or computer-generated evidence admissible in your State?

Animations and/or computer-generated evidence have not been specifically addressed by the Nevada Supreme Court. Their admissibility is therefore governed by the general requirements for "relevant evidence." Relevant evidence is admissible at trial, unless otherwise excluded by law or the rules of evidence. Nev. Rev. Stat. § 48.025. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Nev. Rev. Stat. § 48.015. Notwithstanding, relevant evidence may be excluded if, among other things, its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." Nev. Rev. Stat § 48.035(1); *Las Vegas Metro. Police Dep't. v. Yeghiazarian*, 129 Nev. 760, 765, 312 P.3d 503, 507 (2013).

If the animation and/or computer-generated evidence has a tendency to make the existence of a fact more or less probable, and its probative value is not outweighed by the danger of unfair prejudice or confusion of the issues, it could arguably be admissible at trial, subject to objection. The Nevada Supreme Court has held that evidence is unfairly prejudicial if it appeals to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence. *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). Ultimately, the admissibility of the animation and/or computer-generated evidence is left to the discretion of the individual trial judge.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

In Nevada, there is a pre-litigation duty to preserve relevant evidence. *Waters-Maria v. Valley Health Sys., LLC*, No. 69455, 2017 WL 4996827, at 1 (Nev. App. Oct. 31, 2017) (citing *Bass–Davis v. Davis*, 122 Nev. 442, 449-450, 134 P.3d 103, 108 (2006)). This duty is imposed on each party once the party is on "notice" of a potential legal claim. *Id.* NRS 47.250(3) creates a rebuttable presumption that evidence intentionally destroyed would have adversely affected the party that was required to produce the evidence. Notwithstanding, if "evidence is negligently lost or destroyed, without the intent to harm another party," an inference is permitted at the discretion of the district court. *Waters-Maria*, at 1 (citing *Bass–Davis*, at 448–449, 134 P.3d at 107). This duty to preserve evidence would extend to in-cab videos. The

admissibility of in-cab videos would be determined by the general requirements for "relevant evidence," set forth in NRS § 48.025.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

In 2017, the City of Las Vegas introduced "connected" vehicles to its fleet of vehicles to increase pedestrian safety and traffic flow. Notwithstanding, Nevada has not specifically addressed the retention of telematics data. Based on Nevada's general discovery rules and case law regarding spoliation and preservation of evidence, is it very likely that telematics data would be discoverable.

Nevada was one of the first states to pass legislation requiring manufacturers of motor vehicles to disclose in the owner's manual information regarding any Event Data Recorder (EDR). *See* NRS § 484D.485. The download of the EDR data is prohibited by statute unless: (1) the owner consents to the download; (2) there is a court order mandating the download of the data; (3) it is being downloaded to assist in vehicle safety research; (4) it is being downloaded to diagnose, service, or repair the vehicle; or (5) it is pursuant to a disclosed agreement for subscription services. *Id.*

6. Is a positive post-accident toxicology result admissible in a civil action?

Evidence of intoxication should not be admitted if there is no evidence of a causal link between the alleged impairment and the injury. *Holderer v. Aetna Cas. and Sur. Co.*, 114 Nev. 845, 852–53, 963 P.2d 459, 464 (1998). Stated differently, if the individual's Blood Alcohol Content (BAC) is *below* the legal limit of 0.08 percent (NRS § 484C.110), or 0.04 percent for commercial drivers (NRS § 484C.120), then corroborating evidence of intoxication is required before the evidence is admitted as substantive evidence. *Las Vegas Metro. Police Dept. v. Yeghiazarian*, 129 Nev. 760, 765, 312 P.3d 503, 507 (2013). The Supreme Court of Nevada has stated that a BAC alone is substantially more prejudicial than probative without other evidence suggesting intoxication "or an expert who can explain to a jury how his BAC, ascertained hours after the accident, would have affected him at the time of the accident." *Id.* If the driver's BAC is *above* the legal limit, information regarding the driver's intoxication is deemed relevant and admissible. *Id.* at 766, 312 P.3d at 507. A driver's BAC may be used for impeachment purposes without a causal link. *Id.* at 765, 312 P.3d at 507.

In addition, evidence of intoxication is relevant to a person's ability to perceive and may be admissible to attack a witness on his or her ability to perceive and remember. *FGA, Inc. v. Giglio*, 128 Nev. 271, 285, 278 P.3d 490, 499 (2012).

7. Is post-accident investigation discoverable by adverse counsel?

Rule 16.1 of the Nevada Rules of Civil Procedure states, in relevant part, that a party must disclose all discoverable material. *See* NRCP 16.1(a)(1)(A) and (B). NRCP 16.1 is often

read to be very broad in scope. *See Ett, Inc. v. Delegado*, 126 Nev. 709, 367 P.3d 767 (2010). Additionally, Rule 16.1 must be read in conjunction with Rule 26(b), which outlines the scope of discovery and provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *See* NRCP 26(b). A discovering party may obtain discovery of privileged materials prepared in anticipation of litigation "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." NRCP 26(b)(3).

Nevada has adopted the majority "because of" test for determining if work was done "in anticipation of litigation." NRCP 26(b)(3). *See also Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 339 P.3d. 334, 347 (2017). Under the "because of" test, documents are prepared in anticipation of litigation when "in light of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *Id.* at 348. The anticipation of litigation must be the "*sine qua non* for the creation of the document—'but for the prospect of that litigation,' the document would not exist." *Id.* Documents prepared in the ordinary course of business or that would have been created in a substantially similar manner and form, irrespective of the litigation, are not protected under NRCP 26(b)(3). *Id.*

To determine if the "because of" test is met, Nevada has adopted a "totality of the circumstances" standard. *Id.* The court should determine whether "a request for legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of the document and the nature of the document." *Id.* Finally, a court should consider "whether a communication explicitly sought advice and comment." *Id.*

Based on the foregoing, a post-accident investigation is discoverable if done in the regular course of business. A party can seek to demonstrate, however, that the post-accident investigation was done in anticipation of litigation. Work product is more easily protected if any post-accident investigation is overseen by retained counsel.

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

Nevada was the first state to authorize the testing and operation of autonomous vehicles in 2011. *See* Nat'l Conference of State Legislatures, *Autonomous Vehicles/Self-Driving Vehicles Enacted Legislation* (Nov. 7, 2018). Since that time, Nevada has developed a comprehensive statutory scheme related to autonomous vehicles. *See* NRS § 482A. This statutory scheme includes, but is not limited to, definitions, the requirement for insurance, issues related to liability, as well as civil and criminal penalties related. Additionally, in Nevada a person is deemed not to be operating a motor vehicle if the vehicle is legally driven autonomously. NRS § 484B.165(b).

9. Describe any laws or Court decisions in your State which would preclude a

commercial driver from using a hands-free device to have a conversation over a cell phone.

Use of a cellular telephone or other handheld wireless communications device to engage in voice communications with another person is generally prohibited. *See* NRS § 484B.165(b). Use of a communications device is, however, allowed provided that the device is used with an accessory which permits the person to communicate without the use of his or her hands i.e., hands free. *Id.* Additionally, a driver is allowed to activate, deactivate, or initiate a feature or function on the device using his or her hands. *Id.* Nevada does not prohibit an individual from using a voice-operated global positioning or navigation system that is affixed to a vehicle. *See* NRS § 484B.165(3).

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

In *Lioce v. Cohen*, the Supreme Court of Nevada held that "[a]n attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties." 124 Nev. 1, 22, 174 P.3d 970, 984 (2008). The Court determined that such arguments are improper, because they "infect the jury's objectivity." *Id.*

Lioce has been subsequently interpreted such that a violation of the golden rule occurs when an attorney: (1) asks the jurors to place themselves in the plaintiff's position; or (2) nullifies the jury's role by asking it to "send a message" to the defendant instead of evaluating the evidence. *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 790 (Nev. 2017), *reh'g denied* (Sept. 28, 2017) (citing *Grosjean v. Imperial Palace, Inc.,* 125 Nev. 349, 368–69, 212 P.3d 1068, 1082 (2009) (quoting *Lioce,* 124 Nev. at 20–23, 174 P.3d at 982–84).

There are no special rules or decisions that specifically limit or prohibit a reptile style argument. Notwithstanding, Nevada's form jury instructions provide that a verdict may not be influenced by any personal feeling of sympathy for or prejudice against either party and that both parties are entitled to the same fair and impartial consideration. (Nev. 1GI.5).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

Discovery is generally completed more expeditiously in federal court. The Local Rules of Practice for the U.S. District Court for the District of Nevada require that discovery be completed within 180 days from the date the first defendant answers or appears. *See* LR 26-1(b)(1) and LR 26-2. Federal magistrate judges are sometimes reluctant to extend this discovery period without a specific showing of diligence by the parties and good cause for the requested extension. Conversely, in state court the pretrial discovery ranges from 12 to 24 months and discovery extensions are often freely granted, depending upon the circumstances. *See* EDCR 1.90(2).

In Nevada state courts there is an underlying policy which favors deciding a case on the merits. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. Adv. Op. 78, 428 P.3d 255, 257 (2018);

Stoecklein v. Johnson Elec., Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993); *Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 793 (1992); *Yochum v. Davis*, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982). Consequently, it is much more difficult in Nevada state courts to obtain case terminating sanctions. The state courts have also interpreted this underlying policy to justify the denial of motions for summary judgment particularly in negligence cases. *See*, *e.g.*, *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011); *see also Rodriguez v. Primadonna Co.*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009).

While the federal court judges are more likely to grant summary judgment or evidentiary motions, the Nevada federal court docket is extremely busy. Parties may wait several months before a significant or dispositive motion is set for hearing or decided via written order.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

In *Mendez v. Brinkerhoff*, the Supreme Court of Nevada determined that the evidence of a guilty plea or pleas of no contest support both an inference of admission of guilt and an inference that the party did not contest the citation as a matter of convenience or sound economics. 105 Nev. 157, 159, 771 P.2d 163, 164 (1989). Consequently, evidence of a traffic citation is inadmissible in subsequent litigation regardless of the disposition. *Frias v. Valle*, 101 Nev. 219, 221, 698 P.2d 875, 876 (1985).

For misdemeanor traffic offenses, Nevada Revised Statute 41.133, states that if "an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury." *Langon v. Matamoros*, 121 Nev. 142, 144, 111 P.3d 1077, 1078 (2005).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

In general, evidence regarding the amount charged by medical providers is admissible. Nevada has adopted a *per se* collateral source rule that bars "the admission of a collateral source of payment for an injury into evidence for any purpose." *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). Consequently, evidence of the amount actually paid to a medical provider is generally inadmissible.

There is an exception to Nevada's collateral source rule which allows the admission of the actual workers' compensation benefits paid. *Tri-County Equip. & Leasing v. Klinke*, 128 Nev. 352, 354, 286 P.3d 593, 595 (2012). Nevada law also provides an exception in medical malpractice actions, in which the amount actually paid to a medical provider is admissible. *See Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234, 241 (2015).

14. Describe any statutory caps in your State dealing with damage awards.

There are generally no limits on compensatory damages awards. However, an award for damages in an action sounding in tort brought against political subdivisions may not exceed $100,000. NRS § 41.035(1). Additionally, in medical malpractice actions, noneconomic damages shall not exceed $350,000, regardless of the number of plaintiffs, defendants, or theories of liability. NRS § 41A.035; *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234 (2015).

Punitive damages are limited to three times the amount of compensatory damages awarded, if $100,000 or more. NRS § 42.005(1)(a). If the compensatory damages awarded to the plaintiff are less than $100,000, punitive damages are then limited to $300,000. NRS § 42.005(1)(b). The aforementioned limits do not apply to: (a) a manufacturer, distributor or seller of a defective product; (b) an insurer who acts in bad faith regarding its obligations to provide insurance coverage; (c) a person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1; (d) a person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or (e) a person for defamation. NRS § 42.005(2). The limits on pecuniary damages also do not apply where the injury is caused by an individual who operates a vehicle after consuming alcohol or a controlled substance. NRS § 42.010.