

NEW JERSEY

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

Some counties in New Jersey considered to be more liberal include (in no particular order): Essex County; Hudson County; Camden County; and, Union County. Geographically speaking, those counties in or around large metropolitan areas (such as New York City or Philadelphia) yield more liberal juries, which also tend to be more “plaintiff-friendly”.

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

Some unfavorable verdicts include a \$2.15 million award in a truck accident case causing serious brain injuries; and, a \$1.23 million verdict in a truck accident case involving a railroad worker.

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

New Jersey has applied its standard for admissibility of event reconstruction to computer animations of the relevant event. *Persley v. N.J. Transit Bus Operations*, 813 A.2d 1219, 1228 (N.J. Super. Ct. App. Div. 1 2003). Noting the particular danger of the jury placing undue weight on a reconstructive video and accompanying expert testimony, the *Persley* court stated: “a motion picture of a reconstruction of a particular event may be admitted into evidence when relevant and where its probative value is not offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters.” *Id.*

In *Persley*, the admissible video was found “substantially similar to the subject accident”; the process leading to its creation was known to the jury; and it had a basis in the evidence which did not incorporate a testimonial component. *Id.* Each of these aspects were important factors lending towards admissibility. Cases where the computer-generated evidence was ruled inadmissible found one or all of these aspects missing.

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.

The trend in New Jersey encourages retention, and for companies to have policies in place when such evidence may be requested by interested parties. This incentive would require a company to investigate fully any incidents which would warrant such retention. The existence of a duty to preserve evidence is a question of law to be determined by the court. *Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc.*, 336 N.J.Super. 218, 226, 764 A.2d 475 (App.Div.2001). Such a duty arises when there is pending or likely litigation between two parties, knowledge of this fact by the alleged spoliating party, evidence relevant to the litigation, and the foreseeability that the opposing party would be prejudiced by the destruction or disposal of this evidence. *Aetna Life & Cas. Co. v. Imet Mason Contractors*, 309 N.J.Super. 358, 364, 707 A.2d 180 (App.Div.1998). Depending on the circumstances, spoliation can result in dismissal, a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. *Jerista v. Murray*, 185 N.J. 175, 201, 883 A.2d 350 (2005). If a plaintiff can make a threshold showing that a defendant's recklessness caused the loss of relevant evidence, the jury should be instructed. *Cockerline v. Menendez*, 411 N.J. Super. 596, 620 (App. Div. 2010).

Presently, there are no laws which prohibit the admissibility of in-cab videos, sometimes referred to as “dash-cams”. Such video evidence is admissible, so long as the general requirements for admissibility are met.

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.

The duty to preserve evidence must be tempered by allowing custodial parties to dispose of evidence when the situation reasonably requires it. *See Hirsch v. Gen. Motors Corp.*, 266 N.J.Super. 222, 628 A.2d 1108, 1122 (1993). Often times, onboard equipment such as DriveCam footage or engine control module data will be included on a claimant’s notice to preserve evidence. And, just as frequently, this evidence will be requested through written discovery. Best practices emphasize that such evidence should be preserved as a matter of course in the event of an accident or possible claim.

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

Although admissibility is dependent upon relevancy, generally speaking, medical records, including toxicology reports, are admissible as business records. *N.J.S.A. 9:6–8.46(a)(3)*; *N.J.R.E. 801(d)*; *N.J.R.E. 803(c)(6)*; *see also N.J. Div. of Youth & Family Servs. v. B.M.*, 413 N.J. Super. 118, 129–30 (App. Div. 2010) (explaining the prerequisites for admission under the business records exception). When care facilities, hospitals, and other medical centers make toxicology reports in the regular course of their business, such results tend to be admissible. *See also, New Jersey Div. of Child Prot. & Permanency v. B.G.*, A-2298-14T1, 2017 WL 1548703, at *4 (N.J. Super. Ct. App. Div. May 1, 2017)

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

Post-accident investigation material may be protected from a party's duty to disclose by virtue of the work-product privilege. In determining whether a document is protected from disclosure by the work-product privilege, the threshold question is whether the document was "prepared in anticipation of litigation or for trial. R. 4:10-2(c). If a document was prepared "in the ordinary course of business" rather than in anticipation of litigation, it is not entitled to protection as work product. *Payton v. New Jersey Tpk. Auth.*, 148 N.J. 524, 554, 691 A.2d 321 (1997); *see also Dinter v. Sears, Roebuck & Co.*, 252 N.J. Super. 84, 96, 599 A.2d 528 (App.Div. 1991) (holding work product privilege inapplicable where record did not support assertion that the statements "were written at the direction of counsel or in preparation for litigation).

However, a document may be found to have been prepared in anticipation of litigation even though litigation had not been commenced or even threatened when the document was prepared. *See In re Sealed Case*, 146 F.3d 881, 884-88 (D.C.Cir.1998); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260-61 (3rd Cir.1993); *Springfield Terminal Ry. Co. v. Department of Transp.*, 754 A.2d 353, 358-59 (Me. 2000). As Professor Wright has observed: "Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced." 8 Charles Alan Wright & Richard L. Marcus, *Federal Practice & Procedure*, § 2024 at 343 (2d ed. 1994).

In *Medford v. Duggan*, the court indicated that the work product privilege may be invoked if "the dominant purpose in obtaining a statement [was] ... the potential for litigation." *Medford v. Duggan*, 323 N.J. Super. at 135, 732 A.2d 533. However, Professor Wright and the *Restatement of the Law Governing Lawyers* take the position that for a document to be protected by the work product privilege, it not only must have been prepared for the dominant purpose of litigation, but there must also have been an objectively reasonable basis for anticipating litigation. "The test should be whether, in light of the nature 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." Wright, *supra*, § 2024 at 343. The comment to the *Restatement* indicates that "[t]he reasonableness of anticipation is determined objectively by considering the factual context in which materials are prepared, the nature of the materials, and the expected role of the lawyer in ensuing litigation." *Restatement (Third) of Law Governing Lawyers* § 87 cmt. (1998).

Miller v. J.B. Hunt Transp., Inc., looking to the Third Circuit Court of Appeals, held that a statement or other document will be considered to have been prepared in anticipation of litigation if the "dominant purpose" in preparing the document was concern about potential litigation and the anticipation of litigation was "objectively reasonable." *Miller v. J.B. Hunt Transp., Inc.*, 339 N.J. Super. 144, 148-50 (App. Div. 2001) (citing *Martin v. Bally's Park Place Hotel & Casino*, *supra*, 983 F.2d 1252, at 1260 (3d Cir. 1993).

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

New Jersey is only one of a handful of states that have no laws or traffic regulations specific to autonomous vehicles. As of February 2019, New Jersey's Assembly approved legislation to establish a task force for the safe deployment of autonomous vehicles in the state.

The group's mission is to conduct a study of semi-autonomous and fully-autonomous AVs, ranging from level three to level five vehicles. The task force would recommend laws, rules, and regulations for the use of AVs on New Jersey's roads. The task force will lay the groundwork for three proposed bills which, if enacted, would: authorize the testing of autonomous vehicles on public roads; require the state Motor Vehicle Commission to create regulations for issuing driver's licenses to owners of autonomous vehicles; and, create a one-year pilot program to monitor the testing of autonomous vehicles.

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.

N.J.S.A. 39:4-97.3 makes it illegal to use a cell phone that is not "hands-free" while driving, except in certain specifically-described emergency situations. *N.J.S.A. 39:4-97.3. Kubert v. Best*, 432 N.J. Super. 495, 502 (App. Div. 2013). *N.J.S.A. 39:4-97.3* states specifically that the use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free. *Id.*

There have been no state laws or reported court decisions which imposed a different standard upon commercial drivers. *See, Sipler v. Trans Am Trucking, Inc.*, 2010 WL 4929393, at *4 (D.N.J.2010) (dismissing punitive damages claim against tractor trailer driver who "was talking on his hands-free cell phone at the time of the collision," and finding that "[w]hile such conduct may be negligent, it does not show wanton and willful disregard of Plaintiffs' safety....").

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

Jackowitz v. Lang, 408 N.J. Super. 495, 975 A.2d 531 (App. Div. 2009) (statements that advanced message that defendant should be punished, that focused on what defendant did wrong, when liability was stipulated, and that encouraged jury to "send a message" were improper). *Henker v. Preybylowski*, 216 N.J. Super. 513, 520, 524 A.2d 455 (App. Div. 1987) (improper to ask jurors to award damages for an amount they would want for their own pain and suffering as plaintiff; known as "golden rule" argument). *See also Botta v. Brunner*, 26 N.J. 82, 94, 138 A.2d 713, 60 A.L.R.2d 1331 (1958). § 9:42. *Supporting authorities—Rejection of "golden rule argument"*, 55 N.J. Prac., N.J. Motions in Limine § 9:42

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

Advantages and disadvantages will depend primarily on the vicinage of the Superior Court in which you are venued. More liberal, plaintiff-friendly counties - such as Camden County or Hudson County - tend to motive defendants to investigate potential grounds for removal or transfer. Areas in New Jersey which tend to draw a more conservative jury pool and average more defense-favorable verdicts tend to advantage a defend in obtain more realistic settlement negotiations (without consideration of the basis for claims being brought). Those

cases designated for New Jersey's arbitration program will often be heard by an arbitrator(s) who is aware of the jury pool and case values that come with a given county.

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

In New Jersey, a plea of guilty to a traffic offense may be admissible in a subsequent civil proceeding arising out of the same occurrence as an "admission against interest" or as an admission by a party-opponent.

However, the use of a civil reservation permits a defendant in municipal court to enter a guilty plea and not have that admission of guilt be used as evidence in any subsequent civil trial. Civil reservations are permitted by the Court pursuant to Rule 7:6-2(a)(1) and only apply to the guilty plea. The Rule specifically states: "The municipal court judge, at the request of a defendant, to order that a guilty plea shall not be evidential in any related civil proceeding." R. 7:6-2(a)(1) However, it is noteworthy that any testimony given in municipal court under oath and before the judge prior to the entry of the guilty plea, is not protected by a civil reservation.

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?

Based upon the collateral source rule, medical bills paid by insurance may be introduced into evidence but then must be deducted from the verdict post-trial by the judge molding the verdict. N.J.S.A. 2A:15-97. The collateral source rule does not apply to Medicaid benefits because the plaintiff must reimburse Medicaid. These benefits are not a collateral source and not subject to deduction from the award. Thus, the bills are admissible and would not be deducted from the award by the judge post-trial.

The Appellate Division in *Ribeiro v. Sintra* found that medical expenses "incurred" were equivalent to the amount accepted by the medical providers in full payment, rather than the actual amount billed. complaint *Ribeiro v. Sintra*, A-0701-07T1, 2008 WL 2677536, at *1 (N.J. Super. Ct. App. Div. July 10, 2008)

The decision of *Wise v. Marienski* ruled that the medical expenses not paid by PIP are recoverable in a tort action. *Wise v. Marienski*, 425 N.J. Super. 110 (Law Div. 2011). It decided that the full amount of those bills, without any reduction to the PIP Fee Schedule, were admissible into evidence at trial. Thus, they are fully "boardable" to the extent they were not paid by PIP.

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

The New Jersey Tort Claims Act limits damages in several ways. For instance, Section 59:9-2(e) says that if you have insurance that covers your injury, the amount you receive (or could receive) from your insurer is deducted from any damages award you receive from the state.

Likewise, in order to receive pain and suffering damages as part of your claim, you must meet the requirements of Section 59:9-2, which says that pain and suffering damages will not be awarded unless "permanent loss of a bodily function, permanent disfigurement or dismemberment" have occurred and "medical treatment expenses are in excess of \$3,600."

The New Jersey Punitive Damages Act limits punitive damages to five times the amount of compensatory damages awarded or \$350,000, whichever is greater – except in specific cases involving public policy and social concerns. N.J.S.A. 2A:15-5.9.

Under the Act, punitive damages may be awarded to the plaintiff only if he or she proves, by clear and convincing evidence that the harm suffered was the result of the defendant's act of actual malice.