PENNSYLVANIA

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

Pennsylvania jury verdicts in favor of plaintiff and damage awards have traditionally been higher in the Philadelphia area and surrounding counties compared with the more rural venues and counties in the middle of the Commonwealth and in western Pennsylvania, including Allegheny County (Pittsburgh). However, damage awards exceeding $10 million in favor of personal injury/wrongful death plaintiffs have been awarded by juries in Allegheny County in recent years.

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

DeJesus v. Fowlds Brothers Trucking, et al.
Court of Common Pleas of Montgomery County, Pennsylvania, Case No. 2016-09541

Defense verdict in a case involving a plaintiff who allegedly sustained disc damage, shoulder impingement and lumbar strain when her vehicle was struck by a tractor trailer allegedly making an improper wide right turn from the middle lane of travel and impacted the driver's side of plaintiff's vehicle.

Espinoza v. J.B. Hunt Transport, Inc., Ricky Hatfield, Hatfield Trucking, et al.
Court of Common Pleas of Philadelphia County, Pennsylvania, Case No. 1506002656

Jury verdict for plaintiff and judgment entered for $15,579,429, arising out personal injuries sustained by an adult plaintiff after being struck by a tractor truck operated by defendant Ricky Hatfield of Hatfield Trucking, who was reportedly hauling cargo for defendant J.B. Hunt Transport, Inc. Plaintiff alleged he was on a highway shoulder, assisting a friend who had run out of gas, when Hatfield's truck left the travel lane and entered the shoulder striking plaintiff. Plaintiff contended Hatfield was speeding, fled the scene of the accident, and was later criminally charged for DUI and other violations, and additionally contended that J.B. Hunt was vicariously liable for failing to perform a background check on and investigate the fitness of Hatfield and Hatfield Trucking to operate a tractor truck. J.B. Hunt denied liability on grounds Hatfield was using his tractor for personal reasons and was taking a "joy ride" entirely for his own pleasure. A jury assigned 60 percent negligence to Hatfield and 40 percent to J.B. Hunt. Plaintiff was awarded $12,229,429, and plaintiff's spouse received $3,350,000 for loss of consortium claim.

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

I. PENNSYLVANIA

A. The Pennsylvania Supreme Court has categorized computer-generated animation ("CGA") as demonstrative evidence. *Com v. Serge*, 896 A.2d 1170, at 1179 (Pa. 2006).

1. In order for CGA evidence to be admissible, the evidence must be: (1) authenticated; (2) relevant; and (3) most importantly, has a probative value that is not outweighed by the danger of unfair prejudice. *Id.* at 1177

2. The *Serge* court noted that the difference between past uses of demonstrative evidence such as chalk drawings and present uses such as animation is "one of mode, not meaning." *Id.*

a. Although CGA may be more persuasive than traditional types of demonstrative evidence, persuasive quality and effectiveness are not proper grounds for excluding the relevant evidence.

b. With the dangers inherent in the use of computer-generated evidence, a limiting instruction to the jury may be appropriate.

B. Where the demonstration of evidence contained in CGA is a physical representation of the incident or event, the conditions portrayed in the CGA must be sufficiently close to those involved in the accident at issue

to make the probative value of the demonstration outweigh the prejudicial effects. *Id.*

1. When CGA is admitted, a PA appellate court will only reverse the trial court's admission of such evidence upon a clear showing of an abuse of discretion. *Harsh v. Petroll*, 840 A.2d 404, 421 (Pa. Commw., 2003) (*citing Stecher v. Ford Motor Company*, 779 A.2d 491 (Pa.Super.), petition for allowance of appeal granted, 568 Pa. 619, 792 A.2d 1254 (2001), vacated and remanded on other grounds, 571 Pa. 312, 812 A.2d 553 (2002)).

2. Where the animation is not substantially similar to the actual accident, or where the animation bears no resemblance to the actual crash, the trial court will generally not allow such an animation to be admitted into evidence. *Com v. Serge*, *supra.*

II. THIRD CIRCUIT

A. With respect to computer-generated simulations, reconstruction, and animation, "such computer-generated evidence has long been accepted as an appropriate means to communicate complex issues to a lay audience, so long as the expert's testimony indicates that the processes and calculations underlying the reconstruction or simulation are reliable." *Ortiz v. Yale Materials Handling Corp.*, 2005 WL 2044923, at *8, 2005 U.S. Dist. LEXIS 18424, at *28-29 (D. N.J. 2005).

B. Some district courts in the Third Circuit, including the Western District of Pennsylvania in *Altman v. Bobcat Co.*, 2008 WL 2779301, 2008 U.S. Dist. LEXIS 55024 (W.D. Pa. 2008), have expressed a preference for computer generated evidence if it helps a jury understand and visualize the facts at issue.

1. For example, when the plaintiffs offered an animation to show how a person seated in the backhoe at issue in the case could come within contact of the controls that operated the machine's swing arm, the defendant objected to the animation, arguing that it was improperly authenticated, not scientifically reliable, and later argued that the judge improperly failed to consider the animation's possible prejudicial effect. However, the *Altman* court noted that the Third Circuit had cautioned that computer-generated recreations "could easily seem to resemble the actual occurrence" and therefore mislead jury members "because they do not fully appreciate how variations in the surrounding conditions, as between the original occurrence and the staged event, can alter the outcome," but concluded that the evidence offered by plaintiffs

was allowable because they "did not offer the computer-generated evidence as a reconstruction of the accident, but rather, offered it to help the jury visualize the testimony proffered by their witnesses." *Altman v. Bobcat Co.*, 2008 WL 2779301, 2008 U.S. Dist. LEXIS 55024, at *7 (W.D. Pa. 2008)(*quoting, in part, Fusco v. General Motors Corp.*, 11 F.3d 259, at 264 (3d Cir.1993).

2. On appeal, the Third Circuit affirmed, holding that the "depiction evidence" offered by the plaintiffs "was not 'sufficiently close in appearance to the original accident to create the risk of misunderstanding by the jury' or prejudice to Bobcat." *Altman v. Bobcat Co.*, 349 Fed. Appx. 758, 764 (3rd Cir. 2009) (*quoting Fusco v. General Motors Corp.*, 11 F.3d 259 at 264 (3d Cir.1993).

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.

I. No recent Pennsylvania or Third Circuit case law was located which addressed the specific issues of retention and spoliation of in-cab videos or the admissibility of in-cab videos; however, Pennsylvania and Third Circuit case law was located concerning the retention and spoliation of videos and other documents, which can be applied by analogy.

II. PENNSYLVANIA

A. In order for in-cab video to be admissible, the same standard as other evidence is applicable, that is, the evidence must be: (1) authenticated; (2) relevant; and (3) most importantly, has a probative value that is not outweighed by the danger of unfair prejudice. *Com v. Serge*, 896 A.2d 1170, at 1177 (Pa. 2006).

B. In-cab video evidence of an accident will generally be admissible. In-cab video evidence prior to an accident could be admissible if found to be relevant and probative to the issues being litigated.

C. Under Pennsylvania law, to determine the appropriate penalty for a spoliation of evidence claim, the party raising the spoliation claim must show (1) the degree of fault of defendant in altering or destroying the evidence (2) the degree of prejudice which has been suffered by the spoliation, and (3) the availability of a lesser sanction that will protect the party's rights and deter future similar conduct. *Schroeder v. Commonwealth of Pa.*, 710 A.2d 23, 27 (Pa. 1998) (adopting the Third Circuit's approach in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994) in design defect case).

III. THIRD CIRCUIT

A. A party that reasonably anticipates litigation has an affirmative duty to preserve relevant evidence. *Baliotis v. McNeil*, 870 F.Supp. 1285, 1290 (M.D. Pa. 1994).

1. The duty to preserve evidence arises whenever "the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable and the party in possession of the evidence can foresee the harm or prejudice that would be caused to the party seeking the evidence if the evidence were to be discarded." *Kounelis v. Sherrer*, 529 F.Supp.2d 503, 518 (D.N.J. 2008) (*citing Joe Hand Promotions v. Sports Page Cafe*, 940 F.Supp. 102, 104 n.13 (D.N.J. 1996); *Baliotis*, *supra*).

2. The applicable benchmark concerning the duty to preserve evidence, including video, is whether that duty to preserve was reasonably foreseeable to the party; if evidence was destroyed before the duty to preserve evidence was triggered, there can be no spoliation. *Kounelis v. Sherrer*, *supra.*

3. Spoliation occurs when the evidence was in the party's control, the evidence is relevant to the claims or defenses in the case, there has been actual suppression or withholding of evidence, and, the duty to preserve the evidence was reasonably foreseeable to the party. *Pace v. Wal-Mart Stores East, LP*, 337 F.Supp.3d 513 (E.D.Pa. 2018).

B. The following factors are considered in determining whether spoliation sanctions will be imposed:

1. In addition to proving that spoliation occurred, the party must also prove that the party had an intent to destroy, or fail to produce, relevant evidence.

2. In order to warrant spoliation sanctions, the party seeking spoliation sanctions must also prove a culpable state of mind. *Victor v. Lawler*, 2012 WL 1642603 (M.D. Pa. 2012) (a prisoner lawsuit filed against a prison where a cell extraction video evidence was not preserved).

3. In order to justify spoliation sanctions where video evidence has been destroyed, the plaintiff must show bad faith, fraud, or an intent to suppress the truth. *Jacobs v. City of Pittsburgh*, 143 F.Supp.3d 307 (W.D. Pa. 2015). Where destruction of video evidence occurs as a matter of routine practice with no fraudulent intent, spoliation is unlikely to be found. *Id.* If, however the party

was placed on notice to preserve the video evidence and it was later destroyed, spoliation sanctions could be appropriate. *Jacobs v. City of Pittsburgh*, 143 F.Supp.3d 307 (W.D. Pa. 2015).

4. The Middle District quoted *Victor v. Lawler* as support for the determination of whether an adverse inference instruction will be applied in a video spoliation sanction motion in *American Power, LLC v. Speedco, Inc.*, 2017 WL 4084060 (M.D.Pa. 2017).

5. Although a party's motive for destroying evidence is relevant in determining the appropriate sanction, if any, a finding of "bad faith" or "evil motive" is not necessary. *Baliotis*, 870 F.Supp. at 1291.

C. Cases where no spoliation sanctions were imposed.

1. Although the defendants were found to be at fault for not preserving the requested driver logs, where the destruction of such evidence appeared to be due to carelessness in failing to preserve documents from destruction in the ordinary course of the trucking company's business, and where there was no indication that the failure to preserve driver logs approached the level of intentionality, the court recognized that the plaintiff did not need to show bad faith to prevail in its spoliation claim. *Botey v. Green*, 2016 WL 1337665 (MD Pa. 2016). The *Botey* court determined that, where the defendant lost preservation letters and then allowed documents and information to be purged from the third-party PeopleNet system, the actions amounted to less than actively destroying relevant and pertinent documents, so no spoliation sanctions were warranted. *Id.*

2. The Third Circuit Court of Appeals addressed the appropriate sanction for the spoliation of evidence in a design defect case in *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir.1994). In *Schmid*, the plaintiff's expert altered an alleged defectively-designed product and the district court sanctioned the plaintiff by striking the expert's testimony. On appeal, the Third Circuit recognized that a common penalty for spoliation is a jury instruction allowing an inference that the missing evidence would have been unfavorable to the party that destroyed it. *Id.* at 78. The Third Circuit viewed prohibiting the expert's testimony as an extreme sanction. *Id.* at 79.

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.

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A. Pennsylvania has not enacted a statute or regulation concerning EDR and privacy, nor has Pennsylvania enacted a statute or regulation which places any time frame for retention of telematics data or the scope of telematics data which should be retained. In order to avoid any possible spoliation claim, the general rule is: when in doubt, do not throw it out.

B. In 2016, Pennsylvania House Bill 710 ("HB 710") was proposed, which provided for notice of motor vehicle event data recorders ("EDR") and for information retrieval, imposes penalties and provides for evidentiary rules.

1. The vote on HB 710 failed and was not enacted.
2. HB 710 required new motor vehicles to disclose in the owner's manual whether the vehicle was equipped with an EDR, and, if so, to describe the data which can be recorded and notice that downloaded data from an EDR can be used as evidence in legal proceedings. HB 710 further provided that the downloaded EDR data could not be released or shared except with consent of the vehicle owner, with a court order, used for a research purposes, provided that the owner or driver's identity is not disclosed, or NTSB requests the data as part of an official accident investigation.

C. In 2016, Pennsylvania Senate Bill 728 ("SB 728") also was proposed. With very few exceptions SB 728 was essentially identical to HB710, and also was not enacted.

D. In 2013 Pennsylvania House Bill 879 was proposed and contained language similar to 2016's HB 710 legislation in Pennsylvania. 2013 HB 879 was not enacted.

E. In 2013 Pennsylvania Senate Bill 678 also was proposed and, like its counterpart, contained language similar to Pennsylvania's 2016's SB 278 legislation in Pennsylvania. 2013 SB 678 was not enacted.

F. An explanatory comment which proceeds Pa.R.Civ.P. 4019, concerning production of documents and things and entry for inspection and other activities, was added in 2012 to address electronically stored information ("ESI"). The comment clarifies that, "there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information." *Pa.R.Civ.P. 4019, exploratory comment – 2012.* The

comment further clarifies that the discovery of ESI and treatment of ESI issues are to be governed by a proportionality standard, as with all other discovery. *Id.*

G. Although the issue of retention of telematics data and similar ESI has not specifically been addressed in Pennsylvania, before discarding or destroying potential relevant evidence, the following factors must be considered which would be relevant in a spoliation claim: (1) whether an officer in defendant's organization reasonably should have known there was a potential for litigation; (2) the duty of defendant to preserve all relevant evidence; (3) whether disposal of the evidence was intentional or inadvertent; (4) whether there is a causal connection between the loss of evidence and the inability of plaintiff to recover; and (5) whether plaintiff would suffer actual economic loss from the disposal of the evidence. *Gicking v. Joyce Intern, Inc.*, 1996 WL 942114 (Pa. Com. Pl. 1994).

II. THIRD CIRCUIT

A. In December 2015, the Federal Driver Privacy Act ("FDPA") was enacted. The FDPA places limitations on data retrieval from an event data recorder and provides that information collected belongs to the owner or lessee of the vehicle.

B. The FDPA provides that any data retained by an EDR (as defined in section 563.5 of title 49, Code of Federal Regulations) is the property of the vehicle owner, or, in the case of a leased vehicle, the lessee of the motor vehicle.

C. The Driver Privacy Act of 2015 provides that data contained within the EDR may only be accessed by a person other than the owner/lessee of the vehicle in the following circumstances:

1. When a court having jurisdiction authorizes the retrieval of the data;

2. The owner/lessee provides written, electronic, or recorded audio consent to retrieve the data;

3. The data is retrieved pursuant to an investigation or inspection and the identification of the owner/lessee is not disclosed;

4. The data is retrieved for the purpose of determining the need for, or facilitating, emergency medical response concerning a motor vehicle crash; or

5. The data is retrieved for research purposes and the identification of the owner/lessee is not disclosed.

D. Seventeen states--Arkansas, California, Colorado, Connecticut, Delaware, Maine, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Texas, Utah, Virginia and Washington--have enacted statutes relating to event data recorders and privacy. Among other provisions, these states provide that data collected from a motor vehicle event data recorder may only be downloaded with the consent of the vehicle owner or policyholder, with certain exceptions. Pennsylvania has not enacted a statute or regulation concerning EDR and privacy.

E. United States District Court for the Western District of Pennsylvania Local Rule 26.2 imposes a duty to investigate and provides that, prior to a F.R.Civ.P. 26(f) conference, counsel shall:

1. Investigate the client's Electronically Stored Information ("ESI"), such as email, electronic documents, and metadata, and including computer-based and other digital systems, in order to understand how such ESI is stored; how it has been or can be preserved, accessed, retrieved, and produced; and any other issues to be discussed at the Fed.R.Civ.P. 26(f) conference.

2. Identify a person or persons with knowledge about the client's ESI, with the ability to facilitate, through counsel, preservation and discovery of ESI.

3. Designation of Resource Person. In order to facilitate communication and cooperation between the parties and the Court, each party shall, if deemed necessary by agreement or by the Court, designate a single resource person through whom all issues relating to the preservation and production of ESI should be addressed.

4. Preparation for Meet and Confer. Prior to the Fed.R.Civ.P. 26(f) conference, the parties should refer to both the Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information set forth in "Appendix LCvR 26.2.C-CHECKLIST" to these Rules, and the Guidelines for the Discovery of Electronically Stored Information set forth in "Appendix LCvR 26.2.C-GUIDELINES" to these Rules, including, in primary part:

a. Preservation;

b. Resource person;

c. Informal discovery about locations of date and types of systems in which potentially discoverable information is stored;

d. Proportionality and costs;

e. Search methods, including quality control methods;

f. Phasing of ESI discovery;

g. Production; and

h. E-Discovery Special Masters and/or E-Mediators.

5. Duty to Meet and Confer. At the Fed. R. Civ. P. 26(f) conference, and upon a later request for discovery of ESI, counsel shall meet and confer, and attempt to agree, on the discovery of ESI, including the subject areas identified above.

6. Case Management Conference. Prior to the case management conference, the parties shall complete and file a copy of the form Rule 26(f) Report of the Parties set forth in "Appendix LCvR 16.1.A" to these Rules or the form Rule 26(f) Report (Class Actions) set forth in "Appendix LCvR 23.E" to these Rules, as applicable. At the direction of the Court, the parties may be required to submit a draft of the Stipulated Order re: Discovery of Electronically Stored Information for Standard Litigation set forth in "Appendix LCvR 26.2.E-MODEL ORDER" to these Rules. The parties may also choose to file an order under Rule 502(d) such as the model Order set forth in "Appendix LCvR 16.1.D" to these Rules.

F. United States District Court for the Middle District of Pennsylvania, Local Rule 26.1 imposes a duty to investigate and disclose and provides:

1. Prior to the conference of attorneys required by Local Rule 16.3, counsel for the parties shall inquire into the computerized information-management systems used by their clients so that they are knowledgeable about the operation of those systems, including how information is stored and how it can be retrieved. At the same time, counsel shall inform their clients of the duty to preserve electronically stored information.

2. In making the disclosures required by Fed.R.Civ.P. 26(a)(1), the parties must disclose electronically stored information to the same extent they would be required to disclose information, files or documents stored by any other means.

3. During the conference of attorneys required by Local Rule 16.3(a), in addition to those matters described in that rule, counsel shall discuss and seek to reach agreement on the following:

   a. Electronically stored information in general. Counsel shall attempt to agree on steps the parties will take to segregate and preserve electronically stored information in order to avoid accusations of spoliation.

   b. E-mail information. Counsel shall attempt to agree on the scope of e-mail discovery and e-mail search protocol.

   c. Deleted information. Counsel shall attempt to agree on whether deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.

   d. Back-up and archival data. Counsel shall attempt to agree on whether back-up and archival data exists, the extent to which back-up and archival data is needed, and who will bear the cost of obtaining such data.

   e. Costs. Counsel shall discuss the anticipated scope, cost, and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business, and shall attempt to agree on the allocation of costs.

   f. Format and media. Counsel shall discuss and attempt to agree on the format and media to be used in the production of electronically stored information.

G. United States District Court for the Eastern District of Pennsylvania - The Eastern District judges have each composed his or her own rules regarding ESI, and therefore with the policies and procedures for the judge assigned to the case must be consulted for compliance.

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

The Pennsylvania Supreme Court addressed the admissibility of evidence of intoxication in a civil action in *Coughlin v. Massaquoi*, 170 A.3d 399, 404 (Pa. 2017). Although the *Coughlin* decision addresses toxicology evidence in the context of a pedestrian's toxicology after being struck by a car while crossing a roadway, *Coughlin* provides a recitation of Pennsylvania case law regarding evidence of intoxication in motor vehicle and trucking accidents. In *Coughlin*, the Pennsylvania Supreme Court rejected the Superior Court's holding in *Ackerman v. Delcomico*, 486 A.2d 410 (Pa. Super. 1984), which required "other evidence of an actor's

conduct which suggests intoxication" for evidence of blood alcohol level to be admissible to prove intoxication. Rather than requiring strict adherence to the previous rule requiring independent an corroborating evidence of intoxication for blood alcohol level evidence from being admitted, the *Coughlin* decision, by extension, provides that the admissibility of blood alcohol content evidence is within the discretion of the trial court when determining unfitness to drive and based upon considerations of relevancy, probative value and potential for unfair prejudice as set forth in Pennsylvania Rules of Evidence 401 and 403. *See also Rohe v. Vinson*, 158 A.3d 88 (Pa. Super. 2016) (addressing admissibility of evidence of blood alcohol level, expert toxicologist testimony to determine unfitness to drive); *Knecht v. Balanescu*, 2017 WL 4883198 (M.D. Pa. October 30, 2017); *Pennington v. King*, 2009 WL 415718 (E.D. Pa. February 19, 2009) (discussing admissibility of evidence of marijuana intoxication).

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

Pennsylvania Rule of Civil Procedure 4003.3 provides:

> a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

The Explanatory comments to Rule 4003.3 provide that the amended Rule differs materially from Fed.R.Civ.P. 26(b)(3) because the Federal Rule permits discovery only when the party seeking discovery shows substantial need of the materials in the preparation of his case and is unable, without undue hardship, to obtain a substantial equivalent of the materials by other means. Rule 4003.3's explanatory comments state that under the general provisions of Rule 4003.3, such a showing of substantial need and undue hardship will not be required.

In Pennsylvania, documents created by third-party administrators as part of their routine investigation of a claim, and the administrator's file materials, including recorded statements by fact witnesses interviewed by counsel, may be discoverable if they are recorded by a third-party such as a court reporter or videographer. *See Brown v. Greyhound Lines, Inc.*, 142 A.3d 1 (Pa. Super. 2016).

Pennsylvania state courts often require a privilege log be submitted with discovery responses and document production purporting to be outside the scope of Rule 4003.3 requiring production. Some courts require counsel to certify that counsel fully complied with Rule 4003.3. For example, in *Bowser v. Ryder Truck Rental, Inc.*, (Court of Common Pleas of Allegheny County, Pennsylvania, Case Number G.D. 92-006935), the court construed Rule 4003.3 and

whether information within a report may be deleted pursuant to Rule 4003.3, and held that when portions of a document have been deleted or where documents have been withheld, counsel for the responding party must file an affidavit which avers: (1) that counsel has reviewed the entire report including the deletions, (2) that counsel has read the Opinion in *Bowser*, and (3) that the deletions involve only disclosures of the representative's mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting trial strategy or tactics within the meaning of Rule 4003.3, as construed by *Bowser*.

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

In October 2018, Pennsylvania lawmakers passed a bill, which effectively becomes law in April 2019 that allows for platooning of up to three (3) automated buses, military vehicles, or tractor-trailers on some Pennsylvania highways and interstates. *Act of Oct. 24, 2018, P.L. 729, No. 117 Cl. 75, Session of 2018, No. 2018-117.* This law is able to be limited or restricted by the Pennsylvania Department of Transportation. The vehicles in the platoon will be allowed to follow one another at a much closer distance than is generally allowed by state law, improving aerodynamics and reducing fuel costs.

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.

Commercial drivers in Pennsylvania must not use a hand-held cell phone while operating a motor vehicle. The FMCSA established a law banning commercial drivers from using hand-held cellular phones while operating their commercial vehicles, and Pennsylvania enforces this ban. Under this ban, a commercial driver cannot call or answering their handheld phone, and cannot send or read text messages while driving.

However, drivers may use a phone to make or receive a call so long as hands-free technology is used. Indeed, Section 3316(a) of the Pennsylvania Vehicle Code, 75 Pa.C.S. only bans text messaging while driving and does not prohibit a motorist from engaging in cell phone conversations while driving. *See* Harding, *The Failure of State Texting–While–Driving Laws*, 13 U. Pitt. J. Tech. L. & Pol'y 1, 13 (Spring 2013); Franklin, 117 Penn. St. L.Rev. at 178. Drivers may also use cellphone functions that only require one push button command, such as speed dialing. It is important to be careful because despite using one button commands, conversations on the phone must be had using the hands-free technology. *Rockwell v. Knott,* 12 CV 1114, 2013 WL 10215759, at *8 (Pa. Com. Pl. Aug. 13, 2013).

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

The "golden rule" prohibits a lawyer from asking the jury members to place themselves in the shoes of one of the parties and ask what each of them would have done under the circumstances of the case. Generally, it is considered objectionable because it constitutes an appeal to the jury to abandon their position of impartiality and to exercise their discretion in the

guise of an interested party. *E-Z GO Div. of Textron, Inc. v. Lindsay Golf Grp.*, Ltd, 1814 WDA 2017, 2018 WL 4907687, at *7 (Pa. Super. Ct. Oct. 10, 2018).

However, courts seem reluctant to issue broad, pre-trial prohibitions against reptile theory arguments.

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

Advantages and disadvantages will depend primarily on which county's Court of Common Pleas would be proper venue. More liberal, plaintiff-friendly counties such as Philadelphia County, Allegheny County, and their surrounding counties tend to motive defendants to remove to federal Court, if feasible. However, more counties in Pennsylvania which tend to draw a conservative jury pool and average more defense-favorable verdicts, and which tend to have slower docket disposition, may be an encouraging venue in which to litigate (without consideration of the basis for claims being brought) given the slower litigation/discovery pace compared to the notoriously speedy Federal Court docket pace.

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

Evidence of the violation of Title 75 (the Motor Vehicle Code) is not admissible in a subsequent civil matter. *Cromley v. Gardner*, 385 A.2d 433, 435 (Pa. Super. Ct. 1978). Also, evidence of arrest without conviction is not admissible in a civil case. *Smith v. Leflore*, 293 Pa.Super. 149, 437 A.2d 1250 (1981) (recognizing that the prejudicial impact of such evidence is apparent). *Vetter v. Miller*, 157 A.3d 943, 950 (Pa. Super. Ct. 2017), *appeal denied*, 182 A.3d 987 (Pa. 2018).

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?

Under Pennsylvania law, a plaintiff is entitled to recover for past medical expenses reasonably and necessarily incurred, as well as all future medical expenses reasonably likely to be incurred. *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786, 789 (Pa. 2001), abrogated on other grounds by *Northbrook Life Insurance Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008); *McDonald v. United States*, 555 F. Supp. 935, 962 (M.D. Pa. 1983).

As to past medical expenses, "the law requires a plaintiff to produce evidence which establishes, with a fair degree of probability, a basis for assessing damages." *Phillips v. Gerhart*, 801 A.2d 568, 577 (Pa. Super. 2002). The law does not require exact certainty as to the precise amount of damages incurred. *Id.* Medical expenses "'must be supported by a reasonable basis for calculation; mere guess or speculation is not enough.'" *Durosky v. United States*, 2008 WL 5104850, at *6-7 (M.D. Pa. Dec. 1, 2008) (*quoting McDonald*, 555 F. Supp. at 962).

Further, future medical expenses must be proven by expert testimony both that future medical expenses will be incurred and their reasonable estimated cost. *Mendralla v. Weaver Corp.*, 703 A.2d 480, 485 (Pa. Super. 1997); *Berman v. Philadelphia Board of Education*, 456 A.2d 545, 550-51 (Pa. Super. 1983). Once proof of future medical expenses is offered to a reasonable degree of certainty, the burden shifts to the defendant to produce evidence of a lesser amount. *DeCarlo v. United States*, 2002 WL 31499281,*29-31 (M.D. Pa. Sept. 11, 2002) (defendant offered insufficient evidence that plaintiff would be disqualified from heart transplant). Future medical expenses are not reduced to present value. *Kiser v. Schulte*, 648 A.2d 1, 4 (Pa. 1994); *see* generally *Kaczkowski v. Bolubasz*, 421 A.2d 1027 (Pa. 1980) (general Pennsylvania rule that future damages in personal injury cases are not reduced to present value).

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

For damages are against Commonwealth parties, the damages are capped at $250,000 if they arise from the same cause. Overall, they cannot exceed $1 million. 42 Pa. Cons. Stat. § 8528 Damages against a local government or local agencies are capped at $500,000 in the aggregate. 42 Pa. Cons. Stat. § 8553

There is a general limitation on punitive damages. As a general rule, punitive damages should not be more than ten times the actual damages awarded. The only limitation on the amount of punitive damages that can be awarded in Pennsylvania is that the award cannot be excessive. *BMW v. Gore*, 517 U.S. 559, 134 L.Ed.2d 809 (1996) (discussing the ratio of punitive damages to the actual harm inflicted on the plaintiff and noting that, "in most cases, the ration will be well within a constitutionally acceptable range.... when the ratio is a breathtaking 500 to one, however, the award must surely 'raise a judicial eyebrow.'"); *TXO Prod. Corp. v. Alliance Resources Corp*., 509 U.S. 443, 125 L.Ed.2d 366 (1993) (no federal judicial eyebrow raised at a 10 to one ratio).

Unlike federal law, Pennsylvania does not require proportionality between the amount of the compensatory damages and the amount of punitive damages. In fact, a mathematical proportionality (under Pennsylvania law) would actually defeat the purpose of punitive damages—to punish tortfeasors for outrageous conduct and deter them from similar conduct. *Sprague v. Walter*, 441 Pa. Super. 1, 656 A.2d 890 (1995), *alloc. Denied*, 543 Pa. 695, 670 A.2d 142 (1996), 543 Pa. 730, 673 A.2d 336 (1996). *Martin v. Nat'l Grange Mut. Ins. Co.*, 59 Pa. D. & C.4th 211, 222–23 (Com. Pl. 2000)

Pennsylvania state statute § 1303.505 limits punitive damages against a physician to 200 percent of the victim's compensatory damages unless intentional misconduct is involved. Any punitive damage award is divided between the victim, who receives 75 percent of these damages, and the Medical Care Availability and Reduction of Error Fund ("Mcare"), which receives 25 percent of the award.