VERMONT

Mark F. Werle
RYAN SMITH & CARBINE, LTD.
98 Merchants Row
P.O. Box 310
Rutland, Vermont 05702-0310
Phone: (802) 786-1000
Fax: (802) 786-1100
E-Mail: mfw@rsclaw.com

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

There are fourteen counties in Vermont and no other special venues (besides the Environmental Court), and thus the venues in the State are broken down by county:

Addison:	Moderate
Bennington:	Moderate
Caledonia:	Conservative
Chittenden:	Liberal
Essex:	Conservative
Franklin:	Moderate
Grand Isle:	Moderate
Lamoille:	Conservative
Orange:	Conservative
Orleans:	Conservative
Rutland:	Moderate
Washington:	Moderate
Windham:	Liberal
Windsor:	Moderate

However, it should be noted that even those counties labeled "Liberal" would likely be moderate/conservative on a national scale, with large punitive awards and "runaway juries" being rare in Vermont.

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

Perrault v. Chittenden Cty. Transp. Auth., 2018 VT 58 held that a volunteer driver who was driving a transportation authority rider to an appointment when involved in an automobile accident, is not an employee for purposes of Vermont's Workers Compensation Act, despite receiving reimbursement for mileage and other expenses, where the volunteer manual clearly stated there was no employment relationship.

While there have been recent significant (confidential) trucking settlements in Vermont, there have not been any other trucking or transportation cases taken to verdict in the last several years. (In this tiny jurisdiction, only about a dozen to 20 civil cases of any and all types go to verdict statewide in any given year).

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

Yes, so long as they meet the rigors for expert testimony under V.R.E. 702. *State v. Scott*, 2013 VT 103.

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.

There is no specific case law to spoliation of in-cab videos; however, a court would likely determine whether the party had an obligation to preserve the data at the time it was destroyed. Vermont does not recognize a separate cause of action for spoliation of evidence. *See Nashef v. AADCO Med., Inc*., No. 5:12-cv-243, 2013 WL 2338109 (D. Vt., Apr. 29, 2013); *Naylor v. Rotech Healthcare, Inc*., 679 F. Supp. 2d 505, 511 (D. Vt. 2009).

A court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. Vt. R. Civ. P. 37(f). Note that this applies only to "routine" operation—the result of the basic design of the system to serve its intended purposes. The rule also requires "good faith" operation, precluding the knowing continuation of an operation that results in destruction of information that a party was obligated to preserve. Vt. R. Civ. P. 37, Reporters Notes – 2009 Amendment.

The first element of a spoliation claim is that the party having control over the evidence had an obligation to preserve it at the time it was destroyed. The obligation to preserve evidence "arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Schulman v. Saloon Bev., Inc.*, Civil Action No. 2:13-cv-193, 2014 WL 1516326 (D. Vt. Apr. 18, 2014) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)). Thus, a party has a duty to preserve evidence at any time they believe it could be relevant to future litigation, whether or not there is a demand to preserve the evidence.

The Vermont Supreme Court has used the "traditional approach" of discovery sanctions to punish a spoliator of evidence. See *Naylor v. Rotech Healthcare, Inc.*, 679 F. Supp. 2d 505, 511 (D. Vt. 2009) collecting the following cases: *Lavalette v. Noyes*, 124 Vt. 353 (1964) (considering whether to apply a presumption of falsity, as a sanction for destruction of evidence); *In re Campbell's Will*, 102 Vt. 294, (1929) (applying sanctions for spoliating evidence); *Ellis J. Gomez & Co. v. Hartwell*, 97 Vt. 147 (1923) (noting the rule that willful destruction of evidence gives rise to rise to an inference that the contents would be injurious to the one who destroys it); *Judevine v. Weaks*, 57 Vt. 278 (1884) (noting a deposition is presumed to contain evidence against a party who suppresses it).

There are no specific Vermont statutes, regulations, or case law regarding the admissibility of in-cab videos; in-cab videos would be subject to the same rules of admissibility as any other video evidence and would be subject to the balancing analysis of V.R.E. 403.

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.

Vermont has no specific laws/regulations regarding retaining telematics data. However, telematics data will be subject to the same laws and regulations as other electronic data as detailed under Question 5.

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

Yes, in Vermont the results of a post-accident toxicology result are admissible in a civil action, assuming they meet the scrutiny of the general rule against unduly prejudicial evidence (V.R.E. 403) and regardless of whether the results are above or below the criminal threshold for statutory intoxication (.08%) and for what purpose the toxicology result was taken. *Quensel v. Raleigh*. 128 Vt. 95, 100 (1969) (toxicology of blood taken from deceased driver for purposes of an autopsy admissible in civil action to recover for personal injuries sustained by a passenger).

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

The central question in determining the discoverability of a post-accident investigation turns on whether the investigation was prepared in anticipation of litigation. The Vermont Supreme Court summed up the matter in *Pcolar v. Casella Waste Systems, Inc.*, stating that "[i]t is well settled that reports prepared for counsel in connection with litigation constitute the attorney's work product and are immune from discovery absent compelling circumstances. This protection extends to documents prepared in anticipation of litigation by or for another party's representative, including documents prepared by or for the other party's insurer or agent. However, the work-product privilege is not absolute; it is a qualified privilege subject to override 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 any other means." *Pcolar v. Casella Waste Systems*, Inc., 2012 VT 58 (internal quotes omitted).

V.R.C.P. 23(b) is the rule of procedure most on point, and it specifies that in cases in which a court does order disclosure of work-product materials, "the judge 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 also Hartnett v. Med. Ctr. Hosp. of Vt.,* 146 Vt. 297, 299, 503 A.2d 1134, 1135 (1985) (citing *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

In instances where post-accident investigation was taken on as a regular business activity and not in anticipation of litigation, the investigation is discoverable by adverse counsel to the same degree as other regular business records.

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

Vermont has no laws specifically regulating automated driving systems or platooning. However, because there are no specific laws on these subjects, any vehicle using an automated driving system or engaging in platooning would be subject to all of Vermont's laws and regulations regarding motor vehicles. Specifically, platooning as it is currently understood would likely cause vehicles to violate the rules requiring drivers to keep a safe distance between motor vehicles. Most notably, 23 VSA § 1039(c) states that "[v]ehicles being driven upon any roadway in a caravan or motorcade, other than a funeral procession, shall be so operated as to allow sufficient space between each vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy the space without danger." Platooning would violate this law, though possibly not the public policy behind it, so a change in the statute or case law excepting platooning would be necessary to legalize platoons that bunch more tightly than this statute would allow.

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.

There are none, assuming that the hands-free device is securely mounted and the accessory for securely mounting device is not affixed to the windshield. The use of handheld portable devices is prohibited in Vermont pursuant to Vt. Stat. Ann. tit. 23, §1095(b). The prohibitions **do not** apply: (a) to hands-free use, (b) to activation or deactivation of hands-free use, as long as any accessory for securely mounting the device is not affixed to the windshield; (c) when use is necessary to communicate with law enforcement or emergency service personnel under emergency circumstances, (d) to use of an ignition interlock device, (e) to use of a GPS or navigation system if it is installed by the manufacturer or securely mounted in the vehicle. "Securely mounted" means the device is placed in an accessory or location in the vehicle, other than the operator's hands, where the device will remain stationary under typical driving conditions.

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

Given the relatively recent nature of "Reptile Theory" and Reptile-style arguments, and the relatively few cases tried to verdict each year, Vermont courts have not yet directly addressed these issues. However, much of the Reptile analysis is similar to that of the Golden Rule. "The longstanding rule in Vermont is that counsel should confine argument to the evidence of the case and inferences properly drawn from it, and must avoid appealing to the prejudice of the jury. *State v. Lapham*, 135 Vt. 393, 406-407 (Vt. 1977) (citing *Hall v. Fletcher*, 100 Vt. 210, 213 (1927)). In the criminal context, the Court has stated that "comments of counsel shall not be inflammatory, nor depart from the evidence, nor represent an injection into the case of the

prosecutor's personal belief as to the guilt of the accused." *Id*. The Court in Lapham noted that there is little value in comparing one case to another in this context: prejudice must be apparent. *Id*. The Court is left to ask: "Overall, were the rights of the party injuriously affected?" *Id*.

Based on this analysis, Reptile-style arguments would like be treated in the same manner as the Golden Rule, warranting admonishment of counsel, perhaps, but revering a jury's verdict only when statements by a plaintiff's attorney prejudiced the holding of the case. See *Duchaine v. Ray*, 110 Vt. 313 (1939) (finding plaintiff's charge to the jury to "put yourself in the place of this plaintiff, and assess damages on that theory" to be "highly improper" and "a lamentable departure from the rule which required counsel to confine his argument to the evidence in the case and to the inferences properly to be drawn therefrom," but finding no prejudice as to the jury's verdict for liability or damages). See also, generally, V.R.E. 401, 403 and 404.

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

The advantages of federal court in Vermont are that it has a more streamlined and less cumbersome system for discovery and for noticing depositions; further, federal judges have multiple clerks, while a state court judge in Vermont is fortunate to have one full-time clerk. Accordingly, federal judges are more likely to be fully prepared for complex legal or factual issues. The federal court docket is also often faster than state court; however, since there are only a few federal judges here, a federal judge's docket can get bogged down with even one very large case.

The federal courts incorporate by reference state laws for attachments, provisional remedies, executing a judgment, and the like. However, the federal court has a fully electronic system for marking and introducing exhibits for a jury trial, whereas the state courts do so the old-fashioned paper way, so anyone appearing in federal court must be conversant in the technology necessary to conform to the court standards in this area. Similarly, all federal court filings are electronic. Very few state court counties have electronic filing as of this writing.

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

Generally, citations are not admissible in civil litigation. The exception is a felony citation. A felony citation may be admitted into evidence as a hearsay exception. V.R.E. 803(22). A guilty plea is an admission of guilt and may be used as evidence in a civil matter. A plea of no contest is not admissible evidence.

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?

The trend among Vermont trial courts is to find that if a plaintiff's health insurer has an agreement with a hospital for a discount on payment for services, a plaintiff may still prove up to

the full amount that the hospital would have charged in the absence of such an agreement. *See Buker v. King*, Docket No. 523-11-05 Wrcv (Vt. Super. Ct. Jun. 23, 2008)(Morris, J.)(refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds); *Beaudin v. Kupersmith*, Docket No. So803-07 Cnc (Vt. Super. Ct., Oct. 26, 2010)(Skoglund, J.)(denying Defendant's Motion in Limine to limit the value of medical services to amounts actually paid through plaintiff's medical insurance, as opposed to amounts billed).

A tortfeasor is entitled to offset an award of damages by the amount the tortfeasor's insurer pays on the insured's behalf to the injured party. See Restatement (Second) of Torts § 920A(1) (1977). The rule applies even where the payment was for medical bills for which a finding of liability is not a prerequisite for payment under the policy at issue. *Id.* cmt. a. The rule contemplates, however, that the party seeking the offset provide proof that payment was in fact made. *Scott v. Polak*, No. 2001-272, 2002 WL 34423800, at *1 (Vt. Feb. 2002).

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

There are no statutory caps in dealing with damage awards in Vermont. However, as mentioned in Question 1, "runaway juries" and large punitive awards are rare.