MINNESOTA

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1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

Black Box Technology: Trial courts and the appellate courts in Minnesota have not yet addressed the admissibility of black box/event data recorder data. The Minnesota Legislature considered House Bill 1199 in 2017 and 2018, which related to privacy concerns, standards for the use of data collected by event data recorders, and penalties for misuse of said data, but ultimately the bill failed and was not resurrected in the 2019 legislative session.

Simulations: The standard for admissibility of computer-generated animations and simulations are identical to that for demonstrative exhibits and visual aids under Minnesota law. An animation must be "relevant and accurate and assist . . . the jury in understanding the testimony of a witness" in order to be admissible. *State v. Stewart*, 643 N.W.2d 281, 293 (Minn. 2002). Demonstrative evidence must be an accurate representation of the evidence in the record to which it relates. *State v. DeZeler*, 230 Minn. at 46–47, 41 N.W.2d at 318–19 (Minn. 1950). But "[b]ecause of its dramatic power, proposed animations must be carefully scrutinized for proper foundation, relevancy, accuracy, and the potential for undue prejudice." *Id.* The use of this technology in the courtroom raise concerns "that computer-generated images may cause the jury to confuse art with reality and accept the depictions of [an] expert's testimony as fact." *State v. Thompson*, 788 N.W.2d 485, 495 (Minn. 2010) (admitting computer generated images of bloody shoeprints and emphasizing an analysis of the balance between helpfulness and unfair prejudice.) Additionally, Minnesota law recommends that cautionary instruction be given prior to presenting the animation to a jury. *Stewart* at 293.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

The use of dashboard mounted cameras ("dash cams") is becoming increasingly popular with motorists in the United States and Minnesota is no different. There are no Minnesota court opinions addressing the admissibility of dash cam videos in particular. However, dash-camera footage from police squad cars has been admitted in criminal cases. The traditional evidentiary criteria would need to be satisfied in order for dash cam videos to

be admissible. In most instances the decision whether evidence is relevant, and if so, whether it should be received, rests within the broad but sound discretion of the trial court. *State v. Swain*, 269 N.W.2d 707 (Minn. 1978). Minn. R. Evid. 403 vests the court with discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of causing unfair prejudice, confusing the issues, or misleading the jury, or by considerations of undue delay, waste of time, or the needless presentation of cumulative evidence.

Using a dash cam to record video is legal because Minnesota has adopted a one-party consent law when it comes to audio and video recordings. Minnesota Statue 626A.02, Subd. 2(c) states that it is not unlawful for a person to intercept a wire, electronic, or oral communication, where a person is a party to the communication or one of the parties to the communication has given prior consent. This means that a person may record an incident or accident, even if the other motorist doesn't know they are being recorded, because the person doing the recording is considered a party when they begin recording.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

Spoliation: Minnesota does not have a specific law or regulation regarding the retention of telematics data. However, Minnesota's rules pertaining to discovery of electronically stored information are substantively identical to the federal rules. See, e.g., Minn. R. Civ. P. 16.02(d), 26.02(b)(2). Additionally, Minnesota courts have not addressed the issue of spoliation of telematics data specifically. Our experience is that Minnesota courts treat telematics data the same way as any other evidence and we recommend to our clients that such evidence be preserved after an accident. In general, Minnesota courts have considerable discretion to grant sanctions when, regardless of intent, a party disposes of evidence that it knows, or should know, should be preserved for pending or future litigation. *See Patton v. Newmar*, 538 N.W.2d 116, 118-19 (Minn. 1995).

The propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party. *See Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. Ct. App. 1998). Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice. *Patton,* 538 N.W.2d at 119. Potential sanctions include: (1) adverse inference jury instructions, *see Litchfield Precision Components*, 456 N.W.2d at 436; (2) monetary sanctions, *see Multifeeder Tech., Inc. v. British Confectionery Co.*, No. 09-1090 (JRT/TNL), 2012 U.S. Dist. LEXIS 132619, at *34 (D. Minn., Sep. 18, 2012); *Capellupo v. FMC Corp*., 126 F.R.D. 545, 552 (D. Minn. 1989); (3) a finding of civil contempt, *see Multifeeder Tech., Inc.,* 2012 U.S. Dist. LEXIS 132619, at *34; and (4) exclusion of evidence related to the spoliated evidence, *see Patton,* 538 N.W.2d at 117; *Hoffman*, 587 N.W.2d at 71. Dismissal of a claim or defense may be warranted in extreme circumstances, but is seldom invoked as a spoliation sanction. *See Capellupo,* 126 F.R.D. at 552.

Claims and Insurance Documents: Minnesota Rule of Civil Procedure 26.02 describes the scope and limits of discovery. "Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or impeach a witness and must comport with the factors of proportionality," including "the importance of the discovery in resolving the issues." Minn. R. Civ. P. 26.02 (b). Generally, "parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party." *Id.* "Relevant information sought need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Investigation files or information or insurance company claim files can be considered work product privileged in Minnesota when created in anticipation of litigation. On the other hand, documents prepared "in the ordinary course of business" may not be found to have been prepared in anticipation of litigation. *City Pages v. State of Minnesota,* 655 N.W.2d 839, 846 (Minn. Ct. App. 2003). Whether documents were prepared in anticipation of litigation is a factual determination. *Bieter Co. v. Blomquist*, 156 F.R.D. 173, 180 (D.Minn.1994). The test is 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. *Id*. "In determining whether a document was prepared for litigation, a district court must consider when and by whom the [document] was made and the purpose of the [document]." *In re Child of Simon*, 662 N.W.2d 155, 161 (Minn. Ct. App. 2003).

A party may obtain discovery of documents prepared in anticipation of litigation or for purposes of trial based on a showing of 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. Minn. R. Civ. P. 26.02(c); *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 690 (Minn. Ct. App. 2000).

Unlike some courts that have a bright line rule on whether an insurance adjuster's claim file is discoverable, Minnesota looks at this issue on a case by case basis depending on whether the court reasonably believes litigation is anticipated citing *Carver v. Allstate Ins. Co.* that "not all documents prepared by an insurance company in investigating a claim meet [the] prerequisite[s]" of the work product doctrine. *Kleven v. American Family Mut. Ins. Co.,* 2012 WL 3792833 (Minn. Ct App. 2012) citing *Carver,* 94 F.R.D. 131, 134 (S.D. Ga. 1982).

As the District Court for the Southern District of Georgia aptly observed

> [i]n the early stages of claims investigation, management is primarily concerned not with the contingency of litigation, but with deciding whether to resist the claim, to reimburse the insured and seek subrogation …or to reimburse the insured and forget about the claim shortly thereafter. At some point, however, an insurance company's activity shifts from mere claims evaluation to a strong anticipation of litigation. This is the point where the probability of

> litigation is substantial and imminent. The point is not fixed, it varies depending on the nature of the claim and the type of investigation.

If outside counsel has not yet been retained, it can be challenging to prevent discovery of company investigation files or insurance claim files. As a result, we recommend clients retain counsel immediately after any serious trucking accident and be in communication with the claims adjuster which maximizes the opportunity to claim privilege for both work product and attorney-client privileges.

Social Media: There is enormous growth in the use of e-evidence in both civil and criminal cases, such as: website data; social network communications; postings; email; text messages; computer stored/generated documents; and electronic writings. In Minnesota, e-evidence is subject to the same rules of evidence as paper documents, but the unique character of evidence, as well as the ability to manipulate the data, creates hurdles to admissibility not faced by other forms of evidence. Judges in Minnesota use a four-part analytical process to evaluate e-evidence: 1) Authenticity; 2) Hearsay; 3) Relevance; and 4) Privilege. The four-part analysis focuses on authentication because "authenticity" is at the heart of most e-evidence disputes.

Whenever a new case comes in, we perform a diligent social media search on all parties involved in the litigation, with a focus on recording the data in a way that will allow us to prove its authenticity.

Dealing with Law Enforcement: Having counsel retained early in the process is very important in dealing with law enforcement and controlling the flow of information.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

Even if there is a contract between the employer and the truck driver clearly stating that the truck driver is an independent contractor, that is not the end of the inquiry under Minnesota law. "The label which the contract attaches to the employment relationship is not solely determinative." *Ossenfort v. Associated Milk Producers, Inc*., 254 N.W.2d 672, 677 (Minn. 1977) The courts look primarily to the conduct of the parties operating under the contract. *Barnes v. Northwest Airlines, Inc*.,233 Minn. 410, 47 N.W.2d 180 (Minn. 1951*); Gill v. Northwest Airlines, Inc*., 228 Minn. 164, 36 N.W.2d 785 (Minn. 1949). "It is that conduct to which the law attaches consequences." *Ossenfort* at 677.

The test for distinguishing an independent contractor from an employee derives from *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (Minn.1964): where we said:

> "(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." *Id.*

In determining whether the status is one of employee or independent contractor, the most important factor considered in light of the nature of the work involved is the right of the employer to control the means and manner of performance." *Id.*

In *Corbin v. Commissioner of Revenu*e, Minn., 240 N.W.2d 809, 812 (Minn. 1976), the court described the characteristics of "control:"

> "The determinative right of control is not merely over what is to be done, but primarily over how it is to be done. Basically, it is the distinction between a person who is subject to orders as to how he does his work and one who agrees only to do the work in his own way." *Id.*

It is well-settled under Minnesota law that an employer is liable for harm caused to third parties because of the negligence of its independent contractor. *Conover v. Northern State Power, Co*., 313 N.W.2d 397, 404 (Minn.1981). This vicarious liability does not apply, however, when the injured party is an employee of the independent contractor. *Id*.

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

There is not a specific or different standard for allowing expert testimony in a mild traumatic brain injury cases in Minnesota. Minn. R. Evid. 702 requires that the trial judge make three preliminary determinations before admitting expert testimony: (1) Is the subject matter of the testimony outside the realm of common knowledge so that expert testimony can assist the trier of fact in reaching its decisions? (2) Does the expert, by way of education or experience, possess sufficient expertise or specialized knowledge so that opinions on this subject matter can assist the trier of fact? And (3) Is the foundation for the opinion sound so that the opinion can assist the trier of fact? If the expert opinion involves "novel" scientific evidence then the proponent must also establish that the scientific theory is generally accepted in the appropriate scientific community. *See, generally, Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); Minn. R. Evid. §§ 702.005, 703.04.

Usually appellate courts defer to a trial judge's assessment of the qualifications of an expert witness stating that the trial judge's ruling will not be reversed unless based on an erroneous view of the law or clearly not justified by the evidence. *See Gross v. Victoria Station Farms, Inc*., 578 N.W.2d 757, 760–61 (Minn. 1998) ("A district court's evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the trial court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion. The district court has 'considerable discretion in determining the sufficiency of foundation laid for expert opinion.' Even if evidence has probative value, it is still within the district court's discretion to exclude the testimony. This is a very deferential standard. In fact, we have stated that '[e]ven if this court would have reached a different conclusion as to the sufficiency of the foundation,

the decision of the [district court] judge will not be reversed absent clear abuse of discretion'" (citations omitted)); *See Hagen v. Swenson*, 306 Minn. 527, 236 N.W.2d 161, 162 (1975) ("The qualification of a witness to render expert testimony is a question to be determined by the trial court, whose ruling will not be reversed unless it is based on an erroneous view of the law or clearly not justified by the evidence"); *Hestad v. Pennsylvania Life Ins. Co*., 295 Minn. 306, 204 N.W.2d 433, 436 (1973) ("The admission of an expert's opinion is normally within the discretion of the trial court, and the reviewing court will not reverse unless there is an apparent error"); *Kastner v. Wermerskirschen*, 295 Minn. 391, 205 N.W.2d 336, 338 (1973) ("The sufficiency of the foundation to qualify a witness as an expert and therefore to permit him to express an expert opinion is a determination resting largely in the discretion of the trial judge. This court will reverse only if the exercise of that discretion is clearly wrong").

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

There are no Minnesota court opinions or statutes regarding the admissibility of drug or toxicology tests as it relates to illicit or prescription drug use. However, according to Minnesota Statute § 634.16, the results of an approved breath test are admissible in evidence without foundational expert testimony. The statute provides: "In any civil or criminal hearing or trial, the results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument. . . are admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath." *Id.* It is likely that a toxicology test would be treated similarly in Minnesota courts.

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

With the FMCSA Clearinghouse officially implemented, employers are required to conduct electronic queries in the Clearinghouse, checking CDL driver violation histories (as well as traditional manual inquiries with previous employers in accordance with existing procedures). This will change the landscape of the trucking industry because under the previous regulations, a driver who was terminated from a position due to drugs often could obtain employment with a carrier in a different state. The Clearinghouse, however, will make it easier to identify drivers who received violations. If the FMCSA were to implement hair follicle testing instead of urine, that could eliminate more drivers from the workforce.

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

Minnesota courts require that all cases, except for certain enumerated actions, participate in some form of alternative dispute resolution (ADR) processes. Under Rule 114 of the Minnesota General Rules of Practice, the courts require that attorneys provide clients with ADR information and promptly confer regarding the selection and timing of ADR. Many Minnesota judges will defer dispositive motions or a trial until the parties certify

completion of ADR. Judges also have the authority to impose sanctions for failure to attend a scheduled ADR session. By far, the most common ADR process utilized in Minnesota is mediation.

Minnesota's No-Fault Act provides for mandatory binding arbitration where the claim at the commencement of arbitration is $10,000 or less. See Minn. Stat. § 65B.525.

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes, there is no prohibition on using corporate deposition testimony in support of a motion for summary judgment in Minnesota. Minnesota Rule of Civil Procedure 56.01 and Minnesota Rule of General Practice 115 govern dispositive motion practice in Minnesota.

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

Joint and Several Liability: Minnesota's joint and several liability statute (the Minnesota Comparative Fault Act) applies to cases involving damages for fault resulting in death, in injury to person or property, or economic loss. Minn. Stat. § 604.01(1). Minn. Stat. 604.02 governs joint and several liability and loss reallocation. It provides that persons who are severally liable will have contributions in proportion to their fault. *Id.* However, persons will be held jointly and severally liable for the whole award if (1) the person's fault is greater than fifty-percent, (2) two or more persons act in a common scheme or plan that result in injury, (3) a person who commits an intentional tort, or (4) a person whose liability arises under various environmental statutes. Thus, when two or more defendants cause a single, indivisible injury or harm, each defendant will be responsible for their percentage of damages, unless one of the above exceptions applies.

Contribution: Under the Minnesota Comparative Fault Act, loss reallocation is required where one party is unable to pay for their fair share of a judgment. Minn. Stat. § 604.02(2). Persons who are not parties to the litigation must also be included in the comparisons of fault calculations. *Hosley v. Armstrong Cork Co*., 383 N.W.2d 289, 293 (Minn. 1986). Contribution allows a party who has paid more than their fair share of a judgment to recover against the party whose portion they paid for. *Horton by Horton v. Orbeth, Inc*., 342 N.W.2d 112, 114 (Minn. 1984). In Minnesota, a contribution claim requires both (1) common liability, and (2) one party must have paid more than their fair share. *Id*. at 117. In *Grothe v. Shaffer*, the Minnesota Supreme Court held that a claim for contribution by a joint tortfeasor "does not accrue or mature until the person entitled to the contribution has sustained damage by paying more than his fair share of the joint obligation." 232 N.W.2d 227, 232 (Minn. 1975). The resolution of the underlying tort action is a condition precedent to the transformation of a contingent liability to a fixed one. *Id*. Without a fixed liability, there can be no damage that would trigger

commencement of the statute of limitations on a contribution claim by a joint tortfeasor. *Id*.

11. What are the most dangerous/plaintiff-friendly venues in your State?

The most plaintiff-friendly, in respect to jury awards are Hennepin County, Ramsey County, Dakota County, and St. Louis County. These are some the most populous counties in Minnesota and contain the state's largest cities, Minneapolis/ St. Paul and Duluth.

12. Is there a cap on punitive damages in your State?

Minnesota does not have any damages caps.

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

Evidence of medical expenses billed to the plaintiff are admissible at trial, while evidence of the actual amount of medical expenses paid is not. *See Swanson v. Brewster,* 784 N.W.2d 264, 281-82 (Minn. 2010) (citing Minn. Stat. § 548.251, subd. 5). However, under Minnesota's collateral-source statute, a defendant may move for a post-trial reduction of a plaintiff's award by requesting a determination of collateral sources that have been paid for the plaintiff's benefit, including negotiated discounts. *See* Minn. Stat. § 548.251, subd. 2; *Swanson* 784 N.W.2d at 268.