

## NEVADA

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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.**

Nevada has enacted legislation to protect the privacy interests of vehicle owners in respect to the data collected by black box event recording devices. Nevada Revised Statute Section 484D.485 provides that a “manufacturer of a new motor vehicle which is sold or leased in this State and which is equipped with an event recording device shall disclose that fact in the owner's manual for the vehicle,” including the types of data recorded by the device. Only the registered owner of the vehicle may retrieve or authorize the retrieval of the data from such a device absent a court order. Violation of this statute is a misdemeanor offence. *Id.*

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

If the technological evidence has a tendency to make the existence of a fact more or less probable, and its probative value is not outweighed by the danger of unfair prejudice or confusion of the issues, it could arguably be admissible at trial. The Nevada Supreme Court has held that evidence is unfairly prejudicial if it appeals to the emotional and

sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence. *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). Ultimately, the admissibility of the technological evidence is left to the discretion of the individual trial judge.

**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?**

The Nevada Rules of Civil Procedure, specifically Rule 16.1, require that the parties disclose any materials they intend to use at trial in support of their allegations or denials, including rebuttal and impeachment materials. Failure to disclose materials can result in sanctions. *Hawkins v. Eighth Judicial Court*, 407 P.3d 766, 771 (Nev. 2017). Therefore, any social media investigations which a party plans to use in support of its case must be disclosed during the course of discovery.

Additionally, in Nevada, there is a pre-litigation duty to preserve relevant evidence. *Waters-Maria v. Valley Health Sys., LLC*, No. 69455, 2017 WL 4996827, at 1 (Nev. App. Oct. 31, 2017) (citing *Bass-Davis v. Davis*, 122 Nev. 442, 449-450, 134 P.3d 103, 108 (2006)). This duty is imposed on each party once the party is on "notice" of a potential legal claim. *Id.* This duty applies to any insurance claims documents and incident reports prepared after an accident. Statements made to an insurance adjuster are discoverable. If the statement was elicited or an investigation conducted specifically at the direction of an attorney then work-product or attorney-client privilege may apply. See *Ballard v. Eighth Judicial District Court*, 106 Nev. 83, 84-85. (Nev. 1990). All such documents should be preserved to prevent spoliation.

If the evidence was willfully suppressed, it may be presumed to be adverse to the party that suppressed the evidence. Nev. Rev. Stat. § 47.250(3). The burden then shifts to the party who destroyed the evidence to show, by a preponderance of the evidence, that the evidence destroyed was not unfavorable. *Bass-Davis*, 122 Nev. at 448. Where the evidence is negligently lost or destroyed, the opposing party can only seek an inference that the evidence would have been adverse to the party who negligently lost or destroyed the evidence. *Id.* at 445.

**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?**

In Nevada, one can be liable for the tortious acts of another through the doctrine of *respondeat superior* when "(1) the actor at issue was an employee, and (2) the action complained of occurred within the scope of the actor's employment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223 (1996); *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 657-58 (1978). A trucking company is, therefore, responsible for the conduct of its drivers.

A driver who works as an independent contractor must meet the standards for an independent contractor. Namely, (1) the person reports earning as self-employment income on his or her tax return, (2) the person is required by contract to hold any necessary business licenses, occupational licenses, and insurance to operate in the state, and (3) the person fulfills three of five of the following factors: the person maintains control and discretion over the means and manner of his or her work performance, the person maintains control over the time the work is performed, the person is not required to work exclusively for one principle, and/or the person contributes a substantial amount of investment capital into his or her own business. Nev. Rev. Stat. § 608.0155. If these requirements are met, the individual is conclusively presumed an independent contractor. *Id.* If the requirements are not fully met, the court will evaluate the facts and circumstances to determine if the individual is an employee or independent contractor.

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

Nevada does not have a separate evidentiary standard for expert testimony regarding mild traumatic brain injuries. Therefore the general Nevada standard for expert witness testimony will apply. “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.” Nev. Rev. Stat. § 50.275. If the expert’s testimony meets this standard, he or she will likely be permitted to testify.

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

Evidence of intoxication should not be admitted if there is no evidence of a causal link between the alleged impairment and the injury. *Holderer v. Aetna Cas. and Sur. Co.*, 114 Nev. 845, 852–53, 963 P.2d 459, 464 (1998). Stated differently, if the individual’s Blood Alcohol Content (BAC) is *below* the legal limit of 0.08 percent (NRS § 484C.110), or 0.04 percent for commercial drivers (NRS § 484C.120), then corroborating evidence of intoxication is required before the evidence is admitted as substantive evidence. *Las Vegas Metro. Police Dept. v. Yeghiazarian*, 129 Nev. 760, 765, 312 P.3d 503, 507 (2013).

The Nevada Supreme Court has held that a BAC alone is substantially more prejudicial than probative without other evidence suggesting intoxication “or an expert who can explain to a jury how his BAC, ascertained hours after the accident, would have affected him at the time of the accident.” *Id.* If the driver’s BAC is *above* the legal limit, information regarding the driver’s intoxication is deemed relevant and admissible. *Id.* at 766, 312 P.3d at 507. A driver’s BAC may be used for impeachment purposes without a causal link. *Id.* at 765, 312 P.3d at 507.

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

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

Under the doctrine of *respondeat superior*, the party to whom the employee is subordinate is responsible for the actions of the employee, including ensuring compliance with all federal, state and local laws. Independent contractors must also ensure their own compliance with such laws. However, exercising the level of control over an independent contractor "necessary to comply with any statutory, regulatory or contractual obligations" is not considered when determining a person's status as an independent contractor or employee. Nev. Rev. Stat. § 608.0155. Trucking companies may contractually require compliance with federally-mandated testing or implement other regulations to ensure that all drivers, whether employees or independent contractors, are complying with federally-mandated testing without affecting the employment status of the driver.

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

Nevada employs a mandatory, court annexed, non-binding arbitration program for certain civil cases in which the alleged damages do not exceed \$50,000 per plaintiff, exclusive of interest and costs, and regardless of comparative liability. NV ADR ARB Rule 3. The Nevada Arbitration rules specifically exempt some matters from the program, such as class actions and domestic relations actions or when the plaintiff is seeking non-monetary damages. *Id.*

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

A party may conduct the deposition of a corporate representative under Rule 30(b)(6) of the Nevada Rules of Civil Procedure. The deposition notice "must describe with reasonable particularity the matters for examination." Nev. R. Civ. P. 30(b)(6). The corporation must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. *Id.* "A subpoena must advise a nonparty organization of its duty to make this designation." *Id.*

Depositions may be used to support an assertion that a fact cannot be or is genuinely disputed. Nev. R. Civ. P. 56(c)(1). Nevada courts have not placed restrictions on the type of deposition testimony that may be used to support a motion for summary judgment or other dispositive motion.

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

In Nevada, “where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.” Nev. Rev. Stat. § 17.225. A party who has paid more than his or her share of the common liability may seek contribution from the other jointly liable party or parties. *Id.* This right does not apply to a party who has entered into a settlement with the claimant. *Id.*

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

Las Vegas, Clark County, Nevada, is home to the Eighth Judicial District Court and the Southern Division of the United States District Court for the District of Nevada. The United States Census Bureau estimated that in 2018, Clark County had 2,231,647 residents. Juries in Clark County are generally believed to be more liberal than juries in Nevada’s more rural counties. This may be, in part, a result of Las Vegas’ more transient population. While juries may be more liberal in their awards, defense verdicts are not uncommon.

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

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

In Nevada, punitive damages may not exceed three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is \$100,000 or more, or \$300,000 if the amount of compensatory damages awarded to the plaintiff is less than \$100,000. Nev. Rev. Stat. § 42.005. These limitations do not apply to an action brought against a manufacturer, distributor, or seller of a defective product or an insurer who acts in bad faith regarding its obligations to provide insurance coverage. *Id.* A jury may not be instructed as to these limitations. *Id.*

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

In general, only evidence regarding the amount charged by medical providers is admissible. Nevada adheres to a *per se* collateral source rule that bars “the admission of a

collateral source of payment for an injury into evidence for any purpose.” *Proctor v. Castelletti*, 112 Nev. 88, 90 (1996). Consequently, evidence of the amount actually paid by a third party to a medical provider is generally inadmissible. Under an exception to Nevada’s *per se* collateral source rule, worker’s compensation payments are admissible. *Tri-Cty. Equip. & Leasing v. Klinke*, 128 Nev. Adv. Op. 33, 286 P.3d 593, 595 (2012). In this situation, evidence of the amount actually paid to a medical provider is admissible. *Id.*