NEW MEXICO

S. Carolyn Ramos, Esq.
Raúl P. Sedillo, Esq.
Stephanie J. Schneider, Esq.
BUTT THORNTON & BAEHR PC
P.O. Box 3170
Albuquerque, NM 87190
Phone: (505) 884-07777
Fax: (505) 889-8870
E-Mail: scramos@btblaw.com
E-Mail: rpsedillo@btblaw.com
E-Mail: sjschneider@btblaw.com
www.btblaw.com

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

There have been no significant recent decisions or trends in New Mexico regarding black box technology and simulations. The legal issues surrounding the admissibility of technology evidence is described in 2. and the preservation of technology evidence is described in 3.

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.

Generally, any source of technological evidence can be used in evaluating accidents in New Mexico. Its use at trial must meet the requirements of admissibility. New Mexico has divided "computer-generated evidence" into two categories: computer animations and computer simulations. Animations are computer-generated exhibits used as visual aids to illustrate an opinion that has been developed without using the computer. Simulations are computer-generated exhibits created when information is fed into a computer that is programmed to analyze the data and draw a conclusion from it. *State v. Tollardo*, 2003-NMCA-122, ¶ 12, 134 N.M. 430, 434, 77 P.3d 1023, 1027. The former does not require a showing that the exhibit was produced by a scientifically or technologically valid method. *Id.* Instead, the issue when addressing visual aids is whether the visual aid fairly and accurately represents the evidence or some version of the evidence. *Id.* The reasoning for this evaluation of visual-aids is: "When the computer-generated evidence is used to illustrate an opinion that an expert has arrived at without using the computer, the fact that the visual aid was generated by a computer probably does not matter because the witness can be questioned and cross-examined concerning the perceptions or opinions to which the witness testifies. In such a situation, the computer is no more or less than a drafting device." *Id.*

Alternatively, if an expert's opinion is based in part on the computer-generated evidence, the proponent of that evidence must be prepared to show that the computer-generated

evidence was generated in a way that is scientifically valid. *Id.* This could include the validity standard set forth in *State v. Alberico*, which is defined as "the measure of determining whether the testimony is grounded in or a function of established scientific methods or principles, that is, scientific knowledge." *Id.* at ¶ 50.

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?

A party has a duty to preserve information or evidence when it reasonably anticipates litigation. According to the New Mexico Supreme Court: "We do not require the filing of a complaint or even express notice that a complaint is to be filed in order to trigger liability for intentional spoliation of evidence…the relevant inquiry is knowledge on the part of the defendant of a probability of a lawsuit in the future." *Torres v. El Paso Elec. Co.*, 1999-NMSC-029, 127 N.M. 729, 746, 987 P.2d 386, 403 *overruled on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *see also Coleman v. Eddy Potash, Inc.,* 120 N.M. 645, 905 P.2d 185 (1995) (holding that tort of intentional spoliation of evidence requires, among other things, proof of the existence of a potential lawsuit and defendant's knowledge of that potential lawsuit).

New Mexico does not recognize a separate cause of action for negligent spoliation because adequate remedies exist in traditional negligence to redress the negligent destruction of potential evidence. *Coleman*, 1995 NMSC 063, ¶16. In order to recover based on the negligent destruction of property, a party would have to show a duty, breach, proximate causation, and damages. *Id.* at ¶17. The Court held that absent special circumstances, such as a contract or voluntary assumption of duty, a property owner did not have a duty to preserve or safeguard his or her property for the benefits of individuals in a potential lawsuit. *Id.* at ¶19.

The courts may use their inherent powers to impose sanctions for spoliation. Prior to imposing sanctions, a court should consider: (1) the degree of fault of the party who altered or destroyed evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Rest. Mgmt. Co. v. Kidde Fenwal, Inc.*, 1999 NMCA 101, ¶13. A finding of "bad faith" or "evil motive" is not a prerequisite for imposing sanctions for destruction of evidence. *Id.* at ¶20.

If evidence has been spoliated (lost, destroyed, or altered) the court may give an adverse instruction to the jury:

[Plaintiff or defendant] says that evidence within the control of [other party] was lost, destroyed or altered. If you find that this happened, without a reasonable explanation, you may, but are not required to, conclude that the lost, destroyed or altered evidence would be unfavorable to [other party].

Rule 13-1651 NMRA.

The court may also provide different remedies for the spoliation other than an adverse instruction including, exclusion of the spoliator's evidence, dismissal of the spoliator's case, barring claims or defenses, or designating facts as established. *Rest. Mgmt. Co.*, 1999 NMCA 101, ¶20, 127 N.M. 708, 713, 986 P.2d 504, 509.

The duty to preserve evidence applies equally to electronically stored information. *See* Rule 1-026 NMRA (committee commentary). Indeed, the committee commentary notes that the New Mexico version of the Rule intentionally excludes the federal rule's provision that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules 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." *Id.* According to the commentary, "[t]he committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules." *Id.*

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?

I. Independent Contractor

Generally, an employer of an independent contractor is not responsible for the negligence of the contractor or his employees. *Scott v. Murphy Corp.*, 79 N.M. 697, 448 P.2d 803 (1968). The principal test for determining whether an independent contractor versus a master-servant relationship exists is whether the employer has the right to control the manner in which the details of the work are to be accomplished, not the exercise of any control at all. *Scott*, 1968-NMSC-185, ¶ 10. However, the general rule removing responsibility from an employer has no application where the employer has nondelegable duties (1) arising out of some relation toward the public or the particular plaintiff (e.g., duty of lessor to lessee), or (2) because of work that is specially, peculiarly, or inherently dangerous. *Saiz v. Belen Sch. Dist.*, 1992-NMSC-018, ¶ 10, 113 N.M. 387, 393–94, 827 P.2d 102, 108–09. Consequently, when defending an action involving truck drivers who may be considered Independent Contractors, a consideration must be paid to the amount of control an employer exercises over the work, and whether any of the nondelegable duty exceptions apply.

II. Borrowed Servant/Loaned Employee

As a general rule, an employer is not liable under *respondeat superior* for an injury negligently caused by a servant if the servant is not acting at the time as the servant of that employer, and the evidence shows that the employee has been loaned to the service of another who controls the manner and details of the employee's work. *Los Ranchitos v. Tierra Grande, Inc.*, 1993-NMCA-107, ¶ 10, 116 N.M. 222, 226, 861 P.2d 263, 267.

Therefore, similar to actions involving Independent Contractor's, actions involving Borrowed Servant's require consideration of the party who controls the manner and details of the employee's work.

III. Additional Insureds

Defending a truck driver who may be considered Additional Insureds requires consideration of the insurance contract. "The parties to an insurance contract may validly agree to extend or limit insurance liability risks as they see fit." *Safeco Ins. Co. of Am., Inc. v. McKenna*, 1977-NMSC-053, ¶ 13, 90 N.M. 516, 518–20, 565 P.2d 1033, 1035–37 (citing *Pendergraft v. Commercial Standard Fire & Marine Co.*, 342 F.2d 427 (10th Cir. 1965)). This can include provisions in a policy excluding coverage for intentional injuries, which are designed to prevent indemnifying one against loss from his own wrongful acts. *Id.* Therefore, when a truck driver is an "Additional Insured," consideration must be made to contract use of the definite expression "the Insured" versus indefinite expressions of "any insured" or "an insured" to determine whether the truck driver comes within the terms of the policy. *Safeco Ins. Co. of Am., Inc.*, 1977-NMSC-053, ¶ 14. If an ambiguity is found in the language of an insurance contract, then it is construed in favor of the insured. *Id.* ¶ 20.

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?

I. Legal Standard

An expert providing testimony on mild traumatic brain injury would have to fulfill the requirements for the admission of expert testimony. The "[a]dmission or exclusion of expert testimony in New Mexico is governed by Rule 11– 702 NMRA…" *Parkhill v. Alderman-Cave Milling and Grain Co. of N.M.*, 2010-NMCA-110, ¶ 10, 149 N.M. 140, 245 P.3d 585, cert. granted, 2010-NMCERT-12, 150 N.M. 493, 263 P.3d 270. The rule provides as follows:

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 knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Rule 11-702 NMRA. The admissibility of expert testimony under Rule 11-702 is a preliminary question of law under Rule 11-104(a). The burden is on the party offering expert witness evidence to demonstrate that the expert testimony is admissible under Rule 11-702. *Downey*, 2008-NMSA-061, ¶ 25.

It is an essential requirement for admissibility that expert testimony be testimony that will assist the trier of fact. *State v. Alberico,* 116 N.M. 156, 166, 861 P.2d 192 (1993); *State v. Anderson*, 118 N.M. 284, 291, 881 P.2d 29 (1994); *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 591, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993). Under this requirement, the evidence must relate to a matter actually at issue in the case. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. at 591. The testimony must be relevant and supported by actual evidence. *Archibeque v. Homrich*, 88 N.M. 527, 530-31, 543 P.2d 820 (1975).

Expert testimony may be received only if the expert possesses such facts as would enable him to express a reasonably accurate conclusion as distinguished from mere conjecture. *Leon Ltd. v. Carver*, 104 N.M. 29, 35, 715 P.2d 1080 (1986). An expert witness' s testimony must be based on facts and data**,** *not on speculation or conjecture.* (emphasis added). *Archibeque v. Homrich*, 88 N.M. at 531. Expert testimony that rests on speculation is, by definition, not helpful to the finder of fact. *Romero v. State*, 112 N.M. 291, 301, 814 P.2d 1019 (Ct. App.), *affirmed in part and reversed in part on other grounds*, 112 N.M. 332, 815 P.2d 628 (1991). To be admissible, expert scientific or technical testimony must be grounded in the methods and procedures of science or technology and must be based on an existing body of empirical data. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. at 591; *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1174-75, 143 L.Ed.2d 238 (1999).

Expert opinion evidence must establish that the witness is qualified to render the opinions and must adequately demonstrate the basis for the opinions. *Catalano v. Lewis*, 90 N.M. 215, 217, 561 P.2d 488 (Ct. App. 1977); *Lay v. Vip's Big Boy Restaurant, Inc.,* 89 N.M. 155, 157-58, 548 P.2d 117 (Ct. App. 1976).

The New Mexico Supreme Court has discerned from Rule 11-702 three prerequisites for the admission of expert testimony: (1) the witness must be qualified as an expert; (2) the specialized testimony must assist the trier of fact; and (3) the expert witness testimony must be limited to scientific, technical, or other specialized knowledge in which the witness is qualified. *State v. Alberico*, 116 N.M. 156, 166-67, 861 P.2d 192, 202 (1993); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993). "Pursuant to Rule 11-702, the district court is required to act as a 'gatekeeper' to ensure that an expert' s testimony rests on both a reliable foundation and is relevant to the task at hand so that speculative and unfounded opinions do not reach the jury." *Parkhill*, 2010-NMCA-110, ¶ 12. "Expert testimony may be received if, and only if, the expert possesses such facts as would enable him to express a reasonably accurate conclusion as distinguished from mere conjecture." *State v. Downey*, 2008– NMSC– 061, ¶ 32, 145 N.M. 232, 195 P.3d 1244. Special additional rules apply where the admissibility of scientific testimony is at issue.

In *State v. Torres*, 1999-NMSC-010, ¶ 25, 127 N.M. 20, 976 P.2d 20, the Supreme Court reasserted that courts should apply the factors identified by the United States Supreme Court in *Daubert* when addressing the admissibility of scientific testimony. The New Mexico Supreme Court instructed that in considering the reliability of any particular type of scientific knowledge, the trial court should consider the following factors:

(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique' s operation; (4) whether the theory or technique has been generally accepted in the particular scientific field.

Id. (alteration omitted) (internal quotation marks and citation omitted). A fifth factor may also be considered: "whether the scientific technique . . . is capable of supporting opinions based upon reasonable probability rather than conjecture." *State v. Anderson*, 118 N.M. 284, 291, 881 P.2d 29, 36 (1994) (internal quotation marks and citation omitted).

Applying these principles, the New Mexico Court of Appeals recently considered the circumstances under which treating physicians may offer testimony regarding matters of causation or etiology, i.e. the external causes of a patient' s condition or illness. *Parkhill*, 2010-NMCA-110, ¶ 1. The court instructed that "a treating physician is not automatically qualified to testify as to the external agent that caused" the plaintiff' s condition or illness. *Id.* ¶ 23. The court recognized that, in many cases, the determination of the external cause of a patient' s condition "is a complex process that is unrelated to diagnosis and treatment, and which requires specialized scientific knowledge regarding the external agents involved." *Id.* "In such situations," the court explained, "a treating physician' s expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians who are hired only for the purposes of litigation." *Id.* In other words, the treating physicians' testimony "must be found to be reliable under the *Daubert–Alberico* evidentiary standard." *Id.* ¶ 24.

II. Experience striking mTBI experts and/or claims.

Striking minor traumatic brain trauma experts or claims in New Mexico is very difficult. Assuming the espousing expert's qualifications and opinions come relatively close to meeting the standards of admissibility discussed above, courts in New Mexico will allow the testimony and leave it to the jury to weigh the reliability of the opinions.

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

Yes, provided that such toxicology results must meet the *Alberico* validity evidentiary standard. *State v. Alberico,* 1993- NMSC-047, ¶ 50 9 ("the measure of determining whether the testimony is grounded in or a function of established scientific methods or principles, that is, scientific knowledge.").

Furthermore, in cases in involving an arrest of a driver, the results of a test performed pursuant to the Implied Consent Act, may be introduced into evidence in any civil action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drugs. *See* NMSA 1978, § 66-8-110.

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

It is our position that drivers must comply with federally-mandated testing regardless of their status as Independent Contractors, Borrowed Servants and/or Additional Insureds. Individuals/entities contracting with Independent Contractors or Borrowed Servants may consider the means and methods of enforcing federally-mandated compliance as it may effect the employer-worker status under state guidelines.

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

Not statewide. Some jurisdictions mandate ADR for certain cases. *See, e.g.,* Rule LR2-603 NMRA (2007) (Non-binding court-annexed arbitration for all civil cases where only money is at issue and where the amount in dispute is less than $25,000.00 exclusive of punitive damages, interest, costs and attorney fees).

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

Yes. New Mexico provides for corporate deposition testimony under NMRA 1-030(6). Under NMRA 1-056(C) regarding summary judgment, summary judgment may be rendered if the pleadings, *depositions*, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact so that the moving party is entitled to a judgment as a matter of law. Rule 1-056(C) does not distinguish between 1-030(6) depositions and other deposition forms.

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

New Mexico adopted pure comparative fault in 1981 which abolished joint and several liability between concurrent tortfeasors. The New Mexico Legislature has, however, reinstated joint and several liability with rights of contribution or indemnification in certain circumstances. These circumstances include: (1) intentional tortfeasors; (2) parties who are vicariously liable for the conduct of another, such as a trucking company for its employee driver; (3) parties in the chain of distribution of a defective product; (4) where such an outcome serves public policy, such as parties engaged in inherently dangerous activities; and (5) successive tortfeasors. NMSA 1978, § 41-3A-1 (1987); *Saiz v. Belen School Dist.,* 1992-NMSC-018, 113 N.M. 387, 827 P.2d 102; *Lujan v. HealthSouth Rehabilitation Corp*, 1995-NMSC-057, 120 N.M. 422, 902 P.2d 1025.

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

The Fourth Judicial District (San Miguel County) and First Judicial District Courts (Santa

Fe County and Rio Arriba County) of New Mexico are considered New Mexico' s most dangerous and liberal venues. Moreover, New Mexico' s liberal venue statute allows a wrongful death estate personal representative in a wrongful death action to file where the personal representative resides. Accordingly, a wrongful death action arising from an incident in any county of New Mexico could potentially be filed in either of these two liberal venues.

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

New Mexico has no statutory limits on recovery of punitive damages.

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

A plaintiff can seek to recover the amount charged. In New Mexico, a plaintiff may recover "the reasonable expense of necessary medical care, treatment and services received." *See* UJI 13-1804, NMRA. Citing the collateral source rule, New Mexico courts have determined that the appropriate measure of medical expenses is the amount billed by medical service providers, not the discounted amounts accepted as payment from the health insurer. *Selgado v. Commercial Warehouse Co.*, 1974-NMCA-093, ¶ 14, 526 P.2d 430 (stating that New Mexico's collateral source rule is that "[c]ompensation received from a collateral source does not operate to reduce damages recoverable from a wrongdoer"). *Prager v. Campbell County Mem. Hosp.*, 731 F.3d 1046, 1058-59 (10th Cir. 2013)(The collateral source rule provides that payments made to or benefits conferred on an injured party from a collateral source are not credited against the tortfeasor's liability). This application, which allows a plaintiff to recover more than the damages suffered from the injury, is based on the policy that a wrongdoer should not enjoy reduced liability because the plaintiff received compensation from an independent source. *Prager*, 731 F.3d at 1059. Indeed, the "collateral source rule is an exception to the rule against double recovery." *Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, ¶ 48, 301 P.3d 387. This exception has been justified in several ways: First, it gives a plaintiff the means to reimburse the collateral source. *Id.* ¶ 49. Second, New Mexico courts reason that even if such reimbursement does not occur the purpose of the rule and interests of society are likely better served if the injured person – not the wrongdoer – is benefited. *Id.* ¶ 50.

In other words, the collateral source's contribution could benefit either the plaintiff by allowing the plaintiff to recover twice, or the defendant by reducing the damages the defendant must pay, and as a matter of policy the court would prefer the former to occur. Finally, New Mexico's Supreme Court has reasoned that "double recovery" is more egregious in theory than in practice, as in reality plaintiffs rarely receive their full damages since they must pay attorney fees out of the damages. *Sunnyland Farms*, 2013-NMSC-017, ¶ 50.

Similarly, the Tenth Circuit has held that hospital defendants, tortfeasors in a medical malpractice case, could not receive the benefit stemming from discounts or write-offs of

reduced medical bills that came as a direct result of negotiations between the plaintiff's medical providers and Workers' Compensation. *See Prager*, 731 F.3d at 1058-59. The *Prager* court reasoned that to limit the plaintiff's damages to the amount paid by Workers' Compensation "would confer an unintended and inappropriate benefit on the Hospital Defendants," because the write-offs reflect the negotiating power of the plaintiff's insurer, an independent source, in requiring providers to take discounted reimbursement. *Id.*

Consequently, a plaintiff can seek to recover the amount charged rather than the amount paid because while the collateral source rule does not restrict evidence concerning the reasonableness of expenses for medical services generally, it does restrict the admission of evidence of the amount of write-downs Plaintiff, as the injured party, received as a benefit from a source separate from the tortfeasor.