

NEW HAMPSHIRE

- 1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?**

Generally, there is no specific self-critical analysis privilege in New Hampshire. Certain healthcare entities do have a quality assurance privilege which is similar to a self-critical analysis privilege. See RSA 151:13-a. An argument may be made by analogy that the self-critical analysis should be protected to promote policy interests of accident/injury prevention under the same considerations which underlay the confidentiality of quality assurance review.

- 2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?**

There are no specific rules on obtaining discovery of third-party funding sources in New Hampshire. However, to the extent relevant, such discovery could theoretically be obtained by deposition and notice procedure if relevant to any issue in the underlying litigation.

- 3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?**

As a practical matter, since New Hampshire is geographically a relatively small state, issues of “who travels” are generally handled by agreement. In most cases, the attorney will travel to the witness location. A court could allow a protective order if witness travel would be too expensive, inconvenient, or impractical, but courts are receptive to payment of witness travel expenses. This has become much less of an issue with the advent of widespread Zoom deposition practice.

- 4. What are the benefits or detriments in your State by admitting a driver was in the “course and scope” of employment for direct negligence claims?**

“Under the doctrine of *respondeat superior*, an employer may be held vicariously responsible for the tortious acts of an employee committed incidental to or during the scope of employment.” *Trahan-Laroche v. Lockheed Sanders, Inc.*, 139 N.H. 483, 485 (1995). Additionally, an employer may be liable for damages resulting from negligent supervision of its employees. *Id.* Accordingly, the primary detriment in admitting a driver was in the scope of employment is the resulting admission of vicarious liability. Another detriment may be the advantage gained by the plaintiff in avoiding the need to prove that a driver was acting in the scope of employment.

There may, however, be some benefit to making this admission. First, it could save the time and expense necessary to litigate this issue. Second, it may

present the employer in a more favorable and credible image to the factfinder as an open, honest, and cooperative party. Finally, it may help to settle any potential dispute concerning insurance coverage for a driver acting in the scope of employment.

5. Please describe any noteworthy nuclear verdicts in your State?

There have been no such recent noteworthy verdicts in this State.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

Although the New Hampshire Supreme Court has not provided definitive guidance on this issue, the better practice is to obtain discovery of amounts actually paid versus amounts billed. In addition, the better practice is to raise as an affirmative defense that allowable damages for medical expenses are limited to the amount actually paid. There is a split on this issue currently existing among the trial courts of New Hampshire. Some trial judges allow only the amount of the medical bill actually paid, while some find the so-called “negotiated rate” between the insurance carrier and the provider to be inadmissible pursuant to the collateral source rule.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

Although the New Hampshire Supreme Court has not provided definitive guidance on this issue, parties are unlikely to have much success in obtaining the amounts actually charged and accepted by a healthcare provider for certain procedures, outside of a particular personal injury. Seeking such documents as insurance contracts with healthcare providers often attracts the objection of those third parties and, particularly with respect to trial judges who do not allow evidence of the amount of medical bills actually paid, courts may find such discovery not relevant to a given action.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

Beyond the ordinary considerations involved in a jurisdictional analysis, New Hampshire does not impose any specific rules or legal considerations when an employee is injured in this State. With respect to worker’s compensation claims, New Hampshire will assert jurisdiction under certain circumstances, including if an employee is injured out of state. *See, e.g.,* RSA 281-A:12; RSA 281-A:5-c.

9. What is your State’s current position and standard in regards to taking pre-suit depositions?

Depositions in New Hampshire are typically taken by agreement and sometimes parties will not encounter obstacles in taking pre-suit depositions. To the extent a person or entity is unwilling to be voluntarily deposed, New Hampshire courts allow for pre-suit discovery motions. The New Hampshire Supreme Court has continued to hold that a party may bring a petition for discovery in aid of an action that has not yet been brought. *Robbins v. Kalwall Corp.*, 120 N.H. 451, 452–53 (1980).

The Superior Court has specific authority to afford discovery under RSA 498:1 and the courts have had such equity powers with respect to discovery since 1842. RSA 171:6 (1842) (stating, in pertinent part, that the court “shall have power to hear and determine, as a court of equity . . . in suits for discovery in cases where a discovery may be lawfully required”); *see Reynolds v. Burgess Sulfite Fiber Co.*, 71 N.H. 332, 333 (1902).

Such an action typically may not be maintained where a party has a remedy at law, but they are generally allowed where a party does not know the form of the action to be taken or the identity of parties to be named. Indeed, the court has noted how discovery is more necessary where it is sought from nonparties. “A

nonparty often has no interest in participating in the plaintiff's suit against another litigant, and, absent equitable discovery, a plaintiff may have had no means at law to obtain necessary information." *Gutbier v. Hannaford Bros. Co.*, 150 N.H. 540, 544 (2004).

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

There do not appear to be any particular legal considerations regarding how long a vehicle or tractor-trailer must be held prior to release. If a vehicle is properly taken, the lawful owner or other person lawfully entitled to possession of the vehicle can secure release by paying an amount equal to the towing and storage charges related to the taking of that vehicle. RSA 262:33, II. The owner or other person may seek reimbursement for such charges, after a hearing, if sufficient grounds did not exist for the taking of the vehicle. RSA 262:33, III.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

Unless allowed by statute, punitive damages, in general, are not recoverable. Under certain circumstances, the courts will allow "enhanced compensatory damages." When an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced compensatory damages, which are sometimes called liberal compensatory damages. *Stewart v. Bader*, 154 N.H. 75, 87 (2006). Enhanced compensatory damages may be awarded only in exceptional cases. *Id.* "The mere fact that an intentional tort is involved is not sufficient; there must be ill will, hatred, hostility, or evil motive on behalf of the defendant." *Id.* (quotations omitted). Some enhanced damages are awarded pursuant to New Hampshire statute. See, e.g., RSA 358-A:10 (New Hampshire Consumer Protection Act, allowing for double or triple damages).

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

Zoom trials have not been mandated by New Hampshire Courts. Absent independent circumstances warranting a continuance, some trial courts have mandated that certain criminal trials proceed in-person. Some "virtual" proceedings are conducted in the court's discretion and, in some cases, virtual appearance is mandatory. New Hampshire courts use the program Webex.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

Generally, New Hampshire does not permit punitive damages. Cases in which "enhanced compensatory damages" are awarded are rare. A plaintiff must show ill will, hatred, hostility, or evil motive on behalf of the defendant. See *Stewart v. Bader*, 154 N.H. 75, 87 (2006). Relatively recent cases show enhanced compensatory damages in the hundreds of thousands of dollars. See, e.g., *Danboise v. Espinola*, No. 2009-0159, 2010 WL 11437203, at *3 (Oct. 27, 2010).