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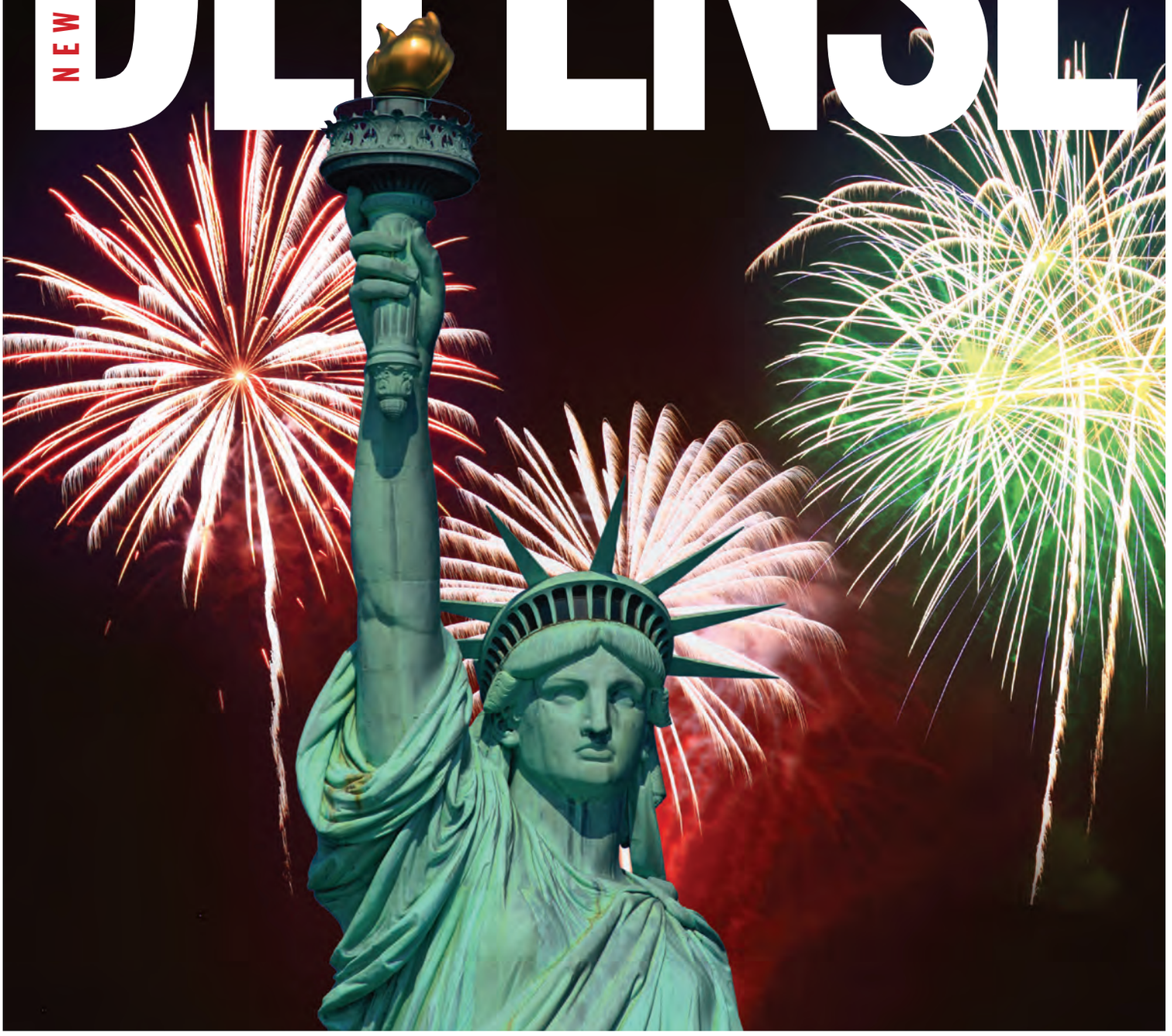
NEW JERSEY DEFENSE



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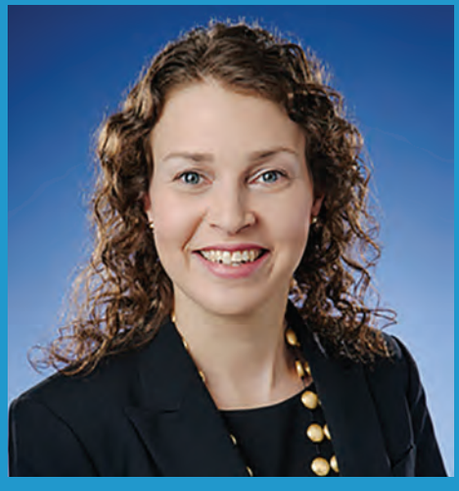


To all NJDA Members and to New Jersey's esteemed Judiciary:

Summer is finally here! With it comes an opportunity to slow down ever so slightly, reflect, breathe in some fresh air, spend much-deserved time with family and friends, and prioritize a few dreams on that ever-growing bucket list.

For NJDA, summer evokes the same sentiments. Our summer kicks off with NJDA's Annual Convention, giving us an opportunity to spend time with colleagues and friends. In addition to the usual outstanding CLE and evening receptions, this year's Convention will involve a celebration of everyone's hard work, and of course, some time to relax in beautiful Lake Placid.

As we reflect on what we've accomplished this year and where we want to go, I am invigorated by how much we did together as an organization. Our Board is an incredible group of attorneys who are as passionate about NJDA as they are about achieving the right result for their clients. They tackle the most important issues in our state's law. They write *amicus curiae* briefs in landmark cases and letters to Legislative committee members about pending legislation, develop top notch CLE seminars that attract both members and non-members, and author articles for *New Jersey Defense*. I want to extend a heartfelt and sincere thank you to each one of them for raising NJDA's profile. No more will people say, "What is NJDA?"

This year we have also made strides in engaging our entire membership and attracting new members. Our networking event in April was very well attended, and I look forward to seeing everyone at future events. You may have noticed that we have become more active on social media, particularly LinkedIn. We post all of our seminars and events, and promote individual member successes and defense wins. We have also activated our committees, which will be holding meetings to allow members to network within their practice areas, share strategies, and assume leadership positions. I encourage you all to attend and to reap the many benefits of NJDA membership.

Summer at NJDA also means a changing of the guard, and an opportunity to add a few more dreams to our NJDA bucket list. I want to wish NJDA's incoming President, Aldo Russo, the best of luck during his Presidency, and look forward to working with him and NJDA's Board to realize those dreams next year.

Natalie H. Mantell

NATALIE H. MANTELL, ESQ.

THE IMPACT OF RECREATIONAL MARIJUANA USE ON THE NEW JERSEY WORKPLACE

BY MARK A. SALOMAN

THE CURRENT STATE OF THE LAW

Since 2010, limited cannabis use in New Jersey was permitted for medicinal purposes under the New Jersey **Compassionate Use Medical Marijuana Act** (CUMMA). Under CUMMA, employers must reconcile accommodating employee-alleged disability treated by prescription marijuana with the competing need to insure a safe and unimpaired workforce. CUMMA does not prevent employers from disciplining or terminating impaired employees; prohibits anyone from operating any vehicle or stationary heavy equipment while under the influence of marijuana; and requires no New Jersey employer to accommodate the medical use of marijuana in any workplace.

Regarding federal law, the Department of Justice changed tactics on marijuana enforcement by rescinding the "**Cole Memo**" and other internal guidelines in early 2018. The Cole Memo de-prioritized federal marijuana enforcement efforts to, among other things, prevent distribution of marijuana to minors; prevent marijuana revenue from funding criminal enterprises; prevent marijuana from moving from legal states; and prevent violence related to growing or distributing marijuana. Though some experts doubt the average consumer will be in danger of arrest by the federal government, the threat to state-legal recreational marijuana businesses is palpable.

WHAT THE FUTURE MAY HOLD

In June 2017, New Jersey's legislature introduced **Bill S3195** which, when enacted, will legalize recreational marijuana use in New Jersey. Among other things, the Senate bill will allow for the possession of up to one ounce of dried marijuana, 16 ounces of edible cannabis products, and 72 ounces in liquid form. S3195 differs from CUMMA in one significant respect: it creates a separate cause of action making it **unlawful for employers**

to take "any adverse employment action" against an employee merely because that person uses marijuana. Refusing to hire or firing such individuals are just two actions prohibited by S3195. This baseline prohibition is softened by only **two caveats**. First, an employer may affirmatively assert the defense it has "a rational basis" for the adverse employment action which is "reasonably related to the employment." This presumably includes safety-sensitive positions and instances when the responsibilities of the current or prospective employee mandate the need for drug-free personnel. Second, employers will remain free to take adverse employment action against an employee if failure to do so places the employer in violation of federal law or causes it to lose a federal contract or funding.

Political insiders originally predicted the bill legalizing recreational marijuana in New Jersey would be signed into law within the first half of 2018, though that fervor has slowed some. In addition to—or perhaps to accelerate—the track for recreational cannabis passage, New Jersey significantly expanded its medical marijuana program in March 2018. The recent expansion approved by Governor Murphy included the addition of several new categories of conditions treatable by medical marijuana, most notably chronic pain related to musculoskeletal disorders, migraines, and anxiety. New Jersey physicians can recommend medical cannabis for these additional conditions, which should increase the patient pool, which remains tiny when compared to the 9 million plus residents of the Garden State. The new rules also triple the number of existing dispensaries to 18, with six each in northern, central, and southern New Jersey. In addition, any physician—not just those appearing on a public registry—may prescribe medical marijuana, a change which should increase patient access. If New Jersey's existing (and new) medical marijuana dispensaries are permitted to sell under the new law, experts believe recreational sales could commence as earlier as Q1 of 2019—but the regulatory and licensing process will probably take at least one year or longer.

ZERO TOLERANCE AND DRUG TESTING

New Jersey employers remain free to ban the use or possession of marijuana on the job. Though legal issues have arisen in other jurisdictions over the termination of workers for cannabis use, employers are protected by some language in S3195. Mirroring CUMMA, S3195 requires no New Jersey employer to permit or accommodate marijuana use in the workplace. Likewise, it does not affect the ability of employers to maintain zero tolerance policies prohibiting marijuana use or intoxication by employees during work hours and does nothing to change employers' right to drug testing.

Employers may, therefore, continue to institute a zero tolerance policy in the workplace, especially for workers in "safety-sensitive" positions. New Jersey still recognizes the public's interest in ensuring workers in safety-sensitive positions are drug-free outweighs any individual right to privacy, and permits employers to test those workers and to discharge them for failing those tests. A "safety-sensitive" position includes those in which an employee is responsible for the safety of herself or others, like those involving driving or using machinery. If such a position requires a commercial driver's license (CDL), then employers must abide by the Omnibus Transportation Employee Safety Act of 1991, which requires all employers drug test employees whose duties require a CDL. Federal Department of Transportation guidelines prohibit the use of medical marijuana for transportation jobs, even in states where possession and use is legal.

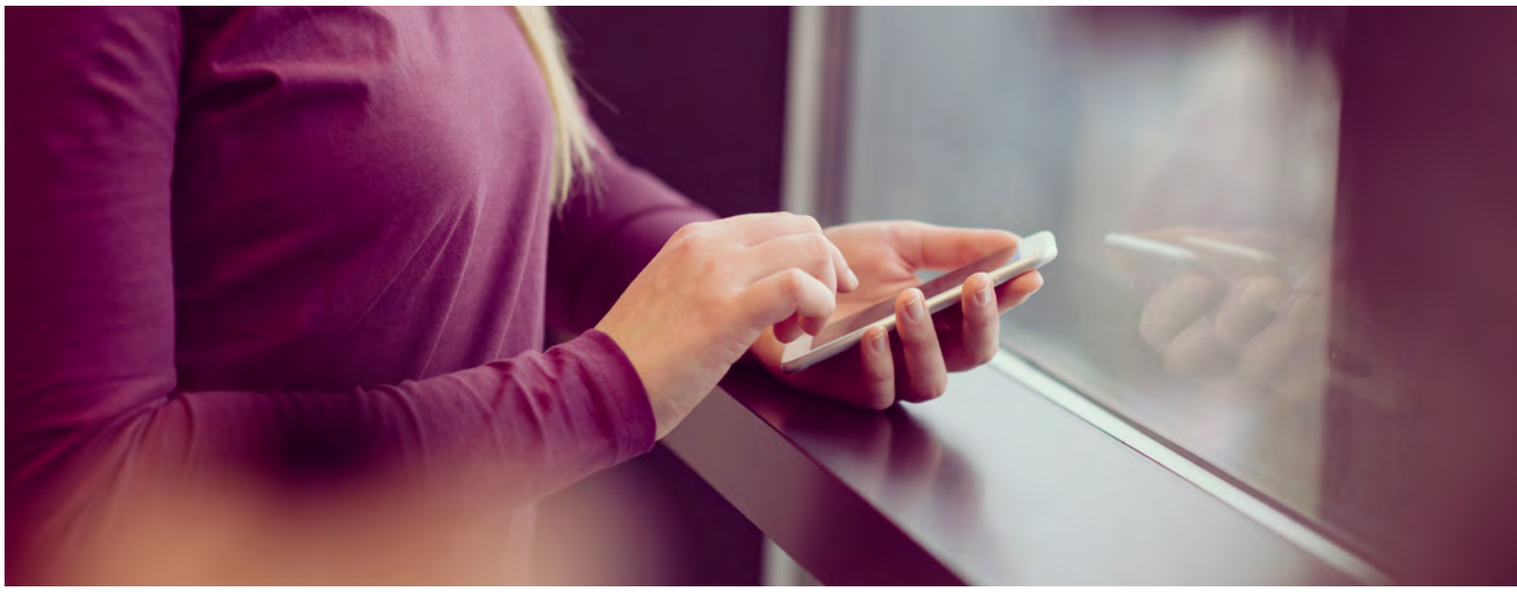
REASONABLE ACCOMMODATION?

If an employee tests positive for marijuana, New Jersey employers should ask if the worker has a current, valid prescription for medical marijuana. Then employers should further evaluate the employment situation and the specific demands of the job (and any competing regulations), in considering an employee's use of medical marijuana.

Once an employer is notified an employee is a medical marijuana user, the employer must be aware the employee is potentially disabled under the Americans with Disabilities Act (ADA) or New Jersey Law Against Discrimination (LAD) and/or has a serious health condition under the Family and Medical Leave Act (FMLA) or New Jersey leave laws. Though the ADA and LAD require no accommodation based on marijuana use, they require accommodations related to a covered disability and afford certain protections to disabled employees and applicants. Therefore, New Jersey employers must consider the specific needs of the job as well as any applicable competing regulations before acting. An example of "reasonable accommodation" might include a modified work schedule allowing the employee to treat his condition with medical marijuana from home during normal work hours. If, however, the position is "safety-sensitive," employers may assert there is no available accommodation because marijuana use by the employee or applicant may pose a direct threat to the health and safety of herself or others.

Employers must ensure any adverse employment decision is made based on the employee's use of marijuana, not the employee's underlying medical condition. Indeed, S3195 makes it unlawful for employers to take "any adverse employment action" against an employee merely because that person uses marijuana. Refusing to hire or firing such individuals are just two actions prohibited by S3195. Further complicating matters, the psychoactive agent in cannabis can stay in a person's system longer than other drugs, such as alcohol, making for a much longer positive test result period. Also, impaired performance caused by marijuana use cannot be proven by current scientific methodology, making it difficult to show the root cause of a workplace accident or poor performance. New Jersey's judicial opinions also may shift to track evolving public policy in favor of lawful cannabis in general.

Mark Saloman is a Partner in the Berkeley Heights office of FordHarrison LLP, a national labor & employment law boutique. Mark, a Past President of the NJDA, frequently counsels clients throughout the U.S. on employment issues, including the affects of recreational and medicinal marijuana on today's workforce. He can be reached at msaloman@fordharrison.com.



WHEN PUBLIC ACCESS MEANS ACCESS TO YOUR PRIVATE DEVICE

BY ELIZABETH M. ANDES, ESQ.

Are text messages on your personal cell phone subject to disclosure to the public? Surprisingly, the answer could be yes. Generally, unless a limited exception applies, the public right to access government records under the Open Public Records Act[1] ("OPRA") grants access to records regardless of whether the records are stored on a personal or government device, such as a cell phone.

This right to access public records extends beyond paper records, and encompasses electronic data, messages and information stored in any medium. Critically, the key question is not what format the record is in, but whether the record has been made, maintained, kept on file or received in the course of official business by any officer.[2] As established by the Government Records Council ("GRC"), text messages are considered government records when the messages concern official business. A records custodian would be obligated to obtain these records, upon request.[3]

Further, "a government record is not restricted by the location of the record," as found in a GRC case where emails regarding municipal business in a mayor's personal email account were subject to disclosure.[4] The GRC stated that "the Custodian should obtain the government records that are responsive to the request and release them in accordance with OPRA" without regard to their location. Likewise, text messages received or sent in the course of official business are subject to disclosure, regardless of whether such messages are sent and/or received on personal or government-issued cell phones or computers.

Another important consideration when public officials communicate in writing, is the potential for violation of the Open Public Meetings Act[5] ("OPMA"), which requires that public meetings be noticed and open to the public. A meeting occurs when a quorum of members of the public body communicate, including through email, phone or by text messaging. Unless publically noticed and open to the public, a violation of OPMA will arise. Public officials must be aware of the implications of engaging in instantaneous messaging with other public officials, where such conversations occur with a quorum of the public body.

So, what does this mean to the government employee or official?

In the interests of protecting privacy to one's own personal cell phone and email account, public officials should not engage in conversations regarding official business through text messaging on their personal cell phones. The same is true for personal email accounts.

It cannot be stressed enough the importance of engaging in conducting official business on government-issued devices and email accounts. Doing so not only allows for the public official to maintain the privacy of their own personal devices and email accounts, but it also allows the records custodian to retrieve responsive records through access to the device or email account. Aside from the public's right to access government records under OPRA and attend meetings under OPMA, there are common law rights of access, record retention requirements under the Destruction of Public Records Law, and the preservation of records for production in discovery in litigation that also must be considered when communicating in writing.

Although text messaging and emailing provide a convenient and instantaneous means of communicating, their informality and promptness do not alleviate the public's right to access official business communications or ameliorate the public's right to attend meetings, even when conducted on a personal device.

1 N.J.S.A. 47:1A-1.1 et seq.

2 N.J.S.A. 47:1A-1.1.

3 Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-387 (July 28, 2015). Although a decision of the GRC is not binding on any case in the Superior Court challenging a denial to access, GRC opinions provide helpful guidance.

4 Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 14, 2005).

5 N.J.S.A. 10:4-6 et seq.

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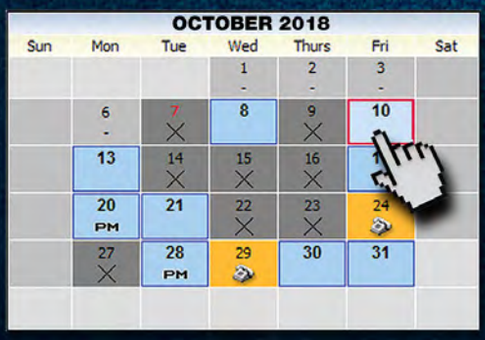

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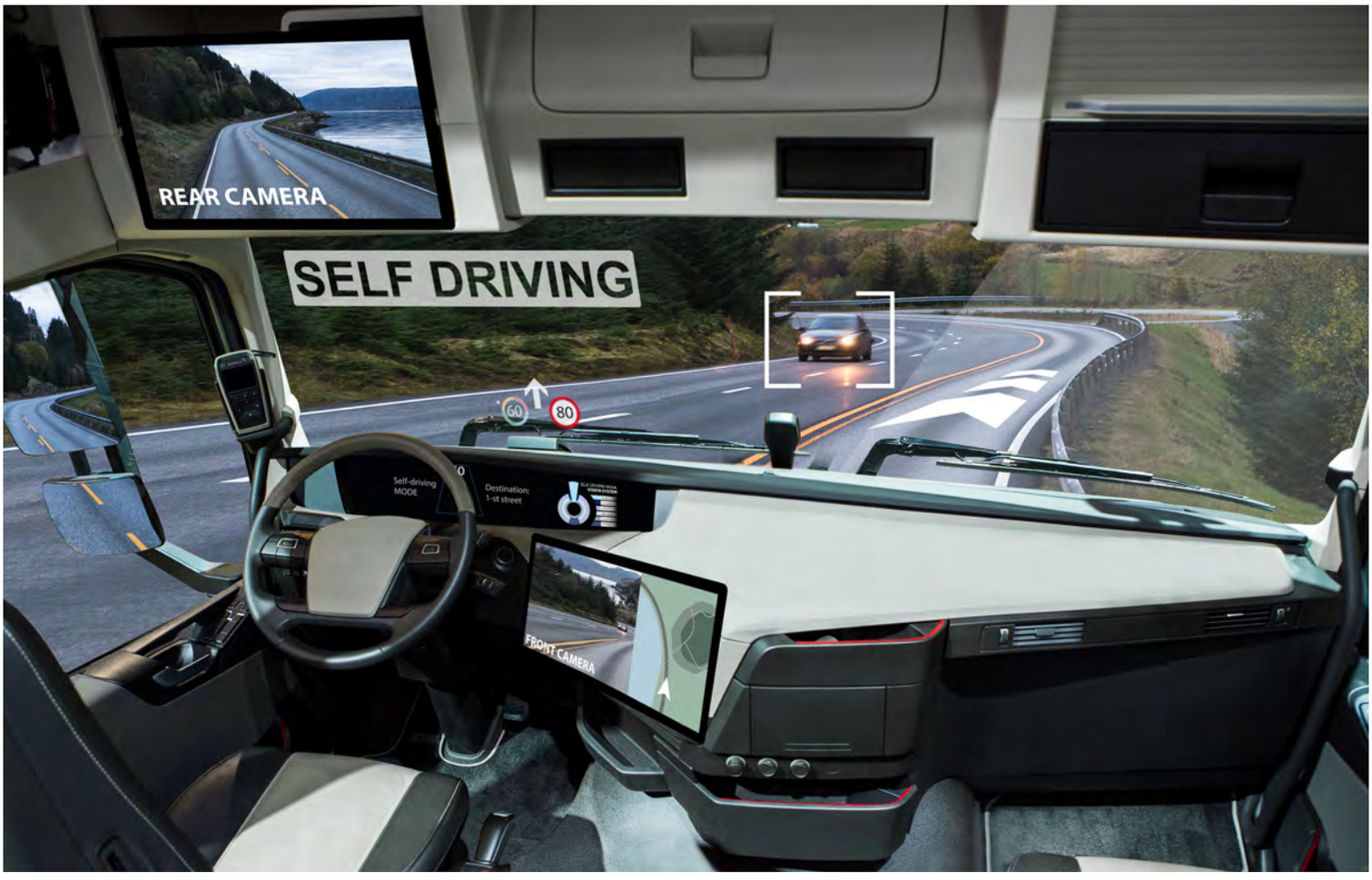

AUTONOMOUS VEHICLE TECHNOLOGY – WHO IS LIABLE IN A CRASH?

BY NICOLE M. CROWLEY AND JONATHAN FABOZZI

Until recently, the dichotomy between whether an automobile driver or an automobile manufacturer should be liable for an accident has been distinct – the driver is liable when his or her alleged negligence causes an accident and a manufacturer may be found liable when its defective product is the proximate cause of an accident. However, with the rise of autonomous driving technology, apportioning liability between drivers and vehicle manufacturers will become increasingly complex.

While fully autonomous vehicles are not currently available to consumers, many vehicles currently come equipped with highly sophisticated driver assistance systems. These systems include brake-assist functions to limit the chance of a rear-end crash, lane keeping functions to help keep a car from drifting into an adjacent travel lane, and pedestrian detection systems to alert the driver and, in some cases, apply the brakes to avoid hitting a pedestrian. These systems, while highly advanced and extremely useful to drivers, are still generally considered "assist" systems. These systems are designed to aid the driver under certain circumstances but they do not replace or minimize a driver's operation of the car. A driver's own negligence will still result in liability. Nevertheless, automotive manufacturers must still minimize risks associated with driver assist systems. For example, manufacturers are advised to educate customers about the capabilities *and limitations* of the assist systems in its vehicles, particularly at the customer-facing dealership level. Marketing and promotional materials released by manufacturers should avoid affirmative statements such as collision "prevention" or "avoidance" to refer to these systems, and not mislead drivers into thinking that these systems in any way take the place of their actions and responsibilities behind the wheel. Drivers must understand that these systems may "limit" or "mitigate" the risk of a collision under certain circumstances, but they cannot and will not prevent every crash.

However, as autonomous technology advances and driver control becomes more limited, there is a greater risk of a liability shift toward manufacturers and the suppliers of its technology.

At the federal level, one of the first recognitions of the this changing landscape occurred in September 2016 when the National Highway Traffic Safety Administration (NHTSA) released its Federal Automated Vehicle policy. In the policy, NHTSA distinguished between when the vehicle or the operator would be liable based upon who was "primarily responsible for monitoring the driving environment." Automated systems become primarily responsible when the system can "both actually conduct some parts of the driving task and monitor the driving environment *in some instances.*" NHTSA adopted the Society of Automotive Engineers Automation Levels to distinguish between different types of vehicle automation. There are five levels of automation – the 1st being no automation and the 5th being that the vehicle can "perform all driving tasks." Vehicles that reach level 3 of automation are able to monitor the driving environment; but, at this level, the human driver must still actively pay attention. It is not until a vehicle is at level 5 of automation that the "automated system can perform all driving tasks, under all conditions that a human driver could perform them." This suggests that in any prior level, the human driver can still be found responsible for an accident as he or she is to still be actively monitoring the driving environment. However, there is little precedent as to when the human driver is responsible versus when the vehicle manufacturer may be found liable.

The aftermath of the unfortunate death of Joshua Brown, the first fatality attributed to an autonomous vehicle, illustrated the uncertainty in this area. Mr. Brown passed away after his Tesla crashed into a tractor-trailer that was crossing an intersection. Mr. Brown engaged his Tesla's "Autopilot" mode prior to the accident; while "Autopilot" mode was able to help prevent rear-end collisions, Tesla argued it was neither designed nor capable of adapting to crossing traffic. The investigation revealed that the Tesla issued 7 warnings to Mr. Brown regarding his use of "Autopilot" mode, which Mr. Brown had used for a continuous 37 minutes, and that Mr. Brown had set the cruise control to 74 miles per hour, in a 65 miles per hour zone, prior to the accident. There is no evidence as to what Mr. Brown was doing prior to the accident. Mr. Brown should have been able to see the tractor-trailer prior to the accident, but he did not hit the brakes. Both the National Transportation Safety Board ("NTSB") and NHTSA investigated the accident and confirmed that the Tesla's "Autopilot" mode was not designed to recognize and react to cross traffic.

However, the NTSB and NHTSA reached separate results at the conclusion of their investigations. NHTSA found no design defects in the Tesla's design and Mr. Brown was responsible for the accident. The NTSB concluded that the Tesla's "operational design" contributed to the accident by permitting Mr. Brown's "overreliance on the vehicle automation." Mr. Brown's "overreliance" is key as it is another potential source of potential liability for autonomous vehicle manufacturers. NHTSA highlighted that it is a concern that manufacturers give the impression that a vehicle is a level 5 automation, i.e., the vehicle can perform all tasks, when the vehicle's technology does not provide for that level of automation. Thus, NHTSA and the NTSB are suggesting that manufacturers may be held liable if their autonomous vehicles do not include enough safeguards, either in design or in their warnings, to ensure that a human driver pays proper attention while driving a vehicle equipped with autonomous features.

On September 6, 2017, the U.S. House of Representatives took the first step toward developing national guidelines for autonomous vehicles when it passed the "Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act". The bill included pre-emptive language which requires states to ensure that any state laws would comply with all federal regulations. It also stated that "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." A similar bill is working its way through the Senate. The bills working their way through the respective federal chambers put NHTSA in charge of overseeing autonomous vehicle manufacturing and design.

On September 12, 2017, NHTSA released "A Vision For Safety 2.0", which builds on the Federal Automated Vehicle policy that it released in 2016. It explicitly provides that states should begin discussing how liability will be apportioned among, at the least, owners of autonomous vehicles and manufacturers. NHTSA points out that "determination of the operation of an [autonomous vehicle], in a given circumstance, may not necessarily determine liability for crashes involving the ADS."

Currently, New Jersey has not enacted any legislation regarding autonomous vehicles; however, at the time this was written, Senators Declan O'Scanlon, Jr. and Robert Gordon had introduced Bill No. 2149 into the Senate. Bill No. 2149 provides for "testing and use of autonomous vehicles on State roadways under certain circumstances." The bill does not address liability. But, it does require a driver to be actively monitoring the vehicle at all times and to be able to take control of the vehicle as necessary.

A clear framework for apportioning liability between automobile manufacturers and human drivers when an autonomous vehicle is involved in an accident is still in its infancy. Until recently, any autonomous equipment would likely fit into levels 1 or 2 of vehicle autonomy. The equipment is designed as an aid to assist human drivers, and human drivers are still tasked with monitoring and reacting to the driving environment. The traditional dichotomy between negligence and product liability remains intact. As manufacturers begin testing and selling vehicles with level 3, 4 and 5 automation, liability will likely begin to shift to manufacturers and its suppliers, including in situations where the autonomous vehicle is not designed with safe guards to ensure the human driver is actively paying attention. However as highlighted by NHTSA and NTSB and as seen in the investigation of Joshua Brown, any analysis will likely go beyond who was operating the vehicle at the time of the incident – the human driver or the autonomous technology.

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O'TOOLE'S COUCH

Although I do enjoy traveling, flying has never fallen under the "enjoy" category. Everything is really high-tech now and, as you know, I am still back in the middle ages. If for some reason I haven't had my boarding pass printed at home, there are self-service machines available. However, I'm always looking for a ticket agent for personal assistance. (We usually fly United and I will say their agents are certainly knowledgeable and very patient.) Once we get past this phase it is on to security checkpoint. We are marked "TSA," but have no idea why. It doesn't matter; the long lines are everywhere. To complicate this stage of our journey I am always pulled aside for a thorough frisk because my two knee replacements make bells and whistles go off.

It is recommended that travelers arrive three hours before boarding time. This is only tolerable because we have a United Clubroom Membership where snacks and an open bar help pass the time more quickly. Prior to boarding I have always purchased flight insurance. I like the feeling of knowing that if the plane goes down, I'll be the only one smiling. However, apparently no one buys flight insurance anymore and even airport employees don't know where these tiny little booths are hidden. Consequently, I am taking my chances along with every other flyer on the plane.

The next step is boarding. It is important that you board as quickly as possible so your carry-on luggage has an overhead spot. Otherwise, it will be whisked away for pick-up after the flight. Now the agonizing part of the flight – Sunny eyes every passenger walking down the aisle, certain that the largest man on the plane will most-certainly be sitting on the other side of her. (Of course, I'm no light-weight myself, so the middle seat that Sunny occupies is not an enviable spot.) With the spacious seats provided, all is well as long as no one budges an inch. (This part of the trip is labeled "tons of fun.")

Everyone knows that the flight attendant responsible for pre-flight instructions has been trained by New Jersey Transit, thus speaking quickly and providing this vital information in under one minute. Sounds reasonable to me …….. Not!

The next decision you have to make is whether or not to start up a conversation with the stranger sitting next to you (in case your wife isn't sitting next to you.) This is really a gamble, especially if it is a long flight. Thus I have always taken the

COME FLY WITH ME

position that I am a mute, satisfied with reading my book or playing chess on the gameboard provided, and napping if at all possible.

30 years ago I took my kids to Disneyworld and that was the only time my luggage was lost. The airline provided me with a toiletry bag, but obviously no fresh clothes. My kids thought it was a scream that for the first couple of days I was wearing a Mickey Mouse sweatshirt. Actually, even after my lost luggage was returned, I continued wearing that sweatshirt because it was far more comfortable than my regular clothes and I was fine looking like a cartoon character.

Fast forward 30 years and my most recent flight was to The Final Four in San Antonio. I had the luxury of traveling with my son, Kevin, who is extremely well-traveled. Consequently, I just had to have him close by and within my sight the entire trip. Since both Kevin and I graduated from Villanova, being in San Antonio for The Final Four was really exciting. However, last-minute flight arrangements were not easy. ("Last minute" because we were only going if Villanova was playing.) We flew out of JFK instead of Newark, and flew into Austin instead of San Antonio. OK, it was a long day, but a sacrifice worth making.

As I said at the beginning of this article, I enjoy traveling, but not flying. Thus the fun didn't begin until we arrived in San Antonio. Aside from fabulous basketball, we toured the city, including the Alamo. (Although my group was ready to leave the Alamo within an hour, I needed much more time to read every depiction of the battle. (FYI – I have often thought that if I could pick a place in history to die, the Alamo would be it, albeit a bit before my time – March 6, 1936.) Our food in San Antonio included Mexican and Spanish. This coupled with all the beer we consumed, I was certain indigestion would kill me. Wait a minute – I could have died near the Alamo.

Another major point of interest in this area is the River Walk that winds around the city for miles. It is beautiful. After the final championship game, the Villanova team, band, cheerleaders and university personnel boarded barges with happy, screaming fans lined up on either side of the river in celebration of this great championship win. What a way to end a great week-end, but wait, we still had to board a flight to get back home!

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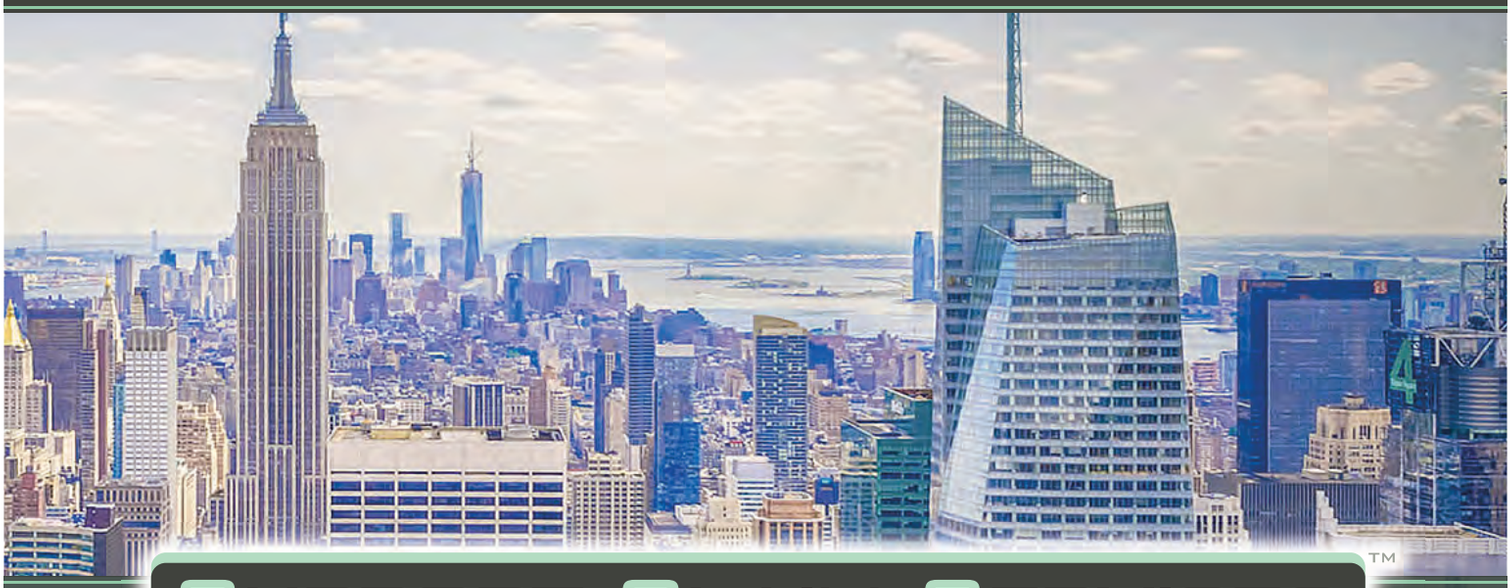

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JULY 13

CO-SPONSOR OF NJSBA MUNICIPAL COURT SECT. HAPPY HOUR & NETWORKING SOCIAL
5:30 pm - 8 pm
Bar Anticipation
Bellmawr, NJ

OCTOBER 8

TRIAL COLLEGE
8:30 am - 12:30 pm
Union County Court House
4.0 CLE Credits

OCTOBER 19

PRODUCTS LIABILITY COMMITTEE JOINT SEMINAR WITH ACCNJ
8:30 am - 12:30 pm
Gibbons, P.C.
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NOVEMBER 12

WOMEN AND THE LAW
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