TEXAS

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1. Requirements for use of hands free devices in each state

“Although Texas has no statewide law banning the use of cell phones while driving for all drivers, many local areas prohibit or limit the use of cell phones while driving. Specific limitations are listed below:

- Drivers with learner's permits are prohibited from using handheld cell phones in the first six months of driving.
- Drivers under the age of 18 are prohibited from using wireless communications devices.
- School bus operators are prohibited from using cell phones while driving if children are present.
- In school zones, all drivers are prohibited from texting and using handheld devices while driving.
- Local restrictions: Since 2009, more than 90 cities have adopted one or more of the three types of cell phone ordinances listed below.
  - Ban on all uses of wireless communications devices while driving.
  - Ban on texting while driving.
  - Ban on texting and other manual uses of wireless communication devices while driving.”


2. Discovery and admissibility of preventability determinations

Preventability determinations are admissible. See Greenwood Motor Lines, Inc. v. Bush, No. 05-14-01148-CV, 2016 Tex. App. LEXIS 13865 (Tex. App.—Dallas Dec. 30, 2016) (“In its fourth issue, Greenwood argues the trial court erred in admitting the ‘preventability assessments’ showing Greenwood determined this accident and accidents in 2003 and 2007 were ‘preventable.’ The documents at issue are internal Greenwood-generated documents sent to Gaston determining the accidents in question were preventable and asking Gaston to sign either in agreement or disagreement with that determination. The documents were admitted as admissions by a party opponent. Rule
801(e)(2) is straightforward: subject to other Rules of Evidence that may limit admissibility, any statement by a party-opponent is admissible against that party. Tex. R. Evid. 801(e)(2); Bay Area Healthcare Grp., Ltd. v. McShane, 239 S.W.3d 231, 235 (Tex. 2007). Under these circumstances, we conclude the trial court did not abuse its discretion in admitting the preventability assessments.”

3. Spoliation of evidence, specifically related to electronic data and whether there is a duty to preserve evidence absent a specific demand

In preparing for electronic discovery, an attorney should give potential parties notice to keep them from altering or destroying relevant evidence. Preservation of electronically stored evidence is particularly challenging because information stored on computer systems is by its nature so dynamic. Further complicating the preservation issue is that most organizations have document-retention policies that require their data to be stored only for a predetermined amount of time, after which it is automatically permanently deleted. See Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 37 (Tex. 2014).

The source of an opposing party’s duty to preserve evidence should be cited in any request to preserve that evidence. A preservation letter is vital, not only to protect relevant data but also to enable the court to impose sanctions on parties who destroy or modify electronic information after receiving notice of its relevance. This preservation letter should outline the type of information to be preserved, and usually includes the following:
1. A description of the potential litigation and the parties involved;
2. A request to suspend any document-destruction/retention policy;
3. A reminder to the recipient of the duty to preserve all information relevant to the suit;
4. Identification of the specific documents, electronic information, and tangible things that should be preserved; and
5. Instructions on how to preserve said items.

A party’s duty to preserve electronic evidence is similar to that for traditional paper-based evidence. Namely, parties have a duty to preserve information they know is relevant to potential or ongoing litigation. See Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 20 (Tex. 2014). Besides this common-law duty, parties may also have a statutory, regulatory, or ethical duty to preserve evidence. A number of statutes, regulations, and canons of ethics require the preservation of records for certain periods of time. See Trevino v. Ortega, 969 S.W.2d 950, 955 (Tex. 1998); see also Bus. & Com. Code § 72.002 (three-year retention of business records required to be kept by state law unless another law provides otherwise); 29 C.F.R. § 1602.40 (two-year retention of school-personnel or employment records): 17 C.F.R. § 240.17a-4 (six-year retention of certain brokerage-firm records). As a specific example for the transportation industry, according to Texas DPS¹, Texas follows the FMCSA and DOT regulations regarding retention of documents. Specifically, DOT § 40.333 provides as follows:

(a) As an employer, you must keep the following records for the following periods of time:

1. You must keep the following records for five years:
   i. Records of alcohol test results indicating an alcohol concentration of 0.02 or greater;
   ii. Records of verified positive drug test results;
   iii. Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);
   iv. SAP reports; and
   v. All follow-up tests and schedules for follow-up tests.

2. You must keep records for three years of information obtained from previous employers under §40.25 concerning drug and alcohol test results of employees.

3. You must keep records of the inspection, maintenance, and calibration of EBTs, for two years.

4. You must keep records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02 for one year.

(b) You do not have to keep records related to a program requirement that does not apply to you (e.g., a maritime employer who does not have a DOT-mandated random alcohol testing program need not maintain random alcohol testing records).

(c) You must maintain the records in a location with controlled access.

(d) A service agent may maintain these records for you. However, you must ensure that you can produce these records at your principal place of business in the time required by the DOT agency. For example, as a motor carrier, when an FMCSA inspector requests your records, you must ensure that you can provide them within two business days.

(e) If you store records electronically, where permitted by this part, you must ensure that the records are easily accessible, legible, and formatted and stored in an organized manner. If electronic records do not meet these criteria, you must convert them to printed documentation in a rapid and readily auditable manner, at the request of DOT agency personnel.

Additionally, FMCSA § 382.401 provides as follows:

(a) General requirement. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:

1. Five years. The following records shall be maintained for a minimum of five years:
   i. Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,
(ii) Records of driver verified positive controlled substances test results,
(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,
(iv) Driver evaluation and referrals,
(v) Calibration documentation,
(vi) Records related to the administration of the alcohol and controlled substances testing program, including records of all driver violations, and
(vii) A copy of each annual calendar year summary required by §382.403.

(2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices) shall be maintained for a minimum of 2 years.

(3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

(4) Indefinite period. Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

(c) Types of records. The following specific types of records shall be maintained. “Documents generated” are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:
   (i) Collection logbooks, if used;
   (ii) Documents relating to the random selection process;
   (iii) Calibration documentation for evidential breath testing devices;
   (iv) Documentation of breath alcohol technician training;
   (v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;
   (vi) Documents generated in connection with decisions on post-accident tests;
   (vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine specimen for testing; and
   (viii) A copy of each annual calendar year summary as required by §382.403.

(2) Records related to a driver's test results:
   (i) The employer's copy of the alcohol test form, including the results of the test;
(ii) The employer's copy of the controlled substances test chain of custody and control form;
(iii) Documents sent by the MRO to the employer, including those required by part 40, subpart G, of this title;
(iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part;
(v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part; and
(vi) Documents generated in connection with verifications of prior employers' alcohol or controlled substances test results that the employer:
   (A) Must obtain in connection with the exception contained in §382.301, and
   (B) Must obtain as required by §382.413.
(3) Records related to other violations of this part.
(4) Records related to evaluations:
   (i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and
   (ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.
(5) Records related to education and training:
   (i) Materials on alcohol misuse and controlled substance use awareness, including a copy of the employer's policy on alcohol misuse and controlled substance use;
   (ii) Documentation of compliance with the requirements of §382.601, including the driver's signed receipt of education materials;
   (iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion;
   (iv) Documentation of training for breath alcohol technicians as required by §40.213(g) of this title; and
   (v) Certification that any training conducted under this part complies with the requirements for such training.
(6) Administrative records related to alcohol and controlled substances testing:
   (i) Agreements with collection site facilities, laboratories, breath alcohol technicians, screening test technicians, medical review officers, consortia, and third party service providers;
   (ii) Names and positions of officials and their role in the employer's alcohol and controlled substances testing program(s);
   (iii) Semi-annual laboratory statistical summaries of urinalysis required by §40.111(a) of this title; and
(iv) The employer's alcohol and controlled substances testing policy and procedures.

(d) **Location of records.** All records required by this part shall be maintained as required by §390.29 of this subchapter and shall be made available for inspection at the employer's principal place of business within two business days after a request has been made by an authorized representative of the Federal Motor Carrier Safety Administration.

(e) **OMB control number.**

(1) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and have been assigned OMB control number 2126-0012.

(2) The information collection requirements of this part are found in the following sections: Sections 382.105, 382.113, 382.301, 382.303, 382.305, 382.307, 382.401, 382.403, 382.405, 382.409, 382.411, 382.601, 382.603.


4. **Broker exposure or liability for motor carrier negligence**

Texas does not have established case law regarding broker liability, however it may be possible for brokers to be held liable if a Plaintiff can prove negligent hiring on behalf of the broker.

5. **Logo or placard liability - whether motor carrier is liable for any vehicle bearing its Department of Transportation identification placard, company name, or business logo**

Logos or placards on the side of a vehicle can be used as evidence of liability in Texas.

6. **Offers of Judgment**

Rule 167 of the Texas Rules of Civil Procedure provides:

167.1 Generally.
Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages - including a counterclaim, crossclaim, or third-party claim - except in:

(a) a class action;
(b) a shareholder's derivative action;
(c) an action by or against the State, a unit of state government, or a political subdivision of the State;
(d) an action brought under the Family Code;
an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or

an action filed in a justice of the peace court or small claims court.

167.2 Settlement Offer.

(a) Defendant's Declaration a Prerequisite; Deadline. A settlement offer under this rule may not be made until a defendant - a party against whom a claim for monetary damages is made - files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.

(b) Requirements of an Offer. A settlement offer must:

1. be in writing;
2. state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;
3. identify the party or parties making the offer and the party or parties to whom the offer is made;
4. state the terms by which all monetary claims - including any attorney fees, interest, and costs that would be recoverable up to the time of the offer - between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
5. state a deadline - no sooner than 14 days after the offer is served - by which the offer must be accepted;
6. be served on all parties to whom the offer is made.

(c) Conditions of Offer. An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.

(d) Non-Monetary and Excepted Claims Not Included. An offer must not include non-monetary claims and other claims to which this rule does not apply.

(e) Time Limitations. An offer may not be made:

1. before a defendant's declaration is filed;
2. within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
3. within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.

(f) Successive Offers. A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.
167.3 Withdrawal, Acceptance, and Rejection of Offer.
   (a) Withdrawal of Offer. An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.
   (b) Acceptance of Offer. An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.
   (c) Rejection of Offer. An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the deadline stated in the offer.
   (d) Objection to Offer Made Before an Offeror's Joinder or Designation of Responsible Third Party. An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

167.4 Awarding Litigation Costs.
   (a) Generally. If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.
   (b) "Significantly Less Favorable" Defined. A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:
      (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or
      (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.
   (c) Litigation Costs. Litigation costs are the expenditures actually made and the obligations actually incurred - directly in relation to the claims covered by a settlement offer under this rule - for the following:
      (1) court costs;
      (2) reasonable deposition costs, in cases filed on or after September 1, 2011;
      (3) reasonable fees for not more than two testifying expert witnesses; and
      (4) reasonable attorney fees.
   (d) Limits on Litigation Costs.
      (1) In cases filed before September 1, 2011, the litigation costs that may be awarded under this rule must not exceed the following amount:
(A) the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus
(B) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.

(2) In cases filed on or after September 1, 2011, the litigation costs that may be awarded to any party under this rule must not exceed the total amount that the claimant recovers or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant.

(e) No Double Recovery Permitted. A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.

(f) Limitation on Attorney Fees and Costs Recovered by a Party Against Whom Litigation Costs Awarded. A party against whom litigation costs are awarded may not recover attorney fees and costs under another law incurred after the date the party rejected the settlement offer made the basis of the award.

(g) Litigation Costs to Be Awarded to Defendant As a Setoff. Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

167.5 Procedures.

(a) Modification of Time Limits. On motion, and for good cause shown, the court may - by written order made before commencement of trial on the merits - modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.

(b) Discovery Permitted. On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.

(c) Hearing Required. The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

167.6 Evidence Not Admissible.

Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

167.7 Other Settlement Offers Not Affected.

This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule
does not apply, cannot be the basis for awarding litigation costs under this rule as to any party. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.

7. **Punitive Damages**

   a. **Are punitive damages insurable?**

   Texas courts review this question on a case by case basis. Various appellate courts have held that exemplary damages can be covered by insurance policies and others have ruled against, with all courts focusing on public policy considerations, the point of awarding exemplary damages, and the freedom of contract.

   In *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008), the Texas Supreme Court prepared an in-depth comparison of the above mentioned points in a workers’ compensation case, and noted the following:

   In response to the certified question, we answer that the public policy of Texas does not prohibit insurance coverage of exemplary damages for gross negligence in the workers' compensation context. However, without clear legislative intent to generally prohibit or allow the insurance of exemplary damages arising from gross negligence, we decline to make a broad proclamation of public policy here but instead offer some considerations applicable to the analysis in other cases. Of course, how our answer is applied in the case before the Fifth Circuit is solely the province of that certifying court. *Amberboy v. Societe de Banque Privee*, 831 S. W.2d 793, 798 (Tex. 1992).

   For another in-depth analysis of the varying Texas Court decisions regarding insurance coverage for exemplary damages, see *State Farm Mut. Auto. Ins. Co. v. Shaffer*, 888 S.W.2d 146 (Tex. App.—Houston [1st Dist.] 1994).

   b. **Any limitations or how much may be awarded as punitive damages?**

   The award of exemplary (punitive) damages is generally limited to the greater of the following:

   1. Twice the amount of economic damages, plus any noneconomic damages (up to $750,000.00) found by the jury; or
   2. $200,000.00

8. Citations or criminal convictions resulting from a motor vehicle accident

a. Are citations admissible in the civil litigation?

Only if there is a guilty verdict.

b. How does a guilty plea or verdict impact civil litigation? Plea of no contest?

A guilty plea can be used against the defendant in civil litigation, a plea of no contest cannot.

9. Recent, significant trucking or transportation verdicts in each state

Alma Nunez, Individually and on Behalf of Martin Nunez, Minor; and on behalf of the Estate of Abraham Cereceres, deceased, Julio Cesar Mora Alvillar, Socorro Cereceres, Cleofas Cereceres, and Jesus Camarillo v. Manuel Sanchez Cobarrubias, Isabel Baeza, Baeza Trucking in its common or Assumed Name, and AES Drilling Fluids, LLC.

2016 Jury Verdicts LEXIS 11595
15-08-21108-CVR
December 16, 2016
Fatality accident
Verdict: $19 million

Irasema Hinostroza Garcia, as next friend of Jazmin Elizabeth Galindo Hinostroza and Yatzari Nohemi Galindo Hinostroza, for the wrongful death of Manuel Galindo Camacho under the Texas Wrongful Death and Survival Statutes v. O'Reilly Auto Enterprises, LLC d/b/a O'Reilly Auto Parts, and David Shoots.

2016 Jury Verdicts LEXIS 5601
DC-15-02606
July 19, 2016
Fatality accident
Verdict: $37,945,000.00, reduced to $9 million due to a high-low agreement range of $3 million to $9 million

10. Admissible evidence regarding medical damages - can plaintiff seek to recover the amount charged by the medical providers or the amount actually paid, and is there a basis for post-verdict reductions or off-sets

Plaintiff can recover only for the amount actually paid or incurred however, Plaintiffs may not recover for any reductions or write-offs in medical costs. Haygood v. De Escabelo, 356 S.W.3d 390 (Tex. 2011).
11. **Driver criminal history and how it affects negligent hiring and supervision claims**

Motor Carriers can be held liable for hiring drivers with criminal histories, specifically when the criminal action is one disclosed in Texas Transportation Code’s list of “disqualifying offenses.” This list can be found in § 522.081.

As to liability, Texas falls in line with Federal law, 49 CFR §383.51 - Disqualification of drivers:

(a) General.

(1) A person required to have a CLP or CDL who is disqualified must not drive a CMV.

(2) An employer must not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a CMV.