1. Spoliation

a. What is the rule regarding spoliation of evidence in Illinois?


A party can claim spoliation if they know or have reason to believe that evidence which was relevant and material to the litigation is lost or destroyed by an opponent. The party's recourse is as follows: (1) sanctions, including the dismissal of his opponent's complaint under Rule 219(c), or (2) bring a claim for negligent spoliation of evidence which is predictably brought under a negligence theory (duty/breach/causation/damages).

b. Is there a duty to preserve evidence absent a specific demand?

A defendant may owe "a duty of care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188, 195, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995). Furthermore, in a negligence claim involving the loss or destruction of evidence, plaintiff must allege sufficient facts showing that such loss or destruction caused her to be unable to prove her underlying suit. *Id.* at 196, 209 Ill.Dec. 727, 652 N.E.2d 267.

The Illinois Supreme Court set out a six-factor test to determine whether or not a pre-suit obligation to preserve evidence exists in *Shimanovsky v. GMC*. The case involved a potential product liability claim against an automobile manufacturer alleging a steering mechanism defect. The case was not yet in suit, but plaintiff's attorney sought to have an expert inspect the steering mechanism. The expert in fact performed destructive testing on the mechanism, rendering it impossible for future inspections. The plaintiff sought to minimize the issue since there was no court order prohibiting such testing, but as it was a potential product liability case, the actual product was obviously crucial when the litigation ensued. The court set out the following test as a result of the case:

1) the surprise to the adverse party;
2) the prejudicial effect of the proffered testimony or evidence;
3) the nature of the testimony or evidence;
4) the diligence of the adverse party in seeking discovery;
5) the timeliness of the adverse party's objection to the testimony or evidence; and
6) the good faith of the party offering the testimony or evidence;

The purpose of choosing which sanction is appropriate under Rule 219(c), is not merely to punish the violating party, but to effectuate the goals of discovery. A claim for negligent
spoliation of evidence under *Boyd* and a dismissal of a complaint as a sanction under *Shimanovsky*, are separate and distinct. The level of sanction depends on the culpability of the party whom destroyed evidence. Moreover, mere negligent spoliation for failure to foresee the destroyed evidence as being material to the litigation may not rise to a drastic level of sanctions.

c. **What is the rule of spoliation of evidence specifically relating to electronic data?**

As stated above, a company would be wise to preserve all available data if possible. There are situations in which data can be overwritten if equipment remains in operation post-occurrence. Thus, the trucking company can be proactive by seeking to release the truck back to service in exchange the opposing parties' agreement that the evidence will first be preserved due to the fact that litigation may not actually occur for a number of years depending on the circumstances. In such a situation, a carrier can avoid the risk of a negligent spoliation of evidence since there has been an agreement among the parties. Otherwise, a carrier may set out parameters for the plaintiffs attorneys/experts to perform an inspection on the equipment before being released back to service.

It is unreasonable to keep equipment out of service during the pendency of the litigation in most cases and thus, to be proactive in the preservation of available evidence seems to serve the purpose of discovery without the carrier losing great economic impact.

d. **What has your experience with its application to onboard equipment like DriveCam?**

Same as above.

e. **Does your state allow direct actions against responsible parties for spoliation?**

When the spoliator is a third-party to a lawsuit and the evidence was not under the control of any other party, the only redress available is to file a lawsuit against the spoliator for negligent spoliation under the *Boyd* theory. In general, there is no duty to preserve evidence for third-parties unless an agreement exists (statutory or otherwise), or assumption of the duty by affirmative conduct, and the foreseeability prong (would a reasonable person in similar circumstances have foreseen the evidence was material to potential litigation.

f. **Is there any limitation on upstream liability for spoliation?**

The non-manufacturing defendant must be free from fault.

2. **Citations or criminal convictions resulting from an accident**

a. **Are citations admissible in the civil litigation?**

Evidence of a driver arrest, citation, or receipt of ticket is generally inadmissible.

b. **How does a guilty plea or verdict impact civil litigation? No contest pleas?**

A guilty plea accompanying a traffic citation becomes admissible as a statement against interest and is thereby admitted in civil litigation. A no contest plea may not be used as an
admission but a conviction based upon a plea of *nolo contendre* may be received as evidence.

Moreover, a party who previously pled guilty in the criminal portion of the occurrence is permitted to explain away to the jury the circumstances of the purpose for the guilty plea. Sometimes, drivers may plead guilty to citations due to the distant locations of the traffic court in order to contest the citation. A driver may rely upon statements made by the other driver(s) at the scene or a police officer who makes exculpatory statements pertaining to the driver's conduct which he/she then relies upon in not attending the court hearing. Unfortunately, these statements are often unreliable and inadmissible.

However, the focus upon the citation may undermine any successful efforts to support a no liability defense.

If a plea of not guilty is entered, and the citation is either dismissed or the driver is found guilty, the result of the citation is likely inadmissible.

3. **Can a plaintiff maintain a negligent hiring/supervision/training claim where the employer admits scope and course of employment?**

Since Illinois recognizes the placard/logo liability, a claim for vicarious liability is almost always going to apply in commercial trucking/transportation cases.

Though an employer does have a duty to refrain from hiring or retaining an employee who is a threat to third persons to whom the employee is exposed. *Bates v. Doria*, 150 Ill. App. 3d 1025, 502 N.E.2d 454 (2nd Dist. 1986), *citing Pascoe v. Meadowmoor Dairies* (1963), 41 Ill. App. 2d 52, 56, 190 N.E.2d (1st Dist. 1963). Such a cause of action arises in favor of a person who is injured as the proximate result of the employer's negligence in hiring or retaining the employee. *Id.*

However, an employer's direct liability for negligent hiring and retention is distinct from its respondeat superior liability for the acts of its employees. *Van Horne v. Muller*, 185 Ill. 2d 299, 311, 705 N.E.2d 898 (1998) *citing Bates*, 150 Ill. App. 3d at 1031. Under a theory of negligence hiring or retention, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, as opposed to the employee's wrongful act. *Young v. Lemons*, 266 Ill. App. 3d 49, 52, 639 N.E.2d 610 (1st Dist. 1994).

4. **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 offsets.**

Illinois follows the collateral source rule which in Illinois is both, a rule of evidence and a substantive rule of damages. *Klesowitch v. Smith*, 52 N.E.3d 365, 375 (Ill. App. March 17, 2016). As a rule of evidence, it prevents the jury from learning any about collateral income. *Id.* As a substantive rule of damages, the rule bars defendants from reducing the plaintiff's compensatory award by the amount the plaintiff received from the collateral source. *Id. (quoting Wills v. Foster*, 892 N.E.2d 1018, 1023 (Ill. S. Ct. 2008)).

Thus, plaintiffs are entitled to seek the full amount of all medical bills that have been charged, regardless of whether they have been paid or not – as long as the requisite foundation is laid to substantiate the unpaid portions of those medical charges which have not yet been satisfied.
There is no post-verdict reduction available in trucking/transportation cases.

5. **What were significant trucking verdicts or rulings in Illinois last year?**

   April 2016 – Cook County – a jury awarded **$22.7 million** on behalf of a family whose father was killed by a truck driver who had been speeding and rear-ended his vehicle, crashing it into the truck in front of him. The at-fault driver had a history of speeding tickets and drugs in his system at the time of the crash.

   January 2017 – Northern District of Illinois – jury awarded **$5.2 million** to couple for injuries sustained after the trailer of a semi-truck became dislodged and struck their vehicle.

   March 2017 – Winnebago County, a jury awarded **$15 million** to a woman whose mother was killed after a truck drove into the rear-end of her vehicle in stopped traffic on a highway. There were two dashboard cameras in the tractor from which the jury inferred the driver had been fatigued and was falling asleep as opposed to the defense's theory that the driver had been checking his gauges.

6. **What is the discoverability of insurance adjuster file materials in your state when outside counsel has not been retained?**

   When the insurance carrier has a duty to select an attorney and provide a defense to its insured, statements made by an insured to his or her insurance carrier or its investigator fall within the attorney-client privilege. *People v. Ryan*, 30 Ill.2d 456, 197 N.E.2d 15, 17 (1964); *Martin v. Clark*, 92 Ill.App.3d 518, 415 N.E.2d 30, 32, 47 Ill.Dec. 305 (3d Dist. 1993) (insured's statements to independent contractor retained by carrier to investigate claim are privileged).

   To establish the privilege, the insured "need only establish: (1) the insured's identity; (2) the insurance carrier's identity; (3) the insurance carrier's duty to defend the insured; and (4) that a communication was made between the insured and an agent of the insurance carrier." *Exline v. Exline*, 277 Ill.App.3d 10, 659 N.E.2d 407, 410, 213 Ill.Dec. 491 (2d Dist. 1995). Moreover, if a statement is made to an insurer by an insured that faces the possibility of liability, it remains privileged later in the litigation, even if the insured is not one of the defendants.

   Thus, insurance adjuster's claims notes, recorded statements and the like would fall into this category and not be discoverable. It is referred to as the insured-insurer privileged and commonly cited in responding to discovery.

7. **Does your jurisdiction follow Carmack or are there jurisdictional specific rules regarding cargo liability?**

   In 2015, the Northern District of Illinois, explained the law of who has the burden of proof in a Carmack Amendment claim. The case, *The Custom Companies, Inc. v. Azera, LLC, et al.* No. 12 C 2590, (N.D. Ill 2015), involved a company which contracted with a carrier to ship their cargo from California to Pennsylvania, and during transit, the truck carrying the goods was involved in a rollover accident. As a result, the company’s cargo sustained damage in excess of $100,00. The court needed to determine who was responsible for the lost goods.

   To establish a *prima facie* Carmack Amendment claim, a shipper must demonstrate (1) delivery of the shipment to the carrier in good condition; (2) loss or damage to the shipment; and (3) the amount
of damages. REI Transport, Inc. v. C.H. Robinson Worldwide, Inc., 519 F.3d 693, 699 (7th Cir. 2008). Once a *prima facie* case is established, the carrier has a burden to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. Allied Tube & Conduit Corp. v. S. Pac. Transp. Co., 211 F.3d 367, 370-71 (7th Cir. 2000).

For example, a carrier would not be held responsible for lost or damaged goods in the event of:

1) the act of the shipper;
2) acts of God
3) public enemies (during times of war)
4) public authority; or
5) the inherent vice or nature of the goods being shipped.

8. **Does your jurisdiction require pre-trial disclosure of surveillance/social media investigations? If so, when are you required to make disclosures?**

Illinois requires full disclosure of any such materials. Illinois law supports discovery of videotapes prepared by consultants in preparation for litigation. Where the material gathered or produced by an attorney is of a more concrete nature . . . and does not expose the attorney's or expert's mental processes, it serves the judicial process and is not unfair to require the parties to mutually share such material and analyze it prior to trial. Neuswanger v. Ikegai America Corp., 221 Ill.App.3d 280, 285, 163 Ill.Dec. 926, 582 N.E.2d 192 (1991).

Ultimately, the information must be disclosed prior to trial in accordance with the rules of evidence. If the information becomes available prior to discovery, and that information is requested, it should be disclosed to the requesting party, with the exception of materials which can be claimed as privilege.