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

In Utah, a person operating a motor vehicle may use a handheld phone only in limited circumstances. Utah Code § 41-6a-1716(3) (2014). It is permissible to use a handheld phone while driving to (among other things): (1) make or receive a telephone call; (2) view a global positioning or navigation device or application; and/or (3) report crimes or hazards or otherwise request emergency assistance. Id. § 41-6a-1716(3)(a)-(f). The law does not prohibit a user from using hands-free or voice operated technology, or from using a system that is physically or electronically integrated into the motor vehicle. Id. § 41-6a-1716(3)(g).

While operating a vehicle, it is not permissible to use a handheld phone to: (1) write, send or read a text message, instant message, or email; (2) dial a phone number; (3) access the internet; (4) view or record video; or (5) enter data. Id. § 41-6a-1716(2)(a)-(e).

A person who is convicted of a violation of Section 41-6a-1716 is generally guilty of a class C misdemeanor. Id. § 41-6a-1716(4)(a). A person convicted under Section 41-6a-1716 may be guilty of a class B misdemeanor in certain circumstances, such as where the person has inflicted serious bodily injury upon another or in the case of a prior conviction for similar offenses. Id. § 41-6a-1716(4)(b). A person who is convicted of unlawful text messaging or electronic mail communication while driving may lose his or her license for a period of three months. Id. § 53-3-218(5) (2015).

Utah courts have not ruled on whether using a handheld phone while driving exposes a driver to punitive damages. For a plaintiff to establish such a claim, the plaintiff would have to “establish[] by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious . . . conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.” Utah Code § 78B-8-201(1)(a) (2011).

2. Discovery and admissibility of preventability determinations
Utah courts have not addressed whether a transportation company’s determination as to whether a particular accident was preventable is admissible. It may be argued that such a determination is inadmissible for three reasons: (1) such a finding is irrelevant; (2) such a determination constitutes subsequent remedial measures; and (3) the self-critical analysis privilege.

First, a company’s finding with respect to whether an accident was preventable may be irrelevant (under Utah Rule of Evidence 401) in a negligence action. A preventable accident is defined as an accident “that could have been averted but for an act, or failure to act, by the motor carrier or the driver.” 49 CFR § 385.3. On the other hand, negligence “means that a person did not use reasonable care,” i.e., a person who is negligent did not do “what a reasonably careful person would do in a similar situation.” Utah Model Jury Instructions (2d) CV202A. The federal standard with respect to whether an accident was preventable is different from the civil negligence standard. Thus, any such evidence may be irrelevant and inadmissible.

Second, Utah Rule of Evidence 407 may provide a basis for excluding a transportation company’s findings with respect to whether an accident was preventable. Rule 407 provides that “[w]hen measures are taken that would have made an earlier event that caused injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove” negligence or culpable conduct. Utah R. Evid. 407 (also listing exceptions). It may be argued that determining whether an accident was preventable constitutes taking measures that would make a similar accident less likely to occur, for the driver specifically and for the company’s safety program in general.

Third, while Utah has not adopted the self-critical analysis privilege, an argument can be made that it should be adopted and applied by Utah’s courts in this context. Utah has codified a version of the privilege in the limited context of environmental self-evaluations. See Utah R. Evid. 508 (2011); Utah Code § 19-7-107 (1995).

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

A. Generally


Utah appellate courts have recognized a spoliation inference. “[W]here a party to an action fails to provide or destroys evidence favorable to the opposing party, the court will infer the evidence’s adverse content.” Burns, 876 P.2d at 419 (emphasis omitted) (citations omitted). Utah Rule of Civil Procedure 37 allows a court to “instruct the jury regarding an adverse inference” where a party has “destroy[ed], conceal[ed], alter[ed], tamper[ed] with or fail[ed] to preserve a document, tangible item, electronic data or other evidence in violation of a duty.” See Utah R. Civ. P. 37(b)(7), (e) (2015). Even the negligent destruction of evidence may be
sufficient to trigger a spoliation instruction without a finding of willfulness or bad faith. See Daynight, 2011 UT App 28, ¶ 2. Where the trial court determines that a party has spoliated evidence, the jury may “assume that the evidence would have been unfavorable to” the spoliating party. Utah Model Jury Instructions (2d) CV131.

Spoliation sanctions may be imposed in Utah’s federal court where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the non-spoliating party is prejudiced by the destruction of the evidence. If the non-spoliating party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions. Turner v. Public Serv. Co., 563 F.3d 1136, 1149 (10th Cir. 2009). In addition, it is appropriate for a federal trial court to consider “the degree of culpability of the party who lost or destroyed the evidence.” North v. Ford Motor Co., 505 F. Supp. 2d 1113, 1116 (D. Utah 2007).

B. EBORs and Electronic Logging devices

Utah courts have not addressed the issue of spoliation in the specific context of EBORs and Electronic Logging devices. This type of evidence is likely to be analyzed as Electronically Stored Information (below).

C. Electronically Stored Information

1. State

The Utah Court of Appeals has affirmed the entry of default judgment against a spoliating party for the bad faith and willful destruction of electronically stored information. Daynight, 2011 UT App 28, ¶¶ 2-3 (a laptop). While the court indicated that a default judgment sanction is “an extreme one” that “should be meted out with caution,” the court also “note[d] that courts around the nation frequently grant default judgments against parties who intentionally destroy evidence, including evidence stored in computers and on hard drives.” Id. ¶ 3 (citations omitted).

Utah’s safe harbor provision provides 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.” Utah R. Civ. P. 37(e).

2. Federal

“[T]he duty to preserve means a litigant must take action to preserve evidence to prevent it from getting lost, destroyed, inadvertently or negligently overwritten, or intentionally wiped out, so that it is available to be produced to the other side.” Philips Elec. N. Am. Corp. v. BC Technical, 773 F.Supp.2d 1149, 1197 (D. Utah 2011). The failure of a company to issue an internal written litigation hold can constitute gross negligence if it is likely to result in destruction of relevant
information. *Id.* at 1202-03 (noting the company’s failure to collect either paper or electronic records from key players, the destruction of email, and the destruction of backup tapes). The Tenth Circuit has cautioned that the implementation of an internal litigation hold is only the beginning of a party’s discovery obligations—not the end:

Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that the relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis, and (3) that relevant nonprivileged material is produced to the opposing party.

*Id.* at 1207-08 (citation and internal quotation marks omitted).

For the safe harbor provision of Federal Rule of Civil Procedure 37(e) to apply, it must be shown that the company’s electronic system’s operation is reasonable and in good faith. *Phillip M. Adams & Assoc., L.L.C. v. Dell, Inc.*, 621 F.Supp.2d 1173, 1191 (D. Utah 2009).

D. Duty to preserve absent a specific demand

Utah courts have not stated whether there is a duty to preserve evidence absent a demand to do so and without a specific regulation. Utah courts have stated, in the product liability context, that where an action is not pending and where there is no notice of the impending filing of such an action, “we are not aware of any general duty requiring defendants to retain the allegedly discarded part.” *Burns*, 876 P.2d at 419. It would be advisable to adopt a risk-avoidance policy, i.e., a company should assume that all but the most minor accidents may result in litigation and take measures to preserve whatever evidence can reasonably be preserved from each accident. Having to later deal with spoliation problems because of a failure to take certain precautions shortly after the accident can be costly to defend at best and litigation-ending at worst.

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

A search on Lexis did not reveal any Utah cases directly addressing broker exposure or liability for motor carrier negligence.

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**

6. **Offers of Judgment**

Rule 68 of the Utah Rules of Civil Procedure provides: “If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree shall pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.” Utah R. Civ. P. 68(b).

The offer must be in writing; expressly refer to the rule; be made more than 10 days before trial; remain open for at least 10 days; and be served on the offeree under Rule 5. Utah R. Civ. P. 68(c).

For accidents arising on or after July 1, 2014, for cases filed under Tier 1 discovery (Rule 26(c)(5)), prejudgment interest is only recoverable if the plaintiff or other claimant tenders a written settlement demand at least 60 days before trial and the amount of the demand does not exceed 1-1/3 of the amount of the judgment eventually awarded at trial. *Id.* § 78B-5-824(2).

7. **Punitive Damages**

    a. **Are punitive damages insurable?**


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

        Generally, a plaintiff must prove that he or she sustained compensatory or general damages before s/he may be awarded reasonable punitive damages. *C.T. by & ex rel. Taylor v. Johnson*, 1999 UT 35, ¶14, 977 P.2d 479.

        Some statutory limitations on punitive damages exist:

        The Dramshop Act caps damages awardable at $1 million per person and $2 million aggregate. Utah Code §32B-15-301(2). Punitive damages against governmental entities are not allowed under the Governmental Immunity Act.

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

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

        Evidence that a person was convicted of an infraction is not admissible to prove the person acted negligently or to impeach the person’s testimony on those issues. Utah Rule of Evidence 416.

    b. **How does a guilty plea or verdict impact civil litigation? Plea of no contest?**
Utah’s Rule of Evidence 410 is the federal rule, verbatim, which allows evidence of guilty pleas so long as they are not withdrawn. Nolo contendere pleas are not admissible.

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

A search on Lexis’ “Verdict & Settlement Analyzer” turned up no significant trucking verdicts in Utah in the last three years. We are not otherwise aware of any such verdicts.

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-set**

Utah courts have not resolved this issue, although the strong trend in the district courts is to allow the amount billed into evidence, and to exclude evidence of the amount paid on the basis of the collateral source rule.


11. **Driver criminal history and how it affects negligent hiring and supervision claims**

While criminal history directly related to driving/transport infractions is relevant, other types of criminal history are not. Trucking companies have no duty to conduct a pre-hiring investigation of a driver’s non-vehicular criminal background. *A.C. v. Roadrunner Trucking*, 1993 U.S. Dist. LEXIS 7251, *31 (D. Utah Mar. 30, 1993) (company not liable for employee’s rape of hitchhiker).