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

Wisconsin prohibits “distracted driving” in general, but doesn’t expressly prohibit using cellphones while driving. Wis. Stat. Ann. § 346.89(1). Only recently-licensed motorists are prohibited entirely from using a cellphone when driving. Wis. Stat. § 346.89(4)(a), (4)(c)(2). Most other drivers are allowed to talk on a cellphone while at the wheel, except in areas where road construction, maintenance, or utility work is being done. Wis. Stat. § 346.89(4)(m). Texting while driving, however, is generally prohibited for all motorists. Wis. Stat. § 346.89(3)(b).

2. Discovery and admissibility of preventability determinations

There do not appear to be any cases (federal or state) specifically addressing the discovery and admissibility of preventability determinations in Wisconsin. However, preventability determinations may arguably be excluded on grounds that they constitute evidence of subsequent remedial measures under Wis. R. Evid. 904.07 or that the probative value is substantially outweighed by a danger of unfair prejudice under Wis. R. Evid. 904.03.

3. Spoliation of evidence, specifically related to electronic data and whether there is a duty to preserve evidence absent a specific demand
There are two kinds of spoliation sanctions: dismissal of the case, see, e.g., American Family Mutual Insurance Co. v. Golke, 768 N.W.2d 729 (Wis. 2009), and the spoliation inference. (“Dismissal of action as sanction for spoliation of evidence is an extreme sanction that is only justified in cases of egregious conduct involving, more than negligence, a conscious attempt to affect the outcome of the litigation, or a flagrant, knowing disregard of the judicial process; lesser spoliation sanctions, such as pre-trial discovery sanctions and negative inference instructions may be appropriate for spoliation where a party violated its duty to preserve relevant evidence, but where the destruction of such evidence did not constitute egregious conduct.”) Id. at ¶ 40.

The spoliation inference permits the trier of fact to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. See, e.g., S.C. Johnson & Son, Inc. v. Morris, 779 N.W.2d 19 (Wis. 2009).

The award of sanctions is wholly within the court's discretion, but the court is required to make factual findings that the conduct of the spoliator was in “bad faith” or egregious. The burden is on the party making the accusations of spoliation to prove by clear and convincing evidence that the other party “intentionally destroyed the evidence.” The sanction should be commensurate with the harm, and a court cannot award excessive sanctions for acts that are merely negligent. An independent tort of spoliation is not recognized in Wisconsin.

Regarding electronic data specifically, Wisconsin requires that the parties must first meet and confer regarding e-discovery issues, including the subject, time, cost, phasing of production, ESI preservation pending discovery, the form or forms in which ESI will be produced, the method for asserting or preserving claims of privilege, and, in certain cases, court appointment of a referee or expert witness to supervise e-discovery. Wis. Stat. § 804.01(2)(e).

A party may make a request to inspect, copy, test or sample any ESI. Wis. Stat. § 804.09(1). The request may, without leave of court, be served upon a party. Id. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts, and the form or forms in which ESI is to be produced. Id. The responding party may object to a requested form but must state the reasons for objection. Wis. Stat. § 804.09(2)(b)1. If a request or subpoena does not specify a form for producing ESI, the person responding shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person responding need not produce the same electronically stored information in more than one form. Wis. Stat. § 804.09(2)(b)2.

Absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system. Wis. Stat. § 804.12(4m).

4. Broker exposure or liability for motor carrier negligence

The Supreme Court of Wisconsin and Wisconsin Court of Appeals do not appear to have ruled on the issue of broker liability for motor carrier negligence.
5. **Logo or placard liability -- whether motor carrier liable for any vehicle bearing its Department of Transportation identification placard, company name, or business logo**

The Wisconsin Court of Appeals has held as follows:

In view of the ICC's express intent that its regulations not impose liability based solely on the carrier's identification on the vehicle, we decline to impose liability on that basis alone. The issue of a carrier's liability for injury caused by a leased vehicle is a matter of state law, as the ICC recognized. However, courts have looked to ICC regulations in defining the carrier's liability so as to further the important interests they protect. We interpret the ICC's decision as a statement that it does not consider liability based solely on the carrier's identification to be necessary for the achievement of its regulatory goals. We will defer to that judgment. We conclude that Jerzak Trucking's identification on Haka's truck on the date of the accident is not enough, in itself, to continue the written lease and impose liability on Jerzak Trucking. However, we also conclude that the existence of the carrier's identification on Haka's truck is evidence that there was a lease in effect on the date of the accident. This approach recognizes the importance of the carrier's identification to the ICC regulatory scheme and purposes, but does not impose liability solely on that basis.


6. **Offers of Judgment**

Wis. Stat. § 807.01(1) provides: “After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.”

Wis. Stat. § 807.01(3) provides: “After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.”

7. **Punitive Damages**
a. Are punitive damages insurable?

Yes. An insurer must specifically exclude coverage for punitive damages if it does not want the policy to cover punitive damages. *Brown v. Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (Wis. 1985).

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

Yes. Punitive damages are capped at $200,000 or twice the amount of compensatory damages, whichever is greater. The cap does not apply to drunk drivers. Wis. Stat. § 895.043(6). Non-economic damages for bodily injury arising from the care or treatment (or any omission) by a “long-term care provider”—which includes nursing homes, hospice centers, and assisted living centers—are capped at $750,000. This same limit already was in place for cases involving other health care providers. See Wis. Stat. § 893.55.

Additionally, in a wrongful death action additional damages are “not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship” to the spouse, children or parents of the deceased, or to minor siblings of the time of the deceased’s death.

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

a. Are citations admissible in the civil litigation?

Traffic citations are generally inadmissible under Wisconsin law absent the driver pleading guilty or being found guilty by a jury. Under Wisconsin’s Rules of Evidence,

> Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person’s conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Wis. Stat. § 904.10. See also *State v. Myrick*, 848 N.W.2d 743 (Wis. 2014). Additionally, pursuant to Wis. Stat. § 345.38, “The forfeiture of a deposit under s. 345.37(2) to a charge of violation of a traffic regulation shall not be admissible in evidence as an admission against interest in any action or proceeding arising out of the same occurrence as the charge of violation of a traffic regulation.” However, the Supreme Court of Wisconsin has held that “a plea of guilty to a traffic charge is admissible in evidence as an admission against interest.” *Gaspord v. Hecht*, 108 N.W.2d 137, 139 (Wis. 1961).
b. How does a guilty plea or verdict impact civil litigation? Plea of no contest?

See response to 8(a) above.

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

We are aware of the following significant trucking or transportation verdict from 2016:

**Cornwell v. Daniels Sharpsmart, Inc.**, No. 2014-CV-003344, 2016 WL 3505061 (Wis. Cir. Ct., 1st Judicial Dist., Milwaukee Co.): Plaintiff alleged injuries due to stopped vehicle being struck from rear by tractor-trailer that failed to maintain reasonable distance and that owner of tractor-trailer was causally negligent. Defendants claimed collision occurred at low speed during stop-and-go traffic due to lane closure and contested extent of Plaintiff’s injuries. Jury was instructed that operator of tractor-trailer was negligent and that negligence was cause of Plaintiff’s injuries. Verdict in favor of Plaintiff in total amount of $563,191.

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

In general, a plaintiff’s recovery for medical services is for the reasonable value of the services, not for the expenditures actually made or the obligations incurred, so evidence of a reduced or negotiated rate would not be admissible. **Leitinger v. DBart, Inc.**, 2007 WI 84, ¶ 23, 302 Wis. 2d 110, 121, 736 N.W.2d 1, 6. (The Collateral Source Rule provides that a tortfeasor’s liability to an injured individual is not reduced because the injured individual received payments from some other source.) *Id.* at ¶ 26. However, there is a rebuttable presumption that the amount of medicals billed reflects the reasonable value of the services incurred. Wis. Stat. § 908.03(6m)(bm).

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

Under Wisconsin’s Rules of Evidence, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character in order to show that the person acted in conformity therewith, unless offered for other purposes, such as proof of motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident. Wis. Stat. § 904.04(2)(a). Although not in the context of a negligent hiring and supervision case, the Supreme Court of Wisconsin has previously held that evidence of a driver’s previous arrests for drunk driving was part of an admitted pattern of conduct and established reprehensibility as part of an analysis to determine excessiveness of a punitive damages award. See **Strenke v. Hogner**, 704 N.W.2d 309 (Wis. 2005).

This section of the Compendium was prepared by an attorney not licensed in the State of Wisconsin. Although the attorney used his/her best efforts to set forth the current law, users of this section of the Compendium should rely solely on counsel licensed in the State of Wisconsin.