

TEXAS

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1. Identify the venues/areas in your State that are considered dangerous or liberal.

Texas is obviously a large state and has had some interesting swings in recent elections moving towards more liberal judges. Historically, the Rio Grande Valley (Hidalgo and Cameron Counties), East Texas (Harrison, Gregg, and Upshur Counties), Nueces County (Corpus Christi), Jefferson County (Beaumont), and El Paso County have been particularly Plaintiff friendly.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

Two historically large verdicts were handed down in Texas in the past year associated with trucking collisions. Both should be viewed unfavorably from the trucking company's perspective. The first (Patterson) due to the common nature of the claimed injury and the second (Blake) due to the facts surrounding the collision (Plaintiff had lost control and veered into oncoming traffic:

- a. *Patterson v. Frac Tech Services International, LLC. et al.*, Upshur County, Texas. The verdict, \$101 Million against a trucking company in Upshur County, Texas. The oil company tractor-trailer rear-ended Plaintiff. Drug tests revealed drugs in Defendant driver's system. The driver was also on probation for past driving violations at the time of the accident. Plaintiff survived the collision and claimed injuries associated with back and neck (requiring surgery). After the surgery, Plaintiff, a crane operator, claimed he was no longer able to work.
 - b. *Blake v. Werner*, Cause No. 2015-36666, Harris County, Texas. The verdict handed down was \$90 Million against Werner. A seven year old boy died and his 12 year old sister claimed catastrophic brain injury. Plaintiff's vehicle was travelling east bound on Interstate 20 outside of Odessa, Texas. A Werner truck was travelling west bound. Plaintiff's vehicle crossed median into the path of the Werner Truck. The Plaintiff's claims centered on the fact that the National Weather Service Winter Storm Warnings not being communicated to Werner's driver. Werner's driver was not cited in the collision.
3. Are accident animations and/or computer-generated evidence admissible in your State?

A computer animator must be qualified and their opinion must be based upon reliable information and information relevant to the case for that person's expert testimony to be admissible. *Costilla v. Crown Equip. Co.*, 148 S.W.3d 736, 741 (Tex. App.—Dallas 2004, no pet.). Relevancy and reliable are the most common issues to this type of expert testimony. To be relevant, the testimony by the expert must tie the facts sufficiently enough to the case that a jury can use that testimony in resolving the factual dispute. *Id.* at 742. To be reliable, the testimony by the expert must be grounded in science. *Id.* There can be no ruling on the admissibility of any computer-generated animation without the consideration of following 5 requirements.

- 1) The expert that created the animation must have adequate credentials and experience
- 2) The computer hardware must be commercially available and accepted as valid by the engineering community.
- 3) The computer software must be commercially available and accepted as valid by the engineering community.

4) To validate the input data 1) the source of the data must be given; 2) the way in which the data was checked for accuracy must be disclosed; 3) the way in which the data was input must be disclosed; 4) the assumptions that were made must be disclosed; and 5) how the data input was checked must be disclosed.

Howard L. Nations & James L. Barton, *Demonstrative Evidence*, in 1 ADVANCED EVIDENCE AND DISCOVERY COURSE A-90 (1989)(published by the State Bar of Texas).

The only way in which reenactments can be admissible is if they are being used to summarize an expert's testimony. *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 130 (Tex. App.—Beaumont 2001, pet. denied). In *Emmons*, over the objections of the defense counsel, the Court decided to admit computer-generated animations that were used as a demonstration of the expert's testimony regarding the events of an accident. The Court of Appeals supports this decision in their *Uniroyal Goodrich Tire Co* opinion stating, "Video animation and other demonstrative evidence that 'summarize, or perhaps emphasize, testimony are admissible if the underlying testimony has been admitted into evidence, or is subsequently admitted into evidence.'" *Id.* (quoting *Uniroyal Goodrich Tire Co*, 977 S.W.2d at 342). Additionally, support for this decision is found in *Pitcock v. B&W, Inc.* in which the court states, "Reenactments can be admissible as extrajudicial experiments". See *Pitcock v. B&W, Inc.*, 476 S.W.2d 83, 93 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.).

Furthermore, photographs of out-of-court experiments and videotaped reenactments should be treated the same. The reason out-of-court experiments are admissible is because there is considered to be a "substantial similarity" – not necessarily identical – between conditions existing at the time of the experiment and conditions existing at the time of the incident in question. *Id.*

It is up to the trial court to determine whether the conditions are similar enough to aid the jury or too dissimilar that they will only confuse the jury. *Id.* The disparity in similarity will go to the weight of the evidence. *Id.* Additionally, it has been determined that reenactments can be used as demonstrative aids to help witnesses follow an expert's testimony. Under these circumstances a foundation that the expert's testimony is truthful and accurate must be laid. See *Speier v. Webster College*, 616 S.W.2d at 618-19.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

Generally if a video recording (including in-cab video) is a fair representation of a transaction, conversation, or occurrence it is admissible. *Seymour v. Gillespie*, 608 S.W.2d 897, 898 (Tex. 1980). In 2018 the Texas Supreme Court clarified the procedure for admissibility of videos. See *Diamond Offshore Servs. v. Williams*, 542 S.W.3d 539, 546-47 (Tex. 2018). Although this case did not deal with in-cab video, it dealt with a workplace accident involving cameras on an off-shore oil rig, the case points out the importance of having the trial court actually view videos that are being offered whether you want the videos admitted or excluded. *Id.* In *Diamond Offshore*, the court ruled that the trial court abused its discretion in excluding a

video under Tex. R. Evid. 403 when it had not been viewed. *Id.* The Court held that courts should view videos before ruling on Rule 403 objections.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

Texas does not currently have any specific laws and/or regulations regarding retention of telematics data. The cases that deal with this type of spoliation all rely on the spoliation statutes and case precedent as avenues for relief and/or sanctions under appropriate circumstances.

In 2015, the retention period for Texas Crash Records Information System data was increased from 5 years to 10 years. Texas Department of Transportation. Crash Data Analysis and Statistics. 2016. (<http://www.txdot.gov/government/enforcement/crash-statistics.html>).

The only Texas statute that deals with telematics data is, Tex. Transp. Code § 547.615, which requires disclosure of Electronic Data Recorders in vehicles in the owner's manual of new vehicles sold or leased in the state and requires disclosure in agreements with subscription services. The Texas statute prohibits the download of data, except 1) with the owner's consent; 2) court order; 3) diagnosing, servicing or repairing the vehicle; or 4) vehicle safety research provided specific identifying information is redacted. There have been a number of hearings in Texas associated with criminal trials involving EDR evidence. Basically, these hearings are used to determine whether scientific evidence produced by an expert witness is valid and admissible in court. In every instance, EDR evidence was found to be admissible. Source: National Conference of State Legislatures. November 6, 2018. (<http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx>)

6. Is a positive post-accident toxicology result admissible in a civil action?

In Texas, evidence of intoxication—including toxicology results—may be admitted if it is relevant to the case and is used for the purpose of determining negligence or contributory negligence. However, intoxication in and of itself does not constitute negligence. *Dagley v. Thompson*, 156 S.W.3d 589, 592 (Tex. App.—Tyler 2003, pet. denied). For example, evidence of intoxication has been held to be admissible when there was also evidence of speeding and erratic driving. *Ford Motor Co. v. Whitt*, 81 S.W.2d 1032, 1036 (Tex. Civ. App.—Amarillo 1935, writ ref'd); *Southwestern Bell Telephone Co. v. Ferris*, 89 S.W.2d 229, 238 (Tex. Civ. App.—Dallas 1935, dis.). In another case, evidence that a driver crossed the center line of a highway and was in the wrong lane of travel sufficed to support the introduction of evidence of the driver's marijuana use. *Nichols v. Howard Trucking, Inc.*, 839 S.W.2d 155, 158 (Tex. App.—Beaumont 1992, no writ). In other words, toxicology results are relevant and admissible if used for the jury to consider how the party's intoxication contributed to their negligence.

7. Is post-accident investigation discoverable by adverse counsel?

Whether post-accident investigations are discoverable by adverse counsel in Texas depends on if the investigation was made in good faith anticipation of litigation, which would qualify the investigation as protected work product. The Texas Supreme Court has held that the anticipation of litigation test is satisfied whenever: 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. ¹ *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 203-04 (Tex. 1993). If the investigation satisfies this test, it is not discoverable.

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

In Texas, the owner of the automated driving system is considered the operator of the automated motor vehicle solely for complying with traffic or motor vehicle laws, regardless if the person is physically present in the vehicle while the vehicle is operating. *Tex. Transp. Code* § 545.453(a)(1). The automated driving system is considered to be licensed to operate the vehicle. *Tex. Transp. Code* § 545.453(a)(2). Further, a licensed human operator is not required to operate a motor vehicle if an automated driving system installed on the vehicle is engaged. *Tex. Transp. Code* § 545.453(b). However, an automated motor vehicle may not operate on a highway in Texas unless the vehicle is capable of complying with the applicable traffic laws, equipped with a recording device, equipped with a system that is in compliance with federal motor vehicle safety standards, registered and titled in accordance with the laws of Texas, and covered by motor vehicle liability coverage or self-insurance in the amount equal to the amount of coverage that is required in Texas. *Tex. Transp. Code* § 545.454(b). In the case of an accident, an automated motor vehicle or any human operator of the automated motor vehicle will comply with the statutes governing motor vehicle accidents. *Tex. Transp. Code* § 545.455.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Texas complies with 49 CFR 392.92 with respect to using hands-free devices and does not currently have any statutes or case law to provide additional preclusions or exceptions than what the federal rule already provides.

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

Texas does not currently have any Court decisions precluding Golden Rule arguments related to the Reptile theory made by Plaintiffs' counsel.

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

The Texas State Court system is robust. Maintaining an efficient justice system across a vast state comprised of 254 counties requires the complicated interworking of state and federal court systems. This structure presents many advantages and disadvantages for attorneys practicing in State courts in Texas.

A general advantage of the federal court system is that the federal court system is open to the public. In general, court records are made available to the public through the office of the court clerk. This access aids attorneys who may need to research past cases for case law precedent, or just in general practice to find a court document.

At top of the Texas court system sits two high courts- The Supreme Court and the Court of Criminal Appeals. Operating under two high courts presents several disadvantages in Texas as it complicates judicial-system administration. Neither court is truly supreme, thus, there is no high court. Therefore, Texas's courts have no ability to resolve disputes that arise when the courts reach different conclusions on a point of law. The complication in making these determinations leads to inefficient clogging of the court's docket and confusion for attorneys particularly when rules of evidence are interpreted in various ways.

State district courts are the primary trial courts in Texas. District courts are the state trial courts of general jurisdiction. A major disadvantage of Texas district courts results from the fact that the courts sit in a spider web of districts having overlapping geographic boundaries. Often a single county is in two or three district court districts, with each of those districts being comprised of a different group of counties. This can prove to be inefficient and it invites forum-shopping.

While the federal court system has special courts or procedures to handle complex or specialized litigation, Texas state courts do not. Consequently, complex litigation in Texas is often conducted in trial courts lacking the knowledge or resources to handle that litigation. Source: Texas for Lawsuit Reform Foundation, *Recommendations for Reform: The Texas Judicial System* (2007)(published by Texas for Lawsuit Reform Foundation)

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Texas Rule of Evidence 410 governs the admissibility of traffic citations in civil litigation in Texas. It provides that only a final guilty plea (i.e. one that was not later withdrawn) and statements made to a prosecutor in negotiating a final guilty plea are admissible. *Cox v. Bohman*, 683 S.W.2d 757, 758 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (citing *Barrios v. Davis*, 415 S.W.2d 714, 716 (Tex. App.—Houston 1967, no writ)). The guilty plea is considered admissible as a statement against the declarant's interest, and it is the party seeking to introduce the evidence's burden to show the plea was made in open court. *Rainbo Baking Co. v. Stafford*, 764 S.W.2d 379, 385 (Tex. App.—Beaumont 1989) writ denied, 787 S.W.2d 41 (Tex. 1990) (citations omitted); *Cox*, 683 S.W.2d at 758. Evidence that a party merely received a citation from an officer is inadmissible for any purpose. *DeLeon v. Louder*, 743 S.W.2d 357, 360 (Tex.

App.—Amarillo 1987), writ denied sub nom. *Louder v. DeLeon*, 754 S.W.2d 148 (Tex. 1988) (citations omitted). Accordingly, merely paying a traffic ticket is not sufficient to make the citation admissible as such payment merely constitutes a plea of nolo contendere. *Cox*, 683 S.W.2d at 758 (citing Tex. Code Crim. Proc. Ann. art. 27.14) (citations omitted).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

The Texas Civil Practice and Remedies Code limits a plaintiff's recovery of medical expenses to those actually paid or incurred by or on behalf of the plaintiff. Under Section 41.0105, a plaintiff seeking recovery of medical expenses is not entitled to the full amount billed by a provider, but rather is limited to those amounts which actually have been, or must be, paid by or on behalf of the plaintiff. In other words, a plaintiff cannot recover for adjustments and write offs to the medical bills. Since plaintiffs are only entitled to put on evidence of medical expenses that have been actually paid or incurred, there is no need for post-verdict reductions for adjustments or write offs to medical bills.

14. Describe any statutory caps in your State dealing with damage awards.

The Texas Civil Practice and Remedies Code applies a cap to exemplary damages. Under Section 41.008, exemplary damages in Texas may not exceed an amount equal to the greater of: (1) two times the amount of economic damages, plus an amount equal to any non-economic damages found by the jury, not to exceed \$750,000; or (2) \$200,000. The only other damages caps in personal injury lawsuits in Texas apply to lawsuits involving medical malpractice claims and claims against governmental entities.