

## ARIZONA

---

### SPOLIATION

#### 1. Elements/definition of spoliation: Is it an “intentional or fraudulent” threshold or can it be negligent destruction of evidence.

Spoliation can be negligent. However, in Arizona, the simple fact of spoliation does not mean that a sanction is imposed. The range of the Court’s discretion runs from no sanction to dismissal. The most common sanction is a negative inference jury instruction. “Adopting inflexible or ‘bright line’ rules in this area, in our view, would be ill-advised. Rather, issues concerning destruction of evidence and appropriate sanctions therefore should be decided on a case-by-case basis, considering all relevant factors” Souza v. Fred Carries Contracts, 955 P.2d, 3,5, 191 Ariz. 247,250. Such factors include, for example, notice of a duty to preserve relevant evidence, as pertains to whether loss or destruction of evidence constitutes spoliation. Negligence can be sufficient for a finding of spoliation but generally, to get a spoliation instruction, a party must prove the evidence lost or destroyed is essential and the lack of evidence is because of an intentional act or bad faith. Smyser v. City of Peoria, 160 P. 3d 1186, 1198, 215 Ariz. 428 (App. 2007). “an innocent failure should be of less concern than intentional destruction or failure to comply with a court order or discovery obligation to preserve or produce evidence.” Id. Dismissal is an extremely rare sanction.

#### 2. Distinction between first party and third-party spoliation.

Spoliation by a party to a suit is considered ‘first-party spoliation’. Non-party spoliation is considered ‘third-party spoliation’.

#### 3. Whether there is a separate cause of action for a spoliation claim.

Arizona does not recognize causes of action for either first-party or third-party spoliation.

#### 4. Remedies when spoliation occurs:

- Negative inference instruction

A negative inference instruction is most frequently available when spoliation is found to have been caused by an intentional act or bad faith. However, though less likely, the instruction may be available for negligent spoliation. The court has inherent discretionary power to make appropriate evidentiary ruling in response to destruction.

- Dismissal

Dismissal is an available sanction, but only ordered in the most extremely prejudicial of circumstances.

- Criminal sanctions

There is no decisional record of criminal sanctions having been imposed in Arizona for spoliation.

- Other sanctions

Arizona courts have full discretion in applying a range of sanctions, though the primary sanctions are negative inference, no sanction, or dismissal.

#### **5. Spoliation of electronic evidence and duty to preserve electronic information.**

Arizona law does not currently recognize a distinction between physical and electronic evidence spoliation. The law should similarly apply.

#### **6. Retention of surveillance video.**

Traditional spoliation law applies.

### **COLLATERAL SOURCE**

#### **7. Can plaintiff submit to a jury the total amount of his/her medical expenses, even if a portion of the expenses were reimbursed or paid for by his/her insurance carrier?**

Yes.

#### **8. Is the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier admissible at trial or does the judge reduce the verdict in a post-trial hearing?**

The verdict is not reduced under Arizona's Collateral Source Rule. Note: The Rule applies in tort but not breach of contract cases.

#### **9. Can defendants reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by an insurer? (i.e. where plaintiff's medical expenses were \$50,000 but the insurer only paid \$25,000 and the medical provider accepted the reduced payment as payment in full).**

No.

### **ACCIDENT AND INCIDENT REPORTS**

#### **10. Can accident/incident reports be protected as privileged attorney work product prepared in anticipation of litigation or are they deemed to be business records prepared in the ordinary course of business and discoverable?**

Not in traditional tort cases. A possible exception may be raised for original communications with counsel in anticipation of litigation.

### **SOCIAL MEDIA**

#### **11. What means are available in your state to obtain social media evidence, including but not limited to, discovery requests and subpoenas? Can you give some examples of your typical discovery requests for social media?**

Discovery is permitted, and we have obtained production on a simple request for social media page information. The discovery requests have generally not been contested. On the few occasions when they have, we have petitioned the Court and our petition has been granted. We also retain third party investigators to obtain social media. We have subpoenaed Facebook with an authorization and they

produced information.

One general Request for Production used in the past is as follows:

Please provide in writing all online accounts held by Plaintiff, including but not limited to, email accounts, cloud storage accounts, third party vendors, social media websites, and blogging sites. Enclosed with this Request for Production are authorizations allowing the release of information from any and all online and public social media sites identified by the Plaintiff. Please have them executed and return the attached authorizations to our office as soon as possible. Pursuant to Fed. R. Civ. P. 26(b), 34(a) and your client's obligation to preserve all electronically stored information, your client is hereby requested to preserve, as is, all information contained within any online or public accounts, and not to change, make additions or deletions to same. In lieu of authorizations to release this information, your client can designate a date and time to meet with a staff member in our office to disclose the log-in information for all accounts to allow us to download information. After the download is complete, all access can be denied by the changing of passwords. All information gleaned from the accounts during the download will be provided to you in disclosure.

**12. Which, if any, limitations do your state's laws impose on a party on obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.**

If the evidence is obtained, relevance is an after-the-fact determination. Privacy depends on the media source, but we have not had to fight a media source on that basis, to date.

**13. What, if any, spoliation standards has your state's Bar or courts set forth on social media for party litigants?**

None at this time.

**14. What standards have your state's courts set for getting various types of social media into evidence? Please address relevance, authenticity, and whether any exclusionary rule might apply (e.g., Rules 404(a) or 802).**

Relevance is the same standard regardless of whether the evidence is social media or other tangible evidence. Authenticity has not been a significant issue although a suitable foundation must be laid as to how the evidence was obtained. Proof of authorship is a difficult foundational hurdle and courts have disallowed social media evidence as an admission based upon inability to prove authorship.

**15. How have your State's courts addressed an employer's right to monitor employees' social media use?**

Not specifically.

**16. How have your State's state or federal courts addressed limitations on employment terminations relating to social media?**

A recent search has found no Arizona case law yet on the subject. There is also no case law yet on the legitimacy of company policy forbidding social media engagement on company computers or during company time.