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HIGGS FLETCHER & MACK, LLP
San Diego, California
www.higgslaw.com

Derek W. Paradis, Esq.
paradisd@higgslaw.com

CALIFORNIA

SPOLIATION

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

Spoliation of evidence is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation." (*Kearney v. Foley & Lardner, LLP* (9th Cir. 2009) 590 F.3d 638, 649.)

The California Supreme Court held that there is no separate tort cause of action for intentional spoliation committed by a party to the underlying lawsuit, at least when the spoliation is or should have been discovered before the conclusion of that lawsuit. (*Hernandez v. Garcetti* (1998) 68 Cal.App.4th 675, 680.) In addition, the California Courts of Appeal in the First, Second, Third, and Fourth Districts have declined to recognize negligent spoliation of evidence. (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1239; *Coprich v. Superior Court, Los Angeles County* (2000) 80 Cal.App.4th 1081, 1083; *Lueter v. State* (2002) 94 Cal.App.4th 1285, 1288; *Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1401.) he

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

Third party spoilation simply means when the alleged spoliator is not a party to the lawsuit while first party refers to the actual parties in a lawsuit. (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1293.)

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

No, see above. Spoliation of evidence is no longer a recognized tort in California as the state prefers non-tort remedies to avoid "undesirable social costs" as discussed in the *Cedars-Sinai Medical Center* decision. (*Cedars-Sinai Med. Ctr. V. Superior Court* 18 (1989) Cal.4th 1, 17-18; *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 474.)

4. Remedies when spoliation occurs:

- Negative inference instruction

California recognizes an evidentiary inference against the party who destroyed the evidence or rendered it unavailable. (*Cedars-Sinai Med. Ctr.*, *supra*, 18 Cal.4th at 11; Evid. Code § 413 [provides an unfavorable evidentiary inference to party who destroyed or rendered evidence unavailable].) The Judicial Council of California Civil Jury Instructions has "willful suppression of evidence" for this inference under No. 204.

- Dismissal

California also recognizes termination sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party. (*Cedars-Sinai Med. Ctr.*, *supra*, 18 Cal.4th at 12.) "A terminating

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sanction is appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 [affirming terminating sanctions where the party negligently failed to prevent potentially relevant files from being destroyed by a third party storage facility].)

- Criminal sanctions

California recognizes criminal penalties as a remedy for spoliation. (*Cedars-Sinai Med. Ctr.*, *supra*, 18 Cal.4th at 13.) "A person who, knowing that any book, paper, record, instrument in writing, digital image, video recording owned by another, or other matter or thing, is about to be produced in evidence upon a trial, inquiry, or investigation, authorized by law, willfully destroys, erases, or conceals the same, with the intent to prevent it or its content from being produced, is guilty of a misdemeanor." (Pen. Code § 135.)

- Other sanctions

Additional sanctions possible include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts to be taken as established or, in the alternative, precluding the offending party from supporting or opposing designated claims or defenses, and evidence sanctions prohibiting the offending party from introducing designated matters into evidence. (*Cedars-Sinai Med. Ctr.*, *supra*, 18 Cal.4th at 12-13.)

Moreover, Rule 3.4 of the California Rules of Professional Conduct prohibits an attorney from altering, destroying, or concealing evidence. Violation of Rule 3.4 could result in sanctions or suspension from the State Bar.

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

The Civil Discovery Act does not specifically prohibit the intentional destruction of relevant evidence before a lawsuit has been filed or before a discovery request. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1419.) Courts disagree on whether spoliation of electronic evidence is sanctionable under the Discovery Act. Some cases authorize discovery sanctions for spoliation absent any discovery request. (*Cedars-Sinai Med. Ctr.*, *supra*, 18 Cal.4th at 12.) Other courts reject sanctions for spoliation on the ground that the Discovery Act authorizes sanctions only to the extent authorized by the chapter governing any particular discovery method or provision of this title, and no discovery methods apply to spoliation before a discovery request. (*New Albertsons, Inc. v. Sup. Ct.* (2008) 168 Cal. App. 4th 1403, 1430-31.)

There is not much California case law regarding discovery of electronically stored information ("ESI"). However, "[b]ecause of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions." (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 862.) As such, under federal precedent, "parties are subject to a general duty to preserve such things as deleted data, backup tapes, and metadata that constitute unique, relevant evidence that might be useful to an adversary." (*Ibid.*) Spoliation of ESI after receiving an ESI preservation letter could possibly result in sanctions under section 2023.010 of the Code of Civil Procedure. Currently, a safe harbor exists for any ESI "lost, damaged, altered, or overwritten as the result of the routine, good faither operation of an electronic information system." (Civ. Code §§ 1985.8; 2031.060, subd. (i).)

6. Retention of surveillance video.

California does not maintain a rule that requires the retention of surveillance video. (See generally *Penn v. Prestige Stations, Inc.* (2000) 83 Cal.App. 4th 336 [observing that even if in some circumstances the failure to exercise due care with respect to evidence may be compensable as negligent spoliation of evidence, such a claim could not be maintained against a convenience store employee who erased surveillance-camera video tapes that may have shown the conditions in the store when the customer slipped and fell on water on the

floor because the employee had not agreed to preserve the video tape and was under no obligation to do so].)

However, other sanctions and consequences noted above in Questions 4 and 5 could apply depending on circumstances.

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, but the total amount of medical expenses is limited to the amount actually incurred and reasonable value (paid or stilling owing for medical care) not the amount billed. (*Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541, 555.)

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?

No. Evidence that payments for medical care were made in whole or in part by an insurer is inadmissible at the time of trial under the collateral source rule. (*Howell*, *supra*, 52 Cal.4th at 567.) "No 'credit against the tortfeasor's liability' [citation omitted] and no deduction from the 'damages which the plaintiff would otherwise collect from the tortfeasor' [citation omitted] is allowed for the amount paid through insurance. Plaintiff thus receives the benefits of the health insurance for which she paid premiums: her medical expenses have been paid per the policy, and those payments are not deducted from her tort recovery." (*Id*. at 342.)

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).

Yes. A plaintiff may not recover more than his or her medical providers accepted in full payment for their services. The amount paid may be admitted into evidence without evidence of the payment's source. Evidence of the full amount billed for a plaintiff's medical care is not admissible to determine past medical expenses where a plaintiff's health care providers have accepted a reduced or negotiated rate for services. (*Howell*, *supra*, 52 Cal.4th at 563.)

Evidence of the full amounts billed for a plaintiff's medical past expenses are also not admissible to determine future medical expenses and noneconomic damages. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330-1333.)

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?

It depends. If the report is created by an employee who has been a witness to a matter that requires communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, the employee is an independent witness, and the employer's requirement that the employee make a statement for transmittal to the employer's attorney does not alter the status or make the statement subject to the attorney-client privilege. (*D. I. Chadbourne, Inc. v. Superior Court of City and County of San Francisco* (1964) 60 Cal.2d 723, 737.)

On the other hand, if an "employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer" and "if the employer

directs the making of the report for confidential transmittal to its attorney, the communication may be privileged." (*Ibid*.)

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?

The traditional means of discovery are available for obtaining social media evidence such as special interrogatories, requests for production of documents, depositions, and subpoenas. Parties can even direct the opposing party to produce a smart phone for inspection by a third-party forensics' expert; however, this will likely be expensive.

Direct discovery to a party might be the most effective approach due to the stance many social media companies take in response to subpoenas. In general, Facebook and Instagram take the following position in response to subpoenas, "Federal law does not allow private parties to obtain the content of communications (example: messages, timeline posts, photos) using subpoenas. See the Stored Communications Act, 18 U.S.C. § 2701 et seq." (*May I obtain any account information or account contents using a subpoena?* www.facebook.com/help/133221086752707 [as of Aug. 31, 2021]; *Information for Law Enforcement*, www.facebook.com/help/instagram/494561080557017 [as of Aug. 31, 2021].)

Specifically, internet social providers rely on federal law to excuse them from disclosing not only the contents of an email and the email's identity but also social media posts in response to a subpoena. (*O'Grady v. Sup.Ct. (Apple Computer, Inc.)* (2006) 139 Cal.App.4th 1423, 1447-1448; but see *Negro v. Sup.Ct. (Navalimpianti USA, Inc.)* (2014) 230 Cal.App.4th 879, 889 [ISP required to produce emails in response to subpoena under SCA's "lawful consent" exception (18 USC § 2702(b)(3)]; *Facebook, Inc. v. Sup.Ct. (Hunter)* (2018) 4 Cal.5th 1245, 1274 [social media communications configured by social media user to be "public" fall within "lawful consent" exception, "presumptively permitting disclosure" by ISP].) However, whether Facebook and other social media companies are covered and bound to federal law (i.e., Stored Communications Act) is still unresolved. (*Facebook, Inc. v. Sup.Ct. (Touchstone)* (2020) 10 Cal.5th 329, 361.)

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.

The objections to discovery requests for social media evidence are no different than objections to common or ordinary discovery requests, which include right to privacy (Article 1, Section 1 of the California Constitution) and relevance (California Code of Civil Procedure § 2017.010).

The constitutional right of privacy protects against the unwarranted, compelled disclosure in interrogatories of various private or sensitive information regarding one's personal life, including his or her financial affairs, political affiliations, medical history, sexual relationships and confidential personnel information. (*Hooser v. Superior Court* (2000) 84 Cal.App.4th 997 (disapproved by *Williams v. Superior Court* (see below) to the extent it and other "prior cases require a party seeking discovery of private information to always establish a compelling interest or compelling need".) The party asserting a constitutional privacy right "must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 552.) The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy" and a court "must then balance these competing considerations." (*Ibid*.)

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

See Question 4 response. No specific standards have been set forth regarding social media. Under existing California law, if there is evidence of spoliation or suppression the jury may be instructed that the evidence would have been unfavorable to that party. (Judicial Council of California Civil Jury Instructions 204 (2014).)

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).

The standards rules of evidence apply to social media, which require relevance (California Code of Civil Procedure § 2017.010), authentication (California Evidence Code § 1401) and foundation (California Evidence Code §§ 403 and 405).

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

California Labor Code § 980 prohibits an employer from requiring or requesting, an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media. However, generally employers have a right to monitor the use of a company computer or phone. This area of law is complex and heavily dependent on the facts as employees still have some reasonable expectation of privacy even on company devices.

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

California Labor Code § 980 prohibits an employer from discharging, disciplining, retaliating, or threatening an employee or applicant for not complying with a request or demand to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media. Labor Code § 980 does have some limitations as stated in the following subdivisions:

> (c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.
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> (d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.
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> (e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

As to federal courts, employers must be careful when social media posts constitute a protected activity. Employers can be found to "discriminate" against an employee under the National Labor Relations Act "when the employee's involvement in a protected activity was a substantial or motivating factor in the employer's decision to discipline or terminate the employee." (*Coffman v. Queen of Valley Medical Center* (9th Cir. 2018) 895 F.3d 717, 729 [wherein employer was ordered to cease and desist for unfair labor practices by discriminating against an employee appearing in pro-union social media posts]).