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DELAWARE

SPOLIATION

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

   The Delaware Supreme Court has ruled that an adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item. Before giving such an instruction, a trial judge must, therefore, make a preliminary finding that the evidence shows such intentional or reckless conduct. Absent such a finding, an adverse inference instruction is not justified. Sears, Roebuck & Co. v. Midcap, 893 A.2d 542, 552 (Del. 2006).

   Delaware state courts have broad discretion in addressing claims of spoliation and, when determining what remedy to award for spoliation, Delaware state courts will consider (1) the culpability of the spoliating party; (2) the degree of prejudice suffered by the aggrieved party; and (3) the availability of lesser sanctions that could both avoid unfairness to the aggrieved party and serve as an adequate penalty to deter such future conduct. In re Shawe & Elting LLC, 2016 WL 3951339, at *19 (Del. Ch. July 20, 2016).

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

   The remedy is applied only to a litigant who intentionally suppresses or destroys evidence. Whether that intentional destruction is performed directly by the party or by an agent is immaterial.

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

   No. Delaware does not recognize an independent tort or cause of action for spoliation. Lucas v. Christiana Skating Center, Ltd., 722 A.2d 1247 (Del. Super. 1998).

4. **Remedies when spoliation occurs:**

   - Negative inference instruction

   Delaware follows the general rule that where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case. Collins v. Throckmorton, 425 A.2d 146, (Del. 1980) See, Equitable Trust Co. v. Gallagher, 77 A.2d 548 (Del. 1950). Delaware will not issue the sanction based on simple negligence. Sears, Roebuck and Co. v. Midcap, 893 A.2d 542 (Del. 2006).

   - Dismissal

   Delaware state courts have not permitted this sanction. In re: Wechsler, 121 F.Supp. 2d 404 (D. Del. 2000) (a federal judge, in an opinion involving spoliation of evidence, discussed the full range of sanctions available from an adverse inference instruction to the judgment against the spoiler which is

what he imposed in that case).

- Criminal sanctions

11 Del. C. § 1269, entitled "Tampering with physical evidence; class G felony," provides, in pertinent part:

A person is guilty of tampering with physical evidence when ... [b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent its production or use, the person suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

11 Del. C. § 1269(2).

- Other sanctions

Delaware state courts have not permitted sanctions other than the adverse inference. In re: Wechsler, 121 F.Supp. 2d 404 (D. Del. 2000) (a federal judge, in an opinion involving spoliation of evidence, discussed the full range of sanctions available from an adverse inference instruction to the judgment against the spoiler which is what he imposed in that case).

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

The Delaware courts have no separate rules for electronic spoliation.

The Complex Commercial Litigation Docket of the Superior Court has promulgated "E-Discovery Guidelines." http://courts.delaware.gov/Superior/pdf/ccld_appendix_b.pdf

Likewise, the Court of Chancery has issued "Court of Chancery Guidelines for Preservation of Electronically Stored Information." https://courts.delaware.gov/forms/download.aspx?id=50988

The leading spoliation case is Genger v. TR Investors, LLC, 2011 WL 2802832 (Del. 2011).

6. Retention of surveillance video.

There are no special rules for surveillance video.

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?

The collateral source doctrine is firmly embedded in Delaware jurisprudence. Med. Ctr. of Del., Inc. v. Mullins, 637 A.2d 6, 10 (Del. 1994) (citing Yarrington v. Thornburg, 205 A.2d 1, 2 (Del. 1964)).

First recognized by the Delaware Supreme Court in Yarrington v. Thornburg, 205 A.2d 1 (Del. 1964), the collateral source doctrine precludes a tortfeasor from mitigating damages because of payments or compensation received by the injured party from an independent source. In other words, the tortfeasor cannot claim the "benefit of the ability of the injured party to recover [] from [] third-party expenses related to [the] injury." Miller v. State Farm Mut. Auto. Ins. Co., 993 A.2d 1049, 1053 (Del. 2010). The tortfeasor may, however, obtain the advantage of payments made by himself or from a fund created by him because the payments come from the tortfeasor himself. Ameer-Bey v. Liberty Mut. Fire. Ins., 2003 WL 1847291, at *3 (Del. 2003) (citing Yarrington, 205 A.2d at 2).

A. Uninsured/Underinsured Insurance Benefits

In the context of uninsured/underinsured insurance claims, the collateral source doctrine allows a plaintiff to submit to the jury the total amount of his or her reasonable medical expenses even if the plaintiff has been

fully compensated from a source other than the tortfeasor. Mitchell v. Haldar, 883 A.2d 32, 38 (Del. 2005) (citation omitted). Indeed, double recovery by a plaintiff is permissible so long as the source of such payment is unconnected to the tortfeasor. Estate of Farrell ex rel. Bennett v. Gordon, 770 A.2d 517, 520 (Del. 2001). As explained by the Supreme Court, the rationale for the collateral source rule appears to emphasize the deterrent and quasi-punitive functions of tort law:

> The collateral source rule is designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong. A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall. Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer.

Mitchell, 883 A.2d at 38 (citation omitted); State Farm Mut. Auto. Ins. Co. v. Nalbone, 569 A.2d 71, 73 (Del. 1989). See also Miller, 993 A.2d at 1053 ("The rule has two underlying rationales. The first is that 'a tortfeasor has no interest in ... monies received by the injured person from sources unconnected with the defendant.' The second, which is particularly relevant here, is 'a concern for prejudice that may result to an injured party in the minds of the jury from knowledge of any 'double recovery.'") (citations omitted).

To restrict double recovery in underinsured/uninsured motorist cases would "frustrate the reasonable expectations of the insured (created by the payment of insurance premiums) to recover under the policy." Miller, 993 A.2d at 1056. Further, applying the collateral source rule in such cases furthers public policy considerations by encouraging motorists to purchase underinsured/uninsured motorist coverage, which is not compulsory. Id.

B. No-Fault Insurance Benefits

In cases involving no-fault insurance, the Delaware Supreme Court has declined to extend the scope of the collateral source rule. "[T]he collateral source rule is properly a doctrine of tort law and ... it is unwarranted to expand its reach and apply it against a no- fault insurer, whose obligations stem not from tort liability, but rather from contractual provisions and the duties imposed by 21 Del. C. § 2118.". Brown v. Nationwide Mut. Ins. Co., 574 A.2d 841, 842 (Del. 1990). See also State Farm Mut. Auto. Ins. Co. v. Nalbone, 569 A.2d 71, 73 (Del. 1989) ("[T]he policy goals of no-fault insurance can best be served by application of principles of contract rather than tort law."). Section 2118 of Delaware's No-Fault Statute limits the collateral source rule by precluding an insured from suing a tortfeasor for damages for which compensation is available under the no-fault statute, whether or not no-fault benefits are actually available. Ameer-Bey, 2003 WL 1847291, at *4 (citing Nalbone, 569 A.2d at 73).

In declining to expand the collateral source doctrine to no-fault insurance cases, the Supreme Court has explained:

> The collateral source rule, with its emphasis on turning a blind eye to the prospect of double recovery so as not to confer a benefit on a wrongdoer, discourages analysis of the critical inquiry in the area of no-fault insurance: what is the actual loss for which compensation should be quickly expected without regard to fault?

Nalbone, 569 A.2d at 75. As the Supreme Court noted, the answer to this inquiry focuses not only on the actual losses sustained, but also on the reasonable expectations of the insured. Id. "Thus, the extent to which the collateral source rule should be applied to permit double recovery should depend upon the contractual expectations that underlie the collateral source payment." Id. For instance, if the insured has paid consideration for recovery from a collateral source, then recover should be allowed. Id. If, however, collateral

payments are received gratuitously, then their receipt should bar recovery under the no-fault policy because the insured has lost nothing – neither wages nor consideration paid to a collateral source. Id.

In Brown v. Nationwide Mutual Insurance Co., 574 A.2d 841 (Del. 1990), plaintiff was injured while riding as a passenger in an automobile and subsequently was unable to work for approximately 4 months. Id. at 842. Under a disability program provided by her employer, plaintiff received 60% of the wages that she normally would have received during her disability. Id. Nationwide, the insurer of the driver of the automobile, paid the remaining 40% as PIP benefits. Id. Plaintiff, thereafter, applied to Nationwide for payment constituting the 60% of wages she had already recouped through her employer. Id. The trial court held that Nationwide fulfilled its obligations under its policy by paying 40% of Brown's lost wages. On appeal, the Delaware Supreme Court affirmed, finding that "when an employee receives wage reimbursement as a benefit of his employment and gives up nothing in return, he has lost 'neither wages nor consideration paid to a collateral source for wage compensation.'" Id.

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?

A. Collateral Source Evidence is Generally Inadmissible at Trial.

In general, Delaware courts prohibit the admission of evidence of an injured party receiving compensation or payments for tort- related injuries from a source other than the tortfeasor. See e.g., Miller, 993 A.2d at 1057; James v. Glazer, 570 A.2d 1150, 1155 (Del. 1990); O'Dell v. Fiorucci, 2011 WL 2083926, at *2 (Del. Super. May 12, 2011).

In Miller v. State Farm Mutual Automobile Insurance Co., 993 A.2d 1049, 1051 (Del. 2010), the Delaware Supreme Court held that it was not harmless error for the trial court to admit collateral source evidence. There, plaintiff moved *in limine* to exclude evidence relating to her receipt of workers' compensation benefits. Id. The trial court denied plaintiff's motion, finding that the "Court shall advise the jury of the workers comp. benefits and plaintiff's obligation to repay them from any verdict." Id. At trial, defendant insurance company disputed only the damages that plaintiff was entitled to recover, arguing that the medical treatments plaintiff had received were not "reasonable and necessary." Id. Defendant also referenced repeatedly plaintiff's receipt of workers' compensation benefits. Id. At the conclusion of trial, the jury awarded plaintiff zero dollars in damages. Id. On appeal, the Delaware Supreme Court held that the admission of collateral source evidence materially prejudiced the plaintiff and, thus, was not harmless error. Id. at 1057. According to the Court, the jury's award of zero damages could have been attributable to its belief that either the plaintiff's medical expenses were not "reasonable and necessary" or its reluctance to award plaintiff a "double recovery." Id. at 1056. Therefore, the Court remanded the matter back to the trial court for a new trial. Id. at 1057.

However, in cases where the injured plaintiff raises the issue of collateral source evidence on direct examination, the Court recognizes an exception to the doctrine's bar of collateral source evidence. See e.g., James, 570 A.2d at 1155. In James v. Glazer, 570 A.2d 1150 (Del. 1990), the Delaware Supreme Court held that the proper foundation had been established to introduce evidence of collateral payments received by the plaintiff. In James, the plaintiff sustained injuries after slipping on an icy cement porch outside her apartment building, which was owned by defendants. Id. at 1152. At trial, plaintiff contended that she stopped taking prescription drugs for her injury because she could no longer afford to buy them. Id. at 1153. Yet, on cross-examination, defendants elicited an acknowledgement from plaintiff that her level of income after the accident was greater than before the accident, due to her receipt of disability income. Id. Plaintiff objected to this line of questioning, arguing that it was inadmissible collateral source evidence. Id. The trial court overruled Plaintiff's objection and admitted the introduction of such evidence. On appeal, the Delaware

Supreme Court affirmed the trial court's ruling, holding that where the plaintiff injects the affirmative element of reduced financial circumstances as a reason for behaving inconsistently with a claimed injury, the court may admit evidence of payments from a collateral source for the limited purpose of attacking the credibility of the witness. Id.

B. No reduction in Jury Award.

As explained above, under the collateral source doctrine, an injured plaintiff may recover damages from a tortfeasor for the reasonable value of medical services, even if the plaintiff has received partial or complete recompense for those services from an independent source. Mitchell, 883 A.2d at 38. The tortfeasor is not entitled to have the damages to which he is liable reduced by proving that the plaintiff has received compensation for the loss from a collateral source. Yarrington, 205 A.2d 1 (Del. 1964) (quoting 25 C.J.S. Damages § 99). Rather, the collateral source doctrine requires "the injured party to be made whole exclusively by the tortfeasor and not by a combination of compensation from the tortfeasor and collateral sources." Mitchell, 883 A.2d at 38. Therefore, because the tortfeasor is not entitled to a credit for the benefits conferred on an injured plaintiff from an independent source, no reduction in a jury award occurs post-trial.

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).

Under the collateral source doctrine, the tortfeasor may not receive credit for the benefits conferred on an injured plaintiff from an independent source. Med. Ctr. of Del., Inc. v. Mullins, 637 A.2d 6, 10 (Del. 1994). In other words, the "tortfeasor is required to bear the cost for the full value of his or her negligent conduct even if it results in a windfall for the innocent plaintiff." Mitchell, 883 A.2d at 38 (emphasis added). Thus, a plaintiff could recover from a tortfeasor the reasonable value of medical services provided even if those services were provided gratuitously. Id.

In Onusko v. Kerr, 880 A.2d 1022 (Del. 2005), the Delaware Supreme Court upheld the lower court's application of the collateral source doctrine, finding that the reasonable value of services provided to an injured plaintiff is the proper measures of damages. Id. at 1024. There, the trial court allowed the jury to consider the normal charge for plaintiff's physical therapy visits when calculating damages, despite the fact that the physical therapist offered the plaintiff a sizeable discount. Id. The Supreme Court held that the trial court acted within its discretion, noting that under the collateral source doctrine, the "tortfeasor may not benefit from any money the injured party may receive from sources other than the tortfeasor." Id. However, the collateral source rule does not apply to Medicare and Medicaid write-offs, where plaintiff may only "board' at trial the actual amounts paid by Medicare or Medicaid providers. Stayton v. Del. Health Corp., 117 A.3d 521, 531 (Del. 2015)(Medicare); Smith v. Mahoney, 150 A.3d 1200, 1207 (Del. 2016)(Medicaid).

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?

Determining whether an accident or incident report is discoverable depends, in large part, on the circumstances surrounding the preparation and maintenance of the report. Under the business records exception to the hearsay rule, set forth at D.R.E. 803(6), only those reports prepared and maintained in the ordinary course of business may be admissible. D.R.E. 803(6). Conversely, a report prepared in anticipation of litigation is protected as privileged under the work product doctrine. Wohlar v. Gen. Motors Corp., 712 A.2d 457, 462 (Del. Super. 1997).

A. Business Records Exception

The business records exception to the hearsay rule permits the admission of a memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with D.R.E. 902(11), D.R.E. 902(12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit. D.R.E. 803(6).

Delaware courts have construed D.R.E. 803(6) as requiring four foundational requirements for admission of an out-of-court record: (1) the record must be “made at or near the time” of the act or event (2) “by, or from information transmitted by, a person with knowledge,” (3) the record must be prepared and maintained “in the course of a regularly conducted business activity” and (4) a custodian or other qualified witness is able to testify. McLean v. State, 482 A.2d 101, 104 (Del. 1984) (citing D.R.E. 803(6)). Even if all four requirements are met, the record may nonetheless be excluded if the method of preparation of the record or the source of the information indicates a lack of trustworthiness. Brown v. Liberty Mut. Ins. Co., 774 A.2d 232, 238-39 (Del. 2001).

Further, records created in anticipation of litigation are not admissible under the business records exception. D.R.E. 803(6), Cmt. See also DiVirgilio v. Eskin, 2005 WL 2249530, at *2 (Del. Super. June 29, 2005) ("Unless it is subsequently demonstrated that any of the provided medical records were prepared solely in anticipation of litigation and not for the purpose of treatment of the Plaintiff, the medical records will be admitted at trial [pursuant to D.R.E. 803(6)."); Caple v. E.I. DuPont de Nemours and Co., 1988 WL 67701, at *2 (Del. Super. June 20, 1988) (noting that there would be no bar to admission under Rule 803(6) because there was no indication that documents at issue were prepared in anticipation of litigation).

B. Work Product Doctrine

The work product privilege, set forth in Superior Court Civil Rule 26(b)(3), provides, in part:

> [A] party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Notably, an attorney need not be involved in order to give protection to documents as having been prepared in anticipation of litigation. Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 140 (Del. Super. 1997). "[S]o long as documents are prepared in anticipation of litigation, the work product doctrine may be applied 'to documents prepared by non- attorneys' or to 'documents prepared ... at counsel's direction.'" Rembrandt Techs., L.P. v. Harris Corp., 2009 WL 402332, at *9 (Del. Super. Feb. 12, 2009). See also Puccio v. Hinkle, 1986 WL 2833, at *4 (Del. Super. Mar. 4, 1986) (noting that Rule 26(b)(3) extends protection to documents prepared by or for a representative of a party, including his agent).

As a general matter, materials asserted to be work product pursuant to Rule 26(b)(3) must have been prepared "in anticipation of litigation." Wohlar v. Gen. Motors Corp., 712 A.2d 457, 462 (Del. Super. 1997); Mullins v. Vakili, 506 A.2d 192, 199 (Del. Super. 1986). See also Rembrandt Techs., 2009 WL 402332, at *9 ("The privilege afforded by the work product doctrine is limited by the requirement that the document be

prepared with an eye toward litigation.") (internal quotation marks omitted). Since Delaware law applies the "because of litigation" test, "work product protection is not precluded merely because the [document] may also serve a business function," if the document "can fairly be said to have been prepared or obtained because of the prospect of litigation." JPMorgan Chase & Co. v. Am. Century Companies, Inc., 2013 WL 1668393, at *3 (Del. Ch. Apr. 18, 2013) (internal citations omitted). Accordingly, those materials gathered during routine investigations by counsel may or may not be protected work product. Ramada Inns, Inc. v. Drinkhall, 490 A.2d 593, 596 (Del. Super. 1985). As recognized by the Delaware Superior Court, "[r]outine business records and other materials gathered in the ordinary course of business are not considered work product and are not protected from discovery by an opposing party." Wohlar, 712 A.2d at 462. See also Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 140 (Del. Super. 1997) ("[D]ocuments prepared only in the ordinary course of business are not within the purview of Rule 26(b)(3).").

In Puccio v. Hinkle, 1986 WL 2833 (Del. Super. Mar. 4, 1986), the Delaware Superior Court held that a report prepared by a defendant's private investigator constituted protected work product. There, plaintiff was injured when a vehicle operated by the defendant jumped the curb and struck plaintiff as he stood on a sidewalk. Id. at *1. Defendant thereafter retained a private investigator to conduct surveillance on the plaintiff. Id. As a part of his investigation, the private investigator prepared a report. Id. In response to discovery requests, defendant contended that the investigator's report constituted protected work product and therefore, was discoverable only upon a showing of "substantial need and undue hardship." Id. The Superior Court held that the investigator's report was protected under the work product doctrine as it was prepared because of the "prospect of litigation." Id. at *4. According to the Court:

> [G]iven that the primary issue in this case is one of damages and that the investigator's reports were obviously prepared to rebut contentions regarding the degree of injury, the reasonable inference is that the investigator's reports were prepared in anticipation of litigation and are, therefore, entitled to the qualified immunity of Rule 26(b)(3).

Id. Further, because plaintiff failed to establish substantial need and undue hardship, the Court held that plaintiff had not met his burden. Id. at *4-5.

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?

No Delaware opinions have squarely addressed this issue, although social media evidence may be requested in the normal course as any other form of electronic evidence.

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.

No Delaware opinions have squarely addressed this issue.

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

While no Delaware opinions have squarely addressed this issue, the Delaware Supreme Court Commission on Law & Technology's Leading Practices on Social Media discusses the duty to preserve social-media content relevant to an active or threatened litigation. Principle 5 of the Commission's Leading Practices states the importance of preserving social-media or social-networking sites, including communications, any related information, and metadata. Principle 5 also recognizes that a lawyer must affirmatively seek out what social-media or social- networking content her clients have in order to properly advise the client how to best preserve the content in accordance with Delaware Lawyers' Rules of Professional Conduct 3.4(a) and the

common-law duty to preserve.

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).

In Parker v. State, 85 A.3d 682 (Del. 2014) the Delaware Supreme Court determined that social media evidence was subject to the same authentication requirements as any other type of evidence pursuant to Delaware Rule of Evidence 901(b), that is "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A proponent of social media evidence may use any acceptable means of verification under Rule 901, including but not limited to witness testimony or explanations of the technical process that generated the electronic evidence, to authenticate a social media post. Under the framework articulated in Parker, if the trial judge determines that there is evidence "sufficient to support a finding" by a reasonable juror that the proffered evidence is what it is purported to be, then the proffered evidence will go to the jury. The jury will then decide whether to accept or reject the evidence.

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

19 Del. C. § 709A directly addresses an employer's use of an employee's social media and prohibits an employer from requesting or requiring an employee or applicant to do any of the following:

> (1) Disclose a username or password for the purpose of enabling the employer to access personal social media.
>
> (2) Access personal social media in the presence of the employer.
>
> (3) Use personal social media as a condition of employment.
>
> (4) Divulge any personal social media, except as provided in subsection (d) of this section.
>
> (5) Add a person, including the employer, to the list of contacts associated with the employee's or applicant's personal social media, or invite or accept an invitation from any person, including the employer, to join a group associated with the employee's or applicant's personal social media.
>
> (6) Alter the settings on the employee's or applicant's personal social media that affect a third party's ability to view the contents of the personal social media.

19 Del. C. § 709A(b).

§ 709A contains the following exceptions whereby the employer is permitted limited access to an employee's social media, if the social media is:

- 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;
- for the purpose of accessing an electronic communication device supplied by or paid for in whole or in part by the employer or an account or service provided by the employer, obtained by virtue of the employee's employment or relationship with the employer, or used for the employer's business purposes; and/or
- information about an employee that is in the public domain.

19 Del. C. § 709A(c), (d), (e) and (g).

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

No Delaware opinions have squarely addressed this issue. However, Delaware courts have recognized an employer's ability to terminate an employee based on the employee's social media when it violates company policy. See, Christian v. New Castle Cty. Head Start, 2018 WL 921571 (Del. Super. Feb. 16, 2018) (the court upheld a finding of the Unemployment Insurance Appeal Board that there was just cause for an employee's termination based on its finding that the employee's Facebook posts violated the employer's social media policy), see also, Burke v. Child, Inc., 2017 WL 5665639 (Del. Super. Nov. 20, 2017) (the court upheld finding of the Unemployment Insurance Appeal Board that employee acted willfully and wantonly in violation of the employer's interest when she violated the employer's workplace violence policy by posting harassing and threatening comments about her coworkers to Facebook).