FOR MORE INFORMATION

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SPOLIATION

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

The definition of spoliation in Iowa is the intentional destruction, alteration, or non-production of evidence without a satisfactory explanation. *See State v. Langlet*, 283 N.W.2d 330,333 (Iowa 2003). Neither negligent destruction nor destruction due to a routine procedure constitutes spoliation. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003). *See also* Iowa Rule of Civil Procedure 1.517(6) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good faith operation of an electronic information system").

The following are the elements of spoliation stated in the Iowa Civil Jury Instructions: "The evidence exists or previously existed, the evidence is or was within the possession or control of (name of party), (Name of party)'s interests would call for production of the evidence if favorable to that party, (Name of party) has intentionally [altered] [destroyed] or [failed to produce] the evidence without satisfactory explanation." Iowa State Bar Association, Iowa Civil Jury Instructions, 100.22 Spoliation of Evidence.

Federal courts in Iowa have also required the moving party to make a showing of prejudice. *Estate of Seaman ex rel Seaman v. Hacker Hauling*, 840 F.Supp. 2d 1106, 1111 (S.D. Iowa 2011).

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

Typically, destruction or alteration of evidence is only considered spoliation if it is the result of an act or omission of a party to the litigation. Iowa has not yet enforced a spoliation remedy when the act or omission was committed by a third party that is not a party to the litigation. *See Meyn v. State*, 594 N.W.2d 31, 34 (Iowa 1999).

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

To date, Iowa courts have declined to adopt an independent cause of action for spoliation of evidence. *Meyn v. State*, 594 N.W.2d 31, 34 (Iowa 1999); *Karr v. Samuelson, Inc.*, 176 N.W.2d 204, 212-213 (Iowa 1970).

4. Remedies when spoliation occurs:

- Negative Inference – Jury Instruction

Iowa does have a negative inference jury instruction that states that the jury may, but is not required to, conclude that the evidence in question would have been unfavorable to the party accused of spoliation of evidence. Iowa State Bar Association, Iowa Civil Jury Instructions, 100.22 Spoliation of Evidence.

In Iowa, negative inference jury instructions will only be used "prudently and sparingly." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 720 (Iowa 2001).

- Dismissal

Dismissal of claims or defenses has not been recognized as a remedy for spoliation of evidence in Iowa. *Hendricks v. Great Plains Supply Co*., 609 N.W.2d 486, 492 (Iowa 2000); *Meyn v. State*, 594 N.W.2d 31, 34 (Iowa 1999).

- Criminal Sanctions

Iowa case law does not recognize criminal sanctions for spoliation of evidence unless the conduct falls within the purview of contempt. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Mulford*, 625 N.W.2d 672, 684 (Iowa 2001); *Meyn v. State*, 594 N.W.2d 31, 34 (Iowa 1999).

- Other Sanctions

The two other recognized remedies for spoliation of evidence in Iowa are imposing discovery sanctions and barring duplicate evidence where fraud or intentional destruction is indicated. *Hendricks v. Great Plains Supply Co*., 609 N.W.2d 486, 492 (Iowa 2000); *Meyn v. State*, 594 N.W.2d 31, 344 (Iowa 1999).

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

In civil cases, as long as a party has not intentionally destroyed electronic information, the duty to preserve is most likely satisfied. Any evidence that is negligently discarded or discarded by routine procedure is not considered spoliation. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003). However, if a party is subject to a "litigation hold" or otherwise should be aware of a duty to preserve evidence, including electronic evidence, such as anticipation of litigation, additional steps may be necessary to comply with the duty to preserve.

6. Retention of surveillance video.

In civil cases, as long as a party has not intentionally discarded the surveillance video, the duty to preserve is most likely satisfied. Any evidence that is negligently discarded or discarded by routine procedure is not considered spoliation. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003).

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?

Evidence offered to prove medical expenses incurred for "reasonable" and "necessary" medical care is limited to evidence of the amounts *actually paid* to satisfy medical bills that have been satisfied, regardless of the source of the payment, and evidence of the amounts actually necessary to satisfy medical bills incurred but not yet satisfied." *See* Iowa Code § 622.4 (2020) and Iowa Code § 668.14A(1) (2020).

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?

Evidence of payments by health insurance companies is generally admissible at trial but Iowa Code § 622.4 and Iowa Code § 668.14A(1) now limit the evidence that can be presented in a way that is intended to avoid presentation of conflicting evidence concerning the amount charged compared to the amount actually paid to satisfy a plaintiff's medical bills.

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 Iowa Code § 622.4 and Iowa Code § 668.14A(1), enacted in June 2020, evidence is limited to amounts actually paid to satisfy a plaintiff's medical bills (if satisfied) or the amounts that will be necessary to do so (if not yet satisfied).

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?**

    Yes, but in order for a report to be protected by qualified privilege under Iowa law as material prepared or obtained in anticipation of litigation, it must have been prepared or obtained "*because of* the prospect of litigation." *See Wells Dairy, Inc. v. American Indus. Refrig., Inc*., 690 N.W.2d 38, 48-49 (Iowa 2004) (rejecting "primary purpose" test but holding that report at issue must have been prepared "in anticipation of litigation"). *See also Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009).

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?**

    To date, Iowa courts have provided very little guidance on discovery of social media. Discovery requests for social media are becoming more common and can be made for entire social media files or be narrowly tailored to certain subjects and time periods. Due to the lack of guidance, the scope and relevance of social media discovery is often contested and determined on a case-by-case basis, based on competing interests of defendants' access to potentially relevant information regarding liability and damages issues and assertions of "privacy interests" of plaintiffs.

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 limitations specific to social media, beyond generally applicable objections to discovery requests that are overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of relevant evidence or that might support entry of a Protective Order (such as discovery requests that are intended to harass or embarrass a party to litigation). However, litigants seeking access to social media in discovery have so far experienced mixed results that appear to be based, in large part, on the specific circumstances of each case. For instance, in *Marchionda v. Embassy Suites*, 2018 WL 8458794 (S.D. Iowa 2018), the court denied motions to compel seeking to require the plaintiff who alleged that she was sexually assaulted in her hotel room to supplement prior discovery responses that included Facebook posts and other social media. The court concluded that that the motions to compel were not timely filed and that the plaintiff's objections based on some of the discovery requests for social media being "unreasonably broad and burdensome" and violating her "right to privacy," were valid concerns. However, the court's ruling clearly seemed to be influenced by the defendants' tactics during discovery, which included deposing the plaintiff for approximately 11 hours and requiring her to respond to over 350 requests for admissions. Presumably, if the discovery requests for her social media had been more limited and other discovery had not been as extensive, the court may have been more receptive to the defendants' position concerning the legitimate need for supplementation prior to trial.

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

None specific to social media, but if a party is on notice of an incident or circumstances likely to result in litigation a general duty to preserve evidence will likely apply. Additionally, once litigation has commenced, the parties are required by Iowa Rule of Civil Procedure 1.507 to address preservation, disclosure and production of electronic evidence, which would include social media). *See also* Iowa Rule of Civil Procedure 1.517(6) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good faith operation of an electronic information system").

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).

Iowa law does not have separate and distinct standards for admissibility of social media evidence. Iowa courts therefore apply general evidentiary rules to social media evidence, including authentication requirements under Iowa Rule of Evidence 1.901. No published cases appear to apply Iowa Rule of Evidence 5.404(a) (character evidence) to social media. Hearsay objections to social media evidence are common but can potentially be addressed through exceptions. In *State v. Akok*, 2018 WL 4362065 (Iowa App. 2018) the Iowa Court of Appeals affirmed the trial court's admission of Facebook posts that were authenticated through circumstantial evidence; specifically, the internet protocol address of the computer from which they were sent. In *In Re A.D.W.*, 2012 WL 3200891 (Iowa App. 2012), the Iowa Court of Appeals was critical of a party's failure to properly authenticate photographs posted on Facebook and therefore disregarded them while affirming on other grounds.

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

No. However, based on developments in other states, it is generally recommended that employers who intend to monitor employees' social media use provide prior notice to their employees about their intention to do so through written policies, receipt of which is acknowledged by the employee.

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

Neither Iowa law, nor Iowa's state or federal courts, have imposed any limitations on employment terminations that are specific to use of social media. It is anticipated that legal disputes over employment terminations that are based on social media would be resolved based on generally applicable legal principles, such as whether the employer had a policy regarding the use of social media, the specific content of the social media at issue, and the extent to which a termination based on the use of social media could violate the employee's rights.