ALFA International
The Global Legal Network
Local Relationships Worldwide

FOR MORE INFORMATION

LEAKE & ANDERSSON, LLP
New Orleans, Louisiana
www.leakeandersson.com

Dean Arruebarrena
darruebarrena@leakeandersson.com

Palvin Jhita
pjhita@leakeandersson.com

LOUISIANA

SPOLIATION

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

In Louisiana, spoliation of evidence may result in an adverse evidentiary ruling, an exclusion of evidence, or damages resulting from the tort of spoliation. Traditionally, Louisiana courts have used the term "spoliation of evidence" to refer to the "intentional destruction of evidence for the purpose of depriving opposing parties of its use." Pham v. Contico International, Inc., 759 So.2d 880 (La. App 5 Cir. 2000). The theory of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. Thus, in order to receive an adverse inference, there must be an allegation that the party intentionally destroyed evidence, and the party can give no reasonable explanation for the destruction. Allegations of negligent conduct are insufficient. Pham, 759 So.2d 880 (La. App 5 Cir. 2000).

However, "before a court may exclude spoiled evidence or provide for an adverse presumption to arise from the intentional destruction of evidence, the party having control over the evidence must have had an obligation to preserve it at the time it was destroyed." Everhart v. Louisiana DOTD, 978 So.2d 1036 (La.App. 4th Cir. 2008). Such a duty arises when the party has notice that the evidence is relevant to the litigation. Id. Once a court concludes that a party was obliged to preserve the evidence it must then consider whether the evidence was intentionally destroyed and the likely contents of that evidence. Id. However, the theory of spoliation of evidence does not apply where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded. Longwell v. Jefferson Parish Hosp. Service Dist. No. 1, 970 So.2d 1100 (La. App.5 Cir. 2007).

While this area of spoliation law is established, there are several spoliation issues which have yet to be addressed by the Louisiana Supreme Court, specifically whether liability for the tort of spoliation is triggered through the intentional or negligent destruction/disposal of evidence. This issue is discussed in more detail below.

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

There is no distinction made in Louisiana between first party and third-party spoliation. The same analysis applies no matter who spoliates the

@2021 ALFA INTERNATIONAL GLOBAL LEGAL NETWORK, INC. | ALL RIGHTS RESERVED.

evidence.

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

As stated above, all Louisiana appellate courts now recognize the tort of spoliation of evidence. The theory of recovery underlying this cause of action is that the plaintiff is entitled to damages for conduct that interfered with his ability to pursue and prove a claim. Guillory v.Dillard's Dept. Store, Inc., 777 So.2d 1 (La. App. 3 Cir. 2000). However, there is a significant conflict among the appellate courts as to whether the destruction/disposal of evidence must be intentional or simply negligent in order to trigger liability.

As indicated in Section I above, several courts still hold that only intentional acts may trigger liability and bases the tort of spoliation on Louisiana Civil Code Article 2315. Pham, 759 So. 2d 880. However, other Louisiana courts have also recognized a cause of action for spoliation of evidence under a negligence theory where the defendant had a duty to preserve the evidence. Longwell v. Jefferson Parish Hosp. Service Dist. No. 1, 970 So.2d 1100 (La. App. 5 Cir. 2007); Carter v. Exide Corp., 661 So.2d 606 (La.App. 2 Cir. 1995). In Louisiana, negligence claims are resolved by employing a duty-risk analysis. Perkins v. Entergy Corp., 782 So.2d 606 (La. 2001). Thus, once a specific duty, whether from "a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence” is found, only negligence is needed to trigger liability. Longwell, 970 So.2d 1100.

Whether La. C.C. 2315 is the basis for this tort or a more specific duty is required, and whether specific intent or negligence is the standard, will not be fully defined until the Louisiana Supreme Court squarely addresses these issues.

4. Remedies when spoliation occurs:

- Negative inference instruction

A court may either exclude the spoiled evidence or allow the jury to infer that the party spoiled the evidence because the evidence was unfavorable to that party’s case. Everhart v. Louisiana DOTD, 978 So.2d 1036, 1044 (La.App. 4th Cir. 2008). Specifically, a litigant’s failure to produce evidence that is available to him raises a presumption that the evidence would have been detrimental to his case. Holloway v. Midland Risk Ins. Co., 832 So.2d 1004 (La.App. 2nd Cir. 2002).

However, Louisiana courts have declined to invoke an "adverse presumption" against a party which had a reasonable explanation for the failure to produce evidence, or where there was no evidence that the destruction of the evidence was motivated by a desire to deprive other litigants of access to it. Allen v. Blanchard, 763 So.2d 704 (La. App. 1 Cir.2000); Hooker v. Super Products Corporation, 751 So.2d 889 (La. App. 5 Cir.1999).

- Dismissal

Louisiana jurisprudence contains no reported cases wherein a case was dismissed as a result of a spoliation claim.

- Criminal sanctions

Louisiana jurisprudence contains no reported cases wherein criminal sanctions were awarded as a result of a spoliation claim.

- Other sanctions

In regard to federal jurisprudence, the Eastern District of Louisiana has provided the following standard regarding sanctions:

> "In the event that relevant evidence is intentionally destroyed, or "spoiled," a trial court may exercise its discretion to impose sanctions on the responsible party. In determining the seriousness of sanctions that may be imposed, the court should consider: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and if the fault is serious, will serve to deter such conduct by others in the future. If appropriate, the court may either allow the jury to infer that the party spoiled the evidence because it was unfavorable to that party's case or exclude the spoiled evidence." Menges v. Cliffs Drilling Co., 2000 WL 765082 (E.D.La.2000).

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

To date, no special rules have been instituted by Louisiana law regarding the spoliation of electronic evidence. As such, the general rules provided above should be followed. However, the federal circuits have touched on this topic in some regard. Specifically, once a duty to preserve is triggered, parties have an obligation to suspend their routine document retention and destruction policies and implement a "litigation hold" to safeguard all relevant evidence. Yelton v. PHI, Inc., 2011 WL 6100445 (E.D.La. 2011). However, a corporation, upon recognizing the threat of litigation, need not preserve "every shred of paper, every e-mail or electronic document, and every backup tape." Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (M.D. La. 2006). Instead, the duty to preserve extends to any documents or tangible things made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." Id. See also, In re Vioxx Products Liability Litigation, 2005 WL 756743 (E.D.La. 2005) (holding that parties have an obligation to preserve metadata as part of their obligation to preserve evidence).

6. Retention of surveillance video.

Likewise, there is little case law in Louisiana regarding the retention of surveillance video. However, one case provides that defendants may have an affirmative duty to preserve video surveillance evidence related to an accident that may expose the defendant to liability. Robertson v. Frank's Super Value Foods Inc., 7 So.3d 669 (La.App. Ct. 5 Cir. 2009). Robertson suggests that liability for interference with a civil action may attach if the owner of the premises knew or should have known that a claim for injuries may be made and the property owner fails to preserve all relevant evidence, including the surveillance. Id. Moreover, Dauzat v. Dolgencorp, LLC provides that failure to preserve video camera footage may entitle plaintiff to an adverse presumption under the theory of spoliation. 2015-1096 (La. App. 3 Cir. 4/6/16), 215 So. 3d 833, 843, writ denied, 2016-0832 (La. 6/17/16), 192 So. 3d 766. But see State v. Bobo, 46,225 (La. App. 2 Cir. 6/8/11), 77 So. 3d 1, 13, writ denied, 2011-1524 (La. 12/16/11), 76 So. 3d 1202 (holding that there was no spoliation because the state witnesses adequately explained how the tape was mistakenly destroyed).

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 Civil Justice Reform Act of 2020, House Bill 57, which amended Louisiana Revised Statute 9:2800.27, and went into effect on January 1, 2021, addresses this query.

Subsequent to 9:2800.27(D), "only after a jury verdict is rendered may the court receive evidence related to the limitations of recoverable past medical expenses provided by Subsection B or D of this Section." As discussed below, Subsection B addresses cases where the claimant's medical expenses have been paid by a health insurance carrier or Medicare to a contracted medical provider. Subsection D addresses cases where the claimant's medical expenses have been paid pursuant to Louisiana Workers' Compensation Law.

In both circumstances, "the jury shall be informed only of the amount billed by a medical provider for medical treatment."

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 Civil Justice Reform Act of 2020, House Bill 57, which amended Louisiana Revised Statute 9:2800.27, and went into effect on January 1, 2021, also addresses this query.

Subsequent to 9:2800.27(D), "whether any person, health insurance carrier, or Medicare has paid or has agreed to pay, in whole or in part, any of a claimant's medical expenses, shall not be disclosed to the jury." The court, however, may consider this evidence in the course of a bench 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).**

The Civil Justice Reform Act of 2020, House Bill 57, which amended Louisiana Revised Statute 9:2800.27, and went into effect on January 1, 2021, also addresses this query.

Subsequent to 9:2800.27(B), regarding cases where the claimant's medical expenses have been paid by a health insurance carrier or Medicare to a contracted medical provider, "the claimant's recovery of medical expenses is limited to the amount actually paid to the contracted medical provider by the health insurance issuer or Medicare, and any applicable cost sharing amounts paid or owed by the claimant, and not the amount billed." Moreover, the court shall award to the claimant "forty percent of the difference between the amount billed and the amount actually paid to the contracted medical provider by a health insurance issuer or Medicare in consideration of the claimant's cost of procurement subject to one exception." This amount shall be reduced if the defendant proves that the recovery of the cost of procurement would make the award unreasonable.

Subsequent to 9:2800.27(C), regarding cases where the claimant's medical expenses have been paid by Medicaid to a medical provider, "the claimant's recovery of medical expenses actually paid by Medicaid is limited to the amount actually paid to the medical provider by Medicaid, and any applicable cost sharing amounts paid or owed by the claimant, and not the amount billed."

Subsequent to 9:2800.27(D), regarding cases where the claimant's medical expenses have been paid pursuant to Louisiana Workers' Compensation Law, "a claimant's recovery is limited to the amount paid under the medical payment fee schedule of the Louisiana Workers' Compensation Law."

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?**

Louisiana Code of Civil Procedure article 7424 establishes the "attorney work-product rule," which generally prohibits courts from ordering "the production or inspection of any writing obtained or prepared by the

adverse party, his attorney, surety, indemnitor, expert, or agent in anticipation of litigation or in preparation for trial." However, that prohibition does not apply when the court is "satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice." Simmons v. Transit Mgmt. of Southeast La., Inc., 780 So. 2d 1074, 1076-1077 (La.App. 4 Cir. Feb. 7, 2001). The purposes of the work-product rule are both to provide an attorney a "zone of privacy" within which he is free to evaluate and prepare his case without scrutiny by his adversary and to assist clients in obtaining complete legal advice. Hodges v. Southern Farm Bureau Casualty Insurance Co., 433 So. 2d 125, 131-32 (La.1983). Moreover, the privilege created by the work-product doctrine is qualified, not absolute. Id. at 131. The Fifth Circuit has indicated that a document is prepared in anticipation of litigation "as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.'' United States *v. Davis,* 636 F.2d 1028, 1039 (5th Cir. 1981) To determine the primary motivation for the creation of a document, courts look to various factors, including, the retention of counsel and his involvement in the generation of the document and whether it was a routine practice to prepare that type of document or whether the document was instead prepared in response to a particular circumstance. Piatkowski v. Abdon Callais Offshore, L.L.C., 2000 U.S. Dist. LEXIS 12067, 2000 WL 1145825, *2 (E.D. La. 2000). Though not dispositive in determining whether a certain document was prepared in anticipation of litigation, the "involvement of an attorney is a highly relevant factor . . . making materials more likely to have been prepared in anticipation of litigation." Transocean Deepwater, Inc. v. Ingersoll-Rand Co., 2010 U.S. Dist. LEXIS 145073, 2-9 (E.D. La. Dec. 21, 2010) (internal quotations omitted).

In Simmons v. Transit Mgmt. of Southeast La., Inc., 780 So. 2d 1074, (La.App. 4 Cir. Feb. 7, 2001), during discovery plaintiffs sought production of all accident reports. Defendant produced a report filed by the van's driver. However, during the taking of a deposition, plaintiffs learned that it was defendant's policy to investigate every reported accident. Plaintiffs filed a motion to compel production of that report, defendant refused to produce the document, and the trial court granted the motion to compel. Id. at 1076-1077. The appellate court affirmed by concluding that the report was prepared by a non-lawyer in the course of regular business as was customary whenever an accident occurred and was thus neither prepared in anticipation of litigation nor in preparation for trial. Id.

On the other hand, in Sass v. National Union Fire Ins. Co., 689 So. 2d 742, 744-746 (La.App. 4 Cir. Mar. 5, 1997), the court concluded that certain accident reports prepared by adjusters and investigators hired by defendant were protected under the work-product doctrine. Notably, in Sass the court did not base its determination on the extent of an attorney's involvement in connection with the creation of the reports.

Consequently, a Louisiana court would likely construe the scope of the work-product doctrine and prepared in anticipation of litigation privilege in the context of the specific facts surrounding the creation of the accident report. Reports prepared with the assistance of counsel or where litigation is likely have the best chance of being privileged. Reports prepared in the ordinary course of business for all accidents and incidents have a far less chance of being privileged.

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?

In Louisiana, social media evidence can be obtained through informal and/or formal means – such as a simple internet search or through discovery requests. Interrogatories can be served upon a party requiring them to divulge pertinent information, including the identification of social media sites where the responding party is a member. Courts consistently hold that there is no protectable privacy or confidentiality interest in material

posted or published by parties on social media. Nola Spice Designs, LLC v. Haydel Enters., 2013 U.S.Dist. LEXIS 108872, 2013 WL 3974535 (E.D. La. Aug. 2, 2013). Accordingly, if it can be shown that such a request will likely lead to the discovery of admissible evidence, which it often does in personal injury and criminal matters, Louisiana courts will compel responses. However, Nola Spice Designs, LLC cautions that an interrogatory seeking username and password information to social media sites is overly broad and presents serious privacy and confidentiality concerns that go "far beyond published social media matters and would permit [parties] to roam freely through all manner of personal and financial data in cyberspace …" Id. Therefore, Louisiana courts will not compel the production of this confidential information.

In addition to discovery requests, parties often seek social media account information directly from the social media entities themselves through subpoenas. However, these entities often dismiss or ignore these subpoenas by claiming that the Stored Communications Act (SCA) limits the ability of internet service providers from disclosing social media contents, even by subpoena. In fact, Facebook's website states the following:

> Federal law prohibits Facebook from disclosing "user content"(such as messages, Wall (timeline) posts, photos, etc.), in response to a civil subpoena. Specifically, the Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.

However, the production of executed authorizations releasing social media content is discoverable and can be compelled by Louisiana courts. Upon receipt of same, all relevant account information can then be obtained by serving the executed authorizations along with properly issued subpoenas upon the respective social media entities.

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.**

Louisiana does not identify any protectable privacy or confidentiality interest in material posted or published by parties on social media. Nola Spice Designs, LLC v. Haydel Enters., 2013 U.S. Dist. LEXIS 108872, 2013 WL 3974535 (E.D. La. Aug. 2, 2013). Accordingly, courts will compel the identification of social media websites where parties have posted content if it can be shown that such a request will likely lead to the discovery of admissible evidence, which it often does in personal injury and criminal matters. However, courts will not compel discovery requests that seek username and password information for social media sites as such requests have been found to present serious privacy and confidentiality concerns that go "far beyond published social media matters and would permit [parties] to roam freely through all manner of personal and financial data in cyberspace …" Id.

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

Louisiana does not appear to have any jurisprudence regarding this particular issue. However, the courts would likely apply the general spoliation standard used for the destruction of other forms of evidence: An adverse presumption or adverse inference as a judicial remedy for spoliation of evidence occurs where there is an intentional destruction of the evidence for the purpose of depriving another party of its use. Randolph v. General Motors Corp., 93-1983 (La. App. 1 Cir. 11/10/94); 646 So. 2d 1019, 1027.

It should be noted that, while certainly not binding authority for Louisiana courts, a federal district court in New Jersey ordered spoliation sanctions against a plaintiff after he deleted his Facebook account as well as all of the account's contents. See Gatto v. United Air Lines, Inc., 2013 U.S. Dist. LEXIS 41909, 2013 WL 1285285 (D.N.J. Mar. 25, 2013). Louisiana courts may issue a similar ruling if presented with a similar situation.

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).

Louisiana does not have a particular standard as it relates to the admissibility of social media evidence. Such evidence must simply follow the general admissibility standards – meaning it must be relevant and properly authenticated. Louisiana law defines relevant evidence as having a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." La. Code Evid. art. 401.

As for authentication of social media evidence, the easiest means is to serve the other party with Requests for Admissions or to obtain a stipulation as to its authenticity. However, if this is not possible, authentication is achieved the same as any other webpage, photograph, or other piece of evidence: testimony from any witness who typed in the URL associated with the website stating that she logged on to the site and reviewed what was there and that the printout fairly and accurately reflects what the witness saw.

Social media evidence, such as a Facebook page, is often met with hearsay objections. However, these objections are mostly overruled as either a party admission or due to the fact that the evidence is not being offered to prove the truth of the information attached to the pictures or other evidence. The exhibits are instead being introduced to show that the pictures/posts in question were in fact posted on the internet. See State v. Poupart, 11-KA-710 (La.App. 5 Cir. 02/28/12); 88 So. 3d 1132, 1143.

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

Louisiana does not have any jurisprudence or other law that prevents employers from monitoring their employees' social media use. However, Louisiana recently enacted legislation prohibiting employers from requiring employees to provide usernames and passwords for their social media accounts. See La. R.S. 51:1951 et seq.

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

No Louisiana state or federal court decisions are directly on point. However, Louisiana is a "right to work" state – meaning that employers can fire employees for any reason so long as they are not fired based upon their race, ethnicity, age, gender, political affiliation, familial status, etc. Laws are also in place to protect employees from being terminated due to whistleblowing.