

MAINE

SPOILIATION

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

Because, in the civil context, the Maine Supreme Judicial Court has not discussed the issue of spoliation and the sanctions to be applied, Maine trial courts follow District of Maine and First Circuit federal cases on this issue. In determining whether sanctions for the spoliation of evidence are appropriate, a court considers: (1) “prejudice to the non-offending party”; and (2) “the degree of fault of the offending party.” *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 120 (D. Me. 2000). Although a finding of bad faith is not required, some degree of fault on the offending party makes the imposition of a sanction more appropriate. *Id.* at 123. The First Circuit weighs prejudice more heavily due to the remedial aim of the spoliation doctrine.

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

Given the limited Maine case law on this issue, there is no established distinction between first-party and third-party spoliation,

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

The Maine Supreme Judicial Court has never recognized spoliation of evidence as an independent cause of action. *See Breen v. Lucas*, No. CV.A RE-03-19, 2005 WL 2736540 at *7 (Me. Super. Ct. July 4, 2005); *Butler v. Mooers*, No. CIV. A. CV-00-737, 2001 WL 1708836 at *1 (Me. Super. Ct. June 13, 2001); *Gagne v. D.E. Jonson, Inc.*, 298 F. Supp. 2d 145, 147-48 (D. Me. 2003).

4. Remedies when spoliation occurs:

- Negative inference instruction

Yes. *See York Ins. Co. v. Snow Flake Holdings*, No. CV-14-236, 2015 WL 1505251 at *2 (Me. Super. Ct. March 20, 2015) (citing *Testa v. Wal-Mart Stores*, 144 F.3d 173, 178 (1st Cir. 1998)).

- Dismissal

Yes. *See Gagne v. D.E. Jonsen, Inc.*, 298 F. Supp. 2d 145, 147-48 (D. Me. 2003).

- Criminal sanctions

No.

- Other sanctions

Sanctions for spoliation “may include dismissal of the case, the exclusion of evidence, or a jury instruction on the “spoliation inference.” *Driggin v. Am. Sec. Alarm Co.*, 114 F. Supp. 2d 113 (D. Me. 2000) (quoting *Vazquez-Corales v. Sea-Land Serv., Inc.*, 172

F.R.D. 10, 13 (D.P.R. 1997).

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

Maine has recognized the 2015 amendment of the spoliation rules for electronically stored information, and relies on Fed. R. Civ. P. 37(e) to govern the spoliation of electronic evidence and the duty to preserve electronic information. See *Boudreau v. Shaw's Supermarkets, Inc.*, 2019 WL 3242051 at *1 (D. Me. 2019).

6. Retention of surveillance video.

The retention of surveillance video falls under the umbrella of Fed. R. Civ. P. 37(e). See *Boudreau v. Shaw's Supermarkets, Inc.*, 2019 WL 3242051 at *1 (D. Me. 2019).

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?

There is currently a split in the Maine Superior Court on this issue. Justices have reached three—sometimes conflicting—outcomes: (1) to admit only the amount paid and accepted by the provider; (2) to admit only the amount billed by the provider; and (3) to admit both the amount billed and the amount actually paid and accepted by the provider. The Maine Supreme Judicial Court has not yet resolved this split.

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 amount paid is admissible at trial, and can be considered by the jury as evidence of the reasonable value of the medical services provided to the plaintiff. In the context of medical malpractice, the Maine Health Security Act provides that if a third-party collateral source seeks to recover the money it paid for medical bills on the plaintiff's behalf, then the court will not reduce the plaintiff's damage recovery. However, if the third-party payer does not seek to recover from the plaintiff's damage award, then the court will reduce the damages awarded by the amount that has been paid or that is payable by a collateral source. 24 M.R.S. § 2906(2) (2021).

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).

Whether that amount is reduced is a fact-specific inquiry that depends on contractual language—if any—at issue, the presiding adjudicator, and the court where the action is pending.

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?

Car accident/incident reports are not privileged and are discoverable.

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?

Both discovery requests and subpoenas are available to obtain social media evidence. Examples of discovery requests include: (1) "Please produce copies of, or sufficient authorizations to obtain copies of, any Facebook and/or Twitter communications you have had with anyone regarding the factual allegations you have made in

your Complaint against the Defendant”; and (2) “For each Facebook account maintained by Plaintiff, please produce all data for the period of _____ through the present. You may download and save (or print) your Facebook data by logging into your Facebook account, selecting “Account Settings” under the “Home” tab,” clicking on the “Download a copy of your Facebook data” link, and following the directions after selecting “Start my Archive.” This request specifically includes all postings on Plaintiff’s “wall” (including comments by Plaintiff’s “friends” or Defendant to any such postings) from _____ to present, and such postings should be downloaded and saved (or printed) to be produced in response to this request.”

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.

A party is entitled to all social media evidence from an opposing that is relevant to the subject matter involved in the pending action or reasonably likely to lead to the discovery of admissible evidence. See M.R. Civ. P. 26(b)(1).

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

Maine has not set forth spoliation standards on social media for party litigants.

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).

Maine courts have not yet set standards for getting social media in evidence, but the general rules for the admission of evidence—including relevance, authenticity, and M.R. Evid. 404(a) and 802—apply to social media.

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

Pursuant to 26 M.R.S. § 616 (2021), an employer is prohibited from requiring an employee or applicant to: (1) disclose their social media account passwords or personal social media information; (2) access their social media account in the presence of the employer; (3) add the employer to their list of social media contacts; or (3) change their settings to allow a third-party to view the contacts of their social media.

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

Recently, in *Gray v. Dep’t of Public Safety*, the Maine Supreme Judicial Court concluded that the Department of Public Safety was entitled to deny an applicant for a professional license where that applicant posted “materially false” statements on social media, which cast into question the applicant’s “ability to competently investigate and then report investigative findings with accuracy, objectivity, and without bias.” 2021 ME 19, ¶ 3, 248 A.3d 212. Outside of the “government as employer” context, employment terminations relating to social media are permissible, so long as they do not violate other laws such as the Maine Human Rights Act or Maine Whistleblower Protection Act