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MARYLAND

SPOLIATION

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

A. Elements/Definition of Spoliation

The spoliation doctrine is well established under Maryland law, and has been defined by Maryland courts as the destruction, mutilation, or alteration of evidence by a party to an action. Miller v. Montgomery County, 64 Md.App. 202, cert. denied 304 Md. 299 (1985). In Miller, the Court of Special Appeals of Maryland noted that "spoliation" is "a term also applied to the unauthorized alteration of a document by a stranger to it." Id. at 221 n.2.

In Maryland, a party seeking sanctions for spoliation must prove the following elements: (1) whether the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) whether the destruction or loss of evidence was accompanied by a culpable state of mind; and (3) whether the evidence that was destroyed or altered was relevant to the claims or defenses of the party that sought the discovery of the spoliated evidence. Thompson v. U.S. Dept. of Housing and Urban Devel., 219 F.R.D. 93, 101 (D.Md. 2003); and Goodman v. Praxair Services, Inc., 632 F.Supp.2d 494, 509 (D.Md. 2009).

The spoliation doctrine "guards against a party 'support[ing] its claims or defenses with physical evidence that it has destroyed to the detriment of its opponent.'" Peterson v. Evapco, Inc., 238 Md.App. 1, 51 (2018) (quoting Cumberland Insurance Group v. Delmarva Power, 226 Md.App. 691, 697 (2016)). "The doctrine of spoliation is grounded in fairness and symmetry." Cumberland, 226 Md.App. at 696.

B. Intentional, Fraudulent, or Negligent Destruction of Evidence

Maryland courts have clarified the possible "states of mind" an individual must have to be culpable for spoliation of evidence. The alteration or destruction need not be intentional, but must fall within one of three categories: (1) bad faith or knowing destruction; (2) gross negligence; or (3) ordinary negligence. Sampson v. City of Cambridge, 251 F.R.D. 172, 179 (D.Md. 2008). The more culpable the conduct, the greater the sanctions to be employed by the court. If documents are destroyed in bad faith, such as by intentional or willful conduct, the court can infer that the destroyed documents were relevant. If documents are destroyed by way of gross negligence or ordinary negligence, then the moving party must establish the relevance of the missing documents. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995); and Thompson, 219 F.R.D. at 101.

For purposes of a permissible inference, the Maryland Civil Pattern Jury Instructions ("MPJI-Cv") distinguish between destruction or failure to preserve with an intent to conceal the evidence and destruction or failure to preserve that is the point of negligence. MPJI-Cv :10 reads:

> The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail of the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

MPJI-Cv 1:10.

Thus, an adverse presumption against the spoliator may arise even if there is no evidence of fraudulent intent. Under either theory, the moving party must show that the evidence was relevant "to the extent that a reasonable fact-finder could conclude that the lost evidence would have supported the claims" sought by the movant. Thompson, 219 F.R.D. at 101.

In the criminal context, the Court of Appeals of Maryland has held that "[c]onsciousness of guilt evidence …, including … destruction or concealment of evidence[,]" is significant because "the particular behavior provides clues to the [actor's] state of mind". Decker v. State, 408 Md. 631, 640–41 (2009); see also Cost v. State, 417 Md. 360 (2010).

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

Maryland courts have not distinguished between first and third party spoliation. In Miller, the Maryland Court of Special Appeals noted that it was not called upon to decide whether intentional or negligent destruction of evidence by a stranger to the action would give rise to a separate cause of action in tort against him. Third party spoliation was not, therefore, discussed in that case. Similarly, in Goin v. Shoppers Food Warehouse Corp., 166 Md.App. 611 (2006) the Court found persuasive a Mississippi case, Dowdle Butane Gas Company, Inc. v. Moore, 831 So.2d 1124 (Miss. 2002), in which the Mississippi court refused "to recognize as separate tort for intentional spoliation of evidence against both first and third party spoliators." The Goin court summarily commented that "the better reasoned cases correctly confine both categories of spoliation to the law of evidence." Goin, 166 Md.App. at 618.

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

In Maryland, intentional spoliation of evidence has not been recognized as an independent tort cause of action. Goin, 166 Md.App. at 618 ("[n]evertheless, the foundation of an inquiry into whether to create a tort remedy for intentional spoliation of evidence must be based on the recognition that using tort law to correct misconduct arising during litigation raises policy considerations not present in deciding whether to create tort remedies for harms arising in other contents.") (additional quotations and citation omitted); and Miller, 64 Md.App. at 214. Rather, the Court of Special Appeals has referred such a determination to the Court of Appeals of Maryland. Goin, 166 Md.App. at 619 ("[w]e are persuaded that it is for the Court of Appeals or the General Assembly to determine whether, at this point in time, the doctrine of spoliation gives rise to an independent cause of action.")

Recent Maryland appellate court decisions have affirmed that there is no separate cause of action for a spoliation claim in Maryland. Cumberland, 226 Md.App. at 698–99 ("[w]e have concluded in other contexts that destruction of evidence is not an independent tort that itself gives rise to a cause of action"); and see

also O'Reilly v. Tsottles, 2021 WL 424415, at *9 (D.Md. Feb. 8, 2021) (slip copy) (the court dismissed counts of spoliation of evidence "and related conspiracy and aiding and abetting claims, on the basis that they asserted claims not recognized in Maryland").

4. Remedies when spoliation occurs:

When a trial court determines that spoliation occurred, the court "has wide discretion to choose a sanction." Klupt v. Krongard, 126 Md.App. 179, 201 (1999). In Klupt, the Maryland Court of Special Appeals adopted a test applied by the United States District Court for the District of Maryland to determine whether sanctions are appropriate:

(1) An act of destruction;

(2) Discoverability of the evidence;

(3) An intent to destroy the evidence; and

(4) Occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent.

Id. at 199 (citing White v. Office of the Pub. Def. for the State of Md., 170 F.R.D. 138, 147–48 (D.Md. 1997)).

- Negative inference instruction

Maryland permits a negative inference jury instruction for spoliation of evidence. In Miller, the Court of Special Appeals of Maryland stated that "the remedy for alleged spoliation would be appropriate jury instructions as to permissible inferences …" Miller, 64 Md.App. at 215. See Cost, 417 Md. at 370 ("[i]n the civil context, we give a jury instruction for the 'spoliation of evidence' where a party has destroyed or failed to produce evidence.") The instruction does not require that a jury make an adverse inference in situations involving the spoliation of evidence, rather it merely permits such an inference. Id. at 370. Such an instruction is designed to draw a jury's attention to a simple, straightforward premise: that "one does not ordinarily withhold evidence that is beneficial to one's case." Anderson v. Litzenberg, 115 Md.App. 549, 562 (1997).

The Court of Appeals has also recognized a "missing evidence" instruction in a criminal proceeding, though only against the defendant. The Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") include an instruction on "Concealment or Destruction of Evidence as Consciousness of Guilt", which reads in pertinent part as follows:

> Concealment or destruction of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether the defendant [concealed, destroyed, or attempted to conceal or destroy] evidence in this case. If you find that the defendant [did so] … then you must decide whether that conduct shows a consciousness of guilt.

MPJI-Cr 3:26.

Nonetheless, while this instruction is permissible, the Court of Appeals of Maryland has noted that trial courts "[g]enerally … need not instruct … on the presence or absence of most evidentiary inferences, including 'missing evidence' inferences." Patterson v .State, 356 Md. 677, 682 (1999).

- Dismissal

Even if another trial court may have imposed a more lenient sanction for spoliation, the Maryland Court of Special Appeals stated that fact "does not mean that the trial court abused its discretion for deciding not to fashion a more lenient result." Cumberland, 226 Md.App. at 712. Maryland courts have upheld a trial court's dismissal of the offending party's claims as the sanction for discovery abuse. Peck v. Toronto, 246 Md. 268, 270, cert. denied, 389 U.S. 868 (1967); Rubin v. Gray, 35 Md.App. 399, 400 (1977).

For example, in Cumberland, a 2018 Maryland Court of Special Appeals opinion, the spoliation that occurred in that case was not obviously malicious, as a property insurance company demolished a property damaged in an electrical fire before the electric company had an opportunity to inspect the damaged property. Cumberland, 226 Md.App. at 694–96. The property insurance company eventually filed a subrogation claim against the electric company, and in response the electric company filed a motion for summary judgment based upon the insurance company's destruction of evidence. Id. at 693 and 696. The court found that the property insurance company was at fault for not stopping the demolition, and the destruction certainly prejudiced the electric company by leaving its experts "with no evidence to rule out or rebut *any* of [the insurance company's] theories" of liability. Id. at 706–12. "[W]hile it's true that [the insurance company] did not directly engineer the demolition, it was heavily involved in, aware of, and financed" the demolition process. Id. at 709. The problem ultimately was a failure by the insurance company to properly provide the electrical company with proper notice that the demolition was going to occur. Id. at 707–09.

Cumberland is in contrast to the clearly intentional destruction of evidence in Klupt, where the violating party destroyed tapes of recorded telephone conversations that were material to the lawsuit with a hammer, and wrote dummy memoranda which he failed to produce. Klupt, 126 Md.App. at 188–90 and 199. The violating party even confessed during "his deposition testimony, he destroyed the tapes as much as six months *after* the [opposing party] had requested" production of the tapes. Id. at 201. In 2018, the court characterized the spoliation that was evident in Klupt as "clear, willful, and contumacious destruction of discoverable evidence." Peterson, 238 Md.App. at 53 (citing Klupt, 126 Md.App. at 203).

- Criminal sanctions

Criminal sanctions have not been successfully imposed for spoliation of evidence in Maryland. In Victor Stanley, Inc. v. Creative Pipe, Inc., a Magistrate Judge ruled that defendants who were guilty of spoliation of evidence should "be imprisoned for a period not to exceed two years," unless and until they paid the plaintiff's attorneys' fees and costs "allocable to spoliation." 2011 WL 2552472 (D.Md. Jan. 24, 2011). The sanctions included all attorneys' fees and costs the plaintiff incurred in bringing the motion for sanctions as well as "all efforts expended throughout this case to demonstrate the nature and effect" of the spoliation. The court stated that it would determine when to commence confinement after the amount of attorneys' fees and costs were quantified.

After further proceedings, however, a District Judge modified the sanctions to eliminate the potential for jail time. Instead, the Judge ordered defendants either to pay an "agreed minimum amount" of sanctions, totaling $337,796.37 to the plaintiff within four days, or to appear in court to show cause for why defendants should not be further held in civil contempt. This case illustrates the reluctance of Maryland courts to grant criminal sanctions for spoliation claims.

- Other sanctions

Maryland courts measure their sanctions for spoliation of evidence against the prejudice to the other party. White, 170 F.R.D. at 152. An example of other sanctions that have been handed down as a result of spoliation by a party include the entry of a default judgment for violations of discovery rules. See Lynch v. R.E. Tull & Sons, Inc., 251 Md. 260, 260–62 (1968); and Pacific Mortgage & Inv. Group, Ltd. v. Horn, 100

Md.App. 311, 324–26 (1994). "The Maryland Rules do not require that a showing of prejudice is necessary to support the entry of a default judgment for failure to comply with the discovery rules. In fact, Md. Rule 2–433(a) clearly provides that once the trial court finds a failure of discovery, it may impose various sanctions." Billman v. State of Maryland Deposit Ins. Fund Corp., 86 Md.App. 1, 11 (1991). However, "generally there exists an element of defiance and/or recalcitrance where the severe sanction of default is imposed." Lakewood Engineering and Mfg. Co., Inc. v. Quinn, 91 Md.App. 375, 387 (1992).

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

"A party has a duty to preserve evidence when the party[,] if placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation …" Broccoli v. Echostar Communications, 229 F.R.D. 506, 510 (D.Md. 2005). The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the discovering party may use to support its claims or defenses. Any information relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the litigation, is covered by the duty to preserve. Id. Thus, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place "a litigation hold" to ensure the preservation of relevant documents. Id.

The duty to preserve electronic evidence extends to the period before litigation when a party should reasonably know that the evidence may be relevant to anticipated litigation. For example, the United States District Court of Maryland has held that the County had no duty to preserve a former employee's email account in anticipation of litigation at the time the emails were deleted. Huggins v. Prince George's County, 750 F.Supp.2d 549 (D.Md. 2010). In contrast, the United States District Court of Maryland in another matter held that an adverse jury instruction was warranted as a spoliation sanction for the destruction of an employee's laptop computer by the corporation prior to the litigation. Goodman, 632 F.Supp.2d at 494. In so ruling, the Court determined that the corporation willfully destroyed the laptop knowing it contained evidence relevant to the employee's claim, including e-mail correspondences, which violated its duty to preserve evidence.

6. Retention of surveillance video.

As of the date this Compendium was issued, there is a case before the Maryland Court of Appeals examining a spoliation claim with regard to surveillance video. The Court of Special Appeals in that matter held that the party raising a spoliation claim with regard to surveillance video has "the burden to establish[,] and the court would have to find that the video 'actually existed.'" Giant of Maryland, LLC v. Webb, 249 Md.App. 545, 571, cert. granted 2021 WL 2374377 (2021) (quoting Solesky v. Tracey, 198 Md.App. 292, 309 (2011)). "There can be no act of destruction or failure to preserve evidence not proven to exist, and therefore no act or omission from which inferences can arise." Giant of Maryland, 249 Md.App. at 571. In Giant of Maryland, the court rejected the plaintiff's request for a spoliation instruction to be read to the jury, even though there were several cameras in the store, including at least one camera "around" the specific location of the subject fall that plaintiff claimed she suffered, as that fact does "not support a factual finding that a video of the incident 'actually existed.'" Id. at 572. Interestingly, the court appears to have inferred that the failure of those cameras to capture a slip and fall can potentially provide a basis for plaintiff to make credibility arguments as to the store's corporate designee, or as to the employee who plaintiff alleged walked into her with a cart the employee was using to stock products. Id. at 572 ("[t]he failure of the multiple cameras to capture the incident could be grist for credibility and argument mills"). However, the court definitively held that a spoliation instruction was not justified, and constituted unfair prejudice to defendants. Id. at 572.

Maryland cases addressing whether sanctions are warranted for spoliation of surveillance video follow the

same principles explained herein for spoliation of other types of evidence. For instance, in Hare, the plaintiff sued the defendant hotel arising from a fight between the plaintiff and one of the hotel's security guards. Hare v. Opryland Hospitality, LLC, 2010 WL 3719915, at *1–2 (D.Md. Sept. 17, 2010).

The hotel had preserved the portions of the surveillance video which it had presented to the police department, whereas other footage as automatically purged once the hard drive became full. Id. at *17–18. The plaintiff contended that the video produced by the hotel started in the middle of the incident, and that the hotel had a burden to preserve additional relevant footage. Id. at *17–18. The Court believed that the plaintiff's accusation simply assumed the existence of additional relevant footage which the hotel had intentionally destroyed, but the court ultimately found that there was an insufficient basis to allege that any relevant footage was destroyed. Id. at *17–18. Plaintiff was also unable to establish the requisite state of mind because no evidence was adduced that the hotel or its employees acted in bad faith or even that they knowingly destroyed relevant footage. Id. at *18. Further, because there was no evidence as to the contents of the surveillance video that was purged, plaintiff could not establish that the destroyed video was relevant to his claims. Id. at *17–18.

In Roese, the plaintiff sued the defendant bar arising from a fight between the plaintiff and one of the bar's patrons. Roese v. Keyco, Inc., 2008 WL 3822157, at *1 (D.Md. Aug. 12, 2008). On the bar's motion for summary judgment, the plaintiff argued that he was entitled to an inference in his favor because the bar failed to preserve surveillance video. Id. at *3–4. A bar employee testified that the video automatically wrote over itself after twenty-eight (28) days. Id. at *2. The plaintiff argued that the bar was on notice that litigation was reasonably foreseeable because his friends had requested to obtain a copy of the video the date after the altercation, as well as the fact that the altercation was of a serious nature. Id. at *3. The Court disagreed with plaintiff's argument, as at the time of the altercation, the bar had a policy to preserve video and turn over a copy only if requested to do so by an attorney or the police. Id. at *4. By the time the suit was filed, the surveillance system had already automatically written over the surveillance video of the altercation. Id. at *4. Further, there was no evidence that the bar was previously involved in any similar lawsuits that relied upon surveillance footage, which may have placed the bar on notice that litigation may arise from the subject altercation. Id. at *3–4.

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?

Maryland courts have applied the collateral source rule since 1899. City Pass Ry. Co. v. Baer, 90 Md. 97 (1899) (holding, in a suit for injuries sustained while attempting to board a trolley car, that sick benefits received by plaintiff from a source other than from defendant were not to be considered by the jury when rendering their verdict). Regardless of the amount of compensation a victim has received from his or her insurance carrier, he or she is permitted to submit the full amount of their provable damages to the jury. Motor Vehicle Admin. Of the Maryland Dept. of Transp. V. Seidel Chevrolet, Inc., 326 Md. 237, 253 (1992). However most courts have restricted application of the collateral source rule to tort litigation. Id.

"The collateral source rule prohibits a defendant in a medical malpractice action from introducing evidence that the plaintiff has or will recover his medical expenses from sources unrelated to the tortfeasor, such as a private insurer, government insurance (Medicare), liability insurance, worker's compensation, and the like. Consequently, actual or possible recovery of medical expenses from a collateral source may not be considered in awarding damages." Narayen v. Bailey, 130 Md.App. 458, 466 (2000).

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 collateral source rule in Maryland "generally prohibits presentation to a jury of evidence of the amount of medical expenses that have been or will be paid by health insurance." Eastern Shore Title Company v. Ochse, 453 Md. 303, 341 (2017) (quoting Lockshin v. Semsker, 412 Md. 257, 285 (2010)). The Maryland Court of Appeals has also precluded, under the collateral source rule, the presentation of evidence as to plaintiff's receipt of disability and retirement benefits. Eastern Shore Title, 453 Md. at 341.

The Maryland legislature allows a judge or jury to consider collateral source evidence in a medical malpractice action and, in their discretion, to reduce damages accordingly in a post-verdict proceeding pursuant to §§ 3–2A–05 and 3–2A–06 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. Poteet v. Sauter, 136 Md.App. 383, 413 (2001) (citing Narayen, 130 Md.App. at 466). This evidence may only be considered in post-verdict proceedings. Id.

Outside the context of medical malpractice actions, collateral source evidence is inadmissible to establish the fair and reasonable value of medical expenses incurred by the plaintiff as a result of an accident, and the defendant is not entitled to have a judgment reduced in accordance with payments the plaintiff receives from a collateral source, such as from workers' compensation. Brethren Mut. Ins. Co. v. Suchoza, 212 Md.App. 43 (2013).

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).

Evidence of insurance or lack of insurance should not be introduced at trial, and any statements made that inadvertently inform the jury of a party's insurance coverage will be grounds for a mistrial. Morris v. Weddington, 320 Md. 674 (1990). However, in an action between an insured and his automobile insurer, the Court determined that Uninsured Motorist and Personal Injury Protection benefits due to the insured must be reduced by the amount received by any workers' compensation benefits received by the insured. TravCo Ins. Co. v. Crystal Williams, 430 Md. 396 (2013). This exception also applies to claims brought by an insured against his or her insurer for non-payment of uninsured or underinsured motorist coverage under the subject policy, as there is a Maryland Pattern Jury Instruction that instructs the jury as to the fact that the insured "is covered by an insurance policy in which the insurance company agreed to compensate the plaintiff for loss due to an injury caused by negligent operation of a motor vehicle by an unknown driver[,] an uninsured motorist[, or] a motorist who may not have adequate insurance". MPJI-Cv 18:15 (format modified for clarity).

Generally, payment by a collateral source cannot be introduced by the tortfeasor for the purpose of mitigating or reducing damages. Haischer v. CSX Transp., 381 Md. 119 (2004). But because of the exceptions that exist in medical malpractice and in certain situations where workers' compensation benefits have paid for medical expenses, collateral source evidence can be argued by a defendant during settlement negotiations. See Narayen, 130 Md.App. at 466; and TravCo Ins., 430 Md. 396 (2013).

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?

In Maryland, the party opposing production of documents bears the burden of demonstrating that they were prepared in anticipation of litigation, as opposed to being prepared in the ordinary course of business. Kelch v. Mass Transit Admin., 287 Md. 223, 229 (1980). Written reports prepared after an accident will be assumed

by the court to be prepared in the ordinary course of business. See Maged v. Yellow Cab Co., 237 Md. 340, 345 (1965). In Maged, the Court ruled that a report created by employees of a cab company following an accident should have been turned over by the defendant in response to the plaintiff's discovery request, and indicated that such reports are not protected by the work product doctrine under Maryland law. Id. at 345.

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 Maryland Rules, like the Federal Rules of Civil Procedure, provide litigants with the ability to propound discovery to an adverse arty, see Maryland Rule 2–402, and issue subpoenas to various entities, see Maryland Rule 2–510. Maryland state courts are yet to specifically address whether discovery requests to obtain social media evidence run afoul of the discovery rules. In absence of such guidance, several normative rules of discovery should be kept in mind when seeking social media evidence in Maryland court.

Interrogatories and written requests for production of documents may only be propounded to other parties in an action, Maryland Rules 2–421 and 2–422, and document requests only require the responding party to produce documents that are in that party's "possession, custody, or control", Maryland Rule 2–422. While Maryland law has not specifically addressed whether one's social media posts are within his or her "possession, custody, or control", an individual or entity surely has control over one's own social media activity, and likely falls within the scope of the Maryland discovery rules. Arguing otherwise would frankly not be a reasonable argument to make before the Maryland bench.

It should be noted that a responding party may not be required to produce social media posts to which he or she no longer has control or access, for example over deleted content. The Maryland Rules specifically state that a party may decline to "provide discovery of electronically stored information on the ground that the sources are not reasonably accessible because of undue burden or cost." Maryland Rule 2–402(b)(2). This rule was drafted more to apply to commercial litigation involving voluminous discovery between business entities, but the plain language of the rule may be applicable to social media. The Maryland Rules Committee's note on Rule 2–402(b)(2) provides that the rule "may involve extraordinary effort or resources to restore the data [in] an accessible format." Id.

Relevantly, Maryland law permits parties to propound on another party requests for the admission of facts and genuineness of documents under Maryland Rule 2–424. When a party has located social media evidence concerning another party, requests for admissions provide an efficient means by which to authenticate that social media evidence. This tool is worthwhile as Maryland sets a relatively high bar to authenticate social media evidence, as the authenticating party is generally required to either (a) ask the purported creator of the social media post if he or she indeed created the profile or post in question, or (b) obtain information directly from the social networking website that links the establishment of a post or profile to the person who allegedly created it. Griffin v. State, 419 Md. 343, 363–64 (2011).

Lastly, an example of a discovery requests regarding another party's social media activity is as follows:

> Identify each social media website or service with which you have an account, including but not limited to Facebook, Instagram, Twitter, Reddit, TikTok, MySpace, YouTube, and/or Vine, identify the username of each account, and provide the login information for each account, the date each account was first used, and identify any modifications or deletions to any posts, videos, photographs, or other submissions made since the occurrence.

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.

Maryland law includes no express limitations on obtaining social media evidence through the discovery process outside of the general discovery rules that apply to all request for the production of documents, tangible things, electronic information or otherwise. For example, the Maryland discovery rules only permit the discovery of relevant evidence. Maryland Rule 2–402. Notably there is a Maryland federal court opinion that found requests for social media evidence must be narrowly tailored to elicit relevant evidence. Ford v. United States, 2013 WL 3877756, at *2 (D.Md. July 25, 2013). In Ford, the defendant requested from the plaintiff "any documents[,] postings, pictures, messages[,] or entries of any kind on social media within the covered period relating to [c]laims by Plaintiffs or their [e]xperts." Id. at *1. The Court held that such a request was not narrowly tailored, as it did not describe the category of material sought, but "rather, it relie[d] on Plaintiffs to determine what might be relevant." Id. at *2.

If a party believes that a discovery request infringes on his or her privacy, Maryland law provides a tool for that party to protest the subject discovery request by requesting the Court to issue a Protective Order. Maryland Rule 2–403, governing protective orders states that:

> "[o]n motion of a party … and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had, … (5) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters, (6) that discovery be conducted with no one present except persons designated by the court, … [or] (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

Maryland Rule 2–403. While the rule does not specifically reference social media activity, a party who does not wish to disclose certain social media evidence has recourse through a protective order, if that party can articulate good cause to the Court.

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

Maryland state courts are still yet to address spoliation claims in the context of social media evidence, or other electronically stored information. However, a Maryland federal court held that a party spoliated evidence when the party deleted thousands of files containing information relevant to opposing party's copyright infringement claim. Victor Stanley, Inc., 269 F.R.D. at 531. That finding may be analogous to the social media context if a party, in bad faith, deletes extensive social media evidence that is pertinent to the facts at issue in an action. Importantly, spoliation sanctions will be imposed under Maryland law if the responding party had a duty to preserve the subject evidence, i.e. when that party anticipates litigation. See Shilan v. Shoppers Food Warehouse Corp., 2014 WL 1320102, at *5–6 (D.Md., March 31, 2014) (holding that a supermarket did not spoliate evidence when CCTV surveillance footage was taped over by more recent footage, when such recording maintenance practices were consistent with the supermarket's routine business practice).

Especially relevant to a spoliation claim in the context of a discovery request for social media evidence, a Maryland federal court opinion held that a defendant spoliated evidence when it changed its website in response to the filing of a lawsuit against the defendant. Nutramax Labs., Inc. v. Theodosakis, 2009 WL 2778388, at *6–7 (D.Md. June 8, 2009). A party's duty to preserve evidence extends to preserving information on a website that the party controls or maintains. Id. Ultimately, a valid spoliation argument can

be raised under Maryland law when a person altered his or her social media accounts after the point at which he or she should reasonably have anticipated the filing of a lawsuit, when the contents of the altered social media evidence were material to that lawsuit.

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).

There are three seminal Maryland court opinions on the authentication of social media evidence. The first is is Griffin, a Maryland Court of Appeals opinion holding that prosecutors in a murder trial failed to properly authenticate an incriminating MySpace page printout. Griffin, 419 Md. at 357–58. The Court ruled that with respect to issues of authentication, social media was held to a higher authentication standard than other forms of electronic media, given "[t]he potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user." Id. There are three ways to authenticate social media evidence in Maryland: (a) ask the purported creator if he or she indeed created the profile and also if she added the posting in question; (b) search the computer of the alleged creator to determine whether that computer was used to originate the social networking profile and posting at issue; or (c) obtain information directly from the social networking website. Id. at 363–64.

Second, in Sublet, the Court of Appeals applied the Maryland Rule on authentication based upon circumstantial evidence (see Maryland Rule 5–901(b)(4)) to hold that to admit social media evidence at trial, the trial court "must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims". Sublet v. State, 442 Md. 632, 678 (2015) (see also Burks v. State, 2021 WL 1747943, at *6 (Md. Ct. of Appeals, May 3, 2021) ("a message alleged to have been digitally sent or received, whether as a text on a phone call or as a 'direct message' through a social media platform, may be authenticated by 'evidence sufficient to support a finding that the matter in question is what its proponent claims") (additional quotations and citations omitted)). Then most recently, a 2020 Court of Appeals opinion examined whether a trial court abused its discretion in allowing a detective to testify that a day after the defendant and his accomplice allegedly commit an attempted armed robbery, "the defendant unfriended his accomplice on Facebook." State v. Sample, 468 Md. 560, 565 (2020). In Sample, the detective requested from Facebook, and received "Facebook Business Records" for the accomplice's Facebook account, and the defendant's Facebook account. Id. at 565–66. The provided records identified defendant's email address which was the email registered to his Facebook account, identified his city of residence, high school and college as "connections". Id. at 566. Furthermore, the provided records also indicated that defendant's Facebook account did not unfriend any other account besides the accomplice's account during the 17 day period that fell within the scope of the requested records. Id. at 566. Facebook provided a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity" with requested records. Id. at 566.

The 2020 Sample opinion makes clear that the Maryland Rules as to authenticity apply to social media evidence. See Sample, 468 Md. at 588–89 (citing Maryland Rule 5–901). The Court of Appeals cited to the Sublet opinion, and held that "there was sufficient circumstantial evidence under Maryland Rule 5–901(b)(4) for a reasonable juror to find that the subject Facebook account belonged to the defendant, that the accomplice's Facebook account belonged to the accomplice, and that the defendant used his Facebook account to unfriend his accomplice in the attempted robbery. Sample, 468 Md. at 597. The Court's "adoption of the 'reasonable juror' test necessarily means that, for a trial court to admit social media evidence, there must be sufficient evidence for a reasonable juror to find that the social media evidence is authentic by a preponderance of the evidence." Id. Importantly, when the proponent of the social media evidence is attempting to properly authenticate the social media activity through circumstantial evidence, the proponent "need not rule out all possibilities [that are] inconsistent with authenticity, or prove beyond any doubt that the [social media] evidence is what it purports to be". Sublet, 442 Md. at 666 (quoting U.S. v.

Vayner, 769 F.3d 125, 130 (2nd Cir. 2014)).

Regarding questions related to hearsay that may arise concerning social media evidence, the Maryland Court of Special Appeals has referenced potential hearsay concerns with an e-mail that was admitted into evidence, which is analogous to hearsay concerns within the context of social media evidence. See Donati v. State, 215 Md.App. 686, n.7 (2014) ("[e]ven if an email is authenticated, the e-mail is still subject to a challenge that the rule against hearsay prevents it from admission into evidence").

There is a 2020 unreported Maryland Court of Special Appeals opinion that examined the prosecution's argument that printouts of social media posts that the defendant intended to offer into evidence were hearsay since the social media posts "were sent by unknown persons, from unknown social media accounts, and they were hearsay not meeting any of the recognized exceptions to the ban on the use of hearsay." Shields v. State, 2020 WL 5951539, at *1–2 (Md. Ct. of Spec. Appeals, Oct. 8, 2020). Ultimately, the court affirmed the trial court's decision to preclude the social media posts since the posts were not sufficiently authenticated, but the court also found that the defendant did not demonstrate that the witness who defendant claimed made one of the social media posts was unavailable for trial, as defendant claimed the posts were admissible through the statement against interest hearsay exception. Id. at *3–4. It appears that Maryland courts have a greater interest in the authenticity of social media evidence as opposed to questions of hearsay, although prepared counsel should certainly be prepared to address or argue hearsay concerns if they should arise concerning social media posts purportedly made by an individual who is not testifying at trial.

Maryland appellate courts have not specifically addressed efforts to exclude social media evidence on the basis that a post or message on social media constituted inadmissible character evidence, but significantly Maryland law prohibits character or character trait evidence that is presented at trial "to prove that the person acted in accordance with the character or trait on a particular occasion." See Maryland Rule 5–404(a)(1). As a result, when attempting to offer social media evidence at trial, the proponent of the evidence must articulate another basis for the post or message's admissibility besides that the post or message demonstrated that the poster acted in accordance with his or her character, or in accordance with a particular character trait at the time of the subject occurrence.

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

Maryland courts have not specifically addressed an employer's right to monitor an employee's social media use, although Maryland law does prohibit employers from demanding an employee's username and password to social media websites. Annotated Code of Maryland, Labor and Employment Law Article, § 3–712. The statute prohibits an employer from discharging or disciplining an employee for the employee's refusal to provide the employee's username, password or other means of accessing a social media account. § 3–712(c)(1). However, Maryland law does not expressly preclude an employer from monitoring an employee's social media activity, especially if certain activity is brought to the attention of the employer as being a poor representation of the job. When an employee accesses their social media when using an employer-provided computer or telephone, an employer obviously has greater access to the employee's social media accounts, and a greater ability to monitor same.

Of course, employees who work for private employers do not receive the same First Amendment protections regarding their social media use that employees in the public sector receive. Those private employees typically can only seek recourse against the employer for wrongful termination if that termination breached the employer's contract with the employee, or otherwise discriminated or retaliated against the employee due to the employee belonging to a protected class.

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

Maryland state courts have not specifically addressed this question, although the Fourth Circuit held that a group of plaintiffs could pursue a wrongful termination action when they were terminated for "liking' a particular Facebook page. Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013). In Bland, six plaintiffs formerly worked for a sheriff's department. Id. at 372. Some of the plaintiffs "liked" a Facebook page promoting the election campaign of a new candidate for sheriff. Id. at 385–86. When the incumbent sheriff won the subject election plaintiffs were not reinstated with the department. Id. at 385–86. Plaintiffs alleged they were wrongfully terminated as a result of their support for the sheriff's opponent, which constituted protected speech. Id. at 385–86.

The Fourth Circuit ruled that "liking" a political campaign on Facebook is constitutionally protected speech, and noted that:

> "On the most basic level, clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."

Bland, 730 F.3d at 386.

The Court ruled in favor of plaintiffs against the sheriff department's summary judgment motion, and stated that an employer "will avoid liability if he can demonstrate, by a preponderance of the evidence, that he would have made the same employment decision absent the protected expression." Id. at 375.

The Bland opinion has been cited by numerous Maryland federal court opinions to establish that posting on social media constitutes speech that affords constitutional protections to public sector employees. See Thomson v. Belton, 2018 WL 6173443, at *14 (D.Md. Nov. 26, 2018) (the Court declared "[i]t is clear that posting a comment on Facebook constitutes speech"). However, public sector employees may be subject to certain speech restraints from their employers as "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. (quoting Garcetti v. Ceballos, 547 U.S. 410, 422 (2006)). Importantly, if an employee is not speaking on a matter of public concern, or is not speaking as a citizen, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Thomson, 2018 WL 6173443, at *16 (quoting Garcetti, 547 U.S. at 418).

Speech typically involves a matter of public concern when a social, political, or other community interest issue is involved. See Thomson, 2018 WL 6173443, at *17. Also, the United States District Court for the District of Maryland has ruled that even when a public sector employee manages social media for her organization, the employee's own Facebook comments from her personal account do not necessarily fall within the scope of her duties as an employee. Id. at 22.

Notably, employees that are in policymaking decisions are subject to dismissal based upon their political affiliation, indicating that a policymaking public employee's social media activity on political issues can justifiably result in the employee's dismissal. See Elrod v. Burns, 427 U.S. 347 (1976).