FOR MORE INFORMATION

MORRISON MAHONEY LLP
Boston, Massachusetts
morrisonmahoney.com

Sean J. Milano
smilano@morrisonmahoney.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

# MASSACHUSETTS

## SPOLIATION

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

Under the doctrine of spoliation, sanctions are permitted against a party who has intentionally or negligently lost or destroyed evidence known to be relevant for an upcoming legal proceeding. *Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 75, 141 N.E.3d 927, 945 (2020).

A claim of intentional spoliation requires a finding of willfulness or bad faith. Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 786 N.E.2d 824 (2003). Negligent spoliation requires a showing that the litigant or its expert knew or reasonably should have known that the evidence at issue was relevant to a pending or anticipated claim. Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. 544, 550, 773 N.E.2d 420, 426 (2002). The threat of a lawsuit "must be sufficiently apparent...that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute." *Zaleskas*, 97 Mass. App. Ct. 55, 75, 141 N.E.3d 927, 945 (2020)*;* Mass. G. Evid. § 1102 (2019).

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

In Massachusetts, first party spoliation occurs when a party or its expert loses or destroys evidence that it knew, or reasonably should have known, might be relevant to a pending claim. *Keene*, 439 Mass. at 234, 786 N.E.2d at 833. However, sanctions for spoliation will not imposed on a third-party that loses or destroys relevant evidence. *Fletcher*, 437 Mass. at 548, 773 N.E.2d at 425-25. Generally, third-party witnesses do not have a duty to preserve evidence for use by others. Id. Nonetheless, a third-party may be required to preserve evidence by contract or subpoena duces tecum. Id.

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

Massachusetts does not recognize an independent cause of action in tort for intentional or negligent spoliation. *Robert D. Cook v. Vincent Iacono* & another. Additional Party Names: Caritas Good Samaritan Hosp., 100 Mass. App. Ct. 1107 (2021).

### 4. Remedies when spoliation occurs:

- Negative inference instruction

At trial, the judge may instruct the jury that a negative inference may be drawn against the party responsible for the spoliation. *Oeurn v. Lowell Lodge*, 78 Mass. App. Ct. 1101, 934 N.E.2d 302 (2010).

- Dismissal

A sanction of dismissal or default judgment is an "extreme sanction" usually reserved for cases of willful or bad faith spoliation. *Lin Yang v. Mauzy*, 97 Mass. App. Ct. 1115, review denied, 485 Mass. 1106, 150 N.E.3d 1116 (2020). Nonetheless, this extreme sanction may be imposed in cases of negligent spoliation where exceptional circumstances are present. *Keene v. Brigham and Women's Hosp., Inc.*, 439 Mass. at 235-36, 786 N.E.2d at 833-34.

- Criminal sanctions

The federal crime of obstruction of justice also extends to claims of spoliation of evidence. See *U.S. v. Lundwall*, 1 F. Supp. 2d 249, 255 (S.D.N.Y., 1998). The federal crime of obstruction of justice is defined as conduct that endeavors to obstruct or impede the due administration of justice. 18 U.S.C. § 1503 (1996). To sustain a conviction for obstruction of justice, the government has to make a sufficient showing that the defendant knew that a grand jury was investigating possible violations of federal law and the defendant intentionally caused destruction of the incriminating evidence. Id.

- Other sanctions

A party who has been aggrieved by the spoliation of evidence may introduce into evidence the pre-accident condition of the destroyed evidence and the circumstances surrounding the spoliation. *MacLellan v. Shaw's Supermarket, Inc*., No. CIV.A. 04-01862A, 2008 WL 2889921, at *3 (Mass. Super. June 23, 2008). Also, a spoliating party may be precluded from offering testimony regarding the pre-accident condition of the evidence. *Id*. Additionally, if a party's expert destroys evidence, portions of the expert testimony may be excluded, so as to prevent that party from having the only expert with first-hand knowledge of the destroyed evidence. *Nally v. Volkswagon of America, Inc*., 405 Mass. 191, 197-98, 539 N.E.2d 1017, 1021 (1989). The remedies for spoliation of evidence may be cumulative. *Gath v. M/A-Com, Inc*., 440 Mass. 482, 488, 802 N.E.2d 521, 527 (2003). As such, the trial judge has broad discretion when determining a remedy for each case. Id. Additionally, an attorney who intentionally destroys or instructs his client to destroy evidence may violate rules of professional conduct and may face disciplinary actions. See Mass R. Prof. Conduct 3.4(a).

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

Generally, there is a duty to preserve electronically stored information ("ESI"). In Massachusetts, spoliation of ESI is analyzed under the same standard as spoliation of other evidence. *Stein v. Clinical Data, Inc*., No. 07-3418-BLS2 (Mass. Super. Oct. 9, 2009). Spoliation of electronic evidence may even occur if the evidence was destroyed through automatic processes in accordance with a company's standard procedure. *Linnen v. A.H. Robins Co., Inc.*, No. 97-2307 (Mass. Super. June 16, 1999). Therefore, once the prospect of litigation becomes sufficiently apparent, it may prove prudent to issue a detailed litigation hold in order to prevent relevant ESI from being inadvertently destroyed or altered.

Mass. R. Civ P. 37(f) addresses ESI spoliation and provides that, absent exceptional circumstances, sanctions are not appropriate for the loss of ESI "as a result of the routine, good-faith operation of an electronic information system." This section was modeled after the 2006 version of Fed. R. Civ. P. 37(e), which was amended effective December 1, 2015, because of the widely divergent interpretations given the rule by the federal courts. There is as of yet no case law decided under Mass. R. Civ. P. 37(f), and it is unclear whether Massachusetts courts will look to cases decided under the amended Fed. R. Civ. P. 37(e).

6. Retention of surveillance video.

A party has a duty to preserve surveillance records of an incident when a threat of a lawsuit is sufficiently apparent. *MacLellan v. Shaw's Supermarket, Inc.*, No. 04-01862A (Mass. Super. June 23, 2008). A duty to preserve surveillance video may arise upon the filing of an incident report. Id. Moreover, failure to preserve surveillance footage may create a triable issue of material fact precluding summary judgment, since a jury may infer negative inferences from such failure. Small v. Maxi Drug, Inc., 2011 Mass. App. Div. 80 (2011).

## 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?

Yes, the plaintiff is permitted to offer a complete sum of medical bills as part of their damages claim. Mass. Gen. Laws ch. 233 §79G. In Massachusetts, the full amount of the bills are admissible as evidence of the "fair and reasonable charge" for medical services. *Law v. Griffith*, 457 Mass. 349, 360 (2010).

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?

No, pursuant to Massachusetts' common-law collateral source rule, the value of reasonable medical expenses that an injured plaintiff would be entitled to recover from the tortfeasor as a component of her compensatory damages is not to be reduced by any insurance payments or other compensation received from third parties by or on behalf of the injured person. *Law v. Griffith*, 457 Mass. 349, 354–55, 930 N.E.2d 126, 131 (2010).

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).

In Massachusetts, a defendant may call a representative of the medical provider to challenge, and to elicit evidence concerning the provider's stated charges and the range of payments that that provider accepts for the particular type or types of services the plaintiff received. *Griffith*, 457 Mass. 349, 360 (2010). The witness may be asked to acknowledge that the range of payments being testified to reflects amounts paid by both individual, self-paying patients and third-party payors, but may not be asked about what was paid by or on behalf of the plaintiff. Id.

## 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?

The mere possibility that a certain event could potentially lead to future litigation does not render all documents subsequently prepared with regard to that event privileged. *Harris v. Steinberg*, 6 Mass. L. Rptr. 417 (Mass.Super.Feb.10, 1997) (Doerfer, J.). The essential question will rest upon the primary motivating purpose behind the creation of a particular document. Id. If an incident report is created with every claim, regardless of the risk of litigation arising from that claim, then the investigation of that claim is performed in the ordinary course of business and is not protected by the work product doctrine. *Walsh v. Wong*, No. 13-CV-3922-F, 2014 WL 3697068, at *2 (Mass. Super. June 24, 2014).

## 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?

Although the law is still developing, an individual's social media "skeleton" is generally discoverable in Massachusetts. Specifically, Massachusetts courts frequently apply the existing rules of discovery and professional conduct to determine the discoverability of social media evidence available to counsel. Factors generally considered by a court when determining whether an individual's social media presence is discoverable include whether the individual whose pages are to be accessed is a party, witness, or non-party; whether the person is a high ranking executive or control personnel of a corporation party, so as to be considered a party; whether the person is represented by counsel; whether the attorney seeks access to public information only or access to private pages; if the latter, whether the attorney uses his/her own name and information or engages in some for of deception (such as fake name or use of third parties).

In general, Mass. R. Civ. P. 26(b)(1) dictates the scope of discovery available and allows parties to discover:

"…any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

As such, the Massachusetts Rules of Civil Procedure sets a broad standard which permits the discovery of all materials relevant to the claim or any material capable of producing relevant and admissible information. Accordingly, although the requestor may need to show relevance and may have to address certain privacy concerns, a party may seek an adversary's social media sites through the usual methods of discovery – informal requests, written interrogatories, and document production requests to parties, and subpoenas to non-parties. See Appendix A (Sample Release); Appendix B (Sample Interrogatories); Appendix C (Sample Requests for Production). The discovery request should be tailored to the particular issue of the case and should not be overly intrusive or invasive of the account owner's privacy. For instance, the discovery requests may ask the recipient to list each e-mail address, social networking site, and user name used in the past ten years.

### 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 may seek discovery of its adversary's social media through traditional discovery methods such as interrogatories, document requests, or by deposition. The requestor will need to show relevance and may need to address privacy concerns in accordance with Mass. R. Civ. P. 26. Generally speaking, requests should be specifically tailored to the particular issues at stake in the litigation.

Requests for access to social media from a person's private pages may be ordered where the need can be shown. § 7:15. Electronic discovery—Social media—Discovery of social media, 49A Mass. Prac., Discovery § 7:15. A party may show likely relevance of and need for the private pages from the opponent's social media where it can demonstrate from the public pages that the private pages are

likely to contain similarly relevant information. *Id.* Among the factors to be considered are whether the person whose social networking pages are to be accessed is a party, witness, or non-party; whether the person is a high ranking executive or control person of a corporate party so as to be considered a party; whether the person is represented by counsel; whether the attorney seeks access to public information only or access to private pages; if the latter, whether the attorney uses his/her own name and information or engages in some form of deception (such as fake name or use of third parties). *Id.*

Requests for a party's log-in and password information are presumptively too invasive and overly broad, but in exceptional cases (usually where some misconduct is present), production may be compelled. *Id.* In other disputed cases, the court may itself conduct an *in camera* review to determine relevance and need of the requested social media documentation. *Id.*

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

Currently, there is no Massachusetts case which deals specifically with the spoliation of social media evidence. However, *Torres v. Lexington Ins. Co*., 237 F.R.D. 533 (D. Puerto Rico 2006), a First Circuit decision which was handed down in 2006, is so directly on point that it should be considered instructive for any Massachusetts attorney looking to preserve an adversary's social media presence for trial. Specifically, Torres stands for the proposition that plaintiffs should not, and must not, delete or otherwise destroy relevant social media evidence in anticipation of trial. In Torres, the plaintiff claimed she was assaulted, and as a result, developed "intense mental anguish, feelings of shame, humiliation, depression, unworthiness, weeping and has been forced to undergo psychological treatment and therapy." Through the defense counsel's own initiative, it was able to locate plaintiff's social media presence and notified her attorneys accordingly. Shortly thereafter, the sites could no longer be found, which prompted defense counsel to file a motion to dismiss for fraud on the court. The district court noted:

At some point during the case, defendants learned outside of discovery that [plaintiff] possessed several web pages depicting an active social life, and an aspiring singing and modeling career. These web pages were in direct contradiction to [plaintiff's] assertions of continued and ongoing mental anguish. At the time the web pages were discovered, neither plaintiffs nor plaintiffs' counsel had knowledge that defendants had discovered the pages. Defendants were able to download and print out much of the content of the web pages and subsequently informed plaintiffs' counsel that eliminating or altering the websites could be considered spoliation or evidence tampering. Two days after plaintiffs were alerted about defendants' knowledge of the websites, the same were deleted in their entirety. No plausible explanation has been offered for this. Defendants now move for sanctions, to wit, that [Plaintiff's] case be dismissed or in the alternative that her damages be eliminated or reduced.

Although the court did not dismiss the case outright, it did sanction the plaintiff by "eliminat[ing] all possibility of introducing evidence of continuous or ongoing mental anguish on her part." In so doing, the court stated as follows:

In this case, [plaintiff] did not make it known to defendants that she had an aspiring modeling or singing career. In fact, she attempted to depict the life of a recluse with no or little social interaction. Instead, [plaintiff] led an active social life and announced this information to the world by posting it on very public internet sites. Then, immediately upon defendants' discovery of evidence, which could be used to contradict or impeach her allegations, [plaintiff] removed the information from the internet. This is the type of unconscionable scheme the court seeks to deter.

Accordingly, when defense counsel becomes aware that a plaintiff has a potential social media presence on the internet that it would like to introduce as evidence, it is encouraged to send a preservation letter to plaintiff's counsel immediately. Further, it is advisable to capture and preserve as much of the publicly available version of the plaintiff's social media presence as possible, so that one can compare what may have once existed with what may later be deleted.

**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).**

Over the recent decades, Massachusetts courts have recognized that the amount of documentary evidence available for introduction in legal proceedings has expanded. Documentary evidence is no longer limited to writings on paper, such as letters, contracts, deeds, and wills etc. Documentary evidence now includes electronically stored information ("ESI"), such as emails, text messages, social media posts, and smartphone photographs. Mass. R. Civ. P. 34(a)(1)(A); Mass. G. Evid. § 1001(a) (2019) (defining "writings" and "records").

- Relevance

Evidence must be relevant to be admissible. The simplest definition of "relevant evidence" is evidence that has a rational tendency to prove a fact of some consequence to an issue in the case. *Commonwealth v. Keo*, 467 Mass. 25, 32 (2014); Mass. G. Evid. § 401 (2019) ("Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action.").

- Authenticity

Documents offered for evidence must, as a preliminary matter, be authenticated; that is, evidence must be presented to show that the document is what it is alleged to be. *Commonwealth v. LaCorte*, 373 Mass. 700, 704 (1977); Mass. G. Evid. § 901(a) (2019). Evidence from email messages, text messages, and social media such as Facebook has become an important issue for the courts. Emails, text messages, and social media posts are not self-authenticating. For example, evidence that a party's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or social networking website such as Facebook or Myspace that bears the party's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the party. *Commonwealth v. Purdy*, 459 Mass. 442, 450 (2011); *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671, 676 (2011) ("It appears patently clear that in the computer age, one may set up a totally fictitious e-mail account, falsely using the names and photographs of others.").

In *Purdy*, the court held that "[t]here must be some confirming circumstances sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails." *Purdy*, 459 Mass. at 450. In Purdy, the court found that email messages were adequately authenticated where they originated from an email account bearing the defendant's name, they were found on the hard drive of a computer owned by the defendant, the computer was protected by passwords supplied by the defendant, and the content of the messages (including an attached photograph of the defendant) linked them to the defendant. Id. The Purdy court declined, however, to list specific requirements to lay a foundation for the admission of emails, text messages, or social media posts into evidence. *Id*.

- Exclusions

Relevant evidence is admissible unless any of the following provides otherwise: (a) the United States

Constitution, (b) the Massachusetts Constitution, (c) a statute, or (d) other provisions of the Massachusetts common law of evidence. Mass. G. Evid. § 402 (2019). Irrelevant evidence is not admissible. Id.

Additionally, a party can move to exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Mass. G. Evid. § 403 (2019).

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

To date, employee privacy rights on social networks have not been clearly defined by the Massachusetts courts or the legislature. PRIVACY IN THE WORKPLACE, EL MA-CLE 22-1. A majority of states have passed statutes that bar, in some form, employers from requesting access to the personal social media accounts of present or prospective employees. While Massachusetts has not adopted any similar laws, a bill was filed during the 2013-2014 state legislative session but did not pass. It does not appear that any similar bills are anticipated in current of future legislative sessions.

Several decisions from the National Labor Relations Board (NLRB) suggest that posting on social media may constitute "concerted activity" and may be protected under the National Labor Relations Act (NLRA) if the postings address the terms and conditions of the employee's employment, including wages, hours, or working conditions. Id. Therefore, an employer's social media policy may subject the employer to a charge that the policy violates the NLRA unless it is drafted carefully and narrowly. POLICIES TO GUIDE EMPLOYEE CONDUCT AND RESPOND TO MISCONDUCT, EMP MA-CLE 17-1. In recent years, the NLRB has issued several reports concerning the legality of language contained in employers' social media policies. It is important to note that the reports were issued by the NLRB's acting general counsel and are not binding on the NLRB or any court. However, the reports have provided employers with guidance as to what provisions may violate the NLRA. A 2012 NLRB report, available at http://www.nlrb.gov/news/acting-general-counsel-releases-report-employer-social-media-policies, includes an entire social media policy the NLRB found to be lawful.

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

Employer rights with respect to termination of employees due to social media activity have not been clearly defined by the Massachusetts state or federal courts.

Massachusetts employers should be aware that NLRB has begun to address the issue of social media related terminations and has focused on whether the postings at issue constitute protected, concerted activities under Section 7 of the National Labor Relations Act. The NLRB and/or administrative law judges have issued opinions in two matters, (i) *Karl Knauz Motors, Inc*. and (ii) *Hispanics United of Buffalo, Inc*., which shed some light on how the NLRB analyzes social media related terminations. These NLRB rulings would likely be considered to have persuasive authority in similar cases tried in Massachusetts courts.

In *Karl Knauz Motors*, it was found that certain employee Facebook postings did not fall within the Act's definition of "protected, concerted activity," and therefore, the employer's termination of the employee for such postings did not violate the employee's Section 7 rights. *Karl Knauz Motors, Inc*., 380 N.L.R.B. No. 164, 2012-2013 NLRB Dec. (CCH) P 15620 (Sept. 28, 2012). In reaching this decision, it was held that since certain Facebook posts at issue had "no connection to the employees' terms and conditions of employment," the posts were not protected under Section 7, and therefore, the

employer's decision to terminate the employee as a result of these posts did not violate the Act. *Id*.

In *Hispanics United*, the NLRB affirmed a finding and ordered that an employer reinstate five workers that it previously terminated due to comments that the employees had posted on their respective Facebook pages. *Hispanics United of Buffalo, Inc*., 359 N.L.R.B. No. 37, 2012-2013 NLRB Dec. (CCH) P 15656, 10 (Dec. 14, 2012). The employees engaged in a Facebook conversation where they complained (after work hours) about their jobs, managers, and some of their clients. Id. In reaching this decision, the NLRB clearly delineated the standard that it shall apply when analyzing whether social media posts constitute protected, concerted activity under Section 7. These steps include the following:

1. The activity engaged in by the employee was "concerted" within the meaning of Section 7 of the Act;
2. The employer knew of the concerted nature of the employee's activity;
3. The concerted activity was protected by the Act; and
4. The discipline or discharge was motivated by the employee's protected, concerted activity.

*Id*. at 368, 369 (2012).