

MONTANA

SPOILIATION

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

Montana is one of the few states that have recognized both intentional and negligent spoliation. Intentional spoliation of evidence requires proof of the following elements: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. *Oliver v. Stimson Lumber Co.*, 1999 MT 328, 297 Mont. 336, 993 P.2d 11.

Negligent spoliation of evidence, on the other hand, requires proof of: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence relevant to that action; (3) destruction of that evidence; (4) significant impairment of the ability to prove the potential civil action; (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages. *Id.*

These torts are cognizable only when the loss or destruction of evidence is committed by an entity or individual who is a third party to the plaintiff's underlying cause of action and dispute. *Id.*, ¶s 32-34. Otherwise, the Montana Supreme Court has found "no reason to recognize a new tort theory to provide relief to litigants when evidence is intentionally or negligently destroyed by a party to the litigation." *Id.*, ¶ 32.

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

As noted above, in Montana, the stand-alone tort of spoliation is limited to third-parties.

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

Spoliation is a separate cause of action that must be affirmatively plead and can be asserted only against non-parties to the underlying litigation. *Estate of Willson v. Addison*, 2011 MT 179, 361 Mont. 269, 258 P.3d 410. A party that breaches the duty to preserve the evidence may be sanctioned under Rule 37. *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, 392 Mont. 458, 426 P.3d 541.

4. Remedies when spoliation occurs:

The remedy against a third party that spoliates evidence is damages. Rule 37 defines the sanctions that can be imposed to remedy spoliation by a party. The possible sanctions include the following.

- Negative inference instruction

Absent a showing of purpose or intent to conceal unfavorable evidence, negligent spoliation is sufficient to warrant a merits-based sanction only upon a showing, by direct or circumstantial evidence, of a reasonable probability that the lost evidence would have materially supported an essential element of a claim or defense at issue. *Id.*

Mere speculation, conjecture, or possibility that negligently-spoliated evidence was materially favorable to the opposing party is insufficient to warrant a severe sanction on the merits.

A Montana trial court relying on federal case law from New York has held that “a party seeking an adverse inference instruction ‘must adduce sufficient evidence from which a reasonable trier of fact could infer that “the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.”” *Back v. Benefis Health Sys.*, 2018 Mont. Dist. LEXIS 3, *25-26 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

- Dismissal

Absent direct or circumstantial evidence of purpose or intent to destroy unfavorable evidence, dismissal or default judgment is a proper spoliation sanction under M. R. Civ. P. 37(b)-(e) only upon a finding of a substantial likelihood that the lost or destroyed evidence would have been materially relevant to an essential element of a claim or defense at issue and not substantially cumulative of other available evidence. *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, 392 Mont. 458, 426 P.3d 541.

In appropriate circumstances a court may dismiss an action or enter a default judgment. *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137 (D. Mont., 2009). One such circumstance would be where the spoliated evidence relates to the matters in controversy in such a way that its spoliation threatens to interfere with the rightful decision of the case. *Id.*

- Criminal sanctions

No Montana case or statute has authorized criminal sanctions for spoliation.

- Other sanctions

In those cases where one or more factors warrant imposition of sanctions against the "spoliating" party, a court may choose any of the following sanctions: (1) a jury instruction on the "spoliation inference," (2) preclusion of the spoliating party's expert witness testimony, or (3) dismissal of the plaintiff's claim or the defendant's defense or grant summary judgment to the innocent party. *Delys v. Sengoku L.A.*, 2005 Mont. Dist. LEXIS 1856.

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

The only Montana rule addressing ESI says, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically-stored information lost as a result of the routine, good-faith operation of an electronic information system.” Rule 37(e), Mont. R. Civ. P.

Montana has not adopted the changes to Federal Rule 37(e). In *Mont. State Univ.- Bozeman*, the Montana Supreme Court found that MSU had a duty to interrupt its routine IT practices, and preserve the electronically stored information “if and when it became reasonably foreseeable that it would likely be subject to an adverse legal claim based on circumstances of the case,” but because the information lost was not a smoking gun or even substantially different from the information already available, the Court reversed the default judgment entered by the lower court.

6. Retention of surveillance video.

A federal district court sitting in Montana addressed spoliation of a police vehicle video of an arrest. After considering a number of possible sanctions, the court found that the most appropriate sanction was a conclusive finding that the arresting officers had used unreasonable force. *Peschel*, 664 F. Supp. 2d at 1145. The court reserved the issues of causation, injury, damages, and two specific factual issues relating to the arrest itself: (1) whether, in addition to the unreasonable physical force applied, the officers tasered *Peschel*; and (2) whether the officers acted with malice. *Id.*

The Montana Supreme Court considered the spoliation of video footage before the initiation of the formal discovery process in *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, 379 Mont. 314, 350 P.3d 52. The Court found the rationale for imposing sanctions on a party for discovery abuse applied to BNSF because it is “a sophisticated and recurrent party to litigation” that “is aware of its obligation to preserve evidence,” and “has in the past been subject to complaints from litigants concerning spoliation of evidence....” *Id.*

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?

Until 2021, Montana's collateral source rule did allow plaintiffs to submit the total amounts charged by medical providers, whether the amounts were reimbursed, paid, or written off. That law was changed effective April 30, 2021. Now, the jury may not consider charges for medical services that were resolved “by way of contractual discount, price reduction, disallowance, gift, write-off, or otherwise not paid.” Mont. Code Ann. § 27-1-307(3) (2021).

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 evidence admissible at trial is limited to amounts actually paid to satisfy the obligation for medical services. Mont. Code Ann. §27-1-308(3) (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).

Defendants cannot reduce the plaintiff's claims by amounts paid by insurers, but under Montana's amended collateral source statute, plaintiffs can only claim amounts that were actually paid by insurers to satisfy the obligation for medical services. Mont. Code Ann. § 27-1-308(3) (2021).

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?

Whether something qualifies as work product is largely a case-by-case determination. The question is whether, in the light of the nature of the document and factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. The core purpose of the work product doctrine is to shelter the mental processes of the attorney, providing a privileged area within which the attorney can analyze and prepare the client's case. *See Draggin' Y Cattle Co. v. Addink*, 2013 MT 319, 372 Mont. 334, 312 P.3d 451.

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?**

Social media evidence can be obtained through written discovery requests and subpoenas.

We might use an interrogatory like this: "Please identify by URL or web address each and every social networking website, including but not limited to Facebook, Twitter, LinkedIn, Instagram, and YouTube, to which you are or were a member, user, or patron at any time from January 1, ____, through the present."

We could use a request for production like this: "Please produce any and all documents concerning any medical treatment you have received, including, but not limited to, any correspondence, e-mails, text messages, instant messages, social media postings, handwritten notes, recorded communications, pictures, videos, calendars, journals, diaries, logs and the like."

- 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.**

The limitations are no different than for other evidence. The party offering social media evidence must authenticate it by laying a proper foundation, establish its relevance, and overcome any objections, such as hearsay.

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

Social media is governed by the rule and case law governing spoliation that is summarized above.

- 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).**

No specific standards have been adopted governing social media.

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

A Montana statute limits what employers may require employees to disclose about their social media. Mont. Code Ann. § 39-2-307. The statute has never been applied by a Montana court. Generally, the statute bars an employer from requiring or requesting an employee or an applicant for employment to (a) disclose a user name or password; (b) access personal social media in the presence of the employer or employer's agent; or (c) divulge any personal social media or information contained on personal social media.

However, an employer may request an employee's user name or password to access personal social media when: (1) the employer has specific information that indicates work-related employee misconduct or criminal defamation, (2) the employer has specific information about the unauthorized transfer by the employee of the employer's proprietary information to a personal online account or service, (3) the employer is required to ensure compliance with applicable federal laws or regulations or with the rules of self-regulatory organizations, or (4) an investigation is under way and the information requested of the employee is necessary to make a factual determination in the investigation.

An employer may be sued in small claims court for violating the statute. Damages may not exceed the jurisdictional limit of that court (which is currently \$7,000). The statute of limitations is one year.

The statute protects the employer's right to promulgate policies governing the employer's electronic equipment. Mont. Code Ann. § 39-2-307(4).

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

Under Montana law, “An employer may not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or job applicant for not complying with a request or demand by the employer that violates [§ 39-2-307].” *Id.*

Montana also has adopted a Wrongful Discharge from Employment Act, under which employers can be liable to an employee who is discharged: (1) in retaliation for refusing to violate public policy or for reporting a violation of public policy; (2) without a legitimate business reason; or (3) in a way that violates the employer’s own personnel policies. Mont. Code Ann. § 39-2-904(1) (2021).