FOR MORE INFORMATION

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NEW MEXICO

SPOLIATION

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

Both intentional and negligent spoliation are recognized in New Mexico.

It has been stated that New Mexico courts may use their inherent powers to impose sanctions for spoliation. Prior to imposing sanctions, a court should consider: (1) the degree of fault of the party who altered or destroyed evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Rest Mgmt. Co. v. Kidde Fenwal, Inc.*, 1999-NMCA-101, ¶ 13, 127 N.M. 708, 986 P.2d 504.

If a court finds there is adequate evidence of spoliation, whether the documents/items have been lost, destroyed, or altered, the court may allow the submission of UJI 13-1650 or 13-1651 NMRA.

13-1650 is to be issued in cases where the court finds there is evidence that supports intentional spoliation of evidence. It provides:

[Party alleging spoliation] says in this case that [other party] intentionally [disposed of, destroyed, mutilated or significantly altered] evidence relevant to [potential lawsuit] [lawsuit]. In order to prove intentional spoliation of evidence, [party alleging spoliation] must prove each of the following: 1. There was [a lawsuit] [the potential for a lawsuit]; 2. [other party] knew there was [a lawsuit] [the potential for a lawsuit]; 3. [other party] disposed of, destroyed, mutilated or significantly altered potential evidence; 4. By its conduct, [other party's] sole intent was to disrupt or defeat a potential lawsuit; 5. The destruction or alteration of the evidence resulted in [party alleging spoliation]'s inability to prove his/her/its case; and 6. [party alleging spoliation] suffered damages as a result of the destruction or alteration.

13-1651 can be issued in conjunction with 13-1650, but also on its own where a court has determined there is a basis for negligent spoliation. It provides:

[Party alleging spoliation] says that evidence within the control of [other party] was lost, destroyed or altered. If you find that this happened, without reasonable explanation, you may, but are not required to, conclude the lost, destroyed or altered evidence would be unfavorable to [other party].

The court may also provide different remedies for the spoliation other than an adverse instruction including, exclusion of the spoliator's evidence, dismissal of the spoliator's case, barring claims or defenses, or designating facts as established. *Rest. Mgmt. Co.*, 1999-NMCA-101, ¶ 20.

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

There are no reported cases as to any such distinction. It is likely, however, that New Mexico Appellate Courts would find that, if a first party was aware of the existence of evidence held by a third-party, the first party is obligated to ensure any such evidence is preserved.

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

A spoliation claim does not need to be asserted as a cause of action in a complaint.

With respect to intentional spoliation of evidence, the New Mexico Supreme Court has stated that it does "not require the filing of a complaint or even express notice that a complaint is to be filed in order to trigger liability for intentional spoliation of evidence . . . the relevant inquiry is knowledge on the part of the defendant of a probability of a lawsuit in the future." Torres v. El Paso Elec. Co., 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, overruled on other grounds by Herrera v. Quality Pontiac, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; see also Coleman v. Eddy Potash, Inc., 1995-NMSC-063, ¶ 13, 120 N.M. 645, 905 P.2d 185 (holding that tort of intentional spoliation of evidence, requires, among other things, proof of the existence of a potential lawsuit and defendant's knowledge of that potential lawsuit).

With respect to negligent spoliation of evidence, the New Mexico Supreme Court has determined that, because adequate remedies exist in traditional negligence to redress the negligent destruction of potential evidence, no separate/distinct claim or cause of action needs to be asserted. Coleman, 1995-NMSC-063, ¶ 16.

Irrespective of the foregoing, it is not unusual for Plaintiff's to assert a spoliation claim in the complaint or even seek to amend the complaint to add such a claim.

4. Remedies when spoliation occurs:

- Negative inference instruction

Yes.

- Dismissal

Yes. More likely in cases where the court determines there was intentional spoliation.

- Criminal sanctions

No reported decisions or rules providing for any such remedy.

- Other sanctions

Exclusion of evidence, barring of certain claims/defenses, granting of certain claims/defenses. All of this is in the court's discretion.

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

The foregoing applies to electronic evidence as well. Any such evidence should be preserved.

6. Retention of surveillance video.

The foregoing applies to surveillance video as well. However, there is no definitive ruling/guidance as to the scope of preservation. While historically surveillance video that showed the incident at issue was adequate, Plaintiff's counsel have been taking the position the preservation of surveillance video is broader, and that any video from the day of the incident and even of the entire store/business should be preserved, as such video is relevant to staffing levels, store "walkthroughs" by employees, and a Plaintiff's actions prior to the incident. Unfortunately, the determination of reasonableness of the scope of any such request/position is on

a judge-by-judge basis in New Mexico, rendering this aspect unpredictable. A company needs to take into consideration the ease or burden there is on retention of video other than that of the incident, as that can be important to a judge's decision. For example, is there just one CCTV/camera from which video can be saved, or 25 covering multiple zones/areas that would take many hours to preserve?

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?**

   Generally, yes. While a few judges in New Mexico have held that only the amount paid can be submitted to the jury, they are in the minority. Most judges find that that limiting a plaintiff's medical expenses to amounts paid violates the collateral source rule.

   A couple of decisions that follow the minority includes a 2013 decision wherein a judge in Taos, NM, held that the amount of medical bills actually paid was the appropriate amount to be submitted to the jury. *See De Anne Santistevan v. Taos Municipal School Dist*., No. D-820-CV-2011-00156 (Eighth Judicial Dist., Taos County). In 2009, a judge in the Sixth Judicial District granted defendant's motion to limit evidence of plaintiff's medical expenses to the amounts actually paid by the insurer. *See Daniel Flores v. Prasad Podila, M.D.*, No. CV-2009-00144 (Sixth Judicial Dist., Grant County).

   Because of the absence of any court rule and lack of decision or guidance from New Mexico appellate courts on this issue, plaintiffs argue for the amount billed and defendants argue for the amount actually paid.

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?**

   Neither is allowed nor occurs.

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).**

   Generally, no. See discussion in response to Question No. 7.

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?**

    There is no governing rule or decision from New Mexico Appellate Courts on this issue. Accordingly, it comes down to a case-by-case analysis by the presiding Judge. Accordingly, any claims of protection and/or privilege should be asserted in discovery answers and responses and identified in a Privilege Log provided with the answers and responses.

SOCIAL MEDIA

11. **What means are available in your state to obtain social media evidence, including but not limited to, discovery requests and subpoenas? Can you give some examples of your typical discovery requests for social media?**

    In addition to request for such information any documents in discovery to plaintiff, subpoenas can be issued to third parties for such information. It is common for the opposing party to seek a protective order, should the subpoena to the third-party be considered overly broad by such party.

Some examples of social media requests include:

Please produce for inspection all social media/networking pages and/or accounts, including without limitation Facebook, MySpace, Twitter, Instagram, Snap Chat and Google that you have maintained, posted to or hosted at any point since you began working at COMPANY XYZ. For Facebook, the instructions for downloading information are as follows: a) Logon to Facebook account; b) In the upper right, click on the down arrow and choose "Settings;" c) Click "Download a copy of your Face book data" near the bottom of the page; d) It downloads as a zip file. You are hereby directed to preserve all such pages and/or accounts and not to in any way alter, damage, or destroy them during the pendency of this lawsuit.

Please produce any and all records of social media postings to Facebook, Twitter, Snap Chat, Instagram or any other social media platform made by you related to the incident forming the basis of this suit.

Please produce any and all documents showing communications regarding the incident by email, text message or instant message (Facebook messenger, internet explorer IM, yahoo messenger, etc.)

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.**

There are no procedural rules or statutes that govern such discovery. If objected to by the opposing party, the courts will, as part of their analysis as to scope, look to the scope of time and subject matter in determining relevance to the claims or defenses raised.

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

There are no procedural rules or statutes specific to social media. Any such issue would be reviewed under the guidance/standards governing spoliation, generally. *See* discussion of spoliation issues, *supra*.

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 no procedural rules or statutes specific to admission of social media into evidence. Admission of such information/documents would be reviewed under New Mexico Rules of Evidence, just as any other proffered evidence would be.

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

New Mexico case law has not addressed this issue. However, NMSA 1978 Section 21-1-46 (2013) prohibits public or private institutions of post-secondary education from requesting or requiring a prospective employee to provide a password or access to the prospective employee' s social networking account.

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

Although employers can't request or require job applicants to provide passwords or demand access to their social networking accounts or profiles, employers may access public information. These restrictions don't limit employers from creating policies regarding workplace internet use, social networking site use and email use. Employers may monitor employees' use of their equipment and email without requesting or requiring job applicants to provide passwords in order to gain access to their social networking accounts or profiles.