FOR MORE INFORMATION

LESTER SCHWAB KATZ
& DWYER, LLP
New York, New York
www.lskdnylaw.com

Michael J. McDonagh
mmcdonagh@lskdnylaw.com

David Motola
dmotola@lskdnylaw.com

GIBSON, MCASKILL
& CROSBY, LLP
Buffalo, New York
www.gmclaw.com

Norman B. Viti, Jr.
nviti@gmclaw.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

NEW YORK

SPOLIATION

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

In New York, a party seeking sanctions for spoliation of evidence must demonstrate that 1) the party in control of the evidence maintained an obligation to preserve it at the time of its destruction; 2) that the evidence was destroyed with a "culpable state of mind"; and 3) "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *Voom HD Holdings LLC v. Echostar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003); *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547-48 (2015).

A "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence. *Zubulake,* 220 F.R.D. at 220. Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed *Id*. In contrast, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense *Id*.

Gross negligence is a "failure to exercise even that care which a careless person would use." Pension Comm. V. Banc of America Securities, LLC, 685 F. Supp. 2d 456, 464-465 (S.D.N.Y. 2010) (the failure to collect paper or electronic records from key players constitutes gross negligence, but the failure to obtain records from all employees, as opposed to key players, likely constitutes negligence)..

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

First party spoliation involves spoliation by a party to the litigation and is governed by CPLR 3126. Third party spoliation involves spoliation by a person or entity who is not directly involved in the litigation but who has a duty to preserve evidence for the benefit of a party.

> Example: an employee of a municipality is injured in a motor vehicle accident while on the job and operating a vehicle owned by the municipality. The municipality fails to preserve the vehicle for inspection. See *Ortega v. City of New York*, 9 N.Y.3d 69 (2007).
>
> Remedy – possible claim for civil contempt for the third party's violation of court order. The burdened party can seek reimbursement of his additional out-of-pocket costs to prove his claim or defense without the spoliated evidence (ie., additional investigation or expert costs that would not be necessary had the evidence been preserved). *Ortega*, 9 N.Y.3d at 80.

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

New York does not recognize spoliation of evidence as an independent tort claim. *Ortega v. City of New York*, 9 N.Y.3d 69 (2007). The Court of Appeals held in 2007 in *Ortega* that no independent tort of spoliation of evidence is recognized in New York. Thereafter, although rare, some lower courts have interpreted Ortega as applying only to claims of negligent spoliation.

> Example: The First Department recognized a claim for fraudulent concealment based on spoliation of evidence. A third party who is not directly involved in the underlying litigation but who has a fiduciary relationship to one of the parties and intentionally destroys or conceals evidence relevant to the underlying action may be subject to a claim for intentional spoliation of evidence. See *IDT Corp. v. Morgan Stanley*, 63 A.D.3d 583 (1st Dep't 2009).

4. Remedies when spoliation occurs:

The extent of the judicial remedy for spoliation of evidence is within the broad discretion of the court and can range from no sanction to the striking of a pleading depending upon how crucial the destroyed evidence was to the party's case.

- Negative inference instruction

A harsh inference may be imposed by instructing the jury that certain facts are deemed admitted and must be accepted as true, and a less harsh instruction would permit, but not require, a jury to presume that the lost evidence is both relevant and favorable to the innocent party. See *Pension Comm. V. Banc of America Securities, LLC,* 685 F. Supp. 2d 456, 470, 471 (S.D.N.Y. 2010); see also *Barnes v. Paulin*, 860 N.Y.S.2d 221 (2d Dep't 2008) (adverse trial inference was proper where vehicle involved in accident was destroyed by defendant, but did not prevent plaintiff from proving their case); (*Arbor Realty Funding v. Herrick, Feinstein*, 140 A.D.3d 607, 36 N.Y.S.3d 2 (1st Dep't 2016) (adverse inference appropriate where key witnesses available to testify as to missing data).

- Dismissal

The striking of a pleading is an available spoliation remedy in where warranted by the severity of the facts of a particular case. See *Neal v. Easton Aluminum, Inc.,* 15 A.D.3d 459 (2d Dep't 2005) (complaint dismissed where plaintiff lost subject bicycle involved in product defect claim); (*Chan v. Cheung*, 138 A.D.3d 484, 30 N.Y.S.3d 613 (1st Dep't 2016) (answer stricken where defendant deliberately destroyed emails relevant to plaintiff's defamation suit). The court will generally evaluate how crucial the destroyed evidence is in determining the appropriate remedy.

- Criminal sanctions

In extreme circumstances spoliation of evidence can rise to criminal obstruction of justice. See *United States v. Groen*, 16 CRIM 683 (S.D.N.Y. 2016) (defendant IT executive convicted of obstruction of justice for the deliberate concealment and destruction of discovery materials in an antitrust action).

- Other sanctions

Courts may also preclude the testimony at trial of a party that has destroyed evidence. See *Erdely v. Access Direct Systems Inc.*, 847 N.Y.S.2d 108 (2d Dept. 2008) (preclusion warranted where defendant discarded ladder involved in a plaintiff's accident).

In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices. *Dobson v. Gioia*, 39 A.D.3d 995, 998

(3d Dep't 2007); *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 1070 (4th Dep't 1999).

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

In New York, electronically stored information ("ESI") is no different than tangible evidence: the "contents of a computer are analogous to the contents of a filing cabinet" and where ESI is "relevant and material . . . disclosure is proper and should be permitted." *Etzion v. Etzion*, 7 Misc. 3d 940, 943 (Sup. Ct. Nassau County 2005).

New York electronic data preservation obligations are summarized in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

> The scope of a party's preservation obligation can be described as follows: 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. *Zubulake*, 220 F.R.D. at 218.
>
> As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.,* those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.,* actively used for information retrieval), then such tapes would likely be subject to the litigation hold. *Id.*
>
> However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes. *Id.*

Proving the destruction, or even the initial existence of, ESI frequently requires the assistance of a forensic expert. *Ingoglia v. Barnes & Noble College Booksellers. Inc.,* 48 A.D.3d 636 (2d Dep't 2008); *Lipco Elec. Corp. v. ASG Consulting Corp.,* 4 Misc. 3d 1019A, (Sup. Ct. Nassau County 2004); see also *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463 (2d Dep't 2004) (defendants required to produce any deleted emails that could be recovered by a qualified expert).

The New York Rules of Court amended in March of 2009 to address ESI to account for the production of ESI:

> 22 NYCRR § 202.12 Preliminary Conference (c) The matters to be considered at the preliminary conference shall include: (3) Where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to (a) retention of electronic data and implementation of a data preservation plan, (b) scope of electronic data review, (c) identification of relevant data, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs of manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation;

6. Retention of surveillance video.

In evaluating a spoliation claim where video footage from cameras on a party's property become unavailable, New York courts will apply the same spoliation analysis for other types of cases. However, when attempting to determine what sanction, if any, to be imposed, the court will generally consider the necessity of the evidence, including whether the lost footage depicted where the accident occurred or where an allegedly dangerous condition existed. In the event that the lost footage did not depict either the accident or the allegedly dangerous condition, it is not often that a court would impose a penalty any greater than an adverse inference. See *Deveau v. CF Galleria at White Plains L.P,* 796 N.Y.S.2d 119 (2d Dep't 2005) (no spoliation sanction warranted where misplaced surveillance footage was not central to the plaintiff's case where the footage did not show the puddle that plaintiff allegedly slipped in or how long it had been on the floor).

Additionally, in evaluating the significance of the lost footage, the court will evaluate whether or not that same information is available via other evidence. See *Barone v. City of New York,* 861 N.Y.S.2d 709 (2d Dep't 2008) (lost video footage of area where the accident occurred only resulted in a negative inference charge as plaintiff was able to recall the accident and the loss of the footage was not fatal to her case).

Similarly, where video footage is inadvertently recorded over because of a technical mishap as part of a routine business practice, it is unlikely that a court would strike a party's pleading. See *Scansarole v. Madison Square Garden L.P.*, 827 N.Y.S.2d 1 (1st Dep't 2006) (denial of plaintiff's motion to strike defendant's answer where a videotape was destroyed that showed the where the plaintiff fell, since the destruction of the tape was the result of an inadvertent and technical mishap done in the ordinary course of recording over old footage. Rather, defendant was simply precluded from offering from presenting evidence pertaining to the lost post-accident images).

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?

In New York, a plaintiff can submit to the jury the total of his/her medical expenses even if some or all of the expenses were subject to collateral source reimbursement. Reduction of medical expenses occurs at a post-trial hearing with the trial judge upon a request made by the defendant.

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?

Although the total of a plaintiff's medical expenses is allowed to be presented to a jury, NY CPLR 4545 provides for the reduction of the amount of compensation that can be collected from a judgment to the extent a defendant can demonstrate plaintiff's losses are almost certain to be replaced by a "collateral source". Generally, at the request of the defendant the court will conduct a post-trial collateral offset hearing to determine any reduction in the jury award for medical expenses, lost wages and employee benefits.

At the hearing, the defendant must prove, with "reasonable certainty" the existence of "collateral sources" that will pay the costs associated with particular categories of damages, and therefore the jury verdict should be reduced accordingly.

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).

At a post-trial hearing each particular category of damages can be reduced from a jury award down to the sum of the amount of that was covered by insurance for the medical service. In order to obtain any reduction for future damages, a defendant must also prove with "reasonable certainty", that the plaintiff would be "legally entitled" to receive the "collateral source" benefit going forward so long as they pay the required premium.

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?

NY CPLR 3101(g) entitled "Accident reports" provides that

> Except as is otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution. N.Y. C.P.L.R. 3101 (McKinney)

New York courts have interpreted that pursuant to CPLR 3101(g), "accident reports prepared in the regular course of business operations or practices are discoverable, even if made solely for the purpose of litigation" *Jacaruso v. Keyspan Energy Corp.,* 109 A.D.3d 585, 586, 971 N.Y.S.2d 14, 15; (2d Dep't 2013) (*Powell v. County of Westchester,* 269 A.D.2d 378, 379, 702 N.Y.S.2d 645 (2d Dep't 2000) [internal quotation marks omitted]; see *Fava v. City of New York*, 5 A.D.3d 724, 725, 773 N.Y.S.2d 603 (2d Dep't 2004); *Pataki v. Kiseda,* 80 A.D.2d 100, 104–105, 437 N.Y.S.2d 692 (2d Dep't 1981)).

In *Miranda v. Blair Tool & Mach. Corp.,* 114 A.D.2d 941, 495 N.Y.S.2d 208, 209 (2d Dep't 1985), the Second Department further explained "[i]t is only when an accident report has not been made in the regular course of business that it may be conditionally exempt if it is made solely for purposes of litigation."

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 New York, once a factual predicate has been established, a party may obtain social media evidence by applying the traditional rules of discovery. Evidence related to a party's social media activities can be obtained via discovery requests, subpoenas, interrogatories, and deposition testimony.

Generally, upon intake of a case, an initial search for plaintiff's public presence on the most prominent social media including sites such as Facebook, Twitter, Instagram, LinkedIn, Youtube, etc. is conducted.

Typical social media discovery demands will include requests for original duly executed authorizations for full access to and copies of the opposing party's current and historical content on any internet based social media and/or networking websites, including, but not limited to, Facebook, Instagram, Twitter, LinkedIn, Google, etc., including site materials, deleted pages, related information, personal information, comments, messages, photographs and videos, and logged IP addresses, as well as preservation of the materials. The discovery demands should further be tailored to the appropriate time period and subject matter as demands which seek

"any and all" information may be denied as overly broad. The demands will also note that the authorization should include the email address linked to each account and any other identifying information linked to each account.

Typical discover demands will further seek the preservation of all of the opposing party's internet based social networking websites and accounts, including the preservation of all photographs, video recordings, essays, e-mails, blogs, chat room discussions and statements contained within or associated with the party's Facebook, Instagram, Twitter, LinkedIn, Google, etc. accounts.

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.

In 2018, the New York Court of Appeals held that a plaintiff's private social media posts and photographs are subject to disclosure where that information is "reasonably calculated to contain evidence material and necessary to the litigation." *Forman v. Henkin*, 30 N.Y.3d 656 (2018). The *Forman* court held that the private content discovery including the plaintiff's private photos and the time and word count from her posts was reasonably calculated to yield evidence relevant to the plaintiff's claim that she no longer engaged in activities she enjoyed before the accident, had become reclusive, and struggled to use a computer and compose coherent messages. *Id.*

The Court of Appeals in *Forman* explicitly specified a two-prong test for courts addressing disputes over the scope of a social media discovery holding that:

> Courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy or non-relevant materials. *Forman,* 30 N.Y.3d at 665.

More recently, in *Vasquez-Santos*, the First Department permitted a defendant to utilize the services of a "data mining" company for a widespread search of the plaintiff's devices, email accounts, and social media accounts for certain discoverable information regarding the credibility of his claim that certain damaging photographs were taken prior to the accident. See *Vasquez-Santos v Mathew*, 2019 NY Slip Op 00541 (1st Dep't 2019).

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

To date, New York courts apply the general standard for spoliation of evidence to social media posts that "once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data". *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.,* 93 A.D.3d 33, 939 N.Y.S. 2d 331 (1st Dep't 2012).

The New York County Bar Association has issued an advisory ethics opinion weighing in on what advice an attorney may provide a client regarding preservation of their social media content:

> "An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed. *New York County Lawyers' Association Ethics Opinion* 745 (July 2, 2013).

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).

In New York admissibility of social media information is evaluated on a case by case basis as to relevance and authenticity, consistent with the evaluation of other types of evidence, including the general exclusions as to character evidence. First, the court determines whether the content in the account is material and necessary, and then it balances whether the production of this content would result in a violation of the account holder's privacy rights. *Fawcett v. Altieri*, 960 N.Y.S.2d 592, (Sup. Ct. Richmond County 2013).

The demand must also demonstrate a good faith basis for the request and be narrowly tailored seeking only that information which relates to the claimed injuries arising from the accident. *Kregg v. Maldonado*, 98 A.D.3d 1289 (4th Dep't 2012). Courts have held content of social medial accounts to be material and necessary where the information "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." *Patterson v. Turner Constr. Co.,* 88 A.D.3d 617, 618 (1st Dep't 2011). Demands compelling the disclosure of "all" social media account records, or a request for "all information" from a party's social media site will most likely be denied as vague and overly broad. *Kregg*, 98 A.D.3d 1289 at 1290; *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (4th Dep't 2010).

The second prong of the analysis balances the social media user's privacy against the opposing party's need for access to the information sought on the social networking sites. *Fawcett* 38 Misc.3d at 432. In *Romano*, a personal injury action where defendant sought access to plaintiff's Facebook and MySpace accounts, the court held that the purpose of social networking sites was to share personal information with others and plaintiff knew her information may become publicly available, therefore plaintiff "cannot now claim she had a reasonable expectation of privacy." *Romano v. Steelcase Inc.*, 30 Misc.3d 426, 434 (Sup. Ct. Suffolk County 2010). The court further instructed, "as neither Facebook nor MySpace guarantee complete privacy, plaintiff has no legitimate reasonable expectation of privacy." *Id*.

Social media evidence that is determined to be relevant, "whether downloaded from a site or captured some other way must satisfy the same rules of evidence that any document must: (1) is it hearsay that is admissible under an exception; (2) has it been properly authenticated, i.e., is it in fact what the proponent purports it to be; and (3) does it qualify under the best evidence rule?" § 140:20. *Authentication of Evidence*, 4F N.Y.Prac., Com. Litig. in New York State Courts § 140:20 (5th ed.). The best evidence rule simply 'requires the production of an original writing where its contents are in dispute and sought to be proven." *Schozer v William Penn Life Ins. Co. of N.Y.,* 84 NY2d 639, 643 [1994].

The New York State Court of Appeals in *People v. Price*, 29 N.Y.3d 472 (2017), clearly stated it was not adopting one strict formula for how social media communications must be authenticated in order to be admitted as evidence. In *Price*, the Court of Appeals found that the proper evidentiary foundation to admit a social media photo was not met where the defendant's ties to the posting of the photo were not proffered. Therein, the Court of Appeals stated "authentication may be established by direct or circumstantial evidence, and 'reasonable inferential linkages can ordinarily supply 'foundational prerequisites' so long as the tie-in effort is not 'too tenuous and amorphous.'" *People v. Price*, 29 N.Y.3d at 481, citing *Patterson,* 93 N.Y.2d at 85).

Per the *Price* holding, "a social media document, even if authenticated by the social media service provider, must be proved to be a statement by the party alleged to have created it. Merely establishing that the document has indicia or traces of ownership—i.e. an address, birthday or reference to personal details—are

not always good enough." § 140:20. *Authentication of Evidence*, 4F N.Y.Prac., Com. Litig. in New York State Courts § 140:20 (5th ed.). It must be demonstrated that the social media page or post was "created by the party or the party was responsible for its contents." *Id.*

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

Presently, there is no law in New York preventing an employer from monitoring an employee's internet usage. New York State Senate Bill S2628 passed the NY Senate and Assembly on June 9, 2021 and is awaiting signature by the Governor. The new amendment to §52-c of the New York Civil Rights Law will require employers who monitor employees' e-mail or internet usage on any electronic device (e.g. phone, tablet or computer) to provide written notice of such monitoring to all employees upon hiring and be posted in the workplace.

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

Pursuant to New York's off duty conduct law (NY Labor Law §201-D) entitled "Discrimination against the engagement in certain activities" off-duty conduct such as political activity, the use of legal consumable products, recreational activities, and union membership is protected and may not be used to make employment-based decisions. §201-d can be applied to information obtained from an employee's social media account.

Certain exceptions to § 201-D exist including where the employee's lawful activity would create a material conflict of interest related to the employer's business interest; and where the employer believes its actions are required by statute, regulation or other government mandate; and where an employer believes its actions are permissible per an established substance abuse program, workplace policy, professional contract or collective bargaining agreement.