FOR MORE INFORMATION

FRANDEN FARRIS QUILLEN
GOODNIGHT ROBERTS & WARD
Tulsa, Oklahoma
Tulsalawyer.com

Jill Walker
jwalker@tulsalawyer.com

Jason Goodnight
jgoodnight@tulsalawyer.com

:

ALFA International
The Global Legal Network
Local Relationships Worldwide

OKLAHOMA

SPOLIATION

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

   "Spoliation" includes the intentional *or* negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. However, the first determination is whether the alleged spoliating party had a duty to preserve material evidence. Said duty can arise before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.

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

   First party spoliation is performed by a party to the underlying litigation. Third Party spoliation is performed by a third-party, who is not a party to the underlying litigation. There is no separate cause of action for spoliation by third-parties, and a victim of third-party spoliation must seek a remedy by means other than an individual tort claim.

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

   Spoliation is an evidentiary concept, not a separate cause of action.

   Akins v. Ben Milam Heat, Air & Elec., Inc., 2019 OK CIV APP 52, 451 P.3d 166.

4. **Remedies when spoliation occurs:**

   - Negative inference instruction

   Evidence of intentional destruction or bad faith is required before a litigant is entitled to an adverse inference instruction for spoliation of evidence. *Akins v. Ben Milam Heat, Air & Elec., Inc.*, 2019 OK CIV APP 52, 451 P.3d 166

   - Dismissal

   The most severe discovery sanctions, such as dismissal of the case, should be imposed only where the party's conduct is intentional, willful or in bad faith. 12 Okl.St.Ann. § 3237(B)(2). *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12.

   - Criminal sanctions

   No criminal sanctions in Oklahoma.

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

   Absent exceptional circumstances, a court may not impose sanctions on a party for failure to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. Okla. Stat. Ann. tit. 12, § 3237 (West). So long as the party is under no legal obligation to retain the electronic evidence at the time it was deleted, and its deletion was

pursuant to the routine, good-faith operations of its document-retention system, the party will fall within 12 O.S. §3237(G)'s safe harbor.

6. **Retention of surveillance video.**

There is no separate duty or specific time frame for retention of surveillance video. Surveillance video is treated the same as other electronic evidence. A party has a duty to preserve material evidence; this duty arises when the party reasonably should know that the evidence may be relevant to anticipated litigation. If a party is not under a duty to preserve surveillance video at the time of its destruction, and the surveillance video was destroyed pursuant to a routine, good-faith retention system, the party will be protected by the safe harbor under 12 O.S. §3237(G).

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, but only if the total amount was actually paid. The actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party

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?**

Evidence of medical insurance and insurance payments is not admissible at trial; such insurance is a collateral source which may not inure to the benefit of the defendant. If evidence of medical insurance is introduced for other purposes, a curative instruction should be given, instructing the jury that the health insurance payments are not available to reduce plaintiff's damages.

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).**

If the medical provider is contractually obligated to accept what the insurer paid as payment in full, the party is prohibited from admitting the full amount of the original bill into evidence, and is limited to only the amount their insurer paid. In contrast, an uninsured party who paid the full amount of their medical bill would be permitted to admit that amount into evidence.

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 answer depends on who drafted the accident/incident report. If the report is drafted by a non-attorney it is likely business records. If an attorney, whether in-house or other counsel, drafts the report it would likely classify as ordinary work product, and discovery of ordinary work product should be granted only upon a convincing showing that the substantial equivalent of the materials sought cannot be obtained without undue hardship, if at all.

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?

To obtain social media evidence, counsel should look for information publicly available on opposing party's social media and should send a preservation or spoliation letter early on in the litigation. Formal discovery is also recommended, especially where an account is private. When sending requests for production of documents, it is important to remember two limiting factors:

1. a request for production must describe the documents sought with "reasonable particularity" and;

2. in order to request social media information ""behind the privacy wall," you must locate evidence on the public-facing pages that led you to the existence of relevant evidence behind that wall. Thus, be particular about the social media you want and need for the litigation.

When requesting social media data directly from a party, detailed instructions should be provided. For example:

Requests for Production: For each Facebook© account maintained by you, produce your account data for the period of January 1, 2016 through the date of your production to this Request. You may download and print your Facebook© data by logging onto your Facebook© account; clicking on the downward facing arrow at the top right of your Facebook© page and selecting "Settings," clicking on the "Your Facebook© Information" below the "General Accounting Settings" tab, and clicking "Download your information."

Third-party subpoenas to the social media providers are also options for obtaining this information on an opposing party. However, these subpoenas may implicate federal law under the Stored Communications Act.

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.

If a social media account's personal information is private then opposing party must request access to the information and give specific details of what evidence they are looking for and why it may be found on the private account. Courts will not generally allow a "fishing expedition."

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

There are no standards specific to social media. The same standards for normal spoliation of evidence apply.

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).

Oklahoma has not adopted any specific standards for admitting social media into evidence. The primary hurdle is authentication. Under 12 O.S. §2901, social media evidence may be authenticated in a multitude of ways: by testimony of the purported creator, testimony from other people who saw the purported creator post the social media, expert testimony concerning the results of a search of the social media account holder's computer hard drive, testimony about contextual cluse and distinctive aspects which could reveal the purported author, testimony from the social media provider linking the profile with the post at issue, circumstantial evidence of authenticity, and of course, an admission of authentication in response to a Requests for Admission.

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

The Oklahoma legislature has enacted 40 O.S. §173.2: Limitations on Employer Access to Online Social Media Accounts of Employees. Under this statute, an employer may not:

1. Require an employee or prospective employee to disclose a user name and password or other means of authentication for accessing a personal online social media account through an electronic

communications device;

2. Require an employee or prospective employee to access the employee's or prospective employee's personal online social media account in the presence of the employer in a manner that enables the employer to observe the contents of such accounts if the account's contents are not available to the general public, except pursuant certain exceptions, such as investigations.

3. Take retaliatory personnel action that materially and negatively affects the terms and conditions of employment against an employee solely for refusal to give the employer the username or password to the employee's personal online social media account; or

4. Refuse to hire a prospective employee solely as a result of the prospective employee's refusal to give the employer the username and password to the prospective employee's personal online social media account.

However, this statute does permit an employer to conduct an investigation, and require the employee's cooperation in sharing content from social media when investigating to:

1. ensure compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct based on the receipt of specific information about activity on a personal online social media account or personal online social media service by an employee or other source, or

2. of an employee's actions based on the receipt of specific information about the unauthorized transfer of an employer's proprietary information, confidential information or financial data to a personal online social media account or personal online social media service by an employee or other source;

Further, an employer may require an employee to disclose any username and password for accessing:

1. Any computer system, information technology network, or electronic communications device provided or subsidized by the employer; or

2. Any accounts or services provided by the employer or by virtue of the employee's employment relationship with the employer or that the employee uses for business purposes.

The statute expressly does not prohibit an employer from accessing its computer system, including electronic communications devices owned by the employer, and reviewing personal online social media accounts that an employee may choose to use while utilizing an employer's computer system, electronic communication device, or information technology network.

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

In Oklahoma, an employer is within its rights to terminate an employee after monitoring the employee's social media accounts. Because Oklahoma is an "at-will" employment state, an employee must demonstrate that their termination was in violation of public policy. In *Peuplie v. Oakwood Ret. Vill., Inc.*, 2020 OK CIV APP 40, 472 P.3d 213, the Oklahoma Court of Civil Appeals found that terminating an employee for violation of company's social media policy was not a clear violation of public policy.