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SPOLIATION

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

Wisconsin law recognizes that every litigant and party to an action has a duty to preserve evidence that is essential to the claims that are likely to be litigated. *Sentry Ins. v. Royal Ins. Co. of Am.*, 196 Wis. 2d 907, 918, 539 N.W.2d 911 (Ct. App. 1995). Not all "destruction, alteration, or loss of evidence qualifies as spoliation" and, accordingly, not every circumstance calls for sanctions. *See Insurance Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI App 15, ¶15, 269 Wis. 2d 286, 674 N.W.2d 886.

After the lost evidence has been identified, the court must determine:

(1) The relationship of the destroyed, altered, or lost evidence to the issues in the present action;

(2) The extent to which the destroyed, altered, or lost evidence can now be obtained from other sources; and

(3) Whether the party responsible for the evidence destruction, alteration, or loss knew or should have known at the time he or she caused the destruction, alteration, or loss of evidence that litigation against the opposing parties was a distinct possibility.

Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District, 177 Wis. 2d 523, 532, 502 N.W.2d 881 (Ct. App. 1993). Then, the court must determine whether sanctions are appropriate. *Id.* The difference between intentional and negligent spoliation matters in the sanction stage. As discussed below, intentional spoliation may be subject to the harsher sanctions than negligent spoliation. A dismissal or negative inference may only be permitted for egregious conduct. *American Fam. Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶42, 319 Wis. 2d 397, 768 N.W.2d 729.

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

Wisconsin law recognizes no difference between first-party and third-party spoliation. It is, however, possible for a party to violate its duty to preserve evidence by the actions of its agents. *See Garfoot v. Fireman's Fund Ins. Co*., 228 Wis. 2d 707, 599 N.W.2d 411 (Ct. App. 1999).

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

Spoliation is not a separate cause of action, but instead is dealt with through court-fashioned remedies. *Neumann v. Neumann (In re Estate of Neumann)*, 2001 WI App 61, ¶80, 242 Wis. 2d 205, 626 N.W.2d 821.

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4. Remedies when spoliation occurs:

- Negative inference instruction

In Wisconsin, a jury may be instructed to draw a negative inference when a party spoils evidence. *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 211 N.W.2d 810 (1973). In *Jagmin*, the Wisconsin Supreme Court limited the issuance of this instruction to only intentional spoliation under the maxim "omnia praseumuntur contra spoliatorem" which means "all things are presumed against the wrongdoer":

> In Wisconsin the operation of the maxim omnia praesumuntur contra spoliatorem is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence.

Id. at 81

Where the inference is applied, the jury is permitted to draw "an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it." *Neumann*, 2001 WI App 61, ¶81.

- Dismissal

Only when the spoliation conduct is "egregious" is dismissal an appropriate sanction. *Milwaukee Constructors II*, 177 Wis. 2d 523 (reversing dismissal for want of egregious conduct). Egregious conduct is a "conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process." *Id.* at 533; *Golke*, 2009 WI 81, ¶40. This sanction is reserved for only egregious conduct and is thus seldom imposed. *Mueller v. Bull's Eye Sport Shop, LLC*, 2021 WI App 34, ¶21, 398 Wis. 2d 329, 961 N.W.2d 112 ("[A] court should only rarely impose dismissal as a sanction."). Wisconsin's rules regarding discovery provide that upon the filing of a motion to dismiss, motion for judgment on the pleadings, or a motion for more definite statement, all discovery and other proceedings must be stayed for a period of 180 days after the filing of the motion or until the court's ruling on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary. Wis. Stat. § 802.06(1)(b). Some defendants may use a motion to dismiss as a tactic to delay discovery by up to 180 days.

- Criminal sanctions

Wisconsin does not recognize criminal sanctions for spoliation. Wisconsin courts have only recognized the following potential remedies for evidence spoliation: (1) discovery sanctions; (2) monetary sanctions; (3) exclusion of evidence; (4) reading the spoliation inference instruction to the jury; and (5) dismissal of one or more claims. *Mueller*, 2021 WI App 34, ¶20.

- Other sanctions

Wisconsin law recognizes that a party may be subject to discovery sanctions, monetary sanctions and exclusion of evidence and dismissal of claims. *See Golke*, 2009 WI 81, ¶42. The extent of these sanctions is in the discretion of the trial court. *Milwaukee Constructors II*, 177 Wis. 2d at 538 ("[The circuit court has a] broad canvas upon which to paint in determining what sanctions are necessary").

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

As mentioned above, Wisconsin law recognizes that every litigant and party to an action has a duty to preserve evidence that is essential to the claims that are likely to be litigated. *Golke*, 2009 WI 81, ¶21. Wisconsin's rule related to discovery sanctions (Wis. Stat. § 804.12) is modeled after Rule 37 of the Federal Rules of Civil Procedure ("FRCP"). *See Rao v. WMA Sec., Inc.*, 2008 WI 73, ¶47, 310 Wis. 2d 623, 752 N.W.2d 220 (stating "The Wisconsin rules governing…sanctions for violations of discovery orders mirror the federal rules…").

Wisconsin Statute § 804.12(4m) provides that "[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." Wisconsin law endorses a burden shifting test providing that:

(1) The challenging party must show that the electronic information is lost, then the burden shifts to the opposing party;
(2) The party failing to preserve the evidence must show that the information was lost "as a result of" the routine, good faith operation of an electronic information system, then the burden shifts back to the challenging party; and
(3) The challenging party must then show that "exceptional circumstances" are present and warrant sanctions.

Fabco Equip., Inc. v. Kreilkamp Trucking Inc., 2013 WI App 141, ¶21, 352 Wis. 2d 106, 841 N.W.2d 542 (interpreting Wis. Stat. § 804.12(4m)).

Recent changes to Wisconsin's rules regarding discovery provide for exceptions to discovery of electronically stored information ("ESI") in that:

"A party is not required to provide discovery of any of the following categories of electronically stored information absent a showing by the moving party of substantial need and good cause, subject to a proportionality assessment under [Wis. Stat. § 804.01(2) (am) 2.]:

a. Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved.

b. Backup data that are substantially duplicative of data that are more accessible elsewhere.

c. Legacy data remaining from obsolete systems that are unintelligible on successor systems.

d. Any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost. In response to a motion to compel discovery or for a protective order, the party from whom discovery is sought is required to show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources only if the requesting party shows good cause, considering the limitations of par. (am). The court may specify conditions for the discovery."

See Wis. Stat. § 804.01(2)(e)1g, as enacted by 2017 Wis. Act 235, which has effective dates of April 5, 2018 and July 1, 2018.

With regard to ESI, there are two additional considerations. First, there is a discuss and confer obligation on the parties regarding ESI discovery under Wis. Stat. § 804.01(2)(e)1r. Second, Wis. Stat. § 804.09(2)(b)1. was amended by 2017 Wis. Act 235 regarding ESI to provide:

"The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production shall be completed no later than the time for inspection specified in the request or another reasonable time specified in the request or another reasonable time specified in the response."

6. Retention of surveillance video.

Wisconsin law does not recognize a hard and fast rule for the retention of surveillance video. Consistent standards and procedures resolve most concerns with surveillance video retention. A recent noteworthy case that dealt with these issues is *Martinez v. Regent Ins. Co*., 2020 WL 1887114, Appeal No. 2018AP1685 (April 20,

2020)(unpublished *per curiam* opinion)(which, under Wis. Stat. § 809.23(3)(a), cannot be cited as precedent or authority, except in limited circumstances such as claim or issue preclusion; provided, however, under Wis. Stat. § 809.23(3)(b) certain unpublished decisions issued after July 1, 2009, may be cited for persuasive value). There, the Martinezes argued that they were entitled to a new trial based on the destruction of surveillance footage. *Id.*, ¶13. The custodian of the surveillance tape was untrained with the restaurant's new surveillance system and made errors in his attempts to capture and save the footage. *Id.*, ¶15. The court affirmed the circuit court's denial of spoliation sanctions on the basis that the custodian did not act intentionally or egregiously in destroying the footage. *Id.*

COLLATERAL SOURCE

7. **Can a 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 Wisconsin, the collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person. *Leitinger v. DBart, Inc*., 2007 WI 84, ¶26, 302 Wis. 2d 110, 736 N.W.2d 1. This rule precludes defendants from introducing evidence about amounts billed opposed to amounts actually paid. *Id.*, ¶¶28-34. The plaintiff is entitled to the full amount billed, regardless of what is actually paid. Although the defendant may be unable to admit the difference between the amount billed and the amount paid, it still may be useful to seek the information through discovery. Although the general rule of inadmissibility typically applies, the information is still valuable because it may confirm whether there are any outstanding items or unpaid bills. Further, there is a limited exception for the use of the information for impeachment. *See id*., ¶30. There is an exception to these general rules allowing collateral source payments to be admitted in medical malpractice cases. *Weborg v. Jenny*, 2012 WI 67, ¶7, 341 Wis. 2d 668, 816 N.W.2d 191.

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?**

   See above.

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).**

   See above.

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?**

    Under Wis. Stat. § 804.01(2)(c)1, attorney work product privilege applies only where a party can show that documents that are generally accident and incident reports prepared in the ordinary course of business are prepared "in anticipation of litigation." Documents that have dual purpose, or that were prepared in the course of ordinary business and for anticipated litigation generally do not enjoy the protections of the attorney work product privilege doctrine. *Shibilski v. St. Joseph's Hosp., Inc*., 83 Wis. 2d 459, 266 N.W.2d 264 (1978) (holding that routine reports prepared by a hospital were not work product). The work product doctrine is extended to documents and tangible things prepared by or for a representative of a party. *Id.* at 468.

    Application of the work product doctrine requires a three-step analysis, as detailed in *Ranft v. Lyons*, 163 Wis.

2d 282, 298, 471 N.W.2d 254 (Ct. App. 1991). First, the party seeking discovery must show the item is within the scope of Wis. Stat. § 804.01(2)(a). Next, if successful, the party opposing discovery must show the documents are work product. *Id.* Finally, if the items are determined to be work product, the party seeking discovery must demonstrate "substantial need of the materials in the preparation of the case" and that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.*

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?

Wisconsin has no unique rules concerning discovery of social media evidence. All Wisconsin rules of civil procedure apply to social media evidence in the same manner as other forms of electronic evidence. All discovery requests are subject to the rules of discovery under Wis. Stat. Ch. 804. If social media accounts are not public, a formal discovery request should be made to the opposing party, not the social media network itself. Section 2702 of the Stored Communications Act, 18 U.S.C. §§ 2701 – 2713 (2021), prohibits social media companies from disclosing content subject to a number of exceptions, including lawful consent. Discovery requests should be limited in time and narrowly tailored to the subject of the case to ensure relevance of the request under Wis. Stat. § 804.01. In many cases, parties may do a simple Internet search to find social media profiles and public postings of other parties.

There are Wisconsin ethical rules that apply. Wisconsin Supreme Court Rules 20:4.2, 20:4.3 and 20:4.4 relate to a lawyer's representation and his or her role and communication with others. These rules control a lawyer's ability to communicate with a third party even over social media.

12. Which, if any, limitations do your state's laws impose on a party obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.

There are no specialized limitations on obtaining social media evidence in Wisconsin from an opposing party outside of the potential for ethical violations, discussed above, and the restrictions of Wis. Stat. § 804.01(2)(a).

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

Wisconsin courts have not established any specific spoliation standards for social media for party litigants. The spoliation standards discussed above apply. Nonetheless, the Wisconsin Rules of Professional Conduct provide that competent representation requires counsel to "maintain the requisite knowledge and skill by keeping abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology …." SCR 20:1.1, Committee Notes, comment 8. An attorney's knowledge of a client's claims and defenses, the location, volume and format of data, and familiarity with the client's preservation obligations are a necessary first step in managing ESI. *See Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 449-50 (S.D.N.Y. 2004).

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).

Wisconsin has not adopted the Federal Rules of Evidence's self-authenticating ESI rules, 902(13) (Certified Records Generated by an Electronic Process or System) and 903(14) (Certified Data Copied from an Electronic Device, Storage Medium, or File). These rules allow parties to authenticate certain types of ESI by a certification from a qualified witness without offering any testimony as to foundation. Wisconsin courts focus on ensuring that social media evidence is relevant and can be authenticated pursuant to Wisconsin and Federal Rules of Evidence. *See In re A.K. v. S.J.A.*, 2020 WI App 18, ¶4, 391 Wis. 2d 496, 942 N.W.2d 498 (unpublished) (noting that social media posts and text messages need to be properly authenticated to be used in court proceedings).

Pursuant to Wis. Stat. § 909.015(1), authentication can be achieved through witness testimony from one who has knowledge of the social media account in question. A party can authenticate evidence relating to social media through circumstantial evidence as well. *See State v. Baldwin,* 2010 WI App 162, ¶55, 330 Wis. 2d 500, 794 N.W.2d 769; *see also* Wis. Stat. § 909.015(4). Electronic communication must be authenticated no differently than other sources of evidence. *State v. Burch*, 2021 WI 68, ¶¶32-34, 398 Wis. 2d 1 (discussing authentication standards for health fitness data). Text messages can be easily authenticated with witness testimony, and social media accounts, while they may provide more difficulty with regard to email authentication on the accounts, are not treated as fundamentally different to authenticate.

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

Wisconsin Statute § 995.55 specifically prohibits employers from requiring or even requesting, access information for any "internet account of the employee or applicant or to otherwise grant access to or allow observation of that account." While this statute does not specifically use the term "social media," it is understood to include any online social media accounts. *See* Wis. Stat. § 995.55(1)(d) (defining "personal internet account" to mean an account "that is created and used by an individual exclusively for purposes of personal communications."). This rule applies not only to employees, but also to job applicants pursuant to Wis. Stat. § 995.55(2)(a)1. Under the statute, "access information" means user name and password, or any other information "that protects access to a personal Internet account." Wis. Stat. § 995.55(1)(a). This statute also imposes these restrictions on educational institutions with respect to current or prospective students and landlords and their tenants or prospective tenants. Wis. Stat. § 995.55 (2), (3), and (4). There are exceptions to this rule, which include allowing employers to access mobile devices or Internet accounts that were provided to the employee by the employer, and allowing access to information where the employer believes that information has been disseminated by means of Internet accounts as a result of employee misconduct in connection with their employment. Wis. Stat. § 995.55 (2)(b). As of late September 2021, no Wisconsin cases addressing Wis. Stat. § 995.55 or employers' rights to monitor employees' social media use were found on Westlaw.

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

Wisconsin courts and federal courts have not set any limitations on terminations of employment related to social media. Social media evidence is treated no differently than other evidence. In *Burton*, the appellate court upheld the termination of a tenured university professor in part because she regularly posted allegations against university administration and false and inflammatory statements about her colleagues on her website and on social media platforms. *Burton v. Bd. of Regents of the Univ. of Wis. Sys.*, 2021 WL 3921443, ¶24, Appeal No. 2019AP2276 (Sept. 2, 2021) (unpublished *per curiam* opinion). With "no basis in fact," the plaintiff posted that various colleagues were racist, sexist, "criminal," and engaged in "illegal behavior." *Id.* In another case, the Court of Appeals upheld the termination of a police officer whose personal social media posts violated Milwaukee Police Department's Code of Conduct regarding integrity. *Andrade v. City of Milwaukee Bd. of Fire & Police Comm'rs*, 2021 WL 3870078, ¶39, Appeal No. 2020AP333 (Aug. 31, 2021) (not recommended for publication).