

**2015 Transportation Committee Conference
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You Decide! Are On-Board Video Systems Worth It?

- I. What are the capabilities of on-board video systems?
 - a. *What is an on-board video system?* An on-board video system is a device that records images within certain parameters during a vehicle's operation.
 - b. *What information can it gather?* The information gathered varies depending upon the device's capabilities. Some older systems gather only video, without sound. Newer systems gather video and sound from multiple camera locations and angles. They can also record engine, brake, signal and systems information from the vehicle while plotting its movement via GPS.
 - c. *How is that information stored?* The information is typically stored on an on-board device. The information can then be downloaded from the device to a company computer system. Some systems will send information directly from the on-board device to the company when certain parameters are met.

- II. Pros/Cons of On-Board Video Systems (50 minutes)
 - a. Pros:
 - i. *Why install it?* Real comments from [The Truckers Report](#) about on-board video systems.
 1. "Probably to keep people from doing crazy stuff like Facebooking while driving or texting or going to get your phone out of the bunk after you set the cruise. It only suppose to record when you hit rumble strips are G force type movements, but I've hit many rumble strips and bumps and it hasn't came on except for this morning."
 2. I will say I don't hear the rumble strips as much, and I do pay more attention. I think it's a win-win.
 3. I doubt if most people would drive like a maniac if they had a camera facing them. I wanted to pass some people in the snow this morning, but the lane was covered, and I could just hear safety saying. You was in that big of a hurry to do something so stupid. So I just waited for a large car passed me and had some tracks to follow to get around them.
 - ii. *Clinical verification of diagnostic results.* A truck may return with some evidence of an event that either the driver denies or does not know anything about. An on-board video system provides a way to determine what happened. This information can then be used to promote driver safety or pursue a claim against the party responsible for the damage.
 - iii. *Protects good drivers.* Real comments from [The Truckers Report](#):

1. It actually gives me more comfort.
 2. It does seem to help encourage safe driving because "I don't want to set that ##### camera off" is pretty good incentive to not drive like an idiot.
 3. I feel it protects me from any 4 wheeler that decides to cut me off, lose control, and spin out in front of me. In other words, non preventable accidents.
 4. Having dash cams in trucks is a good thing. To protect the drivers that are doing the RIGHT THING.
 5. Most accidents you get canned anyway. Some of these accidents because you have a video will show it was unpreventable. If a truck swings in front of you then Jackknifes, the first thing people are going to say is you did not have proper following distance. But the video will show you had no control of the situation and could possibly save your job.
 6. I really think dash cams are good for rigs whether the video is provided by the driver or the company cam. If a company driver screws up (accident) and the company dash captures that, the driver is found at fault. With no cam the driver is still found at fault, as usual. So what's the difference? At least with the cam, when the driver is innocent it can be proven. That's the way I see it.
- iv. *Uniform implementation rather than drivers BYOD.*
1. Drivers without company provided on-board video may take matters into their own hands. If the video is on their own, personal device, the driver owns that video. The company may not have a right to access it or review it.
 2. It is happening. [The Truckers Report](#): "One time I literally got cut off by a 4 wheeler from the right, at night, in an unlit construction zone, when he "merged" right in front of me from a temporary merge lane into the interstate. If I hadn't jammed on my breaks I would have rolled that car. I was going 45, the limit in the C zone. And maintaining safe following distance. So I was doing everything right. But how was I going to prove that if I killed the guy? A few days later I bought a dash cam."
- b. Cons:
- i. *On-board video systems are expensive to install, maintain & update.* This can be true with complex video systems implemented in a large fleet. Some of this cost may be reclaimed if insurance carriers offer any discount for using video systems. The cost must also be compared to the annual claim expenditure.
 - ii. *On-board video systems only catch bad things.* One user on [The Truckers Report](#) said "[t]he video does nothing to help the situation. It only hurts the driver." It is true that on-board video can catch negligent acts, or worse. However the goal is to identify these acts before they produce harm. This then promotes safer driving.
 - iii. *Driver resistance to on-board video systems:*
 1. "My company hires drivers that don't need to be monitored 24/7."

2. "I thought it was going to be real sensitive and I would be on the phone with safety every day trying to explain crap"
 3. "Tricks that don't work: Hanging a hat over it, putting a sticker on it, etc. It defeats the purpose of having it in the first place and if you set it off, you're going to have to explain why they couldn't see whether or not you had your face in a cell phone. And then probably get fired anyways just because you went over a pothole, set it off and had it obstructed. Pulling the wire out doesn't work, either. They know when that happens somehow. Tampering with the camera won't get you anywhere, so just leave it alone and either quit or learn to live with it."
- iv. *Driver's adapt and drive to the camera.*
 1. "Some drivers would rather avoid setting the camera off than lock up the brakes, even if they really have to. It's caused a lot of close calls, just because people don't want the camera to record them hitting the brakes hard when maybe they should have. That kind of scared me when I was in the bunk with someone else driving..."
 - v. *Spoliation of evidence if the on-board video is lost.* If on-board video systems are used, care must be taken to preserve information that may become relevant to anticipated litigation. If the video is lost, a jury could be instructed that it can assume the video would have benefitted the plaintiff.

III. What is Spoliation of Evidence?

a. Defining spoliation of evidence.

It is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *United States v. Kitsap Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002). A party commits spoliation "as a matter of law only if they had some notice that the documents were 'potentially relevant' to the litigation before they were destroyed." *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991). Notice and relevance are usually vigorously disputed. When spoliation occurs, courts presently have broad discretion to fashion spoliation remedies, including jury instructions. "A district court's adverse inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other relevant evidence." *Dzung Chu v. Oracle Corp. (In re Oracle Corp. Sec. Litig.)*, 627 F.3d 376, 386-87 (9th Cir. 2010).

b. Why does spoliation of evidence matter?

Most jurisdictions permit one of two alternative jury instructions to combat spoliation. One is a rebuttable presumption. "[W]illful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence." *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006). If this intent is established it is the spoliator's burden to establish the destroyed evidence was not unfavorable.

The other instruction is a permissible inference. "[A] permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed." "An inference is permissible, not required, and it does not shift the burden of proof."

The potential remedies are not restricted only to jury instructions. Courts may fashion alternative sanctions to tailor the remedy to the harm. For instance, a spoliating party may be

prohibited from introducing evidence and testimony concerning what the missing evidence would have shown unless the opposing party opens the door.

IV. If an accident happens and I am on notice of potential litigation, what do I do and what do I keep?

a. Duty to suspend routine document destruction policies & video self-looping.

The duty to preserve attaches once a defendant is on notice of the potential litigation. The defendant must then preserve evidence. This includes suspending routine document destruction policies for accident reports and other data that is relevant to the event. It also includes locating and preserving video that may be relevant before the video is lost due to self-looping.

b. The video is irrelevant because it shows “nothing.”

In *Bass-Davis v. Davis*, 122 Nev. 442, 446, 134 P.3d 103, 105 (2006) a convenience store lost video of a slip and fall but argued the lost video would have showed “nothing” and was irrelevant. This argument failed. “[E]ven if the videotape would not have shown the location where [the customer] fell, it would have shown whether or not a warning sign was placed near the front door.” An adverse inference was permitted.

In *LaJocies v. City of N. Las Vegas*, 2011 U.S. Dist. LEXIS 49046, 2011 WL 1630331 (D. Nev. Apr. 28, 2011) video and photographs existed but were lost. “Moreover, because the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist, a party can hardly assert any presumption of irrelevance as to the destroyed documents.” The court also rejected argument that the video’s viewing limitations meant it showed no relevant evidence.

Despite the limited viewing angle of the videotape which may have captured only the threshold of the door but not inside the cell, it is likely that it did still capture at least some of the altercation (whether sights or sounds) and could have potentially assisted the jury to understand the tenor of the event and to evaluate the credibility of the witnesses who are providing conflicting descriptions. Likewise, the missing photographs of the injuries possibly could have assisted experts in determining how the injury was more likely to have been caused. At the very least, even if Defendants are correct in their analysis that the photographs and videotapes are now no longer relevant to the ultimate issues which will be presented to the jury, the Defendants still had an initial and continuing duty to preserve the videotape and photographs because they still could likely have led to the discovery of other relevant evidence.

Patton v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 165617, 2013 WL 6158461 (D. Nev. Nov. 20, 2013) also reached this conclusion.

The initial problem with Walmart’s argument, and its document preservation directive, is that Walmart made a conclusion—(viz. that “nothing” was caught on film)—that was not Walmart’s to make. Whether “nothing” or “something” was caught on film is an evidentiary question of relevance. This determination is the court’s, and not Walmart’s, to make. See Fed. R. Evid. 401.

The overarching problem with Walmart's argument and its document preservation directive, however, is that "nothing" is something. Even if "nothing" was caught on film, camera five's video footage is probative because it tends to make the fact that Walmart maintained safe premises more probable than not. See Fed. R. Evid. 401. "Nothing" would show: (1) an empty and unobstructed east entrance; (2) rows of barbecue sauce and other liquids that had not fallen or leaked; and (3) a ceiling that kept water from dripping down and puddling on the floor. "Nothing," therefore, would be central to Patton's negligence claim because nothing would tend to show that Walmart did not breach its duty of care.

Something rather than "nothing," however, was caught on film. The video footage from the time before Patton's fall was reported must have recorded Burton either pushing or pulling his cart. If Burton was pushing the cart, then camera five's video footage would tend to make Patton's allegation that Walmart failed to properly inspect aisle four more probable than not because Burton could not have seen obstructions, like a puddle of liquid, as he entered aisle four. *Id.* But, because Walmart's document preservation directive purportedly instructed employees to only preserve video footage after the incident was reported, Walmart's policy prevented Patton from discovering relevant evidence. In fact, assuming—as Walmart represents—that its employees implemented the document preservation directive correctly, then the policy itself demonstrates that Walmart destroyed relevant and probative evidence.

c. How much video should be preserved?

No matter how much video is preserved, the claimant will argue it is insufficient. In *Maxim v. FP Holdings, LP*, 2014 U.S. Dist. LEXIS 439, 2014 WL 200545 (D. Nev. Jan. 2, 2014) a casino customer slipped and fell on a liquid. A surveillance camera captured the fall and the casino preserved it from a period beginning 10 seconds before the fall through the time the customer was removed by emergency medical technicians. 10 seconds was insufficient.

In *Demena v. Smith's Food & Drug Ctrs., Inc.*, 2012 U.S. Dist. LEXIS 129024, 2012 WL 3962381 (D. Nev. Sept. 10, 2012) a customer asserted she slipped and fell on a jalapeno pepper. She completed an incident report before leaving via ambulance. The store "preserved approximately forty minutes of video - consisting of sixty-five seconds prior to the incident and about thirty-nine minutes after the incident - based on when Plaintiff entered and exited the camera range." This was sufficient.

d. Spoliation for not creating evidence?

Maxim v. FP Holdings, LP, 2014 U.S. Dist. LEXIS 439, 2014 WL 200545 (D. Nev. Jan. 2, 2014). Video of more than 10 seconds before the fall was not preserved because the employees involved "were allegedly unaware that such evidence could be relevant to determining liability for the accident." The casino "also did not identify or obtain statements from employees who were or may have been in the area prior to the accident and may have had knowledge as to how or when the liquid came to be present on the floor."

Defendant's security officers or other employees who are charged with investigating accidents that occur on its premises should be instructed and should know that it is important to obtain and preserve evidence in Defendant's possession, custody or control that may reasonably show how, when and by whom a foreign substance came to be present on the floor of its premises.

V. Evidence has been spoliated, now what?

a. What impact does the instruction have on the defense case?

The impact upon the defense case varies depending upon the remedy imposed and the specific facts of each case. The impact of each spoliation situation must be individually addressed.

b. Is there any way to eliminate a spoliation jury instruction from trial?

One strategy is to admit the part of the case that the spoliation instruction concerns. If the instruction goes to liability but liability is conceded, then the missing evidence is arguably irrelevant as well as the instruction.