

Video Surveillance: A Treasure or a Trap?

I. Types of Surveillance

A. Fixed Surveillance on Premises

1. Monitored vs. Unmonitored
2. Outsourced or CCTV
3. Movement of Camera Angles or Stationary

B. Surveillance for Hire

1. Video of incident vs. Video of witness/party activities for impeachment purposes
2. Footage obtained for purposes of litigation

C. Discovery Issues

1. When video footage must be produced

In *McClure v. Publix*, 124 So. 3d 998 (Fla. 4th DCA 2013), the court held that there was no abuse of discretion by the trial court in permitting the defendant to delay the production of the in-store surveillance video until after the plaintiff's deposition had been completed. Delaying the production gives the defendant the opportunity to have the plaintiff describe the events of the incident exactly as he or she recalls it, without having the plaintiff's memory bolstered or influenced by the video. See also *Ex parte Doster Constr. Co.*, 772 So. 2d 447 (Ala. 2000).

Courts seem to be unanimous that whether the footage at issue is in-store surveillance or hired surveillance, and whether the footage will be used as substantive evidence or for impeachment purposes only, it must be disclosed prior to trial. James C. Haggerty & Christine P. Busch, *Must Surveillance Videos be Disclosed Prior to Trial if Only Used for Impeachment Purposes?*, available at <http://corporate.findlaw.com/litigation-disputes/must-surveillance-videos-be-disclosed-prior-to-trial-if-only-used.html> (Mar. 26, 2008).

2. Work-product arguments

Unlike an internal incident report, which typically enjoys work-product protection from discovery, in-store video surveillance generally does not enjoy such protection. However, surveillance for hire may be protected by the work-product doctrine.

3. Different issues for fixed surveillance vs. hired surveillance

II. Retention and Spoliation Issues

A. Storage Options

1. On-site vs. off-site storage

2. Log systems that cycle/loop over after several days

B. Retention

1. Retention policies – best practices

Written policy regarding the usual storage and recycling procedures for surveillance footage.

Written policy regarding “litigation holds” and preservation of footage in anticipation of litigation.

2. When the duty to preserve arises

“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

a) Steps to take to preserve

Suspend the routine retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant evidence. Internal procedures should be established to ensure the capture and safe storage of video footage once “notice” of an incident that could lead to potential litigation has been received. These procedures should include provisions for affirmative intervention to prevent the automatic recycling of video footage. Beware that courts may consider a business’s failure to comply with its own internal guidelines for the preservation of video footage to be a substantial factor in evaluating spoliation sanctions. See, e.g., *Kroger Co. v. Walters*, 735 S.E.2d 99 (Ga. App. 2012).

If the surveillance is recorded in-house: (1) advise the appropriate retail personnel to take immediate steps to prevent the loss or destruction of the video, (2) have the pertinent parts of the video copied onto a DVD, (3) have the appropriate viewing software copied, and (4) have a copy of the video and software forwarded to risk management personnel for review and safe keeping.

If the surveillance is recorded off site, the necessary steps should be taken to ensure transfer of the recording to a DVD, along with the appropriate viewing software, so the footage can be accessed in the future.

b)What/how much to preserve

The best practice is to preserve the entirety of the event and a “reasonable” period of time prior and subsequent. In an ideal world, you should preserve footage showing from the time of plaintiff’s entry upon the premises through departure, including the time and location of the incident at issue, as well as a sufficient period of time of the location prior to plaintiff’s entrance to address notice of defect issues. *Taylor v. City of New York*, No. 12-CIV-5881(RPP), 2013 U.S. Dist. LEXIS 126359 (S.D.N.Y. 2014); *Gleason v. Marriott Hotel Servs., Inc.*, No. 11-CIV-6295, 2013 U.S. Dist. LEXIS 123967 (S.D.N.Y. 2013); *Simoës v. Target Corp.*, No. 11-CV-2032(DRH), 2013 U.S. Dist. LEXIS 83896 (E.D.N.Y. 2013).

c)How long to preserve

All footage should be preserved until the statute of limitations has expired or the plaintiff’s case has concluded.

d)What if the injured person says they are fine on premises but later files suit? Other problems and pitfalls.

C.Spoliation

1.Standard for imposing sanctions

The standard for imposing sanctions varies, because what constitutes “notice” that surveillance footage is relevant to litigation varies by jurisdiction. *Compare Craig v. Bailey Brothers Realty, Inc.*, 697 S.E.2d 888 (Ga. App. 2010) (“Notice of potential *liability* is not the same as notice of potential *litigation*. . . . [T]he simple fact that someone is injured in an accident, without more, is not notice that the injured party is contemplating litigation sufficient to automatically trigger the rules of spoliation.”), *with*

Rodgers v. Rose Party Functions Corp., No. 100-CV-4780(MKB), 2013 U.S. Dist. LEXIS 161190 (E.D.N.Y. 2013) (“Defendants should have anticipated litigation . . . when defendants’ security personnel arranged for plaintiff to be taken by ambulance to a hospital for treatment of the injuries she sustained when she slipped on defendants’ stairs.”).

Federal Rule of Civil Procedure 37 addresses a party’s failure to provide electronically stored information. Many courts are hesitant to impose sanctions when a video was overwritten according to routine business practice or other circumstances beyond the spoliator’s control.

2. Consequences of destruction of footage

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve such evidence for another’s use in pending or “reasonably foreseeable” litigation. Where spoliation has occurred, the trial court has the discretion to impose sanctions. Generally, “[a] court should impose the least harsh sanction which would serve as an adequate remedy; the range of sanctions, from the least harsh to the harshest, include further discovery, cost-shifting, fines, special jury instructions, preclusions, entry of default judgment, and dismissal.” *Slovin v. Target*, No. 12-CV-863(HB), 2013 U.S. Dist. LEXIS 31858 (S.D.N.Y. 2013).

III. Strategies for Using Surveillance Footage

A. How to use footage before suit

1. What, when, where, how, and why

Use in initial review and evaluation of claim: it may show liability or provide a strong defense to a claim. Even if it shows liability, it may rebut a damage claim if it shows the plaintiff after the accident behaving in a way inconsistent with the injuries alleged.

Use in the investigation stage when interviewing potential witnesses. It can refresh a witness’s recollection or a witness may be able to identify others in the video.

Use favorable video during settlement negotiations to demonstrate to the plaintiff and plaintiff’s counsel the issues they will face in proving the case and explaining the video at trial.

Use to train and educate for risk management purposes, and to evaluate staff’s compliance with risk management procedures.

2. Example videos

B. How to use during litigation

1. What, when, where, how, and why

Use during plaintiff's deposition.

Submit in support of a motion for summary judgment.

Video is a powerful tool at trial, especially in this day and age where jurors expect our every move to be captured.

2. Example videos

C. Privacy Issues

1. When and how privacy issues arise

Employers monitoring employees: Employees have a legitimate expectation of privacy in the workplace, but this expectation is more limited than an individual's expectation at home, outside of working hours, or when not using equipment that belongs to the employer. The employer must balance its legitimate interest in safety and efficiency, the right to adequate performance at work, the right to protect itself against legal action, the right to protect its strategic information and property, and other factors. *Surveillance in the Workplace: What Employers Need to Know*, Fasken Martineau, available at http://www.fasken.com/files/Publication/d0377519-8399-41df-b96c-33bdcd0dbde5/Presentation/PublicationAttachment/842d1305-9b45-4c75-92cd-3aff1df0d6d2/Surveillance_in_the_workplace__what_employers_need_to_know.pdf (Feb. 2, 2011).

Parties or witnesses: Generally speaking, a person involved in a personal injury lawsuit has a reduced expectation of privacy and should reasonably expect an investigation into his or her claims and/or credibility. Surveillance for hire is generally appropriate and such footage is allowed. *Sullivan v. City of Satsuma*, 20 So. 3d 822 (Ala. Civ. App. 2009); *Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276 (Ind. App. 2002); *Furman v. Sheppard*, 744 A.2d 583 (Md. App. 2000); *Brokamp v. Mercy Hosp.*, 726 N.E.2d 594 (Ohio Ct. App. 1999).

Whether surveillance invades a person's right to privacy can hinge on whether the person is engaged in public or private activities, in a public or private location. Larry G. Henning & Edward J. Wilbraham, *Privacy, Surveillance, & The Law: Guidelines for Investigators & Claims Examiners*, available at

http://www.pfiw.org/PDF/informational%20packet/English/privacy_surveillance_law.pdf (2004).

2.Common pitfalls and how to avoid