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Spoliation in Retail & Hotel Post-Incident Investigations: When is it **Really** Spoliation?

I. 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.

II. Post-Accident: When am I on notice?

a. Is the mere fact that an accident happened sufficient for notice?

The mere fact of an accident is sometimes sufficient to put a defendant on notice of potential litigation. Yet courts seem inclined to rule that the customer filling out an accident report is, by itself, sufficient to put retailer on notice. The customer "filled out an accident report which, arguably, is sufficient to put Food 4 Less on notice of potential litigation." *Aiello v. Kroger Co.*, 2010 U.S. Dist. LEXIS

97927, 2010 WL 3522259 (D. Nev. Sept. 1, 2010). The customer "filled out an accident report which, arguably, is sufficient to put Target on notice of potential litigation." *Zapata v. Target Corp.*, 2011 U.S. Dist. LEXIS 75837 (D. Nev. July 12, 2011).

b. Rebuting the "mere fact" argument.

The mere accident = notice argument applies beyond just retailers and is difficult to overcome, but defendants should argue it is inappropriate.

> Because a potential plaintiff has absolute control over whether to file a lawsuit and which theories of recovery he or she chooses to allege, it is perfectly appropriate to impose a duty to preserve evidence and impose sanctions in connection with its loss or destruction. However, a broad duty to preserve becomes problematic when applied to a potential defendant who may either never be sued or be sued upon a particular theory.

Banks v. Sunrise Hosp., 120 Nev. 822, 849, 102 P.3d 52, 70 (2004) (Maupin, J., concurring in part and dissenting in part). Courts should not retrospectively impose "a duty to preserve evidence at a time many months before the plaintiff first generated even so much as a remote reference to the evidence and years before the plaintiff took formal action against the defendant in connection with it."

III. If I am on notice, 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.
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> 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 barbeque sauce and other liquids that had not fallen or leaked; and (3) a ceiling that kept water from dripping down and pudding 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.
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> 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 inspected 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.

IV. 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.