Video Preservation

Caught on Camera—Now What?

By Alexandra Stevens Terry

Practical and legal considerations for the premises owner conducting routine surveillance.

Any YouTube search will return numerous video clips depicting slip-and-fall incidents in retail stores and restaurants alike. Additional searches will reveal a wide variety of video clips depicting various incidents in retail and hospitality settings that might eventually lead to claims or litigation. Why the sudden increase in these videos?

Recent developments in digital surveillance technology have made surveillance systems much more affordable for premises owners and much more commonplace. Many premises owners now add surveillance systems or additional video cameras to monitor all areas of their premises and all types of activities. With an increased number of premises owners conducting surveillance, the number of incidents caught on tape has also increased. Likewise, claimants now expect that owners have caught their incidents on tape and request copies of the surveillance footage.

Despite the recent developments in surveillance technology, "there are many uncertainties regarding this video technology as it relates to the resolution of legal disputes." *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 393 (Fla. 2012). For example,

> the recording systems may vary greatly in quality as well as methodology. Some recordings may be erased automatically, and some may be erased manually. Some recordings may not be in the immediate control of the ultimate defendant. The recording may or may not contain information that is critical to the civil action.

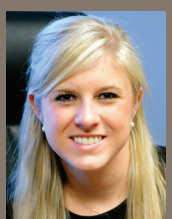
Id.

In addition,

> [m]any steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part.

Fed. R. Civ. P. 37(e) (2006), advisory committee's note.

When relevant surveillance footage is lost or destroyed, a claimant may seek sanctions or, in some jurisdictions, a separate cause of action for spoliation or "the destruction or significant alteration of evidence, or the failure to preserve property



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for another's use as evidence in pending or reasonably foreseeable litigation." *Essenter v. Cumberland Farms, Inc.*, No. 1:09-CV-0539, 2011 WL 124505, at *3 (N.D. N.Y. Jan. 14, 2011).

These uncertainties and the possibility of sanctions for spoliation present a premises owner with many practical and legal considerations.

Courts have considered a variety of factors when determining whether litigation was "reasonably foreseeable."

- When does a premises owner have a duty to preserve surveillance footage?
- What happens if a premises owner fails to preserve the surveillance footage?
- What steps should premises owners and counsel take to ensure the surveillance footage is not lost or destroyed?
- How much surveillance footage should be preserved?
- When must the premises owner produce the surveillance footage?

In addition to these topics, which this article will address, counsel need to consider evidentiary issues, including authentication and admissibility, although this article will not address either due to space considerations.

When Does a Premises Owner Have a Duty to Preserve Surveillance Footage?

It is clear that a premises owner has a duty to preserve evidence that is relevant to an underlying claim. What is less clear, however, is *when* that duty arises. As explained below, courts across the country have identified a wide range of legal standards to make that determination.

Requests to Preserve Video Surveillance Footage

A few courts hold that a duty to preserve surveillance footage arises when a premises owner receives a request to preserve or produce the surveillance. For example, courts in Florida and Louisiana have held that a premises owner did not have a duty to preserve surveillance when the plaintiff did not make a written request to obtain and preserve the evidence. *Osmulski*, 93 So. 3d at 389; *Lucas v. Old Navy, L.L.C.*, No. 07-571-C, 2011 WL 1172710 (M.D. La. Apr. 28, 2009). In these jurisdictions, once a premises owner receives a request to preserve or produce surveillance footage, the owner should take immediate steps to preserve the footage. Many surveillance systems in use today automatically erase or record over footage after a set number of days. For example, if a premises owner receives a request to preserve footage a few days before the system is set to record over footage automatically, but fails to take steps to preserve the footage before the data is lost, a court would likely find that the premises owner breached its duty to preserve the surveillance footage. *See Baynes v. The Home Depot U.S.A., Inc.*, No. 09-3686, 2011 WL 2313658 (E.D. Pa. June 9, 2011) (finding sanctions warranted when a store received a request to preserve data nine days before a system automatically would record over the previous data but failed to preserve footage before the nine days expired and data was lost).

The "Reasonably Foreseeable" Standard

On the other hand, many jurisdictions have found that the duty to preserve arises much earlier or as soon as litigation is "reasonably foreseeable." *See Demena v. Smith's Food & Drug Centers, Inc.*, No. 2:12-CV-00626-MMD-CWH, 2012 WL 3962381 (D. Nev. Sept. 10, 2012); *Zhi Chen v. District of Colombia*, 839 F. Supp. 2d 7 (D. D.C. 2011); *Bright v. United Corp.*, No. 2007/80, 2008 WL 2971769 (V.I. July 22, 2008); *Essenter*, 2011 WL 124505. As one court in Colorado explained:

> The undeniable reality is that litigation is an ever-present possibility in our society. While a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, *the duty to preserve documents should require more than a mere possibility of litigation*. Ultimately, the court's decision [on the duty to preserve] must be guided by the facts of each case. *McCargo v. Texas Roadhouse, Inc.*, No. 09-CV-02889-WYD-KMT, 2011 WL 1638992, at *3 (D. Colo. May 2, 2011) (emphasis added).

An appellate court in Georgia attempted to clarify the issue of "reasonable foreseeability" by distinguishing between potential *liability* and potential *litigation*, stating: "notice of potential *liability* is not the same as notice of potential *litigation*.… The 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…." *Paggett v. Kroger Company*, 716 S.E. 2d 792, 795 (Ga. Ct. App. 2011) (emphasis added). Most courts in California find that the duty to preserve evidence generally arises when a party reasonably anticipates litigation; however, other courts in California have found that the duty arises "as soon as a potential claim is identified." *Compare Housing Rights Center v. Sterling*, 2005 WL 3320739 (C.D. Cal. 2005), *and Apple Inc. v. Samsung Elec. Co., Ltd.*, No. 11-CV-01846-LHK, 2012 WL 3627731 (N.D. Cal. Aug. 21, 2012) (citing *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060,1067 (N.D. Cal. 2006)).

Courts have considered a variety of factors when determining whether litigation was "reasonably foreseeable." For instance, one Florida court found that the foreseeability standard was not met when an insurance carrier advised the premises owner that the insured was only seeking payment for medical expenses. *Osmulski*, 93 So. 3d at 389. In contrast, courts of at least two jurisdictions have determined that a duty to preserve arises once a premises owner has knowledge that a claim has been submitted to the owner's insurance carrier. *See Smith v. Shipping Utils., Inc.*, 2005 WL 3133494, at *3 (S.D. Ill. 2005); *Keene v. Brigham & Women's Hosp., Inc.*, 786 N.E.2d 824, 833 (Mass. 2003).

In addition, at least two courts held that the completion of an accident report may factor into an analysis of whether litigation was reasonably foreseeable. *See Essenter*, 2011 WL 124505; *Demena*, 2012 WL 3962381; *English v. Walmart*, 2011 WL 3496092 (D. Nev. Aug. 10, 2011); *Aiello v. Kroger Co.*, 2010 WL 3522259, at *3 (D. Nev. Sept. 1, 2010). A Georgia court found, however, that a store did not have a duty to preserve surveillance when the man-

ager denied anticipating litigation when he completed a standard incident report that included pre-printed language stating that the report was completed in anticipation of litigation. *Paggett*, 716 S.E. 2d at 792. *But see Kroger Co. v. Walters*, No. A12A1637, 2012 WL 5951476 (Ga. Ct. App. Nov. 29, 2012) (distinguishing *Paggett* and finding that the store had notice that the plaintiff was contemplating litigation when the store manager began to prepare an incident report that stated that it was prepared in anticipation of litigation).

In jurisdictions where documents created in "anticipation of litigation" are protected by the work product doctrine and the duty to preserve evidence arises as soon as litigation is "reasonably foreseeable," counsel may face special problems. For example, if a premises owner loses the video surveillance, counsel for the premises owner would have difficulty convincingly arguing on one hand that litigation was not reasonably foreseeable when the footage was lost while arguing on the other hand that an incident report was prepared on the date of the incident in anticipation of litigation. In comparison, if a plaintiff's counsel seeks to impose spoliation sanctions for surveillance that was lost within 24 hours of an incident because litigation was reasonably foreseeable, the plaintiff's counsel would have difficulty later arguing that an incident report is not protected by the work-product doctrine because the manager could not have anticipated the litigation immediately after the incident.

As discussed above, courts have a variety of legal standards for when the duty to preserve surveillance begins. Counsel should familiarize themselves with recent case law in their jurisdictions to advise clients properly and assist in implementing litigation hold and document retention policies that cover surveillance footage preservation.

What Happens if a Premises Owner Fails to Preserve Surveillance Footage Before It Is Lost or Destroyed?

As explained above, premises owners can sometime lose relevant data due to the routine, good faith operation of a surveillance system itself. However, in certain circumstances, a claimant may assert that the premises owner improperly lost or destroyed or "spoliated" the relevant footage.

Routine, Good Faith Destruction

Fed. R. Civ. P. 37 addresses the failure to provide electronically stored information. Following the 2006 amendment to Fed. R. Civ. P. 37, the advisory committee wrote:

> Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system…. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness…. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation…. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

Fed. R. Civ. P. 37(f) (2006) advisory committee's note. Consequently, many courts have hesitated to impose sanctions when a video was overwritten according to routine business practice or other circumstances beyond the spoliator's control. *Flores v. ExprezitA Stores 98-Georgia, LLC*, No. A10A0703, 2012 WL 687852 (Ga. Ct. App. 2012); *Gutierrez-Bonilla v. Target*, 2009 WL 5062116, at *4 (E.D. N.Y. Dec. 16, 2002); *Goldstone v. TJ Maxx, Inc.*, No. 010575/03, 2006 WL 1320629, at *3 (N.Y. Sup. Ct. May 3, 2006); *Brumfield v. Exxon Corporation*, 63 S.W. 3d 912 (Tex. Ct. App. 2002); *Tomlin v. Wal-Mart Stores, Inc.*, 100 S.W.3d 57 (Ark. Ct. App. 2003). *See also* the Discovery Subcommittee's *Rule 37(e) Proposal to Standing Committee*, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf, pp. 127–128 (recommending a showing of bad faith or willful destruction before imposing sanctions).

Traditional Elements of Spoliation

Generally, a party asserting charges of spoliation must present evidence demonstrating that (1) the spoliator had a duty to preserve the evidence when it was destroyed, (2) the spoliator had a culpable state of mind, and (3) the missing evidence is relevant to the litigation. *Essenter v. Cumberland Farms, Inc.*, No. 1:09-CV-0539, 2011 WL 124505, at *3 (N.D. N.Y. Jan. 14, 2011).

In jurisdictions where documents created in "anticipation of litigation" are protected by the work product doctrine and the duty to preserve evidence arises as soon as litigation is "reasonably foreseeable," counsel may face special problems.

Premises Owner's Duty to Preserve Evidence

As discussed above, a party may have a duty to preserve evidence as soon as litigation is reasonably foreseeable or as late as the first request for the surveillance footage.

Premises Owner's Culpable State of Mind

Courts have also recognized a wide range of degrees of culpability when imposing sanctions. In some jurisdictions, a premises owner must have destroyed footage intentionally, willfully, or in bad faith before a court will impose sanctions. *Watkins v. KFC U.S. Properties, Inc.*, 1:09-CV-1007-JEC, 2011 WL 3875986 (N.D. Ga. 2011); *Woodard v. Wal-Mart Stores East, LP*, 801 F. Supp. 2d 1363 (M.D. Ga. 2011); *Rowe v. Albertson's Inc.*, 178 F. App'x 859

(10th Cir. 2006). As one U.S. district court in Georgia has noted,

> [W]henever a serious fall occurs in circumstances such as this, it would be prudent for a company to preserve any video footage that might bear on the incident. Prudence, however, is not the standard here; bad faith is. Presumably, courts have imposed a bad faith standard out of a recognition that mistakes or misjudgments can occur innocently and that it would undermine the truth-seeking function of a trial to robotically require the entry of a verdict, or a negative inference, on a party whose failure to preserve evidence was not done out of some calculation, intent, or awareness that preservation of the evidence could be important in a later lawsuit.

Watkins, 2011 WL 3875986, at *4.

Many courts have hesitated to impose sanctions when a video was overwritten according to routine business practice or other circumstances beyond the spoliator's control.

In some Texas courts, "if the nonproducing party testifies as to the substance or content of the missing evidence, an opposing party is not entitled to [sanctions]." *Rowe*, 178 F. App'x at 861 (citing *Brumfield v. Exxon*, 63 S.W. 3d 912 (Tex. Ct. App. 2002)).

In other jurisdictions, mere negligence can result in sanctions. *In re Kessler*, 2009 A.M. C. 1355, 1384 (E.D. N.Y. 2009); *Essenter*, 2011 WL 124505 (N.D. N.Y. Jan. 14, 2011); *Matteo v. Kohl's Department Stores, Inc.*, No. 09-Civ.-7830, 2012 WL 760317 (S.D. N.Y. Mar. 6, 2012). In other courts, unintentional destruction due to "unreasonable conduct" can result in sanctions. *Baynes*, 2011 WL 2313658 (E.D. Pa. June 9, 2011). Some of the courts that permit sanctions based on negligent loss or destruction of evidence will still distinguish between negligent and willful destruction when determining the severity of sanctions to impose. *See Bass-Davis v. Davis*, 134 P.3d 103 (Nev. 2006). In Louisiana, the courts are split about "whether or not the action of spoliation must be intentional." *Bertrand v. Fischer*, No. 09-0076, 2011 WL 6254091, at *2 (W.D. La. Dec. 14, 2011).

Relevance of the Lost Evidence to the Litigation

Finally, a party seeking a finding of spoliation must establish that the lost or destroyed evidence is relevant to the pending litigation. *Gutierrez-Bonilla*, 2009 WL 5062116, at * 5. It is important to note that, in some jurisdictions, "[i]n the spoliation context, relevant 'means something more than sufficiently probative to satisfy Rule 401'…" *Id.* Instead, the movant must present sufficient evidence to show that the lost or destroyed evidence was "of the nature alleged." *Id.* Other courts permit an inference of relevance when the evidence was destroyed in bad faith. *Id.* at *6.

Counsel should be aware that the quality and scope of the video footage can affect its relevancy. In *Demena*, 2012 WL 3962381, a grocery store patron slipped and fell on a jalapeno pepper. Following the incident, the assistant store manager reviewed the surveillance footage, which did not depict the jalapeno on the floor, but still 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." *Id.* at *1. The court found that although the store had a duty to preserve additional surveillance, the poor quality of the video made it impossible to see whether any item was on the floor, and, thus, the additional footage was not relevant to the plaintiff's claim that the store had notice of the hazardous substance. *Id.* at *3.

Possible Sanctions for Spoliation

Once a moving party has shown that spoliation occurred, courts may impose sanctions against the nonmoving party. With the increasing number of incidents caught on tape, the likelihood that relevant surveillance will be lost or destroyed has also increased. Accordingly, premises owners should understand the wide range of sanctions that courts can impose for spoliation.

Courts may use either of two sources of authority to sanction parties for spoliation of evidence: the court's inherent authority or Fed. R. Civ. P. 37(b). *Demena*, 2012 WL 3962381. As one court has explained, "[a] court has the inherent power to impose sanctions for the spoliation of evidence, even where there has been no explicit order requiring the production of the missing evidence." *Guiterrez-Bonilla*, 2009 WL 5062116, at *2. On the other hand, courts may impose sanctions under Fed. R. Civ. P. 37(b) "when a court order to produce evidence is violated 'either by destroying evidence when directed to preserve it or failing to produce information because relevant data has been destroyed.'" *Essenter*, 2011 WL 124505, at *3.

Traditionally, the most common sanction awarded by the courts is an adverse inference instruction or "an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Gutierrez-Bonilla*, 2009 WL 5062116, at *3. The imposition of the adverse inference is based upon the idea that a party is more likely to destroy evidence that is harmful to their position. Monique C.M. Leahy & Heidi Gilchrist, *Sanctions for Spoliation of Electronic Evidence*, 1126 Am. Jur. Proof of Facts 3d 1 (Oct. 2012).

Other potential sanctions for spoliation range from preclusion of evidence related to the spoliated evidence, assessment of attorneys' fees and costs, and dismissal or judgment by default. *Essenter*, 2011 WL 124505, at *3. *See also Wal-Mart Stores, Inc. v. Lee*, 659 S.E.2d 905 (Ga. Ct. App. 2008) (excluding testimony relating to videotape surveillance after Wal-Mart lost the footage). As explained by the Eleventh Circuit, "[d]ismissal represents the most severe sanction available to a federal court, and therefore should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice." *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 574 S.E. 2d 923 (Ga. Ct. App. 2003).

When determining the severity of sanctions to impose upon a spoliating party, in addition to the three factors listed above, courts will also consider a variety of other

factors, including (1) the degree of fault of the spoliator; (2) whether the party had physical control over the evidence when was destroyed; (3) the degree of prejudice to the moving party; (4) whether that prejudice could be cured; (5) the availability of lesser sanctions; (6) whether the sanctions would deter future conduct; and (7) any history of noncompliance. *See generally* Rachel A. Campbell, *Effect of Spoliation of Evidence in Tort Actions other than Product Liability Actions*, 121 A.L.R. 5th 157 (2004); Leahy, *supra*. *Compare Cuevas v. 1738 Associates LLC*, 96 A.D.3d 637 (N.Y. App. Div. 2012) (finding sanctions were not warranted because a non-party witness's testimony could cure the prejudice resulting from the spoliation), *and Woodard v. Wal-Mart Stores East, LP*, 801 F. Supp. 2d 1363 (M.D. Ga. 2011) (finding testimony from store employee insufficient to cure prejudice resulting from loss of relevant videotape surveillance of subject area). When imposing monetary sanctions, courts may also consider (1) the fees and costs for associated with the motion for sanctions; (2) the fees associated with discovery, concealment of evidence, or both; and (3) any resulting waste of judicial resources. Leahy, *supra*.

Tort of Intentional Spoliation of Evidence

In addition to the sanctions identified above, a few states recognize a separate cause of action for the intentional spoliation of evidence. Such claims are based on the theory of intentional interference with prospective economic advantage. This tort was first recognized by an appellate court in California. *Smith v. Superior Court*, 151 Cal. App. 3d 491 (Cal. Ct. App. 1984). However, subsequent cases have overruled *Smith*, and California no longer has a separate cause of action for spoliation. *See Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal.4th 1, 74 Cal. Rptr. 2d 248, 258, 954 P.2d 511 (Cal. 1998); *Temple Cmty. Hosp. v. Sup. Ct.*, 20 Cal. 4th 464, 84 Cal. Rptr. 2d 852, 862, 976 P.2d 223 (Cal. 1999); *Forbes v. County of San Bernardino*, 101 Cal. App. 4th 48, 123 Cal. Rptr. 2d 721, 726–27 (Cal. 2002). A few states, such as Ohio, recognize a separate tort for the spoliation of evidence. *Burgess v. Fischer*, 766 F. Supp. 2d 845 (S.D. Ohio 2010) (citing *Smith v. Howard Johnson Co., Inc.*, 615 N.E. 2d 1037 (Ohio 1993). *But see Rosenbilt v. Zimmerman*, (adapting tort of fraudulent concealment to address spoliation, rather than creating a new tort of intentional spoliation) (citing *Viviana v. CBS*, 597 A.2d 543 (App. Div. 1991). In some of the jurisdictions that do recognize a separate cause of action for spoliation, however, a claimant cannot bring a cause of action against the defendant for both intentional spoliation of evidence and the underlying tort. *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. Ct. App. 2003). While the precise elements of intentional spoliation remain unclear, it is likely that a party must prove (1) that a potential lawsuit existed, (2) that the defendant had knowledge of the potential lawsuit, (3) that the evidence was destroyed, (4) the evidence destruction has hindered the party's ability to prove its case in the potential lawsuit, and (5) damages. Leahy, *supra*.

Which Steps Will Preserve Surveillance Footage?

Once the duty to preserve evidence arises, a premises owner should immediately suspend any routine document destruction policy and implement a litigation hold to ensure that the owner preserves all relevant evidence, including relevant surveillance footage. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D. N.Y. 2003). *See also McCargo*, 2011 WL 1638992 (D. Colo. May 2, 2011). To avoid evidence spoliation issues, counsel should advise their clients to develop and implement strong policies for document destruction and retention and litigation holds with specific instructions related to surveillance footage. Leahy, *supra* (citing *Electronic Spoliation of Evidence*, 3 A.LR. 6th 13 and *Black's Law Dictionary* (9th ed.)).

Importantly, the duty to preserve evidence is not owed solely by the premises owner. In fact, some courts have held that the duty "'runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'" *Zhi Chen*, 839 F. Supp. 2d 7 (D. D.C. 2011) (internal citation omitted). *See also Schulte v. NCL (Bahamas) Ltd.*, No. 10-23265-CIV, 2011 WL 256542 (S.D. Fla. 2011) (citing *Target Corp. v. Vogel*, 41 So. 3d 962, 963 (Fla. Dist. Ct. App. 2010)). In addition, if the premises owner or counsel knows of footage depicting the accident but they do not possess it, they may still have a duty to notify the claimant of the existence of the video or of its possible destruction. *See Jain v. Memphis Shelby Co. Airport Authority*, No. 08-2119-STA-dkv, 2010 WL 711328 (W.D. Tenn. Feb. 25, 2010). Courts increasingly expect counsel to initiate evidence preservation and to remain involved in the process of electronic discovery. Leahy, *supra*. In addition, some courts now impose sanctions on counsel, as well as the party itself. *Id.*

In some jurisdictions, a premises owner must have destroyed footage intentionally, willfully, or in bad faith before a court will impose sanctions.

Regardless of the policies implemented, premises owners should educate their employees and staff on those policies and take the appropriate steps to ensure that employees follow them. At least two courts have found that a store's failure to follow its own internal policy suggested a culpable state of mind. *Bright*, 2008 WL 2971769, at *7; *Matteo*, 2012 WL 760317. In addition to ensuring that premises owners and store managers generally educate employees and staff on any litigation hold or retention policies, counsel should review the actual policies for litigation hold and document retention with any employee who may testify in a case. For instance, if an employee testifies that the store policy is to retain all footage depicting the claimant yet the store policy actually is to retain footage of the slip-and-fall area only, counsel would have to rebut the testimony of its own witness, the employee, when explaining to opposing counsel that the store does not have any footage of the claimant entering or leaving the store.

Premises owners and store managers should understand how their video surveillance systems operate, including

when a video surveillance system resets or re-records and how the video is time-stamped. *See Kratsov v. Town of Greenburgh*, No. 10-CV-3142 (CS), 2012 WL 2719663 (S.D. N.Y. July 9, 2012) (imposing sanctions when Town Hall recorded and produced a video requested by the plaintiff for the requested time period based on the video time-stamp and did not learn that video was set with Pacific Standard Time stamp rather than Eastern Standard Time stamp until the video was automatically destroyed).

Counsel should be aware that the quality and scope of the video footage can affect its relevancy.

It is imperative that premises owners and counsel alike take steps to ensure that any DVD or other recording purportedly containing surveillance footage does indeed contain a proper, workable copy of the surveillance. These principles are illustrated in *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7 (D. D.C. 2011). There, a woman was detained by a hotel security guard who believed that she left the hotel without paying for her room. The incident was recorded by a security camera, but when the hotel reviewed the footage, it found only a blank disc. In analyzing whether the hotel had a culpable state of mind, the court considered the following facts: the hotel had possession of the footage and the ability to preserve it; the hotel should have inspected the contents of the disc to ensure that it was copied; and there was no evidence that the hotel's management discussed the hotel's obligation to preserve evidence with the staff. Based on the facts, the court found that the hotel was grossly negligent and possessed a culpable state of mind warranting an adverse inference instruction. *See also Essenter*, 2011 WL 124505 (N.D. N.Y. Jan. 14, 2011 (permitting an adverse inference when a party made a copy of a video that was submitted to corporate headquarters yet corporate headquarters did not review the disc purportedly containing the video upon receiving it and later discovered that the DVD was blank). Thus, counsel and premises owners should make it a practice to review surveillance footage as soon as it arrives at corporate headquarters to ensure that the discs or DVDs function properly.

What Type and How Much Surveillance Footage Should Be Preserved?

Another important issue to consider carefully is which portions of surveillance footage should be retained. Often, "the more difficult question" is how much of the surveillance footage is relevant and should be preserved to meet a premises owner's duty to preserve the evidence. *Demena*, 2012 WL 3962381, at *3. A premises owner will want to remember that "[o]nly at its own risk does [a defendant] make a 'unilateral decision' as to what evidence is relevant." *Id.* In some instances, premises owners may not have any video evidence that reflects the incidents or the areas where the incidents occurred. Nonetheless, in some jurisdictions, this may not completely abrogate an owner's duty to preserve video evidence.

The Temporal Aspect

When preserving video surveillance, a premises owner should consider preserving footage both before and following an incident. As the Supreme Court of the U.S. Virgin Islands explained in a well-publicized case:

> Store managers should retain recorded footage of the area in which an accident occurred both prior to and following the accident. Obviously, such footage is likely to provide relevant and valuable evidence regarding the cause or timing of a spill resulting in a slip and fall accident. It is certainly not within the discretion of a store manager to determine what portion of the available recorded surveillance footage is relevant to anticipated litigation…. While this Court does not find any statutory or case law indicating precisely what portion of surveillance footage capturing a slip and fall accident should be retained, common sense dictates the retention of comprehensive surveillance footage of any accident, including a reasonable period of time preceding and following the accident.

Bright, 2008 WL 2971769, at *7. *See Canton v. K-Mart Corporation*, No. 1:05-cv-143, 2009 WL 2058908 (V.I. July 13, 2009) (citing and distinguishing *Bright*, 2008 WL 297176, and finding an adverse inference was not warranted when two store employees testified that they were uncertain whether a camera was positioned on the incident area at the time and on the date of the incident). In *Bright*, the store manager was notified of a slip-and-fall incident involving a customer and immediately reviewed the surveillance footage. 2008 WL 297176, at *1. The footage depicted the fall but did not depict any substance on the floor at the time of the accident. The manager "conclud[ed] that Bright 'probably tripped on herself'" and copied the footage of the fall itself. *Id.* However, the manager chose not to review or copy any of the footage before or after the fall. *Id.* In that case, the court concluded that the store's failure to preserve footage before and after the accident indicated bad faith. *Id. See also Baynes*, 2011 WL 2313658 (E.D. Pa. June 9, 2011) (finding a spoliation adverse inference warranted when a store retained footage of a fall but discarded footage that may have depicted how long the hazardous substance was present before the fall), *and Clark v. Randall's Food*, No. 01-08-00732, 2010 WL 670554 (Tex. App. Houston 1st Dist., Feb. 25, 2010) (finding a supermarket was aware that footage leading up to the incident was relevant to notice issues and had a duty to preserve that surveillance even though the footage showed only a portion of the fall and the floor itself was not visible).

Compare this result with the result in *Heath v. Wal-Mart Stores East LP*, a case in which a patron slipped on a blue, slippery, liquid substance on the floor and fell, shattering her knee cap. 697 F. Supp. 2d 1373, 1374 (N.D. Ga. 2010). The store retained surveillance footage that depicted an unknown customer with a bottle of liquid entering the aisle approximately 10 minutes before the plaintiff slipped. *Id.* at 1374. The customer then paused at the exact area where the plaintiff fell before exiting the aisle holding the bottle, which was then empty. *Id.* at 1374. Believing that the source of the spill had been identified, the store did not retain any footage for

the time period before the unknown customer entered the aisle where the incident occurred. *Id.* An independent witness later testified that he responded to the scene and observed a bottle of liquid cleaner underneath the display stand where the plaintiff fell. *Id.* at 1375. The plaintiff alleged that the store improperly failed to maintain the footage for the time period before the unknown customer walked down the aisle where the incident occurred. *Id.* Concluding that the store did not have a culpable state of mind, the court reasoned that the store employee acted in accordance with company policy by reviewing the tapes to determine the source of the spill and retaining that portion through the fall. *Id.* at 1378–79.

Areas Outside of the "Subject Area"

Even if a premises owner does not have footage depicting an incident, or even the area where the incident took place, the "subject area," courts may consider surveillance footage of surrounding areas at the time of an incident relevant. In fact, some courts have held that a premises owner improperly destroyed video surveillance footage even though the footage merely depicted the surrounding areas. *Baxley v. Hakiel Industries, Inc.*, 47 S.E. 2d 29 (Ga. 2007); *Pacheco v. Regal Cinemas*, 715 S.E. 2d 728 (Ga. Ct. App. 2011).

In *Baxley*, the plaintiff brought a dram shop action against a bar following a motor-vehicle accident involving one of its "regular" patrons. 647 S.E. 2d 29 (Ga. 2007). After the owner learned of the incident, she immediately questioned her staff regarding the patron's service at the bar that evening; however, she did not review or preserve the surveillance from the three video cameras in place. *Id.* As a result, the tapes were reused and recorded over four days after the accident in the regular course of business. *Id.* The evidence revealed that none of the cameras showed the area where the patron was sitting. *Id.* The court noted, however, that the footage may have contained images of the patron holding her keys or leaving with another person. *Id.* Consequently, the court found that the owner "was aware of the potential for litigation and failed to preserve whatever evidence may have been captured as to whether [the patron] would soon be driving" and permitted an adverse inference against the bar. *Id.*

A similar result occurred in *Pacheco v. Regal Cinemas*, 715 S.E. 2d 728 (Ga. Ct. App. 2011). There, a movie theater patron was walking toward the movie theater when a truck stopped nearby. *Id.* Several individuals exited the truck, then assaulted and shot the patron. The security guard employed by the movie theatre testified that he reviewed the theater's surveillance footage, but it did not show the altercation. The footage, however, did show "the truck entering, then exiting the parking lot approximately five minutes later." *Id.* Because this footage was not preserved by the movie theatre and contained valuable evidence, the court of appeals held that it was proper to allow an adverse inference instruction against the movie theater. *Id.*

Preserving surveillance footage from surrounding areas may also be helpful for premises owners. For instance, the footage could be used to refresh the recollection of store employees. The footage could also reveal potential witnesses as store employees may recognize customers who were in other areas of the store at the time of an accident. *But see Mahaffey v. Marriott Intern. Inc.*, No. 11-995(RC), 2012 WL 4833370 (D.C. Oct. 11, 2012) (holding that sanctions were not warranted when the only evidentiary purpose of video was to identify possible witnesses entering a hotel at time of an accident). When a claimant alleges that he or she was not treated with respect or provided medical attention, the surveillance footage may depict store employees rushing to the scene of the incident. On the other hand, in a slip-and-fall case, the footage may reveal the source of the spill or another spill in another area of the store. Although surveillance footage depicting these scenarios would not assist a premises owner to defeat a claim, the surveillance footage would aid the owner in evaluating the claim from the outset.

In addition, a claimant may request all footage depicting him- or herself in other areas of a store, either before or after an incident, and courts may consider this evidence relevant. Preserving footage of a claimant after an incident may also help a premises owner when it appears that a claimant has exaggerated the severity of his or her injuries.

It may also be helpful to retain footage of surrounding areas of the date of the accident to show that the accident area or the incident was *not* caught on tape. Even if video surveillance does not depict an incident or area, a premises owner's attorney may use it to rebut an allegation of spoliation. However, in some instances when surveillance does not cover relevant areas, premises owners' attorneys rebutted allegations of spoliation successfully by presenting testimony about the surveillance systems' parameters. For instance, in *Gutierrez-Bonilla*, the court ordered the store to present an affidavit addressing whether any surveillance cameras covered the incident aisle; whether any of those cameras would have captured the incident; and the store's policy regarding retaining surveillance tapes. 2009 WL 5062116. The affidavit submitted stated that the only camera that was "potentially capable of capturing footage of the incident" was one camera on an adjacent aisle "that covered a small portion of the floor of the aisle" where the incident took place; however, the affiant was unable to state "with any certainty whether this camera was capable of capturing any footage of the incident at issue." *Id.* at *1. In addition, two store employees indicated that the store did not have footage related to the incident. *Id.* at *2. The court determined that the "[d]efendants complied with that duty by immediately checking the video room for footage of the incident and of the aisle in which the incident occurred." *Id.* at *4. *See also Felix v. GMS, Zallie Holdings, Inc.*, 2011 WL 5837188 (E.D. Pa. 2011) (find-

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The duty to preserve evidence is not owed solely by the premises owner. In fact, some courts have held that the duty "'runs first to counsel."

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ing that the fact that surveillance footage existed after the fall did not establish that a grocery store destroyed surveillance of the incident when the store had stationary and mobile cameras and there was no evidence to indicate which camera recorded the footage covering the period after the incident).

Counsel and premises owners alike should carefully consider the possible relevance of footage of the areas surrounding accident sites both before and after the subject incident to prevent destroying or losing any relevant surveillance footage that may exist. If the footage contains any potentially relevant information, counsel and premises owners should consider retaining the footage to avoid spoliation issues.

When Must a Premises Owner Produce Surveillance Footage?

In most cases, courts will require a premises owner to produce all relevant video surveillance that depicts a litigation-inducing incident. As one court in New York explained, "a store, shop, warehouse, or enterprise should not be given sole discretion of whether to surrender or share such video surveillance taken at its option. Such control is contrary to any notion of fair play." *Savino v. Great Atlantic and Pacific Tea Co., Inc.*, 869 N.Y.S.2d 334 (N.Y. 2008). Many courts have rejected the argument that recordings obtained from surveillance systems were preserved in anticipation of litigation and, thus, constituted work product. As one court has explained, it would be "anomalous, to say the least, if by ordering a client to preserve evidence created in the ordinary course of business… counsel was able to shield that evidence from production based upon work product protection." *See Schulte*, 2011 WL 256542 (S.D. Fla. 2011). Therefore, the issue is not *whether* a premises owner must produce surveillance footage of an incident, but *when* the owner must produce it.

Traditionally, some courts have allowed a party to withhold postincident investigative surveillance of a plaintiff until *after* the claimant's deposition to promote truthfulness and prevent a claimant from altering his or her testimony to "fit" the surveillance. A few courts have ruled in a similar fashion with regard to surveillance footage, holding that the surveillance was discoverable but could be withheld until after the deposition of the plaintiff. *See Parks v. NCL (Bahamas) Ltd.*, No. 12-21708-CIV, 2012 WL 4856942 (S.D. Fla. Oct. 5, 2012); *Rankin v. Waldbaum, Inc.*, 176 Misc. 2d 184 (N.Y. 1998). *But see Savino*, 869 N.Y.S.2d 334 (N.Y. 2008) (declining to extend the *Rankin* decision). Other courts, however, have rejected the notion that a claimant might tailor his or her testimony to a video and ordered that the defendant produce the surveillance footage before the plaintiff offered a deposition. *See Savino*, 869 N.Y.S.2d 334 (N.Y. 2008). *See also Williams v. Castro*, 2008 WL 4513568 (W.D. Tex. Sept. 26, 2008). The courts, in short, have split about when a party with surveillance footage must produce it. Accordingly, counsel should familiarize themselves with the case law in their jurisdictions so they know when their clients must produce surveillance footage.

Conclusion

As technology continues to improve and more businesses implement surveillance systems, counsel should discuss with their clients the need to develop and implement record retention and litigation hold policies that specifically address preserving all video surveillance related to reasonably foreseeable litigation. These policies should attempt to ensure timely preservation to meet a premises owner's duty to preserve relevant footage within the particular jurisdiction, as well as the appropriate footage time frame and the appropriate areas surrounding an accident site. They must also ensure that all employees are well educated on the policies for the preservation of relevant video surveillance footage and the parallel duty to ensure that they actually preserve the footage. Finally, counsel and premises owners alike should understand the potential sanctions that courts may impose for failing to uphold these duties.