

HOSPITALITYLAWYER.COM PRESENTS:

THE **HOSPITALITY LAW**
CONFERENCE

FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 10th - 12th, 2014

CCTVS

PRESENTERS



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The Good, the Bad, & the Ugly

Current Legal and Liability Issues Associated With CCTV



Miami . Tampa . U.S. Virgin Islands . Fort Lauderdale . New York . Orlando . Bahamas . Jamaica

CCTV

- What are the Functional Requirements?
 - Deterrent
 - Recognition alert
 - Record only
 - Access Control
 - Covert
 - Monitor & Response
 - Motion Sensor/Alarmed

CCTV

- What are the Potential Issues?
 - Why was CCTV installed?
 - Unmonitored in Public Spaces (Response)
 - “Dummy” CCTV
 - Out-of-order CCTV
 - CCTV in one area, but not in another
 - Recording capabilities

CCTV

- What are the Potential Solutions?
 - First, Perform a Risk Assessment
 - Understand the Functional Requirements!
 - Keep in working order
 - No Dummy CCTV...ever
 - Train personnel on monitoring/response
 - Ensure recording capability

Preservation & Spoliation

- Many owners have increasingly found themselves sanctioned for spoliation of evidence because footage of a slip and fall, for example, has been recorded over or otherwise erased.



Preservation & Spoliation

- **Spoliation** is defined as the intentional destruction, mutilation, alteration, or concealment of evidence for which differing levels of sanctions may be imposed.



Preservation & Spoliation

- **Spoliation** is established when a party seeking sanctions proves that **(1)** the missing footage existed at one time; **(2)** the alleged spoliator had a duty to preserve the evidence; and **(3)** the evidence was crucial to the plaintiff's case. *See Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 392 (Fla. 2d DCA 2012).

The Duty to Preserve

- Most courts describe the preservation obligation as a **duty** to preserve information because one *knows* or *should know* that it is relevant to future litigation. *See, e.g., John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008)
 - The prospect of litigation must at least be an anticipated or foreseeable possibility, with some courts having required future litigation to be probable to provide the requisite notice that triggers the duty to preserve.

The Duty to Preserve



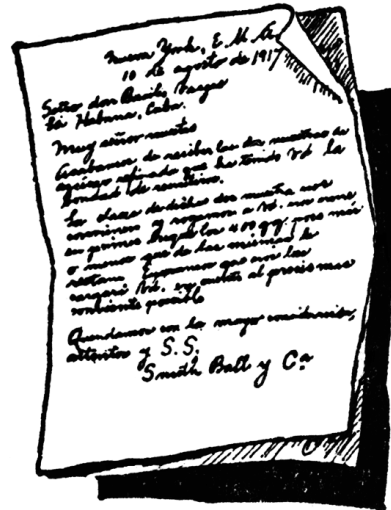
- Florida has traditionally recognized that a party has a duty to preserve “any items or documents that are the subject of a written request to preserve evidence.”
Strasser v. Yalamanchi, 783 So. 2d 1087 (Fla. 4th DCA 2001)
 - However, the 4th District Court of Appeal held that even in the absence of a written request, a party can be charged with a duty to preserve where it could have reasonably foreseen the claim. *Am. Hospitality Mgmt. Co. of Minnesota v. Hettiger*, 904 So. 2d 547 (Fla. 4th DCA 2005)

Example of a Court Not Finding a Duty to Preserve

- *Cox v. Target Corp.*, 351 Fed. Appx. 381, 382 (11th Cir. 2009)
 - The Court declined to impose sanctions where Defendant's employee testified that its surveillance cameras did not provide comprehensive coverage of the entire store at all times, and the Plaintiff was unable to establish that video tape of her fall existed.

Potential Triggers of the Duty to Preserve

- (1) Letters from Prospective Adversaries
 - **Examples:** Pre-litigation hold request; pre-litigation demand letter; notice-of-breach letter; a cease and desist letter; cure notice



Case Without Written Request

- *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012)
- Court did not find spoliation in this slip and fall case.
 - “Here, at the time the video recordings were discarded or taped over, no lawsuit had been filed, no demand for preservation of the evidence had been made, and Defendant’s principal testified that even though he was aware that the Plaintiff had made a claim with the insurance carrier, he had been told that the Plaintiff was only seeking payment for her medical expenses.”

Potential Triggers Cont'd

➤ (2) Notice of Incident

- In an action by an airport slip-and-fall victim against the airport authority and the maintenance company, the court held that because airport police immediately completed an incident report that alerted them to the seriousness of the plaintiff's injury, “almost from the moment the accident occurred, [the airport authority] had a duty to preserve the video. *See Jain v. Memphis Shelby Cnty. Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010).

Potential Triggers Cont'd

- (3) Duties of Prospective Plaintiffs
 - Retaining or consulting with counsel or experts are indicia of anticipating litigation as a plaintiff, as is documenting and estimating the cause or extent of the loss incurred as the result of an incident or malfunction of some kind.

Scope of Preservation

- Courts have not established a bright line rule dictating how much footage should be preserved but instead have cautioned that a defendant proceeds at its own risk when it makes a unilateral decision as to what evidence is relevant.



Scope of Preservation

- While there is no exact length of time a video should be, a store should aim to preserve footage of the source of the hazard, the incident itself, and any action taken thereafter. *See Bright v. United Corp.*, 2008 WL 2971769 at *6 (V.I. July 22, 2008).



Bright v. United Corp., 2008 WL 2971769 (V.I. July 22, 2008)

- This case concerned a slip and fall accident that took place at the Plaza Extra supermarket in Estate Sion Farm, St. Croix.
 - Plaza's destruction of the recorded surveillance footage prior to and after the fall indicated Plaza's bad faith and fraudulent intent to suppress the truth.
 - The Court found spoliation because the failure of the Plaza's manager to retain the recorded surveillance footage prior to and after Bright's fall shocked the conscience of the court and created a presumption of fraud.

Baynes v. The Home Depot U.S.A. Inc., 2011 WL 2313658 (E.D. Pa. June, 2011)

- Plaintiff slipped and fell while shopping at a Home Depot, and alleged Home Depot negligently failed to clean a slippery substance from its floor.
 - Home Depot retained evidence of the fall, but disposed of video footage which may have shown how long the substance was present on the store's floor.
- The Court found spoliation and rendered an adverse inference instruction because it was impossible to establish the length of time the substance was on the floor, which was an essential element of Baynes's case.

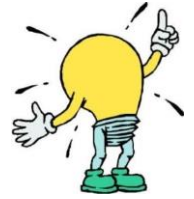
Scope of Preservation

- The scope of a prospective party's preservation obligation bears some relationship to the *time* and *expense* associated with preserving all relevant information that would otherwise be subject to the duty to preserve.
 - Extraordinary or cost-prohibitive efforts should not be expected in any but the most high-stakes litigation. *See* Fed. R. Civ. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”).

Factors That Weigh Against Spoliation

- (1) Poor quality of footage such that allegedly dangerous condition cannot be seen;
- (2) inability to see flooring or source of fall due to view of camera;
- (3) ability to gain evidence of notice by other means such that Plaintiff is not prejudice;
- (4) a slip which is cause by something other than transitory foreign substance.

Final Points



- (1) If a formal investigation is conducted or an accident report completed, immediately ensure that all relevant footage is preserved.
- (2) Do not wait for a written request as that may be insufficient to avoid spoliation sanctions, particularly because even jurisdictions which traditionally had only required a written request are also applying the “reasonably foreseeable” test.
- (3) Moreover, owners should aim to preserve enough footage before and after the accident, including the origin of the spill or hazard.

CCTV Insurance Coverage Issues

- Insurance = an attempt to transfer certain risk by contract.
- Insuring agreement sets forth the type of risk expected to be transferred.
- Definitions and exclusions in policy narrow scope of risk.

CCTV Insurance Coverage Issues

Various insurance policies could transfer risk in this context.

- E & O
- D & O
- CGL
- Cyber Liability

CCTV Insurance Coverage Issues

What are the risks?

- Breach of Privacy
- Improper Installation
- Poor Protocol
- Hacking into System

CCTV Insurance Coverage Issues

Example:

- CGL Policy Bodily Injury Endorsement.
- Provide coverage for “any and all claims for which [the assured] may be held liable for damages arising out of an accident occurring during the term of the policy.
- “Accident” is defined as “unexpected,” “unusual” and “unforeseen.”

CCTV Insurance Coverage Issues

- Under this CGL policy, damages arising from negligence constitute an “accident” for purposes of coverage.
- The personal injury endorsement provides coverage for damages due to personal injury arising out of a publication in violation of an individual’s right to privacy.

CCTV Insurance Coverage Issues

Exclusions:

- Intentional acts excluded
- Dishonest acts excluded

CCTV Insurance Coverage Issues

The Oak Park Marina Case

- Oak Park Marina; a public marina.
- For a fee, patrons can dock boats and use restrooms and share facilities.

CCTV Insurance Coverage Issues

- Owners installed hidden CCTVs in restrooms and changing areas to curb theft.
- They played videos at local bar for amusement of patrons.

CCTV Insurance Coverage Issues

Best Practices:

- If the client has CCTV, does the client intend to transfer risks associated with CCTV?
- What are the client's expectations re risk transfer?
 - Defense
 - Indemnity

CCTV Insurance Coverage Issues

Best Practices Cont.

- Do the policies transfer the risk?
- What exclusions and/or definitions narrow the scope of or eliminate the risk transfer?