



If a picture is worth a thousand words, a surveillance video is priceless

OBTAINING SURVEILLANCE VIDEOS OF PREMISES-LIABILITY INCIDENTS

Obtaining surveillance video footage of your client's fall can make or break your premises-liability case. Surveillance-video footage will potentially serve as the best witness to your client's injury-causing event, providing powerful visual testimony. Witnesses, including your client, will forget the minute details your case depends on – a video will not.

Act fast

Time is of the essence when obtaining surveillance video. Paramount in obtaining surveillance video is contacting anyone who may have possession of surveillance video of the premises as soon after the injury-causing event as possible, to preserve the footage. Surveillance video is routinely deleted or copied over at variable time increments depending on the surveillance systems used. As soon as possible, send a preservation of evidence letter requesting the defendant preserve the surveillance video recording of the event.

The preservation-of-evidence letter should specify a time period before and after the subject event in order to obtain as much evidence as possible to support your

liability position. At minimum try to obtain an hour prior before the event. This additional footage may include the cause of the event and any notice the tortfeasor may have had prior to the event.

Just as important is footage from the aftermath of the event. Any actions by your client, employees of the defendant and third parties may reveal key evidence for your case.

In addition, the letter should request all surveillance video from the premises at the time of the subject event even if the surveillance video does not cover the exact location where the event took place. Potentially, seemingly innocuous, unrelated surveillance-video footage from another part of the premises may include pertinent evidence or leads to important evidence in your case. Further, the letter should include a warning that if the surveillance video is destroyed before being produced, then at trial you will request an instruction that the defendant willfully suppressed evidence.

Potentially, a third party may have surveillance-video footage of the event. Again, as soon as possible, you or your investigator should go to the scene of the

fall and ask local businesses whether they have any surveillance video cameras that captured the event or are aware of another local business that may have surveillance video cameras. With the advent of home-security videos, like Ring, a local homeowner may also have surveillance video of your client's fall. Typically, most people will oblige and provide you with the surveillance video footage. On occasion, a business may require a subpoena. Send a preservation-of-evidence letter to the local business to place them on notice to preserve the surveillance video, then issue a subpoena to the business as needed.

For governmental entities that may have surveillance video, use a Freedom of Information Act request. Paramount in obtaining the surveillance video is to act fast following your client's fall to increase the likelihood of obtaining the surveillance video.

Obtaining surveillance video during discovery

While the defendant may have surveillance-video footage, whether the defendant will provide the video before

filing the lawsuit is arbitrary. Typically, if the surveillance video supports your claim, expect to file a lawsuit and propound discovery to obtain the video.

Your demand for production for the video should specify that the raw footage, including unedited copies of the surveillance video, should be produced. Like your preservation-of-evidence letter, the demand should include significant, but reasonable, time before and after the event and include all surveillance video from other parts of the premises.

As soon as the video is produced, verify that the defendant has not edited the footage produced. Even if the surveillance video is not produced in response to your production, in response to your demand, the defendant must specify if the surveillance video never existed, has been destroyed, lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. (Code Civ. Proc., § 2031.230.)

If the defendant's response is not in compliance with the Code, continue to meet and confer and file a motion to compel if necessary. Defendant's response may state that the surveillance video was destroyed or lost. You can now the response to support your willful-suppression-of-evidence jury instruction at trial.

The details of the surveillance video should also be obtained through California Judicial Council Form Interrogatory No. 12.4 ("Do you know or does anyone acting on your behalf know of any photographs, films, or videotapes depicting any place, object, or individual concerning the Incident or plaintiff's injuries") and full responses to the subparts including the details of surveillance video, how many videos, and who has copies.

Special Interrogatories should request that the defendant identify location of surveillance video cameras on the premises on the date of the event, whether any surveillance video cameras were inoperable at the time of the event, as well as anyone who viewed the

surveillance video footage of plaintiff on the date of the event. Even if the defendant has represented that surveillance video does not exist, your written discovery should be used to verify defendant's representation.

Subsequently, depose anyone identified by the defendant of being responsible for the surveillance video at the time of the incident and/or the persons most qualified regarding the policies and procedures of surveillance-video footage at the subject premises to aid your case. This deposition will have multiple purposes depending on whether surveillance video is or is not produced. For example, if the surveillance video shows the premises at the time of the incident, but not the incident itself, she or he will provide testimony of why there are not cameras in that area of the store, why the camera was broken, or why the surveillance video was recorded over.

If produced, the defendant's PMQ will authenticate the video surveillance and lay foundation at time of trial. The deponent may also testify to the defendant's policies and procedures in retaining and preserving video following an incident. If the policies and procedures are not followed in your case and the surveillance video is not produced, this provides additional support for a willful suppression of evidence instruction at trial.

Willful suppression of evidence

California Civil Instruction No. 204, Willful Suppression of Evidence, states that the jury "may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

The court has provided that this instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598.) If there is evidence that a party improperly

altered evidence (as opposed to concealing or destroying it), users should consider modifying this instruction to account for that circumstance. In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12, a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, "including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."

If the surveillance video is destroyed, lost, and/or "misplaced" by the defendant during discovery, be sure to compile written support in the form of correspondence, discovery, and depositions, for the court to include Willful Suppression of Evidence as a jury instruction. The defendant will oppose the jury instruction and a pocket brief documenting malfeasance by Defendant will help sway the court.

The rise of the protective order

More often than not, if the defendant does possess a copy of the surveillance-video footage, the defendant will request that you execute a protective order before producing the video. A protective order will limit the use of the surveillance video to the sole purpose of litigating the case and will restrict who will have access to the surveillance video to a sphere of attorneys, their office, experts, the judge and jury. Whether or not a protective order is appropriate for your case is dependent on the facts.

Protective orders are warranted when the "burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).) The court may also limit discovery if "cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive" or "is unduly burdensome or expensive, taking into account the needs of the case, the amount in

controversy, and the importance of the issues at stake in the litigation.” (Code Civ. Proc., § 2019.030, subd. (a).)

Protective orders are used in litigation to protect proprietary or confidential information from being disseminated to the public. The burden falls squarely on the defendant to prove that the surveillance video contains confidential and proprietary information necessitating the protective order. “[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.)

The Supreme Court has recognized that the burden of proving that certain information is a trade secret rests on the party who is claiming the information as such. (*In re Provident Credit Card Cases* (2002) 96 Cal.App.4th 292, 301.) Likewise, that same party who is asserting the existence of trade secrets bears the burden of overcoming the presumption in favor of public access. (*Ibid.*)

The defendant may cite security concerns, such as the placement of cameras within their stores, to necessitate a protective order. Defendant may also just assert that a protective order is their standard policy and procedure before producing any surveillance video. Meet and confer with defendant on why they believe a protective order is necessary in your case to ensure the defendant is meeting the burden required and not just arbitrarily requesting an unnecessary protective order.

Explore your options prior to entering a protective order. It may be worth the effort to file a motion to compel the surveillance video or oppose a Defendant’s motion for a protective order before agreeing to a protective order. If you are willing to agree to a protective order, read the terms carefully before signing in haste just to obtain the surveillance video.

The L.A. County Superior Court has a sample labeled as the Los Angeles Model “Stipulation And Protective Order – Confidential Designation Only” that

may be found on its website. This is a basic example of a protective order that you may be agreeable to use in your case. Make sure the protective order does not have any punitive or overreaching clauses. Also ensure the protective order contains a clause to challenge the validity of the protective order for the surveillance video produced in case the Defendant was overzealous in having the protective order in the first place.

Tread carefully before agreeing to any protective order, although these orders are quickly becoming a necessity to obtain a surveillance video.

I have the surveillance video, now what?

If you are lucky enough to obtain the surveillance video, it can be used throughout discovery, through settlement, and then trial. Use the surveillance video to gather evidence and verify both your client’s and the defendant’s versions of the events. The video may show what caused your client’s fall, leading to additional discovery opportunities. Follow up with a notice of inspection for the premises if a permanent hazard or the object itself caused the fall. If the defendant no longer has that specific object, for instance a rug, then where did the defendant obtain the object so you may obtain exemplars for your expert?

Any footage from before the fall may also show whether the defendant had notice of the condition. Did an employee walk by and fail to notice the condition, or worse, see the condition and fail to remedy? How long did the condition exist prior to your client’s fall? If the surveillance video begins right before your client’s fall, you may be missing important information contained in the prior surveillance video footage.

The mechanics of your client’s fall will, hopefully, be shown on the video. Ideally, you will have the video before your client’s deposition to review with her or him prior to their testimony. Did your client slip or trip? What body part struck the ground first? Where was your client looking prior to the fall? What shoes were

your client wearing at the time? This will also be valuable evidence for any of your experts, both liability and damages.

The video may identify potential witnesses, like a store employee or third-party witness who was not identified in the incident report. Surveillance video also may verify any interactions following the fall. Did an employee clean a substance from the floor? Did your client point out the spill to an employee? Did the employee actually have your client help complete the incident report? Defense witnesses and their memories fade quickly but can be refreshed through surveillance video.

During depositions, surveillance video may be reused to refresh testimony or impeach defense witnesses. Depending on the quality, details in surveillance video may be more apparent than in photographs, for instance a sheen of water on a tile floor. Surveillance videos are powerful tools to use during mediation or in front of a jury. Even if poor quality, the surveillance video may be used to help create reenactments of the fall.

Conclusion

Premises-liability cases are notoriously difficult cases that typically require hard-fought litigation in order to be successful. The surveillance video of your client’s fall will be the key to unlocking a trove of evidence that will tip the scales of the burden of proof in your favor. On the other hand, it may also help you avoid spending time and energy on a case that becomes a bottomless pit of resources. Early action on premises liability is vital to obtaining the surveillance video and a successful outcome.

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