



By Nicole C. Leet

Integrating surveillance video into a defense in particular ways can support the defense very beneficially.

Expanding Use of Surveillance Video to Support the Defense in Premises Cases

Surveillance videos are commonly available these days. Most jurors in fact *expect* to see surveillance video in a premises liability case. Of course, when it exists, the video is shown during mediation or trial, but it can also be an

effective tool for use in discovery and motion practice. This article offers practical tips for using surveillance video to support the defense of the case in discovery and motion practice, all the way through appeals.

Using Surveillance Video in Depositions

Depositions are excellent opportunities to pin down a deponent on details, setting up a potential motion or trial theme. Preparing to use the surveillance video is crucial to using it effectively in a deposition setting.

Know the Video

Having precise times, or clips, of the video that you want to use is important to inte-

grate the surveillance video into your deposition. Playing the video through and not being able to accurately pinpoint the exact portions that you want to ask about makes the video lose its power and effectiveness. Also, be familiar with all views of available surveillance video. Frequently, views that do not capture the incident or accident itself can be useful to a defense. For instance, other views can track employees performing their inspections to support that a reasonable inspection procedure was performed, even if the specific area of the accident had not been reached yet; a combatant reentered an affray when the main view of the fight did not indicate that anyone stepped out or back in; or other customers were nearby, or even off-duty security, from whom the plain-



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tiff did not seek assistance, in a negligent security case.

Know the Deposition Venue

Whether a deposition is videotaped or not, you will need to consider how to show the video and question the deponent at the same time. The deposition location may have a television or smart board to allow

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you to connect or play the video. Alternatively, miniprojectors are reasonable and can easily be connected to a laptop, or even smartphone, to play the video on a blank wall in the room. Many surveillance videos are in a proprietary format, so ensuring that they can play on your laptop or phone is also essential.

Prepare as Though It Is Trial

Surveillance videos are used at trial because they (generally) show what occurred in a visual manner, which is then reinforced by oral testimony. The same purpose applies to a deposition. How you use a video in a deposition will depend on what the video can do to support your case. Everyone has experienced attorneys huddled around the deponent, and a single laptop, to discuss on the record what the deponent has to say about the surveillance video. That is generally not the most effective way to use a surveillance video to support a defense. Examining the video and creating an argument drawing from what the video shows that supports your case can determine the outline of the testimony that you can try to elicit from parties and witnesses in their depositions. Obtaining a deponent's testimony verifying what the surveillance video shows is powerful

evidence that you can use in motion practice or at trial.

If visual effect is most important, recording the deponent physically pointing and identifying key details on the video will be useful. The deposition recording should be able to capture the deponent making any requested identifications. Verbal testimony such as "that is me, there," or "then he came through here," with a deponent pointing at a laptop or tablet but that is not captured on the deposition recording is ineffective.

It can be more effective to show the deponent identifying what needs to be seen on the video itself—side by side. Videographers often will be able to zoom in to show specific detail of the identification (such as pointing) on the video if the video is being shown on a large screen or wall. If visual effect or identification is important, but video recording of the deposition is not possible, consider marking video stills as exhibits. Then the deposition testimony can be coupled with an exhibit, giving context.

If a smart board is available, it is an extremely effective tool to use with surveillance video in depositions. Essentially, smart boards function the same as white boards; you can write on smart boards with a "smart pen." Instead of a blank whiteboard, however, a smart board can display a photograph, diagram or surveillance video. The deposition can be videotaped with the deponent interacting with the surveillance video on a smart board, which enables the deponent to circle, mark with an "x" or otherwise mark the video itself in response to questioning.

Alternatively, a tablet can be used. The deponent can use the tablet to watch the surveillance video, and you can hold it up to the camera to demonstrate or identify what is being requested.

Even if visual effect is not as important, a surveillance video can still be a valuable tool. For instance, it can be used to support a motion for summary judgment by having a deponent identify his or her actions (or failures to act). Questioning in true "cross-examination" style in the deposition designed to obtain testimony about what is happening in the surveillance video is particularly effective. For instance, take the following example:

Q: Here, at 11:00:43, it appears that you have gotten out of the truck and are coming to join the group from behind the vehicle wearing that white printed shirt, right?

A: Yes, that's me.

Q: You would have been able to see what was going on right?

A: Yes, I could see everything that was going on.

Q: And here, at 11:02:51, do you see the man in the black shirt pointing the gun at your brother?

A: Yes, I see that.

Q: And you are still right there, immediately to his left in the white printed shirt?

A: Yes, that's me in front of the driver's door.

Q: At this point you would have known that the man in the black shirt had a gun right?

A: Yes, I would have known at that moment, because it looks, looks like I'm looking forward.

Q: You are looking directly at the gun right?

A: Yes, like straight at him with the gun.

Then you can continue the cross-examination, using the video to support your defenses and potential motions.

Q: But you do not run into the store, do you?

A: No.

Q: And here, at 11:04:22, you are still not running for the store, correct?

A: Yes.

Q: Now we are here, at 11:06:01. And this entire time you have been standing in relatively the same spot. You would have been able to see the man in the black shirt and hear anything going on because you were right there, right?

A: Yes. I should have been able to see and hear what was going on from that spot where I was.

Q: And you still have not run into the store or called for help, yelling or waving your arms at the other customers?

A: No. I don't know why.

Depending on the case, what the video does not show may be as important as what it does show.

Q: What did you do, as seen in the surveillance video, to use ordinary care and diligence?

A: All I see is I'm standing there and I cannot—I don't know if I thought of something at that moment. I'm not sure, I don't know.

Q: What actions did you take, as seen in the surveillance video, between the time that you saw the man in the black shirt with a gun and the end point of the video that we were talking about—that you would say was taking ordinary care of yourself?

A: I don't...

Q: You didn't see any, did you?

A: No, I didn't see any.

Identifying the time or other foundational details in a question is an effective way to link the deposition testimony to the video and to identify what you wish to highlight in the video and deposition. For instance, anchoring the question to a specific time—"here, at x time," is one way. Or anchoring the question to a person previously identified is another technique: "you were wearing a yellow shirt," or "here you, in the yellow shirt, fall to the ground." Anchoring also helps to link the deponent to the video. Establishing ownership or possession of the people, objects, even locations, shown in surveillance video can not only be effective for the merits of a case, but it can make the surveillance video a more useable piece of evidence. Establishing in a deposition that the white truck was "the plaintiff's truck," or the path that he took into the store was "the plaintiff's path," can be repeated and used throughout the case, with a direct citation to the deposition as evidence.

Always remember, using uniform time indicators is important for continuity. Often surveillance video marks the time on the video itself, which does not change regardless of the player used to play the video. On the other hand, using the time displayed on the player always risks having different time markers if you use different players.

Using Surveillance Videos in Motion and Appellate Practice

The deposition testimony that you obtain of the deponent identifying key details in the surveillance video can be very effective in motion practice as well. To make it easily verifiable and understandable, deposition questions should establish the cir-

cumstances of the video: who is shown, at what location, and at what time. Those foundational facts set the stage to support later key testimony.

As indicated above, establishing the times that correspond to the facts that you wish to identify in the video when asking deposition questions is one way to create foundational markers. The time should be consistent, and not vary due to the type of player used. Typically, a standard time can be agreed to by the parties, and everyone will use one time reference. If the only time available is the player time, the specific player used should be indicated with the referenced time. For instance, the reference might be 4:32:01 Windows Media Player time or 4:32:01 QuickTime time. That makes it easier to cite to both the deposition testimony and the surveillance video time in a motion.

Deposition testimony that includes references to what is being discussed in written motions or appeals, including the corresponding time code, simplifies reviewing the surveillance video for a judge. The judge can "track" the argument as outlined in the writings and corroborate the written argument with the video by using the specific time references to locating the corresponding video sections, or by finding the person described in both the writing and the video (the white shirt, the khaki shorts).

Having foundational time and references to the people and what the surveillance video shows also enables you to embed video stills more effectively in the a motion itself. A picture can be accompanied by a citation to the surveillance video, but it can also have a deposition cite that provides context to the picture. More and more jurisdictions are recognizing the effectiveness of embedding photographs, video stills, and diagrams in the body of briefs and motions, and exempting them from page limitations. Alternatively, surveillance video stills can still be presented as an attached exhibit. Making key scenes more easily accessible than would be the case if you just sent in the whole video as an exhibit will increase the effect of the video.

Coupled with use during depositions, surveillance video can provide context and support for arguments in motions and briefs in the form of testimony, not mere narration by the attorney. Testimony from

a witness with citations can be more persuasive than paragraphs by counsel merely arguing what the surveillance video shows. Opposing counsel also has less opportunity to challenge the narrative by an attorney about a surveillance video when the citations are to testimony from a witness validating what the surveillance video shows.

Surveillance video can also have almost

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the opposite usage: it can be used to discredit or contradict a witness. If a witness' contradictory testimony has created an issue of fact that is sufficient to defeat summary judgment, if the contradictory testimony does not match the surveillance video, which supports the defense's argument, the video can be used to negate the contradictory testimony and support summary judgment. *See c.f. Scott v. Harris*, 550 U.S. 372 (2007) (holding that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the [video] record... a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

Perils of Using Surveillance Video

Of course, as surveillance video is relied on and used more effectively in all phases of litigation, it will become the target of more attention by the opposing side. Two common areas of "attack" are attempts (1) to use surveillance video to "show" potential issues of fact, and (2) to assert spoliation claims related to the video.

Opposing counsel will often try to turn the tables and use surveillance video to create potential issues. This tactic can be most

Surveillance, continued on page 79

Surveillance, from page 37

effective in response to a motion for summary judgment that uses a surveillance video. Be prepared to see opposing counsel point out something in the video as a fact issue. For instance, an opponent might point out a customer dropping a water bottle before a slip and fall and argue that it shows creation of a hazard. Knowing the surveillance video well, and setting up deposition questions to confirm that the water bottle was sealed before it dropped, or it had a lid, and it still had a lid or seal after it was dropped, is one way to prepare for such an argument. Identifying such potential points in surveillance video that opposing counsel could highlight is important. There are times when focusing on surveillance video can do more harm than good. For instance, a video that does not track or follow a customer for the entire time that the customer is in the store could open the door to an argument that there was potential for an incident to have occurred off camera. Similar to a spoliation argument, discussed below, this may be rebutted by showing that it is a mere hypothetical or speculation. Yet the standard is different than for most spoliation standards, and such conjecture may defeat summary judgment if it is remotely possible. Anticipating such arguments and working to find evidence to limit or rebut such arguments would be a best practice.

Courts are also recognizing that these types of arguments are usually simply speculation that do not amount to any affirmative evidence. Hopefully, your court will not allow such speculation and conjecture to defeat the evidence supporting your motion or brief.

Another avenue for opposing counsel when a surveillance video is used by the defense is to make a spoliation claim. Typically, the video itself is argued to be deficient in some way. The most common argument is that not enough video was preserved. Opposing counsel will argue that more video would have shown that the inspection was not completed, or the hazard was there for a long period of time, or a different angle would have shown the actual hazard. Again, these arguments are based on speculation about what “more” video would have shown. They typically are not supported by actual evidence sup-

porting those arguments. Speculating that additional video would have shown a spill or a hazard on the ground for some length of time should not support a spoliation claim. Indeed, testimony or other evidence can usually be used to rebut these types of arguments. If there is testimony about when certain inspections occurred, or other evidence documenting such inspections, any hypothetical additional video would be duplicative, and thus not an essential piece of evidence that was allegedly spoliated.

Conclusion

As surveillance video becomes more prevalent, and more detailed, it will continue to be used as evidence of what happened at the scene of an incident or accident. But effectively using surveillance video to further the defense of a case requires using the video as more than a simple video. The surveillance video can become interwoven into the defense of the case through interaction with and validation by its subjects in depositions, and it can be used as more effective evidentiary support for arguments in motions and briefs. 