

## **SPOILIATION OF EVIDENCE: WHEN SHOULD YOU RETAIN SURVEILLANCE VIDEO AND DIGITAL DATA?**

### **I. Introduction**

In law, spoliation of evidence is the intentional or negligent withholding, hiding, altering, or destroying of evidence relevant to legal proceedings. Black's Law Dictionary (8<sup>th</sup> Ed. 2004). Spoliation is broadly understood to encompass both intentional and negligent tampering with any form of potential evidence to the extent it interferes with another party's ability to present that party's claim in a civil action. When evidence is lost, destroyed or concealed, it can have significant consequences. In some jurisdictions, the intentional destruction of evidence is a criminal act by statute and is punishable by the imposition of fines and incarceration for parties who are involved. In most every jurisdiction, there are also civil consequences based upon the loss of evidence resulting in the ability to prove valid claims or develop defenses. The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had "consciousness of guilt" or other motivation to avoid the evidence. Consequently, sanctions are appropriate and they may range from permitting the finder of fact to draw inferences from the loss or destruction of evidence to outright dismissal of claims or striking of defenses.

In addition to the criminal and civil sanctions available to parties who are victims of spoliation, a number of states recognize an independent cause of action for the tort of spoliation of evidence. In these states, one may recover damages based upon the spoliation of evidence having impaired or completely impeded a party's ability to prove a civil claim of liability.

### **II. The Law of Spoliation**

Persons who are actually involved in litigation (or know that they will likely be involved) have a duty to preserve evidence for use by others who will be involved in that litigation. Fletcher v. Dorchester Mutual Insurance Company, 437 Mass. 544, 549-50 (2002). The doctrine of spoliation "is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant to an upcoming legal proceeding should be held accountable for any unfair prejudice that results." King v. Brigham and Women's Hospital, Inc., 439 Mass. 223, 234 (2003). The evidence allegedly lost or destroyed must be relevant to a material fact in the litigation. Gath v. M/A-COM, Inc., 440 Mass 482, 489-90 (2003). Sanctions may be appropriate for spoliation committed before the commencement of any lawsuit a litigant knew was likely to arise when it can be established the party should have known that the evidence was relevant to that lawsuit. While it has been stated by a number of courts in a number of different ways, the essence of a party's obligation to maintain evidence requires that a reasonable person in the position of the individual controlling the evidence would realize at the time the evidence was lost destroyed or altered, the potential importance of the evidence to the resolution of a possible dispute.

Evidence spoliation is a longstanding evidentiary matter. For years, courts have struggled with the problem of spoliation and devised possible solutions. Once spoliation occurs, there must be adequate measures taken to insure that it does not improperly impair a litigant's right. Probably the earliest and most enduring solution was the spoliation inference or *omnia praesumuntur contra spoliatores*: all things are presumed against a wrongdoer. In other words, in the context of the original lawsuit, the fact finder deduces guilt from the destruction of presumably incriminating evidence. Trevino v. Ortega, 969 S.W.2d 950, 952 (Tex. 1998). The traditional response to the problem of evidence spoliation claims has been to treat the alleged

wrong as an evidentiary concept in the context of the pending litigation and not as a separate cause of action. This adverse presumption is recognized by virtually every jurisdiction in the United States. Increasingly, however, states are also recognizing an independent tort cause of action for spoliation of evidence. Additionally there are a number of states in which there are statutory criminal penalties for the destruction of evidence.

**a. Which law applies, state or federal?**

Generally speaking, if an action is pending in state court, state law concerning spoliation of evidence will govern the handling of claims of spoliation. Whether sanctions are imposed, whether a separate cause of action is permitted, or whether criminal liability is imposed are typically matters of state common law and statute.

When a case arises in federal court under diversity jurisdiction, however, it may not be so clear whether state law concerning the matter should apply or whether federal law concerning the matter should be applied. There are two sources of authority under which a federal district court can sanction a party for spoliation of evidence – its inherent authority or FRCP Rule 37. Leon v. IDX Systems Corp., 464 F.3d 951, 958 (9<sup>th</sup> Cir. 2006). Regardless of whether it is under Rule 37 or its inherent authority, a federal court applies federal law when addressing issues of spoliation of evidence. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9<sup>th</sup> Cir. 1993). (Applying federal law when addressing spoliation in diversity litigation); see also, e.g., Adkins v. Wolever, 554 F.3d 650, 652 (6<sup>th</sup> Cir. 2009); Slyvestry v. General Motors Corp., 271 F.3d 583, 590 (4<sup>th</sup> Cir. 2001); Riley v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2<sup>nd</sup> Cir. 1999); King v. Ill. Sent. R.R., 337 F.3d 550, 556 (5<sup>th</sup> Cir. 2003).

**b. Elements of spoliation**

In order for the failure to produce material evidence to be viewed as a discovery abuse, it must be established that the non-producing party actually had a duty to preserve the evidence in question. In order for there to be a duty, there must be a showing that the party that destroyed the evidence had notice of both the potential claim and of the evidence's potential relevance to that claim. This requires a court to balance whether, from the view of a reasonable person it can be concluded from either the severity of the accident or from other circumstances surrounding the accident that there is a substantial chance for litigation. The courts will also consider what notice the non-producing party had about the incident prior to litigation and any hints about the opposing party's intentions concerning that incident. "A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed." Trevino v. Ortega, 969 S.W.2d at 955.

The elements necessary to establish spoliation are:

1. The existence of a potential cause of action.
2. A duty to preserve evidence relevant to that potential civil action.
3. Destruction or alteration of that evidence.
4. Significant impairment in the ability to prove the lawsuit.
5. A relationship between the evidence destruction and the inability to prove the lawsuit.

A party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation.

Zubulakevu vs. Warburg, LLC, 200 F.R.D. 212, 216 (S.D.N.Y. 2003). The notice can come in different ways, but most commonly a party is deemed to have notice of pending litigation if the party has received a discovery request, a complaint has been filed or a party has received notification that litigation is likely to be commenced. Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991).

This exact issue was considered in the case of Aiello v. Kroger Company d/b/a Food 4 Less, 2010 WUL 35222259 (D. Nevada). This case was a personal injury action wherein the plaintiff alleged she sustained injuries as a result of a slip and fall on the defendant's premises. The incident was apparently recorded on video by Food 4 Less, that video was reviewed by Food 4 Less employees and after viewing the accident report and surveillance video, the materials were sent to the risk management division at the corporate headquarters. During the course of discovery, however, it was disclosed that Food 4 Less had lost the surveillance video. The court in that case stated that while the term potential litigation had not been specifically defined, it was widely accepted, that as a general rule, a party has an "duty to preserve evidence when it knows or reasonably should know the evidence is relevant and when prejudice to an opposing party is foreseeable. Lewis v. Ryan, 2601 F.R.D. 513, 521 (S.D. Cal. 2009). While the court found that the record was silent as to when the surveillance video was lost in relation to when the litigation actually began, it was determined that immediately after the accident, the plaintiff filled out an accident report which the court held to be sufficient to put Food 4 Less on notice for potential litigation. Aiello v. Kroger Company, 2010 WL 3522259, p.2. The court further found of importance that the Food 4 Less store manager extracted, reviewed and sent the video to the risk management department and stated that as a minimum Food 4 Less had notice of potential litigation at the time the video was sent to its corporate headquarters, thereby triggering a duty to preserve the video. *Id.* at 3.

The question of when a duty arises to preserve evidence arose again in the case of Cook v. Olathe Health System, Inc., 2011 WL 346089 (D. Kansas). In that case, the plaintiff had been stopped by the Olathe Police Department for speeding which led to an investigation of her for a DUI. The plaintiff was eventually arrested, handcuffed and placed in the rear seat of one of the officer's patrol cars, at which point she began to hyperventilate causing officers to request an ambulance. The plaintiff was taken to Olathe Medical Center in that ambulance and while in the ambulance, the plaintiff alleges that the two officers who elected to ride in the ambulance with her, physically battered her by hitting her, pinching her, laying on her, and choking her. This all occurred on April 16-17, 2008. Subsequently the plaintiff retained counsel, and on February 12, 2009 her counsel requested copies of video from inside the ambulance via the Kansas Open Records Act. In that case, the court found that the defendant's duty to preserve the four hard drives of video which would have contained video evidence of the alleged assault, arose on February 12, 2009, when plaintiff's counsel sent the open records act request to the Olathe Police Department requesting a copy of the audio and video recordings. Kirk v. Olathe Health System, Inc., at p. 5.

A Texas appellate court considered the issue of when the duty to preserve evidence arose in the case of Brookshire Brothers v. Aldridge, 2010 WL 2982902 (Tex. App.-Tyler). In that case, Aldridge slipped in a liquid substance on the floor and fell while shopping at the Brookshire Brothers store, consequently suffering a substantial spinal injury. Aldridge initially notified Brookshire Brothers employees of the substance he fell on and his fall, purchased some items and left the store. Later, Aldridge's pain began to increase and he decided to seek out medical treatment. Several days later, he returned to the store and informed a Brookshire Brothers manager of his injury, which prompted the manager to prepare a formal incident report noting the injury. Brookshire Brothers later began paying for the plaintiff's medical care. For a

brief time Brookshire Brothers preserved a short segment of surveillance video of the day in question, but they later allowed the remainder of the video for the day to be recorded over. The preserved portion only showed the plaintiff entering the store, falling and leaving, but did not include portions of the original recording that could have shown the source of the substance on the floor, additional employees that may have seen the substance, or the amount of effort necessary to clean the substance from the floor. At the trial, the trial court admitted evidence relating to the destruction of the video recording and charged the jury with spoliation. With regard to the question of duty, it was noted:

The spoliator can defend against an assertion of negligent or intentional destruction by providing other explanations for the destruction. For example, if the destruction of the evidence was beyond the spoliator's control or done in the ordinary course of business, the court may find that the spoliator did not violate a duty to preserve evidence. Importantly, though when a party's duty to preserve evidence rises before the destruction or a policy is at odds with the duty to maintain records, the policy will not excuse the obligation to preserve evidence. Trevino v. Ortega, 969 S.W.2d 950, 957.

The duty of Brookshire Brothers to preserve the remainder of the video was determined based upon the fact that at the time of destruction of the unpreserved portion of the video, Aldridge had notified Brookshire Brothers of his injury, a Brookshire Brothers manager had prepared a written incident report noting a neck and back injury and Brookshire Brothers had begun paying for the plaintiff to be treated by a neurosurgeon. In fact, Brookshire Brothers had sent correspondence during the period in question referring to Aldridge as "having a claim". The final nail in the coffin was that Aldridge, prior to the time of the destruction of the video, had requested to see a portion of the video recording from the day in question.

What seems clear from these cases is that the duty to preserve video evidence typically will arise at some point before litigation is initiated, typically, around the time an accident report is filed informing of injury or at the point any request is made for the video in conjunction with an incident having occurred. What is also clear is that the courts that have evaluated this issue view the question of duty through the prism of circumstances as they exist at the time of a discovery request, not as they exist at the time of the incident. Therefore, the failure to preserve even evidence that may seem marginally relevant when an incident occurs, such as the pre-accident video from the Brookshire Brothers case above, may result in sanctions when viewed by the court after the case has been more clearly developed and the need for particular evidence more clearly defined.

### **c. Sanctions for spoliation**

Over the years, the courts have found numerous sanctions to be appropriate for spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines and applied most every other sanction available for the failure to provide discovery. A proper spoliation sanction should serve both fairness and punitive functions. Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2008). Because failures to produce relevant evidence fall "along a continuum of fault - ranging from innocence through the degrees of negligence to intentionality," Raush v. United States, 844 F.2d 1239, 1246 (6<sup>th</sup> Cir. 1988), the severity of the sanction must, depending on the circumstances of the case, correspond to the party's fault.

The factors to be considered when determining the propriety of the spoliator's conduct would include:

- (1) the nature of the actor's conduct,
- (2) the actor's motive,
- (3) the interests of the person with whom the actor's conduct infers,
- (4) the interest sought to be advanced by the actor,
- (5) the social interest in protecting the freedom of action of the actor and the contractual interest of the other,
- (6) the proximity or remoteness of the actor's conduct to the interference, and
- (7) the relation between the parties.

*Restatement (2nd) of Torts*, §767 (1979).

In addition to the factors listed above courts have considered:

- (1) the degree of prejudice suffered by the non-spoliating party,
- (2) whether such prejudice can be cured,
- (3) the degree of fault and personal responsibility of the spoliating parties,
- (4) the practical importance of the evidence, and
- (5) the availability of lesser sanctions that would avoid any unfairness to the innocent party while, at the same time, serve as sufficient penalty to deter such conduct in the future.

Aaron House v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992); Sears, Roebuck & Company v. Midcap, 893 A.2d 542 (Del. Sup. 2006).

#### **i. Adverse inference**

Perhaps the most common remedy which is employed by virtually all jurisdictions is to provide an inference of spoliation or an adverse presumption jury instruction. This allows the trier of fact to assume that the proof which was either spoiled or altered would have been unfavorable to the non-producing party. As stated above, the destruction of evidence is somehow evidence of a guilty mind on the part of the non-producing party since the evidence would not have been destroyed if it had been favorable to the non-producing party. An example of the jury instruction presented in such a case based upon willful suppression of evidence would be the following:

You are instructed that there is a presumption that evidence willfully suppressed would be, if produced, adverse to the party suppressing it. This presumption may be rebutted by other competent evidence, but if uncontradicted, the presumption is satisfactory proof of the matter in question.

9 Am.Jur.Pl. and Practice Forms, Evidence §116 (2009).

#### **ii. Dismissal of case or striking pleadings**

Typically, in determining to dismiss a case or to strike pleadings, the degree to which a parties conduct in failing to preserve or destroying evidence shows evidence of intent is of great significance. At least one court has held that striking an answer and entering default judgment against the defendant is too severe a sanction for negligent spoliation and should be reserved

only for cases involving intentional spoliation. McClellan v. Shaw Supermarket, Inc., 24 Mass. L. Rpt. 317, 2008 WL 2889921 (2008). Another court has stated that before imposing a dispositive sanction under its inherent powers for spoliation of evidence, court must (1) consider the feasibility of less drastic sanctions; (2) provide a reasonable explanation why such alternate sanctions would be inappropriate. Halaco Engineering Company v. Costle, 843 F.2d 376, 380 (9<sup>th</sup> Cir. 1988). The imposition of the more drastic sanctions of dismissal or default judgment requires a finding of “willfulness, fault, or bad faith.” Leon v. IDX Systems Corp., 464 F.3d 951, 958 (9<sup>th</sup> Cir. 2006) (citing Anheuser Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337, 348 (9<sup>th</sup> Cir. 1990)).

### **III. Best Practices for Dealing with Video Surveillance and Digital Data**

Given the nature and disparity of sanctions and the negative impact these sanctions can have on pending litigation, it is important to have practices in place for dealing with video surveillance and digital data. Digital data can include a large amount of information which in traditional corporate setting would include email, as well as any other documents which are maintained on a computer service. In the context of companies that operate trucks this can include event data, driver logs, repair and maintenance records for tractor trailers involved in accidents, Qualcomm/satellite position history and Qualcomm/GPS message history.

#### **a. Have a policy in place for dealing with video and data**

The most important practice to have set in place for dealing with video surveillance and cell phone data would be to have a policy for dealing with such video and data. That policy should include at a minimum the following:

1. How long should video or data be retained?
2. What constitutes a triggering event for the retention of video and data?
3. How should video or data be retained?
4. Where should video or data be retained?

#### **i. How long should video or data be retained?**

There is very little authority for how long video or surveillance should be kept. After a review of the following standards, there was only a time frame located in one of them:

- ISO – International Organization for Standards
- ITIL – Information Technology Infrastructure Library
- CobiT - It Governance and Control Framework
- NIST - National Institute of Standards and Technology
- FFIEC – Federal Financial Institutions Examination Council
- HIPAA\HITECH
- PCI – Payment Card Industry

Only PCI makes specific reference to a time frame and it is 90 days.

9.1.1 Use video cameras and/or access control mechanisms to monitor individual physical access to sensitive areas. Review collected data and correlate with other entries. Store for at least three months, unless otherwise restricted by law.

There are other factors to look at in terms of how long video should be retained. They would include whether there are time limited reporting requirements for incidents involving the business in question as well as practical considerations about how long it would take some to report an incident. The length of preservation would also depend on the medium being recorded onto and the storage capacity of the devices being used. On the whole, however, it would appear that for VHS users, a standard period of time to keep tapes before recording over them would be 30 days. For DVR users, most industry auditors would be looking for a 90 day preservation period.

With regard to data preserved in the context of a trucking company, the period of time which information should be maintained after an accident may be much longer. If it is determined to be an at-fault accident, a good rule of thumb is probably to maintain the information in question for at least the period of the statute of limitations of the action in the jurisdiction the accident occurred.

In considering the amount of time video or digital data should be maintained, one of the problems which arises is electronic data over-preservation. In corporate settings it has been estimated that approximately 80% of ostensibly “active” files and folders on hard drives and in file shares have not been accessed for 3-5 years. In other words, 80% of the electronic data are essentially dead, yet IT spends money on these dead data daily for infrastructure recovery and data migration as old server systems are retired. The costs associated with keeping such information can include storage of items on back-up tapes, as well as loss of attorney and legal time spent wading through unused and unwanted information trying to find what is needed. *The Risks of Electronic Data Over Preservation*, Anne Kershaw and Shannon Spangler, **The Woman Advocate** [visited May 25, 2012]. In order to determine if electronic data over-preservation is an issue for a company, a review of information contained on servers should be conducted with an eye towards establishing policies or guidelines concerning the retention of digital data and what types of digital data are being maintained in an effort to develop a policy for disposing of such data.

## ii. What constitutes a triggering event?

Based upon the cases cited previously in this article, it seems that the best practice in terms of what should constitute triggering event for the retention of cell phone information or video surveillance would be that any time an incident occurs which could have been captured by video surveillance or when there could be information on a cell phone to preserve as evidence about an incident and there has been some potentially liability inducing consequence (i.e., a personal injury), that video and digital data should be retained. By way of example, if there is a slip and fall which occurs and there video in the area where it occurred, if there is an injury as a result of the slip and fall, all video related to that event should be retained. Further, if there is not an initial report of injury, as soon as there is a report of injury, effort should be made to capture all video or data associated with that event. The same would go for other events, including allegations of assault, or any other criminal act, as well as any act causing injury of which the insured is made aware.

## iii. How should video or data be retained?

When a triggering event has occurred and it has been determined that there is video or cell phone data of the incident, the question arises as to how the evidence should be retained. Most importantly, the video or data should be retained in the same format in which it was originally recorded. Any change in the form of the data, or in the case of digital video, any change in the format in which it is preserved unnecessarily creates questions about whether the video has been tampered with or altered. In the case of digital video preserved on a DVR, it is quite easy to clip the necessary video and transfer it to a separate hard drive or server so that it is preserved.

In dealing with event data recorders in particular, it is extremely important to insure that the downloading of data is undertaken by a qualified, experienced expert. All parties involved in a significant accident involving a tractor/trailer are likely to want the information contained on the electronic data recorder. Therefore, the extent to which the information is not properly downloaded and maintained can govern the extent to which a spoliation defense may be maintained.

#### **iv. Where should video or data be retained?**

Upon determining that a triggering event has occurred and taking efforts to retain video or digital information captured from the incident, the next issue to be considered is where to retain the information. Typically, it would not be a good idea to retain only one copy of the video or digital data. More than one copy should be retained and it should be retained in separate locations in case one is destroyed in some way. Obviously, keeping video or digital evidence in more than one location requires that a copy be made of the original. By consequence, it is very important to insure that before the original is in any way destroyed or damaged, the duplicate copy which has been made is in an identical format to the original and is actually a viewable copy.

#### **b. Investigate immediately and thoroughly**

Business owners must immediately and aggressively investigate all accident. Business owners should have investigation procedures in place which include, in appropriate cases, the preservation of evidence, the thorough investigation of accidents, proper completion of incident reports, photo and video preservation techniques, as well as instructions from management to cooperate with claims adjusters and defense attorneys. This program should be utilized in each business location and applied consistently. Company policies and procedures should mandate the use of this investigative program to insure that necessary information is collected to give you the best possible shot at a defense.

Whenever surveillance video is involved, it is important to insure that all tapes for the date of the accident are collected, including tapes prior to the incident and after the incident. While this may seem unnecessary at the time, it should be remembered that subsequent claims that evidence has been destroyed are not likely to be viewed from the perspective of the day of the accident, but are more likely to be viewed as of the time the claims are made, looking at the matter in retrospect.

### **IV. The Insurer's Obligations and Liability Concerning Preservation of Evidence**

An insurer may have obligations and liability concerning the preservation of evidence. For insurers, these obligations and liabilities most typically arise as a result of the duty in the insurance policy to investigate potential claims upon proper notice. In circumstances where

the insurer or risk manager has assumed the duty to investigate accidents or incidents, it would be the responsibility of the insurer or risk manager as the investigating entity to insure that all evidence necessary to properly defend the claim is preserved. In an appropriate case, this would include both video surveillance and cell phone data. The question then becomes at what point does the insurer have a duty to preserve potential evidence as a result of that investigation, and when will liability accrue for the failure to do so.

Legal duty to preserve evidence may arise in the relationship between two parties after considering the nature of the relationship between the parties. Specifically, an insurance company may assume a duty to preserve evidence by virtue of taking possession of the evidence. See, Pirocchi vs. Liberty Mutual Insurance Company, 365 F. Sub. 277 (Ed. Pa. 1973); Dardine v. Kuehling, 801 N.E.2d 960 (Ill. App.); Thomas v. Owensby, 704 N.E.2d 134 (Ind. App. 1988)

A liability insurance carrier has a duty in the ordinary course of business to investigate and evaluate claims made by its insured and in carrying out this duty, carriers take possession of things that must be authenticated and tested to evaluate the claim. This conduct may be viewed as gives rise to a contractual relationship with the third-party claimant. In Dardine v. Kuehling, 801 N.E.2d 960 (Ill. App. 2003), the plaintiff, a newspaper carrier, was injured when he fell in a hole in a brick sidewalk while making his deliveries early in the morning. The insured informed her insurance agent that the bricks were “cocked up” and asked for permission to remove the bricks before someone else fell. The agent told her should could, and within a week twenty-five to fifty bricks were removed prior to any photos or video of the sidewalk having been taken. When the plaintiff returned to the site a month later, he found that the bricks had been removed.

In this case the court held that an insurer’s authorization to its insured to make changes to a sidewalk without first recording the condition of the sidewalk by means of photo or video tape gave rise to plaintiff’s claim of negligence of spoliation of negligence. When the carrier has a duty to investigate claims, care must be taken to preserve evidence which is material to a potential lawsuit. Where the evidence is not capable of being stored for later use and examination, it should be preserved by means of photo and video so that the defendant can defend the suit free of claims of negligent spoliation.

Again in Thomas v. Owensby, 704 N.E.2d 134 (Ind. App. 1988), it was held that an independent cause of action could arise against an insurance company by a third party based on the failure to preserve evidence,. In that case a six year old was injured when a dog which was restrained on a cable attacked the little girl when the cable snapped. The dog’s owner had homeowner’s insurance with Indiana Insurance Company, and they investigated the claim and collected the cable which had snapped.

The young girl and her parents subsequently decided to pursue the manufacturer of the cable, only to find that the insurance company had lost the cable. Finding that the insurance company had a duty to safeguard evidence it collected, and that this duty extended to those it was foreseeable would be harmed by the loss of that evidence, the Indiana Court of Appeals allowed a separate cause of action by the young girl and her family based on the failure to preserve evidence.

In the context of the preservation of video or cell phone evidence, it seems equally likely that based upon an insurer’s duty to investigate claims and to gather evidence in the defense of its insured, an insurer may well have an obligation to preserve such evidence. Consequently, it

would be incumbent upon the insurer or risk manager to insure that in the course of the investigation appropriate inquiry is made concerning the presence or absence of video or photo evidence, and in the presence of such evidence appropriate, effort is made to retain and preserve that evidence, whether that be instruction to the insured to preserve the video or whether the insurance company itself take responsibility for the evidence.