

# The Surveillance Video in Trial

By Edward C. Bacon, Esq.

**N**ow that you have invested in the hardware and training, ever wonder how that surveillance video gets used in trial? We're not talking about the easy case, where the video captures the crime and is used in the prosecution. But how about that shoplifting case that went bad...as one loss prevention executive liked to describe it, the "non-productive" stop?

The surveillance video has preserved the mistake (maybe several), and the customer now-turned Plaintiff is suing for false arrest, assault, battery, a host of assorted torts, perhaps including allegations of racial profiling. The surveillance video appears destined to become Plaintiff Exhibit 1 at trial. What to do?

Keep it at all costs and make sure all involved loss prevention agents are trained to secure the complete video in an unaltered format. It is very likely the most important piece of evidence presented at trial to successfully defend a claim.

We now live in a society where video surveillance is the norm. Concern that jurors may find video surveillance offensive has given way to recognition that most jurors expect it. Virtually every video contains information helpful to a successful defense.

Most, if not all, states provide a "probable cause" defense for retailers or merchants, either by statute or common law. Inherent in the defense is the concept of reasonableness. Our experience has been that most jurors are accepting to the concept that "mistakes were made," if given appropriate evidence as to how and why the mistake occurred. "Bad stop" cases can be successfully defended by acknowledging "mistakes were made," while emphasizing that the *reasonable* belief component of "probable cause" does not equate to certainty. The video of the bad stop is often our best evidence. In conjunction with testimony from the involved loss prevention agents, jurors can see and understand what the agents observed and the basis of their conduct.

Over the years we have successfully defended numerous "bad stop" cases by embracing the video at trial, and providing answers to questions that may not be readily apparent. Often the video speaks loudest and addresses key questions:

- Why was surveillance of this particular customer initiated?
- What conduct was observed that triggered the decision to detain?
- Where did the detention occur and who was actually present?
- What degree of force was used, if any, and how did the customer react?
- How long did the entire incident last?
- Were there bystander witnesses and, if so, where and when in the sequence of events?



We often have used the video to contradict or explain away important aspects of the Plaintiff's case by showing:

- Focus on merchandise or means of concealment (i.e., shopping bag),
- Apparent concealment of merchandise,
- Lack of or minimal physical contact on the part of the apprehending agent or, conversely, resistance on the part of the customer, and
- Actual time documented on video of the entire incident.

Our last trial involved the defense of a national retailer against a claim that the customer had been improperly singled out for surveillance based on race, wrongfully accused of shoplifting outside the store in the mall, and detained. The involved loss prevention agent did not see the customer enter the department or remove merchandise from the display. The agent admitted he had made a mistake. But we had the video. The jury acknowledged after returning its verdict on all claims for the defendant that the video was the most persuasive evidence in the trial. A reasonable belief prevailed. ■

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