



CLM 2017 National Retail, Restaurant & Hospitality Conference  
February 22 - 24, 2017  
Grapevine, TX

## **Negligent Security - Early Crime Scene Management**

Every day we see evidence of more and more shootings and violent crimes at businesses throughout our country. Oftentimes, those businesses and their insurers are unprepared for what to do next. This session will not focus on the law, but rather how to handle the immediate response. Included in this session will be a discussion on how to handle the media, the employees, law enforcement and family and friends of the victim. This session will also provide some practical insight into the gathering and preservation of evidence that will help assist you down the road should a claim arise. It is this early initiative that can often make the difference in evaluating and defending these often difficult and expensive claims.

### **I. The immediate response to the incident from managers, risk management and loss prevention personnel**

When a crime occurs, a potential claim is the furthest thing from the minds of those involved including the employees and customers. As a business, the safety and welfare of the employees and customers should be priority number one. A plan should be in place to secure the scene, maintain crowd control and get police assistance as quickly as possible. This is particularly true in an active shooter situation. Protecting your employees and customer during such a situation calls for procedures and protocols that can be followed to avoid placing them in further danger. The goal is to avoid any additional injury, damage or death.

In addition to physical injury, emotional damage often occurs with employees who are working at the time of such serious incidents. Allowing them to leave work and providing them with resources to cope will hopefully allow them to return to work.

Maintaining order, as best you can, helps to prevent collateral damage to your business. Everyone has a cell phone with a camera, and they love to publish such videos on line. You cannot prevent them from taking video, but should do what you can to prevent a chaotic picture of your business from getting out. This is all about protecting the brand and reputation in the community.

A decision needs to be made about if, when, and for how long you should close your business. This decision is most often dictated by the police investigation, as it is now an active crime scene. The police should be given every reasonable resource available to complete a thorough investigation. Their investigation, particularly at the scene, will hopefully reveal important evidence that can be used to defend a future claim. Your business should provide them

with surveillance video, receipts and other records that may help them to determine what happened.

One important consideration in the police investigation is whether or not to allow statements from employees. You should consider whether having a manager, loss prevention person, risk manager or lawyer present when employees give statements. Though they may not be used as substantive evidence in a civil lawsuit, they may be used as a prior inconsistent statement or even as an admission of a party opponent. The evidentiary importance of such statements will depend on your jurisdiction's rules of evidence.

As we all have come to learn, news outlets are constantly monitoring crime lines and respond to shootings or other serious, violent crimes as soon as the police. Their interest in such crimes is heightened when these crimes happen at, or anywhere near, a well-known business. Your handling of the media, particularly your cooperation with them, often influences their message to the public.

As a result, it is vital that you get out in front of the story to help with your brand protection. Choosing the appropriate manner in which to provide a statement to the media is vital. Should you give a written statement or put a face to the message by having a representative give a statement. This decision is often influenced by the nature of the crime. However, when a statement is given, a great deal of thought needs to be given before anything is communicated. Never allow your employees to speak to media and never say "No Comment." Even if the investigation is early, and very little information is available, you must address what has occurred and show your compassion for the victim(s).

## **II. Investigating the potential Claim by risk managers, claims handlers, independent adjusters and attorneys**

From the moment the incident happens, you have to assume that a claim will follow, whether it be a personal injury, worker's compensation or property claim. As such, it is vital to determine what evidence should be obtained and preserved. It is important to be more inclusive rather than exclusive. Risk managers, loss prevention specialists, and claims handlers should be involved in these decisions, as they know more of what can happen in a claim. Do not rely on your employees unless your company has clear guidelines on preservation of evidence, like surveillance video, time sheets, inspection logs, etc. The failure to preserve important evidence, or spoliation, can often transform an otherwise defensible claim into a verdict for the Plaintiff.

Many states provide for independent claims against a business owner for spoliation of evidence. Other states allow a rebuttable presumption that the spoliated evidence would have shown what the Plaintiff claims, i.e., something bad for the defense. The duty to preserve can also be jurisdiction dependent. However, once a letter is sent asking to preserve evidence, then you must make every reasonable effort to preserve it. Do not wait for that letter. As the old saying goes, better to be safe than sorry.

Video surveillance is one piece of evidence that you should preserve as a matter of course. Determine as quickly as possible if video exists, the number of cameras and the length of video available. Most systems delete after a short period. Get the videos from all available cameras, not just when and where the incident occurred. A general rule of thumb is to preserve videos for

2 hours before and 2 hours after an incident. In addition to the incident itself, the video provides useful information about what caused the incident, the activities of the victim and suspect before the incident and the investigation afterwards. In addition to your own video system, check with neighboring business about their surveillance. Their video may have additional that may have additional information that can help piece together what “really happened.”

Identify and meet with witnesses, including employees. Try to obtain written or recorded statements while the incident is still fresh in their minds and their contact information so that you can contact them later. Depending on the business, employee turnover can be high. Some are often hostile by the time they are asked to give a deposition, so getting the statement while they are still cooperative, can be used to impeach them if they change their story.

Monitor the criminal investigation and prosecution, and keep in contact with the lead investigator and/or prosecutor. If you are dealing with an unsolved crime, call the lead detective and ask for informal information. They cannot be deposed about an ongoing investigation, but may give you some insight on what occurred and with whom you should speak. Criminal cases move much faster, so find out right away so you don't miss the trial date. Have someone attend the trial, if possible, as this will give you a sense of the witnesses who testified.

If your employees are called as witnesses in the criminal trial, retain counsel to prepare them for their testimony. Criminal depositions are often short, but you want to avoid the employees providing testimony that will adversely affect your defenses. Unlike statements to police, sworn testimony in the criminal trial (either deposition or trial testimony) can be used as substantive evidence in the civil litigation. They should be prepared as if they were testifying in the civil litigation

Do online research for news and updates about your incident. The media usually has a lot of information early on. Read all of the related stories as they all have different details that may help form your defense or reveal a new witness. Comments on news stories can also be insightful. These people are also your potential jurors, so get a sense of how they react to the story, to help strategize you defenses.

Many times the people involved in these cases are gang members, post pictures of themselves in compromising situations, etc. on social media and you can learn a lot about the parties through their social media. You should get this information immediately as it might be taken down once an attorney is hired and is very difficult to get once it has been taken down. This can be difficult because they do not typically use their real names, so find their friends and family members and use their profiles to lead back to the parties. Look up the people that are posting about the incident by looking at the comments on media articles posted and those people can often lead you to the correct pages

The following are additional records that should be obtained to help you evaluate the potential claim. They should typically be ordered right away and can all be obtained with public records requests, so the opposing counsel will not know what you ordered.

- a. Calls for service - to your location for the three years before the date of incident from your local law enforcement office

- b. Once you have the calls, determine what prior incidents are relevant and order the police reports for those incidents. Calls for service, alone, are often not admissible as evidence. They also do not give you the whole story.
- c. Docket search. Look up the parties and witnesses and determine what kind of criminal history they have and then request copies of any relevant documents from the clerk's office
- d. A public records on the victim and suspects. This request for any and all records related to a specific person to all nearby law enforcement agencies will let you obtain all records from when that person was arrested, gave a statement to police, etc.
- e. State Attorney's Office records – A public records request here can help you obtain not just the relevant police report, but the pictures, videos, 911 calls, depositions in the criminal case, and the entire investigative file that you likely will be unable to obtain from the local law enforcement office, which may claim its privileged- the prosecutor likely has a head start on you and you can get the entire investigative materials from this one source.
- f. Your own maintenance records, particularly for lighting and landscape. Preserve the records to show that the lighting was appropriate.

### **III. Some thoughts when dealing with specific types of claims**

Of course, your handling, investigation and evaluation of a potential negligent security claim is very often dependent on the type of business. Are you a large supermarket? A 24-hour convenience store or quick service restaurant? An apartment complex?

With 24 hour businesses, being open late in the evening and early morning, there are more security concerns for customers. Does your business use off-duty officers or private security firms? Is the location one that becomes a popular hangout spot on certain dates and times? Are there clubs nearby? Some jurisdictions have certain requirements for security for 24-hour businesses. For example, Florida Statute §768.0705 grants landowners a presumption against liability for crimes on the property committed by third parties, where they have implemented substantial security measures in accordance with Florida Statutes §812.173 and §812.174.

For apartment Complexes/residential, does the complex have courtesy Officers? Obtain a copy of their lease and their personnel file. Speak with them about the incident and other crime at the property. It is important to find out if they communicated with the complex about crime on the property or trends in the areas. Notice to residents is also important to determine. Obtain copies of letters sent to residents about crime, notifications posted, security information disseminated.

Many complexes do not maintain these documents for long, but they will be requested in discovery and Plaintiffs will argue that notice should have been given. You should also investigate maintenance records for lighting, fencing, and gates. Were they in place, and more importantly, were they functioning appropriately. If you complex hired security guards, review the contracts to figure out their responsibilities. Often the contracts will say just they were hired to just protect property, although realistically they are doing both

### **IV. Addressing negligent security concerns before they happen**

According to the Federal Bureau of Administration, Private Security within the United States is essential to ensuring the security and safety of persons and property, as well as intellectual property and sensitive corporate information. These services are used in a wide range of markets, from commercial to residential. Some companies hire their own security personnel, whereas others contract with security firms for these services or use a mix of services—both proprietary and contract staff.

Each individual state determines licensing requirements, background checks, and training for security companies and their guards. These standards tend to vary on a large scale. Turnover and a lack of proper training contribute to many of the negligent security issues that arise when situations get out of hand. With high turnover rates and intense competition, many guard operations seek to maximize profit margins by doing the bare minimum required by states when it comes to pre-employment screening, background checks, and training.

Hallcrest Systems; a firm that provides security consulting, market research, and training services, initiated a report based on a survey of the security industry. Within the report, two of the main underlying factors that could possibly lead to negligence in security are the lack of proper training and inadequate or ambiguous post orders or standard operating procedures.

The average training requirement for an unarmed security guard is 8 hours or less. Many states require no training for unarmed security at all. Compare this figure with the average police officer certification of 500 hours. The overwhelming majority of private security firms do little pre-assignment training, instead opting to do “on the job” training. The result is that many major properties across the United States are protected by people who have little familiarity with the property, post orders and procedures specific to the property, or even minute grasp of the emergency procedures for the facility. The potential for loss and injury under the current system is obvious, and the criminal and civil repercussions are already manifesting themselves across the United States.

Now, when speaking on the industry of hospitality, there are many factors that need to be considered when utilizing proper security. The hospitality industry is a broad category of fields within service industry that includes lodging, event planning, theme parks, transportation, cruise line, and additional fields within the tourism industry. The hospitality industry depends on the availability of leisure time and disposable income. Due to the nature of this industry, the interaction of security personnel with the general public is an utmost guarantee. While safety and security are paramount, they must be balanced with customer service. There have been many negligent security issues, which have moved to litigation.

Training security staff that they are also customer service representatives is an issue that must be driven home. The image of the heavy-handed security guard is archaic and unprofessional. Also, due to the number of incidents, there seems to be lack of oversight, either from hotel management or from a designated security manager/ supervisor. One could also question the personnel selection process and if it’s up to local / state laws or meeting the industry standard for a security professional.

