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***Preserving Evidence: What Restaurants and Retail Establishments
Need to Know Before the Accident Happens***

I. Introduction

This interactive session will step through everything you need to know for effective and appropriate evidence preservation within restaurants and retail establishments using recent case law illustrations and trends. Panelists will outline instances in which evidence preservation may be required and highlight exactly what type of evidence to preserve. Possible consequences for failing to preserve evidence will be discussed.

II. The General Rules on Preservation of Evidence

A. Determining when a Restaurant or Retail Establishment is Required to Preserve Evidence

1. Triggers regarding a duty to preserve

Generally, courts look to answer three fundamental questions when it comes to the duty to preserve evidence:

- (1) whether the evidence ever existed;
- (2) whether there was a duty to preserve that evidence; and
- (3) whether the evidence was critical to the opposing party proving its affirmative claim or a defense.

The first prong, whether the evidence ever existed, is usually easily addressed. There will always be exceptions but generally speaking, the evidence either did or did not exist.

As for the second prong, whether there was a duty to preserve the evidence, courts have held that a duty exists to preserve evidence where that party could *reasonably have foreseen a claim*.

The third prong, whether the evidence was critical to the opposing party proving its affirmative claim or a defense, is obviously subjective. It is important to liberally interpret this prong when deciding what evidence to preserve.

2. Determining what must be preserved

It depends! Anything at the scene that can reasonably be preserved should be preserved. The most common examples include surveillance footage, photographs, and non-perishable objects involved in the incident.

The most common causes of spoliation of evidence tend to be:

- Surveillance footage was erased
- Photographs were simply not taken
- Incident reports were incomplete or not utilized
- Broken objects/furniture/fixtures involved in the incident were thrown away or discarded

These issues can be easily avoided when there is ongoing communication between Risk Management and the management/employees of a Retail or Restaurant establishment.

3. Consequences for failing to preserve

Spoliation is '[t]he intentional destruction, mutilation, alteration, or concealment of evidence [.]' Black's Law Dictionary 1437 (8th ed.2004).

Spoliation sanctions are imposed by courts to prevent the spoiler from reaping an unfair advantage in the dispute and to deter this type of conduct from taking place.

Sanctions for spoliation of evidence can range from stricken pleadings, to the barring of a party from introducing certain evidence, to an adverse jury instruction.

Further, depending upon the jurisdiction, spoliation of evidence may lead to an independent cause of action that can be alleged under existing negligence law.

III. Who Needs to Know What and When do They Need to Know It

A. Management

1. Secure the footage!

If there is any video and/or photographs of the scene, it is critical that they be preserved in their entirety by the retail or restaurant establishment. A trained professional should send the footage to the client/TPA adjuster immediately. If this is a cost hardship for the retail or restaurant establishment, then the TPA (or whoever will be handling the claim) should retain an independent consultant to secure the videos and/or photographs. An adjuster should document their notes as to any barriers and/or successes regarding securing this footage.

2. Gather any routinely kept sheets or logs

In a slip and fall, if the retail or restaurant establishment keeps “sweep” logs, they should be preserved. If the incident involves food, any paper trail or documentation relating to temperature, handling, and/or sanitation procedures of the food/premises should be preserved. Depending on the nature of the incident, whether it be a valet parking accident or a wrongful detention claim for alleged shoplifting, the retail or restaurant establishment should know what records to preserve in case litigation ensues.

3. Gather vendor agreements

The agreements between a retail or restaurant establishment and its property management company, or other potentially relevant vendors, should be gathered and preserved for defense counsel. Any third parties who may have liability for the incident should be put on notice of the incident.

B. Defense Counsel

It is critical that defense counsel be provided with the names and phone numbers for the employees who were present at the time of the incident; copies of all photographs and/or video of the incident and preceding the incident; access to scene itself for inspection; any relevant vendor agreements in case of potential third party liability; any

paper trails regarding inspections or other incidents; and any other materials available regarding the incident and its possible prevention/detection.

Defense counsel (or the TPA) should immediately put any third parties who may have liability for the incident on notice of the incident.

IV. Unique Areas of Interest

A. Retail and Restaurant Establishments:

For personal injury cases (such as a slip and fall), the material or product that allegedly cause the claimant's injury in some way needs to be preserved if reasonably possible. Examples of such evidence could include debris on the floor, a broken piece of furniture, an uneven floor surface, fixtures in the store or even a product sold within the retail or restaurant establishment.

All surveillance video and/or photographs should be secured immediately. Ideally, preserve all footage from the date of the accident and, if possible, for the days leading up to the accident. Such footage may show what caused the allegedly dangerous condition, whether any inspections occurred, or in some instances, whether the allegedly dangerous condition even existed prior to the accident.

All witness and employee statements should be preserved (whether in writing or recorded). If there are employee time cards available, those should be preserved as well to demonstrate who was working at the time of the incident and in the days leading up to it.

B. Banks/ATMs on Retail or Restaurant Establishments:

Upon first learning of an incident involving an incident at an ATM, steps should be taken to collect the relevant evidence. The crime history of a location may indicate that certain assault/robbery crimes are foreseeable by the mere fact that they occurred previously, frequently, and within a relevant time period. Police departments typically keep computerized records known as crime grids from which printouts can be generated that classify crime records by date, location, crime type, and case number. A copy of the actual police reports can be obtained and will usually provide more detailed information of each offense (*i.e.*, victim, witnesses, police officers, facts of the crime, etc.) to enable

the bank's attorney to make a determination as to whether the crime is similar in nature to the subject ATM attack.

The initial report and all supplementary reports of the police investigation into an ATM related attack may also provide crucial information, such as, witnesses, written statements, narratives regarding the claimant's account of the attack, and photographs of the scene immediately after the attack.

Not all crime is preventable. If the perpetrator is identified, his prior criminal record can be obtained. Some local police will provide area businesses, upon request, a crime safety study or perform a "stake-out" of a business's parking lot if there is a recent increased trend of a specific type of crime – *e.g.*, automobile burglary. A study performed prior to an ATM incident may provide useful information.

The bank's own documents may establish the frequency and type of crimes that have occurred at a particular ATM. The bank may have a professional management company and/or security company that also maintains incident reports, and in the case of a security company, additional documents such as daily activity reports, post orders and schedules, and procedures, if any, at the ATMs.

The bank branch or corporate real estate division may maintain documents depicting the location and types of lighting fixtures used at a particular ATM, along with lighting surveys which test lighting sufficiency at the ATMs. Records also exist identifying the security hardware (*i.e.*, surveillance cameras and mirrors) used at the subject branch locations. The number and positioning of surveillance cameras, or lack thereof, may also affect the foreseeability/ adequacy analysis.

The corporate real estate department may have site plans/architectural designs of the remodeling or construction of the particular ATM. These plans may show the positioning of the ATMs on the property for purposes of evaluating the visibility and openness of the machines. Photographs of the ATM will also be a valuable source of information in this regard. Photographs may be taken immediately after the incident for documentation purposes before any changes or modifications are made at the ATM.