



2020 Annual Conference
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Defense Counsel's Wish List

I. The Pre-Accident Phase

Creating a culture of safety is already a given for many retailers, but premises liability claims remain an issue. Although some of these claims are legitimate, many feature ambitious plaintiffs who exaggerate--or worse yet, fabricate--claims against retailers. Reviewing a defense counsel's claim referral wish list will help.

This panel will explore topics that include: What more can we do to help prevent accidents? And what can we do after an accident happens, but before a lawsuit is filed, to protect ourselves? Successfully tackling this issue often comes down to a renewed focus on record keeping. The panel will revisit ways to do this effectively and will help participants discover what has gone wrong and how a few changes can help lead to victories at trial or summary judgment.

Included in conversation will be the importance of proper procedures and record keeping, as well as information that records should contain. The group will explore some typically bad examples versus some good examples. Often a few small tweaks can make a major difference.

A. Key steps to have in place BEFORE the Accident

When an accident happens, confidence in knowing that you have good policies and procedures in place, a good training program and managers who know how to train and know the policies and procedures can completely change what happens next. You do not want to learn of your inadequate policies, inadequate training for the complete absence of policies during litigation. There are some policies that should be put in place well before any accident happens and updated.

Specifically, policies regarding procedures for accident prevention, procedures for responding to accidents, what to do in investigating an accident, proper incident report

procedures and preserving evidence are all critical policies that no business should be without.

B. Policy MUSTS

Some retail and restaurant managers feel that less is better, and to some extent that's true. The concern of "if I write it in a procedure, it admits that I'm on notice" is not an excuse for the lack of good policies. The discussion about policies should be more about whether they are clean and understandable, rather than whether you should have them the policies it should be written in a way that are clear, concise, easily understandable and would convey the message you want to send to a jury. The policies should include care for safety, and specifics on what to do for the prevention of accidents.

It is important that you make sure your policies provide a roadmap for your employees on how to address accidents or incidents. You may need to consider whether the policy should be written in several languages but also should give the employee a sense of confidence on what to do when faced with a situation is not something they frequently have to address.

Training is also a critical element having a policy and procedure protocol. There's no training, it's equivalent to having no policy. Regular training that includes instructions and demonstrations should all be part of the training protocol.

II. Incidents/Accidents

A. Procedures for Accident Response and Investigation

When an employee is faced with an unfamiliar situation, you never know what they're going to do. Providing detailed training on procedures for accident response and investigation makes for a more thorough, complete and accurate information upon which to make a determination claim is presented. The procedures should be detailed, balanced with customer service and provide a checklist for the response and investigation. What things to look for in the investigation stage, the importance and method of documenting information as well as whether to create your own evidence, such as photographs of the incident scene must be considered and addressed.

Whether to have an incident report is no longer the question, but whether there should be a separate report that the guest completes is the only question that should be asked regarding the preparation of an incident report. There is no doubt that a manager or employee responding to an incident should have a document that walks them through what they need to do and specifically what they need the document at the

accident scene. But having an employee provide an incident report specifically for the guest to complete about the guest's version of the incident should also be part of the accident investigation. If there's an employee or guest who witnessed the incident, a statement should be obtain immediately. Training employees on how to take statements what information to obtain should also be taught. It should also be protocols for reviewing annotating any video documentation that may be available after the incident or what happens after the incident occurred.

B. Video Surveillance

In today's world, everyone relies on technology, video surveillance systems are ubiquitous. Ensuring that there is a proper protocol for determining whether an incident is captured on the video camera is crucial to have a claim progresses. If video existed at some point that may have captured the incident, and it was not preserved, that may take a case with very limited exposure and changes it to a presumption of fault. Should be a protocol for determining whether there is video of the incident, and how to then preserve that video for future needs.

The question is: how much should be retained? Claimant's counsels are more frequently sending reservation letters requiring establishment to maintain 12 hours before the accident or 12 hours after the accident, or something to that extreme effect. But the reality is how much should be preserved in order to be cautious and compliant. That may vary from state to state, but most people agree that retaining an hour before the incident in an hour after the incident should be sufficient, although as stated before, it may depend on the jurisdiction.

Spoilation of evidence is an alternative method of establishing fall even though there may not be fault for the underlying incident. Knowing and understanding how spoliation of evidence works in your states, specifically what laws, what statutes mandate preservation most certainly will have an impact on any analysis of negligence and exposure of any claim.

C. Claim File Documentation

Providing a good claim file will help get defense counsel started on the right foot heading in the correct direction. Claim file documentation which is very helpful should be included in the file provided to defense counsel. Documentation such as the demand letters and their enclosures as well as all communication with the claimant's counsel should be provided. Investigation materials from the initial investigation at the accident scene as well as the investigation that occurred after the claim was reported to the claims professional will provide much-needed evidence to help direct the defense counsel. Mostly, that information will include names of witnesses and pertinent employees, as well as whether or not surveillance video exists and what it may show.

Getting the file documentation, communication, incident investigation as well as claim file notes altogether also serves to save time and expenses when the matters referred to defense counsel.

III. Anticipatory Discovery Requests

Preparing for the inevitable discovery requests litigation in advance can be extremely valuable and will save time and expense.

Every litigation, plaintiff's counsel's will always submit discovery requests such as interrogatories and request for production. Anticipating those requests and having the documentation already available is invaluable to the defense counsel. Anticipating and having available the names and contact information of known witnesses, employee schedules and whether those individuals no longer work for the company will shorten the time necessary to respond but also provides defense counsel with much-needed information that will help prepare the responses that will ultimately go to the plaintiff's counsel.

Researching the relevant policies and procedures in obtaining any employee handbooks that may be relevant also serve to reduce post-litigation expenses and delay. Also determining if there is information that may be relevant to any prior claims or incidences may also be beneficial. Having the information on videos of the incident, photographs and incident report information at the time of the assignment are very high among the defense counsel's wish list. The documentation such as communication with plaintiff's counsel to be able to determine what the theory of the claim is, damages claimed and also what evidence may be available may be extremely important in establishing the initial plan of action.

IV. Focus in on YOUR Preferred Plan of Action

Explain your preferred plan of action in the initial file referral ups the defense counsel know what direction you want to go or what information is needed initially in order to move the case in the direction you want to go.

Providing direction to the defense counsel about exactly what is needed and you want this claim to go tailors the defense and limits expense. Questions to consider include:

- ❖ Is it a case where you want to settle early, or is there some information that is specifically needed in order to complete your evaluation?
- ❖ Is this is a claim that needs to be fought because there is no liability, no damages, or is it an outright fraud?

If there is a clear direction plan stated specifically in the assignment or referral letter, then make it part of your initial case discussion with your defense counsel so that there is a direction from the outset. If no direction is given, then defense counsel may be left guessing. That only leads to unclear goals, unnecessary expenses, and files that remain open longer than they need to be.