



# 2023 Hospitality & Retail Practice Group Seminar

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### Police Academy

*A Discussion of Best Practices to Defend, Survive, and Advance  
When Crime Comes to Your Client*

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# A Discussion of Best Practices to Defend, Survive, and Advance When Crime Comes to Your Client

## Background

Crimes against persons committed on the premises of retail and hospitality businesses are a major source of litigation in many jurisdictions around the country. Hotels and stores, shopping malls, apartment complexes, restaurants, bars, movie theaters, nightclubs, parking facilities, dormitories and even churches are commonly named as defendants in lawsuits by Plaintiffs following such incidents. The types of crimes vary from carjackings and purse snatchings to robbery, assault and battery, abductions, rape and murder. Defendants are commonly sued for lack of security or inadequate security when these incidents occur. Problematically for Defendants, these type of cases typically involve innocent victims, press coverage, sympathetic juries and the possibility of large awards due to the emotionally charged circumstances of many cases.

## Issues in Such Cases

When a crime occurs on a client's property, it is a crisis situation. In responding and defending against such claims, Defendant Clients and their attorneys should be aware of the following issues:

### 1. Foreseeability

Did the Client have actual notice of the crime risk? Alternatively, did the client have constructive notice (knew or should have known) that a crime risk existed given the particular circumstances of the case.<sup>1</sup>

### 2. Policies and Procedures

Did the client have policies or procedures in place to address the potential risk of harm to customers or patrons who were present on the premises? Were those policies or procedures followed?

### 3. Investigation

Can an effective and comprehensive investigation be timely and effectively conducted following the occurrence of an incident in order to defend, mitigate or absolve the client of responsibility for the incident.

It is important to remember that a Plaintiff will seek to put the client in a position which portrays the client to be at fault for the criminal acts of third parties. A good Plaintiff's lawyer will seek to find a crack or opening to shift the blame from the criminal to the client. They will try to do this by showing the a policy or procedure was not followed, that specific security measures were not functioning, that the client or security personnel were inadequately trained or supervised, that there was inadequate staffing for any security protocols to be effective, or that current or former security personnel/staff have become disgruntled and critical of the client and have an ax to grind.

## Importance of Immediate Response to Notification of Incident

*Critical Point: If an effective defense can be presented, the immediate collection of all details and facts surrounding the incident is critical. Be proactive – not reactive. Risk manager, carrier representative and outside counsel should work together to adopt a shared crisis mindset.*

### Considerations

1. Timely collection of factual details: The passage of time can allow crucial evidence and facts to be lost or at the very least be more difficult to acquire.
2. Interview of client representative(s) and management personnel who were on duty at time of incident.
3. Collection of client incident reports and employee statements from all employees on duty when incident occurred.
4. Interview maintenance personnel regarding any issues relating to broken locks, alarms or barriers.
5. Interview and obtain signed statements/affidavits from non-employee fact witnesses.
6. Take photographs of scene.
7. Ascertain existence of outside police or incident reports via client, Freedom of Information Requests or private investigative services (include 9-1-1 call transcripts, body cam videos of responding officers and any crime data statistics collected by the police for the area in question).
8. Ascertain and preserve video evidence and its platform. Determine types of cameras in use and location and angle and orientations of camera views and document same by use of a site map.
9. Collection of client policies, procedures, security and emergency manuals pertaining to security of premises.
10. Obtain copies of any outside security contracts which client may have with security vendors in order to determine scope of responsibility.
11. Collect daily activity reports for security personnel for the time period leading up to and on the day of any incident
12. Collect any post orders which describe security responsibility of outside vendor provider.
13. If client has conducted security audits, obtain copies and determine if recommendations from audit were implemented.
14. If client has a management company, obtain copies of all management agreements.
15. Collect marketing and advertising materials and compare same to existing conditions on site.
16. Ascertain timing and nature of any previous incidents and acquire documentation related to same.
17. Review print and broadcast media sources for news coverage of the incident.
18. Advise client to cooperate with police in all respects.

## Consider Retention of Counsel

*Critical Point: The retention of counsel for the client allows many aspects of the investigation to be protected under the work product or attorney client privilege – including interviews with client representatives and witnesses who may have knowledge.*

### Considerations

1. If possible, consider having counsel present for police interviews with client representatives and employees
2. Have counsel interview all client representatives and employees to gain possible protection of work product/attorney client privilege. Obtain written statements from employees and any non-employee witnesses in order to preserve present recollection and to protect against disgruntled employees later criticizing the client
3. Have counsel ascertain ownership, history and use of any video surveillance equipment, maintenance and repair history if needed
4. Have counsel ascertain whether video surveillance is live or reviewed as needed and document as suggested above
5. If possible, have counsel develop good working relationship with police investigators

## Consider Retention of Premises Security Expert

*Critical Point: Early use of a premises security expert who can visit the scene and evaluate the circumstances firsthand will assist the client in developing an effective defense strategy and in helping to formulate an appropriate narrative in response to any claim. An expert can also educate the client and the attorney on areas of strength and weakness.*

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<sup>i</sup> Restatement (Second) of Torts § 344 provides: A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentional harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done, or (b) give a warning adequate to enable the visitors to avoid the harm or otherwise to protect them against it.