

**2016  
HOSPITALITY LAW  
CONFERENCE**

FEBRUARY 22-24, 2016

**FACT OR FICTION  
DEALING WITH GUEST CLAIMS  
(REAL & IMAGINED)**



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# PRESENTER



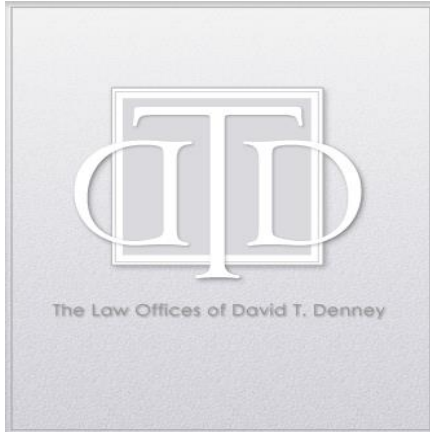
## DAVID T. DENNEY

**The Law Offices of David T. Denney, PC (A Nose-to-Tail Law Practice®)**

- [FoodBevLaw.com](http://FoodBevLaw.com)

**The firm's Food, Beverage & Hospitality practice focuses on representing clients around the country in:**

- The formation, purchase and sale of entities;
- Private Placement of Securities (Seed, Series A, and beyond);
- Franchising;
- Corporate transactions;
- Civil litigation;
- Commercial real estate/leasing;
- Beverage alcohol licensing;
- Employment matters;
- Developing Comprehensive Policies and Procedures; and
- Other random, weird stuff.



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# DEALING WITH INCIDENTS AND GUEST ALLEGATIONS

- **BEFORE:** Preparing for allegations and claims
- **DURING:** What to do when faced with an allegation
- **AFTER:** How to evaluate the allegation and mitigate potential damages



# BEFORE: PREPARING FOR ALLEGATIONS AND CLAIMS

- It's just a restaurant. What could possibly happen?
  - Most common claims
    - “You Made Me Sick!....(2 hours ago)”
    - “I broke my tooth!”
    - “I fell down and didn't realize I was injured until later.”
  - Expect and prepare for the worst
- Train your staff
  - Policies and procedures
    - Who handles these allegations?
    - What do they say? Do you have a procedure?
  - Routinely reiterate the policies and procedures in training



# DURING: WHAT TO DO WHEN FACED WITH AN INCIDENT

On premise:

- Take care of the guest.
  - Always offer to call an ambulance or other emergency provider.
  - Complete incident report:
    - Ask questions! (interview witnesses)
    - Who, when, where, what happened?
    - What **NOT** to do...(!!)
    - Are they privileged?



# DURING: WHAT TO DO WHEN FACED WITH AN INCIDENT

- Collect evidence.
  - Preserve the food and/or foreign object when possible, making sure to clearly mark the evidence to protect it from disposal.
  - If you are in possession of evidence, you must preserve it. If the claimant is in possession of evidence, it is his/her responsibility to maintain the chain of custody.
  - Make copies of video surveillance, if any, as DVR systems commonly overwrite content after only a few weeks.

Off-premise (email/phone allegations):

- Have standard responses for emailed complaints
- Know whom to call...



# THIS IS THE BS I'M TALKING ABOUT

This is the complete text of an actual email received by a client last month:

"I was at your Dallas-Fort Worth airport location and had a "mexican salad". While it was tasty and all that, just 2 and a half hours later I had the runs at 37 thousand feet. Thanks a lot !! (PS: I hadn't had any breakfast so don't tell me it wasn't you. That was the only thing that I ate that day. it's a good thing otherwise I would have had even more runs to deal with.)"





# INCUBATION CHART

Pathogen	Incubation	Symptoms	Duration	Source
Bacillus cereus	1-6 hours (vomiting); 6-24 hours (diarrhea)	Nausea and vomiting <i>or</i> colic and diarrhea	24 hours (short form); 24-48 hours (long form)	Soil organism found in raw, dry and processed foods (e.g. rice)
Campylobacter	2-10 days; usually 2-5 days	Diarrhea, cramps, fever and vomiting; diarrhea may be bloody	2-10 days	Raw and undercooked poultry, unpasteurized milk, water
Clostridium botulinum (botulism)	2 hours to 8 days; usually 12-48 hours	Vomiting, diarrhea, blurred vision, double vision, difficulty swallowing, descending muscle weakness	Variable (days to months)	Home-canned food, improperly canned commercial foods
Clostridium perfringens	6-24 hours	Cramps, diarrhea	24-48 hours	Meats, poultry, gravy; foods kept warm



# AFTER: HOW TO EVALUATE AND MITIGATE

Damage control for injuries or claims.

- Successful follow-up with the Claimant can be the difference between a gift card and ??? years of litigation.
- What does she want?
  - Money?
  - Medical Bills Covered?
  - Free Dinner?
- Just an Apology???



# EXPRESSIONS OF REMORSE

## WARNING!

**Expressions of sympathy or remorse can be used as evidence to prove liability.**

In Texas, an expression of general sympathy is not admissible...

“I’m sorry you had a bad experience with us.”

...but statements regarding liability or negligence (even those made inadvertently) are.

“We’re sorry our food made you sick.”

“I’m sorry we put peanuts in your food.”



# CASES INVOLVING THESE INCIDENTS



# BURNS V. MCDONALD'S CORP.

“As he drove his pickup truck onto Route 44 while finishing the cheeseburger, Burns had to [1] brake so suddenly because of traffic that he [2] had to restrain with his right hand his 75-pound dog, which had “started to go flying,” and then [3] grab the steering wheel with both hands to keep his truck under control. Indeed, [4] he “needed to push” the cheeseburger into his mouth so he could grab the wheel. While braking, with cars around him swerving, including the car behind him “swerv[ing] out from underneath the truck and into the breakdown lane,” Burns [5] bit onto something and felt pain in the whole right side of his mouth.”



# SCRUGGS V. CHICK-FIL-A

“As a result of biting into the maraschino cherry with a pit inside, Plaintiff fractured two teeth below the gum line, and shortly after this incident, her gums became infected and she developed sepsis. Shortly thereafter, Plaintiff sustained a heart attack.”

...

“Defendants’ failure to exercise reasonable care to reduce or eliminate this pit risk, or to warn Plaintiff of same, was a proximate or producing cause of the incident and injuries in question, and Plaintiff’s harm and damages resulting from the incident in question.”



**SOMETIMES, YOU'RE JUST GONNA GET SUED**



# JOHNSON-CHAMBERS V. APPLEBEE'S

## INCIDENT OUTSIDE THE RESTAURANT

2004 – Plaintiff ordered chicken salad to go from a Louisiana Applebee's.

- When she began to eat the salad on her way back to work, she allegedly found a human fingertip in her food.
- Johnson-Chambers allegedly “called the restaurant and **was given an apology.**”
- She appears to have driven directly to her attorney's office, where he promptly put “the very tip of a finger plus some of the fingernail” into a freezer in his office.





# JOHNSON-CHAMBERS V. APPLEBEE'S, CONT'D

- On the day of the incident, a manager responded to the complaint she made by phone, and referred the matter to a district manager.
- Johnson-Chambers allegedly threatened to sue, and failed to return the district manager's call.
- An internal investigation by Applebee's revealed that a cook's knife slipped, accidentally cutting off the very tip his thumb. As the cook tended to his injury another cook stepped in, cleaned the workspace, and completed Johnson-Chambers' order.
- Plaintiff lost at trial, but the process lasted SEVEN years. When Applebee's announced it's cook was at fault, stock price fell 2% (temporarily).



# MARTIN V. APPLEBEE'S

## INCIDENT INSIDE RESTAURANT

- A pregnant woman and her entire family allegedly shared a salad at a California Applebee's that contained a bloody piece of fingertip in December **2015**.
- Applebee's Management: "We immediately investigated and determined that an accident did occur in our kitchen. We discussed the matter with the Martins while still at our restaurant, shared our sincere apologies, and have continued to speak with Mrs. Martin in an effort to address her concerns."

*(the fingertip)*



Suit filed January 2016.



# DEVELOPING POLICIES AND PROCEDURES



# SAMPLE SCRIPT FOR CONTACT

Thank you for contacting us. We take all complaints very seriously and will do a thorough investigation of your complaint.

Will you please help us look into this by providing us with some more information?

What date and time did you visit us?

Which location?

Where there other people with you? What are their names?



# SAMPLE SCRIPT FOR CONTACT, CONT'D

What did you order and what did they order?

Did you eat just your food or did you try their food, too?

What about drinks, what did you have to drink?

Did you pay by credit card (you name on the card)?

When did you start to feel differently? [This is for foodborne illness. It is not really necessary if someone states that they broke a tooth, had allergic reaction or was injured on premise].

Did you seek medical attention?



# SAMPLE SCRIPT FOR CONTACT, CONT'D

If yes, what did the doctor say? Did the doctor release you? Is there any further treatment recommended?

Can you send us those records/diagnosis/bills or receipt of payment?

[for foodborne illness] It would be extremely helpful if you could provide us with **a food log** of what you ate (and where) within the last 7 days (whether at home or out).

We are going to investigate right away. If there is anything else you'd like to give us or tell us, please call [designated person (can be manager or attorney)] directly at (#).”



# LEGAL RESPONSIBILITIES

“Claims-made” general liability policies require insureds to give notice of “potential claims” if there will be a delay between the incident and filing a claim.

Always provide your insurer with notice of a potential claim, in case the situation escalates and you need coverage after a policy period ends.

Evaluate the case relative to your deductible and loss history to determine whether you should make a claim.

Call your attorney ASAP. It is always advisable (not necessarily possible) to get a release.



???

“I’d like to think diners may go out without fear of finding something dangerous, anatomical, or biological in their meal.”

- attorney Eric Traut, in an interview about the Applebee’s case.

- *San Luis Obispo Tribune*, Jan. 7, 2016

