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Liquor Liability: Accident investigation, Preservation of Evidence and Loss Prevention

I. Liquor Liability: Minimizing Exposure in an Increasingly Litigious Society

Liquor Liability generally refers to the legal responsibility imposed as a result of the actions or omissions of those who are involved in the sale, service or consumption of alcohol. Each year, restaurants, retail stores and hospitality providers incur substantial costs and expenses as a result of accidents and incidents related to the service and consumption of alcohol. According to The Centers for Disease Control and Prevention's Alcohol and Public Health fact sheet, approximately 80,000 people die each year in the United States as a result of excessive alcohol consumption. In addition to these fatalities, commercial enterprises suffer a far greater number of claims for personal injury and property damage because of the service, distribution and consumption of alcohol. Consequently, businesses, their insurers and risk managers must be familiar with the types of claims that they may face and the limitations on such claims, the laws of the jurisdictions in which they do business and their potential exposure to both civil and criminal penalties. Such enterprises should recognize that despite their best efforts to avoid such claims, incidents are certain to happen. Therefore, they should ensure that they should they have procured the appropriate types of insurance with sufficient coverage limits to protect their businesses in the event claims are asserted. They should also educate themselves and their employees on the necessary steps that must be taken after accidents occur to investigate the incidents and preserve evidence to limit their exposure.

A. Types of Liquor Liability Claims

To avoid or minimize the exposure to one's business, it is imperative that the owners, operators, managers, supervisors and employees of such commercial enterprises be aware of the types of claims that their businesses may be subject to. Since most businesses are insured and the insurance companies will often bare the risks for their insureds' misconduct, insurance professionals including brokers, underwriters and risk managers should take affirmative steps to educate those who purchase their products on best practices to avoid and minimize such risks.

1. Dram Shop/Social Host Liability

There are significant distinctions between so called "dram shops" and "social hosts". The legislatures of most states have promulgated specific statutes that regulate and/or limit the sale and distribution of alcohol. It is critical that any person or business who is involved in the sale, distribution or service of

alcohol, understand and be fully familiar with the rules governing the host jurisdiction and the civil and criminal risks they face as a result of the violation of same. Most claims filed against bars, taverns and restaurants result from fights and altercations involving persons who consumed alcohol. These claims often include related assault and battery charges. Some of those claims involve alleged sexual assault or sexual harassment. Although this presentation will be limited to dram shop liability, it is highly recommended that everyone educates themselves on the social host laws in the states and municipalities in which they live and work.

Dram Shops

Dram shops are **commercial entities** that serve alcohol. These businesses include restaurants, bars, taverns, caterers and reception halls.

Social Hosts

Social hosts (non-commercial) are **individuals** who host parties and/or events at which alcohol is served.

2. First Party/Workers' Compensation Claims

The effects of alcohol on those who consume it are well known. Intoxicated individuals often lose their inhibitions, coordination and ability to think rationally or logically. They often become aggressive. Consequently, those who serve, sell or distribute alcohol may themselves become the victims of those to whom they provide alcohol. Owners, operators and employees of dram shops may be injured as a result of bar fights or other assaults by patrons or even co-workers who consume alcohol while working. Those individuals may be injured while taking affirmative actions to "cut off" intoxicated men and women who take offense to the suggestion that they are drunk. They also may be injured when attempting to remove the intoxicated individuals from their establishments. Most jurisdictions have workers' compensation statutes that limit the liability of owners, operators or co-workers for injuries suffered by employees and other co-workers. Additionally, businesses may suffer first party losses, including medical expense and property damage, as a result of the actions of intoxicated patrons and customers. These losses are often quite costly and may cause business interruption.

3. Criminal Liability and Punitive Damages

Individuals and commercial enterprises that serve, sell or provide alcohol in contravention with the statutes, rules, regulations and ordinances governing the host jurisdiction will not only be subject to civil liability but criminal liability as well. These rules may subject the dram shop and/or social host to criminal fines and even incarceration. Vehicular manslaughter charges have become commonplace. According to The Centers for Disease Control' published statistics nearly 30 people die each day in car crashes that involve a drunk driver. Some jurisdictions allow for the award of punitive damages. The laws of many jurisdictions hold that awards for punitive damages and/or the assessment of criminal fines are not insurable.

B. Potential Claimants: Those Who May Assert Liquor Liability Claims

Anyone who suffers personal injury or property damage as a result of the sale, distribution, service or consumption of alcohol may assert a claim as a result of such loss. Potential plaintiffs/claimants include:

1) individuals who are injured or assaulted; 2) the estates of people killed; and 3) individuals and businesses that suffer property damage as a result as a result of the acts or omissions, including the criminal acts, of intoxicated individuals. These include the people who serve alcohol and innocent people who were not involved in, and were not even geographically near, the place the alcohol was served or consumed such as pedestrians and motorists.

C. Potential Defendants

1. Owners/Operators of Food Services Businesses
2. Owners/Operators of Retail Stores That Sell Alcohol
3. Business Owners and Individuals That Host Events at Which Alcohol is Served
4. Business Owners and Individuals That Allow Patrons to Bring and Consume Alcohol in Their Establishments (BYOB Establishments)

Owners and operators of food services businesses including bars, taverns, restaurants, caterers, banquet halls and hotels are subject to liability for personal injury, wrongful death and property damage claims. Owners, operators and even cashiers of retail stores that sell alcohol may face liability including losing their licenses for failure to check a patron's ID before selling alcohol. Selling alcohol to minors is illegal in all 50 states. In some jurisdiction such as State College, PA, the retail establishment may be civilly and criminally liable for selling alcohol to a person who is of legal age but who is accompanied by a minor. Business owners who host company functions such as holiday parties where alcohol is served may be liable for injuries and property damage resulting therefrom even where the catering company employees were the people who served the alcohol. It is therefore, advisable for such businesses to ensure that the catering contracts they execute contain strongly worded and enforceable indemnification and insurance procurement provisions. It is also imperative that their businesses be named as additional insureds on the catering establishment's insurance policies. Even BYOB establishments that allow patrons to bring their own alcohol may be held liable.

*As stated above, while this presentation will not specifically address or focus on the social host's potential liability, all persons who host parties or other events, are potential defendants in both civil and criminal proceedings. Such liability may result from incidents involving alcohol poisoning. They should educate themselves on the local laws for their jurisdiction before serving alcohol and take all necessary precautions to minimize their risks.

D. Elements of Claims and Defenses

1. Claims

The laws vary from state to state. Some states impose strict liability against the server/provider of alcohol. The sale or service of alcohol to minors is, with some limitations, illegal in all 50 states. In states that have promulgated dram shop and/or social host statutes (all but 8 states of some form of legislation), the violation of those laws is a basis to impose liability on dram shop or host. Generally, the service of alcohol to a person who is visibly intoxicated constitutes such a violation. The definition of what constitutes "visible intoxication" varies from state to state. Generally, a reasonableness standard or common-sense approach is applied. Elements to be considered are the intoxicated person's coordination, significant physical dysfunction, drunk, loud or vulgar behavior or the results of blood alcohol (BAC) levels if the state, such as New York, permits such proof to be considered.

Another basis for liability is the sale or service of alcohol to persons known to be habitually intoxicated including persons known in the community for their addiction to alcohol. Liability may also be predicated upon general principles of common law negligence particularly where the jurisdiction does not have a dram shop statute.

Elements of proof include: 1) proof that alcohol was sold/served to the patrons; 2) the claimant suffered injury; 3) the sale/service of alcohol was a proximate cause of the intoxication; and 4) the sale/service of alcohol was a proximate cause of the harm suffered.

2. Defenses

In addition to generic defenses applicable to all claims such as jurisdictional and statutes of limitations, liquor liability claims have some defenses unique to the claims. Like the elements of the claims, the defenses to such claims also vary from state to state. Generally, Defendants will maintain that they did not serve alcohol which caused the tortfeasor to become intoxicated or that the person was not visibly intoxicated at the time he/she was served. Some states have safe harbor or trained service statutes that provide additional protection or immunization from suit. For example, the Texas Dram Shop Act contains provision that grants partial immunity to commercial providers of alcohol that require their employees to complete a TABC Seller/Server Training Program. Those businesses will only be liable if the claimant can prove that the business encouraged the trained employee to violate the statute. Other states preclude the intoxicated person from suing the establishment that served him/her for injuries suffered by the intoxicated patron.

- Most states (46 of 50) have Joint & Several Liability statutes which vary from state to state. In most liquor liability lawsuits, the plaintiffs name multiple defendants while often asserting different theories of liability. States such as New York, will hold any defendant found liable for violating its dram shop laws jointly and severally liable for all of the claimant(s)' damages regardless of how fault is apportioned between the defendants.
- Some jurisdictions such as New Jersey prohibit intoxicated persons from obtaining first-party benefits (no-fault or PIP) from their automobile insurers for injuries sustained as a result of their operation or use of a motor vehicle while intoxicated. Many motor vehicle insurance policies exclude coverage for third-party claims resulting from such conduct.

II. Accident Investigation and Preservation of Evidence

All potential defendants should conduct or arrange to be performed a thorough and complete accident investigation immediately upon receiving notice of an accident or claim that is even arguably related to the service or consumption of alcohol. Since the evidence will be essential to successfully defend the claims, time is of the essence. The investigation should include the identification of all potential witnesses, securing and preserving audio and video tapes or electronic mediums, identification of and preservation of receipts invoices etc. for the alcohol sold and/or consumed, and taking measurements and/or photographs where appropriate. Written and/or recorded statements should be secured from witnesses once identified as soon as practical. Assuming the witnesses' versions of the events supports the establishment's defense, formal depositions of the witnesses should be noticed and taken to preserve the testimony before the claimants' counsel may contact and potentially influence the people.

Accident/incident reports must be prepared in a timely basis. Business owners must appreciate that information omitted from incident report may be as significant as the information included. Since the reports, prepared in the regular course of business are discoverable, it is paramount that all persons preparing such reports be properly trained on best practices for preparing the reports. Attention to detail is also critical. For example, when quoting witnesses, the report should use quotation marks to reflect same. The reports must identify the source of the information memorialized and how and when it was obtained. Note, many proprietors or employees of bars, taverns, restaurants etc. give away free drinks or pour stiff ones. Such conduct, while often intended to obtain bigger tips, may increase the commercial enterprise's liability. When investigating incidents and claims, it is imperative to determine whether the servers or staff provided free drinks to the person who caused harm and/or his companions. These drinks will likely not appear on receipts, invoices etc. but may be a plaintiff's dream if discovered. Do not be surprised after a lawsuit is filed or after a trial begins.

III. Loss Prevention and Risk Management

A. Know the Law of the Jurisdiction Where the Establishment Operates

1. Limitations of First and Third-Party Claims
2. Comparative/Contributory Negligence/Joint & Several Liability
3. Do Not Give Away Free Drinks
4. Make Last Call Before Establishment Closes or Event Ends to Give Patrons Opportunity to Sober Up
5. When in Doubt, Call an Uber or Cab for Intoxicated Patrons or Otherwise Ensure They Have a Safe Method of Transport

B. Train Employees on Legal Obligations

It is important to train all restaurant and bar employees on the applicable state law as well as the store policies. Some states require **Mandatory** training. In other states, the training is **Voluntary**. Some states do not have any statutory or regulatory provisions but most responsible restaurant and bar owners require their employees to attend some sort of alcohol service training.

Below is a list of regulations for each of the 50 states:

State	M	V	M+V	NL
Alabama		✓		
Alaska	✓			
Arizona		✓		
Arkansas		✓		
California		✓		

Colorado		✓		
Connecticut				✓
Delaware	✓			
Florida		✓		
Georgia				✓
Hawaii	✓			
Idaho	✓			
Illinois	✓*			
Indiana	✓			
Iowa		✓		
Kansas				✓
Kentucky				✓
Louisiana	✓			
Maine		✓		
Maryland	✓			
Massachusetts				✓
Michigan			✓	
Minnesota		✓		
Mississippi				✓
Missouri				✓
Montana	✓			
Nebraska		✓		
Nevada	✓			
New Hampshire			✓	
New Jersey	✓			
New Mexico	✓			
New York		✓		
North Carolina		✓		
North Dakota				✓
Ohio		✓		
Oklahoma				✓
Oregon			✓	
Pennsylvania		✓		
Rhode Island			✓	
South Carolina				✓
South Dakota		✓		
Tennessee			✓	
Texas		✓		
Utah	✓			
Vermont	✓			
Virginia		✓		

Washington			✓	
Washington DC	✓			
West Virginia				✓
Wisconsin	✓			
Wyoming		✓		

* By July 1, 2018, all Illinois on-premise alcohol servers (and those required to check identification for alcohol service) will be mandated to take a BASSET course.

Employees should receive training on responsible alcohol service to include how to recognize an intoxicated person, what sort of personal identification is required and the different alcohol volume that is included in each type of alcoholic beverage. This training will assist employees to make good judgments when faced with challenging situations when serving alcohol.

Texas Alcoholic Beverage Code - ALCO BEV § 106.14. Actions of Employee

- *(a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a person who is not a member of a private club on the club premises, a minor, or an intoxicated person or the consumption of alcoholic beverages by a person who is not a member of a private club on the club premises, a minor, or an intoxicated person, the actions of an employee shall not be attributable to the employer if:*
 - (1) the employer requires its employees to attend a commission-approved seller training program;*
 - (2) the employee has actually attended such a training program; and*
 - (3) the employer has not directly or indirectly encouraged the employee to violate such law.*

In the *20801, Inc. v. Parker* case of 2008, the Texas Supreme Court interpreted this statute to mean that the defendant must prove that they meet the first two criteria, but the defendant does not have to prove the third. Instead, if the plaintiff wants to attempt to counter this defense, it is the plaintiff's burden to prove that the bar does indeed encourage their employees to violate the rules. *20801, Inc. v. Parker* (Tex. 2008)

In summary, if a bar gets sued, the owners can argue that their servers participated in a specific training program that qualifies them for immunity. To counter this claim of immunity, the plaintiffs will argue that even though the bar's employees were duly trained, the bar still broke the rules because of a permissive culture of rule breaking.

Florida has a similar statute. Florida's Responsible Vendor Act (F.S. 561.701-706) provides significant legal benefits for those alcohol licensees who comply with the requirements. Florida's Responsible Vendor Act (F.S. 561.701-705), was enacted to reduce the sale of alcohol to underage patrons, to reduce alcohol related accidents, injuries and deaths and to eliminate illegal drug activity on licensed premises. When the bar owner is in compliance with the act, it provides mitigation and exemption from suspension and revocation of an alcoholic beverage license for the illegal acts of employees who serve alcohol to underage

customers.

1. Management/Supervision

It starts at the top. Management plays a crucial role in providing proper training to employees and for enforcing the training and the rules. Many times, bars and restaurants have good alcohol service training programs that are provided to new employees but the problem lies with the execution of the programs. When litigation does arise, it is often discovered that management does little or nothing to enforce the alcohol service programs and rules.

Managers should be aware of the alcohol service rules and should ensure that the rules are always being enforced. Managers must be prepared to step up and step into difficult situations and be ready and willing to say, “no more.”

2. Written Protocols

Written protocols are important and should be specific and easy to understand. For example, some establishments have drink number maximums or require the approval of a manager after a patron is served a certain number of drinks.

All employees should be provided with the state alcohol beverage service rules as well as the restaurant alcohol service policies and they should regularly be discussed in training and at safety and shift meetings. Further, management should keep track of all employees’ responsible alcohol service training records so that if there is a claim or lawsuit filed then the bar or restaurant can show that it required its employees to regularly attend responsible alcohol service training.

C. Balance Desire to Be Profitable With the Health and Well Being of the Public and the Exposure of Business to Civil and Criminal Liability and Reputational Harm

A business is a productive organization—an organization whose purpose is to create goods and services for sale, usually at a profit. Business is also an activity. One entity (e.g., a person, an organization) “does business” with another when it exchanges a good or service for valuable consideration. *Moriarty, Jeffrey, "Business Ethics", The Stanford Encyclopedia of Philosophy (Fall 2017 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2017/entries/ethics-business/>>.*

How do restaurant and bar managers reconcile their desire to make a profit with their responsibility to keep their customers safe? First, every business owner knows that reputation is everything. If a restaurant or bar is the target of a dram shop claim as a result of a death and it appears that the bar owner put profits over the safety of its patrons, then the business could suffer. Most regular customers of a bar or a restaurant understand that the servers must follow strict guidelines when serving alcohol to their guests. It is better to lose one belligerent customer than to continue to serve her and cause someone to lose their life. Careful consideration should be given when considering drink specials or happy hour specials. Both of these events can be a money-making venture for the bar or restaurant but rules should be in place so that responsible drinking rather than overindulgence is encouraged.

Most successful restaurant and bar owners understand that their liquor license and business is at stake if they do not adhere to the state guidelines and policies. They will not put their reputation on the line by

serving minors, intoxicated persons or failing to follow their own maximum drink policies. Unfortunately, the service of alcohol comes with risks and sooner or later most restaurants and bars will be subject to a claim or a lawsuit. The bar or restaurant owner who has written rules in place and requires that they be followed without exception will be in a much better legal position when litigation does arise.

D. Experts

In a liquor liability matter experts are key and they can help you reduce your liability. Toxicologists, security experts and safe alcohol service experts can help adjusters and attorneys make decisions early in the litigation or even pre-suit.

Toxicologists are trained to interpret blood alcohol readings and autopsy results and can help you and the jury understand in laymen's terms exactly how intoxicated a person was at the time of an event and how such intoxication would have affected the person. Unlike a criminal case, a blood alcohol reading alone is insufficient to establish intoxication in a civil case. However, a skilled toxicologist can explain in laymen's terms how the amount of alcohol in the affected person's condition would have affected their driving, judgment etc.

A security expert can also help you in a liquor liability case. A security expert can review industry standards and determine what measures were taken by the establishment to keep its customers safe. A security expert will consider the following considering the facts in your case:

- whether the restaurant owners and/or management made reasonable efforts to provide training of his or her employees and customers;
- whether the training and alcohol safety rules were enforced and whether or not they were enforced on the day of the event; and
- whether the restaurant owner and/or management made reasonable efforts to secure the premises i.e. hired the appropriate security personnel.

Finally, a safe alcohol service expert can help explain the standards that should be followed when serving alcohol. A qualified standards expert can testify concerning the restaurant's policies, the types of outward signs of intoxication a server should be looking for, the amounts of alcohol drinks, and what type of procedures should be in place.

IV. Risk Transfer

A. Indemnification, Contribution and Subrogation Claims

Indemnification Agreements

Many dram shops, retailers and hospitality providers will hire a security companies to assist with security for their businesses. A restaurant, tavern and/or bar owner may be transfer all or part of their liability in a liquor liability case to a security company. For example, a security company may assume liability in a well-written indemnification agreement. By signing such an agreement, the security company agrees to

cover a restaurant and/or bar owner under its insurance policy, should it be sued for negligence. Consequently, it is possible that a security company may then be financially responsible when the security company allows or causes the restaurant or bar employees or guests to become victims of criminal acts. This situation would most likely arise when an act of violence such as a fight or altercation occurs inside or outside the restaurant or bar. Additionally, as stated above, when businesses host parties or other events at which alcohol will be served, they should ensure their agreements are in writing and that they include strongly worded and well vetted indemnification and insurance procurement provisions. The business should require their contractor or host to procure insurance on their behalf naming the commercial enterprise, its principals and employees as additional insureds. Thereafter, and before the party or event, should obtain proof of the insurance and that they have in fact been named as additional insureds

Contribution

The laws in every state requires that an individual has a duty to act as a reasonable person. When a person does not act reasonably and injury occurs, that person may be held entirely or partially responsible for the resulting injury, even though another party was involved in the accident. Here is an example of how contribution could apply in a dram shop action.

Example 1 First Party Claim: Good Times bar serves Sally 4 mixed drinks. Sally leaves Good Times and runs into a tree. As a result of the accident Sally dies. Who is at fault in this situation?

After Sally's family files a negligence claim, the defendant (Good Times) may then assert a contributory negligence claim Sally, effectively stating that the injury occurred at least partially as a result of Sally's own actions. This would be a contributory negligence counterclaim. If Good Times can prove the contributory negligence claim, Sally's family may be totally barred from recovering damages or her family's damages may be reduced to reflect her role in the resulting injury.

Example 2 Third Party Claim: Good Times bar serves Sally 4 mixed drinks. Sally leaves Good Times and gets into a car accident with Paul. Paul is injured in the crash. Who is at fault in this situation?

In this case Paul will most likely sue both Good Times and Sally and the jury will consider the contribution to the negligence of both parties. Paul's negligence might also be submitted to the jury *if* there is any evidence that he caused and/or contributed to cause the car accident.

V. Insurance Coverage: Have Correct Type with Sufficient Limits in Place

Not all insurance policies are the same. When you own or operate an establishment that sells or serves alcohol be certain that you have the appropriate type of insurance with adequate liability limits in place. Dram shops, retailers or hospitality providers should procure **liquor liability insurance policies** and not exclusively general liability policies. Most liquor liability insurance policies exclude coverage for the illegal sale of alcohol such as the sale of alcohol to minors. Assault and battery coverage should be included. Most liquor liability policies are sold as stand-alone policies or are packaged with a general liability policy. Coverage should include litigation costs including attorney's fees.