



Dram Shop Laws – Effective Elements of Responsible Retailing
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A foreseeable and preventable tragedy unfolds several times a day somewhere in the United States. Over fifteen thousand people are killed and thousands more are seriously injured in impaired driving crashes in the United States each year. Even more shocking is that half of these deaths and injuries can be attributed to drivers who were coming *directly* from a beverage license premises where they were over-served or allowed to over-consume alcohol.

Beverage alcohol is the only universally available consumer product that has the capacity to cause changes in the consumer's emotional state, his or her cognitive ability, gross and fine motor skills, and can diminish the drinker's ability to make rational decisions. Beverage alcohol is widely sold and consumed in businesses that are primarily accessible through the use of personally operated vehicles creating a reasonable expectation that many customers will also drive those vehicles away from the bar or restaurant. Many will be under the influence of the intoxicating effect of the product and unable to safely operate those vehicles. At least 80 million trips are made annually in the United States by drivers with a BAC over .08.

The business model under which the alcoholic beverage industry operates can be antithetical to the elements of responsible alcohol retailing. In many cases tips; a significant part of servers' income, come from "good service" which often equates to heavy pours of alcohol, frequent replenishment, and a wink and a nod at increasing intoxication levels. Beverage retailers often utilize questionable promotions, two for one or all you can drink specials, for example, to gain a competitive advantage or to maintain marketing parity with other retailers. The choices bar owners and bartenders make in over-serving their guests often eliminate the choices their guests might have in moderating their drinking behavior.

No one will argue that the impaired driver in an alcohol related crash is blameless. The decision to have the first, second or perhaps the third drink rests solely with the drinker. At a certain point, however, the drinker loses his or her ability to make rational decisions about further alcohol consumption. The drinker's ability to engage in appropriate behavior and make rational decisions is diminished. It is a truism worthy of a scientific designation; the more alcohol one consumes, the lower one's ability to assess their own intoxication and assess their own ability to safely operate a motor vehicle. This most certainly creates a "Catch 22" logic model in which the person the retailer often believes responsible for determining whether their faculties are impaired becomes more and more impaired with each drink the retailer serves.

A beverage license is a privilege issued by the government. Its issue and retention is conditioned on the licensee's agreement to act in the public's interest. *Responsible retailers* provide an inviting and enjoyable hospitality experience with alcohol service as an adjunct to that experience. A responsible retailer's obligation under that mantle is to prevent patron intoxication. Unfortunately, not all beverage retailers act in a responsible manner. Not all beverage retailers serve alcoholic beverages with the goal of providing hospitality while preventing patron intoxication.

Thirty-eight states and the District of Columbia have determined that their public policy interests are better served by placing some responsibility for over-service or over-consumption on the alcohol server or the licensee through the civil justice system. These *dram shop* laws provide a plaintiff legal standing to bring an action against a tortfeasor for an alcohol related injury or death. Most instances that bring rise to a civil dram shop lawsuit stem from a traffic crash. Other causes of action, however, relate to homicide, sexual assault, and other incidents where the intoxicated patron loses the ability of self-regulation.

Standards for dram shop lawsuits vary widely among states. Those standards include prohibitions of service to *intoxicated, visibly intoxicated or obviously intoxicated* patrons or *when it should have been known that the patron was intoxicated*. One state prohibits service to a *drunken person* in a *criminally negligent manner*. Another allows a civil action when the service was to a person *clearly intoxicated*. Several states require proof that the alcohol service was done in a *reckless manner* or that the alcohol was provided with *reckless disregard to the rights of others*. Other states require proof that the patron *was intoxicated to the extent he or she presented a clear and present danger to self or other*. Florida allows a dram shop action only when the alcohol service was to someone *habitually addicted* to alcohol. This standard is particularly difficult because alcoholics do not carry or present identification cards identifying them as such and rarely make self-admissions to bartenders.

The phrase *dram shop* is based on a unit of measure popular in Victorian times; approximately 1/8th of an ounce in our vernacular, and has become synonymous with a prohibition on the over-service of beverage alcohol to a patron or guest. The principal purpose of dram shop laws is to protect the public; and even the drinker himself, from the over-service or over-consumption of beverage alcohol and from the service of alcohol to persons under 21 years of age. This law calls upon beverage licensees and their employees to play a significant role in the enforcement of this important public policy. No other business type comes to mind where the holder of a government license; by acceptance of that license, is required to act as an agent of the state in taking affirmative action to monitor and intercede in the behavior of a citizen/business invitee. Under these civil dram shop laws, the retailer becomes his brother's keeper.

Responsible retailing involves the development and implementation of effective alcohol service policies, practices, employee training, and management systems. These elements are the keys to responsible retailing and the prevention of acts and situations leading to a dram shop lawsuit. Conversely, irresponsible beverage retailers do not employ these elements or they have developed ineffective policies, practices, training, and management systems that fall below a reasonable standard of care.

Dram shop cases involve an examination of two elements; the fact situation involving the alleged service to an intoxicated patron or service to a minor and an examination of the premise's alcohol service practices, policies, training and management systems, which allowed the beverage service to occur. In fact, findings related to the insufficiency of practices, policies, training and management also serve as the basis for punitive damages in many states. Beverage retailers

simply cannot ignore the dangerous nature of these products and sell them as those the danger did not exist.

Examination of the fact situation can demonstrate that the retailer served an intoxicated patron. The drinker's self-admission and/or witnesses describing the condition of the patron at the time of alcohol service can be illustrative. Over-service of alcoholic beverages can also be determined through receipts, credit card charge slips and extrapolation of the drinker's BAC based on his or her personal characteristics such as gender, weight, and the elapsed time. Elapsed time can be determined through witnesses, charge slips, crash reports, and even triangulation of the drinker's cell phone position.

Examination of the business policies, practices, employee training and management systems can support the testimony of the fact witnesses. It can also illustrate the businesses' alcohol service pattern and practice serving to support a finding of benign neglect or intent. This examination can be done through an assessment of written policies and training curriculum, through depositions of current and past employees, and through observations of current business practices.

Beverage retailers should have written policies that address, at a minimum, the prevention of the sale of alcoholic beverages to persons under the age of 21, including an apparent age that triggers an ID request, acceptable forms of identification, and how to properly examine and verify an ID; and policies to prevent over-service and service to an intoxicated patron including identification of an intoxicated patron, identification of a patron habitually addicted to alcohol, discontinuance of alcohol service and the provision of alternate transportation. When a beverage retailer does not have written policies, application of responsible retailing practices will be inconsistent and will be subject to the interpretation of the individual employees. Servers and bartenders will have no point of consistent reference guiding their actions and behavior. In fact, their interpretation may even vary from day to day without the consistency provided by a written policy. The lack of written policies also limits the licensee's ability to provide effective and consistent oversight and employee training.

The business practices of bars and restaurants should be designed to mitigate the risks presented by the business model, clientele, location, and environment. Beverage licensees have an obligation to prevent law violations regardless of the size of their establishment or their success. For example, happy hour and other gender, price, time, or quantity based drink specials and promotions are legal, however, they contribute significantly to the probability of patron over-service and service to minors. The court will look at these practices to determine if the beverage retailer appropriately scaled their intervention and prevention practices in response to the risks at their business. While many beverage retailers will seek to explain that they were unable to adequately control consumption by minors or over-consumption in their establishment because they had 1000 patrons going to 5 internal bars, dram shop liability does not diminish simply because the business is financially successful. Responsible retailing practices are scalable to meet the risks, if the retailer chooses to utilize them.

A responsible retailer will provide appropriate training to his or her employees and will ensure that the employees understand what is being taught and can apply the information. Training is not a one-time practice. It is unreasonable for a beverage retailer to believe that an hour or two of instruction on responsible retailing practices on the employee's first day will serve that employee well for the next 5 or 10 years. Training must be ongoing. At the very least, beverage retailers should provide a structured training program to employees two or three times a year and provide mini-courses or shift reminders on a daily basis.

It is critical that bartenders and servers be trained using objective standards to determine if a patron exhibiting signs of intoxication. Beverage retailers will instruct their bartenders and servers not to serve alcohol to an intoxicated patron and then provide the server with outrageous examples of behavior to use as a guide, behaviors that would only emerge when a person's BAC was already twice the legal limit. Even when the retailer tells the server to watch what they serve the patrons, the licensee will not provide the employees with BAC calculators or BAC charts or even information about standard drink units to help the bartender or server determine the maximum amount of alcohol that could be safely served to that employee in a given period.

Training should include role-play exercises so that servers and bartenders become accustomed to interacting with patrons and asking questions to help them determine whether the patron is of legal age or becoming intoxicated. Unfortunately, many bars and restaurants, including national casual dining chains, invest extensive resources and time in training their employees about menu items and the alcoholic beverages available for purchase and almost no time training a bartender or server to be a responsible alcohol server. Many retailers operate under the false economy that "telling" is easier and less expensive than training.

Management systems may in fact be the most important aspect of responsible retailing. Without active and knowledgeable management, a beverage premises may be nothing more than a collection of independent contractors serving alcoholic beverages. Servers and bartenders stress those things they perceive to be important to management. If management believes that responsible retailing is important and continually stresses compliance with the law prohibiting service to a minor or service to an intoxicated patron, the servers will stress this as well through their actions. Conversely, if this is not important to management, it will not be important to the servers, regardless of potential criminal penalties.

How can the jury determine if a beverage licensee acted in good faith and exercised the appropriate standards of care to ensure safe service and consumption of alcohol? The jury will look at many issues concerning the operation of the business in making their determination. Did the business utilize appropriate policies, practices and training? Did the manager overrule a server's assessment of intoxication and subsequently require the server to provide alcohol to intoxicated patrons? Did the manager downplay the importance of appropriate service standards? Did the business value repeat customer visits and high alcohol sales over responsible alcohol service?

The jury will look to see if the business attempted to comply with the law. Did the beverage licensee simply tell his or her employees not to violate the law or did they provide encouragement, knowledge, and tools to empower compliance? Did the beverage licensee provide BAC calculators to assist the bartenders and servers do their job? Did the beverage licensee or manager remind his or her employees what to look for to determine the subtle signs of intoxication before the person was a risk to themselves or others? Did the licensee employ mystery-shopping programs and video surveillance systems to ensure the bartenders and servers were not over-pouring alcohol, and were not ignoring signs of obvious and visible intoxication? These, and many more practices are indicative of responsible alcoholic beverage service.

Dram shop laws provide greater benefits than simply being the basis for civil lawsuits. Dram shop laws contribute to responsible retailing in a way that criminal and administrative penalties prohibiting over-serve and service to minors often cannot. It is an unfortunate fact that many beverage retailers look at misdemeanor criminal charges brought against their servers and administrative action brought against their alcoholic beverage license as a cost of doing business. To many, it is a cost benefit-risk analysis. In fact, these penalties are generally quite modest when

they are actually imposed. Criminal and administrative laws against over-serving, when they even exist, are among the most disregarded laws in the country. Even though the bars and restaurants that over-serve and usher their intoxicated patrons out the door and into vehicles represent fewer than 10% of the beverage premises in any community, law enforcement and regulatory agencies either do not have the resources to adequately investigate and prevent these occurrences or do not give over-serving sufficient priority.

At least one large national beverage retailer has determined that their bottom line is better served by settling several wrongful death lawsuits per year rather than implementing effective alcohol policies and employee training which may offend some patrons and cause those patrons not to return. This bean-counter approach to the sale and service of alcoholic beverages is reminiscent of Ford Motor Co.'s decision to weigh the cost of correcting deficient fuel tanks in Ford Pintos against the cost of wrongful death lawsuits. Ford valued each potential death at \$200,000 and determined that wrongful death settlements would cost less than investing \$11 to correct the deficiency in each fuel tank. It is unfortunate that some members of the hospitality industry have the same perspective and value repeat and happy customers over responsible service practices.

Civil judgments can be significant and can cause change in the way in which alcoholic beverages are served both by the beverage retailer against whom the suit was filed and against other beverage retailers in the community. Their appreciation of the financial risk they face from engaging in irresponsible alcoholic beverage service, in many cases, will have an affect on the policies and practices they employ. The utilization of a civil dram shop law can significantly affect impaired driving crash deaths and injuries.

The use of dram shop laws and the civil justice system increases awareness of the negative consequences of over-service and over-consumption of alcohol because of the publicity that is generated about dram shop cases and their verdicts. Dram shop laws decrease excessive and illegal alcohol consumption by both adults and underage persons by reducing the incidence of lower-price drink promotions (like "happy hours") which encourage excessive consumption in a limited amount of time and are attractive to underage drinkers. States with dram shop liability have more thorough checks of identification reducing the number of underage drinkers who are able to drink illegally in beverage-licensed premises.

Dram shop laws do not decrease personal responsibility as more responsibility is shifted to beverage retailers. Creating a cause of action against an establishment that engages in over-service of alcohol does not mean that the individual is not also held responsible. Rather, punitive damages for both drinking drivers and serving establishments serve similar purposes – to show that penalties come with these actions and to cause the retailer and server to rethink their practices leading to over-service and over-consumption of alcohol.

Dram shop cases are not limited to the prototypical motor vehicle crash. Dram shop cases are appropriate to any situation where alcohol over-service leading to intoxication was a proximate cause of the harm. Dram shop cases have been successfully prosecuted when the intoxication led to a homicide or sexual. Dram shop theory has been applied to alcohol hazing g situations in fraternities and sororities where the organization operates as a deface retail bar. Dram shop theory has also been used for acts occurring on cruise ships and in international resorts.

About the author: Maj. Mark Willingham served with the Florida Division of Alcoholic Beverages and Tobacco for 30 years where he policed and regulated the alcoholic beverage industry. He is a national expert in responsible retailing and dram shop litigation. He provides litigation support, expert witness services, and consultation in matters pertaining to the responsible service and use of beverage alcohol. Maj. Willingham can be reached at 904 707 4400, Mark@DramShopExpert.Com; Mark@AlcoholSolutions.org, or www.DramShopExpert.Com.

