

## **National Standards for Dram Shop Legislation**

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An American tragedy unfolds several times a day every day. A family traveling home from an outing is hit by an impaired driver with devastating results. Almost 20,000 people are killed and almost a quarter of a million people are seriously injured in impaired driving crashes in the United States each year <sup>1</sup>. 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 <sup>2</sup>.

Beverage alcohol is the only universally available consumer product that when used as directed causes changes in the consumer's emotional state, his or her cognitive ability, their gross and fine motor skills, and diminishes their ability to make rational decisions. It is widely sold and consumed in businesses that are primarily accessible through the use of personal vehicles creating a reasonable expectation that many customers will also leave those businesses in their vehicles 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 by drivers with a BAC over .08 <sup>3</sup>.

Even the business model under which the alcoholic beverage industry operates can be antithetical to the elements of responsible retailing. In many cases tips; a significant part of servers' income, come from "good service" which equates to heavy pours of alcohol, frequent replenishment, and a wink and a nod at increasing intoxication levels. The choices bartenders make in over-serving their guests often eliminate the choices their guests might have in moderating their drinking.

The phrase *dram shop* is based on a unit of measure popular in Victorian times; approximately 1/8<sup>th</sup> 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 nationwide is to protect the public; and even the drinker himself, from the intentional or negligent over-service or over-consumption of beverage alcohol and from the service of alcohol to persons under 21 years of age.

Dram shop laws exist in almost every state placing some responsibility to monitor the behavior of the drinker and their consumption of alcohol on the bar and the bartender. These laws call upon beverage licensees and their employees to play a significant role in the enforcement of this important public policy. No other business type readily comes to mind where the government licensee; by acceptance of the business 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.

How do states seek to limit over-service and prevent these tragedies? One course of action is through state sanctioned penalties against businesses that do not adequately monitor and intercede in the behavior of their patrons. A few states have enacted criminal prohibitions through which bartenders, servers, and even the manager or owner of a bar or restaurant can be arrested and prosecuted criminally for serving a patron to the point of intoxication. Those states and many others also utilize a regulatory process through which a civil penalty ranging from a fine to revocation of the alcoholic beverage license can be imposed on the business owner by the beverage licensing agency for over-service, over-consumption, or service of alcohol to a person under 21 years of age.

Criminal and administration sanctions can be effective in implementing this important public policy when utilized with sufficient frequency. Unfortunately, state licensing and regulatory agencies rarely enforce these laws and impose sanctions with the frequency necessary to positively affect retailer behavior. Most states do not have the resources to consistently investigate their beverage licensees to insure that over-service, over-consumption, and sales to underage are not occurring and many more states either do not have criminal or even civil regulatory penalties for over-service or allowing over-consumption.

A presumption exists that alcohol servers are highly trained and supervised and retailers employ adequate numbers of employees to properly manage their premises. This is often not the case either. Many retailers employ far fewer employees than reasonable to control and supervise their premises and no law exists mandating a minimum ratio of servers to patrons. Many retailers provide no or inadequate training to their employees.

The other course of action available to limit over-service or over-consumption of alcohol and the service of alcohol to underage persons is the use of the *civil justice system*. The civil justice system can be utilized to establish public policy, generate specific changes in the operating policies and practices of offending retailers, and reinforce responsible retailing practices throughout the alcoholic beverage industry.

Just as we find criminal and regulatory remedies inconsistently applied, the availability of civil remedies is equally inconsistent across the country. Twelve states do not allow the application of civil tort remedies for adult over-service or over-consumption by the licensee or the server in whole or in part. For example, Louisiana law specifically states that a commercial server cannot be held liable for the actions of an intoxicated patron over the legal drinking age <sup>4</sup>. And Nevada law states that persons who serve or sell alcoholic beverages are not liable either (1) for the injuries caused by the individuals who consumed such beverages or, (2) for the injuries sustained by such individuals <sup>5</sup>. It is clear that these twelve states look solely at the individual for responsibility for their own actions.

Individual responsibility alone may not be well founded because the consumption of beverage alcohol reduces the drinker's ability to assess their own intoxication level and, therefore, they may not be able to make prudent decisions as to whether they should

continue to drink or if they should drive. The more alcohol one consumes, the lower one's ability to assess intoxication and one's ability to safely operate a motor vehicle. This most certainly creates a "Catch 22" logic model in which the person responsible for determining whether their faculties are impaired becomes more and more impaired with each drink.

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 states have a civil dram shop provision. But even through they provide the ability for a plaintiff to bring an action against a tort feisor for an alcohol related injury or death, the standards applied in these states vary widely.

Six states require a plaintiff to establish that the alcohol was served to an *intoxicated patron*. Two of the six require proof that the service was done in a *reckless manner* and one requires that the alcohol was provided with *reckless disregard to the rights of others*.

Six states require proof that the service was to an *obviously intoxicated* patron. One of the six states further requires proof that the patron *was intoxicated to the extent he or she presented a clear and present danger to self or others* while another state allows a civil remedy only after *the criminal conviction* of the alcohol server for service to an intoxicated person.

Eight states utilize a *visibly intoxicated* standard. One of those requires *willful and knowing* service while another places responsibility on the bartender if he or she continued to serve alcoholic beverages to the patron *when it should have been known that the patron was intoxicated*.

Alaska allows a civil action for service to a *drunken person* in a *criminally negligent manner* while Arkansas allows a civil action when the service was to a person *clearly intoxicated*. Arkansas, however, requires the jury to determine if the service constitutes a proximate cause of any subsequent injury to another person.

Plaintiffs in two states must show that alcohol service to an intoxicated patron was a result of *wanton and reckless misconduct*. Georgia established a standard based on *noticeable intoxication*. And Kentucky allows civil remedies when service was to a patron who was *already intoxicated* at the time.

Florida allows a civil remedy to be utilized 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. Several counties in Maryland<sup>6</sup> prohibit service to someone of *intemperate habits* or *unsound mind*.

And while most states allow civil remedies for injuries or deaths arising out of the service of alcohol to someone under the legal drinking age, several states only support this action when the alcohol service was to an *intoxicated minor*.

Even the definition of obviously intoxicated varies widely. Arizona law defines obviously intoxicated to mean *inebriated to such an extent that a person's faculties are substantially impaired and the impairment is shown by a significantly uncoordinated physical action or physical dysfunction that would have been obvious to a reasonable person*. And Nebraska is very specific when it deems someone intoxicated when they *can be plainly determined by appearance, conduct, and/or demeanor. Such indicators include, but are not limited to: problems with balance, inability to maintain balance, i.e., stumbling, staggering gait, bumping into furniture while walking, falling against bar or all off stool, head on bar; ineffective muscular coordination, i.e., spilling and/or knocking over drinks, unable to pick a change; strong smell of alcohol; slurred speech, i.e., thick tongue, uncontrollable voice muttering; bloodshot and/or glassy eyes, i.e., flushed face; condition of clothes and hair, i.e., disheveled appearance, hair, unzipped clothing; unusual behavior, i.e., vomiting, profanity, hiccups, boisterous, obnoxious behavior*.

It is evident that businesses operating in multiple states would have a difficult time developing one company-wide service standard that would comply with all the variances across the country. It is also evident that these different standards reflect inconsistent approaches to dealing with a crucial matter of public safety and public policy. The variances in state law makes it is clear that not every citizen benefits from the same level of protection against over-service' over-consumption and sales to underage through the civil justice system throughout the country.

There is a need for a consistent national policy on server and licensee responsibility in the prevention of over-service, over-consumption and service to underage patrons through the utilization of civil liability. Not only would this consistent policy provide additional avenues of redress for those currently disenfranchised, it would elevate the level of responsible retailing of alcohol across the alcoholic beverage industry in the United States.

What is the standard that trial lawyers and other parties interested in the responsible retailing of beverage alcohol could put forward? There are two components that should be considered. One is an examination of the *standards of intoxication* and *who is most appropriate* to make that determination. And the second is the *availability of civil remedies* to provide justice to those damaged through inappropriate acts or omissions and to use the *power of the purse* to encourage retailers to meet responsible retailing standards.

Standards of intoxication in civil dram shop actions should be simple. In fact, the thrust of responsible retailing which is supported through dram shop laws should be to *prevent* intoxication, not to develop policies and practices dealing with an intoxicated patron after they have become so. Therefore, beverage servers should be subject to civil actions if they have served someone who *is intoxicated* or *served someone to the point of intoxication*.

An *intoxication* standard should include an acknowledgment that the time interval between drinking and the crash or incident does not break the chain of causation. A prima-fascia standard of evidence of over-service should be established for a BAC of .08 or higher 1 hour after last drink based on extrapolation.

And the pattern and practice of the business's marketing should be admissible to demonstrate the nature of the business. For example, happy hour and other gender, price, time, or quantity based drink specials and promotions should be prima-facie evidence of intent to encourage drinking, perhaps to intoxication<sup>7</sup>.

Texas law (§ 45.103) specifically outlaws eleven promotional practices that have been deemed to promote intoxication. These could provide evidence of intent to encourage drinking as part of a national standard. Those prohibited practices are:

- “Two for one” or other discounted multiple alcoholic beverage sales:
- Increasing the volume of alcohol in a drink without increasing the price.
- Serving more than one free alcoholic beverage to any identifiable segment of the population.
- Fixed – price or “all you can drink” sales
- Selling alcoholic beverages as a reduced price for a fixed “buy-in” price.
- Selling alcoholic beverages at a price contingent on the amount consumed by an individual
- Reduced drink prices after 11pm
- Selling more than 2 drinks to a single customer at one time
- Imposing an entry fee for the purpose of recovering financial losses incurred because of reduced drink prices
- Drinking contests or awarding of alcoholic beverages as prizes.
- Any practice that is reasonably calculated to induce consumers to drink to excess, or that would impair the ability of the licensee to monitor or control the consumption of alcohol by their customers.

And the standard should not require that the server *knew* the patron was approaching intoxication or was intoxicated. Requiring this knowing may necessitate evidence of what was in the server's mind rather than examining the behaviors and actions from a more objective view.

An Arizona Supreme Court ruling can be useful as a guide for the development and implementation of a consistent *intoxication* standard across the nation. The Arizona Supreme Court abolished the common law doctrine of no tavern owner liability stating that “those who furnish liquor have an obligation or “duty” to exercise care for the protection of others”. The Court held that the general rules of liability applicable to all other persons in Arizona should apply to licensed sellers of alcohol and that they “may be held liable when they sell liquor to an intoxicated patron or customer under circumstances where the licensee or his employee know or should know that such conduct creates an unreasonable harm to others who may be injured either on or off the

premises<sup>8</sup>. (This ruling was later amended by the Arizona Legislature limiting dram shop exposure).

A standard based on *intoxication* will require servers and licensees to concentrate on training and on policies and procedures that involve an analysis of factors that *predict and prevent* intoxication including: the customer's gender, body weight, body mass (fat vs. lean); food intake prior to and during drinking; type of drink being consumed (carbonated, sweet, etc); alcohol volume in the drink (doubles, cocktail with several types of alcohol, etc) and the customer's emotional state. These are key factors in predicting and preventing intoxication which is the primary tenet in responsible retailing. This information is currently taught to employees by responsible retailers.

Alcohol service should be based on the standards of what a *properly trained* bartender could observe. A properly trained bartender or server should be monitoring the customer for changes in their emotional state and utilizing subtle clues that a fellow customer might not be aware of. Bartenders should be trained not only to assess the customer's predicted alcohol intake capacity on their initial observation and continuously re-evaluate the customer throughout their beverage service, they should be trained in techniques to monitor the drinking behaviors of the patrons while in the premises and to observe the subtle clues that will tell them the customer's intoxication level.

Properly trained bartenders should be able to observe changes in behavior and affect including: bloodshot eyes, loss of judgment, flushed face, aggressive behaviors, loud speech, bravado, boasting, overly animated or entertaining, boisterous, overly friendly to other guests and employees, drinking alone drinking too fast, ordering doubles, careless with money, buying rounds for strangers or for the house, annoying other guests and employees, complaining about drink prices, complaining about the strength or preparation, crude behavior, inappropriate sexual advances, foul language, making irrational statements, depressed or sullen, radical changes in behavior, or speaking loudly and then quietly. These are behaviors that should alert a properly trained bartender or server that the customer should be observed even more closely because they are moving toward a state of intoxication.

These subtle behavioral clues are substantially different than clues which would be obvious to another customer which indicate the patron is *already intoxicated*: slurred speech, staggering, vomiting, strong alcohol breath, loud speech, bravado or boasting, overly animated or entertaining, boisterous, argumentative, aggressive or belligerent, obnoxious or mean, making inappropriate comments about others, crying or moody, drowsiness, bloodshot or glassy eyes, lack of focus and eye contact, slurred speech, rambling conversation, loss of train of thought, difficulty remembering, slow response to questions, spilling drinks, trouble making change, difficulty handling money, picking up change, difficulty lighting a cigarette, lighting more than one cigarette at a time, letting cigarette burn without smoking, clumsy, uncoordinated, difficulty standing up, unusual gait, stumbling, bumping into things, swaying, staggering, unable to sit straight in chair or on bar stool, can't find mouth with glass, falling down, mussed hair when it was groomed earlier, disheveled clothing, and falling asleep.

If the bartender is using any of these as his or her clue to slow or discontinue service, the patron is already too intoxicated to safely operate a motor vehicle and the business's policy of preventing intoxication has failed.

Bar owners will often contend that their employees do not have the time to observe these subtle clues when they are serving hundreds of patrons. The beverage law and any applicable dram shop law or standard does not provide beverage licensees with the allowance to deviate from their obligation simply because their business is successful. A beverage licensee is obligated to monitor the drinking behaviors and emotional state of their customers regardless of circumstances. If a beverage licensee's business is successful they should increase staff and develop policies and practices to provide the same level of oversight as if their business was less successful.

Evidence indicates that the implementation of a dram shop law and the establishment of an intoxication standard will significantly impact impaired driving crash deaths and injuries. Texas experienced a 6.5% decrease in single vehicle nighttime crashes resulting in injury after a liability case was filed in 1983 and an additional 5.3% decrease after another case was filed in 1984<sup>9</sup>. A similar decrease was observed in 2001 with a 5.8% decrease in fatal crashes from the implementation of dram shop laws<sup>10,11</sup>.

Dram shop laws increase awareness of the negative consequences of over-service and over-consumption and alcohol because of the publicity that is generated from dram shop cases and verdicts. Studies show that states that have a high level of dram shop liability have more publicity about the impact of liability resulting from these cases and have more servers and managers who are aware of liability<sup>12</sup>.

Dram shop laws decrease excessive and illegal alcohol consumption by both adults and underage persons. Studies also have found that states with high dram shop liability also had fewer lower-price drink promotions (like "happy hours") that encourage excessive consumption in a limited amount of time and are attractive to underage drinkers<sup>13,14</sup>.

States with dram shop liability also have more thorough checks of identification on average, which means that fewer underage drinkers were able to drink illegally in beverage licensed premises<sup>15,16</sup>.

And finally, 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, over-consumption, and alcohol consumption by underage persons.

Endnotes:

1. <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809904.pdf>

2. O'Donnell, M. (1985). Research on drinking locations of alcohol-impaired drivers: Implications for prevention policies. *Journal of Public Health Policy*. Vol 6: 510-525. Anglin L, Calverson R, Fennel R, Giesbrecht N, and Mann RE (1997). A Study of Impaired Drivers Stopped by Police in Sudbury, Ontario. Addiction Research Foundation: Toronto, Ontario. Gallup Organization. (2000) – Volume I – Findings, Racial and Ethnic Group Comparisons, National Surveys of Drinking and Driving, June 2000, Attitudes and Behavior – 1993, 1995, and 1997. National Highway Traffic Safety Administration: Washington DC, DTNH22-96-C-05081.
3. Countermeasures That Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices. DOT HS 809 980 January 2006.
4. Louisiana Statutes § 9:2800.1(B).
5. Nevada Statues.
6. Maryland alcohol laws are enacted by county.
7. *Outlveros V. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983) Author's note: the Arizona Legislature enacted two statutes which subsequently limited the effect of *Outlveros*. However, in a later case the Appeals Court found that the Legislature could not restrict the general negligence rights afforded by the State Constitution through a dram shop law. (*Young V. DFW Corporation dba Keegan's Grill and Taproom* 184 Ariz. 187; 908 P.2d 1; 1995 Ariz. App.
8. Authors note: As of January 1, 2003, 27 states had provisions expressly prohibiting excess drinking practices or happy hour type of promotions. In particular, prohibited drinking practices included:
  - Free beverages – 10 states have happy hour provisions that contain specific prohibitions against the distribution of free alcoholic beverages.
  - Additional servings – 16 states prohibit an establishment from providing additional servings of alcoholic beverages until previous servings have been consumed.
  - Reduced price – specified by day or time. 18 states prohibit the sale of alcoholic beverages at reduced prices during specified days or times.
  - Unlimited beverages – fixed price, fixed time – 23 states prohibit the sale of alcoholic beverages during a fixed period of time for a fixed price.
  - Increased volume – 12 states prohibit increasing the volume of alcoholic beverages in a drink without increasing the price.
  - Prizes – 15 states have happy hour provisions that contain specific prohibitions against giving beverages as prizes.
9. Wagenaar, Alexander C. and Harold D. Holder. "Effects of Alcohol Beverage Server Liability on Traffic Crash Injuries." *Alcoholism: Clinical and Experiential Research* 15 vol. 6 (1991): 942-947.
10. Eisenberg, Daniel. "Evaluating the Effectiveness of .08 Percent BAC Limit and Other Polices Related to Drunk Driving." Stanford Institute for Economic Policy Research Discussion Paper No. 00-23. Stanford, CA: Stanford Institute for Economic Policy Research, January 2001. <http://siepr.stanford.edu/papers/pdf/00-23.pdf>.
11. Other studies have found a similar deterrent effect from dram shop liability by three to five percent. This is because this liability makes it in the economic best

- interest of establishments to have responsible serving practices. (Chaloupka, Frank, Henry Saffer, and Michael Grossman. "Alcohol-Control Policies and Motor-Vehicle Fatalities." Journal of Legal Studies XXII (1993): 161-186. Whetten-Goldstein, Kathryn. et al. "Civil Liability, Criminal Law, and Other Policies and Alcohol-Related Motor Vehicle Fatalities in the United States: 1984-1995." Accident Analysis and Prevention 32 (2000): 723-733. Young, Douglas, Thomas Likens. "Alcohol Regulation and Auto Fatalities." International Review of Law and Economics 20 vol. 1 (2000): 107-126. Sloan, Frank A., et al. Drinkers, Drivers, and Bartenders: Balancing Private Choices and Public Accountability. Chicago, IL: University of Chicago Press, 2000.)
12. (Holder, Harold D., et al. "Alcoholic Beverage Server Liability and the Reduction of Alcohol-Involved Problems." Journal of Studies on Alcohol 54 (1993): 23-36. Sloan, Frank A., et al. Drinkers, Drivers, and Bartenders: Balancing Private Choices and Public Accountability. Chicago, IL: University of Chicago Press, 2000.)
  13. Powell, Lisa, Jenny Williams, and Henry Wechsler. "Study Habits and Alcohol Use among College Students." Education Economics (August 2004). Powell, Lisa et al. "Binge Drinking and Violence among College Students: Sensitivity to Correlation in the Unobservables." Research Paper Series, No. 20 (February 2002). [http://www.alcoholpolicysolutions.net/pdf/bingeviolence\\_powellfinal.pdf](http://www.alcoholpolicysolutions.net/pdf/bingeviolence_powellfinal.pdf))
  14. Author's note: This is particularly important because access to an unlimited amount of alcohol for a flat fee increases the number of drinks in a sitting by 1.6 drinks on average based on one study. (Powell, Lisa, Jenny Williams, and Henry Wechsler. "Study Habits and Alcohol Use among College Students." Education Economics (August 2004).)
  15. Holder, Harold D., et al. "Alcoholic Beverage Server Liability and the Reduction of Alcohol-Involved Problems." Journal of Studies on Alcohol 54 (1993): 23-36.)
  16. Author's note: US purchase surveys show that 40 to 90 percent of outlets sell to underage buyers and that this stems from low and inconsistent levels of enforcement against adults who sell or provide alcohol.(Forster, Jean L., et al. "Commercial Availability of Alcohol to Young People: Results of Alcohol Purchase Attempts." Preventive Medicine 24 (1995): 342-347. Forster, Jean L., et al. "The Ability of Young People to Purchase Alcohol Without Age Identification in Northeastern Minnesota, USA." Addiction 89 (1994): 699-705. Wagenaar, Alex and M Wolfson. "Deterring Sales and Provision of Alcohol to Minors: A Study of Enforcement in 295 Counties in Four States." Public Health Reports 110 (1995): 419-427. Wagenaar, Alex and M Wolfson. "Enforcement of the Legal Minimum Drinking Age in the United States." Journal of Public Health Policy 15 (1995): 37-53).