


2009 HOSPITALITY LAW CONFERENCE

## Legal Aspects of Alcohol Beverage Marketing



Elizabeth A. DeConti, Esq.  
 GrayRobinson, P.A.  
 201 N. Franklin St., Suite 2200  
 Tampa, FL 33602  
 (813) 273-5159  
 edeconti@gray-robinson.com

## Presenters



**ELIZABETH A. DECONTI, ESQ.**

- Shareholder with the Tampa office of GrayRobinson, P.A.
- Practice focus on litigation and compliance matters related to the rules, regulation and business practices that govern the marketing, sale, and consumption of malt beverages, wine, distilled spirits, and other regulated products.
- Advises clients on issues pertaining to trade regulation and marketing practices in the food and beverage industry, and concentrates on regulatory compliance, as well as advertising and promotional law.
- Handles food law issues.
- Trial experience includes commercial, dram shop, franchise, intellectual property, and ADA cases litigated on behalf of major breweries, alcohol suppliers, wholesalers, retailers, and other members of the hospitality industry in state and federal courts and administrative agencies throughout the United States.
- In addition to her court experience, she represents many clients in alternative dispute resolution.

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### Alcohol Beverage Marketing: What is Included?

- Billboards – both traditional and electronic
- TV and Radio Ads
- Print Ads in Newspapers and Magazines
- Coasters and Other “Trinkets and Trash”
- Coupons
- Product samplings/tastings
- Contests/Sweepstakes
- Direct Mail – both snail and electronic

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### But Wait! There's more ...



- Interior/Exterior Signs
- Bar/Trade Spending
- Combination Packaging
- Gaming Promotions, e.g., Poker, Roulette
- Private Promotional Events on Retailer's Premises

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**Questions to Consider When Planning a Promotion**

- 1) Are there regulations governing who pays for this promotion?
- 2) Are there legal limitations as to the cost or value of the promotion?
- 3) Are there restrictions as to the content?
- 4) Are there restrictions as to the manner and location of distribution?

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**Laws on Beverage Marketing**

- Federal Law
  - Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*
  - Code of Federal Regulations
- Individual States: The 21<sup>st</sup> Amendment of the U.S. Constitution allows them to regulate alcohol within their borders
  - Statutes enacted by state legislatures
  - Administrative regulations promulgated by state agencies

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**The Three Tier System in the United States**

Manufacturers/Suppliers  
(e.g., Anheuser-Busch, Jim Beam, Kendall Jackson)

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Wholesale/Distributors  
(e.g., Glazer's, Republic Beverage, Southern Wine & Spirits)

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Retailers  
(e.g., T.G.I. Friday's, W Hotels, Ralph's, ABC Fine Wines & Spirits)


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**Tied House Evil!**

- Protects retailers from undue influence
- Prevents manufacturers from giving retailers "things of value"
- Prohibits manufacturers from paying or crediting the retailer for any advertising, display, or distribution service




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 27 U.S.C. § 205(f) Restrictions on Alcohol Advertising Content

**DON'TS:**

- Don't disparage a competitor alcohol beverage manufacturer/product;
- Don't put anything in the advertisement that is designed to be attractive to minors or that could be construed as attractive to minors;
- Don't make any representation about an alcohol product that is or could be construed as false, misleading, obscene or indecent;
- Don't make any claim or representation about an alcohol product that is inconsistent with the product's labeling;


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 Advertising "Don'ts" (continued)


- Don't make any representations about an alcohol beverage product that indicates the product influences health, strength, athletic ability, or any other physical factors;
- Don't make any price comparison between one brand of alcohol beverage and another
- Don't make any representation about an alcohol beverage product that is inconsistent with the spirit of safe driving programs.



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 Point of Sale Materials And Consumer Specialty Items


- Exceptions to Tied House rules
- May be given or sold to retailers by manufacturers under certain conditions
- Point of Sale materials are for retail premises – e.g., wine lists, coasters, bar backs
- Consumer specialty items are for patrons – e.g., ashtrays, hats, T-shirts
- State restrictions likely will govern issues such as the dollar value of items to be provided/sold, and whether and/or in what manner retailer names/logos may be featured


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 State Example: New York

- Manufacturers/wholesalers may offer recipe books or matchbooks to retailers as long as they do not contain the retailer's name
- Manufacturers may provide posters for interior use as long as they do not contain the retailer's name




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## Retailer Advertising Specialties

- Retailer advertising specialties are items which are primarily valuable to the retailer as POS and only secondarily valuable in connection with operating the business and these include: trays, coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, thermometers, clocks, and calendars. The name and address of the retailer may be added.
- Manufacturers/wholesalers may make consumer premium offers, but no retailer names.


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## Menus

- Current tied house issue of concern to state regulators
- Retailers wish to offset expenses
- Legal Gray Area in many states
- New York State Liquor Authority policy:
  - Suppliers may not pay for food portions of menus;
  - Suppliers may not pay for covers or jackets unless they are disposable and of *de minimis* value;
  - Supplier payments must be made directly to independent printing company pursuant to invoice.


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## Equipment

- Federal definition (27 C.F.R. § 6.88) includes glassware, dispensing accessories, carbon dioxide, ice
- Sell vs. Give
- Installation, cleaning, and servicing

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## Product Sampling

- Sampling is for the trade
- Quantities are limited
- Who may give and who may receive
- Should be new brands or those not previously purchased


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## Consumer Tastings

- Tastings are for consumers
- Permits and/or prior notice to state regulatory agency may be required
- Areas of regulation:
  - Who pays for product
  - Who pours product
  - Quantities
  - Location
  - Frequency


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## Advertisements in Print Media

Issues to consider:


- Whom does the advertising benefit?
- Who is paying for the ad?
- Will there be cooperative advertisement concerns?
- Do any recognized exceptions apply?


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## Coupons as a Popular Form of Beverage Marketing


- Manufacturers generally fund
- Tied house laws and regulations apply
- Instantly-redeemable or rebate variety
- Coupon rules vary from state to state, and by segment
- Some states prohibit coupons of any kind
- Popular state concerns include inducement, below cost/predatory pricing, attracting minors, exclusion


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## Contests and Sweepstakes


- Rules vary by state
- General uniform prohibitions:
  - No purchase necessary
  - No alcoholic beverages as prizes
  - Industry members and their employees and family members may not participate


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## Retailer Incentive Contests


- Suppliers offer trips, televisions, cash and prizes to induce retailer employees to sell their products
- Some states prohibit as tied house violation (prohibited thing of value/exclusion)
- Small minority of states allow under specified conditions


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## Retailer Entertainment


- Usually event tickets are allowed (sports, theater, concerts) along with reasonable food and drink
- How much is too much?
- Individual states regulate based on tied house laws

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## Happy Hour

- May be regulated at the state, county, and/or city level
- Laws are directed at temperance concerns
- Common areas of regulation and prohibitions:
  - freebies and “two-for-ones”
  - discounts in one area of the restaurant only
  - specials directed at particular groups

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## Conclusion

- Alcohol Beverage Marketing is a highly regulated area
- Federal, state, and local laws may apply
- Watch for Tied House issues, such as cooperative advertising and impermissible things of value
- Be mindful of temperance concerns

Any questions, please call me at (813) 273-5159 or email me at: [edeconti@gray-robinson.com](mailto:edeconti@gray-robinson.com)

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