

HOSPITALITYLAWYER.COM PRESENTS:

THE **HOSPITALITY LAW**
CONFERENCE

FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 10th - 12th, 2014

HOT TOPICS IN FOOD & BEVERAGE LAW

Elizabeth DeConti, GrayRobinson

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John Merkin, IHOP Restaurants – DineEquity

PRESENTERS



Elizabeth DeConti - Shareholder at GrayRobinson, P.A. with nat'l practice in alcohol beverage & food law - Gray-Robinson.com

- Litigator focusing on dram shop litigation and other liability issues of concern to sellers of alcohol beverages and food
- Counsels clients on best practices, litigation defense, trade practices, and promotions and social media law.



David T. Denney, The Law Offices of David T. Denney, PC - FoodBevLaw.com

- Food, Beverage and Hospitality Practice focuses on the formation, purchase and sale of entities, private placement of securities, corporate transactions, real estate transactions, civil litigation, employment issues & beverage alcohol licensing
- Author and speaker for various publications and conferences.



John Merkin, SVP Operations, IHOP Restaurants - DineEquity

- Responsible for franchise and company operations across 1,600 restaurants
- Previous experience includes brand management, hotel operations, litigation support, human resources and franchise administration

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HAPPY HOUR

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- Price Violations
- License Infractions, e.g.
hours of sale
- Advertising



Happy Hour Promotions



- May be regulated at 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

Social Media

- Foursquare, Yelp, Facebook, Twitter, Gowalla
- Geolocational Marketing now the focus for your texting clientele
- Mobile | Web | E-mail



Threshold Legal Issues in Social Media

- **Intellectual Property Overview**
 - Use your own IP consistently throughout your brand identity
 - Be mindful of the IP of social media clients [websites] and understand the terms of use
- **Consumer Privacy and Related Issues**
- **Company Guidelines**
 - Employee Policy
 - Who Controls Your Sites (Who may post content)

Alcohol Beverage Law Issues in Social Media

- Key Concept: Promotions which are Regulated in Other Media still will be regulated in Social Media
- Common Promotions Now Appearing in Social Media
 - Brand Advertisements
 - Coupons and Rebates
 - Happy Hour
 - Contests and Sweepstakes



Examples of Social Fun

- Competitive Offers
- Specialty Drinks for Foursquare and other geolocational users
- The New Face of Loyalty
 - Badges
 - Passport Stamps
 - Pins



REFILLING AND REBARRELING LEAD TO REVOCATION!

- The problems:
 - Refilling an old container
 - Changing a product out of its container for some aesthetic or other purpose
 - Substituting a premium product with a cheaper one
 - Dilution

**Ripped from the Headlines:
Operation Swill in New Jersey**



STATE PENALTIES - REFILLING

- Florida (distilled spirits containers):
 - First Occurrence: \$1,000.00 and a 20 day license suspension
 - Second Occurrence: Revocation
 - Criminal penalties
- California
 - With different brand: 15 day suspension
 - With same brand: 5 day suspension
- Texas: Revocation (spirits)



CHANGING CONTAINERS

Intentions May be Good, but this is Most Often Illegal

- Product must remain in original containers as received from the manufacturer or wholesaler
- Product must be poured/served from a container it was designed for so that it is clear that the label matches the product
- Changing a container for decorative purposes violates these rules

SUBSTITUTION/DILUTION

- Enforcement issues
 - Selling a product which is inconsistent with its labeling
 - Misleading consumers

SUBSTITUTION/DILUTION: PENALTIES

- New Jersey: Heavy fines and license suspension
- California: 15 day suspension
- Florida: (serving draft beer without the correct tap)
 - First Occurrence: \$1,000.00
 - Second Occurrence: \$2,000.00
 - Third Occurrence: \$4,000.00
 - Fourth Occurrence: Revocation

RETAILER TO RETAILER SALES

How to make an operations problem a legal problem

- This is a three tier violation
- Penalties:
 - Texas
 - First Occurrence: 8-13 day suspension and \$300/per day fine
 - Second Occurrence: 16-26 day suspension and \$300/per day fine
 - Third Occurrence: Revocation
 - Florida
 - First Occurrence: \$1,000.00
 - Second Occurrence: \$2,000.00
 - Third Occurrence: Revocation

2013 FDA FOOD CODE

- The FDA Food Code may or may not be immediately adopted by state/local health departments as it is at their discretion of when to implement
- New display requirement notifying the public that inspectional information is available for review.
- Requirement added for the availability of an irreversible registering temperature indicator
- Person in charge present, demonstrates knowledge and performs duties requirement is a change from prior code



TRUTH IN MARKETING

- **Chipotle Labels GMO Items – March 2013**
 - Not required, but consumers are becoming more aware of GMOs
 - Imagine how difficult it is to actually confirm presence of GMOs

- **“Food Misrepresentation” is a strict liability offense in some states, with statutory penalties**
 - Florida penalties are \$500 for “each instance”
 - Vietnamese Catfish passing as grouper: 2007. 2010. 2014?

- **FDA Clarifies “Gluten-Free Rules” for Restaurants – Jan. 2014**
 - Gluten limit of less than 20 parts per million (ppm) for foods that carry the label “gluten-free,” “no gluten,” “free of gluten,” or “without gluten.” This level is the lowest that can be reliably detected in foods using scientifically validated analytical methods.

TRUTH IN MARKETING, CONT

- Liability may also stem from breach of warranty claims, which are gateway claims to potential Deceptive Trade Practice actions.

- Results from failure to understand products' chain of custody:
 - Substituting one species of fish for another (Vietnamese Catfish?)
 - Labeling other beef as "Kobe"
 - Fudging Pre/Post-cooked weight
 - Misrepresenting cooking methods
 - "Free-range," "Grass-fed," "Organic"
 - Place of origin ("Atlantic" Salmon; "Roquefort" cheese)

LIQUID NITROGEN & FIRE

- Liquid nitrogen is dangerously cold, with a *boiling point* of -320° F.
- LN can be used to “flash-freeze” food and liquids, or chill glasses (creating a fog when exposed to air).
- LN can safely be used in food/drink preparation, but it must be **fully evaporated** to ensure it is not ingested.

LIQUID NITROGEN & FIRE, CONT.

- **April 2012**, Atlanta – man hospitalized after liquid nitrogen “incident” during the opening week of the CZAR Ice Bar.
- The restaurant group’s Director of Marketing confirmed the incident. Could provide no details except that the gentleman recovered, and that Czar decided to scrap liquid nitrogen in favor of serving vodka in blocks of ice. He said Czar “could not take the risk.”

LIQUID NITROGEN & FIRE, CONT.

- **October 2012**, Lancaster, England
 - Gaby Scanlon's 18th Birthday dinner.
 - Bar featured a shot made by adding Jagermeister to liquid nitrogen.
 - Barman poured a round for Gaby and three of her friends. The girls were impressed by the steam and asked how it was made. The bartender explained, and the girls drank the shots.
 - Bartender then offered Gaby another, on the house, for her birthday.

LIQUID NITROGEN & FIRE, CONT.

- Not only had the extremely low temperature of the liquid nitrogen burned a hole in her stomach (its effects are similar to frostbite), the substance had completely destroyed the stomach lining and caused a perforation of her stomach.
- Her entire stomach had to be removed, so surgeons connected Gaby's esophagus directly to her small intestine.

LIQUID NITROGEN & FIRE, CONT.

- Journal of Burn Care and Research, Jan/Feb 2006, V. 27(1)

Face Burns Caused by Flambé Drinks

- Reviewed medical records of **25 patients** admitted to one hospital in **30-month period**

Journal of the International Society for Burn Injuries, Mar. 2008

Burns Due to Flaming Alcoholic Beverages in the UK

- “The woman was sitting in front of the barman as he poured a flammable drink onto the bar and set it alight as part of a ‘show’. The flames ignited her clothing. She sustained 25% burns to her left arm, leg, chest and abdomen.”

NTSB PUSH TO DROP BAC TO .05

- NTSB is merely an investigative agency
- Dept. of Transportation and individual states would have to become involved
- NTSB estimates that a nationwide shift to .05 would save 1,000 lives annually
- Restaurant and Beverage groups fear that business will suffer, but we don't want to be in the position of arguing economics against human lives.
- **BEST SOLUTION** is for the industry to engage in more rigorous self-policing, which means you must implement and **FOLLOW** procedures for the responsible service of alcohol.