



# CONTROLLING ALCOHOL RISKS EFFECTIVELY

Presented by Jill Pepper and  
Elizabeth A. DeConti



GRAY | ROBINSON  
ATTORNEYS AT LAW

# Presenters



- Jill Pepper
- Jill is the executive director of TEAM (Techniques for Effective Alcohol Management) Coalition, a national non-profit organization with 20 members and 6 strategic partners
- Jill manages the TEAM training program, including a network of over 1,000 active trainers representing more than 200 professional and collegiate sports and entertainment facilities where 41,000 employees became TEAM-certified in 2010
- Jill coordinates sweepstakes with all the professional sports leagues (including the NFL, MLB, MLS, NBA and NHL) to encourage more fans to participate in designated driver programs at the sports stadiums and arenas. In 2010, over 718,000 sports fans pledged to be designated drivers.



- Elizabeth A. DeConti, Esq.
- Elizabeth is a shareholder with the Tampa office of GrayRobinson where she focuses her practice 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.
- Elizabeth's 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

# TRAINING GOALS



- Identify Guests Demonstrating High Risk Behavior
- Intervene Appropriately
- Report Concerns to Supervisors
- Management should Support Employees' Decisions to limit/stop Consumption

# IMPAIRMENT

HOSPITALITYLAWYER.COM PRESENTS  
**2011 THE GLOBAL CONGRESS**  
ON LEGAL, SAFETY & SECURITY  
SOLUTIONS IN TRAVEL  
AUGUST 25-28, 2011 HOUSTON



# SIGNS OF IMPAIRMENT

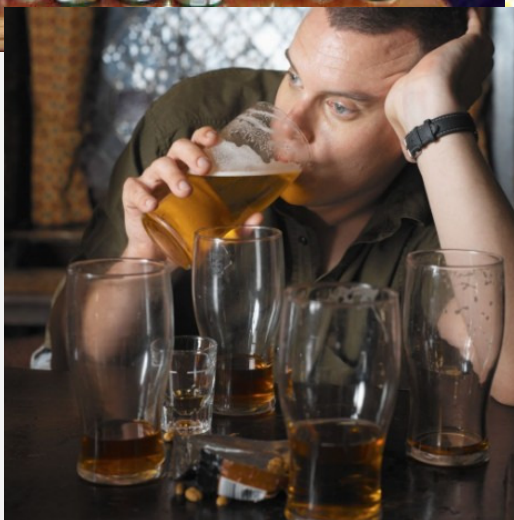
J



I



R



C

# SIGNS OF IMPAIRMENT

## JUDGMENT

- Inappropriate Jokes
- Drinking Games
- Foul Language
- Driving while Impaired

I

R

C



# SIGNS OF IMPAIRMENT

**J**

**INHIBITIONS**

**R**

**C**

- Mood Swings
- Overly Friendly
- Being Flirtatious
- Removing Clothing



# SIGNS OF IMPAIRMENT

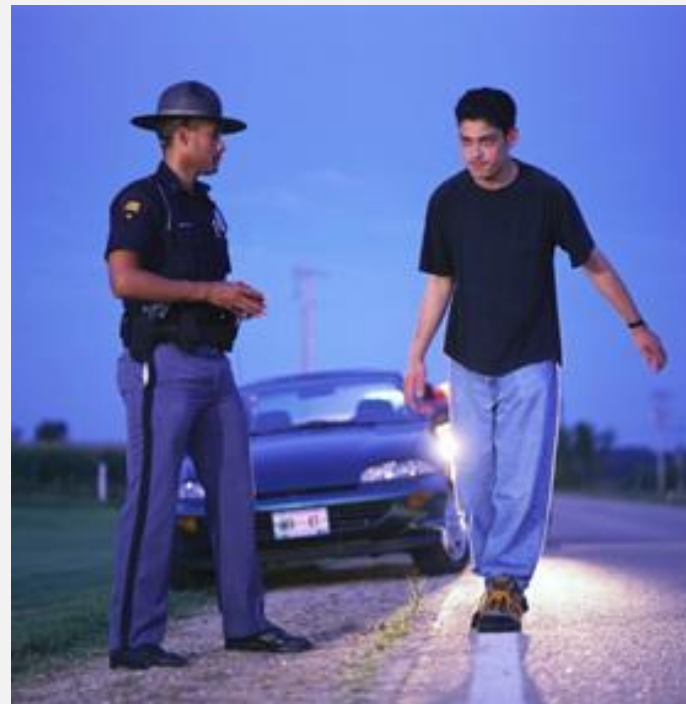
**J**

- Losing train of thought
- Trouble answering simple questions
- Glazed Eyes
- Slurred Speech

**I**

**REACTIONS**

**C**





# SIGNS OF IMPAIRMENT

- Stumbling, falling
- Dropping things
- Falling asleep
- Spilling drinks

J

I

R



## COORDINATION

# TOLERANCE

- The body's ability to mask or hide **BEHAVIORAL CUES**
- A guest with **HIGH TOLERANCE** may be legally impaired
- **HIGH TOLERANCE** does **NOT** mean lower **BAC**

# ABSORPTION RATE FACTORS

G  
R  
A  
S  
S  
F



# ABSORPTION RATE FACTORS

## GENDER

R  
A  
S  
S  
F



# ABSORPTION RATE FACTORS

G

## RATE OF CONSUMPTION

A

S

S

F



# ABSORPTION RATE FACTORS

**G  
R  
A  
G  
E  
S  
S  
F**



# ABSORPTION RATE FACTORS

**G  
R  
A  
S  
I  
Z  
E  
S  
F**



# ABSORPTION RATE FACTORS

**G  
R  
A  
S  
S  
T  
R  
E  
N  
G  
T  
H  
O  
F  
D  
R  
I  
N  
K**



4.2% ALCOHOL



8.5% ALCOHOL



# ABSORPTION RATE FACTORS

**G  
R  
A  
S  
S  
FOOD**



# ABSORPTION RATE FACTORS

## WITHIN CONTROL

- RATE OF CONSUMPTION
- STRENGTH OF DRINK
- FOOD

## NO CONTROL

- GENDER
- AGE
- SIZE

# ASSESSING GUESTS

## Level One – Behaving Responsibly

–Guest is behaving responsibly

## Level Two – Potential or Borderline Impairment

–Guest is showing some signs of impairment, and you are concerned

## Level Three – Definitely Impaired

–Guest is not behaving responsibly

# PROACTIVE STEPS



- Reasonable Efforts
  - The steps that all employees are expected to take to prevent alcohol-related problems or injuries
- Examples
  - Alcohol service policies
  - Employee training
  - Signage
  - Working with law enforcement

# TYPICAL ALCOHOL SERVICE POLICIES

- 2 Drinks per ID
- Cut-off Service Before Event Ends
- Check IDs of Guests Who Appear 30 or Younger
- No Service to Guests Showing Signs of Impairment

# OTHER POLICIES AND PROCEDURES

- **Outside Alcohol**
  - Identified at the gates
  - Identified inside the facility
- **Underage Drinking**
  - Zero tolerance
  - ID checking beyond point of sale to avoid “pass-offs”
- **Compliance Team/Monitors**
  - Observing fans
  - Observing employees

# ID CHECKING

- Determine Valid Forms of ID
- 4 Step Process
  - Guest removes ID from wallet, employee holds ID, looks at both sides
  - Confirm face on ID matches face in front of you
  - Confirm DOB is older than today's date, 1990
  - Confirm expiration date is in the future
- 2nd Form of ID is ANYTHING with Same Name
- When In Doubt DO NOT Sell
- Better to Abandon than to Confiscate

# INTERVENTION GUIDELINES

- Avoid Escalation
- Make Clear Statements
- Use first person “I”
- Be non-judgmental and unthreatening
- Provide reasons for your action
- Use indirect strategies



# EVALUATING RESPONSES

## Level One – Most Effective

- Employee handles the situation effectively

## Level Two – Moderately Effective

- Employee attempts to intervene but is not completely successful

## Level Three – Ineffective

- Employee does not effectively manage the situation

# KEY TAKE AWAYS



1. Management Supports Your Efforts
2. Look for Patrons Violating Policies
  - Signs of Impairment
  - Passing Alcohol to Minors
3. Politely Refuse Service
4. Report Concerns to Manager

# LEGAL LANDSCAPE



- Ordinary Negligence
  - Broad laws based on common law and prior court cases
  - Not specifically addressing alcohol but may relate
  - Applies to ALL employees in the facility
- Dram Shop
  - Liquor license holder (Commercial Host Liability)
  - Patron or 3rd party injury
  - May start by serving underage or someone showing visible signs of impairment

# LEGAL STANDARDS FOR VISIBLE INTOXICATION



- Signs of intoxication become evidence used by the Trier of fact to decide cases

A person may be found to be intoxicated when it is apparent that she is under the influence of liquor to such a degree that her manner is unusual or abnormal and is reflected in her walk or conversation, when her ordinary judgment or common sense are disturbed, or her usual willpower temporarily suspended. Intoxication means an abnormal mental or physical condition due to intoxicating liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions and energies. The person need not be “dead drunk.” It is enough that the use of liquor has so affected her in her acts or conduct that a person coming into contact with her can readily see and know that she is intoxicated.

***Geib v. Sheraton Stamford Hotel*, 2008 WL 5481146 (Conn. Super. Nov 18,2008); Conn. Jud. Branch Civil Jury Instructions No. 3.17-1**

# WHAT IS YOUR DUTY TO YOUR GUESTS & WHEN DO YOU ASK THEM TO LEAVE?



- Negligent eviction is claim
- The duty of care to the public when they are your invitees and when they leave
- Where does your duty begin and where does it end?

# NEGLIGENT EVICTION CASE EXAMPLES



- *Hoff v. The Elkhorn Bar*, 613 F. Supp. 2d 1146 (D. N.D. 2009)
- *Sinisgalli v. O'Rourke*, 2010 WL 5493495 (Conn. Super. Dec. 7, 2010)

# DO YOU HAVE A DUTY TO FIND TRANSPORTATION FOR YOUR INTOXICATED GUESTS?



- *Rodriguez v. Primadonna Co.*, 2009 WL 3151167 (Nev. Oct. 1, 2009)
- *Bourgeois v. Vanderbilt*, 2009 WL 2323088 (W.D. Ark. Jul. 28, 2009)
- Special Issues of Concern to Casinos and Other Large Establishments

## OTHER CAUSES OF ACTION APPEARING IN DRAM SHOP COMPLAINTS



- Negligent hiring, negligent supervision, and other employment-related claims.
- These are really dram shop cases trying to be something else.
- Negligent supervision/hiring claims allege improper training, inadequate security, or other set of facts to argue the plaintiff was injured because of employee's inability to identify/control intoxicated person.
- Another way for the plaintiff to attempt to avoid the limitations of dram shop statutes.



## OTHER CAUSES OF ACTION APPEARING IN DRAM SHOP COMPLAINTS CONT.



- *Marotta v. Palm Mgmt. Corp.*, 2009 WL 497568 (S.D.N.Y. Feb. 25, 2009).
- *Felt Enter., Inc. v. Chau Chow, II, Inc.*, 28 Mass. L. Rptr. 252 (Mass. Sup. Ct. Mar. 7, 2011)

# COMPLIANCE CHALLENGES FOR LARGE VENUES



- Case Example: *Phuong Luc v. Wyndham Management Corp.*, 496 F.3d 85 (1<sup>st</sup> Cir. 2007)
  - Plaintiff sued eight corporate defendants involved in ownership/management of hotel.
  - Issue: Do any of the entities exercise control over sales and service?
- Plaintiff in *Phuong Luc* case also used clever “method of operation” theory.
- Does your premises have:
  - a low ratio of servers to customers?
  - a dark, loud, and crowded atmosphere?
  - multiple sales points?

# COMPLIANCE CHALLENGES FOR LARGE VENUES (CONT'D)



- *Robinson Property Group Limited Partnership v. McCalman* 51 so.3d 946 (Miss.2011)

# BASIC ELEMENTS OF A RESPONSIBLE ALCOHOL SERVICE POLICY – HOW TO TREAT CUSTOMERS



- Do not serve or sell to those under 21
- Do not serve or sell to the obviously intoxicated
- Do not serve or sell to known alcoholics / “habitual drunkards”
- Do not sell multiple drinks at the same time
- Do not encourage overconsumption with discounts/specials

# THE SIZE AND MARKETING OF SPECIALTY DRINKS



## ***Yes, size does matter!***

- Should be part of a responsible alcohol policy
- A standard serving is 12 oz. for beer, 5 oz. for wine, and 1.5 oz. for spirits
- Each of these standard servings *should* contain approximately 0.6 oz. of alcohol
- Marketers of martinis and other specialty drinks need to focus on the percentage of alcohol by volume, not the size of the glass

# WHY DO YOU NEED A GOOD ALCOHOL BEVERAGE POLICY?



- *Johnson v. Brunswick Riverview Club*, 2009 WL 4506580 (Ala. Dec. 4, 2009) – the role of the internal alcoholic beverage policy.

# FOCUS ON EMPLOYEE ISSUES



- Many states (37 and D.C.) allow 18 and over to serve (deliver alcohol beverages to customers)
- Many states (24) allow 18 and over to tend bar (mix drinks/dispense alcohol beverages)
- Depending on the jurisdiction, even younger employees may be able to stock coolers and clear alcohol beverages from tables
- Result: Increased liability exposure for on-premises establishments

# WHEN EVERYONE TAKES RESPONSIBILITY EVERYONE WINS



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