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Larry D. Strate

University of Nevada, Las Vegas, strate@ccmail.nevada.edu

Thomas J. A. Jones

University of Nevada, Las Vegas, null@unlv.nevada.edu

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Abstract

In their efforts to provide an atmosphere or hospitality to their casino customers, many operators will provide complimentary alcoholic beverage service. This practice is fraught with liability, particularly in venues outside of Nevada. Conscientious operators must take every precaution to mitigate the possibility of lawsuit.

Keywords

Larry Strate, Gaming, Gambling, Casino

Casino drink policies: Limiting third-party liability

by Larry D. Strate
and Thomas J.A. Jones

In their efforts to provide an atmosphere of hospitality to their casino customers, many operators will provide complimentary alcoholic beverage service. This practice is fraught with liability, particularly in venues outside of Nevada. Conscientious operators must take every precaution to mitigate the possibility of lawsuit.

The subject of dram shop or third-party liability has been addressed in hospitality literature, some may say exhaustively, since the 1976 incident in Southern California when a bar was held liable for \$1.9 million in damages as the result of an accident involving an intoxicated patron.¹ Boyd, Vickory and Maroney outlined the prevailing trend of these laws, as did Robin.² What these authors reported continues to hold true, that is, an operator's liability as determined by state law and court decisions varies widely from jurisdiction to jurisdiction.

Much has also been written on how to limit the specter of that lia-

bility. Rutherford established a policy to limit third-party liability, and Crafts examined several server intervention programs designed to limit patron intoxication and thus limit operator liability.³ In addition, proprietary intervention programs offered by Techniques for Alcohol Management (TAM) and Training for Intervention Procedures for Servers of Alcohol (TIPS), the American Hotel & Motel Association (AH&MA), the National Restaurant Association (NRA), and others have been instrumental in raising the awareness of many operators throughout the country.

Not all lodging, food service, and retail beverage operators may be cognizant of the pitfalls associated with serving too much beverage alcohol, but most of their brethren definitely are because of the comprehensive dissemination of information on the topic through these many sources. However, it has become highly

evident that one expanding sector of the hospitality industry is not as fully aware of the legal, societal, and public relations problems caused by over service of beverage alcohol. Furthermore, this same sector has a number of commonly-held policies and practices that serve to exacerbate the situation.

Casinos pose problem

That sector is the gaming industry. There are four primary reasons why the service of beverage alcohol is particularly problematic to this industry. First is the tradition of complimentary beverages served to patrons who are playing the games. Second is the status of dram shop liability in the state of Nevada which serves as the primary market for management talent for casinos in other jurisdictions. Third is the size and layout of many casinos, coupled with the peripatetic activities of many patrons in a casino environment. Fourth is the absence of a trained and experienced staff in many of the newer gaming jurisdictions.

This article addresses each of these four issues in detail and examines a recent case involving casino dram shop liability outside the state of Nevada. It will conclude with a prescription, based on observations of current casino beverage operation procedures on how casinos might limit their dram shop liability.

Complimentary beverage service is found in almost every casino in the land except for

those few properties located within jurisdictions that specifically forbid the practice. The high visibility of alcohol in the gaming industry was described as early as 1935, when Matt Penrose wrote, "these were the days when champagne flowed as freely as waters in a spring flood."⁴ Alcohol continues to be one of the integral components of the gaming industry and is enjoyed by millions of visitors to Nevada annually. Some might argue that bars, taverns, restaurants, social clubs, showrooms, and cocktail lounges both in and out of casinos have evolved into "hospitality centers" that are not just engaged in the selling of alcohol,⁵ but the statistics would indicate otherwise. Nevada's hospitality industry sales of beverages for the past five years⁶ has remained at 5 to 6 percent of total industry revenue as indicated in Table 1. In 1995, some 213 gambling establishments sold over \$620 million in beverages alone. Of this amount, some 56 percent were complimentary beverages. The understood reason for this seemingly philanthropic drink policy is to ensure optimum profitability in the casino by encouraging longer play per customer.

This policy is not without its downside, even in Nevada, for research has shown that more than one-half the drunken drivers did their drinking in a licensed gaming establishment.⁷ In recognition of this problem, the city of Las Vegas and the county of Clark

Table 1
Revenues, complimentary drinks, servers and establishments,
1990-1995

| Year | % Complimentary | Beverage revenue | % | # of Establishments | Employment | Beverage servers |
|------|-----------------|------------------|-----|---------------------|------------|------------------|
| 1990 | 52.9 | \$486,855,601 | 6.0 | 182 | 151,779 | 11,156 |
| 1991 | 55.6 | \$522,426,855 | 5.8 | 198 | 152,119 | 11,000 |
| 1992 | 57.3 | \$524,422,399 | 5.7 | 192 | 155,962 | 11,364 |
| 1993 | 57.8 | \$537,203,393 | 5.6 | 189 | 145,942 | 10,512 |
| 1994 | 58.1 | \$587,519,449 | 5.4 | 207 | 165,149 | 11,604 |
| 1995 | 56.4 | \$623,768,643 | 5.2 | 213 | 170,190 | 11,263 |

Source: Nevada Gaming Abstract, Nevada Gaming Control Board, 1990-1995

enacted ordinances requiring alcohol awareness training programs for those serving and selling alcoholic beverages, as well as their supervisors and other managers.⁹ Casino operations have also instituted programs to prevent minors from entering cocktail lounges, gambling areas and package off-sale outlets, and have increased methods to prevent sale to and consumption by minors.

Many casino operators in Nevada recognize that too liberal a complimentary drink policy is a prescription for trouble. Intoxicated customers who might become abusive and upset other patrons, or slow or stop table play are not good for business. Consequently, many casinos will limit drink portion size and speed of service, and several will refuse to serve more than one drink at a time, or will demand the authorization from the casino shift manager before a multiple liquor cocktail or double is "comped."

Liability is limited in Nevada

In the past 20 years a number of cases involving third-party liability have appeared in Nevada courts, including heirs of a pedestrian killed by a drunk driver⁹; heirs of a pedestrian killed by a drunk driver when the operator of a parking lot surrendered the car to him with knowledge of his drunken condition¹⁰; a pedestrian left paralyzed by a drunk minor who had purchased alcoholic beverages from another minor who had purchased them from a mini-mart¹¹; collision between an automobile and a motorcycle caused by a minor who purchased alcoholic beverages from a 7-11¹²; a minor who consumed beverage alcohol at the Mirage Casino, the Rio Suite Hotel and Casino, and Eddie's, who then drove under the influence and collided with a car, injuring several passengers.¹³

On each occasion, relief was denied. The judicial admonition was to the point, "Here, as in

Hamm, if civil liability is to be imposed upon a vendor who sells liquor to an inebriated person, or a minor, it should be accomplished by a legislative act.¹⁴ The minority position of the supreme court explained a concern and Nevada political reality, "I intend no disrespect for our legislature, but the realities of political life in a state heavily financed by establishments that benefit economically from the sales and inducements of alcoholic beverages leave little reason to believe that dram shop legislation will materialize."¹⁵ Nevada has steadfastly clung to the common law reasoning regarding liquor liability that individuals, either drunk or sober, are responsible for their own torts, that the drinking of the intoxicant, not the furnishing of it, was the proximate cause of injury.

Only one decision based in significant part upon the involvement of a minor and violation of a state statute was given relief under what appears to be a liquor liability statute.¹⁶ All other Silver State supreme court decisions have denied relief.

To further solidify the prevailing wisdom regarding liquor liability, the Nevada legislature in 1995 enacted Senate Bill 498, which put into state law the results of these supreme court decisions dating back to 1969, when Nevada repealed its dram shop liability statute.¹⁷ The 1995 statute denies a negligence *per se* claim against an operator who serves a minor or intoxicated person as well.¹⁸ This current status

of liquor liability laws in Nevada is explained (and defended) in part by a justice, who indicated in *Hamm*, "Whatever choice we make for Nevada is supportable by case authority elsewhere."¹⁹

Border states are different

Although the common law reasoning prevails within the borders of Nevada, it will not necessarily prevail in the five border states. Through either statutory enactment or common law judicial decision, all neighboring states to Nevada, California, Oregon, Idaho, Utah, and Arizona, now impose some form of liability upon commercial servers of alcoholic beverages for the actions of their patrons.

The question of the liability of a liquor seller for injuries caused by an intoxicated patron is resolved through choice-of-law issues. This body of law represents federal and state cases in which courts have considered whether civil damage or dram shop acts may be applied extra-territorially in order to impose civil liability on a seller of intoxicating liquor for injuries or death caused by an intoxicated patron, and the right to recovery.

So far, three neighboring states have had cases that involve this question. In California in 1976,²⁰ a California resident alleged injury in a motor vehicle accident in California. The plaintiff, a fellow Californian, had been served alcohol in Nevada and was returning to California. California applied its law and found the Nevada establishment liable.

In Idaho in 1985,²¹ an Idaho resident returning from Cactus Pete's in Jackpot, Nevada, who was intoxicated from drinks served at the casino, collided head on with another car. The Idaho court, despite strong objection, held that Nevada law applied and subsequently denied relief.

In Arizona in 1991,²² four Arizona residents were injured in an automobile accident in Arizona caused by another Arizonan who had been served alcohol by a Nevada casino. Arizona applied its own law and indicated that the Nevada casino could not help but know that the patrons it seeks who sit at tables and drink liquor have come from Arizona and will return there. It concluded that the casino must respond in damages for negligently serving alcohol to intoxicated patrons. Another Arizona case involved a similar situation, but was settled out-of-court for a reputed medium-six figure sum.²³

The Nevada state legislature may have resolved the issue of dram shop liability within its boundaries, but at the border is an entirely different situation. At the present time, the score is one for Nevada and three for the other states. It would seem prudent for the industry in Nevada to better prepare operationally and internally against such risk, but there is going to be risk, however remote, as long as there is beverage alcohol service.

As border casinos continue to proliferate, the number of cases should be expected to increase. Southern California roads lead to

Primm, Nevada, where Whiskey Pete's, Buffalo Bill's, Prima Donna, and a California lottery ticket outlet wait. In the northwest, Lake Tahoe has been a gambling destination for years. On the northern border of Nevada and the southern border of Idaho, the northwest opens to Jackpot, Nevada, with Cactus Pete's 10-story tower. Two locations with Utah, Wendover, Nevada, on the Wasatch front of Utah to the north, and Mesquite to the south with the Virgin River, Peppermill Oasis, the Casablanca, and others offer services to neighboring Utah residents. The Arizona border has seen the greatest expansion at Laughlin, which has become a major gambling destination center, sporting numerous large casinos, hotels, and restaurants.

Design complicates issue

Casinos are designed to stimulate the senses, entertain, and create a fantasy environment. Traditionally, they never contain windows to the outside, clocks, or drinking fountains, nothing that would distract a patron from the games and the availability of the complimentary cocktails. Many contain a tremendous amount of square footage. The MGM Grand in Las Vegas advertises a casino of more than 171,000 square feet. Casino layout is typically byzantine by design. People will often find themselves lost, unable to find the elevators to rooms or exit doors.

All of this creates impediments to the monitoring of alcohol

consumption. Patrons are typically mobile, moving from area to area rather than occupying the same seat for the duration of their visit, as they do bars and taverns. They may be served by two, three, or more servers in as many server stations. There are often multiple service bars, making it difficult for cocktail servers to communicate to other servers the status of their former guests who have moved to other stations. It's often difficult for servers to track their patrons who move because of the immensity of the place, coupled with the slot machines and signs that tend to obscure sight lines.

Casino cocktail service is also a hectic assembly line process in many casinos with servers typically delivering 12 to 20 drinks per trip, making it difficult for personnel to take the time to track a customer who has reached his limit and has wandered off to another part of the casino. Even in the smaller properties outside of Nevada, there are casinos occupying two or even three levels, making the monitoring process doubly difficult. One would be hard pressed to design an environment that would be less conducive to the monitoring of alcohol consumption than the modern American casino.

The advent of casinos in new venues, often in areas that are economically depressed, has been a boon for the labor market, for the casino industry is an extremely labor-intensive industry. Many of these new job opportunities are to be found in the service of beverage

alcohol. In Las Vegas alone, over 11,000 people are employed serving cocktails in the casinos. However, the creation of new jobs in alcohol service is not without its downside. People without prior experience are often hired; these are people who lack the training to identify the behavioral warning signs of intoxication and know how to respond to those signals.

Training programs lapse

One food and beverage manager interviewed in a jurisdiction outside Nevada stated that when her property opened, all beverage personnel were trained in server intervention techniques, but upon further questioning she admitted that no one hired since the opening had been given that training. In this volatile occupational sector, it would be highly likely not to have anyone on the staff who had undergone the training three to five years after the date of a casino opening.

Unfortunately, all too often, particularly with smaller operators, an informal on-the-job training motif is typically the case. Newly-hired workers are told to shadow more seasoned employees who hold the same position. These informal trainers pass on not only how things ought to be done, but they may also teach the neophyte shortcuts which may compromise the house's policies. Unscrupulous employees may even teach the newly-hired how to steal or other ways to abuse the operation. On-the-job training is an appropriate approach only when it is well

thought out, the trainers are rewarded, and the entire process is monitored by management.

Casino operators cautioned

Nevada operators are not completely invulnerable to the specter of third-party liability; however, they do enjoy a substantially reduced degree of risk when compared to their colleagues operating in other states. A recent case from Mississippi, *Wolff vs. Bayou Caddy's Jubilee Casino*, resulted in an out-of-court settlement in the seven-figure range. The case was scheduled for federal district court. Although the case is unique with regard to its holdings, it serves as a cautionary tale to casino operators who have complimentary drink policies.

On Sunday, May 29, 1994, at about 5 p.m. Eliot Wolff²⁴ was driving his Chevrolet Camaro to work. Wolff was a casino executive at Bayou Caddy's Jubilee Casino in Lakeshore, Mississippi. He was stopped at a railroad crossing of the CSXT when James Zamecnik, proceeding in the opposite direction, left his lane to pass a line of cars that were properly stopped at an intersection immediately before the rail crossing. Zamecnik went through two stop signs (one at the intersection and another at the rail crossing) at a high rate of speed. Zamecnik's vehicle became airborne upon impact with the steep grade preceding the CSXT tracks and his vehicle landed on top of Wolff's, tearing away the top of Wolff's vehicle. Wolff miraculously

survived the accident, but suffered irreparable brain damage.

Ironically, Zamecnik and his passenger, Jackie Dale Gaddy, had become intoxicated while playing at Wolff's employer, the Bayou Caddy's Jubilee Casino, prior to the accident. Zamecnik and Gaddy arrived at the Jubilee Casino between 10 a.m. and noon on May 29. It was only Zamecnik's second visit to a casino. The first was the night before.

Initially, Zamecnik ordered and paid for a beer. After wandering around the casino for about 20 minutes he and his partner gravitated to the craps table. Complaining of how the beer had affected his stomach, Zamecnik decided to order a sweet concoction from the cocktail server. The server suggested a number of different drinks, including a Long Island Iced Tea, which he chose. He had consumed only one or two in his entire life prior to this encounter. Under questioning, he claimed that he did not know the recipe and assumed it contained a shot of liquor, sugar, and tea. Zamecnik's testimony given at his deposition made it very clear that he was not by anyone's definition a cosmopolitan drinker.

It was conservatively estimated that Zamecnik was delivered four Long Island Iced Teas over the next three hours. He never placed another order for a drink during his entire stay at the craps table, but the server continued to supply additional Long Island Iced Teas. He stated that he often had one to two drinks in front of

him at once and was rewarding this service with \$5 tokens on almost every round. Conservatively, it was estimated by Dr. William Brady, the plaintiff's toxicologist, that he had consumed an equivalent of at least 15 ounces of 80 proof liquor during his visit. His blood alcohol was twice the legal limit when taken after the accident.

At the end of his session at the craps table, Zamecnik left with his partner for his unintended engagement with Wolff. He stated that several employees saw him as he proceeded to his car in his intoxicated condition. He even admitted that he removed his boots at the front door of the casino and carried them through the parking lot to his vehicle. But the spectacle of this intoxicated gentleman wandering the parking lot in his stocking feet looking for his vehicle evidently did not raise any suspicions.

Large settlements are common

The case was filed in U.S. District Court, Southern District of Mississippi, because CSX Transportation, Inc. and Waveland, Mississippi, were named as co-defendants. The grade at the railroad crossing was deemed to be incorrectly designed by the railroad and the signs at the crossing were obscured by vegetation, thus obscuring Zamecnik's vision of the crossing and Wolff's automobile. Wolff, his wife, and three small children received a pre-trial settlement of \$5,125,000.

This case is an instance of third-party liability that resulted

in a tremendously large settlement that could have either been prevented or mitigated. Unfortunately, it is not an isolated case. There have been a significant number of other similar cases involving casino complimentary drinks that have been settled out of court for undisclosed sums. The agreements reached in many of these settlements often prevent either party from publication or discussion of the facts of the cases.

Liability can be limited

Casino properties do have a model which they might follow to reduce the likelihood of similar incidents taking place in their establishments.

The first defense for any property is to practice due diligence with reference to all applicable city, county, and state laws. Nothing should appear in training manuals, statements of policy, or any other written document that subverts any applicable alcohol beverage control laws. Furthermore, all orientation and training meetings or workshops should reflect those applicable ordinances and laws. Third, all directives and instructions by management should also reflect these laws. It only takes one or two employees to testify that management demanded that patrons be served until they fell off their blackjack stools, to place doubt in a jury's mind. It is also a wise idea to have the property's council review all manuals and policy statements to see if there is anything that appears in print that

could be construed to be in disagreement with applicable laws.

In the case of Mississippi, the law clearly empowers the server with the authority and responsibility to cease service to an intoxicated customer. In a review of one employee handbook of a casino property in that state, the manual clearly stated that only the casino manager had the right to cut off a customer. If such a manual were to be subpoenaed by a plaintiff, it may well have provided a prima facie case against a property.

A reputable server intervention program should be included for all employees, including beverage personnel, security, casino personnel who are authorized to request cocktails for customers, and auto valet personnel. Before the car keys are handed over to a customer who is intoxicated, the house should intervene, and sometimes the best, and last, line of defense is the auto valet attendant. There are several good programs available from the National Restaurant Association, the American Hotel & Motel Association, and, of course, Techniques of Alcohol Management (TAM) and Training for Intervention Procedures for Servers of Alcohol (TIPS).

Discussions at the executive level in the organization should include the effect the intoxicated person has on the company's business from a consumer, public relations, community relations, employee relations, and legal perspective. For any intervention program to be truly effective, it takes the com-

mitment of top management. At one of the largest hotel/casinos in the world, all of the company's top executives completed the server intervention course at the behest of the president, who also participated. The purpose was to demonstrate to all within the organization top management's commitment to keep their patrons from imbibing too much. Drunks, even in a casino or bar, are simply not good for business.

There are also numerous operational tactics that casinos can employ to help minimize liability as follows:

- Limit drink sizes to three fourths of an ounce for complimentary highballs and one ounce for cocktails and all types of multiple liquor drinks.
- Refuse to serve doubles as complimentary drinks and limit the sale of your more potent drinks, e.g., "Limit of One to a Customer."
- Never serve a customer two drinks at once and always clear the old drink when delivering the new order.
- Measure all drinks, preferably with an electronic dispensing gun; a number of casinos outside Nevada were observed free pouring their drinks.
- Use appropriate glassware; a number of smaller operations

use plastic glasses and will typically use only one size. When a nine-ounce tumbler is used to deliver a straight shot of liquor, whether it's on the rocks or straight up, a bartender will often double or triple the portion of the drink to make it look ample.

- Serve a six or eight ounce glass of beer and never serve the bottle when serving complimentary drinks.
- Slow service to customers who are drinking too fast; train cocktail servers to avoid or minimize their presence with these patrons.
- Provide alternative transportation, e.g., cab rides or lodging, to those who have been over served.
- Establish a communication system to alert the pit, security, and other servers if a suspect customer is spotted; do not wait for the situation to magnify.
- Although the house cannot detain a customer, security should inform the police and provide a description of the individual and the automobile if a patron insists on driving away after having been warned.

It is the responsibility of the front line supervisor to continually reinforce the message to line

employees that the house does not want to bring customers to the point of intoxication, nor does it expect them to serve anyone who is already intoxicated. Ultimately, these tactics cannot be expected to prevent all incidents of intoxication, nor will it prevent the possibility that the house may end up in civil court on a third-party liability claim, but their adoption will make such instances a rarity and, perhaps, an acceptable calculated risk. It is far better to manage a risk than to ignore it and, thereby, be managed by the risk.

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¹⁵ See *Hinegardner*, supra.

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Larry D. Strate is an associate professor in the College of Business and **Thomas J.A. Jones** is an associate professor and chairman of the Department of Hotel Management, University of Nevada, Las Vegas.

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