

Issues that can cause Problem Bars – A view from the Eye of a Hurricane

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I am writing this article from the imposed quarantine of my home office. We are witnessing the almost overnight shutdown of the United States' hospitality industry that in 2019 employed an estimated 16.78 million persons¹. Not since the passage of the 18th Amendment and the subsequent beginning of Prohibition on January 17th, 1920, has this industry segment undergone such a seismic shift.

Today we are all waiting for the National emergency created by the virus pandemic COVID-19 to run its course and allow for the re-start of this massive economic engine. It is in this context (that of being in the eye of an economic hurricane) that I consider issues that will, as it has in the past, affect the on-premise retail alcohol industry as it re-starts and seeks to re-gain profitability.

HISTORY - Alcohol is a highly regulated industry, governed primarily by the individual states through the authority granted to them by ratification of the 21st Amendment of the US Constitution on December 5, 1933. In the ensuing eighty-six years, the United States Supreme Court has ruled on various alcohol related issues created by the inconsistencies between the Constitution's commerce clause and the states' rights to regulate alcoholic beverage manufacture, distribution, sale and consumption. The Court has generally upheld the states' rights to promulgate laws and regulations that promote the health, safety and welfare of the public.

While each of the fifty states (and the District of Columbia) have established their own alcohol regulatory scheme, there are three general commonalities that tend to transcend state borders. They are:

- Alcohol is a prohibited product, unless manufactured, distributed and sold by either state entities or private businesses regulated and licensed by the state. As a businessman operating within this regulated industry, he/she must abide by the laws and regulations under pain of criminal prosecution, and/or the administrative suspension or revocation of his/her license to operate. This means they must seek to maximize profits while operating within the confines of the regulatory scheme. The license holder (licensee) becomes BOTH an owner of a for profit business and a gatekeeper who enforces the laws and regulations. The two most universal restrictions are:
- The retail sale of alcoholic beverages to a person under the legal age (PULA) to purchase is prohibited. Such a sale could result in criminal charges, the suspension or revocation of the license to operate and, where injuries or damages result, civil liability.
- The retail sale of alcoholic beverages is prohibited to a person, who at the time of service, exhibited signs of intoxication.²

¹ <https://www.statista.com/statistics/978503/hospitality-industry-employees-us/>

² States use different terminology such as: visible intoxication; obvious intoxication; apparent intoxication; actual intoxication; and, signs of intoxication. All the terms describe behavior that fall into three broad categories: (1) decreased inhibitions; (2) psychomotor impairment; and, (3) cognitive impairment (Brick- 2017)

The inattention by the licensee, their management and staff to these Gatekeeping responsibilities can create a problem bar – a licensed retail on-premise alcohol establishment whose business practices fall below the standards established by the regulatory scheme and thereby create dangerous conditions adversely affecting the health, safety and welfare of the public.

Underage Patrons (PULA) – I was once told by a Prosecutor “that underage drinkers are like cockroaches. If you see one or two, you probably have a hundred patronizing your business.”

All retail Licensees are required to take reasonable measures to detect PULAs and prevent them from purchasing, possessing or consuming alcoholic beverages on the licensed premise. This gatekeeping function requires house policies and procedures to ensure staff diligence and consistency in the identification of potential underage patrons, the request to produce acceptable identification and the careful examination of the identification and patron.

This gatekeeping function is not just for the staff assigned to the door. All the staff, from the licensee, the management, the bartenders, the service staff and the security are responsible for the implementation of PULA detection procedures. It is okay for a youthful patron to be “carded” by the staff multiple times during a visit – in fact, such diligence is advisable. A well-trained staff member can place the patron at ease while making the point that the establishment does not tolerate nor welcome PULAs. When effectively implemented, the establishment quickly develops the reputation that it is not the place to go and attempt to purchase alcohol if you are underage.

Usually, state requirements limit acceptable identification to:

- A currently valid state driver’s license, or in some states a valid state identification card
- A valid passport
- A military identification

Any other type of identification is unacceptable.

When checking identification, the staff should examine:³

- Date of birth
- Date of expiration
- The embedded government seal / hologram
- Photo – (is it the person you are examining)
- Signature
- Issuing Authority

The staff should always request that the guest remove the identification from a wallet. Well run establishments encourage their staff to question the patron about the information on the identification. Questions such as: “I see you live in Podunk. My best friend is from Podunk. What high school did you attend? When did you graduate?” can frequently trip up a nervous person pretending to be older than they are. Finally, if your state recommends an age verification scanner, swipe the card through the device. If the establishment has a state provided gaming or lottery terminal with a gaming/lottery age

³ TIPs (Training for Intervention Procedures) On-Premise training, Health Communications, Inc. Arlington, VA

verification feature, use it for alcohol age verification. This establishes a reasonable practice using state supplied equipment.

The absolute policy must be: When in doubt, don't allow the person to purchase or consume alcohol on the licensed premise.

Since the mid-2000s, criminal elements, often from Eastern Asia, produce and sell almost undetectable counterfeit driver's licenses via the internet, the dark web and other sources. These sites are well known on almost any college campus in the United States. The counterfeit licenses will contain the actual photograph of the holder and are almost impossible to detect as bogus. The counterfeit license will scan and to the casual observer look genuine. If, however, the counterfeit license is examined by law enforcement, and compared to the information contained in Department of Motor Vehicle databases, the query will result in a "no record found" since the date of birth has been altered. Generally, an alcohol establishment does not have access to restricted government databases, so the establishment must rely on the reasonable diligence of its staff to verify.

Over Service of Patrons – In most states it is prohibited by the regulatory scheme for an establishment to sell or serve alcohol to any patron who, at the time of the sale or service, demonstrated observed abnormalities associated with alcohol intoxication. The service staff are not police officers trained to conduct scientifically validated examinations to determine a greater than not probability of intoxication. Nor does the staff have the legal authority, or quite frankly the knowhow, to require patrons to participate in a standardized field sobriety test. This simplifies the standard of care to that of a reasonable and prudent person whose observations and/or interactions with the subject should identify the abnormalities association with intoxication.

This gatekeeping function relies on the knowledge and diligence of the establishment's staff. The conflict arises when the staff that the licensee and the state are relying on to prevent over service rely principally on monetary tips from the patrons purchasing and consuming the alcoholic beverages. This creates a disincentive to "cutting someone off" at an appropriate time, because patrons who are cut off and ejected almost never leave tips.

A reasonable and prudent policy should require that the establishment compensate the affected staff fifteen percent of the ejected patron's tab. This, in part, demonstrates the establishment's efforts to prevent the over service of alcohol.

The Transforming Restaurant - Some restaurant/bar establishments seek to maximize profits by transforming from a restaurant into a nightclub around 10PM and then staying open until last call. This transformation flips the percentage of revenue from 60%-80%: food and 20%-40% alcohol during restaurant times to 80%-100%: alcohol and 0%-20% food during the time as a nightclub.

In the transformation, tables and chairs get moved to the side of the room opening a dance floor. This reduces the available seating and increases standing capacity.

A band or DJ are often hired and frequently set up a sound system that is as loud as a jet engine and equipped with a bone jarring mega bass.

Sometimes portable bars are wheeled out of storage to provide additional sale and service points. The portable bars are frequently placed "near an electrical outlet" without regard to fire code entrance /

egress requirements, the ability of bar backs to service the bar or the proper lighting to allow for interaction of customers and staff.

The number of waiters/waitresses usually decrease. The number of bartenders and bar backs usually increase. The wait staff will frequently transform from an appropriate restaurant uniform into something a bit more provocative.

Security staff must be dramatically increased to perform duties not normally associated with a restaurant. For example:

- Increased foot traffic at the entrance that must be evaluated for suitability to enter,
 - Determination if the patron is of legal age to consume alcohol?
 - Determination if the patron is exhibiting indicators of intoxication attributable to alcohol or drug use?
 - Identification and deterrence of potential criminal elements (e.g, prohibiting the display of gang colors, motorcycle gang jackets, scanning for concealed weapons, etc.)
 - Determination if the patron has been banned from entering?
 - Collection of a cover charge
 - Identification of any exiting patrons who exhibit signs of intoxication and take appropriate action.
- Interior security
 - Observe the patrons to detect, respond to and defuse potential problems including proper ejection from the premise
 - Coordinate with service staff in identifying patrons exhibiting signs of intoxication and handle the ejection from the premise
 - Detect potential underage patrons who may have made it through the front door security and eject if necessary
 - Identify and coordinate with service staff to promptly remove empty bottles from patron areas and clean up any spills
 - Coordinate with service staff and all other security to safely dismiss patrons at the close of business. Ensure that all patrons have exited the premise.
 - Coordinate with police, fire or EMS in response to an on-premise emergency
- Exterior security
 - Coordinate with other security in the proper ejection of any patrons
 - Maintain order of persons in line waiting to enter.
 - Maintain order of patrons exiting the premise and leaving the area immediately around the premise
 - Ordering a taxi or ride sharing service and/or assuring safe rides

The business plan for offered services, regulatory compliance proper staffing and profitability are very different between the restaurant and the nightclub. In addition, the business activities and their impact on the surrounding neighborhood are dramatically different. While restaurants often enhance a neighborhood, a nightclub that has not factored into its business plan the impact its operations will have on its neighbors is often a catalyst of nuisance bar complaints. The establishment has modified its original business plan of primarily a restaurant that provides alcoholic beverages during a meal to one where the goal is to maximize its profit through the sale of high margin alcohol during the remaining

hours until mandated closing - what could possibly go wrong? Such a practice requires that the licensee and their management are diligent in effectively addressing the differences in business models in order to remain compliant with the regulatory scheme and a beneficial neighborhood business.

Promoters, Bottle Service - The term “club promoter” describes an independent contractor, (single person or company) hired by a nightclub to promote events, parties, concerts, gatherings, celebrity appearances and more. This person or entity is compensated: per head, by door percentages (cover-charge), revenue sharing, or perks and benefits. The bottom line, the more people in the door- the more money to the promoter.

Promoters are infrequently licensed by the alcohol regulatory body, often not registered or licensed businesses. They have historically been accused of promoting prohibited activities (e.g., beer pong drinking games, Jell-O shot consumption contests or girls gone wild contests). The promoter has little ability or desire to ensure that the crowd they draw to the establishment is, for example, the legal age to consume alcohol or do not over-indulge. Some promoters cater to specific gang affiliations, and the crowds they draw have proclivities of violence to outsiders.

An establishment that uses the services of a promoter must never relinquish to them any segment of control over the operation of the business. To do so often results in administrative and/or civil tort exposure against the licensee in addition to long term damage to neighborhood relations.

Shot Girls – Are independent contractors, frequently hired by nightclubs and/or adult entertainment venues. They are frequently compensated only upon the number of shots they sell to patrons and the tips they receive. Frequently, they have not received industry best practice training to detect underage and over-served patrons. And, based upon their compensation, have little interest in the licensee’s gatekeeping responsibilities. All too often the shot girls are allowed by the licensee to act outside of the regulatory scheme to prevent the service of alcohol to underage and patrons who exhibit signs of intoxication., such as convincing the patron to purchase multiple shots, or buying a shot for her (such shot usually do not contain alcohol). However, the licensee is ultimately responsible for the actions of these folks as they ply alcohol to patrons on the licensed premise.

In the post COVID-19 shutdown world, the significant new business practices will revolve around the mandated safety issues of serving patrons during a pandemic. The issues I outlined must still be considered in the establishment’s business model and reasonable, prudent steps be incorporated to prevent their occurrence. There is no doubt the great re-start will try the ingenuity and resourcefulness of the hospitality industry. I look forward to returning and toasting your success.

About the author:

John Cocklin enjoyed a thirty-four-year law enforcement career with the Office of the New Jersey Attorney General – twenty-two as a detective, Lieutenant, Deputy Chief and Chief with the office’s Division of Criminal Justice and twelve as Chief Investigator with the office’s Division of Alcoholic Beverage Control (the State alcohol regulatory and enforcement agency in New Jersey) .

As Chief Investigator for the New Jersey Division of Alcoholic Beverage Control (NJABC) Mr. Cocklin was involved in the supervision of over 17,000 investigative activities and regulatory oversight of

more than 10,000 businesses licensed to manufacture, distribute, sell or serve alcoholic beverages. As a member of the NJABC executive staff, he was involved in the State's alcoholic beverage administrative rule making process. Mr. Cocklin received an Exceptional Service Award from the New Jersey Attorney General for his work in the NJABC's Last Drink Initiative, which collected information from more than 530 municipal, county and state law enforcement agencies regarding the location of a person's last drink before they were arrested for driving while impaired. Data were used to identify patterns of customer over-service at retail alcohol establishments

John Cocklin's twenty-two-year tenure with the New Jersey Attorney General's Division of Criminal Justice culminated in his promotion to Chief of Detectives. Mr. Cocklin had overall supervisory responsibility for 400 Detectives and Investigators assigned to various criminal investigation units in the Division of Criminal Justice (NJDCJ), the Office of the Insurance Fraud Prosecutor, and the Office of the State Medical Examiner. He was a commanding member of a team of NJDCJ, State Police Detectives, and Deputy Attorneys General that established the first Statewide Attorney General's [Police] Shooting Response Team. As a Deputy Chief, he commanded the Division's Internal Affairs unit and the Prosecutor's Supervisory Bureau involving the supervision and review of criminal conduct, non-criminal professional conduct, use of force, and code of ethics violations involving the 3,800 investigative and prosecutorial personnel of the NJDCJ, New Jersey's 21 county prosecutor's offices and the New Jersey Police Training Commission authorized police training academies. As a detective, John was assigned to the Division's Organized Crime and Racketeering Bureau, Statewide Narcotics Task Force, Economic Crimes Bureau and Medicaid Fraud Bureau.

For the past several years Mr. Cocklin has been a much sought after expert witness for both Plaintiff and Defense Counsel engaged in Dram Shop and other alcohol-related litigation. Most recently, Mr. Cocklin has worked with a team of technical experts employed by Exigent Forensic Consulting #Exigent-Forensics and @JohnCocklin

Mr. Cocklin holds a Bachelor of Science in Criminal Justice, a Bachelor of Science in Accounting and a Master of Business Administration. He is a Certified New Jersey Public Manager and a twenty-five-year certified New Jersey police instructor. He held additional certifications from the New Jersey Police Training Commission as a Firearms Instructor, Subgun Instructor and Rangemaster. John is a National Rifle Association-certified Range Safety Officer.