Defining the risk of liability

by James E. Peters

Risk assessment can be preventive (pre-incident) or reactive (post-incident) but the process is the same.

ILLUSTRATION BY KIM MAENAK

Just as a savvy restaurateur would not invest thousands of dollars in a new piece of equipment without evaluating the need or studying alternatives, a similar process is necessary for the development of a comprehensive responsible hospitality program. Insurance companies, legislators, regulatory agencies, and juries in dram shop lawsuit cases are beginning to look beyond server training, and are reviewing other business practices in determining negligence. Self-assessment *before* a problem develops can be done at a minimal cost; once a lawsuit is filed or an insurance policy cancelled, the costs escalate substantially.

In recent months, how to define 'risk of liability' is a question of concern to owners and managers, insurance agents, legislators, regulatory agencies, the media, and attorneys involved in dram shop lawsuits. Before a process of 'risk assessment' can begin, it is necessary to define the outcomes which create the risk. In general, three areas need be evaluated to determine liability: Risk of selling alcohol to a minor, risk of

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selling alcohol to an intoxicated person, and practices which allow or encourage excessive alcohol use.

Whether the purpose of the assessment is *preventive* (defining standards for obtaining insurance, drafting new legislation, adapting to changes in the marketplace, or establishing a responsible practices defense) or *reactive* (developing or defending a dram shop lawsuit), the process is the same. Gather information on business practices and focus on four general categories:

• Personnel: recruiting, selection, training, job descriptions, supervision, compensation, and written policies and procedures.

• Marketing: advertising, promotions, food to beverage sales ratios, and availability and promotion of alternative beverages and transportation.

• Community: location, access to transportation, number of alcohol serving establishments, and number and type of alternative activities.

• Environment: type of clientele (transient versus regulars, professional, working class, or family, age, sex, culture, and single versus group mix); decor; seating arrangements; cleanliness and orderliness; house policies on dress codes, age identification, and seating limits; and staff attitudes and teamwork.

With this information, business practices are evaluated within the context of the legal and regulatory system of the state or city, the standards for the community, and the standards for the industry. To do this, ask following questions:

Does the establishment have practices for recruiting employees who are responsible, experienced, and knowledgeable of the law and their responsibilities in serving alcohol and food? Are references required? Are employee records maintained?

Are employees properly trained and supervised, with written policies and procedures, regular staff meetings, and the necessary support for interventions with problem customers?

Are employees adequately compensated relative to the community standards? Are there economic incentives for responsible service and the promotion of food and alternative beverages or are employees economically discouraged by loss of income or status when an intervention is necessary? Do employees (staff or management) drink while on duty? What are policies regarding employees known to have problems?

Does management maintain adequate records of food to beverage sales ratio, including a break-down by alcohol and nonalcohol beverages, time of day, and check averages (drinks as well as dollar amounts)? What steps are taken to change averages in order to promote food and alternatives? Are staff informed as to numbers of drinks required for an average person to become intoxicated?

It is necessary to produce as much congruent documentation as possible.

Are policies created based upon clientele (i.e., strict age identification for under 21-year-old clientele, alternative transportation for suburban locations, etc.)? How are policies developed, implemented and enforced? What penalties exist for violation of policies?

Does management become involved in community activities to keep informed about local citizens' concerns? Is there a local trade association as well as a state association, and what standards do they recommend? Does the establishment belong to these associations and adhere to these standards?

Do advertising and promotions emphasize drinking (i.e., two-for-one specials, contests, etc.) or hospitality (service, quality, entertainment, food, etc.)?

Do the service personnel display confidence and control in greeting, seating, order taking, service, and cleanliness? Is there teamwork and cooperation among staff? Are customers made to feel welcome, respected, and safe?

How are customers informed about policies? What are standard procedures for intervention? What records are kept? How is the customer dealt with in the future? When are police called? What are your relationships with the police and regulatory agencies?

There are two methods for gathering this information. In a 'pre-incident' assessment questionnaires, interviews and site observations can be administered. A 'post-incident' (lawsuit) assessment usually involves depositions, investigative reports, and witness testimony.

In either case, all levels of the organization are involved, including owners, managers, and staff. It is necessary to produce as much documentary evidence as possible; all information will be evaluated.

During the past year, many establishments have sent their staff to alcohol awareness programs. Although a positive step in the proper direction, staff participation alone will not be meaningful unless there is documentation of participation, the organization providing the training impresses the jury as being credible, and recommendations of the training are put into practice.

Looming over the horizon of the dram shop lawsuit wave are other social, legal, and regulatory obligations which will impact the hospitality industry. The federal sanitation certification program, regulations on smoking, truth-in-menu, and pressure to change labor practices must be dealt with. Policies and practices must be developed which satisfy the concerns of the public while fulfilling the need to maintain a profitable business. Service personnel need to be trained in 'hospitality skills' as well as in understanding their social and legal obligations in serving food and beverage alcohol. But most importantly, they need to be provided with the environment in which to carry-out their basic function—to satisfy the customer. ☐

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