

# IN-HOUSE TEXAS

## AVOIDING DRAM SHOP LIABILITY, NAVIGATING THE SAFE HARBOR



by DEWEY BRACKIN

Civil and administrative liability issues related to the sale and consumption of alcoholic beverages are paramount to Texas Alcoholic Beverage Commission (TABC) permit-holders. In passing the Dram Shop Act, chapter two of the Texas Alcoholic Beverage Code, the Texas Legislature intended to provide the exclusive remedy for liability resulting from injuries caused by an alcoholic beverage permit-holder's negligence in serving a person over 17 years of age.

Under the act, providers of alcoholic beverages may be civilly liable and subject to administrative sanctions by the TABC for serving persons who are so obviously intoxicated that they are clearly a danger to themselves or others. The code also provides for separate administrative sanctions to alcoholic beverage permit-holders who serve patrons who do not have the full use of their mental or physical faculties. The above standards are objective, based on a reasonably prudent server in a similar situation. The provider does not have to actually view the apparent intoxication, as this would encourage a server to turn a blind eye to his patrons' intoxication.

Fortunately for prudent general counsel of bars, restaurants, hotels, nightclubs, and convenience and grocery stores, the code (§106.14) provides a "safe harbor" from civil liability and administrative sanction due to the actions of negligent employees. If permit-holders can affirmatively show they follow a few simple requirements involving employee training, they can avoid liability under the code.

The TABC certifies Seller Training Schools, similar to the familiar concept of defensive driving classes, which bartenders, waiters, waitresses and management can attend. These schools teach the various signs of intoxication, prudent serving methods and tactics to deal with customers who have become or arrive intoxicated on a licensed premise. The TABC Web site at [www.tabc.state.tx.us](http://www.tabc.state.tx.us) provides a list of the schools, including some with online offerings. Larger permit-holders can also become certified to conduct their own in-house classes.

The first step in navigating the safe harbor is for alcoholic beverage permit-holders to require all employees who sell or serve to attend a TABC-certified school. While the plain wording of the statute requires all employees to be seller-trained, the courts and the TABC in practice have only looked to those employees who sell or serve alcoholic beverages. Traditionally, cooks, busboys, bookkeepers and other staff have not been required to attend the seller-training courses. However, TABC administrative rulings have held that managers who occasionally help behind the bar must also attend the classes for the safe harbor to apply.

The TABC, by rule, gives a 30-day grace period for requiring new employees to become certified. However, for the safe harbor to apply, the code also requires the actual completion of the course by the employee. So, if a new employee serves alcoholic beverages to an intoxicated person during her training period, the safe harbor protection is unavailable. Thus, only trained and certified employees should be allowed to serve alcoholic beverages.

Another safe harbor requirement is that the alcoholic beverage

permit-holder must show that he has not directly or indirectly encouraged his employees to serve intoxicated persons. While it is easy enough to demonstrate this — few operators blatantly instruct their employees to serve intoxicated patrons — it is much more difficult to show that one does not indirectly encourage employees to continue to serve drunks. The courts have stated that the Texas Legislature, in enacting the safe harbor provisions, did not intend that an employer could require attendance of the training program to avoid liability but then ignore the actions of its "trained" employees.

In practice, lack of indirect encouragement can typically be demonstrated when an establishment has, and consistently enforces, strict policies and procedures regarding the sale and service of alcoholic beverages to intoxicated persons. It is advisable that these policies be signed and acknowledged by each employee and that a copy be placed in each employee's personnel file. Likewise, management should hold regularly scheduled meetings to reinforce the policies and procedures related to intoxicated persons.

It is also important to prominently post the establishment's policies and procedures regarding serving intoxicated patrons. The TABC has passed a rule which creates the presumption that, without this, the permit-holder is indirectly encouraging sales to drunks.

Be aware that the TABC rules create a prima facie case of "indirect encouragement" if a provider violates the law regarding serving to intoxicated persons more than two times in a consecutive 12-month period. This is based on the idea that there must be some, shall we say, wink, wink, nudge, nudge, by management when repeat offenses occur in a relatively short time. The TABC also has mandated by rule that seller/server certifications be continuously updated every two years for the safe harbor to apply. Thus, management should enact a tickler system whereby each employee's certification dates are monitored to ensure no lapse in certification.

No published opinions address the interplay between the TABC rules, which clearly apply in the administrative arena, and their application in a civil Dram Shop suit. Certainly the plaintiffs bar will argue that failure to follow the TABC rules relating to seller/server training is a per se failure to meet the affirmative requirements of the safe harbor in the civil arena.

By following the procedures described above, general counsel who advise providers of alcoholic beverages may navigate their clients into a safe harbor, thereby avoiding exposure to Dram Shop suits and administrative sanctions, based on the negligent actions of their employees who may serve intoxicated patrons.

*Dewey Brackin is an attorney with Gardere Wynne Sewell in Austin. He is a former staff attorney for the Texas Alcoholic Beverage Commission and former assistant attorney general for Texas.*

This article is reprinted with permission from the March 7, 2005 issue of *In-House Texas*. ©Texas Lawyer.

For subscription information, contact: **Texas Lawyer**

1412 Main Street, Suite 1300, Dallas, TX 75202 • 214-744-7701 • 800-456-5484 ext. 701 • [law.com/texas](http://law.com/texas)