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The Defense Perspective: Investigation, Discovery and Trial Tactics

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§ 4.01 INTRODUCTION

In any dram shop action, a prompt investigation should be conducted to elicit the facts of the case. Many individuals employed in the alcohol service industry are inherently transient and have short-term employment with taverns, nightclubs and restaurants. Accordingly, an expedited investigation should glean the social security number, date of birth and other information which will facilitate locating any alleged employee involved in the event that the employee moves from the area. This will assist in obtaining and preserving favorable trial testimony.

The fundamental objective of an investigation in a liquor liability case should focus on determining the facts regarding the incident in an attempt to establish factors other than intoxication as the cause of the accident such as: weather conditions, road conditions, another driver or defects in the motor vehicle. Furthermore, if defense counsel can prove that the tortfeasor consumed alcoholic beverages in his vehicle or at another establishment, especially after frequenting your client's establishment, this should be pursued aggressively. Moreover, a listing of all serving establishments and liquor stores in the area at the time of the incident should be compiled.
Obviously, the imbibers consumption of alcoholic beverages at other taverns, if it is to be presented to a jury, should be done where the tortfeasor consumed alcoholic beverages at a bar subsequent to frequenting the Defendant tavern. If the tortfeasor consumed alcoholic beverages prior to frequenting your client’s tavern, defense counsel is confronted with a dilemma. Naturally, defense counsel will argue that the imbibers was not visibly intoxicated at his/her client’s tavern. If defense counsel files a Third-Party Complaint versus a tavern ("first tavern") where the imbibers consumed alcohol prior to his client’s tavern ("second tavern"), defense counsel must proceed with extreme caution so as not to prove the Plaintiffs case that the imbibers was visibly intoxicated while at both establishments. If the imbibers was intoxicated at the first tavern, one would assume that the imbibers was more intoxicated at the second tavern provided that there was no significant lapse in time between the imbibers visits to the two establishments. However, dram shop law imposes very specific burdens of proof that focus on notice to the serving establishment prior to service of the last alcoholic beverage. This time frame should be focused on very closely. Most jurisdictions require that tortfeasor demonstrate visible signs of intoxication, so as to notify the tavern that the tortfeasor is intoxicated. (For further discussion, see § 4.04 infra.). The "visible signs" requirement may not be necessary in instances where the tortfeasor is a minor.

§ 4.02 INSURANCE COVERAGE ISSUES

In dram shop litigation, the availability of insurance coverage is a pivotal issue to all parties. From the defense perspective, insurance coverage is significant because an insurer will defend and indemnify the tavern for a settlement or judgment up to the limits of the applicable policy limits. From a plaintiffs standpoint, lack of a dram shop policy may make the serving establishment judgment proof.

The existence or absence of liquor liability coverage will strategically govern both the prosecution and the defense of a dram shop action. Taverns, nightclubs and restaurants may carry two types of applicable insurance, general liability insurance and liquor liability insurance. Typically, a commercial general liability policy provides coverage for general negligence claims against the commercial vendor. However, most general liability policies contain an exclusion for claims arising out of the alleged negligent service of alcohol. A liquor liability insurance policy
provides coverage for liability due to bodily injury or property damage caused by the distribution, sale or serving of any alcoholic beverages at the insured premises. It is possible that the tavern, nightclub or restaurant only carries general liability insurance and not liquor liability insurance. The relevant policies must be read closely with particular attention paid to any and all exclusions. Obviously, when defending an establishment, every meritorious argument for coverage should be advanced.

Frequently, negligent security claims accompany dram shop actions. But negligent security claims do not necessarily arise out of circumstances whereby negligent service of alcohol is alleged. If such a scenario ensues, this claim should be covered by the general liability carrier. Increasingly, liquor liability carriers are affording coverage for negligent security claims as well. If a plaintiff's complaint contains multiple counts, it is necessary to examine each individual count to determine which type of insurance policy applies to which count.

Most liquor liability policies exclude coverage for assault and battery. Moreover, an assault and battery has been held not to be an "occurrence" under a liquor liability policy. Similarly, many general liability policies also decline coverage in a dram shop case for allegations of assault and battery. Accordingly, the language of any applicable insurance policies must be reviewed carefully.

§ 4.03 DEFENDING AN UNINSURED TAVERN VERSUS AN INSURED TAVERN

The existence of liquor liability insurance is obviously preferable in the defense of any dram shop action. However, taverns, nightclubs and restaurants often do not carry liquor liability insurance. The approach to defending an uninsured tavern versus an insured tavern varies significantly. An apparently defensible case may settle for "short" money where there is no insurance coverage.

Defense counsel should communicate to plaintiff's counsel, as early as possible, that there is no applicable liquor liability insurance to satisfy

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any prospective settlement or judgment. When the tavern is uninsured, it is often advisable for defense counsel to inquire of his/her client for how much he/she would be willing to settle the case. Obviously, the tavern owner must engage in cost-benefit analysis before making such a determination. If an uninsured tavern owner decides to litigate the case, defense counsel should clearly communicate to the tavern owner the anticipated costs of proceeding to trial. Typically, dram shop cases are more costly to defend than a "garden variety" negligence action. While the costs of defense in dram shop actions can vary, the range of defense costs in defending a dram shop suit usually ranges from $10,000.00 to $25,000.00.

Assuming an expedited settlement cannot be reached in the representation of an uninsured bar, defense counsel, at a minimum, should forward written discovery to the plaintiff and conduct the plaintiff's deposition. If applicable, the imbibers deposition should be done as well.

When representing an uninsured tavern, defense counsel should employ as many methods of informal discovery as possible.\(^3\) This is especially pertinent when obtaining medical records which can be obtained via a Request for Production of Documents. However, if there is any deficiency in the medical records which were produced as a result of the Request for Production of Documents and/or the Plaintiff has medical records which reflect a pre-existing condition, it is advisable to subpoena these records.

In jurisdictions that permit the attachment of liquor licenses, if the bar is uninsured, counsel may attempt to attach the tavern's liquor license to satisfy a potential judgment or a judgment. Moreover, if a judgment is obtained, plaintiff's counsel may file a motion for the sheriff to levy any cash contained at the bar on a given date. Defense counsel should also consider the possibility of the tavern filing bankruptcy in cases where liability appears clear and the plaintiff's damages are substantial. The threat of bankruptcy can also be used as a settlement tool by defense counsel.

Naturally, when the tavern, nightclub or restaurant is insured, defense counsel has greater latitude in conducting discovery. Furthermore, if there is coverage, suspect liability cases are more likely to be fully litigated. For policy reasons, insurance companies will often litigate questionable dram shop cases to discourage dram shop suits generally.

\(^3\) For a further discussion of informal discovery techniques, please see § 4.05(b)-(c).
Liability may attach to a patron of a tavern who purchases alcoholic beverages for another if that individual is later a defendant in a dram shop action.\(^4\) In *Mayknen*, a patron purchased drinks for his nephew. Under these circumstances, home owner's coverage may be an applicable insurance policy to provide coverage for the allegations in the Plaintiff's Complaint.

Depositions are the best discovery mechanism in a dram shop case where there is liquor liability coverage. In large cases, all relevant witnesses should be deposed.

§ 4.04 VISIBLE SIGNS OF INTOXICATION

In most jurisdictions, in order for the Plaintiff to prevail in a dram shop case, the Plaintiff must demonstrate that the imbibers was visibly intoxicated while served alcoholic beverages at the Defendant's tavern.\(^5\) Additionally, many jurisdictions have dram shop statutes.\(^6\) "Visible intoxication" is an extremely high standard which is greater than mere intoxication.\(^7\) Some jurisdictions require that the imbibers be visibly intoxicated at time of last service of an alcoholic beverage at the Defendant's tavern in order for the Plaintiff to prove a dram shop case.\(^8\)

The traditional visible signs of intoxication include, but are not limited to, loud or boisterous behavior, red or glassy eyes, slurred speech, and a staggered gait. In some instances, a substantial number of drinks consumed by the tortfeasor may be sufficient to establish that the server knew or should have known that an intoxicated person was being served. Through discovery, defense counsel should try to develop evidence that the imbibers did not exhibit any of these visible signs of intoxication at the tavern while served alcoholic beverages.

Often, the bartenders, cocktail waitresses, and employees of a tavern will not remember if an imbibers were on the premises on the date in question. In fact, it is frequently when the bar is initially served with a Summons and Complaint, or put on notice by its insurance company, that the bar is first apprised of a dram shop claim. However, the fact that the Defendant tavern's employees may not know or may not remember the imbibers presence on the premises, let alone any signs of intoxication, on the date in question, is solid "negative" evidence that nothing extraordinary occurred that evening. Accordingly, the tavern can argue that it was not on notice that any of its patrons were visibly intoxicated on the date in question. Further, a bar's "regular" customers should be informally surveyed to ascertain if they have any knowledge regarding the tortfeasor's presence at the Defendant tavern on the date in question. Register tapes can also prove very helpful in rebutting claims of over service.

Taverns that cater to a younger crowd, especially college-aged students, sometimes use a machine to photograph driver's licenses, which are examined at the door. Inquiries should be made at the bar whether any such machine existed on the date in question to ascertain whether any such photograph of the tortfeasor or of his license was taken on the date in question.

Defense counsel should also learn whether the tavern requires a cover charge and the cost of the cover charge. The defense counsel should also determine whether dancing is offered at the club and whether a D.J. or band was at the premises that evening. If a band played, the band members and their entourage, if any, should be interviewed.

Defense counsel should be thoroughly familiar with the interior of the bar including the location of any pool tables, dart boards, dance floors, or D.J. booths. Thus, defense counsel should conduct a site inspection/discovery meeting ("site inspection") at the tavern immediately.
Further, defense counsel should know where the bathrooms are located and the shape or shapes of any bars in the establishment. In addition to having the tavern professionally photographed at the site inspection, defense counsel should sketch the interior and exterior of the bar in preparation for depositions.

§ 4.05 INITIAL INVESTIGATION

§ 4.05 (a) Policies and Procedures of the Bar

Once an insurance company or defense counsel receives an assignment in a dram shop action, a thorough investigation should be initiated forthwith, which should include a site inspection. The site inspection should involve meeting with any tavern employees who have knowledge regarding the allegations of the underlying action.

At the site inspection, a professional photographer should be present to photograph the bar under optimal indoor lighting conditions. Frequently, at trial, photographs of a clean, well-illuminated bar convince a jury that the tavern is a clean, well run establishment and not a "dive." When the photographs are taken, one should ensure that any empty bottles or refuse are removed from the area. It is preferable to take the photographs in the morning or prior to the time that the tavern opens for business.

If the claim involves allegations of drunk driving by the tortfeasor, it is advisable to photograph the accident scene and/or vehicles involved in the accident as soon as possible. It is especially critical that defense counsel be familiar with the area not only adjacent to the bar, but the accident scene and surrounding area as well. This could potentially lead to evidence that the tortfeasor frequented another bar in the area on the date in question. Sometimes, the tortfeasor becomes intoxicated and forgets other taverns, restaurants, nightclubs or liquor stores which he/she frequented that evening. Consequently, the investigator should discreetly visit taverns, restaurants, nightclubs and liquor stores in the area and ascertain whether the tortfeasor was present at these other establishments on the date in question.

Defense counsel should familiarize himself/herself with the roads and highways in the vicinity of the accident. Additionally, defense counsel should drive the alleged route and videotape that route, if road conditions are a likely superseding or contributory cause to the accident.
This will help defense counsel determine what routes were actually being driven at the time of the accident.

At the initial site inspection, defense counsel and/or the investigator should thoroughly review the alcohol selling policies and procedures of the bar. Specifically, the following policies and procedures should be addressed:

1. What personnel are TIPS certified?
2. How often are personnel TIPS certified?
3. Do bartenders have to attend bartending school?
4. Review the job experience and alcohol selling experience of each employee.
5. Can the employees recognize and articulate the visible signs of intoxication?
6. Are the employees familiar with state law regarding the service of alcohol?
7. Do the employees monitor patrons’ alcohol consumption to prevent patrons from becoming visibly intoxicated?
8. Does the tavern have written policies governing the service of alcohol?
9. Are periodic meetings held relative to service of alcohol issues?
10. What type of continuing alcohol service training is offered by the establishment?
11. Find out details concerning the bar’s menu, including, whether bottled, cans or draft beer are sold; What brands of liquor were stocked on the date in question?
12. Does the bar free-pour, use a shot glass, a counting method, or an automatic shot glass to pour its drinks?
13. Does the tavern have a limit for the number of drinks that it will sell to a patron?
14. Are shots sewed?
15. Are exotic drinks served? Are Polynesian drinks and bowls sewed?
16. Does the tavern have a happy hour?
(17) What are the tavern's happy hour policies?
(18) Are taxis called or is transportation provided for a patron who is too intoxicated?
(19) What is the bar's policy for "shutting off" customers?
(20) Is food served at the establishment?
(21) Do patrons ever leave their keys with a valet parking or other attendant?

If credit cards are accepted at the tavern, defense counsel should gather all credit card receipts for the date in question. Typically, there will be allegations that the imbiber consumed an excessive amount of alcoholic beverages at the tavern. If these beverages were purchased with a credit card, some factual allegations can be proved or refuted by the credit card receipts. Similarly, the cash register tapes for the day should be compiled as soon as possible. If the cash register itemizes the specific type of alcoholic beverage purchased, it may be possible to determine precisely how many alcoholic beverages were sold to the tortfeasor on the date in question. The Internal Revenue Service mandates that the cash register receipts be maintained for two years. Accordingly, if the tavern does not possess the register receipts, the tavern's accountant should have possession of receipts for the previous two years.

If the tavern has written employee schedules in existence for the date in question, these should be obtained as soon as practicable. Additionally, if the tavern uses time cards for its employees, these should be obtained as well. Since the bartender(s) will be one of the most critical witnesses in the defense of this action, it is important that defense counsel meet and prepare the bartender(s) for his/her deposition testimony as soon as possible. Moreover, the bartender(s) was in the best position to make observations relative to any visible signs of intoxication which the imbiber may or may not have exhibited.

Increasingly, taverns install video cameras for security reasons as well as to monitor employee theft. Therefore, at the site inspection, find out whether the tavern had any video surveillance on the premises on the evening in question. If so, review the video as soon as possible.

Any such videos are indispensable in cases which involve allegations of negligent service of alcohol and negligent security. Possibly, the altercation in a negligent security case is captured on the video. Ideally, the video will depict that the tavern was quiet, the evening was uneventful
and that the altercation that ensued was not reasonably foreseeable. If the altercation was not reasonably foreseeable, the bar can argue that it was not on notice of the likelihood of the altercation which subsequently ensued.  

§ 4.05(b) Formal Discovery

At the site inspection, defense counsel can frame his or her answers to the Plaintiff's Interrogatories, Requests for Production of Documents and Request for Admissions. Sample Interrogatories and Requests for Production of Documents are included as Appendixes. Furthermore, defense counsel should take copious notes, so that the information conveyed during the site inspection by the tavern's employees can be used during the Plaintiff's and/or imbibers deposition.

The Plaintiff's deposition should be noticed at the nascent stages of the litigation. Once the Plaintiff's medical records, employment records and any other pertinent records are obtained, the Plaintiff's deposition should be scheduled immediately thereafter. It is preferable to subpoena these records to ensure that records are complete. Additionally, in the case of medical records, defense counsel should draft a Schedule "A" to accompany the deposition subpoena, which includes a request for the Plaintiff's medical records prior to the date of loss. Potentially, this will reveal pre-existing medical conditions and/or other valuable information. Ambulance records and emergency room records should be reviewed meticulously for potential party admissions. In cases where the tortfeasor is not the Plaintiff, i.e., an imbibers who subsequently injures the Plaintiff, the tortfeasor's deposition should be noticed quickly as well.

§ 4.05(c) Informal Discovery

Once defense counsel receives a dram shop assignment, a public records request should be forwarded to the local and state licensing authorities to determine what, if any, licensing violations that the tavern may have. Often, the liquor licensing violations are for matters unrelat-ed to the alleged negligent service of alcohol, but every effort should be made to learn of these as soon as possible into the case. At trial, a Motion

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in Limine should be filed to exclude such evidence as character evidence which is unduly prejudicial, and which does not focus on the critical issue in the case: Was the tortfeasor served alcohol while visibly intoxicated at the defendant tavern on the date in question?

If the case involves allegations of the tortfeasor driving while intoxicated, defense counsel should drive the route which the tortfeasor allegedly followed on the date in question. Observations should be made of the speed limit, plus any other taverns, restaurants, nightclubs or liquor stores in the vicinity. If so, an investigation should be made to verify whether the imbiber frequented any other taverns, restaurants or liquor stores located near the accident scene or your client's tavern.

§ 4.06 POLICE RECORDS

If the tortfeasor was criminally prosecuted for operating under the influence or other criminal offenses as a result of the alleged over service by the tavern, any police records should be subpoenaed immediately. A subpoena duces tecum to the police department should include a request for any and all BAC (Blood Alcohol Concentration) tests, photographs of the vehicle, photographs of the accident scene, and the accident report and any physical evidence obtained. A model Schedule "A" for a subpoena duces tecum to a police department is included as an Appendix.

The significance of obtaining original photographs from a police department cannot be overstated. This is especially pertinent since imbibers periodically consume alcoholic beverages in their car. These photographs will serve as powerful evidence to demonstrate that the driver/tortfeasor was drinking after he left the Defendant tavern. Defense counsel can then argue that the tavern's service of alcohol to the imbiber was not the proximate cause of the Plaintiff's injuries. Furthermore, such photographs often reveal evidence of drug use in the vehicle that is beneficial to the defense, particularly if drugs were consumed off the Defendant's premises subsequent to the imbiber's consumption of alcoholic beverages at the tavern.

After receiving the police's response to the subpoena duces tecum, the police officer(s) who were at the scene and/or completed accident reports should be deposed. It is advisable to informally interview the police officers prior to noticing their depositions.
§ 4.07 CRIMINAL PROSECUTION

If a criminal case has been filed against the tortfeasor, defense counsel should make every effort to monitor the criminal proceedings, including having an attorney attend the trial to take notes if possible. The issue whether the tortfeasor's criminal defense counsel will be cooperative or hostile to the tavern's defense counsel is contingent upon a variety of factors. Obviously, it is in the tortfeasor's interest to cooperate with the civil defense of the tavern, so that the tortfeasor can potentially avoid any civil liability, in addition to the potential criminal sanctions, which the tortfeasor faces. If possible, the tavern's defense counsel should contact the tortfeasor's criminal defense counsel immediately. Sometimes, this is not practicable because defense counsel does not receive the assignment from their insurance company until well after the underlying incident.

It can be detrimental if plaintiff's counsel contacts the tortfeasor's criminal defense counsel before the tavern's defense counsel has such an opportunity. It is not uncommon for the tortfeasor, who is typically judgment proof or without sufficient assets to cover a prospective judgment, to pay a nominal settlement to the plaintiff and obtain a release. Additionally, the tortfeasor may be required to pay restitution to the plaintiff through the criminal courts, which affords the tortfeasor another opportunity to obtain a release from civil liability from the Plaintiff.

In some jurisdictions, during the criminal prosecution, the court requires the tortfeasor to reveal the last tavern at which he consumed alcohol. Clearly, this is the type of evidence which the tavern defense counsel should seek to exclude at the civil trial.

At a minimum, defense counsel should obtain the transcript of any criminal trial related to the civil dram shop case. Obviously, securing the transcript to the criminal trial provides defense counsel "free" discovery and thereby enhances the possibility of obtaining inconsistent statements from the tortfeasor, the Plaintiff and other adverse witnesses. Defense counsel should also propound Interrogatories and conduct depositions in an attempt to further obtain inconsistent statements prior to trial.

§ 4.08 LICENSING HEARING

A liquor licensing hearing may prove hazardous for the defense of a dram shop action because of the potential introduction of evidence of a license suspension during the civil trial. Moreover, if defense counsel is retained
via a liquor liability insurance policy, the tavern may have corporate counsel defend it at the licensing hearing. It is advantageous to have defense counsel coordinate strategy with corporate counsel prior to the licensing hearing since the tavern's objectives at the licensing hearing are distinct from the tavern's goals at the civil dram shop trial. At the licensing hearing, the tavern wants to ensure no penalty or the minimal penalty and, if possible, to avoid a license suspension so that its business proceeds without interruption. The tavern must be informed of the importance of preventing visible signs of intoxication evidence from being developed at the licensing hearing that potentially could prove the plaintiff's case.

The licensing hearing poses an opportunity for the Plaintiff to obtain inconsistent statements and "free discovery" of the tavern's employees. Therefore, if a licensing hearing was held and testimony was taken of any of the tavern's employees, the licensing hearing minutes or transcript should be secured prior to any of the Defendant's employees' depositions. If possible, defense counsel in conjunction with corporate counsel should prepare the tavern's employee's testimony for the licensing hearing.

§ 4.09 EXPERTS

§ 4.09(a) Toxicologist

Defense counsel should strongly consider the possibility of retaining an expert toxicologist to testify as to the significance of the tortfeasor's BAC level. For more details concerning BAC, see Chapter 5. A toxicologist can provide invaluable insight in preparing for the imbiber's deposition. Furthermore, a toxicologist can help in locating testimony that the Plaintiff's toxicologist has offered in prior cases for impeachment purposes if the Plaintiff's toxicologist adopts a position contrary to earlier testimony on another case. Even if no BAC test was conducted, the toxicologist can review the discovery and records and formulate an opinion regarding whether the tortfeasor was visibly intoxicated while at the tavern. In addition, a toxicologist can help counsel in determining the "chain of custody" of the imbiber's blood sample and test results to determine if the BAC has any evidentiary use.

When the Plaintiff's deposition is conducted; it is critical that defense counsel ascertain the Plaintiff's height and weight at the time of
the incident. Additionally, defense counsel should obtain testimony regarding what food, if any, the Plaintiff consumed during the day and if the Plaintiff was taking any medication or narcotics at the time of the incident. Find out whether the imbiber is an "experienced" drinker, the imbiber's drinking habits and the driver's medical history. Regarding these medical issues, see chapter five.

Admission of the imbiber's BAC level may prove fatal to the tavern in a dram shop action. This is especially pertinent in jurisdictions that permit the presumption of intoxication when the imbiber's blood alcohol concentration equals or exceeds .08. Accordingly, a Motion In Limine should be filed to exclude these test results. Defense counsel should focus the jury's attention on whether the tavern violated its duty by serving a visibly intoxicated person on its premises and whether this alleged service was the proximate cause of the Plaintiff's injuries.

If the results of the BAC test are contradictory to the testimony regarding the absence of the imbiber's visible signs of intoxication, defense counsel should attempt to prevent the Plaintiff's introduction of the test results. It should be argued that the percentage of alcohol in the blood test result is not illustrative of visible intoxication in all instances. This strategy may prove more effective when the BAC is less than or equal to .14. Often, the critical inquiry is what the Plaintiff's BAC would be at time of last service of alcohol. Obviously, the higher the imbiber's BAC is, the more difficult it is to convince a jury that the imbiber was not visibly intoxicated at time of last service of alcoholic beverages at the tavern.

§ 4.09(b) Accident Reconstruction Expert

If the case involves a motor vehicle accident, serious consideration should be given to retaining an accident reconstruction expert. Obviously, if an accident reconstruction expert is to be so employed, it is preferable to secure his or her participation as early as possible in the litigation. This is especially true because skid marks are transient in nature. Moreover, the accident reconstructionist should examine any damage done to the vehicle(s) involved in the accident. The more time that elapses prior to retaining an accident reconstructionist, the greater the likelihood that this evidence will be repaired and/or removed.

§ 4.09(c) Vocational Rehabilitation Expert

In cases where the Plaintiff has sustained serious medical damages and is considering a new career path, a vocational rehabilitation expert
maybe advisable. If the vocational rehabilitation expert is used, defense counsel should ensure that all of the plaintiff’s employment records have been subpoenaed or obtained from his or her employer/former employers. Additionally, a Request for Production of Documents should be made to include the plaintiff’s tax returns, both State and Federal, for the previous five years.

§ 4.09(d) Economist

An economist may be retained if the plaintiff alleges a lost earning capacity claim to evaluate the extent and validity of the plaintiff’s lost wages claim.

§ 4.09(e) Medical Experts

As in any tort case, defense counsel should consider the possibility of retaining medical experts to conduct a medical file review, an independent medical exam of the plaintiff or to provide an expert opinion.

§ 4.10 MEDICAL RECORDS

If the insurance company is monitoring the action prior to the involvement of defense counsel, the adjuster should request all medical records from plaintiff’s counsel. If the imbibers is not the plaintiff, the imbibers medical records should be obtained if the records show the imbibers BAC level on the date in question. Medical records often contain damaging party admissions. Moreover, medical records can indicate whether the plaintiff is taking prescription drugs or consumed any drugs on the evening in question. The medical records can reveal the existence of pre-existing injuries or medical conditions. Further, obtaining all the medical records can lead to possible impeachment of witnesses at trial if they are less than forthright at their deposition.

§ 4.11 TRIAL TACTICS

§ 4.11(a) Motions In Limine

Motions in Limine should always be filed in defending a dram shop action. In every liquor liability case, defense counsel should file a Motion in Limine to exclude evidence of the tavern’s reputation (”prior bad acts”) including previous licensing violations or previous allegations of negligent service of alcohol. The thrust of the arguments to be articulated in such a motion are described in Federal Rule of Evidence 404(b).
Defense counsel should argue that prior evidence of misconduct concerning alleged negligent service of alcohol to another patron may involve substantially different circumstances which will not be relevant in establishing any credible evidence concerning whether the tavern, its agents or employees negligently served alcohol to the imbiber on the night in question. Further, it should be argued that the introduction of such evidence will address collateral issues, waste judicial time and tend to confuse and mislead the jury on a central in the case: whether the imbiber was visibly intoxicated while consuming alcohol on the Defendant's premises. A Motion in Limine to Exclude Prior Bad Acts is critical where the bar has been cited for prior licensing violations. Accordingly, it is imperative that defense counsel obtain from the local and state licensing authority any licensing violations which may have been issued to the tavern. A sample Motion in Limine to Exclude Prior Bad Acts is included in the Appendixes.

Naturally, with the exception of the Motion in Limine to Exclude Prior Bad Acts, the Motions in Limine which defense counsel should file vary from case to case. These are some of the following Motions in Limine which should be considered:

1. Motion in Limine Precluding the Introduction Regarding the Legal Limit of Intoxication;
2. Motion in Limine to Preclude the Introduction of the Results of BAC Test;
3. Motion in Limine to Exclude Plaintiff's Expert Testimony;
4. Motion in Limine to Introduce Evidence of the Plaintiff's Failure to Wear a Seatbelt; and
5. Motion in Limine to Exclude Evidence of subsequent remedial measures. (For instance, if the bartender was fired or serving policies were changed after the incident, defense counsel should argue that these issues are immaterial and irrelevant.)

§ 4.11(b) Jury Selection/Voir Dire

In jurisdictions that allow lawyers to conduct extensive voir dire, defense counsel must ensure that plaintiff's counsel limits the scope of his summary of the case to the jury and does not address public policy issues. A sample series of written voir dire questions is included in the Appendix.
The objective of voir dire in a dram shop case is to discover the jurors' attitudes about the use of alcohol. From the defense standpoint, it is preferable to select jurors who consume alcoholic beverages. Voir dire can be used to rectify any misconception, on the part of the jurors, that a tavern will serve any customer who requests to be served provided he or she is able to pay for the alcoholic beverages. Furthermore, an artful voir dire can shift the jury toward the defendant's position and demonstrate that the plaintiff's injuries were caused by someone other than the tavern.

Most prospective jurors will have hosted parties at their homes where alcohol was furnished by the homeowner. This may cause the jury to sympathize with the tavern owner. Voir dire can be used to convey to the jurors that the individual drinker should assume responsibility for his or her actions and that the drinker, rather than the defendant tavern, should be held liable.

§ 4.11(c) Opening Statement

The opening statement presents an opportunity for defense counsel to humanize the tavern and create jury sympathy for his or her position. A sample opening statement is included in the Appendix. Consequently, the owner of the tavern, nightclub or restaurant, should be introduced to the jury by defense counsel during the opening and should be present throughout the trial. Ideally, tavern owners should be accompanied by family members at trial.

The goal of the opening statement is to establish a favorable jury impression and to focus the jury's attention on the Defendant's theory of the case. Additionally, counsel should focus the jury on facts which demonstrate that the tavern did not serve the imbiber while visibly intoxicated at the Defendant's premises.

§ 4.11(d) Handling the Plaintiff on the Stand

When cross examining the plaintiff, defense counsel must be sensitive in front of the jury; an overly aggressive cross-examination is not necessarily recommended. Further, a combative cross-examination of the plaintiff can be counter-productive.

The cross-examination of the plaintiff is contingent upon whether the plaintiff is an imbiber or an "innocent" third party. If the plaintiff is an imbiber, a more aggressive approach to cross-examination is appro-
appropriate. Defense counsel should elicit testimony that emphasizes that the imbiber should assume responsibility for his or her own actions and should not be "pointing the finger" at the tavern. Jurors have little, if any, sympathy for a plaintiff who becomes intoxicated at a tavern, suffers injuries and then sues the tavern. In some jurisdictions, in order for the plaintiff to prevail at trial, a plaintiff-imbiber is held to a greater standard than a mere negligence standard. For instance, in Massachusetts, an imbiber must prove that the conduct at the bar was "willful, wanton or reckless" when the tavern served the plaintiff while visibly intoxicated.10

An "innocent" plaintiff who is injured by an imbiber creates a more favorable impression in front of the jury than does an imbiber. For example, if the plaintiff is an elderly pedestrian and was struck by the imbiber's vehicle while allegedly intoxicated, defense counsel must not attack the plaintiff.

If the plaintiff was a passenger in the imbiber's vehicle, defense counsel should argue that the passenger/plaintiff was in the best position to prevent the imbiber from operating the motor vehicle. If the plaintiff/passenger felt that the imbiber was not intoxicated and was capable of operating a motor vehicle, defense counsel should argue that the tavern similarly would not have been on notice that the imbiber was visibly intoxicated. In such a scenario, testimony should be elicited as to the passenger's familiarity with the plaintiff's drinking habits to establish that the imbiber did not demonstrate any visible signs of intoxication while served alcohol at the tavern.

§ 4.11(e) Closing Argument and Jury Instructions

If plaintiff's counsel is an experienced dram shop litigator, defense counsel should try to obtain the transcripts of other trials which plaintiff's counsel has handled, to review plaintiff's counsel's closing arguments. Often, experienced dram shop litigators will use a "formula" with specific themes and "buzz words" in their closing argument. Thorough preparation in this area can be useful in countering plaintiff's counsel closing argument.

The focus of defense counsel's closing argument should be that the plaintiff failed to demonstrate that the imbiber was visibly intoxicated

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while being served alcohol at the defendant's premises. It should be argued that the mere proof of the imbibers alleged intoxication, even if the imbibers was on the defendant's premises, is insufficient to sustain a plaintiffs verdict.

The defendant should be humanized as much as possible in front of the jury. If the tavern is a corporation, defense counsel should argue that the company is not a heartless conglomerate, but is owned and operated by regular citizens. Further, a jury instruction should be requested that corporations are entitled to the same treatment as individuals. If the tavern, nightclub or restaurant is family owned and operated, defense counsel should articulate the history of the tavern in front of the jury. Such an argument can be used to neutralize a "David versus Goliath" argument by plaintiffs counsel.

If the plaintiff is an imbibers, the theme of personal responsibility should be emphasized. Defense counsel should direct the jury's attention to the "just say no campaign" that has been pervasive in the media.

If the plaintiff is an "innocent" third party, defense counsel should inform the jury that she sympathizes with the plaintiffs injuries, but the injuries were not caused by the negligence of the tavern. Defense counsel should concisely argue that the tavern is not legally responsible for the plaintiffs injuries. Defense counsel should focus on service of the imbibers at other taverns or alternate causes of the accident.