

# CHAPTER 12

## YOUR RESPONSIBILITIES WHEN SERVING FOOD AND BEVERAGES

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“KNOW THE NUMBERS look good,” Trisha Sangus said, as she adjusted her glasses. “That’s the problem. They look too good.” It was a typical second day of the month at the hotel. That meant reviewing the prior month’s profit and loss statement. Trisha sat at her desk across from Ahmed Cantonio, the hotel’s new controller. Ahmed and Trisha had worked together for three months, and Ahmed had seen this look on the general manager’s face before. Usually, Trisha’s P&L reviews focused on expense categories that exceeded budget. This time, the focus was on food cost. Those costs were actually below the

projection Trisha and Ahmed had made at mid-month, which made Ahmed wonder all the more about Trisha’s uneasiness. Usually, expenses below budget or projection were something to celebrate, but Trisha Sangus was not celebrating.

“Are you sure you have accurately reported sales for food and beverage?” asked Trisha. Ahmed was nearly offended. He had answered the same question ten minutes ago. He was positive that all food and beverage sales had been properly recorded.

He replied, “For the month, \$273,000. I checked the numbers three times. Banquet sales of \$112,000,

restaurant sales of \$88,000, and bar sales of \$73,000. That makes \$273,000.”

“And our mid-month projection for food and beverage cost of sales?” asked Trisha.

“Well,” Ahmed began again, looking up from the P&L, “after we adjusted for the big banquet we picked up on the 22nd, we projected sales of \$275,000. Pretty close, if you ask me. Food and beverage costs combined were estimated at 28.5 percent, or \$77,800.”

“That’s true,” said Trisha, as she leaned back in her chair and stared at the ceiling. “However, I see an actual expense of only \$64,800, and that has me concerned. Did you double-check beginning and ending month inventories as I had asked?”

“Sure did,” replied Ahmed. “I know they are accurate. I even spot-checked some of the inventory counts myself. Everything on the inventory is in-house and valued correctly.”

“And total food purchases,” continued Trisha, “We haven’t omitted any invoices from our calculations?”

“No,” replied Ahmed, “I am sure we have not. My assistant, Veronica, contacted every supplier this morning. We have all the invoices. I guess the new chef is just doing a great job holding down our costs. We should be pleased.”

Trisha looked up at Ahmed. “Ahmed, I like low costs. When Jerry Mekemson was the chef here, before his retirement, we ran great food costs—always in line with my projections. I knew Jerry, and the quality he insisted we . . .”

Before she could finish, Trisha was interrupted by the telephone ringing on her desk. “Hello,” said Trisha as she picked up the receiver. “This is Trisha Sangus, how can I help you? . . . Really?” she said. “None at all? But 25 pounds of bleu? By the way, do you happen to know offhand the current price difference between Roquefort and bleu? Okay, thanks, Judy. No problem; yes, I’ll be down.”

“Well,” said Trisha as she hung up the telephone, “that was Judy down in the kitchen storeroom. I called her earlier and asked her if I could get a Cobb salad for lunch. Let’s go down to Jill’s.”

Ahmed was confused. Jill’s Tavern was one of two restaurants operated by the hotel. It was a casual, fun-style restaurant that served salads, burgers, steaks, and grilled items—very high quality, and with superb service. But it wasn’t like Trisha to leave an unsolved problem, even for lunch. In fact, she was noted for often eating lunch at her desk as she continued to work. And Judy didn’t actually work in the dining room. She received and put away the grocery orders as they were delivered to the kitchen that serviced the restaurants.

“Let’s go,” said Trisha. “A Cobb salad with fresh grilled chicken breast, California avocado slices, Roquefort cheese—makes me hungry just thinking about it,” she continued. But she had a look in her eye that told Ahmed she was thinking about more than just lunch. “I think we can have lunch and solve our mystery,” she revealed. Let’s ask the chef to eat with us, too.” Ahmed had a feeling that Trisha was going to enjoy her lunch, but he wasn’t quite sure that the new chef would.

## IN THIS CHAPTER, YOU WILL LEARN:

1. A foodservice establishment’s responsibilities, under the Uniform Commercial Code (UCC) and other laws, to serve wholesome food and beverages.
2. To apply “truth in menu” concepts to the service of food and beverage products.
3. To assess the current legal risks associated with serving alcohol.
4. To implement training programs that result in the responsible service of alcohol.

## 12.1 SERVING FOOD

People all over the world love to dine out. And when they are not dining out, Americans have increasingly begun to patronize foodservice operations that offer preprepared food they can take home to eat. In fact, 1996 was the first year that takeout occasions exceeded on-premise occasions in the U.S. foodservice industry. Whether the food is eaten in a restaurant or taken home, *Cooking for Profit* magazine estimates that U.S. restaurants post combined sales of nearly \$1 billion per day. Some experts predict that fully 75 percent of all food eaten in the United States will be preprepared by restaurants or grocery stores within the first decade of the twenty-first century.

## Uniform Commercial Code Warranty

As a hospitality manager involved with the service of food, you have a legal obligation to only sell food that is wholesome, and to deliver that food in a manner that is safe. This responsibility is mandated by the Uniform Commercial Code (UCC), as well as other state and local laws. Figure 12.1 details one section of the UCC that relates to selling safe food. When a foodservice operation sells food, there is an implied warranty that the food is *merchantable*. Simply put, a foodservice manager is required to operate his or her facility in a manner that protects guests from the possibility of *foodborne illness*, or any other injury that may be caused by consuming unwholesome food or beverages. Unfortunately, sometimes, food is served that contains something that the guest normally would not expect to find in the dish (e.g., a small stone in a serving of refried beans). The question that must be answered in these cases is whether or not the food or beverage served was “fit” for consumption.

The courts usually apply one of two different tests to determine whether a foodservice establishment is liable to a guest for any damages suffered from eating the food. (In the case of the stone found in the refried beans, the damage may consist of a broken tooth from biting down on the small stone.) One test seeks to determine whether the object is foreign to the dish or a natural component of it. If the object is foreign, then the implied warranty of merchantability (fitness) under the UCC is breached, and the foodservice operator would be held liable. If it is a natural component, the warranty would not be breached. For example, the stone in the refried beans, though commonly found in large bags of raw beans, would be considered foreign, and thus the foodservice operator would probably be held responsible. If instead the guest had broken a tooth on a piece of clamshell while enjoying a steaming bowl of New England clam chowder, the guest would probably not recover any damages under this test. The clamshell, as a natural component of clams, the court reasons, is also a natural component of clam chowder.

The foreign/natural test is slowly being replaced by the “reasonable expectation” test. This test seeks to determine whether an item could be reasonably expected by a guest to be found in the food. The clamshell situation is a perfect example of why the law (and assessing liability) can be difficult at times. Clamshells are natural parts of clams, but are they really natural components of clam chowder? Put another way, would you, as a guest, reasonably expect to find pieces of clamshell in a bowl of clam chowder that was served to you? If a judge or jury decided that it was not reasonable to expect to find a clamshell in the chowder, then the foodservice operator would be held liable. A tricky situation arises if someone orders a fish filet sandwich. As the word “filet” means boneless, a guest would not expect to find bones in the sandwich. Accordingly, if a bone were present, and the guest choked on that bone, the consequences could be substantial for the foodservice operator.

### Uniform Commercial Code: IMPLIED WARRANTY

§ 2-314.: Merchantability; Usage of Trade.

1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

#### LEGALESE

**Merchantable:** Suitable for buying and selling.

#### LEGALESE

**Foodborne illness:** Sickness or harm caused by the consumption of unsafe foods or beverages.

**Figure 12.1** Uniform Commercial Code: Implied Warranty.

## Guest Safety

To help foodservice operators prevent foodborne illness, local health departments conduct routine inspections of restaurants and other food production facilities, and may hold training or certification classes for those who handle food. It is important to know the local health department requirements that relate to food handling in your area, and to work diligently to ensure that only safe food is served in your operation. If you do not, the results can be catastrophic.

Consider the case of Kelly Kleitsch. Kelly worked long hours to establish her own successful restaurant. With much hard work and a considerable investment of capital, Kelly built the reputation of her restaurant by serving high-quality food at fair prices. When a careless member of the food preparation team forgot to refrigerate a chicken stock one night, then used the stock the next day to flavor an uncooked sauce, which was later served, several individuals became very ill. The good reputation of Kelly's restaurant disappeared overnight as the local newspapers and television stations reported how one elderly lady was hospitalized after eating at the restaurant. Customer counts plummeted, and Kelly lost her business. And that was before the lawsuit was filed on behalf of the elderly diner.

The law in this area is very clear. Restaurants will be held responsible for the illnesses suffered by their guests, if those illnesses are the direct result of consuming unwholesome food. Thus, managers must make every effort to comply with local ordinances, train staff in effective food-handling and production techniques, and document their efforts. The National Restaurant Association, and its ServSafe program, can be a great asset in managers' efforts to ensure the safety of the food they serve. ServSafe is a national educational program designed to help foodservice operators ensure food safety.

Of course, you should take all reasonable measures to ensure that the food you serve is safe and consumable by your guests. Disclosing ingredients and warning

### » ANALYZE THE SITUATION 12.1

HARRY DOLINSKI WAS THE executive chef at the Regal House hotel. One of his specialties was a hearty vegetable soup that was featured on the lunch buffet every Thursday. Pauline Guilliard and her friends decided to have lunch at the Regal House one Thursday before attending an art exhibit. Ms. Guilliard read the lighted menu at the front of the buffet line. The chef's specials, including the vegetable soup, were written on the menu with a felt-tip pen.

Ms. Guilliard selected the vegetable soup and a few other items, and consumed one full bowl of the soup. Three hours later, at the art exhibit, she suffered seizures and had difficulty breathing. It turned out that the soup contained MSG—a food additive to which she had severe reactions. Ms. Guilliard recovered, but her attorney contacted the hotel with a demand letter seeking compensation for her suffering.

The hotel's attorney replied that the soup served by the hotel was wholesome and that Ms. Guilliard's reaction to the MSG could not have been reasonably foreseen. In addition, the hotel maintained that MSG is a common seasoning in use worldwide for many years, and thus it would have been the diner's responsibility to inform the foodservice operation of any allergies or allergic reactions. As a result, the liability for Ms. Guilliard's illness was hers alone.

1. Did the hotel have an obligation (or duty as outlined in Chapter 9, “Your Responsibilities as a Hospitality Operator”) to notify guests that the soup contained MSG?
2. How do you think a jury would respond to this situation? What level of damages, if any, do you think a jury would be included to award in this case?
3. What should the chef do to avoid similar problems in the future?

guests of potential concerns is the best practice. If a potential incident does occur, however, the steps itemized in the next Legally Managing at Work feature should be taken to ensure the safety of all guests and to prevent further potential liability.

The quality of the food a restaurant serves is important, as you have seen, but how that restaurant serves its food can be just as important from a legal standpoint. Again, the UCC addresses the issue of a restaurant’s responsibility to serve food properly. As can be seen in Figure 12.2, a restaurateur is considered an expert—that is, an individual with skill and judgment—when it comes to the proper delivery of prepared food and beverages.

Not only can restaurants be found guilty of serving unwholesome food, but they can also be found liable if they serve wholesome food in an unsafe or negligent manner. Consider Terry Settles. Terry and his wife were guests at the Remington restaurant. He ordered cherries jubilee for dessert. When the server prepared the dish, a small amount of alcohol splashed out of the flambé pan and landed on the arm of Terry’s wife. As she jumped back in her chair to try and avoid the burning liquid, she

## LEGALLY MANAGING AT WORK:

### Steps to Take When a Guest Complains of Foodborne Illness

1. Document the name, address, and telephone number of the guest who complains of an illness, as well as the date and time the guest patronized your facility.
2. Document all items eaten in your facility by the guest during the visit in question.
3. Obtain the name and address of the physician treating the guest. If the guest has not contacted a physician, encourage him or her to do so.
4. Contact the physician to determine if in fact a case of foodborne illness has been diagnosed.
5. Notify the local health department immediately if a foodborne illness outbreak is confirmed, so the staff there can assist you in determining the source of the outbreak, as well as identifying affected guests and employees.
6. Evaluate and, if necessary, modify your training and certification efforts that relate to the areas involved in the incident.
7. Document your efforts, and notify your attorney or company risk manager.

**Figure 12.2** Uniform Commercial Code: General Obligation and Construction of Contract.

### **Uniform Commercial Code: GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

#### § 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

fell and severely injured her back. There is little question in this case that the restaurant will face severe penalties for the carelessness of its server.

Management should frequently review all food temperatures, serving containers, food production techniques, and delivery methods. Chipped plates and glasses or poorly washed utensils can present just as much of a legal risk as serving spoiled or unwholesome food. Some states even require restaurants to post signs disclosing the use of microwave ovens when applicable, to caution restaurant patrons who have pacemakers.

In addition, restaurants should strive to accommodate guests who ask that dishes be prepared without a specific ingredient to which they are allergic and to closely supervise the preparation of that dish. In fact, the issue of food allergies has become a topic of increasing importance in recent years. Both the federal and state governments have begun to initiate regulations for foodservice providers, focusing on preventing allergic reactions. For example, the Food Allergen Labeling and Consumer Protection Act, which became effective in 2006, requires the labeling of foods that contain major allergens, such as milk, eggs, fish, shellfish, peanuts, tree nuts, wheat, and soy. These ingredients must be disclosed, even if they are used in

## » ANALYZE THE SITUATION 12.2

PENNY MANCE WAS A single mother of three children living in an urban apartment complex. She worked as a paralegal in a downtown attorney's office. One morning, Penny was asked to come into work an hour later than her usual time. She used the opportunity to treat her three children to breakfast at a fast-food restaurant near their home. The Mance family arrived at the restaurant at 8:00 A.M. and ordered breakfast. For their beverage selections, Penny ordered hot chocolate and the children selected orange juice.

After the family sat down, Tina, Penny's six-year-old daughter, told her mother that she wanted to try the hot chocolate. The beverage had been served in a Styrofoam cup with a plastic lid. Penny replied that the chocolate was "probably too hot for her to try." This comment was overheard by several guests sitting near the Mance family. Tina reached for the chocolate anyway; her mother, while trying to pull the chocolate away, spilled it on her own hands. Penny suffered second- and third-degree burns from the hot chocolate and was forced to miss work for three weeks. Upon returning, her typing speed was severely reduced as a result of tissue scarring on her left hand.

Penny retained one of the attorneys where she worked to sue the fast-food restaurant. In court depositions later on, it was estimated that the chocolate was served at a temperature of 190 degree Fahrenheit. The restaurant's attorney claimed the chocolate was not unsafe when it was served. He pointed to the fact that Penny knew the beverage was probably too hot for the child as an indication that she was willing to accept the risk of drinking a hot beverage. In addition, the restaurant's attorney maintained that it was the child's action, not the restaurant's, which was the direct cause of the accident. Undeterred, Penny's attorney sued for damages, including medical expenses, lost wages, and a large amount for punitive damages.

1. Did the restaurant act negligently in the serving of the hot chocolate?
2. Do you think that Penny Mance was negligent? If so, how much difference, if any, do you believe that Penny's negligence would make in the size of the jury's award?
3. Whom should the restaurant manager and company look to for guidance on properly serving temperatures and techniques? Could you defend this source in court?

minimal amounts, such as a spice blend, or if used as a processing aid in the preparation of a food product, such as peanut oil and soy lectin.

States have also crafted legislation related to food allergies. Massachusetts, for example, requires restaurants to educate their staff on the issue of food allergies, and requires managers to earn certification in a food allergy training course. With the growing notoriety and outbreaks of food allergies, it is likely that more and more regulations will be passed in the future. As a manager, be sure to check with your state laws to make sure that you are in compliance with any regulations that have been, or will be, adopted by your state. Additionally, it is always a good practice to disclose ingredients that are known to cause allergic reactions so that guests can make informed choices. Be sure to train your employees about allergies and to be sensitive to guests with allergies and be patient with their inquires about menu ingredients.

If an incident occurs that involves how a food was served, rather than what was served, the manager should complete an incident report at the earliest opportunity. (Refer back to the Incident Report Form in Figure 9.2.)

## 12.2 TRUTH IN MENU LAWS

As a hospitality manager, you have a right to advertise your food and beverage products in a way that casts them in their best light. If your hamburgers contain eight ounces of ground beef, you are free to promote that attribute in your advertising, your menu, and as part of your server's verbal descriptions. You are not free, however, to misrepresent your products. To do so is a violation of what has come to be commonly known as *truth in menu laws*. These laws, which could perhaps better be described as "accuracy in menus," are designed to protect consumers from fraudulent food and beverage claims. Many foodservice operators believe that truth in menu laws are recent legislation. They are not. In fact, the federal government, as well as many local communities, have a long history of regulating food advertisement and sales, as can be seen in Figure 12.3.

### LEGALESE

**Truth in menu laws:** The collective name given to various laws and regulations that have been implemented to ensure accuracy in the wording on menus.

**Figure 12.3** Laws regulating food labeling and advertising. (See page 478 for complete figure.)

#### 2002

The Organic Foods Production Act and the National Organic Program (NOP) are intended to assure consumers that the organic foods they purchase are produced, processed, and certified to consistent national organic standards. The labeling requirements of the new program apply to raw, fresh products and processed foods that contain organic ingredients. Foods that are sold, labeled, or represented as organic will have to be produced and processed in accordance with the NOP standards.

#### 2003

To help consumers choose heart-healthy foods, the Department of Health and Human Services announces that FDA will require **food labels to include trans fat content**, the first substantive change to the nutrition facts panel on foods since the label was changed in 1993.

#### 2004

Passage of the **Food Allergy Labeling and Consumer Protection Act** requires the labeling of any food that contains a protein derived from any one of the following foods that, as a group, account for the vast majority of food allergies: peanuts, soybeans, cow's milk, eggs, fish, crustacean shellfish, tree nuts, and wheat.

### » ANALYZE THE SITUATION 12.3

JEFFERY AND LATISHA WILLIAMS arranged a fiftieth anniversary party for Latisha's parents. They reserved a private room at the Tannery, an upscale steak and seafood house located two miles from their suburban home. The Williams hosted a total of ten people. Unfortunately, the service they received from the restaurant staff was not very good. When the check arrived, Mr. Williams noticed that a 15 percent charge had been added to the total price of the bill. When he inquired about the charge, his server informed him that it was the restaurant's policy to assess a 15 percent "tip" to the bill of all parties larger than eight persons. The policy, explained the server, was not printed on the menu, but was to be verbally relayed anytime a guest made a reservation for more than eight people. Mr. Williams replied that the reservation was made by his secretary, and she mentioned no such policy when she informed Mr. Williams of the restaurant's availability.

Mr. Williams refused to pay the extra charge claiming that it should be he, not the restaurant, who determined the amount of the gratuity, if any. When the restaurant manager arrived on the scene, he informed Mr. Williams that the server had misspoken and that the extra charge was in fact a "service charge," and not a tip. Mr. Williams still refused to pay the added charge.

1. Does Mr. Williams owe the extra 15 percent to the restaurant?
2. Does it matter whether the surcharge is called a gratuity or a service charge? How would that be determined?
3. What should the restaurant do to avoid similar problems in the future?



The various truth in menu laws currently in effect run to thousands of pages and are overseen by dozens of agencies and administrative entities; thereby taking the labeling of food to much greater degrees of accuracy. Though these laws are constantly being revised, it is possible for a foodservice operator to stay up to date and in compliance with them. The method is relatively straightforward, and the key is honesty in menu claims, in regard to both the price that is charged and the food that is served.

Certainly, menus should accurately reflect the price to be charged to the customer. If one dozen oysters are to be sold for a given price, one dozen oysters should be delivered on the plate, and the price charged on the bill should match that on the menu. Likewise, if the menu price is to include a mandatory service charge or cover charge, these must be brought to the attention of the guest. If a restaurant advertises a prix fixe dinner with four courses and a choice of entrees, the guest should be told the price of the dinner, which courses are included, and the types of entrees he or she may choose from.

“Accuracy in menu” involves a great deal more than honestly and precisely stating a price. It also entails being careful when describing many food attributes, including the preparation style, ingredients, origin, portion sizes, and health benefits. Because this area is so complex, and because consumers increasingly demand more accurate information from restaurants, the National Restaurant Association (NRA) and many state associations have produced educational material designed to assist foodservice operators as they write and prepare menus. Called *A Practical Guide to the Nutrition Labeling Laws*, this publication is written specifically for the restaurant industry; it outlines everything you need to know about nutrition claims you can make for your menu items. You can secure a copy for a modest charge from the NRA. As discussed earlier, food allergies are another area of concern for hospitality operators. For more information, please visit [www.cfsan.fda.gov/~dms/wh-alrgy.html](http://www.cfsan.fda.gov/~dms/wh-alrgy.html). In addition, the federal government issues food description standards that can be of great assistance. You should pay particular attention to the following areas when you begin writing the menu for your own foodservice establishment.

## Preparation Style

Under federal law, certain food items and preparation techniques must be carried out in a very precise way, if that item or technique is to be included on a menu. In many cases, the federal government, through either the Food and Drug Administration or the U.S. Department of Agriculture, has produced guidelines for accurately describing menu items. Consider the following common items and the specificity with which their preparation style is determined by federal guidelines:

**Grilled:** Items must be grilled, not just mechanically produced with “grill marks,” then steamed before service.

**Homemade:** The product must be prepared on premises, not commercially baked.

**Fresh:** The product cannot be frozen, canned, dried, or processed.

**Breaded shrimp:** This includes only the commercial species, *Litopenaeus setiferus*. The tail portion of the shrimp of the commercial species must comprise 50 percent of the total weight of a finished product labeled “breaded shrimp.” To be labeled “lightly breaded shrimp,” the shrimp content must be 65 percent by weight of the finished product.

**Kosher-style:** A product flavored or seasoned in a particular manner; this description has no religious significance.

**Kosher:** Products that have been prepared or processed to meet the requirements of the orthodox Jewish religion.

**Baked ham:** A ham that has been heated in an oven for a specified period of time. Many brands of smoked ham are not oven-baked.

It is important that your menu accurately reflect the preparation techniques used in your kitchen, not only because the law requires you to but also to help ensure your operation's credibility with the public.

## Ingredients

Perhaps no area of menu accuracy is more important than the listing of ingredients that actually go into making up a food item. Although restaurants are not currently required to divulge their ingredient lists (recipes) to their guests, there are specific situations when the ingredients listed on a menu must precisely match those used to make the item. If, for example, an operator offers Kahlua and cream as a drink on a bar menu, the drink must be made with both the liqueur and the dairy product stated. Kahlua is a specific brand of Mexican coffee liqueur, and cream is defined by the federal government as a product made from milk with a minimum fat content of 18 percent. Of course, a bar manager is free to offer a different, less expensive coffee liqueur to guests, and use half-and-half (which contains 12 percent milkfat) instead of cream, but the drink could not be called a Kahlua and cream. To do so is unethical at best and illegal in most areas.

Whenever a specific ingredient is listed on a menu, that item, and that item alone, should be served. For example, if the menu says maple syrup, then colored table syrup or maple-flavored syrup should not be served. This is especially important when listing brand-name products on a menu. (Recall the discussion of trademarks and brand-name items from Chapter 6, "Legally Managing Property.")

If substitutions of the menu items must be made, the guest should be informed of those substitutions before ordering. As consumers' interest in their own health continues to rise, foodservice operators can expect more involvement and consumer activism in the area of accurate ingredient listings.

Recently, in light of the growing number of obesity-related health issues in the United States, municipal localities and state legislatures have begun to take a stance on what ingredients should not be included in dishes served to the public. Although this issue remains very controversial, these entities, most notably California, have created bans on certain ingredients, and are not allowing them to be served to the public. Specifically, California has legislated a ban on artificial trans fats in restaurants. Trans fats are a type of unsaturated fat that is mostly used to increase the longevity of food products. However, trans fat intake has been related to several dire health issues, such as: coronary artery disease, Alzheimer's, breast cancer, diabetes, and infertility. Hospitality managers need to be aware that such laws may exist, and while there are many opponents that argue the unconstitutionality of the bans on multiple grounds, if your state or local government entity has enacted a law or ordinance that bans certain ingredients, you should be mindful of compliance, unless you wish to pay a fine and copious amounts of legal fees. To learn more about artificial trans fats, and the growing number of laws banning them, go to [publichealthlawcenter.org/sites/default/files/resources/phlc-policy-trans-fat.pdf](http://publichealthlawcenter.org/sites/default/files/resources/phlc-policy-trans-fat.pdf).

Continuing the trend toward bettering the nutrition and health of the American public, legislators have drafted proposed legislation that seeks to set requirements for labeling the nutritional content of food on menus. To read further on the subject of menu labeling laws, go to [www.hospitalitylawyer.com/Newsletters/feb11beveragenews.html](http://www.hospitalitylawyer.com/Newsletters/feb11beveragenews.html).

## Origin

For many menu items, the origin of the product or its ingredients is very important. Many consumers prefer Colorado trout to generic trout, Washington apples to those from other states, and Bluepoint (Long Island) oysters to those from other areas. It can be tempting to use these terms to describe similar menu items from other places, which may cost less to purchase. But to do so is fraudulent. Moreover, it

sends the wrong message to employees who know of the substitutions, as well the guests who ultimately are deprived of the items they thought they purchased. It is also illegal.

## Size

Product size is, in many cases, the most important factor in determining how much a guest is willing to pay for a menu item. For example, a steakhouse could offer different cuts of beef and price them appropriately according to size. An 8-ounce steak might sell for \$17.95, while the 12-ounce might sell for \$23.95 and the 16-ounce for \$25.95.

Other types of food products may be harder to associate with precise quantities. For example, “large” East Coast oysters must, by law, contain no more than 160 to 210 oysters per gallon, while “large” Pacific Coast oysters, by law, may contain not more than 64 oysters per gallon. Nevertheless, whether it is the size of eggs sold in a breakfast special, or the use of the term “jumbo” to refer to shrimp, specifying size on a menu is an area that must be approached with the understanding that the law will expect you to deliver what you promise. A simple rule of thumb for avoiding difficulties in this area is: If you say it, serve it.

## Health Benefits

For many years, the only menu item most restaurants offered as a healthy one was the “diet” plate, generally consisting of cottage cheese, fruit, perhaps some grilled poultry, and a lettuce leaf. It is no surprise that today’s health-conscious consumer demands more. In response, restaurants generally have begun to provide greater detail about the nutritional value of their menu items. The federal government, however, issues very strict guidelines on what you can and cannot say about your menu offerings. Thus, truth in menu laws relate not just to what is charged and what is served, but also to the nutritional claims made by foodservice operators.

According to FDA estimates, well over half of all printed menus in the United States contain some type of nutritional or health benefit claim. There are two types of claims generally found on menus: nutrient claims and health benefit claims. Nutrient claims contain specific information about a menu item’s nutrient content. When a dish is described on a menu as being “low-fat” or “high-fiber,” the restaurateur is making a nutrient claim. Health benefit claims are claims that do not describe the content of specific menu items, but instead show a relationship between a type of food or menu item and a particular health condition. For example, some restaurants include a note on their menu stating that eating foods low in saturated fat and cholesterol can reduce the risk of heart disease. Other restaurants identify nutritionally modified dishes on their menu using terms such as “heart-healthy” or “light,” or use symbols such as a red heart to signify that a dish meets general dietary recommendations.

The Food and Drug Administration (FDA) has issued regulations to ensure that foodservice operators who make health benefit claims on their menus can indeed back them up. These regulations, published in the August 2, 1996, Federal Register, apply the Nutrition Labeling and Education Act (NLEA) of 1990 to restaurant items that carry a claim about a food’s nutritional content or health benefits. All eating establishments must comply with these regulations.

Following are two examples of FDA regulations surrounding the use of common menu terms.

### *Nutrient Claim*

A low-sodium, low-fat, low-cholesterol item must not contain amounts greater than FDA guidelines for the term “low.” Light, or “lite” items must have fewer calories and less fat than the food to which it is being compared (e.g., “light Italian” dressing). Some restaurants have used the term “lighter fare” to identify dishes containing smaller portions. However, that use of the term must be specified on the menu.

### ***Health Benefit Claim***

To be considered “heart-healthy,” for example, a menu item must meet one of the following conditions:

- The item is low in saturated fat, cholesterol, and fat, and provides without fortification significant amounts of one or more of six key nutrients. This claim will indicate that a diet low in saturated fat and cholesterol may reduce the risk of heart disease.
- The item is low in saturated fat, cholesterol, and fat; provides without fortification significant amounts of one or more of six key nutrients; and is a significant source of soluble fiber (found in fruits, vegetables, and grain products). This claim will indicate that a diet low in saturated fat and cholesterol, and rich in fruits, vegetables, and grain products that contain some types of fiber (particularly soluble fiber), may reduce the risk of heart disease.

When printing health benefit claims on a menu, further information about the claim should be available somewhere on the menu, or be available on request. Restaurants do not have to provide nutrition information about dishes on the menu that have no nutrient content or health claim attached to them. The FDA permits restaurants to back up their menu claims with a “reasonable” base, such as cookbooks, databases, or other secondhand sources that provide nutrition information. (By contrast, the FDA requires food manufacturers to adhere to a much more stringent set of standards. Many food manufacturers perform chemical analyses to determine the nutritional value of their products and to ensure that the information about their product printed on the food label is true.)

The enforcement of truth in menu regulations is undertaken by state and local public health departments, which have direct jurisdiction over restaurants by monitoring their food safety and sanitation practices. The general public can also act as a regulator in this area. In today’s litigious society, a restaurant manager should have any menu containing nutritional or health claims reviewed by both an attorney and a dietician.

In addition to carefully developing menus, truth in menu laws require that restaurants truthfully and accurately specify what their servers say about menu items, as well as how their food products are promoted or shown in advertisements, photographs, and promotions.

## **General Nutrition and Obesity**

There is no denying the rising numbers of obesity, morbid obesity, and obesity-related diseases in the United States. Although much debate exists as to what the cause(s) of this increase is, the fact remains that more and more people are dying from obesity-related illness each year. Recently, many states have begun to tackle the obesity problem with regulations that are meant to encourage healthy eating habits and discourage unhealthy ones. You have already learned about one of the ways governments are regulating to promote healthy lifestyles—ingredient bans. However, there are many other ideas circulating throughout legislatures that a hospitality manager needs to be aware of. For example, the so-called Happy Meal laws seek to prevent including toys alongside food that does not meet certain nutritional standards, restrict the use of food stamps to pay for drinks with a high sugar content, and require fast-food restaurants to post the caloric content of food items on the menu.

Regulations enacted to tackle obesity are a quickly moving, controversial, and murky area of the law. Often these laws are newly formed, and there is not much, if any, precedent on which the laws are based; thus, it is difficult to say which laws will be long lasting and which ones will be deemed unconstitutional. However, it is certain that these issues will not go away soon, so it would be wise for a hospitality manager to stay current on any obesity-related movements and legislation.

## Search the Web 12.1

Visit [www.bk.com](http://www.bk.com).

1. Select: Menu and Nutrition.
2. Select: Any item from the “Select an Item” menu.
3. Review your selected item’s nutritional content, then answer the following:
  - a. What are the nine nutritional categories about which this company supplies information?
  - b. Do you think restaurateurs have a duty of care to provide this level of nutritional information? Why or why not?
  - c. What do you think the future holds for the level of nutritional information that foodservice operators will be required to supply?

## 12.3 SERVING ALCOHOL

Throughout history, alcoholic beverages have played many roles. In some societies, they were thought to possess magical or holy powers. They were also an important part of medical treatment well into the 1800s. In various cultures, alcoholic beverages were considered a basic and essential food. Because beer, ale, and wine did not carry the diseases associated with drinking contaminated water, they became an accepted part of everyday meals. They were particularly valued by travelers, who had to be especially cautious about contracting strange diseases. In fact, most early taverns, as well as hotels, considered the service of alcohol to be a basic traveler’s amenity. By the time the first settlers left for the New World, taverns were essential social centers, providing drink, food, and sometimes lodging. The early settlers brought this tradition with them to the New World. In the vast wilderness of the new continent, taverns took on new importance. By the mid-1800s, the largest taverns became the first hotels.

In 1920, Congress passed the Eighteenth Amendment to the Constitution, which prohibited the manufacture, sale, transportation, and importing of alcoholic beverages. The amendment was effective only in stopping the legal manufacture, sale, and transportation of liquor. Many people still drank, but they drank poor-tasting, illegally produced (and in some cases unmerchantable) alcoholic beverages. In 1933, Congress recognized the failure of prohibition and repealed the act with the passage of the Twenty-First Amendment. However, even after the repeal, the consumption of alcohol was not quickly reaccepted into American society.

The Twenty-First Amendment gave individual states, counties, towns, and precincts the authority to control the sale and use of alcoholic beverages within their jurisdiction. As a result, a variety of alcohol-related laws exist throughout the United States today. As a hospitality manager, it is your responsibility to know and carefully follow the applicable laws for your state and community. If you manage a facility that serves alcohol, you should have copies of the state and local laws regulating the service of alcohol in your community.

### Privilege of Alcohol Service

Alcohol is a drug. Historically it was used, like other drugs, to treat disease. And like other drugs, it is also a substance to which people can become addicted. Despite the fact that alcohol often creates a euphoric state in the user, it is a *depressant*.

#### LEGALESE

**Depressant:** A substance that lowers the rate of vital body activities.

Other depressants include barbiturates, tranquilizers, quaaludes, Librium, and Valium. Interestingly, society very tightly regulates the dispensing of most depressants. Pharmacists must go to school in order to earn the right to legally dispense many types of depressants. In most cases, a depressant can be requested from a pharmacist only after presenting a prescription from a licensed medical doctor. Alcohol, by contrast, can be served by any individual over a state-specified age, who may have had little, if any, mandatory training prior to being employed as a bartender.

All that said, it is important to remember that no hospitality manager has a “right” to serve alcohol; rather, it is a privilege that is carefully regulated by law, and one that cannot be taken lightly.

There is no alcoholic beverage that is safer or more moderate than another. According to the federal government’s dietary guidelines, the alcohol content in standard servings (drinks) of beer (12 ounces), table wine (5 ounces), and distilled spirits (1½ ounces in a mixed drink) is equal. Thus, the service of all types of alcoholic beverages must be treated in the same serious manner. Put another way, the major factor in controlling the risks associated with serving alcohol is to realize that it is not what you serve, but how much you serve that is most important.

The amount of alcohol consumed by an individual in a specific time period is measured by the individual’s *blood alcohol concentration (BAC)*. Many factors, in addition to the number of drinks consumed, influence the BAC of an individual. Because the liver digests alcohol at the slow, constant rate of about one drink per hour, a 160-pound man may typically reach a BAC of .08 (or 8 percent) by drinking two to four drinks in one hour, which is legally drunk in all 50 states. Ten drinks would produce a BAC of approximately .25 or higher. Figure 12.4 details some of the effects felt by individuals with increasing BACs.

Alcohol affects different individuals in a variety of ways. Lawmakers commonly use specific BACs to define legal *intoxication*. In October 2000, the federal government passed legislation to establish a .08 BAL as the standard in all states. Although the federal government cannot directly force the states to enact the standard, the threat of withholding federal highway construction funds from any state that did not utilize the .08 standard pretty much guaranteed that all states would comply. Unfortunately, hospitality managers do not have the ability, at this point in time, to easily measure the BAC of their guests. Still, the law prohibits serving alcohol to an intoxicated guest. Thus, a hospitality manager must rely on his or her own knowledge of the law, operational procedures, and staff training programs to avoid doing so.

Alcohol is sold in an amazing variety of hospitality locations. Bars, amusement parks, golf courses, sporting events, and restaurants are just a few of the venues where a guest may legally buy alcohol. Each state regulates the sale of alcohol in the manner it sees fit. Regional differences do exist, but in all cases, those who sell alcohol are required to apply for and obtain a *liquor license* or liquor permit to do so.

Recall our discussion of alcohol regulation from Chapter 2, “Government Agencies That Impact the Hospitality Industry.” Every state has an alcoholic beverage commission (ABC), which grants licenses and regulates the sale of alcohol. At the local level, some cities or counties also have a local alcohol control board that works with the state agency to grant licenses and enforce the law. As a hospitality manager, you should request a copy of your state and city’s regulations.

### LEGALESE

**Blood alcohol concentration (BAC):** A measurement, expressed in a percentage, of the concentration level of alcohol in the bloodstream. Also known as blood alcohol content or blood alcohol level, or BAL.

### LEGALESE

**Intoxication:** A condition in which an individual’s BAC reaches legally established levels. These levels are not uniform across the United States. An intoxicated person may not sell or purchase alcohol, nor operate a motor vehicle.

### LEGALESE

**Liquor license:** A permit issued by a state that allows for the sale and/or service of alcoholic beverages. The entity holding the license is known as the licensee.

### Effects of Increasing BALs

| <i>BAL Level</i> | <i>Effect</i>  |
|------------------|--|
| .06–.10          | Significant decrease in reaction time and visual abilities |
| .11–.15          | Slurred speech and volatile emotions                       |
| .22–.25          | Staggering, difficulty talking, blurred vision             |
| .40              | Induced coma   |
| .50              | Cessation of breathing and heart failure                   |

**Figure 12.4** Effects of increasing blood alcohol concentrations (BACs).

Though different types of liquor licenses exist to meet the needs of various types of businesses, they can be divided into two general categories:

1. Licenses for on-premises consumption (required for restaurants, taverns, clubs, etc.)
2. Licenses for off-premises consumption (required for liquor stores and other markets that carry alcohol)

Various types of on-premises licenses also exist, such as a beer-only license, a wine license (which may or may not include beer, but does not include mixed drinks), and a liquor license (which includes, beer, wine, and mixed drinks). In most states, liquor licenses are issued for a period of one year, at the end of which the establishment must apply for a license renewal.

Once an establishment has been granted a liquor license, it is required to operate in accordance with all rules and regulations established by state and local ABCs. Some common areas of operation that are regulated by the states include:

- *Permitted hours of sale:* Local communities may prohibit the sale of alcohol after a specified time of day. Some communities have “blue laws,” which restrict or prohibit the sale of alcohol on Sundays.
- *Approved changes for expansion or equipment purchases:* Before a liquor license is issued, the state or local ABC may inspect the applicant’s establishment prior to granting approval. Once a premise has been inspected, any further changes to the size of the establishment or the equipment used must first be approved by the state ABC. In some states, establishments that serve alcohol are prohibited from operating in close proximity to a school or a church.
- *Maintaining records:* Establishments that sell alcohol must keep detailed records of the amount of alcohol purchased each day, information on the vendors from which alcohol is purchased (including the vendor’s license and other business information), and the establishment’s daily sales of alcoholic beverages. A state ABC will perform random audits to determine the accuracy of the information received.
- *Methods of operation:* As discussed previously, employees working as waiters, servers, or in any other capacity where they may be required to handle alcoholic beverages must be above the state’s specified minimum age for serving alcohol. Other states have regulations restricting the types of promotions and advertising that a bar can undertake.

In addition to licensing, special rules may apply to specific situations in which alcohol is sold. In each case, however, its service is tightly regulated. Figure 12.5 is an example of one such regulation. Note how precisely the state of Connecticut regulates the sale of alcohol from minibars located in guest hotel rooms.

In order to combat increasing alcohol-related injuries and deaths, many states have enacted happy-hour laws, which are meant to decrease the excessive consumption of alcohol. These statutes vary from state to state, but they all contain some, if not all, of the following prohibitions:

- Distribution of free alcoholic beverages
- Providing additional servings of alcohol until the previous serving has been consumed
- The sale of alcoholic beverages at a reduced price during specified days or times
- Unlimited beverages—the sale of alcoholic beverages at a fixed price during a fixed period of time
- Increasing the volume of alcohol in a beverage without increasing the price
- Giving alcoholic beverages as a prize

States are very careful when granting licenses to sell liquor, and they are generally very aggressive in revoking the licenses of operations that fail to adhere to the

### Connecticut Permit Law

#### Sec. 30-37i. Hotel guest bar permit

a) A hotel guest bar permit, available to a hotel permittee, shall allow the retail sale of alcoholic liquor located in registered hotel guest rooms. The annual fee for a hotel guest bar permit shall be fifty dollars for each hotel room equipped for the retail sale of alcoholic liquor. (b) A hotel guest bar shall: (1) be accessible only by key, magnetic card, or similar device provided by the hotel to a registered guest twenty-one years of age or older; and (2) restocked no earlier than nine o'clock A.M. and no later than one o'clock A.M. (c) The Department of Consumer Protection shall adopt regulations, in accordance with the provisions of Chapter 54, for the operation of hotel guest bars.

**Figure 12.5** Connecticut permit law.

state's required procedures for selling alcohol. In most states, a liquor license can be revoked as a result of:

- Frequent incidents of fighting, disorderly conduct, or generally creating a public nuisance
- Allowing prostitution or solicitation on the premises
- Allowing the sale or use of drugs and narcotics
- Illegal adult entertainment, such as outlawed forms of nude dancing
- Failure to maintain required records
- Sale of alcohol to minors

In some states, representatives from the ABC will conduct unannounced inspections of the premises where alcohol is served and/or intentionally send minors into an establishment to see if the operator will serve them.

## Liability Associated with Alcohol Service

Because alcohol can so significantly change the behavior of those who over-indulge in it, society is left to grapple with the question of who should be responsible for the sometimes negative effects of alcohol consumption. In cases where intoxicated individuals have caused damage or injury, either to themselves or others, society has responded with laws that place some portion of responsibility on those who sell or serve alcohol.

Every state has enacted laws to prevent the sale of alcohol to minors, to those who are intoxicated, and to individuals known to be alcoholics. Figure 12.6 is an example of how one state, Texas, has developed laws to discourage minors from drinking and to penalize those who would serve them. It is presented here as an example of how seriously society takes the sale of alcohol to minors.

To understand the complex laws that regulate liability for illegally serving alcohol, it is important to understand that there can be at least three parties involved in an incident resulting from the illegal sale of alcohol.

- *First party:* The individual buying and/or consuming the alcohol.
- *Second party:* The establishment selling or dispensing the alcohol.
- *Third party:* An individual not directly involved in a specific situation having to do with the sale or consumption of alcohol.

There is a misconception by some that the common law did not hold an organization that served alcohol liable for serving an intoxicated person. That is not the case. Under common law, a facility that negligently served alcohol to an obviously



**Minor in Possession:** If caught with alcohol, a minor will be charged with a Class C misdemeanor. Maximum fine of \$500, mandatory attendance at an alcohol awareness class, 8–40 hours community service and 30–180 days loss of driving privilege.

**Minor Driving While Intoxicated (DWI):** Zero BAL allowed for minor drivers. If caught, a minor will be charged with a Class C misdemeanor. Maximum fine of \$500, mandatory attendance at an alcohol awareness class, 20–40 hours community service, and 60 days loss of driving privilege.

**Possession of Fake Identification:** If caught, a minor will be charged with a Class C misdemeanor. Maximum fine of \$500, mandatory attendance at an alcohol awareness class, 8–12 hours community service, and 30 days loss of driver's license for first offense.

**Adult Purchase of Alcohol for a Minor:** A Class B misdemeanor. Maximum fine of \$2,000, confinement in jail for up to 180 days, or both.

**Bar That Sells Alcohol to a Minor:** Bar owner to receive administrative penalties of 7–20 day liquor license suspension, and a fine not to exceed \$25,000 for each day of the suspension. The bartender or employee who sold the alcohol to the minor faces a Class A misdemeanor charge with a maximum punishment of one year in jail and a \$4,000 fine.

**Figure 12.6** Summary of selected Texas laws that address minors and alcohol.

intoxicated guest could be sued for negligence if harm came to the guest. What is relatively new in many jurisdictions is that *third-party liability* can also be imposed on those that serve alcohol.

### **Social Host**

Historically, courts in the United States have not found that those who host parties where alcohol is served should be liable for the subsequent actions of their intoxicated guests. While this position, like all areas of social law, may change someday, the current feeling of most courts is that a social host has no common law duty to generally avoid making alcohol available to an adult guest.

There are several reasons why a social host is not held to the same standard of care responsibilities as a licensed provider of alcohol. Consider the case of Brad Seeley. Brad is a real estate agent who hosts a party in his home for past customers and potential clients. If you analyze the situation Brad has created by hosting this party, you will see that:

1. Brad's guests will likely make their own decisions on how much to drink.
2. It is unlikely Brad has acquired the knowledge and training to detect those who have become intoxicated.
3. He has no effective means of controlling the number of drinks consumed by his guests.
4. If large numbers of guests attend his party, it will be extremely difficult for Brad to know who, if anyone, is becoming intoxicated.

Despite the court's position on social host liability, the slogan "Friends don't let friends drive drunk," is a good rule to live by. As a responsible party host, Brad should be cautious about allowing his guests unlimited alcohol consumption.

Although courts have not been inclined to impose a duty of care on a social host providing alcohol to a guest, they are less clear on the issue of whether a social host has a common law duty not to allow minors to consume alcohol. A social host does have a responsibility to see to it that they themselves do not serve minors alcohol. Because serving alcohol to a minor is illegal, even a social host could be accused of negligence should he or she allow it.

### **LEGALESE**

**Third-party liability:** The two areas of liability theory that a hospitality manager should be aware of focus on the duties of a host who holds a party where alcohol is served, and that of an establishment licensed to sell alcohol.

The most important thing for you, as a hospitality manager, to remember about social host liability is that the courts will not view your operation as that of a social host. As a license holder, you and your operation will be held responsible for the service of alcohol in a very different way.

### ***Dram Shop***

Prior to the 1990s, most courts did not hold those who were licensed to serve liquor responsible for the damages sustained by a third party that resulted from a customer's intoxication. Today, nearly every state has established *dram shop* laws that impose third-party liability on those who sell or serve alcohol.

Under the dram shop legislation instituted in most states, liquor licenses are responsible for harm and damages to both first and third parties, subject to any contributory negligence offsets by these parties, if three circumstances exist:

1. The individual served was intoxicated.
2. The individual was a clear danger to him- or herself and others.
3. Intoxication was the cause of the subsequent harm.

It is important to understand that there can be criminal liability as well as civil liability when alcohol is sold irresponsibly. Civil liability, under state dram shop laws, could require an alcohol establishment to pay for various expenses to injured or deceased parties, such as medical bills, property damage, lost wages, monetary awards to surviving family members, awards for pain and suffering, and punitive damages. Criminal liability could subject a hospitality operator to a revocation of the liquor license, severe fines, and/or jail time.

Figure 12.7 is an example of the dram shop law for the state of Connecticut. Note the wording that holds alcohol servers responsible for injuries to third parties, the amount of damages they could be liable to pay, and the time limits placed

#### **LEGALESE**

**Dram shop:** A name given to a variety of state laws establishing a liquor licensee's third-party liability.

### **Connecticut Dram Shop Law**

Sec. 30-102. Dram Shop Act; liquor seller liable for damage by intoxicated person.

If any person, by himself or his agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of twenty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of fifty thousand dollars, to be recovered in an action under this section, provided the aggrieved person or persons shall give written notice to such seller within sixty days of the occurrence of such injury to person or property of his or their intention to bring an action under this section. In computing such sixty-day period, the time between the death or incapacity of any aggrieved person and the appointment of an executor, administrator, conservator or guardian of his estate shall be excluded, except that the time so excluded shall not exceed one hundred twenty days. Such notice shall specify the time, the date and the person to whom such sale was made, the name and address of the person injured or whose property was damaged, and the time, date and place where the injury to person or property occurred. No action under the provisions of this section shall be brought but within one year from the date of the act or omission complained of.

**Figure 12.7** Connecticut dram shop law.

on filing a lawsuit. Connecticut is one of several states that places a monetary limit on the amount of damages a hospitality operator would have to pay if found liable. Figure 12.8 summarizes the civil liability for a licensee and a social host with respect to first and third parties who have been harmed by the irresponsible and illegal service of alcohol.

| <b>Alcohol Liability</b> |                        |                       |                           |
|--------------------------|------------------------|-----------------------|---------------------------|
|                          | Licensee<br>Common Law | Licensee<br>Dram Shop | Social Host<br>Common Law |
| First-Party Liability    | Yes                    | Yes                   | No                        |
| Third-Party Liability    | No                     | Yes                   | No                        |
| Liable If Minors Served  | Yes                    | Yes                   | Yes, in most cases        |

**Figure 12.8** Alcohol liability.

## » ANALYZE THE SITUATION 12.4

MARK HADLEY ENTERED THE Squirrel Cage Tavern at 4:00 P.M. on a Thursday afternoon. He sat down at the bar and, according to eyewitnesses, uttered just a single word when approached by the bartender. The one word was “draft.”

As the bartender had only one brand of beer on draft, she silently pulled the beer, handed it to Mr. Hadley, and accepted the \$5 bill he offered in payment. Mr. Hadley left the bar some 15 minutes later having never said another word to anyone, leaving the change from his \$5 on the bar counter.

Subsequently, Mr. Hadley was involved in an auto accident in which a ten-year-old boy was rendered sightless. The boy’s parents sued the Squirrel Cage Tavern and another operation, the Dulcimer Bar. The Dulcimer Bar was sued because Mr. Hadley had consumed ten beers in three hours at that establishment prior to leaving it and driving to the Squirrel Cage.

Attorneys for the Squirrel Cage argued that their client could not have known of Mr. Hadley’s condition when he entered their establishment, and that they were indeed acting responsibly in that they served him only one beer. Attorneys for the injured boy countered that the Squirrel Cage served alcohol to an intoxicated person, a violation of state law, and thus under the state’s dram shop legislation was responsible for Mr. Hadley’s subsequent actions.

1. Did the Squirrel Cage violate the liquor laws of its state?
2. Did the Squirrel Cage bartender act responsibly in the service of alcohol to Mr. Hadley? Did she act differently from bartenders in similar situations?
3. What should the owner of the Squirrel Cage do in the future, if anything, to minimize the chances of reoccurrence?

## Training for Responsible Service

In many states, legislatures have sought to limit the liability of those who serve alcohol by enacting regulations that insulate, to some degree, those establishments that commit to thoroughly training their employees who are involved in the sale of alcohol. In most jurisdictions, responsible alcohol server training will be either mandated or strongly encouraged. The absence of such training would, without doubt, be a significant hindrance should you ever face a lawsuit that accuses your operation of irresponsible alcohol service. The National Restaurant Association, the American Hotel and Motel Association, and many private organizations provide excellent training materials that can help make your training task easier. Training for Intervention Procedures (TIPS) is one of the most well-recognized responsible server programs. Developed by Dr. Morris Chafetz, founding director of the National Institute of Alcohol Abuse and Alcoholism, TIPS incorporates a common-sense approach to serving alcohol responsibly in a variety of settings. Dr. Chafetz is also the author of the book *Drink Moderately and Live Longer: Understanding the Good of Alcohol* (Scarborough House, May 1995).

### Search the Web 12.2

Log on to [www.hospitalitylawyer.com](http://www.hospitalitylawyer.com).

1. Select: Solutions Store.
2. Select: Alcohol Server Training from the education and training online programs menu.
  - a. What are the advantages of online training?
  - b. What are the disadvantages of online training?

Regardless of whether you choose to create your own responsible server program, or to purchase and implement one of the many available on the market, you should carefully review your program to ensure that it meets five criteria:

1. *It is an approved training course.* The training program you use will, in all likelihood, need to be approved by the agency that monitors alcohol service in your area. If you create your own training program, it too must be submitted for approval. The best of the nationally available training programs will be preapproved for use in your area, but it is your responsibility to make sure that the one you use is. Never purchase or use a training program that has not been approved. A jury could perceive the use of such a program as an indication that management was not serious about responsible alcohol server training.
2. *It explains the nature of alcohol's absorption into the bloodstream.* A basic understanding of how alcohol is absorbed in the body is crucial for serving responsibly. A variety of factors affect an individual's BAL. These include:

- *Body weight:* The larger the body, the more the alcohol is diluted. Because of this, given the same amount of alcohol, a large person will be less affected by alcohol than a smaller person.
  - *Food consumption:* The consumption of food slows the rate at which alcohol is absorbed into the system. In addition, different foods affect absorption rates in different ways.
  - *Amount of sleep:* Tired people feel the effects of alcohol more than those who are well rested.
  - *Age:* Younger people feel the effects of alcohol more quickly than older people. But the eyesight of older customers is more affected by drinking.
  - *Health:* The liver plays an important part in removing alcohol from the system. Customers with liver problems are more apt to become intoxicated.
  - *Medication:* Many medications do not mix well with alcohol, and in some instances mixtures can be very dangerous.
  - *General metabolism:* Some people's bodies convert alcohol faster than others do.
3. *It extensively instructs servers in the methods of checking for legal identification, as well as for spotting false IDs.* Often, minors who wish to drink secure false identification documents in order to gain access to establishments where they can buy alcoholic beverages. This puts the beverage manager in a difficult legal position. Although a beverage manager is not expected to know whether a minor is presenting false identification, he or she is required to use reasonable care in spotting those who attempt to use a false ID. Because false ID documents are in such widespread use, a major component of any responsible alcohol server program should be instruction in how to identify false IDs. Make sure that your training materials address the following areas:
- Alteration of type style, including font and point size
  - Cut-and-paste techniques
  - Physical identification/picture match
  - Relamination detection
  - Random information verification (address, Social Security number, etc.)
  - Listing of qualifying ID documents
4. *It emphasizes early intervention when confronted with possible overconsumption by guests.* It is clearly against the law to serve an intoxicated person. The difficulty, of course, lies in identifying when a person is intoxicated. The number of drinks (and/or the amount of alcohol in multishot drinks) served in a given time period gives an indication of possible BAC, but as we have seen, many factors affect BAC. A good, responsible, server-training program will teach your servers to note the observable behavioral changes that occur with advancing stages of intoxication. When these are noted, there are specific techniques that can be employed to limit the quantity of alcohol served to such guests and, if necessary, to refuse service completely.
5. *It provides for documentation of training effectiveness.* It is not enough for employees to attend responsible service training sessions. They must demonstrate a mastery of the material as well. The best of the training

materials on the market have examination components to test trainee competence. The tests should be both reliable and valid. The examinations should be scored by an independent source, and the results should be reported to management in a timely fashion. If you must defend your use of a particular program in court, you almost certainly will be defending its effectiveness as well. The inability to demonstrate your responsible server training results might damage your ability to prove that you have conducted your training in a responsible manner.

## » ANALYZE THE SITUATION 12.5

MICHELE RODGERS ENTERED THE Golden Spike Bar and Grill on a Friday night at approximately 10:30 P.M. At the door, she was stopped briefly by the bar's security guard. The guard, Luis Sargota, inspected Michele's photo ID, as he had been trained to do during the one-hour orientation class he attended on his first day of work.

The photo ID presented by Michele showed her age to be 21 years and three months. The photo on the picture was clearly her own. She was not asked to remove the ID from her wallet. Michele entered the bar and, over a period of three hours, consumed five fuzzy navel drinks, each containing approximately 1.5 ounces of 80-proof alcohol served with fruit juice.

Upon leaving the bar at 1:30 A.M., Michele was involved in a traffic accident that seriously injured a man who was driving home after working the late shift at a local factory. The family of the injured man sued Michele and the Golden Spike when it was discovered that Michele was, in fact, only 20 years old, and thus was not of legal age to drink alcohol.

The attorney for the Golden Spike maintained that the bar acted responsibly, in that it trained its security guards to check for identification prior to allowing admission to the bar, and that Ms. Rodgers had presented a falsified identification card, which the bar could not reasonably have known was false. In addition, the security guard stated that Ms. Rodgers "looked" at least 21 when she entered the bar. Thus, the bar was not guilty of knowingly serving minors.

1. Is the bar responsible for illegally serving Ms. Rodgers? Was she served excessively?
2. Since the security guard did not serve alcohol, do you think a jury would find one hour of orientation sufficient in his training?
3. What could the owners of the Golden Spike do in the future to prevent a reoccurrence such as this?

## » ANALYZE THE SITUATION 12.6

SAMUEL VOSOVIC ATTENDED A reception in the ballroom of the Altoona Pike Country Club. Mr. Vosovic was a salesman for a photography studio, and he attended a reception at the invitation of Ronald Thespia, one of the club's well-known members. Mr. Thespia's company sponsored the reception, which consisted of light hors d'oeuvres and an open bar.

Over the course of two and a half hours, it was determined that Mr. Vosovic consumed approximately nine drinks. The reception was large enough to require three bartender stations in the room. No single bartender served Mr. Vosovic more than three drinks in the course of the evening. Lea Tobson, one of the club's bartenders did finally detect a significant change in Mr. Vosovic's behavior and, when Mr. Vosovic requested another drink, refused to serve him and summoned a manager.

The club's food and beverage director determined that Mr. Vosovic was in all likelihood intoxicated. The director asked Mr. Vosovic to turn over his car keys, then instructed one of the club's waitstaff to drive Mr. Vosovic home, give the car keys to his wife, and take a cab back to the club. One hour after being taken home, Mr. Vosovic got back behind the wheel of his car and, still intoxicated, he lost control of the vehicle and crashed into a tree, killing him instantly. His wife brought suit against the country club under dram shop legislation in her state.

The club responded that it had acted responsibly in both refusing to service Mr. Vosovic and in ensuring that he got home safely. Mrs. Vosovic replied that her husband was upset at his treatment by the club when he arrived home and that she "couldn't stop him" when he took the car keys from her, intent on returning to the club. She held the club responsible because, as she stated, "They got him drunk." As additional evidence of the club's irresponsibility, she pointed to the tipping policy in place during open bars; essentially, in an open bar situation, the bartenders at the club were paid a percentage of the sales price of the alcohol consumed. Mrs. Vosovic's attorney claimed that the club's tipping policy encouraged its bartenders to overpour the drinks they served, as they sought to build the sales value of the event and thus their own income.

1. Did the country club act responsibly in this situation?
2. What steps could a responsible beverage manager take to reduce the possibility of such an incident reoccurring?
3. Would the club's tipping policy influence a jury's view of responsible alcohol service by the club if the case went to trial? Why?
4. Was it foreseeable that Mr. Vosovic, once home, would leave the house in his intoxicated condition?



## INTERNATIONAL SNAPSHOT

### *International Perspective on Food and Beverage Litigation*

As in the United States, food and beverage litigation internationally involves issues of jurisdiction, substantive law, and burdens of proof. The following is a brief review of these issues.

As for jurisdiction, it was held that when a seaman died onboard a ship in Africa from food poisoning, that the proper jurisdiction was the District of Columbia, the state of registry of the ship instead of Africa (*United States Shipping Board Emergency Fleet Corp. v. Greenwald*, 16 F. 2d 948 (1927)). Courts have also ruled that on international flights, the Warsaw Convention, which provides for uniform rules limiting aviation liability also applies to food and beverage claims (see *Rhodes v. American Airlines*, 1996 U.S. LEXIS 21052 (NY 1996)). Further, when a passenger became sick due to the food he ate on one leg of a round trip from Saudi Arabia, the Warsaw Convention was interpreted as conferring jurisdiction on the location of destination, or in Saudi Arabia and not New York, where the lawsuit was filed (see *Abdulrahman Al-zamil v. British Airways, Inc.*, 770 F. 2d 3 (2d Cir. 1985)). A court also ruled that a French company operating a resort in New Zealand could be sued in New Zealand, with New Zealand law being applied in a case where a guest claimed to have suffered food poisoning at the resort (see *Club Mediterranee NZ v. Wendell*, 1 NZLR 216; 1987 NZLR LEXIS 712 (1987)).

Internationally, suppliers of food and beverage are subject to actions based on reasonable standards of care or negligence (see *McNeil v. Airport Hotel (Halifax) Ltd.*, 1980 A.C.W.S.J. LEXIS 15714, 5 A.C.W.S. (2d) 476); and, under contract and warranty claims, such as for breach of the implied warranty of fitness for a particular purpose, or that the food would be fit for human consumption (see *Lockett v. A & M Charles Ltd.*, 3 AL ER 170, Kings Bench Div. (1938)). A Canadian court held

that the manufacturer and seller of a bottle of chocolate milk that contained glass and injured a consumer could be sued under causes of action in negligence and breach of warranty (see *Shandloff v. City Dairy Ltd. and Moscoe*, [1936] O.R. 579; 1936 Ont. Rep. LEXIS 70 (1936)).

The pivotal issue of causation exists under international law as well. In *Berko v. Canada Safeway Ltd.*, 2000 B.C.D. Civ. J. 4810 (2000), the British Columbia Supreme Court held that, to be successful in her lawsuit, a plaintiff must still prove that the food was the cause of her illness. In *Berko*, the plaintiff became ill within a few hours of consuming food. The medical evidence suggested that the incubation period was too short to support a finding that the food consumed at the restaurant was the cause of her illness. Thus, she could not sustain her burden of proof and her lawsuit was dismissed. However, another Canadian court held that, even though evidence was circumstantial that the food was the cause of illness, the doctrine of *res ipsa loquitur* could be applied when a family became sick after eating a pizza purchased from a restaurant (see *Stewart v. J.M. Investment Ltd.*, 1993 A.C.W.S.J. 581586, 41 A.C.W.S. (3d) 989 (Saskatchewan Provincial Court, 1992)).

Finally, as with many cities in the United States, the City of Toronto's laws require a restaurant operator to disclose the results of a food premise inspection. Toronto's law was recently upheld as constitutionally valid, despite any perceived negative effect on a restaurant (see *Ontario Restaurant Hotel & Motel Association v. Toronto*, [2004] O.J. No. 190; 2004 ON.C. LEXIS 287 (January 22, 2004)).

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## THE HOSPITALITY INDUSTRY IN COURT

To understand how the failure to warn guests of certain ingredients can impact your operation, consider the case of *Livingston v. Marie Callender's, Inc.*, 72 Cal. App. 4th 830 (Cal. Ct. App. 1999).

### FACTUAL SUMMARY

David Livingston went to a Marie Callender's restaurant, where he ordered a bowl of vegetable soup. Before ordering, Mr. Livingston asked the waitress whether the soup contained MSG (monosodium glutamate). He explained he had asthma and was



allergic to MSG. The waitress assured him MSG was not an ingredient in the soup so Mr. Livingston ordered and consumed the vegetable soup. Thereafter, Mr. Livingston developed MSG symptom complex, which includes respiratory arrest, cardiac arrest, and brain damage, as well as a number of other symptoms. Mr. Livingston subsequently sued the restaurant and its owners for failing to warn him MSG was an ingredient in the vegetable soup.

### QUESTION FOR THE COURT

The question for the court was whether Marie Callender's had a duty to warn Mr. Livingston the vegetable soup contained MSG. Mr. Livingston argued a manufacturer has a duty to warn where the harmful ingredient is one that a large number of people are allergic to, and the ingredient must be one whose harmful nature or presence is not generally known to consumers. Where these conditions exist, Mr. Livingston argued, a manufacturer that fails to warn of the presence of such an ingredient should be strictly liable for the injury suffered by the consumer. The court pointed out strict liability was not to be confused with absolute liability. With strict liability, a manufacturer can warn consumers of the potential for harm resulting from an unintended use and be protected from liability. With absolute liability, a manufacturer would be liable for any injury resulting from any use of a product placed on the market.

### DECISION

The court held for Mr. Livingston, ruling Marie Callender's could be strictly liable for failing to warn consumers about the presence of MSG in the vegetable soup. The court concluded Marie Callender's knew or should have known of the danger MSG posed to the general public, and hence had a duty to warn the public of the presence of MSG in the vegetable soup.

### MESSAGE TO MANAGEMENT

Menu disclosures and warnings such as the one set out here are the best policies:

Caution: There may be small bones in some fresh fish. Maraschino cherries and nearly all wines contain sulfating agents to protect flavor and color. Certain individuals may be allergic to specific types of food or ingredients used in food items (e.g., MSG). We are not responsible for an individual's allergic reaction to our food or ingredients used in food items. Please alert your server of any food allergies prior to ordering.

There is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach, or blood, or have immune disorders, you are at greater risk of illness from raw oysters and should eat oysters fully cooked. If you are unsure of your risk, consult a physician.

For an example of a dram shop lawsuit, see the case of *Jackson v. Cadillac Cowboy, Inc.*, 986 S.W.2d 410 (Ark. 1999).

### FACTUAL SUMMARY

On August 31 and September 1, 1994, Kevin Holliday was served alcoholic beverages at the Sundowners Club, a club owned by Cadillac Cowboy, Inc. (Cadillac Cowboy). Mr. Holliday became extremely intoxicated while at the club. Despite his intoxicated state, and with knowledge that he would drive his automobile while intoxicated, the club continued to serve Mr. Holliday. Around 12:45 A.M. on September 1, Mr. Holliday left the club in his pickup truck. His truck collided with a vehicle driven by James Jackson, causing it to roll over and kill Mr. Jackson. Mr. Jackson's wife, Pam (Jackson), sued Cadillac Cowboy Inc. for negligence in failing to refuse service to Mr. Holliday when it was clear he was very intoxicated.

### QUESTION FOR THE COURT

The question for the court was whether a licensed alcohol vendor could be liable for selling alcoholic beverages to an intoxicated person who then caused injury to a third person. The plaintiff, Jackson, argued that since the court had already held vendors

liable in cases involving the sale of alcoholic beverages to minors, liability should be extended to all persons. Cadillac Cowboy argued it was the job of the legislature to impose liability on alcoholic beverage vendors, and since the legislature had not enacted a civil liability statute, it could not be liable for the death of Jackson. The court examined the rule of law in a number of other states and found only six states that did not impose liability on vendors. The other 46 states all imposed liability in one way or another on state-licensed alcoholic beverage vendors.

### DECISION

The court held in favor of Jackson, ruling that a state-licensed alcoholic beverage vendor could be held liable for serving an intoxicated patron who in turn injured a third party.

### MESSAGE TO MANAGEMENT

Third-party liability laws exist in almost all states today. Be sure to train all employees and management on the responsible service of alcohol.

## WHAT DID YOU LEARN IN THIS CHAPTER?

You are the general manager of a casual theme restaurant. The restaurant includes both a cocktail area and dining room. Average sales per restaurant are \$4 million per year, with 30 percent of the sales attributed to alcohol. At the annual conference of managers, sponsored by your company, your supervisor, the district manager, assigns you to a company task force charged with making recommendations on a new liability training program for bartenders working in your operations.

Your specific task is to recommend the length of this portion of a bartender's training, as well as to estimate the costs associated with it.

1. Assuming that bartenders earn \$15 per hour, including benefits, and trainers within your company average \$40 per hour, develop a short outline of required training concepts, estimate the time to cover each topic, and assign a per-bartender cost, assuming that the bartenders must be trained in a one-on-one setting.
2. Prepare a three- to five-minute presentation for your district manager and the other conference attendees that justifies your costs as developed.
3. Estimate the yearly cost of bartender liability training if your company of 400 restaurants hires 1,100 bartenders per year. Give your opinion on the cost likely to be incurred if no such training is implemented.

## RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Log on to the website of the National Restaurant Association ([www.restaurant.org](http://www.restaurant.org)). Click on the Food Safety tab and then on Foodborne Illnesses. Identify at least three common foodborne illnesses and at least two ways each is spread. Create a ten-minute training session geared to dishwashers that would help them and you prevent these types of outbreaks.
2. Do you think restaurants face greater liability in what they serve or how they serve it? What impact will increased consumer acceptance of takeout foods have on your position?

3. Collect two takeout menus from restaurants near your home. Identify by circling the menu items, any reference to preparation style, brand-name ingredients, origin, size, or health benefits of their menu offerings. Compare the two restaurants' use of these descriptions.
4. Despite its name, "prime rib" does not have to come from prime grade beef. Contact your local butcher or meat purveyor to identify exactly which ribs are contained in prime rib. Check this information against that found in the National Association of Meat Purveyors' *Meat Buyers Guide*.
5. As a drug, alcohol is classified as a depressant. Consult a medical encyclopedia to identify at least two other types of depressants, as well as the following characteristics of depressants:
  - Their primary effects on basic metabolism
  - Symptoms of excessive dosage
  - Symptoms of withdrawal
6. Contact your local police department or state police. Identify the BAC in your state in which a driver is considered legally intoxicated. Discover whether the same BAC applies to minors. Ask for details on how officers identify those that they believe have exceeded the legal limits of alcohol consumption.
7. Assume that you operate a country-western dance club. Create a script for your servers to follow when they must tactfully refuse to serve alcohol to an intoxicated guest. Provide responses that your servers can use to counter the reactions they might reasonably expect from guests.

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In teams, brainstorm all of the physical characteristics that an intoxicated person might exhibit. Then develop ten methods to help prevent your servers from serving people who are (or appear to be getting) intoxicated.

## TEAM ACTIVITY

