



DRAM SHOP DISCOVERY

A discovery misstep in dram shop litigation can mean the end of a case. Know where to start—and what not to overlook.

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The hallmarks of drunk driving collisions are well-known: out-of-control drivers barreling down the roadway, high speed impacts, mangled vehicles, and devastating injuries or death. Every day, approximately 29 people in the United States die in motor vehicle crashes involving alcohol-impaired drivers—one death every 50 minutes.¹ Yet a less understood element in many of these cases is the role that commercial sellers of alcohol—“dram shops”—play in fueling or foiling drunk driving.²

Dram shop liability refers to civil liability related to the sale, service, and consumption of alcohol. At common law, suppliers of alcoholic beverages generally enjoyed immunity for injuries to the consumer or third parties. Courts held that no duty existed because the drinking, not the selling, caused the harm. This remains the law today in some states.³

But the foundation on which this general rule rested has been “eroded by the shift from commingling alcohol and horses to commingling alcohol and horsepower.”⁴ For victims of drunk driving, that shift has led many state legislatures to enact statutory frameworks that recognize a shared responsibility to combat drunk driving and allow licensed sellers of alcohol to be held responsible—under certain circumstances—for injuries caused by their intoxicated patrons.

In many of these cases, the drunk driver who injured your client is substantially underinsured, and you must consider whether an establishment might be liable for having unlawfully sold alcohol to the driver. After identifying every possible vendor, determine whether the vendor violated the state’s dram shop standards.

In South Carolina, for example, that typically means exploring whether the bar, restaurant, convenience store, or other seller “knew or should have known” that the patron was intoxicated at the time of sale.⁵ Some states require proof of visible intoxication at the time of sale, and sales to minors also must be considered.⁶ Identifying possible vendors and evaluating potential dram shop liability requires a careful presuit investigation and, once the case is filed, detailed discovery.⁷

Where to Start

Investigating and conducting discovery in dram shop cases can be challenging. Key witnesses such as your client, the drunk driver, or vehicle passengers may be deceased or incapacitated after a crash. If alive and conscious, they might have cloudy or absent memories due to the effects of alcohol. Frequently, you're trying to get information from a drunk driver who is facing criminal charges, blacked out during the incident, or may already be in prison.

One of the first pieces of evidence you get in a vehicle wreck case is the collision report. At this early stage, your client may have no idea who the driver was, let alone whether the driver was drunk at the time of the crash. If the collision report states that a toxicology result is pending or you receive information from law enforcement that alcohol may have been involved, your dram shop antenna should go up.

If alcohol was part of the mix and a DUI has been charged, find out whether the driver is represented by a criminal defense lawyer. If so, make contact early. That attorney may be able to facilitate gathering useful information about where the driver was drinking, how much alcohol was served, and

whether other potential witnesses saw the driver intoxicated. DUI defendants often will cooperate to show they tried to help victims locate other avenues of recovery by being forthright with information.

Spoliation letters and private investigators. Depending on how early you get involved and what information is available, consider immediately sending a spoliation letter to all establishments where the driver consumed or purchased alcohol before the wreck. Like in trucking and products liability cases, we have a standard preservation letter for dram shops that can be useful if sent quickly. This letter lists all possible sources of relevant information in the establishment's possession.

While receipts and other point of sale or service (POS) data (discussed later) are critical in dram shop cases, security camera footage can make or break your case if you can get your hands on it. Most nightclubs or bars use video systems that overwrite footage automatically on a time or storage cycle (typically anywhere from five to 30 days), so act quickly.

A tenacious and tactful private investigator can be your best resource in dram shop cases. Because evidence may disappear quickly, you need someone on the

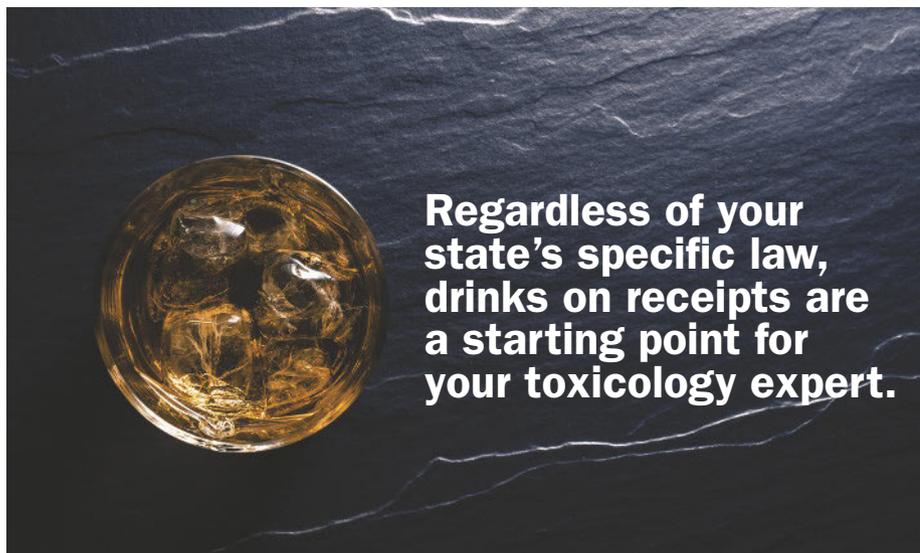
ground aggressively obtaining key information, interviewing witnesses, and pursuing every lead. The early evidence gathering efforts in these cases may be more important than almost any other type of case.

Law enforcement. We often work with local law enforcement to help them identify where to look for evidence that can bolster their DUI case beyond a breathalyzer and field sobriety test, as well as help provide an avenue of recovery for the victims. Examples of this evidence include the drivers' cell phone records, GPS data from vehicle event data recorders, and video surveillance and receipts from the commercial establishment, all of which law enforcement can obtain with a search warrant as part of the criminal charges if those officers know what to ask for and why.

Subpoenas. When drivers or their attorneys are unhelpful, our firm immediately files suit against the driver and then uses subpoenas to jump-start the dram shop investigation and connect the dots.

Say, for example, you know the drunk driver works for ABC Corporation. You promptly subpoena his employment file and find out through direct deposit or other records that the defendant maintains his bank accounts at XYZ Bank. Send a second subpoena for bank statements, and now you should have a sense of the defendant's whereabouts on the night of the incident (assuming he's not an all-cash patron). If you're lucky, you might determine exactly where and when he was drinking and how much money was spent at each establishment. These are all crucial pieces of information.

If your initial investigation reveals an apparent overservice of alcohol (which is usually clear based on the driver's blood alcohol content level and the time it was tested), turn your focus to the establishments and the information



BLOOD ALCOHOL CHART

The % of alcohol in the drinker's blood can be estimated by counting drinks
(one drink equals 1 volume oz. of 100-proof alcohol or one 12 oz. bottle of beer or 5 ozs. of table wine).

FEMALE

MALE

		BODY WEIGHT IN POUNDS																	
		90	100	120	140	160	180	200	220	240	100	120	140	160	180	200	220	240	
Drinks		.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	.00	
1		.05	.05	.04	.03	.03	.03	.02	.02	.02	.04	.03	.02	.02	.02	.02	.02	.02	IMPAIRMENT BEGINS
2		.10	.09	.08	.07	.06	.05	.05	.04	.04	.08	.06	.05	.05	.04	.04	.03	.03	
3		.15	.14	.11	.10	.09	.08	.07	.06	.06	.11	.09	.08	.07	.06	.06	.05	.05	DRIVING SKILLS SIGNIFICANTLY AFFECTED
4		.20	.18	.15	.13	.11	.10	.09	.08	.08	.15	.12	.11	.09	.08	.08	.07	.06	
5		.25	.23	.19	.16	.14	.13	.11	.10	.09	.19	.16	.13	.12	.11	.09	.09	.08	POSSIBLE CRIMINAL PENALTIES
6		.30	.27	.23	.19	.17	.15	.14	.12	.11	.23	.19	.16	.14	.13	.11	.10	.09	
7		.35	.32	.27	.23	.20	.18	.16	.14	.13	.26	.22	.19	.16	.15	.13	.12	.11	—
8		.40	.36	.30	.26	.23	.20	.18	.17	.15	.30	.25	.21	.19	.17	.15	.14	.13	
9		.45	.41	.34	.29	.26	.23	.20	.19	.17	.34	.28	.24	.21	.19	.17	.15	.14	LEGALLY INTOXICATED
10		.51	.45	.38	.32	.28	.25	.23	.21	.19	.38	.31	.27	.23	.21	.19	.17	.16	
																			CRIMINAL PENALTIES

SOURCE: ADAPTED FROM ETIPS ON PREMISE 3.0, TRAINING FOR INTERVENTION PROCEDURES (TIPS)

you'll need to prove they violated a dram shop law. Again, once suit is filed against the driver, send subpoenas to the establishments for video surveillance, receipts, audit reports, and other POS information along with the names of employees working on the date of the incident.

Discovery Tactics

Your standard discovery requests will not sufficiently cover what you'll need to prove your case. Send focused requests that put defense counsel on clear notice of what the commercial establishment needs to preserve and produce.

Receipts and point of sale data. The driver's receipts or other transaction records showing the purchase of alcohol are among the most obvious important pieces of information. Because of the POS technology modern bars and restaurants use,⁸ these documents usually are not burdensome to obtain, despite what the dram shop's lawyer tells you. Most of these software systems are highly customizable and can generate a variety of data-laden reports with a few simple clicks.

If the drunk driver's tab reflects that a significant amount of alcohol was served, you will face some variation of

the defense that the intoxicated person "didn't consume all" of the beverages shown on the receipt. Get the receipts and transaction data for everyone else in the same party (if applicable) so you can rebut that defense. If others in the party had their own tab, it's less likely the driver was sharing drinks. And it's important to see whether servers included multiple guests on a tab and whether the servers assigned specific drinks and food to specific guests—usually by seat number.

Some states' dram shop laws prohibit the sale of alcohol to any person who appears to be intoxicated "considering the totality of the circumstances" (or some similar standard).⁹ In South Carolina, for example, the case law interpreting the relevant statutes prohibits the sale of alcohol to anyone whom a server knew or should have known was intoxicated at the time of the sale.¹⁰

Other, more exacting states require evidence of "obvious" or "visible" intoxication. Regardless of your state's specific law, drinks on receipts are a starting point for your toxicology expert to conduct an anterograde or retrograde extrapolation and ultimately opine about the signs of intoxication that someone who is drunk would have exhibited at a given blood alcohol content (BAC) level.

If your state law permits, consider expanding the scope of discovery beyond the driver to uncover the root cause of the server's negligence: for example, negligent training and supervision. This kind of direct claim against the commercial establishment is rooted in traditional principles of negligence and the duty owed by a licensed alcohol-selling business to the general public.

When you can show that the overservice of alcohol was not isolated to a particular patron but was the pattern and practice of the establishment—without regard for public safety—the case will resonate more with jurors.

Many times, you will receive receipts for the day or night in question and based on the number of guests, number of drinks, time, and other factors, you can argue that these are "other similar incidents" and compel production of additional receipts to further demonstrate a pattern. This may bolster a claim for punitive damages if, for example, your state is one that lists "similar past conduct" as an appropriate consideration in assessing such damages.¹¹

Training and personnel files. As in any case, it's helpful to know the "rules" that govern the defendant's conduct and establish the standard of care.¹²

These days, most reputable bars and restaurants use eTIPS (gettips.com), ServSafe (servsafe.com), or a similar industry-based third-party service to train and certify employees on everything from food handling to the safe service of alcohol. You can subpoena these entities for their training materials, or you can register and complete the courses online. Regardless of the approach, obtain these materials, which can offer crucial information that you can use when deposing managers, bartenders, and servers.

For example, you will find powerful and straightforward rules such as: “You must stop alcohol service if a guest shows signs of intoxication *or* you are concerned about the number of drinks they have had;” and “Always count drinks because it may be difficult to spot signs of intoxication.” Training materials also will include a BAC chart that servers must know to estimate intoxication based on the number of drinks over time and the patron’s weight and gender. (See p. 49.)

Social media. Although social media content frequently is used to try to undermine a plaintiff’s credibility, don’t overlook a commercial establishment’s social media content. Bars and other establishments commonly use platforms such as Facebook, Instagram, and TikTok for customer outreach, promotion, and feedback.

For example, in a recent case against a national restaurant chain, Instagram’s geotag feature—which groups together all public content tagged to a specific location—helped us uncover evidence of repeated, excessive service of alcohol to numerous patrons.

In another case, Facebook posts from the defendant bar revealed a culture of overservice, highlighted by promotions for annual binge drinking events such as “Beer Olympics,” including a drawing depicting the tops of several beer cans in the form of the Olympic rings and a pictogram of a person vomiting.

Bartenders and servers often use social media to engage with and entice their customers to visit and consume alcohol at their establishments, and those postings can shed light on what happened on the night in question. In one case, for example, we found a photo on Facebook from the night a bartender allegedly overserved Fireball shots to a patron—it showed her holding up the bottle after pouring six full-size cups halfway full.

TripAdvisor, Yelp, and other user review platforms also can provide information about pattern and practice at certain dram shop establishments. For example, one review said: “Nice little bar, bartenders seem to over serve people. Watched a few stumble to walk out. Hated to see them drive!”

‘Off premise’ sales and sales to minors. Alcohol liability laws also may apply to convenience stores and grocery stores, so consider these potential sources of alcohol. When you have a case involving consumption of alcohol by a minor, it is critical to track down the alcohol’s origin. Regardless of whether the minor used a fake ID or an illegal sale was made, there will be corporate training policies setting the standards for preventing both.

In a recent case involving alcohol sold to a minor without checking his ID, the store’s video from the sale in question had “disappeared.” However, we obtained video surveillance of other alcohol sales that day and were able to show sales clerks selling alcohol to young looking patrons without checking their IDs and routinely overriding the register’s ID verification program.

The path your investigation and discovery will take in any dram shop case depends on various factors, but with the right facts and a carefully crafted plan, a well-litigated dram shop case could mean a full measure of justice for your client. ■



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NOTES

1. Ctrs. for Disease Control & Prevention, *Impaired Driving*, tinyurl.com/ebmj5f7w.
2. Dram shop litigation gets its name from the Scottish word “dram”—historically used to describe a small drink of spirits. Other common monikers include “tavern liability” or the broader “alcohol liability,” which generally also includes “social host liability,” which is not addressed in this article. The insurance industry regularly uses the term “liquor liability” in commercial liability policies.
3. See, e.g., Cal. Bus. & Prof. Code §25602(b)–(c) (1978); *Robinson v. Matt Mary Moran, Inc.*, 525 S.E.2d 559, 562–63 (Va. 2000).
4. *Garcia v. Hargrove*, 176 N.W.2d 566, 572 (Wis. 1970) (Hallows, C.J., dissenting).
5. *Hartfield v. Getaway Lounge & Grill, Inc.*, 697 S.E.2d 558, 564 (S.C. 2010).
6. See, e.g., Ind. Code §71-5-10-15.5 (2018); Me. Rev. Stat. tit. 28-A, §2501 et seq. (1987); Miss. Code Ann. §67-3-73 (2020).
7. Another important issue beyond the scope of this article is whether the dram shop has adequate insurance coverage for liquor liability. Some states mandate a minimum level of liquor liability coverage. See, e.g., S.C. Code Ann. §61-2-145 (2017); Ala. Admin. Code r. 20-X-5-.14(1) (2010). In South Carolina, we have encountered numerous instances of lapsed coverage despite the statutory mandate.
8. Among the more popular POS software are Aloha (alohancr.com), Future (futurepos.com), and Toast (pos.toasttab.com), although there are countless others.
9. See, e.g., Ala. Admin. Code r. 20-X-6-.02(4) (2010); R.I. Gen. Laws §3-14-6(c) (2019).
10. See S.C. Code Ann. §61-4-580 (2013); *Hartfield*, 697 S.E.2d at 564.
11. See, e.g., S.C. Code Ann. §15-32-520 (2014).
12. See Rick Friedman & Patrick Malone, *Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability* (2006).