

Liquor Liability

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the alcohol concentration test, (2) the rate of elimination used to calculate the decline in the subject's BAC is appropriate, (3) there were no special factors affecting the subject's post-accident BAC, and (4) the alcohol test result was reliable.

Example: Assuming that the subject was post-absorptive at the time of the MVA and his BAC was 0.09% 90 minutes after the MVA, what was the BAC at the time of the accident? **Solution:** During the 90 minute post-accident period, the subject's BAC fell about 0.023% (1-1/2 hours x an average elimination rate of 0.015% per hour). Therefore, his BAC at the time of the accident was about 0.11%.

But ... remember ... drinkers almost always experience a rising BAC following the last service of alcohol and the use of retrograde extrapolation to estimate BAC at the time of last service is usually inappropriate.

Forward extrapolation: Forward extrapolation is based on the analysis of factors that include the subject's body weight and sex, the amounts and times of alcohol service-and-consumption as well as the time-course and extent of the absorption, distribution, and elimination of alcohol. An alcohol test result is not required; but, when available, the extrapolated BAC and any available BAC test result(s) should be compared.

Point extrapolation: A method based on an assumption regarding the amount of stomach alcohol not yet absorbed at the time of the last service plus the amount of alcohol provided at the time of last service. The BAC at the time of last service can be estimated if there is a timed post-service BAC and the equivalent change in BAC associated with absorption-and-distribution of alcohol and the off-setting elimination of alcohol between the time of last service and the BAC test is accounted for.

Range extrapolation: A process that explicitly considers all reasonable variables affecting the reliability of the factors involved in the method used to extrapolate the person's BAC.

Psychophysical extrapolation: Reports of a drinker-driver's post-MVA indicia of intoxication or impairment have been used to argue that the drinker was visibly intoxicated when served. The argument is usually based on an expert's opinion that the drinker's BAC at the time of the service of alcohol was similar to the BAC at the time of the subsequent observation. This approach to extrapolation is sometimes used when there is no useful alcohol test. The approach is often highly speculative.

Effects of alcohol

A case opinion regarding whether or not a subject exhibited visible or obvious indicia of intoxication should include a consideration of the following:

Witness testimony

This should include a consideration of the witness's relationship to the drinker, prior familiarity and personal experience, motivation, and the witness's BAC. For both plaintiff and defendant, the approach to taking the deposition of a witness is very important.

Impairment Estimation Procedure (IEP)

While an Impairment Estimation Procedure (IEP) has been used to estimate BAC, the results are not conclusive.

Population-based studies

These studies report the percentage of a subject population who appeared to be visibly or obviously intoxicated or drunk at different BACs. Some guidelines regarding BAC-and-effect, such as the table by Dubowski, are not appropriate.

Tolerance to alcohol

Studies have established that active alcoholics can develop an increased tolerance to alcohol such that some do not appear to be visibly or obviously intoxicated at BACs that are extremely high.

Learned behavior or behavioral modification

Behavior can be learned or modified. Simply put, a person can learn that the display of physical or behavioral indicia of intoxication can lead to denial of service and, as a result, the person might be motivated to modify or control behavior in order to avoid a denial of service.

The allegedly intoxicated patron's history of alcohol-use, criminal offenses, social service counseling, drug use, and visible or obvious intoxication is important.

Examination of an expert:

Case-decisions regarding deposition, voir dire, and cross-examination at trial

Case-evaluation and case-strategy are two important considerations when deciding if-when-how to examine an expert. When considering these and other case-specific options, counsel will usually benefit from a discussion with an experienced liquor liability expert.

Expert deposition: Yes/No and how - when - why

Following your case review or consultation with a liquor liability expert, you might decide to depose an alcohol expert if ...

- You know little or nothing about the expert's approach to case-analysis and/or ability to defend the approach to case analysis, subject-specific assumptions, case-calculations including the subject's TAC and extrapolated BAC at the time of last service, the relevance of scientific studies relating the expected effects of alcohol, the reliability of witness statements and/or the interpretation of subject-specific testimony;

- You want to establish the nature, scope, and limits of the expert's case-analysis as presented in a written report and/or you want to "marry" the expert to a flaw in the case-analysis or written report; or,
- You want to settle the case and hope to diminish the perceived impact of the expert's testimony.

As a general rule, depose the expert as late as possible ... after you have obtained a report and/or completed reviews of the expert's qualifications, testimonial history, and case-opinions.

Voir dire: An opportunity often lost

A voir dire is an under-utilized opportunity. While you might be hesitant to disclose your approach to cross-examination at a pre-trial deposition, you should be much less concerned when conducting a voir dire.

A well devised voir dire can be much more than a discovery deposition: The expert is usually not able to effectively rehabilitate his/her approach to case-analysis:

"Isn't it true that when I questioned you about 20 minutes ago, you were not able to ...?"

Cross-examination: Knowing and controlling ...

The effectiveness of your examination is based in large part on preparation, anticipation of the content of expert's testimony and usual behavior, your confidence, the use of control techniques, and a goal of providing the jury with both information and explanation.

Strategy

Cross-examination of the expert should reflect a consistent case-strategy that includes ways to effectively present information regarding the expert's qualifications, personal knowledge, and approach to case analysis.

Control the expert

Review the scientific literature, the expert's implicit or unspoken assumptions, and the expert's usual appearance-behavior-demeanor ... so you can confidently and effectively use techniques to control both the flow of the examination and the expert's response.

Practice and test your trial skills

Consider your example outline of case-specific questions, potential adverse answers, and ways to maintain or regain control of the witness and/or focus on your topic, follow-up questions and/or illustrations, and checklists used to ensure that you provide the jury with necessary information.

Use scientific literature

You do not have to get the expert to agree that an article or book or study is generally regarded as authoritative in order to effectively use the information in that resource material. You do not even have to establish that the expert is familiar with the author or article or journal.

Consider a pre-trial run-through

Ask your expert/consultant to assume the role of the adversarial expert ... agreeing to a summary of anticipated evidence and testimony, and then conduct a telephonic cross-examination ... following with discussion including the expert's use/disregard of scientific literature.

Case exhibits for mediation or trial

Well prepared exhibits can focus attention on allegations, the state of the evidence, implicit or explicit assumptions relied on by an expert witness, reasonable alternative explanations, and case analyses. *It has been said that well prepared case exhibits resemble very effective story-boards.*

Expert review and preparation for testimony

Most experienced experts recommend the following approach:

- Consultation prior to deposing individuals regarding alcohol-related time-line, events, effects, etc.
- Review all relevant case materials including complete transcripts of depositions and exhibits.
- Disclosure of your expert and anticipated testimony or written report after disclosure by your adversary.
- Consultation regarding the need for, approach to, and timing of the deposition of an "adversarial" expert.
- An outline for trial testimony including introduction, orientation to the case, qualifications, case materials, relevant background, case analyses, and defensible opinions. *Special attention should be paid to the likely cross-examination of your expert.*
- Consider trial exhibits relating to the time-course of alcohol consumption or the rise-and-fall of BAC curves or the estimation of BACs at specific times. *Exhibits should be presented as templates ... to be completed by the expert.*

Vetting a potential liquor liability expert

A conflicts check

An agreement regarding conflict/confidentiality

Your description of the case facts

The expert's answers to five key questions

The expert's related experience and record

The expert's evaluation/recommendation

The expert's C.V. and billing practices

Be prepared to discuss ways in which the expert can assist you as a consultant or as a testifying expert. Discuss specific assignments and cost estimates.