



# THE LIQUOR CONTROL CODE'S Three-Strikes Rule

## TIPS TO DEFEND A LIQUOR LICENSEE AT A PENALTY HEARING

By Ronald D. Richards Jr.

Today's world is filled with various "three strikes" rules. Three strikes in baseball, of course, results in an out. Three-strikes sentencing laws are also well known, and perhaps controversial: they require courts to hand down mandatory and extended imprisonment terms to persons convicted of three or more serious criminal offenses. There are other three-strikes laws too—such as those in some jurisdictions that cut off an Internet user who violates file-sharing or copyright laws more than three times. For example, New Zealand just recently amended its copyright laws to provide that copyright infringers get two warnings (notices of infringement).<sup>1</sup> On the third notice of infringement, the copyright owner may take the infringer to a copyright tribunal in which the maximum penalty is a fine of \$15,000; alternatively, the copyright owner may pursue a court order disconnecting the infringer from the Internet for up to six months. While the consequences of violating the various three-strikes rules differ by context and are all relative, suffice it to say that three strikes are something to be avoided.

The Michigan Liquor Control Code (the Liquor Code) has its own three-strikes rule—and its own harsh consequences. Under the Liquor Code, a liquor licensee found responsible for selling alcoholic liquor to a minor or an intoxicated person in violation of §801<sup>2</sup> on three or more occasions within any 24-month period must appear before the Liquor Control Commission for a penalty hearing. That penalty hearing is held for a single purpose: to determine whether the licensee's license should be revoked or suspended. There are no other lesser penalty options.<sup>3</sup>

While licensees strive to avoid violating §801 at all (let alone three times in a 24-month period), a licensee may for various reasons find itself subject to the three-strikes rule and therefore the focus of a penalty hearing. What can be done then? The licensee is surely between a rock and a hard place. There is no discretion in the statute—a penalty hearing must occur, and a suspension or revocation must occur. As noted, the only question at the penalty hearing is whether the commission will revoke the license or suspend it.

So if faced with a penalty hearing under the Liquor Code's three-strikes rule, the goal for an attorney representing a licensee becomes persuading the commission to hand down the least harsh penalty—here, the shortest suspension possible. At the pen-

alty hearing stage, the licensee has already been found responsible for violating §801 of the code by serving underage patrons at least three times within a 24-month period. So the defense cannot be that there was no service to minors in the past. Rather, the focus ought to be on showing that the licensee is taking remedial actions to prevent future violations involving underage patrons. That is, consider presenting evidence concerning the steps the licensee has taken to correct systemic deficiencies that led to the §801 violations or that otherwise shows that the licensee is serious (or more serious than before) about stopping underage purchases.

To that end, here are some items that attorneys may consider when defending a liquor licensee at a three-strikes penalty hearing before the commission.

### Consider Mitigating Facts from the Three Prior §801 Violations

While the penalty hearing is not the time to contest whether there have been prior §801 violations, it is reasonable to use the penalty hearing to present any mitigating facts that surrounded the three prior violations. For example, let's say that one of the three prior underage sale violations occurred when the employee served an underage person alcohol on the employee's very first shift—before receiving formal TIPS training<sup>4</sup> on serving alcohol. If following the violation the licensee adopted a policy manual prohibiting any employee from serving alcohol until after completing formal TIPS training, then that evidence relating to the prior violation might be useful to persuade the commission to impose a less severe penalty.

### Has the Licensee Passed Controlled Buys?

The penalty hearing should be used to introduce other evidence that puts your licensee client in a positive light. To that end, you might consider introducing evidence that the licensee has passed "controlled buys" during the time the licensee has owned the liquor license. Local police agencies or the commission often arrange for minors to enter licensed establishments in an undercover attempt to see if the licensee will sell liquor to underage patrons. If the licensee has passed multiple controlled

## Fast Facts:

Under Michigan's Liquor Code, a liquor licensee found responsible for selling alcoholic liquor to a minor or intoxicated person on three occasions within a 24-month period must appear before the Liquor Control Commission for a penalty hearing.

At the penalty hearing, the Liquor Control Commission's only choice of penalties is revocation or suspension of the licensee's license.

Introducing evidence at the penalty hearing that paints the licensee in a "positive light" may help minimize the penalty the commission hands down after the hearing.

buys and did not sell liquor to the minor in any of them, that evidence may help at the penalty hearing.

## Is There a Newly Adopted Employee Policy Manual?

It might also improve the outcome if the licensee can show that its establishment has adopted an employee policy manual that bars sales of liquor to underage patrons. Although the nature of the penalty hearing means that the licensee has sold alcoholic liquor to minors at least three times in the past, the licensee's recent (perhaps after the third strike) adoption of an employee policy manual that requires all employees to read it and abide by rules for alcoholic service might be mitigating evidence at the penalty hearing.

## Has the Licensee Conducted Alcohol Training Programs?

Evidence that all current employees involved in serving alcohol to customers are trained through a Liquor Control Commission-approved alcohol-training program might also be helpful in portraying the licensee positively at the penalty hearing. The idea here is to show that the licensee requires all employees involved in the sale of alcoholic beverages—current employees and future hires—to successfully complete a server-training program before they can serve alcohol. These classes are held regularly and, though there is a charge for them, they typically provide certification that might be helpful evidence at the penalty hearing.

## What Was the Fate of the Employees Who Served the Minors?

It may also be persuasive to present evidence about how the licensee punished the particular employees involved in the prior violations. For example, evidence that the licensee terminated each offending employee immediately upon learning of the prior violation might be helpful mitigating evidence and show the seriousness with which the licensee treats alcohol-sale violations.

## What Experience Does the Managerial Staff Have?

A licensee should also consider presenting at the penalty hearing the particular experience of its managerial staff. For example,

if after one or two of the prior violations the licensee hired a new general manager with numerous years of experience overseeing the operation of a business involving alcohol sales, that arguably militates in favor of a finding that the licensee treats such matters seriously and, in turn, might help avoid revocation.

## Is the Licensee Open to Using Age-Identification Scanning Equipment?

Consider offering to have the licensee install age-identification scanning equipment to prevent future sales of alcohol to underage patrons. There is a variety of equipment available at varying costs, but one popular item is an electronic identification scanner, which offers a fast and easy way for employees to confirm the age of their customers by scanning documents such as driver's licenses. The use of an electronic identification scanner means the employee no longer has to calculate the date of birth of a customer who is attempting to buy alcoholic beverages. Other similar pieces of equipment purport to be able to detect a fake ID.

## Final Thoughts

There is no question that defending a licensee at a penalty hearing under the Liquor Code's three-strikes rule is challenging. After all, a three- or five-day liquor license suspension is not normally a good result. But given the parameters of a penalty hearing, an organized preparation and presentation aimed at showing that the licensee has taken and is continuing to take remedial actions to prevent future violations involving underage patrons may go a long way toward minimizing an otherwise potentially severe penalty. ■



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## FOOTNOTES

1. See, e.g., New Zealand's Copyright (Infringing File Sharing) Amendment Act 2011, No. 11, which became effective September 1, 2011, available at <<http://www.legislation.govt.nz/act/public/2011/0011/latest/DLM3331813.html>> (accessed October 21, 2011).
2. MCL 436.1801.
3. MCL 436.1903(1).
4. TIPS training refers to Training for Intervention ProcedureS, an educational and training program for the responsible service, sale, and consumption of alcohol.