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Nothing herein contained shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that policies regarding youth alcohol and drug problems include: prevention, education, treatment, law reforms, and strategies for raising the necessary fiscal resources attendant to such policies. Accordingly, the American Bar Association recommends that:

1. Illegal Sales to Minors

Criminal penalties for persons convicted of illegally selling alcohol or other drugs to minors should be greater than current penalties for such sales to adults.

2. Juvenile Offender Treatment

When a juvenile offender has been adjudicated within the juvenile justice system and has been evaluated and found to have alcohol and/or other drug abuse problems, any disposition of the case should include treatment for those problems. Any juvenile who is detained pending trial must be given access to appropriate alcohol and/or drug treatment if evaluated and found to have alcohol and/or drug abuse problems.

3. Revocation of Driver's License

States should enact legislation authorizing a judge to completely or partially suspend or revoke the driver's license of persons under the age of 21 upon conviction of an alcohol or drug related traffic offense or upon refusal to submit to substance testing under existing state implied consent laws.

4. Youth Paraphernalia Law

Federal legislation should be enacted to prohibit transportation or shipment of drug paraphernalia, as defined in the Model Drug Paraphernalia Act, to minors either by mail through the United States Postal Service or in interstate commerce.

5. Age 21 Drinking Laws

(a) All states, territories and the Department of Defense should adopt 21 years as the minimum legal age for the purchase or public possession of all alcoholic beverages.

(b) Federal legislation should continue to provide significant fiscal incentives for each state to enact and/or maintain a law establishing 21 years as the minimum legal age of purchase.

6. Forfeiture

(a) State criminal forfeiture provisions should be strengthened as avenues for curtailing drug trafficking.

(b) A significant portion of the revenues produced by federal and state civil and criminal forfeiture provisions should be specifically allocated to supplement alcohol and other drug abuse enforcement, prevention, intervention, treatment and research programs, especially for minors.

11. Child Abuse and Neglect 98

(a) The courts should recognize that parental or guardian alcohol and drug abuse is a frequent contributing factor in child abuse and neglect incidents, and existing neglect and other child protection laws should be utilized to assist families in dealing with alcohol and other drug abuse. 99 100 101 102 103 104 105

(b) Where existing child abuse and neglect laws do not enable the courts to deal with incidents in which alcohol and drug abuse are factors, these laws should be amended to provide such authority. 106 107 108 109 110

12. Consent to Treatment 111

In order to facilitate treatment of youth with alcohol and other drug problems and to remove any barriers to such treatment: 112 113 114

(a) States should enact statutes authorizing a minor to consent to any non-custodial, non-invasive treatment. 115 116 117

(b) States should enact statutes permitting a minor to obtain voluntarily custodial or invasive treatment at a state licensed facility, even if the parents, after being notified, fail to, or do not consent to such treatment programs, provided that in the absence of such consent, within 48 hours: qualified counsel is appointed for the juvenile; parents have the right to participate; an appropriate alcohol or other drug treatment professional promptly evaluates the juvenile and the proposed plan of treatment; and an appropriate judicial body reviews the treatment plan for the juvenile. 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132

13. Discrimination in Schools 133

(a) School systems and other public providers of services to youth should not discriminate against a youth because he or she seeks treatment for alcohol or other drug problems. 134 135 136 137

(b) States should enact legislation as necessary to prevent such discrimination. 138 139

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AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

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We would like to express our deep appreciation to John C. Shepherd, President of the American Bar Association, for his leadership, inspiration and support of the Section of Individual Rights and Resonsibilities and its Advisory Commission on Youth Alcohol and Drug Problems. Likewise, we are very grateful to all of those members of the ABA Board of Governors, the Council of the Section of Individual Rights and Responsibilities and its Advisory Commission on Youth Alcohol and Drug Problems (whose names appear in footnote 1 of the report), whose support and work made this effort possible. Special thanks go to I.R.& R. Section Chairperson J. David Ellwanger and I.R.& R. Council Members Sara-Ann Determan and Clifford D. Stromberg, Advisory Commission Chairperson Abigail J. Healy of the White House Drug Abuse Policy Office and David G. Evans, Chair of the section's Committee on Alcoholism and Drug Law Reform, for their tireless leadership. We also wish to thank I.R.& R. Council Member Randolph Thrower for his splendid assistance with the arrangements for the Atlanta field hearing as well as Advisory Commission member Madeline E. Lacovara and I.R. & R. Section Council member Philip A. Lacovara for special arrangements during the Washington, D.C. Advisory Commission meeting.

Numerous members of the ABA staff as well as part-time consultants and law clerks were an integral part of the process that produced this report and made the work of the Advisory Commission possible. We are deeply grateful for the long hours and conscientious efforts of the following persons: Steven G. Raikin, Assistant Staff Director of the ABA Public Services Division and Staff Director of the Section of Individual Rights and Responsibilities; Ellen S. Teller, Project Consultant for the Advisory Commission; J. Wade Carey, Administrative Assistant of the I.R. &. R. Section; Karen Hinks, Assistant to the Project Consultant; J. Benedict Centifanti, Consultant; Lawrence D. Schlang, Law Clerk; Joan E. Fairbanks, Law Clerk; and Anne Tolson-Hoskinson, Law Clerk. Finally, special thanks for their constant support and encouragement go to Thomas H. Gonser, Executive Director and Chief Operating Officer of the ABA; Katherine McG. Sullivan, Assistant Executive Director of the ABA Public Services Group; and Harriet Wilson Ellis, Director of the ABA Office of the President and President-Elect.

Report

Introduction

The Section of Individual Rights and Responsibilities and its ABA Advisory Commission on Youth Alcohol and Drug Problems respectfully submit this recommendation pursuant to their mandate enunciated by ABA President John C. Shepherd in his inaugural address to the American Bar Association. President Shepherd stated:

> I anticipate a major effort on the entire range of juvenile justice and child advocacy concerns to which our association has long been committed. I intend to put the needs of children of America, which have long been overlooked, high on the agenda of the American Bar Association. [Inaugural Address by John C. Shepherd, President, American Bar Association (August 8, 1984).]

In that inaugural speech, President Shepherd also announced that Abigail J. Healy, President Reagan's Alcohol Liaison in the White House Office of Drug Abuse Policy would chair the Advisory Commission. He noted that many of America's children have become the customers of merchants of drugs and alcohol. He also acknowledged the especially important role that the organized bar and members of the legal profession have in lending their support and expertise to help combat this growing problem.

From its inception, this outstanding multidisciplinary, non-partisan Advisory Commission of 27 experts, (13 lawyers, 3 judges and 11 non-lawyers, including representatives of the U.S. Department of Justice and the ABA Sections of Criminal Justice and Family Law, Young Lawyers Division and the Special Committee on Youth Education for Citizenship, all with extensive prior experience in some aspect of federal or local government, substance abuse, treatment, education, private industry, pharmacology, medicine or juvenile justice)[1] has labored to identify for the ABA in an organized way some of the most important youth substance abuse problems. This recommendation and report summarize to a substantial degree the Advisory Commission's suggestions concerning proposed remedies to these problems in the selected areas deemed most appropriate to the bar's expertise. In an intensive series of meetings and two-day field hearings in Atlanta, Princeton, and Los Angeles,[2] involving the personal testimony of over 160 witnesses who submitted over 250 recommendations and hundreds of pages of written testimony and exhibits, as well as the written submissions of several others unable to appear as witnesses, the Advisory Commission has carefully researched and debated scores of difficult issues it uncovered as it endeavored to carry out its charge from President Shepherd.

Witness after witness appearing before the Advisory Commission testified about the enormity of youth alcohol and other drug problems. Some witnesses termed the present state of these drug problems an epidemic; one called it a pandemic.[3] George Gallup, Jr. of the nationally known Gallup Poll personally appeared to report that one out of every three teenagers in the U.S. admits that their friends drink, and two in ten admit that they use marijuana.[4] He further reported

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[1]David G. Evans, Chairperson, ABA Section of Individual Rights and Responsibilities Committee on Alcoholism and Drug Law Reform; Ms. Abigail J. Healy, Chairperson, ABA Advisory Commission on Youth Alcohol and Drug Problems and Alcohol Liaison, White House Office of Drug Policy; Mr. Rowland Austin, Director, Employee Assistance Program, General Motors; Mr. Dan E. Beauchamp, Professor, Department of Health Policy and Administration, University of North Carolina; Mr. John Bland, (cont. on next page)

[1](cont.) Director, Alcoholism Control Administration, Maryland Department of Health and Mental Hygiene; Ms. Pat Burch, Legislative Liaison, Nat'l Federation of Parents for a Drug Free Youth; Dr. William Butynski, Executive Director, Nat'l Association of State Alcohol & Drug Abuse Directors; Robert E. Carlson, Esq., ABA Special Committee on Youth Education for Citizenship; Honorable Andy Devine, Nat'l Council of Juvenile Court Judges; Scott Drexel, Esq., Assistant General Counsel, State Bar of California; Thomas R. Dyson, Esq., Criminal Defense Attorney; Ms. Diane Grieder, Treatment Program Director, New Beginnings - Serenity Lodge; U.S. Senator Orrin Hatch (R., UT); Henry B. Hine, Esq.; Honorable Gladys Kessler, Associate Judge, Superior Court of the District of Columbia; Ms. Madeline E. Lacovara, Counselor & Psychology Instructor, Georgetown Visitation Preparatory School; Donald MacDonald, M.D., Administrator, Alcohol, Drug Abuse and Mental Health Administration; John M. McCabe, Esq., Nat'l Conference of Commissioners on Uniform State Laws; U.S. Representative George Miller (D., CA); Honorable M. Carl Moultrie, Chief Judge, Superior Court of the District of Columbia; Mr. David W. Oughten, Nat'l Association on Alcoholism and Drug Abuse Counselors; Leopoldo L. Ramos, Esq.; Mary Pat Toups, Esq.; Mr. Wheelock Whitney, Chairman, National Council on Alcoholism; James M. Wootton, Esq., Deputy Administrator, Office of Juvenile Justice and Delinquency Prevention, U.S Depart. of Justice; and E. Paul Young, III, Esq.

[2]The Atlanta field hearing of the Advisory Commission (hereinafter cited as "Atlanta") was held on January 22 and 23, 1985; the Princeton field hearing (hereinafter cited as "Princeton") was held on February 7-8, 1985; and the Los Angeles field hearing (hereinafter cited as "Los Angeles") was held on February 21 and 22, 1985.

[3]See testimony of William Coletti, Robert Margolis, Ph.D., Atlanta; and Ray Chavira, Los Angeles.

[4]Testimony of George Gallup, Jr., Princeton.

that six out of ten teenagers polled have drank alcohol, and 15 percent say that their alcohol use has already caused problems for them or others.[5] A recent study by the U.S. Department of Justice estimates that the five leading drugs among high school seniors are: alcohol - 70 per cent; cigarettes - 30 per cent; marijuana - 29 per cent; stimulants - 11 per cent; and cocaine - 5 per cent.[6]

On the state level, it was noted that 36,000 youth in New Jersey between the ages of 13 and 18 were experiencing alcohol problems, and that 25 to 40 percent of adolescents admitted to New Jersey correctional facilities were either drug or alcohol addicted or experiencing alcohol or drug problems.[7] In California, a Juvenile Court judge testified that 85 to 90 percent of the juveniles coming before his court have alcohol or other drug problems.[8] At the Atlanta field hearing one witness testified that there are approximately 40,000 juvenile drug addicts in Georgia alone.[9] In a paper presented to the Advisory Commission, a Georgia physician testified that there are 45,000 teenagers with alcohol problems in Georgia, and over 3.3 million in the United States.[10] Based upon the same data, the Commission was told that nine out of ten tenth graders report they have already been drunk, and one-third of high school students have been drunk at least six times per year.[11] These sources indicate that 94 percent of high school seniors have used alcohol, 90 percent have tried marijuana, while 54 percent report regular use and one of thirteen is a daily user.[12] Another witness noted a 50 percent increase in teenage drinking over the past two years.[13]

In addition to alcohol and marijuana use, a leading treatment expert reported a dramatic rise in cocaine use by

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[5] Id.

[6] THE MAGNITUDE OF SUBSTANCE ABUSE IN AMERICA, Special Report of the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice at 6 (Oct. 1984).

[7] Testimony of Thomas Blatner, Princeton.

[8] Testimony of Judge H. Randolph Moore, Jr., Los Angeles.

[9] Testimony of Charlotte Czekala, Atlanta.

[10] Testimony of Martha Morrison, M.D., Atlanta.

[11] Id.

[12] Testimony of Martha Morrison, M.D., William Coletti, Atlanta.

[13] Testimony of Gary Magniofico, Los Angeles.

youth, from 6 percent to 20 percent in 1982 due to lower prices and increased supplies.[14] In the past five years, this rise in cocaine use has resulted in a 200 per cent increase in cocaine-related deaths, and a 500 per cent increase in cocaine-related treatment admissions.[15]

Notwithstanding these alarming statistics, witnesses before the Advisory Commission repeatedly testified about the shocking scarcity of juvenile diagnostic and treatment facilities, special relevant training for lawyers or judges, funding for such treatment, and overall public awareness in this area.[16] Numerous witnesses also commented upon the effects of alcohol beverage advertising directed at youth and the marketing practices conducted by some distributors on college campuses.[17]

Witnesses repeatedly noted the demonstrated links between youth alcohol and other drug abuse and juvenile crime, serious health problems, poor school performance, automobile accidents, fatalities and other life-threatening injuries, as well as teenage suicide.[18] As numerous statistical studies reveal, alcohol-related auto accidents continue to be the leading cause of death in the 16 and 24 year old age group.[19] With an

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[14] Testimony of Arnold Washton, M.D., Princeton.

[15] See supra note 6, at 5. See also testimony of Martha Morrison, M.D. Dr. Morrison testified that:

> There are an estimated 20 to 45 million cocaine users in this country. Cocaine is a 26 to 32 billion dollar a year industry...One of the most dangerous chemicals is PCP or Angel Dust or phencyclidine. This substance has a predilection for causing disorientation, perceptual aberrations and paranoid behavior. Death may occur from cardiac and respiratory toxicity and also from behavioral toxicity. PCP is illegal and manufactured only in street labs...PCP is the most common contaminant found in a number of other street substances.

[16] Testimony Richard J. Russo, Princeton; and Charlotte Czekala, Atlanta (one state juvenile treatment facility for all of Georgia).

[17] See e.g., Testimony of Alan Stoudemire, M.D.; Al Hooney, M.D., Atlanta; George Hacker, Esq., Princeton; and Timothy McFlynn, Esq; Judge Leon Emmerson, Los Angeles.

[18] Testimony of George Hacker, Esq.; Thomas Blatner, Princeton; and Judge H. Randolph Moore, Los Angeles.

[19] Testimony of Minuard McGuire, Atlanta. According to Mr. McGuire, "young people exhibit two things that tend to increase their chances of having an accident involving alcohol: 1) lack of driving experience; and 2) lack of experience with drinking."

estimated annual societal cost of $116.7 billion from alcohol use,[20] the prognosis for the future is not promising based on these statistics.

Left unchecked, these statistics foretell continued validity for current estimates of: five percent of the population suffering from alcoholism and ten percent as problem drinkers; over 19,000 annual deaths due to medically-related alcohol illnesses; over 24,000 alcohol-related automobile fatalities; 30,000 other alcohol-related deaths from falls, fires and suicides; and over 300,000 disabling injuries.[21] Alcohol and other drug abuse has become the modern plague of our youth and our society.

This initial recommendation is just a beginning. A research and drafting process of only eight months -- even one as intensive as ours has been -- could not possibly attempt to solve all the myriad complex problems in this field. The regional field hearings revealed that there are no easy solutions to many of these problems. This 20-part recommendation is a distillation of over 250 recommendations extracted from the field hearings. They are targeted at some of the more troubling areas highlighted by the Advisory Commission's proceedings, as well as some of the more manageable issues that were deemed susceptible to resolution in the near term. The efforts of the Individual Rights and Responsibilities Section and its Advisory Commission in reaching out to the legal community and beyond can proceed with this initial recommendation as a basis for dialogue, further investigation and reflection. The recommendation is part of the larger continuing process of study and action in which the Individual Rights and Responsibilities Section and its Advisory Commission and the state and local bars are already participants with others seeking solutions to these problems.

During the coming Association year, the Section of Individual Rights and Responsibilities and its Advisory Commission will strive to implement the recommendation adopted by the House of Delegates. It will also continue its efforts to involve lawyers nationwide in the search for solutions to our serious national crisis of youth substance abuse.

1. Illegal Sales to Minors

Throughout the Advisory Commission field hearings, a recurrent theme was the need, expressed by many of the public, law enforcement and treatment personnel, for tougher penalties against convicted drug pushers who sell drugs or alcohol to

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[20]Testimony of Alan Stoudemire, M.D., Atlanta.

[21]Id.

youth.[22] There is ample precedent for creating a separate class or category of crimes specifically focused on the sale of large quantities of alcohol and hard drugs to youth. The typical state alcohol beverage control laws or juvenile protection laws provide penalties for the purchase and/or sale of alcohol by or to a minor.[23] State laws typically prohibit sales of alcohol and other potentially dangerous substances to particularly vulnerable individuals.[24] Moreover, many states prohibit the sale or the act of providing a dangerous weapon or other instrumentality to a young person.[25] Also typical of these laws is the prohibition of certain sexual conduct relating to youth or other especially vulnerable persons.[26]

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[22]See, e.g., testimony of William Coletti, Sue Rusche; Gregg Ruduka, Ph.D., C.A.C., Randall Simpson, Atlanta; and Barry Nidorf, Los Angeles.

[23]See, e.g., 18 Pa. Cons. Stat. Ann. S. 6308 (Purdon 1983)("A person commits a summary offense, if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malot or brewed beverages.") See also 1 Pa. Cons. Stat. Ann. S. 6307 (Purdon 1983)(misrepresentation of age to purchase liquor); 18 Pa. Cons. Stat. Ann. S. 6309 (Purdon 1984)(representing to liquor dealers that minor is of legal drinking age); 18 Pa. Cons. Stat. Ann. S. 6310 (Purdon 1983)(inducement of minor to buy liquor).

[24]See, e.g., 50 Pa. Cons. Stat. Ann. S. 4605(1) (Purdon 1983) (providing separate penalities for delivery of "any alcoholic or other intoxicating or narcotic substance" to any person in a mental health facility without the director's knowledge or consent.)

[25]See, e.g., 18 Pa. Cons. Stat. Ann. S. 6302(a) (Purdon 1983) (providing separate criminal penalities for sale or lease "to any person under 18 years of age of any deadly weapon cartridge, gunpowder, or other similar dangerous explosive substance.") See also 18 Pa. Cons. Stat. Ann. S. 6303(a) (Purdon 1983)("starter pistols"); 18 Pa. Cons. Stat. Ann. S. 6304(a) (Purdon 1983)("tobacco in any form"); 18 Pa. Cons. Stat. Ann. S. 6306(a) (Purdon 1983)("cigarettes or cigarette paper"). See also Wash. Rev. Code S. 9.41:080 (1977) and Mich. Comp. Laws S. 750.223 (1978)(firearms to minors).

[26]See, e.g., 18 Pa. Cons. Stat. Ann. S. 3123(4)(5) (Purdon 1983) (involuntary deviate sexual intercourse with any person "who is so mentally deranged or deficient that such person is incapable of consent; or who is less than 16 years of age.") See also 18 Pa. Cons. Stat. Ann. S. 3121 (Purdon 1983)(rape); 18 Pa. Cons. Stat. Ann. S. 3126(2)(5) (Purdon 1983)(indecent assault). Cf., Cal. Penal Code S. 266(h) (West 1985)(providing for higher penalities for facilitating the prostitution of a person under 16 as opposed to an adult);(con't. on next page)

Finally, many states provide special assault "victim" categories to protect certain persons at risk, particularly police officers, teachers, students and the elderly.[27] This proposal is consistent with these other, longstanding prohibitions regarding sales or conduct involving youth and other susceptible groups. Recently, a number of states have proposed and enacted mandatory minimum sentences for a limited group of serious crimes including gun violations,[28] drunk driving[29] and drug selling generally.[30]

Typically, these sentencing laws, as they relate to drug selling, define a list of serious and harmful drug classifications including heroin, PCP (phencyclidine or "angel dust") methamphetamine and methaqualone.[31] Some proposals also include possession of very large quantities of marijuana.[32] The mandatory minimum sentencing aspects of these laws typically provide for no parole and no probation from rigid custodial sentences for possession of these listed substances in the quantities specified in the statutes.[33]

26con't Cal. Penal Code S. 266(i) (West 1985)(pandering to minors); Cal. Penal Code S. 311.2 (West 1985)(felony penalty for exhibiting child pornography to a minor versus misdemeanor for adult exhibits.)

27 See, e.g., 18 Pa. Cons. Stat. Ann. S. 2702(2)(3) (Purdon 1983)(police officers) and (5)("teaching staff member, school board member, other employee or student of any elementary or secondary publicly-funded educational institution..."). It should be noted that these special "victim" categories were specifically enacted despite the Commentary to the Model Penal Code opposing such special categories. See Model Penal Code and Commentaries (Official Draft and Revised Comments 1980), Part II, at 183-5. See also Cal. Penal Code S. 243(b) (West 1985).

28 See, e.g., Neumann, Loftin and McDowall, Federal Firearms Policy and Mandatory Sentencing, 73 J. Crim. L. & Criminology 1051 (1982).

29 See, e.g., Note, Under the Influence of California's New Drunk Driving Law: Is the Drunk Driver's Presumption of Innocence on the Rocks?, 10 Pepperdine L. Rev. 91 (1982); see also 39 N.J. Stat. Ann. S. 4-50 (West 1983-84).

30 See, e.g., Ruff, Mandatory Minimum Sentencing Initiative, 8 Dist. Law. 28 (1984). See also 11 Crim. J. News 1 (1980)(23 states enacting similar laws).

31 Id. See also on the quantities, etc., Rendell Greenleaf Proposes Minimum Drug Sentences, Phila. Inq., March 6, 1985, S. B, at 1.

32 Id. at 2.

33 Id.

In 1983, however, the ABA House of Delegates passed a recommendation against mandatory minimum sentencing.[34] At that time the emphasis was on drug offenses in general without any further qualification, rather than on tougher sentences for the sale of large quantities of dangerous drugs to youth. Moreover, despite the efforts of law enforcement and judicial control, there have been numerous citations of ever-increasing alcohol and other drug use by our youth,[35] and inappropriate punishments for the pushers.[36] To clarify, our recommendation is directed "specifically at increasing sentences for a class of crime -- illegally selling alcohol or hard drugs to young people -- not at mandatory minimum sentencing. Under over recommendation, any and all relevant individual sentencing considerations would still be applicable. Only the maximum applicable penalty would be affected. For these reasons, this recommendation is appropriate for consideration at this time.

2. Juvenile Offender Treatment

There is general agreement among those involved in juvenile justice administration, whether judge,[37] prosecutor,[38] or treatment specialist,[39] that alcohol and drug abuse has reached epidemic proportions among juvenile offenders. One

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34 ABA Policy on "Mandatory Minimum Prison Sentences," February, 1974:

> The ABA opposes, in principle, legislatively or administratively imposed mandatory minimum prison sentences not subject to probation or parole for criminal offenders, including those convicted of drug offenses.
>
> The ABA further approves that the ABA President is authorized to advocate this position in any appropriate forum.

35 See supra notes 22-24.

36 Supra note 31 at 2.

37 See testimony of Judge Leon Emmerson, Los Angeles.

38 See testimony of Phillip Carchman, Princeton: "I can only speak for [my] county, perhaps in excess of 50 percent of the offenses we see committed by juveniles involve alcohol abuse or drug abuse."

39 See testimony of Thomas H. Blatner, Princeton: "The New Jersey Department of Corrections estimates that 25 to 40 percent of the adolescents admitted to its facilities are either alcohol or drug addicted, or are experiencing problems with drugs or alcohol."

treatment official in Los Angeles reported to the Advisory Commission that, "of the 35,000 plus youngsters who come through Los Angeles County's Juvenile Courts each year ..., 85 to 90 percent have a basic, underlying drug problem."[40] A recent national study reported by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) found that 50.3 percent of adolescents treated for delinquency had drug and/or alcohol problems.[41]

Youth drug and alcohol abuse is a problem which the current system has failed to adequately address, and without reform may be unable to overcome.[42] Accordingly, this recommendation and report urge the ABA House of Delegates to recommend that all juvenile offenders in need of alcohol or drug abuse treatment be given access to treatment while in the custody of legal authorities, and that the diversion of eligible juveniles into treatment facilities is an appropriate method for achieving such treatment.

Background: Access to Treatment

In 1967, President Johnson's Commission on Law Enforcement and the Administration of Justice recommended the "early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."[43] This recommendation

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[40]Testimony of Judge Randolph Moore, Los Angeles. Judge Moore added that the statistics he reported did not account for "the many more thousands that do not come before our Courts and go unnoticed, untreated, and uncared for...."

[41]Young, Residential Child Care, 1966 and 1981: Facilities for Children and Youth with Special Problems and Needs, University of Chicago, School of Social Service Administration (1982) at 92.

[42]See generally testimony of Gary Mangiofico, Los Angeles: "[the adolescent treatment community does] not believe that jail cells will cure chemical dependency, but we do believe the law enforcement/legal system can make a major impact in getting young people the appropriate help they need."

[43]Report of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society at 332 (1967).

won swift approval from a variety of sources in the legal community.[44]

The American Bar Association endorsed offender diversion early,[45] and has been instrumental in the creation and development of subsequent criminal diversion policy. The ABA, in conjunction with the Institute of Judicial Administration has dedicated volumes of the Juvenile Justice Standards to discussing and standardizing the procedures involved in juvenile diversion. The Standards Relating to Youth Service Agencies state:

> The primary goal of each youth service agency is to ensure that needed services are delivered to juveniles in the community before any court contact occurs. A subsidiary goal is to ensure that suitable programs are also available for all juveniles and their families formally referred by the police or courts, and not simply for those who are most easily rehabilitated.[46]

Juvenile diversion is firmly rooted within the ABA's tradition as an important alternative to the standard tools of juvenile justice: prosecution and incarceration. This support has been a crucial factor in the development and maintenance of

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[44]See former Attorney General John Mitchell's address to the National Conference on Corrections, in which he states, "in many cases society can best be served by diverting the accused to a voluntary, community-oriented correctional program instead of bringing him to trial." The Minneapolis Star, Dec. 6, 1971, at 13b. See also an address by Associate Justice Rehnquist before the National Conference on Criminal Justice, in Washington, D.C., January 24, 1973. Other groups voicing support of diversion as a viable alternative to adjudication and incarceration, include the National District Attorneys Association, American Correctional Association, and National Council on Crime and Delinquency.

[45]See ABA Commission on Correctional Facilities and Services, Coordination Bulletin No. 17, June 1973; see also ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (1971). Standard 3.8(a) of the Prosecution Function, and Standard 6.1 of the Defense Function urge each party to explore the availability of non-criminal disposition, including early diversion into community-based rehabilitation programs, especially for first offenders.

[46]Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Youth Service Agencies, approved by the House of Delegates, American Bar Association, 1980, see, e.g., commentary to Standard 2.1 of Youth Service Agencies at 38.

the various diversion programs around the country.[47] Therefore, it is consistent with established ABA policy that any juvenile who has come in contact with the juvenile justice system, andd who has been found to have alcohol and/or other drug abuse problems should be given access to appropriate treatment. Juvenile diversion is an appropriate vehicle to facilitate these treatment needs.

The Problem

As early as 1967, government officials were concerned about the sharply rising numbers of arrests, and the high recidivism rates among juveniles. The President's Commission on Law Enforcement and Administration of Justice, critical of the formal juvenile justice system, concluded that "the formal sanctioning system and pronouncement of delinquency should be used only as a last resort."[48]

The U.S. Supreme Court, in In re Gault,[49] held that the wide powers of the juvenile court system had not appreciably diminished youthful crime, that inconsistencies in its philosophy had adverse effects upon youth under its control, and that gross injustices had resulted from its procedures in which youth were punished more severely than adults for comparable offenses.[50] Critics condemned the juvenile court

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[47]See, The Performance Standards and Goals for Pretrial Release and Diversion, approved by the National Association of Pretrial Services Agencies, which remarks in the preface, "To date the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals have led the way in attempting to define some standards in the area of diversion against which we can all measure whether we are coming any closer to being able to administer justice". Id. at iii.

[48]President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 81 (1967). The Report continued to say, "[the juvenile court system] has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency or in bringing justice and compassion to the child offender."

[49]387 U.S. 1 (1967).

[50]Id. at 1-81; see also Lemert, Instead of Court: Diversion in Juvenile Justice, 3 (Center for Studies in Crime and Delinquency, National Institute of Mental Health, 1971).

system as "degrading,"[51] "unreasonable, prone to ordering detention,"[52] and "criminogenic."[53] This was the atmosphere from which the juvenile diversion programs first evolved.[54]

Testimony received by the Advisory Commission, reported that the same problems which confronted the juvenile justice system in the 1960's are still prevalent today. A broad consensus exists among juvenile justice officials and scholars that an unacceptably high rate of recidivism continues to persist among juvenile offenders;[55] that the juvenile justice system fails to meet the specific needs of juveniles;[56] and that contact with the juvenile justice system can be more injurious than rehabilitative.[57]

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[51]Lemert, supra note 50 at 12.

[52]Ferster, Juvenile Detention: Protection, Prevention or Punishment?, 37 Fam. L. Rev. 123 (1969); also published in Diverting Youth from the Correctional System (Youth Development and Delinquency Prevention Administration, U.S. Department of Health, Education and Welfare, 1973), at 31.

[53]Vorenberg and Vorenberg, Early Diversion From the Justice System: Practice in Search of a Theory, published in Prisoners in America, at 154 (Ohlin, ed. 1973). The Vorenbergs, described the court system as "hopelessly overloaded with cases;...brutal, corrupt and ineffective."

[54]Hillsman, Pretrial Diversion of Youthful Adults: a Decade of Reform and Research, 7 Just. Syst. J. 361 (1982):

> Defendants were afflicted with a wide array of social, emotional and physical problems, and their criminality tended to be neither violent nor particularly serious. What struck the reformers of the 1960's was the court's inability to address these deeper problems as they went about their traditional task of processing cases.

[55]See generally testimony of Phillip Carchman, Princeton. See also Selke, Diversion and Crime Prevention, 20 Criminology 395 (1982); Rojek and Erickson, Reforming the Juvenile Justice System: the Diversion of Status Offenders, 16 Law & Soc'y Rev. 241 (1981-82).

[56]See generally testimony of Phillip Carchman, Princeton; and Judge Randolph Moore, Gary Mangiofico, Los Angeles; Hillsman, supra note 54 at 361.

[57]See generally testimony of Paul Mones, Esq., Los Angeles; and Thomas H. Blatner, Princeton; Baker, Hillsman, and Sadd, The Court Employment Project Evaluation: Final Report (Vera Institute of Justice, 1979).

The term diversion[58] has been used to describe various administrative practices which procedurally have very little in common.[59] For example, the police officer who rather than arresting a delinquent youth, chooses to take him home for a talk with his parents, exercises in essence a diversion decision.[60] The unstructured discretion of a prosecutor to decline to charge or to prosecute in the interest of justice is

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[58]The American Bar Association, in its Juvenile Justice Standards, adopts the definition of diversion found in the Report of the Corrections Task Force of the National Commission on Criminal Justice Standards and Goals:

> Diversion refers to formally acknowledged ... efforts to utilize alternatives to ... the justice system. To qualify as diversion, such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred ... Diversion implies halting or suspending formal criminal or juvenile justice proceedings against a person who has violated a statute in favor of processing through a non-criminal disposition.

Institute of Judicial Administration-American Bar Association Juvenile Justice Standards: Standards Relating to Youth Service Agencies, at 5, citing, National Commission on Criminal Justice Standards and Goals, Corrections Task Force Report, 50 (1973). Implicit in the above definition is a two step process: first the accused is diverted from the traditional criminal process, and then placed into an alternative rehabilitative program such as an alcohol and/or drug abuse treatment program.

[59]Nimmer, Diversion: The Search for Alternative Forms of Prosecution, 4 (American Bar Foundation, 1974).

[60]Klein, Issues and Realities in Police Diversion Programs, 22 Crime and Delinquency 421 (1976).

also diversion.[61] The problem with defining these informal procedures as juvenile diversion, is that such procedures, ad hoc by their very nature, are subject to uneven, even unfair, application.[62] Thus, the American Bar Association, National Association of Pretrial Services Agencies, and other concerned organizations promulgated standards by which pretrial diversions should be governed.[63]

This recommendation takes into account the various procedural and Constitutional challenges which have been levied against diversion.[64] These concerns are dealt with in the Institute of Judicial Administration-American Bar Association Juvenile Justice Standards. Thus, issues such as juvenile representation, the requirement of a plea, and the right to a speedy trial will not be discussed in this report.

Goals of Access to Treatment Through Juvenile Diversion

The traditional goals of pretrial diversion include: unburdening court dockets and conserving judicial resources for more serious cases; reducing the incidence of offender recidivism by providing an alternative community-based rehabilitative incarceration; and benefiting society,

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[61]National District Attorney's Association, Monograph on Philosophical, Procedural and Legal Issues Inherent in Prosecutor Diversion Programs, at 3-4 (1974).

[62]National Association of Pretrial Services Agencies, Pretrial Diversion: Performance Standards and Goals for Pretrial Releases and Diversion, approved 1978. See generally Programs in Criminal Justice Reform (Vera Institute of Justice, 1972).

[63]See Standards Relating to Youth Sevice Agencies, supra note 46. See also National Association of Pretrial Services Agencies, Diversion: Performance Standards and Goals for Pretrial Release and Diversion, supra note 47; and Note, Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827, 828 (1974):

> The label of diversion may properly be reserved for dispositions pursuant to formal standards followed by supervised rehabilitation. Pretrial diversion provides, in principle, criteria for decision-making, ... [I]t is an attempt to standardize ad hoc procedures of an informal discretionary system.

[64]See generally Note, supra note 63, at 827.

by the training and placement of previously unemployed persons.[65] This recommendation addresses another goal: where evaluation and screening indicate an alcohol and other drug abuse problem, diversion can facilitate the treatment and rehabilitation of the accused. The Advisory Commission received a great deal of testimony throughout its hearings explicitly recommending that adequate and complete substance abuse treatment to those juveniles in need of such treatment could be accomplished through diversion.[66] These recommendations from those working within the juvenile justice system are important given the recent history of the pretrial diversion movement. Though pretrial diversion is far from dead,[67] its prominence has decreased over the last several

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[65]These goals had general support. See National Association of Pretrial Services Agencies, Standards and Goals for Pretrial Release and Diversion, supra note 47, at 24, which defined the goals of diversion as:

> providing the traditional criminal justice system with greater flexibility and enabling the system to conserve its limited resources for cases more appropriately channeled through the adversary process; providing eligible defendants with a dispositional alternative that avoids the consequences of regular criminal processing and possible conviction, yet insures that defendants' basic legal rights are safeguarded; advancing the legitimate societal need to deter and reduce crime by impacting on arrest-provoking behavior by offering participants opportunities for self-development.

[66]See generally testimony of Thomas Blatner, and Phillip Carchman, Princeton; and Gary Mangiofico, Judge Randolph Moore, Paul Mones, Esq., Los Angeles.

[67]Hillsman, supra note 29 at 367.

years.[68] While the number of diversion programs across the country has fallen,[69] the amount of criticism the movement received has increased.[70] Much of the criticism has centered on the failure of the diversion movement to achieve the lofty goals it set for itself back in the late 1960's. Pretrial diversion advocates have responded to this criticism by reappraising their goals:

> It would appear that the most relevant question today about the pretrial diversion movement is not whether the programs have the impact they originally intended but why they do not, or why those effects are not stronger .... The major task now facing this field involves identifying the conditions under which pretrial diversion programs might achieve more of what they set out to do over a decade ago.[71]

One condition under which pretrial diversion can achieve its original goals would be the diversion of alcohol or drug abusing youth into treatment programs. These programs, with their limited scope and purpose, have achieved dramatic results in the treatment and rehabilitation of juvenile offenders.[72]

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[68]Pryor, Practices of Pretrial Diversion Programs: Review and Analysis of the Data, (Pretrial Services Resource Center, 1982).

[69]The American Bar Association Directories of Pretrial Intervention Projects identified 148 projects in 1976. The Pretrial Services Resource Center identified 127 such projects in a 1981 survey. An interesting fact uncovered by this recent survey is the volatility of diversion programs; of the 127 projects identified 62 percent had started up after 1974, and 28 percent since 1976.

[70]See supra note 55 at 241.

[71]Hillsman, supra note 54 at 380.

[72]A limited but rewarding investigation by the Advisory Commission uncovered a number of successful diversion projects around the country. For example:

> The Youth Diversion Unit of Whittier, California. This project is administered by the local law enforcement agency. The Unit identifies eligible first offenders and refers them to the appropriate treatment facility. The Unit reports that in fiscal year 1984, of the total number of juveniles taken into custody, 19.2 percent were diverted, of that number, 19.8 percent recidivated (cont. on next page).

Conclusion

Testimony before the Advisory Commission has confirmed that a crisis presently exists in the juvenile justice system. The juvenile courts across the nation are ill-equipped to deal with the alcohol and drug abuse epidemic which prevails in its courtrooms and jails. This recommendation calls upon the ABA House of Delegates to recommend that the states confront this

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72(cont.)

The District of Columbia Juvenile Diversion Project. This project refers eligible juveniles to treatment in one of a consortium of private agencies. The project reports that while 30-35 percent of previously incarcerated juveniles are subsequently rearrested, only 20 percent of those juveniles who have been diverted are later rearrested.

Alcohol-Jail Program, Metropolitan Atlanta Council on Alcohol and Drugs, Inc. Due to the fact that the local county and city jail facilities in metropolitan Atlanta were estimating that 75-80 percent of their inmates had alcohol related incidents, an "Alcohol-Jail Pre-Release Course" was initiated by the Metropolitan Atlanta Council on Alcohol & Drugs, Inc. The Alcohol-Jail Pre-release course consists of four two-hour sessions taught over a two week period. The medical aspects of alcoholism, the relationship between alcohol/drugs and crime, the relationship between alcoholism/drugs and domestic relationships, the disease of alcoholism, and the revolving door jail syndrome are just some of the topics covered by the course. A personal action plan is also developed and tailored to fit the needs of the individual and help find constructive alternatives to his alcohol/drug abuse. See testimony of Robert Y. Halford, Atlanta.

The Intake Service Conferences of Essex County, New Jersey. This diversion process is administered by an adjunct of the county Family Court. The court case managers review those accused, and refer eligible candidates to outside agencies. Essex County reports that of those diverted, 68 percent never come before a court. Each of New Jersey's counties has an equivalent program. These programs derive their authority from the New Jersey Family Court Act, N.J. Stat. Ann. S. 2A:4A-70 et. seq. (West 1983-84), which refers explicitly to alcohol and drug abuse as one of the criteria to be considered in making the decision to divert. Other states possess similar diversion statutes as that contained in the New Jersey Family Court Act. See, e.g., The California Juvenile Court Law, Cal. Welf. & Inst. Code S. 654 (West 1984); Mass. Gen. Laws Ann. ch. 276A, S. 1 et. seq. (West 1985).

crisis and provide alcohol or drug abusing youth within the juvenile justice system effective treatment through diversion programs.

3. Revocation of Driver's License

The statistics on the under 21 involvement in traffic fatalities, along with the "blood border" fatalities justify some limitation on licenses up to age 21.[73] The complete or partial revocation or suspension of a youth license is another step to begin solving the problem of alcohol-related traffic fatalities. The Presidential Commission on Drunk Driving has recommended that states adopt the provisional youth driving license.[74] The President's Commission noted that 35 states have adopted some variation on limiting the licenses for drivers under the age of 18.[75]

On April 10, 1985, Robert J. Mellow, a Pennsylvania State Senator, introduced Senate bill No. 660[76], providing for

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73In 1981, approximately 25,000 people died from alcohol-related highway accidents (70 lives per day). In that same year 4,884 persons died in alcohol-related highway accidents in which the driver was under 21. This represents 23.6 percent of all alcohol-related fatalities. Over 5,000 teens are killed and 130,000 are injured yearly in alcohol-related accidents. These statistics demonstrate the gross involvement of teens in alcohol-related fatalities despite the fact that drivers under 21 represent only ten percent of the licensed drivers, and only drive nine percent of the vehicle miles driven. The American Automobile Association, Why the Legal Drinking Abe Should be 21 (1984). See recommendation and report on the 21 drinking age.

74See Presidential Commission on Drunk Driving, Final Report, at 21 (Nov. 1983).

States should adopt laws providing a provisional license for young beginner drivers which would be withdrawn for a DUI conviction or an implied consent refusal.

75Id.

76Drug and alcohol related offenses by persons under 18 years of age; restrictions, suspension, or delay of driving privileges:

(a) Upon conviction of a person for any offense specified in subdivision (d), committed while the person was under the age of 18 (cont. on next page)

provisional youth licenses, based on an existing California statutory provision for delaying or revoking driver's licenses of persons under 18 convicted of drunk driving.[77] There have been similar proposals with regard to restricted adult licenses after DWI convictions.[78] Some of these proposals, however, are not above question on constitutional grounds as cruel and unusual punishment. However, it has been established that the consent provision is appropriate since the U.S. Supreme

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> years and while driving a motor vehicle, the court may suspend or restrict the person's driving privileges on conditions that the court deems appropriate or, in the case of a person who does not yet have the privilege to drive, order that the privilege be delayed. The duration of the restriction, suspension, or delay shall be for up to one year or until the person reaches 17 years of age, whichever is longer; however, if the person's driving privileges have been previously suspended, restricted, or delayed pursuant to this section, the duration may be extended until the person reaches 18 years of age.

See also Cal Veh. Code S. 13352.3 (West 1985), regarding the terms of revocation and reinstatement of such licenses.

[77]PA Senate Bill 660, Printer's No. 755 (1985), proposes to amend the existing Pennsylvania driving law as follows:

> 75 Pa. Cons. Stat. S. 3731(e)(1983) is amended by adding a paragraph to read:
>
> > S. 3731 Driving under the influence of alcohol or controlled substance...
> >
> > ...e. Penalty
> >
> > ...(9) In addition to the other penalities prescribed under the section, any person under 21 years of age violating any provision of this section shall have his driver's license revoked until he reaches 22 years of age. Revocation shall occur for in-State violations of this section and for out-of-state violations of laws of the situs state which conform to this section.

See Cal. Veh. Code S. 13202.5 (West 1985).

[78]See, e.g., the "labeling" of DWI offenders in Oklahoma. Oklahoma Town Tags Convicted Drunk Drivers, The Washington Post, Feb. 21, 1985, at A3; Caufield, A Look at His Bumper Can Tell the World He Has Driven Drunk, Phila. Inq., Feb. 20, 1985, at 12A.

Court has repeatedly upheld state blood-alcohol and breathalizer tests in addition to restrictions resulting from a refusal to consent.[79]

Therefore, provisional youth licences subject to complete or partial revocation upon conviction or refusal to consent are extensions of already existing laws or pending legislation.[80] This recommendation urges the ABA House of Delegates to support both provisional youth licences and uniform 21 minimum drinking age laws as two measures that in tandem can help to address the "drinking and driving" aspect of youth alcohol and other drug problems.

4. Paraphernalia Law

The problems involved with the easy availability of drug paraphernalia were raised throughout the Advisory Commission hearings.[81] Parent groups, school administrators, students and treatment professionals[82] all remarked on the ease with which a juvenile may acquire the needed tools of drug use.

The statistics are staggering. Nearly 65 percent of all juveniles have tried marijuana and 48 percent of those have used the drug more than 10 times.[83] The Surgeon General of the United States, Dr. C. Everett Koop, has reported that:

> In the past 20 years there has been a 30-fold increase in (marijuana) use among youth. More than a quarter of the American population has used (marijuana). The age at which people first use marijuana has been getting consistently lower and is now most often in the junior high school years. Daily use of marijuana is greater than that of alcohol among this age group. More high school seniors smoke marijuana than smoke cigarettes.[84]

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[79]See, e.g., South Dakota v. Neville, 103 S. Ct. 916 (1983); and Mackey v. Montrym, 443 U.S. 1 (1979).

[80]Such partial licenses are already permitted in some states so as to enable minors to travel to and from work. See, e.g., N.Y. Veh. & Traf. Law S. 501.3 (McKinney 1984-85).

[81]See testimony of William Coletti, Amy Haywood, Atlanta; and Arnold Washton, M.D., Princeton.

[82]Id.

[83]131 Cong. Rec. S3319 (daily ed. March 20, 1985) (statement of Sen. Pete Wilson).

[84]Id.

The statistics are equally alarming with regard to other controlled substances. Cocaine use among high school students leaped from an estimated 6 percent in 1976 to over 20 percent in 1982.[85] This figure translates to one out of every seven high school seniors experimenting with cocaine.[86] This increase in use has been attributed to easy availability, reduced prices and improved purity.[87] In response to these figures, it is not surprising that the drug paraphernalia industry reports record sales. The numbers are estimated in the billions of dollars.[88] As an outgrowth of this boom, the paraphernalia industry in 1977 established its own trade organization, trade journal and periodical. This recommendation[89] encourages federal action to prohibit the interstate sale and shipment of drug paraphernalia which would eliminate the mail order and catalog sales of the instruments of drug use to minors.

The Advisory Commission adopted the definition of drug paraphernalia as stated in the Model Drug Paraphernalia Act (MDPA).[90] That definition states that:

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[85]Testimony of Arnold Washton, M.D., Princeton.

[86]See supra note 81.

[87]Testimony of Arnold Washton, M.D., Princeton. According to Dr. Washton:

> The price of cocaine has fallen by as much as 50 percent in the past year in many of the large cities: one gram of cocaine, at $60-70 on the illegal market, is now cheaper than an ounce of marijuana. Meanwhile, the purity has increased from about 28 percent in 1982 to over 40 percent in 1983.

[88]see supra note 81.

[89]See S.713, "The Mail Order Drug Paraphernalia Control Act" which was introduced on March 20, 1985 to the Senate Committee on the Judiciary by Senator Pete Wilson (R., Ca). 131 Cong. Rec. S 3319 (daily ed. March 20, 1985). Similarly, See, e.g., federal law also restricts the sale of all firearms or ammunition to youth under eighteen, and certain other weapons to youth under 21. See, e.g., 18 U.S.C.A. 922 (b)(1) (West 1976). See also the recommendation and report regarding illegal sales to minors.

[90]The Drug Enforcement Administration (DEA) drafted the Model Drug Paraphernalia Act (MDPA) in 1979 to counter the availability of drug paraphernalia, which the DEA characterized as at an epidemic level. The MDPA attacks the drug paraphernalia industry (cont. on next page)

> Drug Paraphernalia means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging,

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[90](cont.)

> which promotes, even glamorizes, the illegal abuse of drugs by adults and children alike. Sales of drug paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the (original) Uniform Act was drafted has now mushroomed into an industry so well entrenched that it has its own trade ... lines and associations.

The MDPA was written in response to judicial invalidation of various state and municipal laws controlling drug paraphernalia. Several of these pre-MDPA laws fell before constitutional challenges on both overbreadth and vagueness grounds.

> The MDPA is the DEA's attempt to write a statute broad enough to deal with the problem of drug paraphernalia, narrow enough to avoid impinging on constitutionally protected conduct, and precise enough to be understood by both the law's enforcers and its targets.

Note, The Constitutionality of Anti-Drug Paraphernalia Laws - The Smoke Clears, 58 Notre Dame L. Rev. 833, 840 (1983).

The MDPA attempts to overcome overbreadth and vagueness concerns in two ways. First, the Act precisely defines drug paraphernalia and provides examples and other factors for a court to consider when determining whether a particular item is proscribed paraphernalia. See infra note 93. Second, the Act includes an intent (to use with a controlled substance) requirement to obviate any definitional ambiguity. "The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use ... with a controlled substance." MDPA Art. I.

The MDPA has been adopted in its entirety or in a modified version, by a majority of the states and by many communities. Only seven states and the District of Columbia lack laws focused on prohibiting drug paraphernalia. See 58 Notre Dame L. Rev. at 842, n. 44. (listing of state codification of the MDPA).

storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act.[91]

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[91]This definition includes, but is not limited to:

1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;
2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;
4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;
5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;
6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;
7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
8) Blenders, bowls containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;
9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;
10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;
11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parentally injecting controlled substances into the human body;
12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

In order to further avoid claims of vagueness or overbreadth, the definition of paraphernalia[92] has been refined to provide a fair warning to manufacturers of what conduct is prohibited and a list of appropriate standards for police and courts to follow when enforcing the law.[93] The

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[91](cont.)

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(b) Water pipes;
(c) Carburetion tubes and devices;
(d) Smoking and carburetion masks;
(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
(f) Miniature cocaine spoons, and cocaine vials;
(g) Chamber pipes;
(h) Carburetor pipes;
(i) Electric pipes;
(j) Air-driven pipes;
(k) Chillums;
(l) Bongs;
(m) Ice pipes or chillers.

[92]Early "pipe laws" were struck down on the grounds that they were inherently vague and included a wide variety of objects that the non-hypodermic drug user employed. See Grayned v. City of Rockford, 408 U.S. 104 (1972); See also Note, supra note 90 at 836.

[93]In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;
(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;
(3) The proximity of the object of controlled substances on the object;
(4) The proximity of the object to controlled substances;
(5) The existence of any residue of controlled substances on the object; (cont. on next page)

Act also contains a specific intent requirement "to mitigate any definitional ambiguity or uncertainty."[94]

To date, there has been no direct constitutional challenge to the MDPA in the U.S. Supreme Court. In 1982, in Hoffman Estates v. Flipside,[95] the Court upheld a city anti-paraphernalia ordinance which did not contain language as precise as that of the MDPA. That decision virtually assures that a carefully drawn anti-paraphernalia law will withstand a pre-enforcement facial challenge to its constitutional validity.[96]

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[93](cont.)
(6) Direct or circumstantial evidence of the intent of an owner, of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;
(7) Instructions, oral or written, provided with the object concerning its use;
(8) Descriptive materials accompanying the object which explain or depict its use;
(9) National and local advertising concerning its use;
(10) The manner in which the object is displayed for sale;
(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community such as licensed distributor or dealer or tobacco products;
(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
(13) The existence and scope of legitimate uses for the object in the community;
(14) Expert testimony concerning its use.

[94]See Note, supra note 90, at 841.

[95]455 U.S. 489 (1982), reh'g denied, 102 S. Ct. 2023 (1982).

[96]In Flipside the court employed a two-pronged analysis in upholding the constitutionality of the ordinance: Overbreadth - whether the enactment reaches a substantial amount of constitutionally protected conduct, Vagueness - whether the enactment is impermissibly vague in all its applications.

Since Flipside, of the 13 cases considering drug paraphernalia laws, only one has held an ordinance unconstitutional; and that ordinance was not based on the MDPA.[97] In addition, no appellate level Federal Court has overturned a state or local ordinance mirroring the MDPA.[98] An Eleventh Circuit decision, Florida Businessmen for Free Enterprise v. the City of Hollywood,[99] indicative of similar decisions reached by the other circuits, held that the city ordinance, based on the MDPA, did not impinge on protected non-commercial speech.[100] The intent provisions of the ordinance gave fair notice of which articles fell within the ordinance's scope, and the ordinance's "reasonably should know" standard defining substantive offenses was not impermissibly vague.[101]

To date, 38 states and hundreds of localities[102] have enacted statutes prohibiting the sale of drug paraphernalia. An unfortunate outgrowth of the success of these state and local statutes has been the emergence of the mail order paraphernalia industry. Upon introducing S. 713, the Mail Order Drug Paraphernalia Control Act, Senator Pete Wilson, (R., Ca) stated:

> By using the mail to ··· transport drug paraphernalia this industry is seeking to circumvent state and local laws. These products enhance or aid consumption of illegal drugs, glorify the use of drugs, and enrich those who would victimize our nation's children through these mind-destroying drugs.[103]

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[97]Record Head Corp. v. Sachen, 682 F.2d 672 (7th Cir. 1982).

[98]See, e.g., Nova Records, Inc. v. Sendak, No. 81-1107 (7th Cir. 1983); Camille Corp. v. Phares, No. 82-1410 (7th Cir. 1983); and Stoianoff v. State of Montana, 695 F.2d 1214 (9th Cir. 1983).

[99]673 F.2d 1213 (11th Cir. 1982), cert. den., 51 U.S.L.W. 3520 (Jan. 11, 1983).

[100]Id.

[101]Id.

[102]See News Release, Senator Pete Wilson (R. Ca.) (March 20, 1985). See also supra note 83.

[103]Id.

The constitutionality of the local paraphernalia ordinances has been challenged and defeated in virtually every case where the ordinance was patterned after the definition used in the MDPA. With the subsequent rise of the mail order paraphernalia houses, the instant recommendation urge the ABA House of Delegates to support the enactment of legislation designed to prohibit transportation or shipment of drug paraphernalia through the mails and interstate commerce.

5. Age 21 Drinking Laws

The magnitude of the problem of "under 21" drinking and driving was repeatedly raised throughout the Advisory Commission field hearings.[104] The statistics demonstrate that approximately 3,588 teenagers between the ages of 16 to 19 are killed in alcohol-related accidents each year,[105] making these accidents the leading cause of death for that age group.[106] Put another way, nearly half of all deaths of 16-19 year olds are due to motor vehicle accidents.[107]

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[104]See, e.g., Testimony of Alan Stoudemire, M.D., Minuard McGuire, Al Mooney, M.D., William Coletti, Atlanta; and George Hacker, Esq., Phyllis Schepps, John F. Vassallo, Jr., Princeton.

[105]See, e.g., Presidential Commission on Drunk Driving, supra note 74 at 5-6; The Secretary's Conference for Youth on Drinking and Driving, at 2 (U.S. Gov. Printing Office 1983); Fill, Alcohol Involvement in Traffic Accidents, DOT-HS-806-269 (May, 1982).

[106]See also AAA Report, supra note 73 at 3.

> In 1981, 4,884 persons died in alcohol-related highway accidents in which the driver was under 21. This represents 23.6 percent of all alcohol-related fatalities. Drivers under 21 represent about 10 percent of the licensed drivers, drive about 9 percent of the vehicle miles driven.

But see National Association of Broadcasters, Drunk Driving: A National Responsibility ... A Local Solution at I (1984).

> Although 16-20 year olds comprise only 10 percent of the licensed drivers in this country and account for less than 8 percent of the total vehicle miles traveled, they are involved in 20 percent of all fatal alcohol-related crashes.

[107]Secretary's Conference, supra note 105.

Moreover, injuries are also disproportionally represented from teenage alcohol-related motor vehicle accidents.[108]

On July 17, 1984, President Reagan signed Public Law 98-363 which calls upon those states that do not have a minimum legal drinking age of 21 to enact such legislation by September, 1986. Failure to enact such legislation would result in a withholding of five percent of federal highway construction funds in fiscal 1987 and ten percent in fiscal 1988. Only 23 jurisdictions, less than half of the 50 states, have enacted 21 minimum drinking age laws.[109] Of these, four enacted such provisions only as recently as last year.[110] Since the number has increased from 15 in 1981 to 23, the trend is towards raising the minimum drinking age,[111] thus reversing the trend between 1970 and 1975 when 29 states lowered their minimum drinking ages.[112]

In addition to the issue of uniform state laws, the Advisory Commission also noted concern about the under 21 drinking age among military personnel subject to the jurisdiction of the Department of Defense. A 1971 Congressional study by the Comptroller General has reported the high incidence of alcohol problems among younger servicemen.[113] A 1984 Special Report of the Office of Juvenile Justice and Delinquency Prevention confirms that study by reporting that 84.4 percent of all military personnel consume alcoholic beverages and that heavy drinking occurs

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[108]Insurance Institute for Highway Safety, The Year's Work 1983-1984, at 5 (1984). See also AAA Report, supra note 73.

[109]See Appendix A, "Status of Efforts to Raise Legal Drinking Age to 21." This figure was also derived from the table entitled "State Legal Drinking Age Summary (9/30/84)", prepared and published by the U.S. Department of Transportation, reprinted in, Drunk Driving: A National Responsibliity, supra note 106.

[110]Id.

[111]Cook and Tauchen, The Effect of Minimum Drinking Age Legislation on Youthful Auto Fatalities, 1970-77, 13 J. Legal Stud. 169 (1984).

[112]Id., Cook and Tauchen report that 14 of these 29 states had reversed earlier amendments which had previously lowered the drinking age.

[113]Comptroller General of the U.S., Alcoholism Among Military Personnel, A Report to the Subcommittee on Alcoholism and Narcotics, U.S. Senate Committee on Labor and Public Welfare (1971) at 6: (cont. on next page)

most often among personnel aged 24 and below.[114] More recently, the Federal Trade Commission staff noted that "the Department of Defense has developed a number of informational and educational campaigns designed to combat alcohol abuse on military bases."[115] Similarly, the Advisory Commission has also expressed concern about the potential dangers of alcohol marketing directed at college students, many of whom are in the same age group as under 21 servicemen.[116]

The 21 proposal is widely supported by public and private agencies across the country.[117] The 21 issue, however, does have its critics. One often-repeated criticism is that the arguments for prohibiting drinking by under 21 year olds could just as readily be made for under 24 year olds based on the equally appalling statistics for that older group.[118] One commentator responded to this criticism by stating that:

> (M)uch merit could be seen in a drinking age of 25. People between 21 and 24, after all, are significantly over-represented in alcohol-related crashes, (although not quite as over-represented as are 18-20 year olds)...(I)n all honesty, however, the selection of 21 as the proposed minimum drinking age is dictated largely by pragmatism. It is unlikely that a higher age would receive the public and political support necessary to secure its enactment.[119]

The statistics on deaths per licensed drivers also indicate that ages 18 through 21 are the highest impacted age group, with 18 the peak age, and each year after that "tailing off."[120] There are qualitative as well as quantitative differences between the under and over 21 classification.[121] Perhaps, the answer to the why just under 21 query, is that it works. States that have raised their minimum drinking age have reported significant decreases in the involvement of the affected age groups.[122] The state of Michigan raised the drinking age to 21 in 1978 and reported that alcohol-related traffic accidents in the 18-20 year old age group had decreased by 31 percent in 1979.[123] Confirmation of this deterrent effect has also been reported in Illinois where in 1980 the drinking age was raised to 21 and for that year, single-vehicle nighttime accidents involving male drivers under the age of 21 decreased 8.8 percent.[124] In a study by the Insurance Institute for Highway Safety, a 28 percent decrease in alcohol-related accidents were reported in eight of nine states where the drinking age had been raised.[125]

Finally, a major concern of the 21 proponents is the problem of "blood borders," so called because of higher fatality rates at or near borders between states with differing drinking ages. Drivers from the state with the more restrictive legal minimum drinking age travel to a contiguous state that has a less restrictive drinking age policy. Numerous studies document the high incidence of alcohol-related traffic fatalities at or near the borders of these neighboring

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113(cont.)
(A)bout 38 percent of the problem drinkers identified by squadron commanders ... were in the 17 to 24 age group. ...[In] the younger servicemen [where] drinking was repetitive, [they were] undisciplined...[and] had caused their commanders problems....

Heavy drinking, however, often starts among younger servicemen and could develop progressively into a more serious problem. Id. at 8.

114OJJDP Report, supra note 6 at 19.

115See Recommendation of the staff of the Federal Trade Commission, Omnibus Petition for Regulation of Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices, Docket No. 209-46, at 42 (March 1, 1985).

116See the recommendation and report on college marketing.

117See, e.g., supra note 105-108. See also Ross, Deterring the Drinking Driver, at 114 (Lexington, 1981); Prohibit the Sale of Alcoholic Beverages to Persons Under 21 Years of Age, Hearings on H.R. 3870 Before the House Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce, 98th Cong., 1st Sess. (1984).

118Drinking Age 21: Facts, Myths and Fictions, U.S. Department of Transportation, National Highway Traffic Safety Administration at 11 (1984).

119Id.

120Insurance Institute for Highway Safety, Status Report, Vol. 16, No. 14 at 3 (Sept. 23, 1981).

121See testimony of William Coletti, Atlanta.

122See Williams, Zador, Harris and Korph, The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes, 12 J. Legal Stud. 169 (1983).

123AAA Report, supra note 73 at 2.

124Id.

125Id.

states.[126] These border tragedies demonstrate the need for uniform minimum 21 laws. A clear plurality of states have set 21 as the minimum drinking age with others proposing legislation at this time. Accordingly, this recommendation and report urge the ABA House of Delegates to support a uniform 21 drinking age for the purchase and possession of all alcoholic beverages.

6. Forfeiture

Background

The concept of forfeiture can be traced to the Book of Exodus in the Old Testament.[127] It has been defined by our modern courts as the "divestiture (to the sovereign) without compensation of property used in a manner contrary to the laws of the sovereign."[128] Forfeiture provisions are critical for two major reasons: 1) helping to curb drug trafficking by removing the implements of the crimes and taking the profits; and 2) raising revenue for drug abuse enforcement, treatment, prevention and education activities.[129]

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[126]See, e.g., Lillis, Wilians, Williford, Special Policy Consideration in Raising the Minimum Drinking Age: Border Crossing By Young Drivers, paper presented at National Alcoholism Forum, April 12-15, 1984.

[127]See MYERS & BRZOSTOWSKI, DRUG AGENT'S GUIDE TO FORFEITURE OF ASSETS 1 (Drug Enforcement Assistance Administration, 1981).

[128]United States v. Eight Rhodesian Stone Statutes, 449 F. Supp. 193, 195 n. 1 (C.D. Cal. 1978).

[129]This recommendation and report is not to be construed to support in any way the application of forfeiture to the issue of attorney's fees. It is the primary intent of this recommendation to create additional sources of revenue for treatment. The issue of forfeiture and attorney fees is so complex that it cannot be considered here and is being considered elsewhere in the ABA. The Defense Function Committee of the ABA Criminal Justice Section is conducting a survey to ascertain the extent to which federal prosecutors are using provisions enacted by the Comprehensive Crime Control Act of 1984 to seize and seek the forfeiture of fees paid to defense attorneys by defendants in drug and racketeering cases. In 1979-80 the Drug Enforcement Assistance Administration seized assets totaling nearly one-half its annual budget. See supra note 127 at 365.

Forfeiture statutes can either be civil or criminal. A civil forfeiture statute is a proceeding in rem, where the property is the defendant.[130] A criminal forfeiture statute, on the other hand, requires a criminal conviction for the underlying crime before the fruits and implements of that crime can be forfeited.[131]

Before the forfeiture of money or property can be required, procedures must occur to insure that constitutional due process requirements are satisfied. In a civil forfeiture proceeding, the focus is on the use of the property, not the motive of the individual.[132] It is an in rem proceeding: the property is the defendant.[133] No conviction of the person who used the property is required because the personal guilt of the individual is not at issue.[134] The government need only prove that it has reasonable grounds for believing that the property was connected to illegal activity.[135] In a criminal forfeiture proceeding, there must be a conviction for the underlying crime before the tools of that crime can be forfeited to the government.[136] The standard of proof in a criminal forfeiture proceeding is the higher standard of proof beyond a reasonable doubt to believe that the property was connected to criminal activity.[137]

If the participants in drug-related criminal activity can be deprived of their assets, it follows that the incidence and extent of drug trafficking will lessen.[138] If the state forfeiture statutes are amended to include civil forfeiture, the burden of proof for the government in civil cases would be reduced and forfeitures would be sustained more easily.[139]

Fourteen states and the District of Columbia have made

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[130]Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931).

[131]See MYERS & BRZOSTOWSKI, supra note 127.

[132]Comment, California Forfeiture Statute: A Means for Curbing Drug Trafficking, 15 Pac. L.J. 1035 (1984)

[133]Id.

[134]Id. at 1036

[135]Id.

[136]Id. See also MYERS & BRZOSTOWSKI, supra, note 127 at 10.

[137]Id.

[138]See supra note 127 at 364.

[139]Id. at 15.

special provisions in their civil and/or criminal forfeiture provisions for the disbursement of forfeited money and assets as a result of drug-related activity. These states include: Alabama, Alaska, California, District of Columbia, Florida, Illinois, Indiana, Michigan, Minnesota, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee and Washington.[140]

Federal legislation governing controlled substances contains both civil and criminal forfeiture provisions. In 1970

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[140] Alabama: Ala. Code S. 20-2-93 (1984)(sell what is not to be destroyed; pay off all expenses; remaining to be divided among local, city, state and general fund)
Alaska: Alaska Stat. S. 17.30.122 (1984)(destroy property harmful to public; pay expenses of proceedings; use for enforcement)
California: Cal. Health & Safety Code S. 11489 (West 1985)(50% allocated to Department of Mental Health for primary prevention programs)
District of Columbia: D.C. Code Ann. S. 25-144 (1984)(sell to pay expenses; balance of proceeds shall be used to finance programs to rehabilitate drug addicts, educate citizens, prevent drug addiction)
Florida: Fla Stat. Ann. S. 893.12 (West 1984)(to enforcement agencies)
Illinois: Ill Rev. Stat. ch. 561/2, S. 712, 1413, 1651 et. seq. and 2105 (1984)(12-1/2% paid to Juvenile Drug Abuse Fund - funding of programs and services for drug abuse treatment for juveniles, remaining amounts in this fund go to other programs and services for drug abuse treatment, prevention and education; 87-1/2% deposited in the Treasurer's office for drug enforcement)
Indiana: Ind. Code Ann. S. 16-6-8.5-5.1 (Burns 1983)(pay expenses; balance shall be used for payment into the common school fund of the state)
Michigan: Mich. Comp. Laws Ann. S. 333.7524 (West 1984-85)(until Oct. 1, 1985, 25% balance to be credited to Dept. of Public Health for substance abuse)
Minnesota: Minn. Stat. Ann. S. 152.19 (West 1985)(balance to state drug abuse authority for distribution: one-half to hospital and drug treatment facilities for care and treatment, remainder to appropriate state agency)
North Carolina: N.C. Gen. Stat. S. 90-112 (1981)(surplus to be paid to school fund of county in which drugs seized)
Oklahoma: Okla. Stat. Ann. tit. 63, S. 2-503 (West 1984)(drug enforcement)
Oregon: Or. Rev. Stat. S160.725 (1983)(general school fund)
South Carolina: S.C. Code Ann. S. 44-53-580 (Law. Co-op 1985)(all fines shall be used by Dept. of Mental Health exclusively for the treatment and rehabilitation of drug addicts)
Tennessee: Tenn. Code Ann. S. 52-1443 (1983)(drug enforcement)
Washington: Wash. Rev. Code Ann. 69.50.505 (1985)(50% in criminal justice training account).

Congress enacted two major pieces of legislation designed to curb drug trafficking: Racketeer Influenced and Corrupt Organizations Statute (RICO)[141] and the Drug Abuse Prevention and Control Act of 1970 (ControlledSubstances Act).[142] Each act contains a criminal forfeiture provision[143] which requires forfeiture of illegally ensued property[144] when the user has been convicted of the underlying crime.[145]

The Comprehensive Crime Control Act Amendments of 1984[146] have further expanded the forfeiture provisions of RICO and the Controlled Substances Act to now include, inter alia, a funding mechanism to permit the use of forfeited proceeds to defray the escalating administrative costs in pursuing forfeitures.[147] A thorough understanding of the concept of forfeiture as it relates to the objectives stated above -- deterring drug activity and raising revenue -- requires a discussion of the state and federal statutory schemes, specifically: 1) Uniform Controlled Substances Act; 2) Model Forfeiture of Drug Profits Act; 3) anti-racketeering statutes; and 4) Comprehensive Crime Control Act Amendments of 1984.

1. Uniform Controlled Substance Act

The Uniform Controlled Substances Act was drafted by the National Conference of Commissioners on Uniform State Laws and approved by that body in 1970.[148] The Act was drafted "to achieve uniformity between the laws of the several States and those of the Federal government," and to provide "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem."[149]

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[141] 18 U.S.C. S. 1961 et seq. (1982).

[142] 21 U.S.C. S. 801 et seq. (1982).

[143] 18 U.S.C. 1962, 1963 (1982); 21 U.S.C. 848 (1982).

[144] Id.

[145] 21 U.S.C. 881(a) (1982).

[146] Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[147] S. Rep. No. 225, 98th Cong. 1st Sess. 6 (1984), reprinted in U.S. Code Cong. & Ad. News 195, 196.

[148] Unif. Controlled Substances Act S. 101, 9 U.L.A. 197 (1970).

[149] Id., Prefatory Note at 188.

The drafting of the Act came on the heels of the enactment of the "Controlled Substances Act"[150] which enabled the states to update and revise their own controlled substances laws.[151] All but two states, New Hampshire and Vermont,[152] have adopted the Uniform Controlled Substances Act.[153]

2. Model Forfeiture of Drug Profits Act

The Model Forfeiture of Drug Profits Act (Model Act) was drafted by the Drug Enforcement Administration, U.S. Department of Justice in January 1981.[154] The Model Act is based on Title 21, Section 881(a)(6) of the United States Code, which is the federal civil forfeiture statute. The Model Act was deemed necessary after passage of the 1978 amendments[155] to the Comprehensive Drug Abuse Prevention and Control Act of 1970 expanded the civil forfeiture provision to include the forfeiture of illegally accumulated profits of criminal activity.[156] Prior to the amendment, only the tools of criminal activity were required to be forfeited. The new 1978 amendment greatly expanded the weapons that could be used to attack organized crime.[157] The Model Act amends the civil forfeiture section of the Uniform Controlled Substances Act to conform to 1978 civil forfeiture amendments,[158] which has been enacted by forty-eight states, the District of Columbia, Puerto Rico, Guam and the Virgin Islands.[159]

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[150] 21 U.S.C. S. 801 841 et seq. (1981).

[151] Unif. Controlled Substances Act, supra note 137.

[152] Id. at 99 (as amended 1984).

[153] Puerto Rico, the Virgin Islands, Guam and the District of Columbia have all adopted the Uniform Controlled Substances Act.

[154] See MYERS & BRZOSTOWSKI, supra note 127 at 363.

[155] Pub. L. No. 95-633, 92 Stat. 3768 (1978).

[156] 21 U.S.C. 881(a)(6) (1982).

[157] See MYERS & BRZOSTOWSKI, supra note 127 at 364.

[158] Unif. Controlled Substances Act S. 101, 9 U.L.A. 197 (as amended 1984).

[159] Id.

3. Anti-Racketeering Statutes

Twenty-two states and the Commonwealth of Puerto Rico[160] have adopted anti-racketeering statutes of their own in the wake of the enactment of federal RICO.[161] Federal RICO, by its own terms, is not preemptive.[162] Section 904 of the Organized Crime Control Act of 1970 (of which RICO is one title), provides that "nothing in the [RICO] title shall supersede" any provision of state law "imposing criminal penalties of affording civil remedies in addition to those provided for in this title."[163]

RICO was enacted by Congress to strengthen law enforcement weapons against criminal infiltration of legitimate businesses.[164] RICO provides for criminal penalties, civil remedies and a forfeiture provision designed to deprive racketeers of the benefits of their illegal activity.[165] Existing state RICO statutes resemble the federal law, but contain significant differences.[166]

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[160] 5 Trade Reg. (CCH) 50,449.

[161] Racketeer Influence Corrupt Organizations, 18 U.S.C. 1961 et seq. (1982).

[162] "Big RICO" and "Little RICO's": An Overview, 2 RICO Litigation Rep. (RLR) 240 (Sept. 1984).

[163] Id. See also Chapter XXII of the Comprehensive Crime Control Act Amendments of 1984, 98 Stat. 2192 (1984), which states in full:

> SEC. 2201. Notwithstanding this or any other Act regulating labor-management relations, each State shall have the authority to enact and enforce, as part of a comprehensive statutory system to eliminate the threat of pervasive racketeering activity in an industry that is, or overtime has been, affected by such activity, a provision of law that applies equally to employers, employees, and collective bargaining representatives, which provision of law governs service in any position in a local labor organization which acts or seeks to act in that State as a collective bargaining representatives pursuant to the National Labor Relations Act, in the industry that is subject to that program.

[164] See "Big RICO" and "Little RICO's", supra note 162.

[165] The 1984 Amendments to the Forfeiture Provisions of RICO, 1 R.L.R. 586 (Jan. 1985).

[166] "Big RICO" and "Little Rico's," supra note 162.

Proceeds from any forfeiture under Federal RICO are to be deposited into the Department of Justice Assets Forfeiture Fund.[167] The monies in this fund are in turn disbursed by the Attorney General for, inter alia, reimbursement for costs of the forfeiture proceedings.[168] No specific provisions are made for these monies to be allocated to the prevention of the drug-related crimes, treatment of those involved in the criminal activity or, in the case of drugs, the addicts themselves. Individual states may enact provisions in their own RICO statutes to create a fund from the proceeds of forfeiture actions which could in turn be used for drug abuse enforcement, treatment, prevention and education programs.

4. Comprehensive Crime Control Act Amendments of 1984

The 1984 Amendments[169] established the Department of Justice Assets Forfeiture Fund,[170] into which will be deposited "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice remaining after the payment of expenses for forfeiture and sale authorized by law."[171] No provisions are made for the disposition of these monies. To implement this recommendation, the House of Delegates should, among other things, recommend that the Attorney General promulgate regulations which would allocate these monies to drug abuse enforcement, treatment, prevention and education, especially for programs directed at youth substance abuse.

The 1984 Amendments established the Customs Forfeiture Fund,[172] into which shall be deposited "all proceeds from the sale or other disposition of property forfeited under, and any currency or monetary instruments seized and forfeited under, the laws enforced or administered by the United States Customs Service."[173] The statute is also silent as to the disposition of the monies beyond payment of the expenses of forfeiture proceedings and the payment of awards to informers. To implement this recommendation, the ABA House of Delegates

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[167]Comp. Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2052 (1984).

[168]Id.

[169]Id. at S. 1837.

[170]Id. at S. 1837, 2052.

[171]Id. at S. 310.

[172]Id. at S. 2054.

[173]Id.

should, among other things, urge that the United States Customs Service promulgate regulations which would allocate at least a portion of this fund to drug enforcement, treatment, prevention, and education programs, particularly those programs impacting on youth substance abuse.

Chapter XIV of the Comprehensive Crime Control Act Amendments of 1984[174] is the "Victims of Crime Assistance Fund of 1984."[175] The monies in this fund come directly from convicted criminals or public donations.[175] The Attorney General is authorized to make annual grants from this fund to the states for the purpose of compensating and providing services to victims of crime.[176] Legislative intent contemplates the allocation of these monies to state victim assistance funds to be awarded to "community-based volunteer organizations of the kind that have pioneered the provision of services for victims of sexual assault, spouse abuse, and child abuse."[177]

While the Act does not specifically contemplate juvenile drug addicts as "victims", an analogy could be made that they are the victims of drug trafficking and that monies from this fund could be used for treatment programs. Because these annual grants go directly to the states, each state could redefine its statutory definition of victim to include juvenile alcohol and drug abusers in order to develop specific education and treatment programs targeted to this population.

7. Surcharge

Many witnesses at the Advisory Commission field hearings testified about the lack of adequate funding for substance abuse treatment facilities and prevention programs directed at youth alcohol and drug abuse.[178] The mandated insurance and state excise tax proposals offer two alternative means of increasing funding. Funding would originate from the policies of the general public who buy insurance, in the first instance, and by the same general public as legal users of these beverages. The forfeiture proposal, however, is directed at raising funds from drug lawbreakers themselves, as is this proposal regarding imposition of surcharge fines against both

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[174]Id. at S. 2170.

[175]Id.

[176]Supra note 147, at 8. Cong.

[177]Id. at 437.

[178]See, e.g., testimony of Sue Rusche, Gregg Ruduka, Atlanta; and Ray Chavira, Los Angeles.

alcohol and drug law violators.

Based on the testimony of a New Jersey state health official[179] various enforcement personnel, and others concerned,[180] the imposition of a "dedicated" surcharge fine on controlled substance and liquor code violators would be an effective and appropriate tool for funding of treatment and prevention. Based on the large number of violations currently, even a small fine on violators could generate the much needed revenue.[181]. Moreover, there are relevant legal precedents for such dedicated surcharges in the area of drunk driving fines,[182] liquor license revenues,[183] excise taxes[184] and other similar existing or proposed regulatory enforcement measures.[185] In addition, if surcharges are viewed as

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[179]See testimony of Richard J. Russo, Assistant Commissioner, New Jersey Department of Health, Princeton. This New Jersey health official estimated that between $1 to $1.5 million could be raised by adding a $100 fine to penalities for controlled substance and liquor law violations based on an annual rate of 34,000 drug arrests and 13,000 liquor law violations, (exclusive of drunk driving) with a 25 - 30 percent conviction rate. He suggested that this revenue could directly support two or three new residential youth treatment centers or to reimburse existing programs for treating indigent youth clients.

[180]See, e.g., testimony of Mark J. Byre, Nancy Brach, Mia Anderson, Princeton.

[181]See supra note 179.

[182]See, e.g., New Jersey drunk driving law regarding dedicated charges for Intoxicated Driver Resource Centers, 39 N.J. Stat. Ann. 4-50 (f) (West 1984).

[183]See, e.g., National Association of State Alcohol and Drug Abuse Directors, State Survey Fact Sheet, Dedicated Alcohol Taxes (1982). See, e.g., Mich. Comp. Laws S. 436.47 (1978); Mont. Code Ann. S. 16-404, 408 (1983); Ohio Rev. Code Ann. S. 4301.30 (Page 1971); and Wash. Rev. Code Ann. S. 66.08.180 (1985).

[184]See alcohol excise tax recommendation and report.

[185]See U.S. J. of Alcohol and Drug Dependence, at 15 (Jan. 1985), regarding Texas Senate Bill 620 providing for dedication of substance abuse and DUI fines to fund treatment facilities. This bill permits the exact percentage of these funds dedicated to be determined by each county from its total fines. The bill was introduced by Amarillo State Senator William Sarpalius on behalf of a group of judges and the Panhandle Regional Planning Commission. Senate Bill 620 has already passed the Texas Senate and has now been referred to the House where it received its second reading on May 17, 1985 with final passage and approval by the governor expected shortly thereafter.

a form of "victim compensation," there are apt analogies to statutes across the country which compensate individual victims of specific crimes[186].

To a great extent, drug and alcohol violations are societal in addition to individual crimes. Substance abuse is costly to society as well as to the individuals directly involved.[187] A report recently developed for the Alcohol Drug Abuse and Mental Health Administration, estimates 1983 costs of alcohol and drug abuse to society at $176.4 billion.[188] To identify and recompense individual victims for these general harms would be costly and impracticable. Therefore, it would seem only appropriate to require the substance violator to provide for some of the "system" costs for the rehabilitation of his victims.[189] A dedicated surcharge, especially a nominal one, would violate no constitutional norm against cruel or unusual punishment. Such fines for environmental, food and drug, and other societal crimes are relatively routine. The treatment and prevention costs thus recovered would still be minimal compensation to the societal costs and illegal profits involved in these violations.[190]

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[186]See, e.g., numerous articles on the growing trend of "victimology," including Kiesel, Crime and Punishment, 70 A.B.A. J. 25 (1984); Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 U.C.L.A. L. Rev. 52 (1982); Goldstein, A New Role for the Victim: The Federal Victim Act of 1982, 100 F.R.D. 94 (1982) (concerning the Federal Victim and Witness Protection Act, 18 U.S.C. S. 3579, at 80). The new emphasis on "Dram Shop Acts" also reflects this trend. See the recommendation and report on dram shop laws.

[187]See, e.g., Fein, Alcohol in America the Price We Pay (Care Institute 1984).

[188]Harwood, Napolitano, Kristiansen, Collins, Economic Costs to Society of Alcohol & Drug Abuse & Mental Illness, Report developed by the Research Triangle Institute for the Alcohol Drug Abuse & Mental Health Administration, June 1984.

[189]Id. See also supra note 57, at 182. ("Because drivers under the influence are responsible for this problem with its great resulting human cost, it is appropriate that offenders should defray the costs of enforcement, prosecution, adjudication, treatment and education.")

[190]One Georgia witness estimated the total spending for alcohol and drugs for that state alone to be $1 billion annually. See testimony of Martha Morrison, M.D., Atlanta.

8. Dram Shop and Host Liability

A coherent, uniform dram shop liability policy would help to prevent not only alcohol-related accidents, but also the problem of excessive drinking. Re-oriented to include explicit prevention goals, dram shop laws would encourage server intervention as a tool to avoid excessive drinking and the accidents which inevitably follow. A dram shop liability policy built around prevention goals would induce alcohol beverage servers to take the reasonable precautions necessary to avoid legal liability, such as instituting alcohol education programs for the server's employees, or offering alternative transportation to those who have consumed alcohol.[191]

The current state of dram shop liability policy is one of disarray.[192] Each of the fifty states possesses and applies its own idiosyncratic view of dram shop law. While one state moves judicially to expand the reach of dram shop liability to include social and business hosts[193], another passes legislation severely limiting the scope of possible liability[194]; as one state hands out record monetary damage

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[191]Organizations in various states are investigating different ways of using dram shop policy to encourage prevention techniques among alcohol beverage servers. For example, the Prevention Research Center of California is drafting a model dram shop act with the explicit purpose of trying to "prevent intoxicated related traumatic injuries, death, and other damages." See also the work of James M. Schaefer, Director, University of Minnesota's Office of Alcohol and Other Drug Abuse. Mr. Schaefer's organization is researching a program which would require liquor establishments to hire only specially trained and certified bartenders, waiters and waitresses. Such training programs for alcohol servers would be encouraged by offering discounts to bar owners who hire trained and licensed servers. Similar work is being done by Intermission Unlimited. Intermission is working to establish alcohol training programs for Massachusetts bar employees. To aid in its efforts, Intermission also publishes a newsletter, Responsible Beverage Service, to educate the public with regard to serving alcoholic beverages. See also, testimony of James F. Mosher, Los Angeles.

[192]See attached chart, Appendix B.

[193]See Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

[194]In 1978 the California Legislature, in response to a California case finding social host dram shop liability, passed two related statutes severely curtailing the court's ability to find dram shop liability. Cal. Bus. & Prof. Code S.25602, 25602.1 (West Supp. 1983).

awards against alcohol beverage servers [195], another legislatively limits the damages recoverable by any allegedly injured plaintiff.[196]

Resulting from this legislative and judicial non-conformity is an uneven system of victim compensation, an unreliable system of deterrence, and an unpredictable system by which alcohol servers may be held liable. The Advisory Commission received repeated testimony from its field hearings criticizing the current state of dram shop law, and recommending a uniform policy of alcoholic beverage server liability for serving minors.[197]

With this in mind, this recommendation urges the ABA House of Delegates to recommend that all states enact dram shop and social host liability legislation which would establish civil liability against a negligent server of alcoholic beverages to an individual whom that server knew or should have known to be a minor, and where that minor subsequently becomes intoxicated and as a result injures himself, a third person, or such third person's property.

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[195]E.g., in Cabrian v. Booe, #78-05432 127th Judicial District of Harris County (Tex. 1983), the court awarded a dram shop plaintiff a record $2.5 million in damages, despite the fact that Texas possessed no dram shop law. See also Pattison v. Brooks, #80CV0876 District Court, County of Denver (Colo. 1983), the parties settled on a $10 million award for plaintiff, even though Colorado possessed neither a statutory nor a common law rule providing for dram shop recovery.

[196]N.C. Gen. Stat. S. 183-123 (1984) limits total dram shop recovery to a maximum of $500,000.

[197]See generally testimony of James F. Mosher, Los Angeles, "It is critical that dram shop laws provide a clear set of guidelines to licencees that will promote the responsible service of alcoholic beverages"; Judge Leon Emerson, Los Angeles, "Shielding laws that prevent judges and courts from applying civil, criminal and economic responsibility from licencees and negligent, careless hosts are dead wrong in my opinion."; Lawrence Wallack, Los Angeles, "Because the laws concerning dram shop liability vary from state to state there is no consistent view of the legal responsibility of the server or the establishment. The lack of clear policy in this area results in 'business as usual' which can mean inappropriate serving techniques resulting in preventable traffic crashes and related problems." See also Alan Stoudemire, Atlanta, "Epidemiologic, Economic and Clinical Perspectives in the Prevention of Alcohol Dependence and Abuse" (paper presented).

A. Background

Dram shop liability first appeared in American law in the 1880's as an attempt by the temperance movement to close saloons.[198] These early statutes typically provided that financial support be paid by tavern owners to the families of patrons who had become habitual drunkards.

In their current application, modern dramshop statutes refer to the potential liability of the furnisher of alcoholic beverages for the negligent, reckless or intentional conduct of the drinking patron which causes harm to either the drinker or a third party. Most courts, before finding server liability, require the plaintiff to demonstrate that the patron's intoxicated condition contributed to the injury.

Currently, several states fail to recognize any form of dram shop liability. These states prefer to retain the traditional common law doctrine which recognizes no relation to proximate cause between the sale of liquor and a tort committed by a buyer who has consumed the liquor.[199] This recommendation and report urge the ABA House of Delegates to support the abolishment of the traditional common law rule barring third party dram shop claims.

B. The Elements of Dram Shop Liability

In establishing dram shop liability policy, three key issues must be resolved: who may be found liable; what constitutes actionable negligence; and who may sue.

Who May Be Found Liable

All the states which recognize dram shop liability make state licensed retail establishments (both on-sale and off-sale) potentially liable for harms caused their patrons.[200] In reaching this result many courts and legislatures have relied on statistical evidence linking automobile accidents to consumption of alcohol in bars and restaurants. For example, a 1978-79 Los Angeles study found that approximately 50 percent of those arrested for driving while intoxicated, identified a licensed

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[198]Mosher, Dram Shop Liability and the Prevention of Alcohol Related Problems, 40 J. Stud. Alcohol 773, (1979).

[199]See, e.g., State for Use of Joyce v. Hatfield, 197 Md. 249, 249-255, 78 A.2d 754, 756 (1953).

[200]Mosher, Legal Liabilities of Licensed Beverage Establishments: Recent Development in the United States, at 8 (1983).

establishment as the location of their last drink prior to the arrest.[201] Another study, a 1973 report on a national roadside breathalizer test survey, found that 44 percent of those tested with a blood alcohol content level of 0.10 percent or greater were driving to, from, or between public drinking places.[202]

The general rule among courts has been to limit the application of dram shop acts to provide a cause of action only against those in the business of selling liquor and not against one who provides another an intoxicating beverage as a mere act of hospitality.[203] It is interesting that those courts which distinguish social hosts from commercial servers in this way, do so though most dram shop acts explicitly prohibit "any person" from serving intoxicated persons or minors. Courts which accept this approach do so on the basis that commercial enterprises are better equipped than social hosts to pay damages for the injuries caused by intoxicated patrons.

A number of courts, however, "have been willing to impose a duty on social hosts similar to that imposed on commercial vendors" where the guest is a minor.[204] In 1972, the Minnesota Supreme Court became the first modern court to impose social host liability in the case of Ross v. Ross.[205] Following the Ross decision, a number of other state courts followed suit in establishing social host liability.[206] In reaching this conclusion these courts have relied on one of the three theories of liability: 1) a strict statutory approach -- that the dram shop act does not preclude social host

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[201]Mosher and Wallack, The DUI Project: Description of an Experimental Program to Address Drunk Driving Problems Conducted by the California Department of Alcoholic Beverage Control (1979).

[202]Mosher, Server Intervention: A New Approach for Preventing Drinking and Driving, 15 Accident Analysis Prevention 483, 487 (1983).

[203]53 ALR 3d 1285, 1286 (1973). See, on the fundamental difference between serving alcohol in social and commercial settings.

[204]Id. at 1268.

[205]294 Minn. 115, 200 N.W.2d. 149 (1972).

[206]See, e.g., Brattain v. Herron, 155 Ind. 663, 309 N.E.2d 150 (1975); Wener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Linn v. Rand, 356 A.2d 15 (N.J. 1976)(holding a social host liable to a third person injured by a minor who previous to the accident was served alcoholic beverages by the social host.)

liability[207]; 2) notions of per se negligence[208] -- that the serving of alcoholic beverages to a minor is a criminal violation and automatically subjects the offender to civil liability; or 3) on a traditional negligence theory[209] -- that a reasonable person could foresee that an intoxicated minor would become involved in some type of accident, thereby establishing a duty to refrain from providing alcohol to minors.

To this point, no cases have been found holding parents liable under a dram shop theory for injuries caused by their children or their children's guests, who have consumed the parent's alcoholic beverages. Two New York Supreme Court Appellate Division cases,[210] however, have held that parents may be subject to negligence actions for injuries caused by intoxicated minors who had been served alcoholic beverages by the parent's child. In both of these cases the court relied on traditional common law principles of negligence and not on New York's dram shop act.

What Constitutes Actionable Negligence

The negligent furnishing of alcoholic beverages consists of two elements: that the defendant affirmatively offered the liquor to the consumer; and that the defendant possessed the capacity to control the service of the alcoholic beverages.[211] Inherent in this definition of the negligent furnishing of liquor are traditional notions of reasonable standards of care which form the basis of all tort law. Dram shop liability may result either from serving alcoholic beverages to those under the minimum drinking age, or from serving obviously or apparently intoxicated adults: All fifty states make either practice criminally punishable.

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[207]See, e.g., Drattain v. Herron, 155 Ind. 663, 309 N.E.2d 150 (1975).

[208]See, e.g., Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968).

[209]See, e.g., Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971).

[210]Hugler v. Rose, 88 A. D.2d 755, 451 NYS2d 478 (1982) and Comeau v. Lucas, 90 A. D.2d 674, 455 NYS2d 871 (1982).

[211]Bedard, One More for the Road: Civil Liability of Licensees and Social Hosts for Furnishing Alcoholic Beverages to Minors. 59 B.U. L. Rev. 725, 741 (1979).

Those states which recognize dram shop liability can find one who serves liquor to a minor negligent in one of three ways: 1) expressly imposing liability for serving minors who subsequently become involved in an injury producing accident; 2) finding liability by using traditional negligence concepts -- minors are presumptively unable to responsibly consume alcohol, thus a reasonably prudent person would not provide alcohol to a minor in order to avoid a foreseeable injury to that minor or others and; 3) finding servers per se negligent, where the serving of alcoholic beverages to minors is a criminal offense, the offender is per se subject to civil liability for subsequent injury.

With regard to serving adults rather than minors, dram shop liability currently depends on whether the consumer was "obviously intoxicated" when he was served. The "obviously intoxicated" standard is criticized by many commentators as too subjective and imprecise to fairly judge the relative reasonableness or unreasonableness of an alcohol server's conduct.[212] Though courts are almost unanimous in espousing the notion that obvious intoxication is readily apparent to any reasonable person, many critics maintain that the standard fails to prevent the very harm which dram shop liability seeks to curtail: injuries caused by inebriated people. In most cases, once the point of obvious intoxication is reached, a person is well beyond the level of legal intoxication.[213] For example, in Paula v. Gagnon,[214] the defendants blood alcohol content level was twice that of legal intoxication (0.19 percent), and yet, the court would not consider that figure conclusive evidence of obvious intoxication.

Some critics contend that the obviously intoxicated standard is so vague it precludes alcohol servers from conforming with the law.[215] This measure of liability fails to provide a simple, objective standard against which servers may gauge their conduct, or have their conduct judged. This recommendation therefore urges the ABA House of Delegates to support replacing the anachronistic obviously intoxicated standard with the common law torts standards of reasonable care and negligence: Has the alcoholic beverage provider taken the necessary and reasonable precautions to avoid foreseeable harm

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[212]See, e.g., Server Intervention, supra note 202, at 483.

[213]See Bedard, supra note 211, at 736.

[214]81 Cal. App.3d 680, 146 Cal. Rptr. 701 (Ct. App. 1978).

[215]See supra note 210. See also Bedard, supra note 211, at 735-742.

to his drinking patrons, social guests, or unknown third parties. This type of tort analysis more properly frames dram shop liability as a preventative device.

Who May Sue?

All courts which recognize dram shop liability include third party victims (neither the server nor consumer) as potential plaintiffs.[216] In the case where patron A leaves tavern B and causes crash with victim C, who does not contribute to his own injury, courts in dram shop liability jurisdictions are unanimous: C has a valid cause of action against tavern B.

The courts, however, are split as to cases where the factual setting varies from that above. For example, where victim C is a drinking partner of patron A, and C actually encourages A to become intoxicated, the courts differ as to whether victim C is contributory negligent in fostering A's intoxication, and if so, whether C is barred from recovery against B. The court decisions are similarly confused where patron A sues tavern B for injuries he sustained as a result of an alcohol-related incident.

C. The Current Status of Dram Shop Liability Among the States

Twenty-three states currently possess some form of dram shop liability legislation.[217] Fourteen of these statutes are at least thirty-five years old, with a majority dating back to the turn of the century. As products of the temperance movement, these laws primarily seek to abolish habitual drunkeness by awarding financial support to the drunkard's family.[218] Six of these fourteen statutes are so archaic that their limited scope effectively precludes most, if not all, modern dram shop suits. For example, Colorado, by law, permits dram shop suits only where a licensee serves a habitual drunkard.[219] Georgia, on the other hand, permits server liability if a licensee serves a minor, but such suits may only be brought by the minor's parents, thus barring third party claims.[220] The remaining eight pre-1950 statutes contain language broad enough to permit recovery in most modern third party dram shop suits.

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[216]Mosher, supra note 200 at 7.

[217]See appendix B.

[218]See, e.g., Act of May 1, 1954, Ohio Stat. S. 5, Ohio Rev. Code Ann. S. 4399.01 (Page 1954).

[219]Colo. Rev. Stat. S. 13-21-103 (1983).

[220]Ga. Code Ann. S. 3-3-22 (1984).

Nine states have enacted new dram shop legislation since 1971. Seven of these statutes permit broad recovery by third party plaintiffs. Two states, Florida and California, have recently passed laws strictly limiting dram shop liability. Florida's statute allows liability only in those cases where the licensee "willfully" serves a minor[221] and California's statute requires liability only where a licensee serves an "obviously intoxicated minor."[222] In each case, the state legislatures sought to stem the growth of potential dram shop liability by narrowly defining who may be sued, and what constitutes culpable conduct.

Seventeen jurisdictions currently enforce dram shop liability as a matter of common law. The supreme courts of 10 jurisdictions (9 states and the District of Columbia) have imposed dram shop liability solely as a matter of common law. In 1959, New Jersey in Rapporport v. Nichols,[223] became the first state to assign civil liability to an alcohol retailer even though New Jersey lacked a statute providing for such liability. Seven states possess both statutory and common law liability. Thus states like Ohio and Wyoming, which have archaic and restrictive dram shop statutes, have broadened possible recovery through common law.[224]

The current trend among the states is toward a substantial expansion of dram shop liability.[225] For example, five of the seven state legislatures which have enacted dram shop legislation in the last twenty-five years have passed laws which created new liability. In addition, six state supreme courts have created dram shop liability by case decision in the past twenty-five years.[226]

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[221]Fla. Stat. Ann. S. 51-1-18 (West 1983).

[222]Cal. Bus. & Prof. Code S. 25602.1 (West 1983).

[223]31 N.J. 188, 156 A.2d. 1 (1959).

[224]See, e.g., Mason v. Roberts, 33 Ohio St.2d 29, 294 N.E.2d 884 (1973), and McClellan v. Totten, 666 P.2d 408 (1983).

[225]A recent article in the Philadelphia Inquirer highlights this trend in the growth of alcohol server liability, Risky Business, Philadelphia Inquirer, March 24, 1985, at B-1. The article recognizes the rapid expansion of alcohol server litigation, and the threat tavern owners experience as a result of this explosion in litigation.

[226]For a recent example of a State Supreme Court creating common law dram shop liability see Sorensen v. Jarvis, 119 Wis.2d 627, 350 N.W.2d 108 (1984).

In the twenty-five states which possess either restrictive statutes or no official statewide liability policy, only seven supreme courts have explicitly deferred to their respective state legislatures, and refused to accept a new common law rule.[227] The remaining seventeen states have yet to have the issue reviewed by their respective highest courts. Yet, in each of these states, the trial and appellate court decisions have generally favored imposing dram shop liability.[228]

Large settlements and unappealed plaintiff verdicts are occurring with regularity even in states where there is no statutory dram shop liability, and where appellate courts have not accepted the modern common law theory of dram shop liability.[229] One California settlement, for example, awarded $2.5 million to a young girl who was injured when the car in which she was a passenger struck a tree.[230] The driver, a minor, had purchased (or was given) beer from a friend who worked at defendant convenience store. This settlement is significant not only for its record size, but that it occurred in California, a state with an extremely restrictive dram shop law.

The federal government has come to view dram shop liability as a viable weapon in the battle against drunk driving. Both the Presidential Commission on Drunk Driving[231] and the National Highway Traffic Safety Administration (NHTSA) have endorsed dram shop liability as a legitimate strategy for

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[227] See, Mosher, supra note 200 at 12.

[228] Id. at 13.

[229] Harrington, Illustrative Dram Shop Settlements and Jury Verdict Cases: Further Evidence that Server Liability is Expanding?, at 1-15, reprinted in, National Association of State Alcohol & Drug Abuse Directors, Special Report -- Alcohol Server Liability and the Law: Examples of Lawsuits, Major Financial Settlements and State Laws (December, 1984).

[230] Cunningham v. Shorttop, Inc., #108600 Sup. Ct. of Marin County, Cal. (May, 1983).

[231] Presidential Commission on Drunk Driving, supra note 74 at 11. The Commission's Dram Shop Recommendation states:

> States should enact "dram shop" laws establishing liability against any person who sells or serves alcoholic beverages to an individual who is visibly intoxicated.

reducing drunk driving. NHTSA has stated:

> The potential threat of a substantial jury award resulting from a dram shop suit...can effectively motivate people to stop serving drivers who are obviously becoming intoxicated.[232]

The trend among the various legislatures, courts and agencies around the country is to adopt dram shop liability as a tool with which to confront alcohol related problems. The difficulty these various bodies face is to modernize and revitalize the 19th century concept of dram shop liability to do the work of contemporary social policy.

Conclusion

Across the nation, courts are being asked to judge the civil liability of those who provide alcoholic beverages to minors, where those intoxicated minors injure the property or person of another. The decisions from district to district often conflict in result, as well as in rationale. This lack of coherence in dram shop policy deprives: injured plaintiffs of a complete system of compensation; government officials of a reliable system of deterrence; and alcohol beverage servers of a predictable system of civil liability.

This recommendation calls upon the states to harmonize their various dram shop laws and adopt a unified policy establishing civil liability against those who negligently provide alcohol beverages to a minor. In addition, it would be helpful to the states if the National Conference of Commissioners on Uniform State Laws would draft a model dram shop law statute addressing the concerns of this recommendation.

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[232] 48 Fed. Reg. 5545 (1985).

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9. Alcohol Excise Taxes

Numerous studies have now demonstrated that the effective tax rates on alcoholic beverages have not kept pace with inflation since 1953 as compared to the costs of other goods and services.[233] The result, according to testimony before the Advisory Commission, is that in some areas, beer is price-competitive with soft drinks.[234]

The increased taxes may also impact on the demonstrated elasticity of demand for some alcohol products, by lowering consumption of beer, for example, particularly by the young for whom beer is the alcohol beverage of choice.[235] The impact of such taxes seems also to be on consumption across the range from heavy to light drinkers, thus answering criticisms that only marginal consumers would be affected.[236] Finally, the essential regressivity of alcohol taxation can also be readily defended because of the tremendous social cost imposed by alcohol abuse on the rest of society.[237]

In addition, it is also clear that the current levels of alcohol taxes often vary according to the type of beverage

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[233] See, e.g., Mosher and Beauchamp, Justifying Alcohol Taxes to Public Officials, J. Pub. Health Pol'y, 422 (Dec. 1983).

[234] Id. at 435. See also testimony of James F. Mosher, Los Angeles. San Diego Dept. of Health Services, Alcohol Taxes: A Rethinking of Their Relationship to Prevention of Alcohol Problems, 30, Table XVII (Jan., 1984).

[235] See Cook, The Effect of Liquor Taxes on Drinking, Cirrhosis and Auto Accidents in Alcohol and Public Policy: Beyond the Shadow of Prohibition at 255 (Moore and Gerstein Eds., 1981), See also Cook, The Economics of Alcohol Consumption and Abuse, in Alcoholism and Related Problems: Issue for the American Public at 67 (Prentice Hall, 1984)(regarding the effect of alcohol taxes on consumption). Equalizing taxes by alcohol content may also interfere with youth's ability to purchase beer, their beverage of choice by raising the price beyond their means. See Mosher and Beauchamp, supra note 233 at 435. See also Wallack, The Prevention of Alcohol-Related Problems: Recommendation for Public Policy Initiatives at 3, 14 (July 1984).

[236] Grossman, Coate and Arluck, Price Sensitivity of Alcoholic Beverages in the United States, 8 (Sept. 1984). There also seems to be little cross-elasticity of demand between beverages. Id. at 31.

[237] Id. at 35.

without any rational relationship to the relative alcohol content.[238] This disparity in taxation of alcohol content further distorts price competition between beer, wine and distilled spirits. It also results in making beer cheaper than its actual alcohol content would dictate if taxes were made more uniform or "equalized" based on alcohol content as some have proposed.[239]

The primary concern expressed by many parent groups, treatment personnel and other witnesses at the Advisory Commission field hearings was the need for new sources of funding for treatment facilities for young alcohol and other drug abusers.[240] It seems clear that an observable inequity in alcohol taxation and a need for treatment facilities should be paired as a classic, matched "source" and "use" of funds.[241]

One example of this "dedicated" tax is currently being proposed in Michigan pursuant to the Petition Initiative on the ballot submitted in 1984 by the Michigan Citizens for Substance Abuse. The proposed Amendment to the Michigan State Constitution reads as follows:

> Twenty five percent of all revenues generated for the state of Michigan from excise taxes, sale, manufacture, or distribution of alcoholic beverages shall be allocated for community-based alcohol and drug abuse treatment and prevention programs. These revenues shall not be used for state administration of substance abuse programs, nor to supplant existing federal, state and local funding, nor infringe upon those recipients specifically funded by alcohol revenues 10 percent of these revenues generated for substance abuse programming shall be allocated for primary and secondary school-based prevention/educational services. Further, said excise taxes from date of implementation shall not be increased without the consent of a majority of Michigan's electorate so voting.

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[238] Mosher and Beauchamp, supra note 233 at 435.

[239] Id. at 438. The authors note their particular concerns about this price anomaly especially because of the popularity of beer to youth.

[240] See, e.g., testimony of Richard Russo, Princeton.

[241] At least one commentator has referred to the dedicated alcohol tax as a "sin-tax." Sloan, Small Business Angle: Medicare Reform - A Matter of Sin Tax (1985). Recently, the National Federation of Independent Business supported the dedication of the alcohol tax because of alcohol's contribution to the medicare debt. Id.

At this time, the Initiative does not provide for any increase in the excise tax levels, however, this is reportedly due to that state's depressed economy.

Dedication of tax revenues has been traditional in other areas, particularly bond issues relating to public projects involving construction of public buildings, including health care facilities. The following thirteen states to date have dedicated alcohol excise taxes: Maine, Maryland, Mississippi, Nevada, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia and West Virginia.[242]

There are other sound fiscal, economic and public health bases for raising the historically low alcohol taxes to fund prevention and treatment. First, the increased revenues could be a major funding source in times of tight budgets for government at all levels. As one Commission witness stated: "The state of California, for example, has lost an estimated $188,702,700 since 1960 by not having the state (alcohol) tax indexed to inflation."[243]

For all of these reasons, it seems practical both to equalize and increase alcohol excise taxes and to dedicate the increased revenue at least in part, to alcoholism prevention and treatment. Therefore, this recommendation urges the ABA House of Delegates to support increased federal and state alcohol taxes and the allocation of significant portions of the tax revenues to supplement prevention, intervention, treatment and research for youth with alcohol problems.

10. Child Custody and Visitation

The Advisory Commission received testimony from several witnesses regarding the power of domestic courts, as a condition in custody or visitation matters, to require referral and evaluation of parents whom the courts have credible evidence to suspect of having alcohol or other drug problems.[244] It was apparent from this testimony that many

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[242] See National Association of State Alcohol and Drug Abuse Directors, State Survey Fact Sheet, Dedicated Alcohol Taxes (1982). See generally Estes and Heinemann, Alcoholism, Development, Consequences, and Intervention at 86 (2nd ed. 1982)(regarding dedicated taxes for prevention programs). See also Mosher and Beauchamp, supra note 233, at 436-7. Fein, Alcohol in America the Price We Pay, supra note 187; and Cook, supra note 235.

[243] See testimony of James F. Mosher, Los Angeles. See also San Diego Dept. of Health Services, supra note 234 at 7.

[244] See, e.g., testimony of Sheila B. Blume, M.D., Thomas H. Blaffner, Princeton.

judges and other court personnel are cognizant of the degree to which their caseloads reflect substance abuse.[244]

A description of the typical situation in custody or visitation cases involving substance abuse was described to the Commission whereby the court hears an allegation by one parent as to the alcohol or other drug problem of the other.[245] The court's observation of the parties may not be indicative of whether a problem in fact exists. In some cases, there may be additional evidence available from court social workers or from others outside the court. However, without the power to require a professional evaluation for substance abuse, the courts are left to make custody and visitation decisions on the very limited, though often credible, evidence before them. If the court accepts this limited evidence as credible, without any evaluation, it may be deciding custody or visitation based on a mistaken foundation. If evaluations were permitted based upon credible evidence, courts could make final custody and visitation determinations based on professional opinions rather than purely advisory statements. These concerns are the basis for this recommendation which follows the recent trend establishing court referral and diversion in areas such as juvenile cases,[247] drunk-driving,[248] and spouse or child abuse.[249] Recent statutes in the latter areas provide a

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[245] See, e.g., testimony of Hon. Leon Emmerson, Hon. Randolph Moore and Hon. Jerry Moore, Los Angeles.

[246] Statement of David Evans, Esq., Princeton.

[247] See the recommendation and report regarding juvenile offender treatment.

[248] See, e.g., 39 N.J. Stat. Ann. S. 50-4 (West 1984) for drunk driver treatment.

[249] See 16 D.C. Code Ann. S. 1005(c)(1)-(3)(1984):

> (c) If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order:
>
> (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;
>
> (2) requiring the respondent, alone or in conjunction with any other member of the family before the court, to participate in psychiatric or medical treatment or appropriate counseling programs; (cont. on next page)

precedent, in addition to model language, authorizing such referrals.[250]

The issue of alcohol and other drug abuse by parents and its impact on children in custody and visitation cases is not new to domestic relations courts.[251] The courts' attitude toward parental substance abuse problems, however, have been steadily evolving[252] away from a strict, uncompromising moral condemnation of the abusing parent, to one of concern toward the child.[253] Where some courts would have formerly denied custody or visitation, more recent decisions indicate a willingness by the courts to consider the recovery from the illness

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249 (cont.)

> ...
> (3) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter. (emphasis added).

See also the recommendation and report regarding child abuse and neglect.

250 See, e.g., Ill. Ann. Stat. ch. 40, S. 2303-8(c)(5) (Smith-Hurd 1984):

> (c) The order of protection may include any or all of the following remedies:
> ...
> (5) Requiring or recommending the respondent to undergo counseling for a specified duration with a social worker, psychologist, clinical psychologist, psychiatrist, family service agency, mental health center guidance counselor, or any other guidance service the court deems appropriate...

251 See, e.g., Ploscowe, Foster and Freed, Family Law: Intoxication, Drug Addiction and Parental Fitness, at 917-20 (2nd ed. 1972)(and cases cited therein).

252 See, e.g., Note, The Best Interests of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends, 18 Washburn L.J. 482, 491-2 (1979): "Evidence of drunkenness is treated with contempt by most courts. The offending parent encounters difficulty in persuading the court he or she can provide a suitable living environment. An adverse impact on the child may be presumed." (citing, Comment, Child Custody: Considerations in Granting the Award Between Adversely Claiming Parents, 36 S. Cal. L. Rev. 255 (1963).

253 Id. There has also been an apparent change in the attitudes related to drinking in particular: "Although the older cases regarded female drinking as immoral, the more
(cont. on next page)

or the possibility that fitness for custody or visitation might be affected by treatment for substance abuse problems.[254] The question to be addressed is whether or not domestic relations courts have the power to require evaluation for such problems under their existing statutory authority.

In the first instance, a domestic relations court's authority to refer an individual for substance abuse evaluation would seem to parallel other necessary protections for children such as supervised visitation[255] or requirements for

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253 (cont.) recent cases look at its effect upon parental functioning and possible detriment to the child." For examples of this attitude, see Wallser, Measuring the Child's Best Interests - A Study of Incomplete Considerations, 44 Den. L.J. 132, 137 (1967):

> Alcohol and motherhood are as incompatible as drinking and driving in terms of a mother's fitness to have custody. The alcoholic mother finds difficulty recovering custody of her children. Her drinking seems to contradict the devotedness a court expects in a mother.

See also Bergman, Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism, 2 Fam. L.J. 384, 404 (1968).

254 Ploscowe et al., supra note 251 at 918.

> In the case of alcoholic parent, the court should consider the welfare of both the patient and the child plus medical opinion as to the effect of a continued relationship upon the treatment of the parent for alcoholism. (emphasis added).

Cf. Hardin, When a Parent is Unfit, 4 Fam. Advoc. 8, 11 (1981):

> It is not enough, therefore, to prove that a parent is an alcoholic. You must prove that, for example, the parent is neglectful while drinking, and that neither the drinking nor the neglect is likely to improve.

See also Hardin and Tazzara, TERMINATION OF PARENTAL RIGHTS, at 8-9 (1981).

255 See, e.g., Parker v. Ford, 89 A.D.2d 806, 453 N.Y.S.2d 465 (1982)(supervised visitation with "unfit," "common drunkard" father); Tibbetts v. Tibbetts, 6 Ariz. App. 316, 432 P. 2d 282 (1967)(transferring custody to admitted alcoholic father who had stopped drinking).

psychiatric or psychological treatment for parents and children.[256] In the context of domestic relations cases, courts have been vested with a wide range of authority in deciding the delicate matters of custody and visitation. In addition to specifically requiring parents to attend counselling sessions,[257] some courts now have the authority to act by: setting conditions on custody or visitation;[258] seeking advice of professional personnel, whether or not employed by the court;[259] ordering an appropriate agency to exercise continuing jurisdiction over the case;[260] and ordering the use of physicians, psychiatrists, social agencies or others to facilitate conciliatory court functions.[261]

One of the sources for these provisions has been the Uniform Marriage and Divorce Act (UMDA) which has been enacted in large part in Arizona, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington.[262] The UMDA includes several sections providing for supervision of the mental and physical health of the family in divorce proceedings.[263] For example, UMDA Section 402 conditions custody on the "best

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[256] See generally Note, Making Parents Behave: The Conditioning of Child Support and Visitation Rights, 84 Colum. L. Rev. 1059 (1984).

[257] See, e.g., 23 Pa. Cons. Stat. Ann. S. 1006 (Purdon 1984).

[258] See, e.g., Minn. Stat. S. 518.13(h)(1) (1984).

[259] See, e.g., Ind. Code Ann. S. 31-1-11.5-21(e) (West 1984).

[260] See, e.g., Wash. Rev. Code Ann. S. 2609.250 (West 1984). See also Ind. Code Ann. S. 31-1-11.5-21(c) (West 1984).

[261] See, e.g., Ariz. Rev. Stat. Ann. S. 25-381.16C (West 1984); Cal. Civ. Proc. Code S. 1770, 1771 (West 1984); Ind. Code Ann. S. 31-1-11.5-19 (West 1984); and Iowa Code Ann. S. 598.16 (West 1984).

[262] Uniform Marriage and Divorce Act, National Conference of Commissioners on Uniform State Laws, 9A U.L.A. 56 et. seq., (Rev. 1973).

[263] Two cases decided under the Illinois version of the UMDA have indicated that willingness to undergo psychiatric treatment may be a factor in the court's allowance of visitation. See Taraboletti v. Taraboletti, 14 Ill.2d 350, 372 N.E.2d 155, 56 Ill. App.3d 854 (1978)(mother with a history of violence and paranoia, although properly denied visitation, may re-petition the court upon obtaining psychiatric treatment); (cont. on next page)

interest of the child" considering inter alia: "the mental and physical health of all individuals involved."[264] With respect to visitation and custody, UMDA section 404(b) states:

> The courts may seek the advice of professional personnel, whether or not employed by the court on a regular basis.[265]

In cases of contested custody, section 405(a) of the UMDA authorizes courts to employ an investigator who, in preparing a court-ordered report, may refer the child for professional diagnosis, or consult with medical, psychiatric or other professionals who have served the child in the past.[266]

UMDA section 407 permits denial or modification of a parent's visitation rights in the event that such visitation may "endanger seriously the child's physical, mental, moral or emotional health"[267] in which case, pursuant to UMDA Section 408(b), the court may also require continuing supervision over the exercise of the custodial or visitation terms of the decree by the local probation, welfare or court social service agency.[268] In their comments to UMDA section 408, the Commissioners on Uniform State laws specifically noted that:

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[263] (cont.) In re Marriage of Newt, 57 Ill. App.3d 1046 (1981) (lower court improperly denied visitation to mother with history of severe psychiatric difficulty who was much improved and continuing psychiatric treatment and medication as prescribed).

[264] See Ariz. Rev. Stat. Ann. S. 25-332(A)(5) (1984).

[265] See Ariz. Rev. Stat. Ann. S. 25-334(B) (1984); Del. Code Ann. tit. 13, S. 724(b) (1984); Ill. Ann. Stat. ch. 40, S. 604(h) (Smith-Hurd 1984); Ind. Code Ann. S. 31-1-11.5-2(e) (West 1984).

[266] See Del. Code Ann. tit. 13, S. 255(b) (1984); Ill. Ann. Stat. ch. 40, S. 605(b) (Smith-Hurd 1984); Ind. Code Ann. S. 31-1-11.5-22(b) (West 1984).

[267] See Ariz. Rev. Stat. Ann. S. 25-337 (1984); Ill. Ann. Stat. ch. 40, S. 607; (Smith-Hurd 1984); Ind. Code Stat. Ann. S. 31-1-11.5-24 (West 1984).

[268] See Ariz. Rev. Stat. Ann. S. 25-338(b) (1984); Ill. Ann. Stat. ch. 40, 608(b) (Smith-Hurd 1984). Ind. Code Ann. S. 31-1-115-21(c) (West 1984).

> The court could intervene in the decision of grave behavioral or social problems such as refusal by a custodian to provide medical care for a sick child.[269]

In the case where a parent's alcohol or other drug problem is sufficiently grave, UMDA section 408 may authorize referral for evaluation and treatment.

In one variation on UMDA provisions on supervision, Delaware does not specifically provide for court supervision but does allow the court to set "a specific limitation of the custodian's authority" in the best interest of the child.[270]

Other state statutes that do not follow the UMDA, however, rely upon broad language authorizing the domestic court to fashion custody or visitation orders "equitably" depending upon the courts "best judgment" in order to insure that the case is decided with the child's best interest as paramount.[271] Therefore, it may prove beneficial to have either the UMDA provisions or language similar to other family "protection" statutes cited above.[272]

Without domestic court authority referring parents for evaluation, it may be futile to recommend further training and education for domestic relations court judges, court personnel and lawyers regarding alcohol and other drug abuse.[273] Given the wide variation in procedures now utilized by domestic relations courts, this recommendation to provide specifically for referral and evaluation of parents reasonably suspected of alcohol and other drug problems is both timely and appropriate.

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[269] See report on consent to treatment. See also Sokolsky, The Sick Child and the Reluctant Parent, 20 J. Fam. L. 69 (1981).

[270] Del. Code Ann. tit. 13, S. 728 (1984).

[271] See, e.g., Conn. Gen. Stat. Ann. S. 466-56, 46(b)-59; Iowa Code Ann. S. 598.41 (West 1985).

[272] See supra notes 249 and 250.

[273] See the recommendation and report regarding legal training on alcohol and other drug problems.

11. Child Abuse & Neglect

In the United States it is estimated that there are more than 28 million children of alcoholics: one out of every 8 Americans.[274]. Approximately 6.6 million of these children of alcoholic parents are under the age of 18[275]. These children are over-represented in our medical and psychiatric facilities and in our juvenile justice system. No figures are available to date regarding the number of children of drug dependent parents, but given the high incidence of drug use in this country, the numbers have been estimated in the millions.

This recommendation is not intended to imply, however, that parents who are alcohol and drug abusers are per se abusive or neglectful towards their children. The goal of this recommendation is to eliminate the legal barriers to treatment and to seek out support services for those children and parents suffering from alcohol and other drug problems.

Historically, child abuse laws have been concerned with battered or abused children, and have defined these concepts in terms of physical harm.[276] Several states have redefined these terms to include emotional or psychological harm.[277] Neglect laws have been commonly defined as a parent's failure to protect their child from obvious physical danger. Neglect laws, in addition to child abuse laws, have been the subject of extensive legislative reform in an effort to define and measure the level of parental conduct necessary to trigger these laws.[278]

> Broadly speaking...child neglect occurs when the dominant expectations for parenthood are not met -- when a parent fails to provide for a child's needs according to the

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[274] Testimony of Sheila B. Blume, M.D., Princeton. Recent statistics on children of alcoholics reveal that: 7 million children under age 20 are children of alcoholics; some 500,000 children in New York State live in alcoholic families; more than 50% of all alcoholics have an alcoholic parent; and sons of alcoholic fathers are 4 times more likely to become alcoholics than sons without alcoholic fathers. THE MAGNITUDE OF SUBSTANCE ABUSE IN AMERICA, supra note 6, at 11.

[275] Testimony of Sheila B. Blume, M.D., Princeton.

[276] Katz, Have & McGrath, Child Neglect Laws in America, Fam. L.Q. 1, 4 (Spring 1975).

[277] Id.

[278] Id. at 5.

preferred values of the community. The legal concept of neglect calls for consideration for rights and corresponding duties as they arise within the tripartite interaction between child, family and the state. The basic goal of any neglect statute is to prevent harm -- physical always, sometimes also psychological and social -- from occurring to children. Determination of neglect is not merely, however, a question of medical or even psychiatric judgment, but it is essentially a social policy issue. Primarily, neglect denotes conduct in conflict with the child-rearing standards of the dominant culture, and determination of neglect is based on social as well as legal judgments.[279]

While no figures are available regarding actual abuse and neglect of children as a direct result of their parent's alcohol or drug abuse, there is speculation that the problem has become widespread.[280] These fears are more clearly being realized as more parents seek out treatment programs for their alcohol and other drug abuse.[281]

Due to the constitutionally protected parental right to be free from state interference in child-rearing, a state child abuse and neglect statute must not be overbroad.[282] These

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[279] Id. (citations omitted).

[280] A conflict currently exists between federal statutes and regulations protecting the confidentiality of alcohol and drug abuse patients, and state laws which require child abuse and neglect reporting. This conflict has been the subject of several State Attorney General rulings and at least one court battle, State v. Andring, 342 N.W.2d 123 (Minn. 1984). The Alcohol Drug Abuse and Mental Health Administration (ADAMHA) has commissioned a study on the problem, which is being conducted by the LaJolla Management Corporation with the Legal Action Center acting as Special Consultant. It has been suggested that data from this study may assist this Commission in making its recommendations to make changes in the law, if appropriate. See Testimony of Paul Samuels, Esq., Princeton.

[281] See, e.g., Densen-Gerber, Hutchinson & Levine, Incest and Drug-Related Child Abuse: Systematic Neglect by the Medical and Legal Professions, 6 Contemp. Drug Problems at 135, (1977). See also Panel Workshop: Violence, Crime, Sexual Abuse and Drug Addiction, 2 Contemp. Drug Problems at 383, (1974). Densen-Gerber and Rohrs, Drug Addicted Parents & Child Abuse, 5 Contemp. Drug Problems 385 (1976).

[282] Besharov, State Intervention to Protect Children: New York's Definitions of "Child Abuse" and "Child Neglect", 26 N.Y. L. Rev. 723 (1981).

statutes must be structured in such a way as to safeguard both the parental rights and the child's right to be protected from abuse and neglect.

Every state has enacted child abuse and neglect statutes,[283] yet few statutes include parental or guardian alcohol or drug abuse as an express element contributing to the child's physical, mental or emotional impairment.[284] The vast majority of state statutes define abuse and neglect solely in terms of physical harm to the child. Several statutes address the "incapacity" or "unfitness" of the parent, but fail to precisely define those terms.[285] Most states have judicially defined abuse and neglect, which may or may not include parental alcohol or drug dependency.

The State of New York, in an attempt to find solutions to the widespread incidence of child abuse and neglect,[286] addressed the potential link between parental alcohol and drug abuse and child neglect. The New York statutory scheme incorporates the instant recommendation:

> (f) "Neglected child" means a child less than eighteen years of age:
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> (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

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[283] See generally Child Neglect Laws in America, supra, note 278.

[284] In 1977, the Institute of Judicial Administration of the American Bar Association published a draft on Standards for Abuse and Neglect. In 1981 the ABA National Legal Resource Center for Child Advocacy and Protection published A Summary and Comparison of Grounds [for Termination of Parental Rights] from Nine Model Acts, including the 1977 ABA draft. Four of the model acts included alcohol and drug abuse by a parent as a specific factor to be considered in termination of parental rights. The ABA draft, by comparison failed to include parental alcohol or drug abuse as a specific ground.

[285] Id.

[286] In 1979, 92,000 cases of known or suspected child neglect were reported in New York State. This was a 45-fold increase over 1969, when 3,169 cases were reported. State Intervention to Protect Children, supra note 282 at 724.

> (B)...or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions;...provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision.[287]

Thus, this statute creates the much-needed definition of neglect with respect to parental alcohol or drug abuse, yet also provides an incentive for those parents to obtain treatment.[288]

Parental abuse of alcohol, however, is not considered to be prima facie evidence of child neglect under the current New York law,[289] even if the parent is exhibiting the symptoms of

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[287] N.Y. Civ. Prac. Law S. 1011, et. seq. (McKinney, 1984) (Family Court Act).

[288] Cf. N.Y. Civ. Prac. Law S. 1046 (a)(iii) (McKinney 1984), provides that evidence of drug addiction is prima facie evidence that a child or one who is the legal responsibility of a drug addicted parent or guardian is a neglected child. The requisite proof of this abuse is further defined as:

> Proof that a person repeatedly uses a drug, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality....

The statute assumes that if a parent or guardian exhibits the specified degree of drug addiction, then he or she must suffer impaired judgment, from which the child inevitably suffers. Practice Commentary at 227. Other state statutes and courts have not adopted this prima facie approach to neglect caused by substance abuse. See the recommendation and report regarding custody and visitation.

[289] N.Y. Civ. Prac. Law. S. 1046(a)(iii) (McKinney 1984).

substance abuse described supra.[290] The New York Act provides in part that parental failure to provide "proper supervision or guardianship" is equivalent to the use of the "alcoholic beverage to the extent that (the parent) loses self-control of his actions."[291] There must as well be shown a resultant impairment or threatened impairment of the child to satisfy the New York statutory definition of neglect.

Direct proof of a parent's addiction is not always easily available. For example, many children born to drug and alcohol abusers exhibit withdrawal symptoms at or shortly after birth.[292] Courts have constructed a rule of evidence designed to address the neglect of these children. Under these laws a new-born having withdrawal symptoms is prima facie evidence of a neglected baby.[293] Some states include within their definitions of child abuse and neglect those children in utero whose parent's drug or alcohol abuse is a substantial and on-going practice. While significant policy questions surround the rights of the mother and those of the fetus, successful treatment of alcoholic pregnant women has been obtained under court order, with later custody of the unborn child contingent on the attainment of abstinence.[294] This example of government intervention accomplished two major objectives: (1) treatment of the pregnant women's substance abuse and (2) protection of the child from potential abuse and neglect.

At least one state has established a "Juvenile-Family Crisis Intervention Unit"[295] which operates under the theory that "a vast majority of juvenile misconduct is a result of troubled family circumstances."[296] The unit operates either as part of the court intake service or through another appropriate public or private county agency. The intake procedures require that the crisis unit file recommendations to resolve the juvenile-family crisis where it has reason to believe that the parent or guardian involved is an alcohol or drug dependent parent."[297] This program also provides for

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[290] See supra note 287.

[291] Id. at S. 1012 (f)(i)(B).

[292] See Blume, Children of Alcoholic Parents: Policy Issues (Brown University 1983) (Discussion of Fetal Alcohol Syndrome).

[293] See Practice Commentary, supra note 288, at 261.

[294] Children of Alcoholic Parents, supra note 292, at 6.

[295] N.J. Stat. Ann. S. 2A:4A-76 (West 1984).

[296] See Senate Judiciary Committee Statement appended to N.J. Stat. Ann. S. 2A:4A-76 (West 1984).

[297] N.J. Stat. Ann. S.2A:4A-85 (West 1984).

specific action if there is reason to believe that the juvenile is an abused or neglected child as a result of the parent's alcohol or drug abuse.[298]

In those cases where intervention measures fail to work and a drug or alcohol abusing parent is charged with child abuse or neglect, some states adopt creative treatment measures to avoid termination of parental rights, or other drastic measures which further disrupt the family. One example involves probation with mandated treatment as a sentencing option.[299] Using the model of drinking-driver rehabilitation programs, a court could offer the parent the option of an educational program on child abuse and parenting, or peer diagnosis and treatment for substance abuse as a condition to retaining custody: the wish to retain child custody being a painful motivation for most parents.[300]

Since states have diversion programs for youth as alternatives to incarceration, an argument can be made that parents could benefit from diversion programs as well. Community services performed in juvenile facilities or child protection agencies, coupled with treatment programs for alcohol and drug abuse can often times be more productive avenues than incarceration, probation or termination of parental rights. Because of the great potential for harm to children from alcohol or drug abusing parents, this recommendation urges the ABA House of Delegates to support child abuse and neglect laws that include parental alcohol and drug problems as possible causes of child abuse and neglect. These laws could then provide a viable means for treating children, and their parents afflicted with alcohol and other drug problems.

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[298] The ABA National Legal Resource Center for Child Advocacy and Protection has provided some guidelines for training and developing qualified attorneys for children in abuse and neglect cases. See, e.g., Horowitz, Upgrading Legal Practice in Juvenile Court in Protecting Children through the Legal System, at 868 (ABA, 1981). There may also be a need for the appointment of a guardian ad litem for the child. See Davidson, The Guardian Ad Litem An Important Approach to the Protection of Children in Protecting Children through the Legal System at 835. See generally Walker, A Functional Approach to the Representing of Parents and Children. See also recommendation and report on Dependency and Neglect Proceedings in Protecting Children Through the Legal System at 126.

[299] Children of Alcoholic Parents, supra, note 292 at 6.

[300] Id. See recommendation and report on child custody and visitation.

12. Consent

The Advisory Commission heard testimony at all three field hearings regarding the issue of parental consent to treatment and how often times it can be a legal barrier to treatment for a youth with alcohol and othe drug problems.[301] Parental consent may be required for those youth voluntarily seeking treatment, and may not be given in cases where the parents themselves have alcohol or drug problems, or refuse on other grounds.[302] In some cases, programs cannot provide treatment without consent due to legal or financial requirements. In addition, there is also the issue of confidentiality of youth records when parental consent is required.[303]

As a means of encouraging juveniles to voluntarily enroll in alcohol and other drug treatment programs, this recommendation urges the ABA House of Delegates to recommend that parental consent not be required for the purposes of any non-custodial, non-invasive[304] treatment of juveniles.[305] When a juvenile does seek custodial, invasive treatment, however, the parent should be notified. If the parent fails to consent, procedural safeguards will prevent the defeat of the juvenile's treatment goals, and will determine if the juvenile in fact needs treatment. This statement, however, is not intended to interfere with any already established legal rights of parents to place children in treatment in accordance with appropriate due process safeguards.

The question of parental consent for juvenile alcohol and other drug abuse treatment is a matter of state law. At present, thirty-five states do not require parental consent for treatment.[306] Of those states, approximately ten have clauses which require parental consent unless the treatment

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[301] See, e.g., testimony of Paul Samuels, Princeton.

[302] Id.

[303] Id.

[304] Non-custodial, non-invasive treatment is any treatment where the juvenile is not detained overnight or in any way against his/her will and which consists only of counseling. This counseling can include help for personal problems and for coping with parental alcohol and drug problems.

[305] For purposes of this recommendation, state law governs the age of maturity.

[306] A thorough analysis of state law regarding a minor's right to consent to treatment is compiled in a book written by James M. Morrissey, Esq., and is awaiting publication.

program staff comes to the conclusion that parental involvement would not be in the best interest of the child. Typical situations triggering this clause may be those where the parent refuses to consent, but the physician or qualified treatment team believes the child should receive treatment, or where the parent may in fact object and prevent the child from receiving treatment.[307] While those state laws with no consent requirement vary in degree, treatment is generally defined as any alcohol or other drug treatment, be it custodial or non-custodial, invasive or non-invasive.[308]

It is necessary to strike a balance between parental involvement and support in a juvenile's treatment[309] and situations where little would be accomplished by involving a parent.[310] The Advisory Commission's concern was that always requiring parental consent to treatment would not all cases be in the child's best interest. The goal of this section and each of the 20 other sections is to encourage juveniles to obtain alcohol and drug abuse treatment. This goal would be more easily accomplished if there were no legal barriers to the juvenile's ability to seek treatment.[311] Juvenile alcohol and drug abuse is regarded as a "family disease" because it affects the entire family.[312] In addition, many juveniles

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[307]See testimony of Paul Samuels, Esq., Princeton.

[308]See Morrissey, supra note 306.

[309]Id.

[310]See testimony of by Robert D. Hargolis, Ph.D., Atlanta.

[311]An additional impediment to juveniles seeking treatment is the fear that their parents will learn of the juveniles drug/alcohol problem. Thus, the confidentiality of drug and alcohol abuse treatment records may be a critical aspect of the effective treatment of abusers. The issue of confidentiality of treatment records is currently under study by the Attorney General (See Attorney General's Task Force on Family Violence, Final Report, September 1984); the National Center on Child Abuse and Neglect (NCCAN) and th Alcohol Drug Abuse and Mental Health Administration (ADAMHA), which are both components of the Department of Health and Human Services. (See Joint Policy Statement on Confidentiality of Alcohol and Drug Abuse Patient Records and Child Abuse and Neglect Reporting, Appendix to Atty. Gen. Op. Supplementing 76-52, May 3, 1979). The Advisory Commission is also studying this issue further before setting forth a recommendation.

[312]See testimony of Paul Samuels, Esq., Princeton.

become abusers because their parents are in fact abusers.[313] Because denial is such a strong factor within the addiction diseases, many abusing parents; in an effort to deny their own addictions, may find it personally threatening to permit their children to obtain treatment or to get appropriate help in coping with their parent's addiction.[314] Moreover, many juveniles who are substance abusers come from broken homes -- or have no parent or guardian who could consent to treatment on their behalf.

For those juveniles who have parents who are not themselves substance abusers, the necessity of obtaining parental consent for treatment may not always be in their best interest. Many of these juveniles will not seek treatment for drug or alcohol abuse if parental consent is required simply because of the tension that would be created if the parents were to discover the juvenile's alcohol or drug problem. A good treatment program will recognize the importance of parental involvement and will involve the family in the juvenile's treatment at the earliest possible stage. Since alcoholism and drug addiction have an impact on the entire family, treating only one family member is not as effective as treating all members of the suffering family.[315] This familiar intervention also serves to cushion the threatening nature of the juvenile's situation and also reinforces the traditional supportive structure of the family unit.

There are constitutional questions as well regarding the denial of treatment to a juvenile if he or she refuses to obtain parental consent, or when the parent is contacted but refuses to permit treatment. The U.S. Supreme Court has affirmed a Washington court decision allowing a blood transfusion to a minor over the objections of the minor's parents who were practicing Jehovah's Witnesses.[316]

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[313]Recent statistics on children of alcoholics reveal that: approximately 28 million Americans have at least one alcoholic parent; 7 million children under age 20 are children of alcoholics; some 500,000 children in New York State live in alcoholic families; more than 50% of all alcoholics have an alcoholic parent; and sons of alcoholic fathers are 4 times more likely to become alcoholics than sons without alcoholic fathers. THE MAGNITUDE OF SUBSTANCE ABUSE IN AMERICA, supra note 6, at 11.

[314]Id. Mr. Samuels has found this is especially true when the child is not necessarily abusing alcohol or drugs but is seeking counseling to help cope with the addicted parent.

[315]But see Youngberg v. Romeo, 457 U.S. 307 (1982).

[316]Jehovah's Witness v. Kings County Hosp., 278 F. Supp. 488 (W.D. Wa. 1967), aff'd. per curiam, 390 U.S. 598 (1968)(without opinion, affirming in reliance on Prince v. Massachusetts, 321 U.S. 158 (1944)). See also Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

While the Advisory Commission has not drafted a model consent statute for non-custodial, non-invasive treatment for juvenile alcohol and other drug treatment, several states have enacted statutes that carry out this intent. A much thornier problem is whether parental consent should be required when a juvenile seeks custodial or invasive treatment for alcohol or other drug abuse problems. This recommendation recognizes the right of the parent to be informed of the child's problem and treatment, yet also maintains an interest in protecting the child's interest in treatment should the parent refuse to consent. Therefore, this recommendation is a rejection of 3 concepts: 1) that parental consent must always be obtained prior to a minor's treatment; 2) that a minor at whatever age is always competent to decide whether in-patient, invasive treatment is appropriate; and 3) that a treatment facility staff is always an adequate substitute for parental guidance in treatment matters.

The procedural framework of this recommendation is best described by way of example. A juvenile recognizes that s/he has a substance abuse problem. Perhaps the juvenile has attempted counseling or other non-custodial, non-invasive treatment without success. For a variety of reasons, the juvenile is reluctant to seek help from a parent or guardian. In many cases, the parent or guardian may be unaware of the problem. For reasons discussed supra the involvement of the parent or guardian may not be in the best interests of the child. When the juvenile contacts a state licensed facility for treatment, the staff will inform him/her that the parents must be notified and their consent obtained before the juvenile can be admitted. The parents are contacted and they refuse to give their consent for treatment. This right of the parent to be informed and to give or withhold consent has been upheld by the U.S. Supreme Court.

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations'...The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has been recognized that natural bonds of affection lead parents to act in the best interest of their children.[317]

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317 Parham v. J.R., 442 U.S. 584, 602 (1979).(cont. on next page)

The Supreme Court does, however, recognize that a parent is not always acting in the best interests of the child and that a "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[318] Therefore, in order to assist the judicial decision-maker in determining whether treatment is within the best interests of the child, and should be given over the objection of the parent, it is imperative that an appropriate treatment professional evaluate the child and the proposed plan of treatment where all three parties (parent, minor and treatment personnel) agree, in-patient, invasive treatment can occur without court involvement. Invasive in-patient treatment may never occur without experts agreeing that it is necessary.[319] Nor should a treatment staff be able to take a minor under the age of discretion into in-patient, invasive treatment over the objections of parents, without court approval that such treatment is necessary in the minor's best interest. In the case of a child suffering from an alcohol or other drug abuse problems, a parent is not always acting in the best interests of the child when they are contacted by the state licensed facility and refuse to give consent to treatment. At this stage an appropriate judicial body should review the treatment program within 48 hours, parents be given the opportunity, if they so desire, to make an appearance at the hearing, and counsel be appointed to represent the juvenile's interests. This "buffer" of court review has several beneficial results: 1) the parents ultimately may be assured that the treatment is in fact in the child's best interest; 2) if the parents are not convinced they will be be prevented from interfering with the child's treatment; 3) over-zealous treatment advocates will be curtailed should the judicial body find that treatment is unwarranted; and 4) on advice of counsel, the juvenile will retain the right to refuse treatment should it be found that the treatment is not in the child's best interest.

Although it is always preferable to include parents in a child's drug or alcohol treatment, as demonstrated infra, there are occasions whereby a parent's refusal to cooperate or consent to treatment will allow a serious disease to continue to harm the child and, perhaps others. When this situation arises, it is necessary for the child to act in his own behalf

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317 (cont.) Parham dealt with the constitutionality of involuntary commitment of minor children by their parents. Thus, while Parham is not relevant in some ways to this recommendation, it contains the absolute minimal safeguards for procedural due process in commitment proceedings. This recommendation, however, goes beyond the requirements of Parham.

318 Id.

319 Id.

to seek appropriate treatment. When this treatment is custodial or invasive, treatment personnel are not an adequate substitute in guiding a young minor into treatment. Therefore, it is necessary for the court, which has traditionally filled the role of parental decision-maker, to invoke additional procedural safeguards to insure that constitutional rights and protections are not infringed.

13. Discrimination

One of the principal concerns raised at the Advisory Commission field hearings was the need to improve access to treatment facilities for youth with alcohol and drug problems. The Advisory Commission, however, learned from the witnesses at these hearings that there still are barriers to treatment even for youth voluntarily seeking such treatment.[320] One of the most critical sources for access to treatment for youth is teachers and other school personnel. Teachers and school personnel often serve as advisors and counselors, particularly regarding alcohol and other drug problems. Some school systems, however, are reluctant to permit students to attend treatment programs during the school year in addition to providing the related educational services to assist that student during and after such treatment. For example, the Commission learned of one situation involving a student voluntarily seeking alcohol treatment during the school year who was denied a leave of absence and the necessary tutoring to make up school work missed during his treatment.[321] Because of the significant health risks involved in delaying such treatment, this recommendation urges the ABA House of Delegates to support schools and other public service providers in assisting students to seek treatment in the same manner as students with other illnesses and learning disabilities who presently receive the protection of the laws, rules and regulations ensuring equal educational opportunities.

It has been established under federal law that public schools ordinarily fall within the scope of Sections 503 and 504 of the Rehabilitation Act of 1973 as federal contractors or recipients of federal funds.[322] It has also been established that under federal law as interpreted by the Attorney General and under regulations, persons recovering from alcoholism and drug addiction are covered

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[320] See, e.g., testimony of Thomas C. Blatner, Princeton.

[321] See statement of David G. Evans, Esq., Princeton.

[322] 29 U.S.C. 793, 794 (1982). Section 503 and 504 are the civil rights laws involving equal employment and public service to the handicapped. See, e.g., Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984), and, generally, Smith v. Robinson, 104 S. Ct. 3457 (1984) (relief under 504 denied on other grounds).

under these sections.[323] In addition to Section 503 and 504, youth suffering from alcohol and drug problems may also be protected under Public Law 91-230, 20 U.S.C. 1401 et seq. Under that Act, the Supreme Court has upheld the providing of educationally "related services" such as clean intermittent catherization to a young student suffering from spina bifida.[324] Substance abuse counseling, tutoring and other needed services would appear to be "related services" for youth with alcohol and other drug problems while attending school. Some states have also enacted similar statutory and regulatory provisions protecting disabled persons, specifically extending such provisions to cover persons recovering from substance addictions.[325] In some instances, the states' laws are broader in scope as to the services covered than the federal provisions.[326]

Recently, however, several questions have surfaced regarding the obligations of the states and their political subdivisions under the Federal nondiscrimination laws. These questions relate to the 11th Amendment state immunity from lawsuits in the federal courts without a waiver or consent by the states. In two suits, Pennhurst State School and Hosp. v. Haldeman,[327] and Scanlon v. Atascadero State Hospital,[328] this immunity issue has been recently raised before the U.S. Supreme Court in different ways. In Pennhurst, one of the issues was the 11th Amendment immunity of counties receiving state funds. In its Pennhurst opinion, the Supreme Court held that since the county's involvement in the case was a function of state laws and funds - as in the education field, there could also be no suit against them in that case.

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[323] See 43 Op. Att'y Gen. 12 (1977).

[324] See Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984). See also School Committee of Town of Burlington v. Dept. of Education of Mass., No. 84-433 Slip op. (April 29, 1985). (affirming reimbursement to parents for educational placement of their handicapped child in a private school).

[325] See, e.g., Minn Stat. Ann. S. 363.01 et seq. (West 1966 and Supp. 1985), and S. 120.03 (West 1960 and Supp. 1985); 10 N.J. Stat. Ann. S. 10:5-1 et seq. (West 1976 and Supp. 1984-85); and Wis. Stat. Ann. S. 111.31 et seq. (West 1974 and Supp. 1984-85). See also Nold, Hidden Handicaps: Protection of Alcoholics, Drug Addicts and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act, 1983 Wis. L. Rev. 725.

[326] Supra note 325.

[327] 104 S.Ct. 900 (1984)

[328] 735 F. 2nd 359 (9th Cir. 1984), cert. granted, 53 U.S.L.W. 3403 (U.S. November 27, 1984)(No. 84-351).

In Scanlon, one of the issues is whether the states themselves are immune from all lawsuits under Section 504 of the Rehabilitation Act. If Scanlon is decided in favor of the states, applying Pennhurst may result in the counties and thereby schools being immune from such suits. Scanlon was argued before the U.S. Supreme Court on March 28, 1985. The Court focused on the 11th Amendment issue and the Pennhurst opinion. A decision by the Court can be expected by the end of the term in June, 1985. Since the full Court of nine justices participated in the argument, a tie vote is impossible and reargument unlikely in contrast to several other cases already heard this term.[329]

As with Metropolitan Insurance Co. v. Massachusetts,[330] which is now before the Supreme Court and will decide the legality of mandated insurance,[331] a decision by the Supreme Court in Scanlon can be expected by the end of the 1984 term in June, 1985. As with the Metropolitan case, there are reasons for optimism as to the outcome in Scanlon. The decision below was favorable to handicapped persons and there are strong policy and historical arguments for upholding the application of 504 to the states themselves. Several of the leading advocacy groups and even a group of nine Congresspersons have filed amicus briefs supporting the position that Section 504 applies and was always intended to apply to the states.[332]

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[329] See, e.g., City of Cleburne v. Cleburne Living Center, No. 84-468 (Reargued April 23, 1985). See generally, Kornen, Court Accepts Church-State Case, Washington Post, April 2, 1985, at A3 (7 tie cases and 4 rearguments).

[330] Attorney General v. Travelers Ins. Co, 385 Mass. 598, 433, N.E.2d 1223 (1982), vacated sub nom., Metropolitian Life Ins. Co. v. Massachusetts and Travelers Ins. Co. v. Massachusetts, 103 S. Ct. 3563 (1983), on remand, 391 Mass. 730, 463 N.E.2d 548 (1984), prob juris. noted sub. nom., Metropolitian Life Ins. Co. v. Massachusetts, 105 S. Ct. 320 (1984) (Consolidating Nos. 84-325 and 84-356)(argued Feb 26, 1985).

[331] See the recommendation and report on mandated insurance coverage.

[332] See, e.g. Brief Amicus Curiae of the ACLU Foundation and ACLU of Southern California; Brief Amicus Curiae of Senators Cranston, Pell, Stafford, Wiecker and Representatives Biaggi, Edwards, Frod, Jeffers and Miller.

In any event, even if Scanlon were to be decided in favor the state's immunity from 504 suits on behalf of the handicappel,[333] the state's own laws against such discrimination should continue to be extended and enforced to protect persons recovering from alcoholism and drug addiction.

14. Qualified Immunity

Both adult and teenage witnesses testifying before the Advisory Commission field hearings acknowledged the critical role that can be played by teachers and other school personnel in dealing with youth alcohol or drug problems.[334] Because of their regular contacts with students, school personnel can greatly assist in identifying those students with problems and by referring them to appropriate treatment. Several witnesses, however, also raised the issue of the potential legal ramifications for teachers and school personnel who attempt to deal with youth alcohol and other drug problems.[335] Because of current legal developments, there is a legitimate concern regarding the civil liability of teachers for identifying, reporting or confronting students with alcohol or other drug problems.

A number of states currently provide immunity from civil liability to school personnel who report suspected student drug-related activity to appropriate school officials.[336] These states allow exemptions from liability for a variety of different teacher actions. For example, Delaware provides civil and criminal immunity for school personnel who have

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[333] In addition, to the immunity issue, the state in Scanlon is also arguing that under Quern v. Jordan, 440 U.S. 332 (1979), it is also immune from any retrospective suits against its treasury. Thus, even if Scanlon is reversed as to this issue alone, only prospective, injunctive suits against states may be permissible. Such a holding would also severely undercut effectiveness of 504 litigation. See Senators and Representatives Brief Amicus Curiae, supra note 332.

[334] See, e.g., testimony of William Coletti, Atlanta, and Mark Byrne, Mia Andersen, Princeton.

[335] See, e.g., testimony of William Coletti and Robert Halford, Atlanta.

[336] See, e.g., Del. Code Ann. tit. 14, S. 4112(d)(1974); Fla. Stat. Ann. S. 232.277 (West Supp. 1985); Ga. Code Ann. S. 51-1-30.2 (Supp. 1984); N.J.Stat. Ann. S. 18A: 4.1-4.2 (West 1984); N.Y. Educ. Law S. 3028-1 (McKinney 1981).

probable cause to believe a person possesses controlled substances and provides information leading to the arrest of that person.[337]

Florida limits the civil immunity to school personnel who report "in good faith to the proper school authority suspected unlawful uses, possession, or sale of drugs by students."[338] Any report to the parent or guardian may be made only by the school principal or his designee.[339]

Georgia, on the other hand, provides civil immunity for teachers and other school personnel who "communicate directly information in good faith concerning drug abuse by any child to that child's parents, to law enforcement officials, or health care providers."[340] This statute, though similar to Florida's, gives the teacher greater discretion -- either to consult the student's parents immediately, to go directly to the police, or to a health care provider. This permits a teacher to expose the suspected abuse to those outside the school community. In Florida, by contrast the responsibility to notify parents is vested solely with the school principal, and the statute is silent as to immunity for even a principal who involves the police or others not the child's guardian.

New York's education statute provides for civil immunity for any school personnel who have reasonable cause to suspect that a student is a substance abuser, and subsequently reports such information to school officials or parents, depending on that particular school's established drug policy.[341]

Of the statutes researched to date, New Jersey's teacher immunity statute is the most complex.[342] New Jersey not only grants to school officials an immunity from civil liability for reporting suspected student drug abuse, but also places an affirmative duty on educational personnel to make

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337 Del. Code Ann. tit. 14, S. 4112(d)(1974).

338 Fla. Stat. Ann. S. 232.277 (West Supp. 1985).

339 Id.

340 Ga. Code Ann. S. 51-1-30.2 (Supp. 1984).

341 N.Y. Educ. Law S. 3023-1(a)(McKinney 1981). The establishment of such a school "drug policy" could provide an additional protection for teachers and students in the drug reporting situation involving possible civil liability. Such a drug policy can also conceivably include procedures for treatment referral and providing educationally related services. See the recommendation and report on discrimination.

342 N.J.Stat. Ann. S. 18A:40-4.1 4.2 (West Supp. 1984-85).

such a report.[343] Upon a good faith suspicion of student drug abuse, educational personnel may notify the student's parents, and then compel a medical investigation to prove or dispute the allegations. If each of these actions: the report by the teacher; the medical investigation; and the suspension of the student is taken in good faith, the school representative is free from potential civil liability. The statute provides New Jersey education personnel with a step-by-step procedure to follow once student drug activity is suspected. Also included in the statute is the grant of authority to school officials to require an immediate medical examination to substantiate the charges. Although this aspect of the law has yet to be judicially tested, a recent U.S. Supreme Court decision, New Jersey v. T.L.O.,[344] suggests

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343 N.J. Stat. Ann. S. 18A:40-4.1:

> Whenever it shall appear to any teaching staff member, school nurse or other educational personnel ... that a pupil may be under the influence of a controlled dangerous substance ... such teaching staff ... shall report the matter as soon as possible to the school nurse ... The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, ... and arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian. ... If such doctor ... is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital accompanied by a member of the school staff ... and a parent or guardian, ... for the purpose of diagnosing whether or not the pupil is under such influence. ... If such diagnosis is positive, the pupil shall be returned to his home ... and appropriate data shall be furnished to the Department of Health ... The pupil shall not resume attendance at school until he submits to the principal a written report certifying that he is physically and mentally able to return.

344 New Jersey v. T.L.O., 105 S. Ct. 733 (1985). Florida similarly mandates reporting. Fla. Stat. Ann. S. 232.277 (West Supp. 1985).

that the other sections of the New Jersey law are permissible under the Fourth Amendment.[345] In T.L.O., the Court held that although the Fourth Amendment prohibition against unreasonable searches and seizures applies to searches conducted by public school officials,[346] such searches need not be supported by a warrant, nor by probable cause.[347] Rather, in the school setting, the Fourth Amendment requires only that a student search be "reasonable" in light of the circumstances. The Court concluded:

> Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[348]

The Court in T.L.O. attempted to balance the legitimate end of preserving order in the schools with the recognized interest of student privacy.[349] The Court resolved the balance by applying a reasonableness standard: Was the initiation and extent of the search reasonable given the setting, the nature of the offense and the grounds for the suspicion that an offense had occurred. Any future student searches, including those mandated by the New Jersey teacher immunity statute, will be judged by the T.L.O. standard. Also, based on T.L.O.'s "reasonable" standard, there may soon be attempts to amend existing state statutes to reflect the "probable cause" standard.

The T.L.O. decision spares "teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[350] The Supreme Court has sanctioned those student searches reasonably undertaken. Accordingly, because of the deterrent effect of possible tort liability on teachers and other school personnel, this recommendation urges the ABA House of Delegates to support qualified immunity for attempts to help students get treatment by reporting suspected drug and alcohol use. With such an immunity, teachers and other school personnel

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[345] See U.S. Const. amend. IV.

[346] 105 S. Ct. at 739.

[347] Id. at 743.

[348] Id. at 744.

[349] Id. at 742.

[350] Id. at 744.

can act conscientiously in providing access to treatment for drug and alcohol abusing students, without fear of recrimination if their basis for reporting is challenged later in court.

15. Mandated Insurance

There is no serious dispute that funding of treatment for alcohol and drug abuse and dependency should be provided by both the public and the private sector, including private health insurance carriers.[351] However, despite great changes in public attitudes toward alcohol and drug abuse and dependency problems many private health insurers have routinely excluded such coverage.[352] One approach that has been taken in many states is to require private insurance carriers to include at least some minimum coverage for alcohol and/or drug abuse treatment in all health insurance policies.[353] This procedure, often referred to as "mandated" coverage, has also been traditionally used to require other kinds of insurance coverage, such as mental health benefits, which were not being readily provided by insurers.[354] Similarly, in the area of alcohol and/or drug abuse treatment, such mandated coverages are necessary to remove current exclusions, to increase access to treatment services especially for youth.[355] This recommendation urges the ABA House of Delegates to join with other national organizations ranging from voluntary citizens groups to treatment professionals who are calling for mandated coverage for alcohol and other drug dependency treatment.[356]

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[351] See, e.g., testimony of Carolann Kane, Nancy Brach, Mia Andersen, Princeton. See also Fein, supra note 187 at 44.

[353] See NIAAA Health Insurance Resource Kit, Private Sector - Alcohol Coverage (1981) at 1. "(L)ess than 40% of full time private sector workers have any health insurance that would cover any form of treatment for alcoholism or drug abuse."

[354] Id.

[355] See infra on the failure of the insurance "market" to provide for such coverage.

[356] See Fein, supra note 187 at 52. See also Private Health Insurance Coverage for Alcoholism and Drug Dependency Treatment Services. (National Association of State Alcohol and Drug Abuse Directors, 1983); Cooper, Private Health Insurance Benefits for Alcoholism, Drug Abuse and Mental Illness at 2-3,5 (Intergov. Health Policy Project 1979); Donabedian, Benefits in Medical Care Programs; Rosenberg, Survey of Health Insurance for Alcoholism: In-Patient Coverage.

[356] See, infra note 357, Briefs Amicus Curiae of the American Psychiatric Association, et al.

There must be a temporary caveat here because of the pending decision by the United States Supreme Court in the case of Metropolitan Life Insurance Company v. Commonwealth of Massachusetts.[357] This case concerns the issue of whether the state of Massachusetts can legally mandate minimum coverage of mental health treatment by private insurers.[358] The insurers are opposed the state's statutory requirement on the grounds that federal law, specifically the Employee Retirement Income Security Act (ERISA) and the labor laws, pre-empt the state from attempting to regulate employee health benefit plans in this manner. The state had won the right to mandate such benefits in the court below. The insurers then appealed to the U.S. Supreme Court.[359]

Putting aside the Metropolitan case for the moment, the case for requiring insurance coverage of alcohol and drug abuse and dependency treatment is already well documented on policy grounds.[360] For example, there are 36 states with statutes mandating some form of insurance coverage for treatment of alcoholism and 15 states requiring coverage of drug abuse and dependency treatment.[361] From these states' experiences and others, there is a substantial body of data to convince legislators in the remaining states of the soundness of such required coverage.[362] As was demonstrated in the Metropolitan case, there

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[357]Attorney General v. Travelers Ins. Co., 385 Mass 598,433 N.E.2d 1223, (1982) vacated sub nom., Metropolitan Life Ins. Co. v. Massachusetts and Travelers Ins. Co. v. Massachusetts, 103 S. Ct. 3563 (1983), on remand, 391 Mass. 730, 463 N.E.2d 548 (1984), prob. juris. noted sub nom. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 320 (1984)(Consolidating Nos. 84-325 and 84-356) (argued Feb 26, 1985).

[358]In the Metropolitan case, the close similarities between mandated mental health coverage and mandated alcoholism coverage were specifically addressed in a brief amicus curiae filed by the National Association of Alcoholism Treatment Program, Inc. (NAATP). The NAATP amicus brief also specifically addressed the need for such insurance to provide treatment for youth. NAATP Brief Amicus Curiae in Metropolitan, at 5.

[359]See also Olkin, Preemption of State Insurance Regulation by ERISA, 13 Forum 652 (1982).

[360]See supra note 355.

[361]See Fein, supra note 242 plus verbal update in 1985, as well as appendix IIA to Brief Amicus Curiae of Health Insurance Association of America in Metropolitan. However, as the Brief Amicus Curaie of NAATP noted at 18, even these state mandates often provide only for minimal coverage. See also NIAAA Health Insurance Resource Kit, State Activity, 1983.

[362]See Cooper, supra note 355.

is more than ample evidence that mandated coverage of these benefits is financially feasible.[363] For example, on this issue in the Metropolitan case there were repeated allegations by the insurers that such benefits were financially disastrous for the insurers. In fact, as noted in the oral argument before the Supreme Court, there was no hard evidence brought forth at any time in that case, from trial through appellate review, to document the insurer's claims of ruin.[364]

The record thus far also documents that coverage of alcohol and drug dependency treatment is affordable for consumers,[365] increases availability of treatment,[366] and actually results in cost savings as compared to the enormous societal losses from continued alcoholism and drug abuse.[367]. For example, recently a major study funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) was released which examined in depth the costs and utilization of an employees insurance plan with coverage of alcoholism treatment. That major study, referred to as the "Aetna Study," demonstrates that:

> Overall health care costs and utilization for alcoholics show a gradual rise during the three years preceding treatment, with the most dramatic increase occuring in the six months prior to treatment. Following the initiation of treatment, the health care costs of alcoholics drop significantly.[368]

The advantage of the Aetna Study is that it covered a relatively large study group (a treatment group of 1,645 families, and 1,697 persons in alcoholism treatment), over a long pre and post treatment period, with a comprehensive set of utilization and cost measures, as compared to a demographically comparable non-alcoholic comparison group of 3,598 families. The total cost for alcoholism treatment

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[363]See, e.g., Brief Amicus Curiae of the Coalition for Comprehensive Insurance Coverage in Metropolitan.

[364]Argument of Commonwealth of Massachusetts in Metropolitan, February 26, 1985.

[365]See Fein supra note 242.

[366]Id.

[367]See, e.g., Testimony of Nancy Brach See also Cost and Utilization of Alcoholism Treatment Under Health Insurance, A Review of Three Studies, 9 Alcohol Health and Research World 45 (Winter 1984-85).

[368]Abstract: Alcoholism Treatment and Impact on Total Health Care Utilization and Cost: A Four Year Longitudinal Analysis of Federal Employee Health Benefit Program with Aetna Life Insurance Company (1985).

was just over $9 million, and there were no allegations of financial pressure on the company as a result of this coverage.[369]

Nevertheless, each of these arguments must await the final decision in Metropolitan. Argument was held before the Supreme Court on February 26, 1985 and a decision will be reached by the conclusion of the current term at the end of June, 1985. There are grounds for optimism. For example, the case for the state is strong because ERISA contains a specific statutory exemption for any state laws regulating the business of insurance.[370] Additionally, even if Metropolitan were to be reversed, there may be still one other alternative possible to insure mandated coverage consistent with federal law. By seeking Congressional rather than state-by-state mandate of such coverage, even a negative federal pre-emption decision in Metropolitan could still be turned to advantage on this issue.[371]

In order to assure sufficient alternatives for treatment, any statute mandating such coverage should not be limited to hospital care but should also permit treatment to occur in a wide range of less expensive settings. Specifically, mandated coverage should provide insurance benefits for alcohol and drug abuse and dependency treatment in public and private, free-standing and hospital-based, inpatient and outpatient programs when duly licensed by the appropriate governmental bodies, properly accredited and staffed.[372]

Another related major issue is the coverage of substance abuse treatment by public health insurance such as medicare and medicaid. With the huge federal and state outlays for health care under these programs[373] the same cost savings arguments apply as in the private insurance sector. Recent studies involving

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369 Id. It is projected that within 2 to 3 years the cost of treatment is fully offset by decreases in other health care costs.

370 29 U.S.C. 1144(b)(6)(A).

371 This theory assumes that the Court decides that federal law controls in Metropolitan.

372 See, e.g., the current New Jersey Medicaid Model Program which includes coverage of non-hospital, free-standing alcohol treatment facilities pursuant to a HCFA Alcoholism Services Demonstration grant which includes six states. See also Becker, Mangerial Report: The Illinois Medicare/Medicad Alcoholism Service Demonstration, Sept. 21, 1984. See generally Brief Amicus Curiae of NAATP in Metropolitan, at 20-22.

373 During FY 1985, the medicare program is expected to finance service for 28 million aged and 3 million disabled Americans at a projected cost of $69.7 billion, Budget of the United States Government, FY 1985.

medicaid patients demonstrate the similarity in lower health costs between public and private health insurance coverage of alcoholism treatment.[374] Mandated private insurance coverage should therefore be matched by increased public insurance of substance abuse treatment.

Given the huge social costs of untreated alcoholism and drug abuse (estimated at $176.4 billion in 1983) which are increasingly being documented,[375] the mandating of insurance benefits for treatment by some level of government is a public policy imperative.[376]

16. Media Ads

The issue of the effects on youth of alcohol advertising over the broadcast media was thoroughly examined, considered and debated at the Advisory Commission field hearings and meetings.[377] There were widely divergent opinions on advertising and its effects expressed by the media broadcasters,[378] the alcohol producers (specifically the brewers and vintners who advertise over television and radio stations and networks)[379] and a number of the leading critics of such advertising.[380] In addition to this testimony, the Commission received and reviewed extensive current scientific, economic and legal materials from various interested parties

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374 See Becker, supra note 372. See also Hollen, A Rationale for Development of HMO Regulation Concerning Alcoholism and Drug Abuse, (1984).

375 See Economic Costs to Society of Alcohol and Drug Abuse and Mental Illesss: 1980 (report submitted to the Alcohol Drug Abuse and Mental Health Administration by Research Triangle Institute, June 1984).

376 See Fein, supra note 342. See also Los Angeles County Estimated Expenditure Due to the Misuse of Alcohol 1980-1981, submitted by Raymond A. E. Chavira, Los Angeles.

377 The issue of alcohol advertising was raised at all three field hearings. See, e.g., testimony of Al Mooney, M.D., Atlanta; George Hacker, Esq., Princeton; and Brian L. Dyak, Los Angeles.

378 Testimony of Richard Wiley, Esq. (National Assoc. of Broadcasters), Los Angeles.

379 Testimony of Donald B. Shea (U.S. Brewers Assoc.) and Patricia Schneider (Wine Institute), Los Angeles.

380 Testimony of James F. Mosher, Los Angeles; and George Hacker, Esq., Princeton.

concerning alcohol advertising.[381] Finally, in its own review and deliberations, the Commission considered a wide range of evidence, opinions and proposals on this particular issue before making its recommendations on alcohol advertising.

Notwithstanding these contested matters, however, there appears to be a broad consensus developing on one fundamental issue in this area. No one involved, including the broadcasters, alcohol producers, and advertising critics appears to favor any media advertising that would demonstrably tend to stimulate the universally-acknowledged tidal wave of youth alcohol and other drug problems.[382]

With regard to this issue, there presently exists an opportunity to fashion workable compromises and coalitions across the spectrum of interests represented. There is a clear mandate to do so. According to the Harris polling organization, 57 percent of the public favors banning alcohol advertising from the broadcast media.[383] The publicity surrounding the petition to the President and Congress by Project S.M.A.R.T. (Stop Marketing Alcohol on Radio and Television) is yet another indication of the increasing level of public concern.[384] Similarly indicative are the legislative and administrative proceedings on alcohol advertising which will be described more fully infra.[385] Each of these public concerns demonstrate that alcohol advertising is undeniably a national issue. This recommendation urges the ABA House of Delegates to go on record expressing its own concern and opposition in principle to such advertising and its possible effects on youth. This recommendation further urges that the House of Delegates recommend that the ABA support further research on this issue. However, this recommendation expresses no preference for any particular reform

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[381] See, e.g., Mosher and Wallack, Government Regulation of Alcohol Advertising: Protecting Industry Profits Versus Promoting the Public Health, 2 J. Publ. Health Pol'y. (Dec. 1981); NAB: Summary and Citations of Records Related to Beer and Wine Advertising, (Nov. 1984); Pittman and Lambert, Alcohol, Alcoholism and Advertising (St. Louis, 1978); Wallack, Alcohol Advertising Reassessed: The Public Health Perspective; Wallack, The Prevention of Alcohol-Related Problems: Recommendation for Public Policy Initiatives; and Watson, Advertising and Alcohol Abuse, (Ad. Assoc. 1981).

[382] See, e.g., testimony of Richard Wiley; Donald B. Shea; James Mosher; and Patricia Schneider, Los Angeles.

[383] Business Week 2 (Feb. 25, 1985).

[384] See, e.g., Alcohol on the Rocks, Newsweek, at 52, (Dec. 31, 1984).

[385] See infra part 4.

proposal. For the moment, the design of a specific remedy, if any, should be left to further public debate and reflection, and to the legislative and administrative process.

2. The Alcohol Advertising Issue

As set forth in the extensive testimony and written evidence submitted to the Advisory Commission, the critics of alcohol advertising are primarily concerned regarding the glamorization of alcohol and other drug use, and abuse, without any realistic depiction of these drugs and their many attendant dangers and serious health consequences.[386] The advertising critics also voiced their concern about the pervasiveness of the media advertising of alcohol, particularly with regard to sports and other programs with large youth audiences, and the perceived effects on youth who are particularly susceptible to alcohol and other drug problems.[387]

In addition to the broadcast media's portrayal of alcohol through advertising, the Advisory Commission also heard several criticisms of the way in which alcohol and other drugs are being depicted on television programming generally.[388] These criticisms are directed at the frequency with which social drinking is shown on programs that are particularly attractive to younger viewers.[389] Some members of the entertainment industry have become

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[386] See, e.g., testimony of Timothy McFlynn, Esq., Los Angeles and Dr. Al Mooney, M.D., Atlanta. Both of these witnesses, and others, noted the persuasiveness of alcohol advertising jingles, "buzzwords" or "slogans" among youth. Examples are "This ____'s for you"; "You can have it all"; "Bring out your best"; "There's a style in your life, _____"; "It's ____time"; "____tastes so nice... _____, ____ on ice"; "_____ will sell no wine before its time"; and "_____ _____ is _____ made the American way." See also Thompson, The Battle is Brewing: A Campaign Against the Broadcasting of Wine and Beer Ads, The Wash. Post, K.1. (Mar. 24, 1985), at 1, col. 1.

[387] Testimony of Timothy McFlynn, Esq., Barbara Emerich; Los Angeles. Another related aspect of this problem is the alcohol industry's college marketing practices. See the recommendation and report on marketing on college campuses.

[388] See, e.g., testimony of George Hacker, Esq., Phyllis Scheps, Princeton; and Paul Mones, Esq., Ray Chavira, Los Angeles. See also testimony of Martha Baker, President, National Council on Alcoholism, before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse (Feb. 7, 1985) (Sen. Paula Hawkins, Chr.).

[389] Id.

trying to reduce the amount of drinking in programming and to show alcohol use only when necessary for artistic purposes.[390] The alcohol advertisers and producers have questioned both the statistics and generalizations on the issue of alcohol programming.[391] The controversial issues involved in alcohol advertising and television programming overlap to some extent, and in other ways, they are very distinct.[392] However, when the glamorization and unrealistic portrayal of alcohol and other drugs is the concern - the issues are very similar.

On either side of the advertising and programming controversy there is no denial of the enormity of youth alcohol and other drug problems.[393] Similarly, the impact of television on youth is increasingly being documented.[394] The dollar amounts and frequency of alcohol advertising are a matter of public record. Regardless of whether one chooses data from the broadcast industry, the alcohol producers or the critics, the amounts involved exceed

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[390]See Stewart, Report of the Program Adopted by the Caucus for Producers, Writers and Directors, Caucus Alcohol and Drug Abuse Committee (1984). See also testimony regarding the Entertainment Industries Council, Inc., Brian L. Dyak, Los Angeles.

[391]See testimony of Richard Wiley, Los Angeles. See also, testimony of Edward O. Fritts, National Association of Broadcasters before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, supra note 388.

[392]See, e.g., infra part 5.

[393]See generally the Introduction to these recommendations. See also Weekly Reader, A Study of Children's Attitudes and Perceptions About Drugs and Alcohol (1984) (The Study reviewed children's own attitudes by analyzing a sample of 600 survey sheets from a pool of 15,000 from 3,700,000 students in grades 4 to 12. Sample results include the result that "one-third of students in grade 4-8 believe that drinking alcohol is 'A big problem' among kids their age, and about 40 percent say the same about drugs. In both cases, the percentage rises among high school students." Study, question 7. In all, the Study featured 8 questions concerning alcohol and other drug problems.)

[394]See, e.g., Tooth, Why Children's TV Turns Off So Many Parents, U.S. News & World Report, at 65 (Feb. 18, 1985).

$750 million annually.[395] As the broadcasters and producers have noted, the alcohol advertising revenue is a significant factor to the networks and many stations throughout the country.[396]

The broadcasters and alcohol advertisers maintain that media advertising of alcohol is legal and is largely directed at brand selection, rather than encouraging increased consumption or abuse by anyone, especially the young.[397] The broadcasters and alcohol producers contend that they are responding to the youth alcohol problem by self-regulation through their own alcohol advertising codes and standards[398] which already limit various aspects of their advertising, and by their youth driver education and other alcohol moderation efforts directed at youth.[399] The Wine Institute, U.S. Brewers Association and Distilled Spirits Council of the Untied States (DISCUS) have all promulgated

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[395]Newsweek, supra note 384 at 53. But see Wash. Post, supra note 386 ($1 Billion annually). One study suggests that, typically, children see 3,000 "drinking acts" each year, Stoudemire, Wallack, Hedemark, Frank and Kamlet, Epidemologic, Economic and Clinical Perspectives in the Prevention of Alcohol Dependence and Abuse (1985), at 23-24. "Given current levels of exposure a person under the legal drinking age will be exposed to more than 3000 drinking acts over the course of a year. This does not include the active role modeling of alcoholic beverage advertisements."

[396]See, e.g., testimony of Edward O. Fritts, National Association of Broadcasters, before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, supra note 388. See also testimony of Stephen K. Lombright, Vice President, Anheuser-Busch Companies, Inc., Id. But see Gay, Beer Ad Ban Won't Hurt Nets, Ad Age (Mar. 11, 1985).

[397]See, e.g., testimony of Donald B. Shea before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, supra note 388. See also, testimony of Stephen K. Lambright, Vice President, Anheuser-Busch, Companies, Inc., and Edward O. Fritts, National Association of Broadcasters, Id.

[398]Testimony of Patricia Schneider, Los Angeles. The use of these codes is limited by antitrust considerations. See Letter from FTC to John DeLuca, President, Wine Institute, March 31, 1976, submitted with Ms. Schneider's statement. See also on this issue, the recommendation and report regarding college alcohol marketing practices.

[399]Id., and testimony of Donald B. Shea, Los Angeles.

voluntary advertising codes which inter alia regulate the broadcasting of alcoholic beverages. These codes, for example, prohibit the depiction of excessive drinking or intoxication, establish the minimum ages of advertising actors, and prohibit the showing of dangerous activities in connection with alcohol.[400]

The broadcasters formerly had Radio and Television Codes regulating the advertisement of beer and wine products.[401] With the dissolution of those codes, the major networks and individual stations now contend that they utilize commercial standards departments to screen alcohol advertisements before they are broadcast in order to ensure that they are tasteful and non-deceptive.[402] As will be more fully discussed infra, these voluntary efforts must be viewed as at least one other alternative to any of the proposed legal or enforced reforms being suggested as remedies to the potential effects of alcohol advertising.[403]

Whatever the proposed solutions, however, it is apparent that the debate over the advertising issue has produced at least two highly emotional issues that appear to be in direct conflict. On one side, there is the serious concern over increasing youth alcohol problems as a national issue and, on the other, the shadow of a new prohibition with its denial of what some view as a basic right.[404] It is hoped that some common ground between these two polar extremes is the reality and that neither must ultimately prevail in order to remedy the problem.

3. The Proposals for Reform

Coming from a variety of sources, a series of proposed media reforms of alcohol advertising have been made, ranging

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[400]The Wine Institute's Code of Advertising Standards was discussed in the testimony of Patricia Schneider, Los Angeles, and John DeLuca before the U.S. Senate Subcommittee, supra note 388. The U.S. Brewers Association's Guidelines for Beer Advertising was discussed in the testimony of Donald B. Shea, Los Angeles.

[401]See supra note 398.

[402]Id.

[403]See FTC Staff Recommendation, infra note 434, at 34-46 on these voluntary, private sector efforts.

[404]Id. and testimony of Timothy McFlynn, Esq., James Mosher, Judge Leon Emerson, Los Angeles; and George Hacker, Esq., Princeton.

in scope from one end of a continuum of restrictiveness from the greatest (a) to the least restrictive (d), as follows:

(a) An enforced absolute ban on all broadcast media advertising of alcohol.

The Project SMART petition is in the vanguard of this proposal at present. There are already state and local examples of such bans as well as several foreign countries with absolute prohibitions on such advertising in law or in practical effect.[405] The closest precedent for such a proposal is the existing self-imposed ban on distilled spirits media advertising and the tobacco advertising ban.[406] This degree of restriction clearly raises the most complex questions regarding the constitutionality among the various proposed reforms, however, there are already three leading cases involving such bans which have not ultimately decided the issue.[407]

(b) Time and manner restrictions on media alcohol advertising.

This proposal has been made by several critics of alcohol advertising.[408] There are existing precedents among the media practices regarding children's programming and adult material. The particular area of concern over alcohol advertising seems to be sports events and other programming which have large youth audiences.[409] In addition, another concern is the sheer volume of such advertising during prime time television.[410]

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[405]See, e.g., testimony of Donald B. Shea. See also Winski, Pressures Mounting to Curtail Liquor Advertising, Ad Age, at 1 (July 18, 1983)(state ad ban proposals); NAB: Background Material for 'Broadcasters' Responsibilities: Beer and Wine Advertising, at 3 (Nov. 1984).

[406]See, e.g., testimony of Timothy McFlynn, Esq., Los Angeles; but see part 6(a) infra regarding the tobacco ban.

[407]See infra part 6(b).

[408]See FTC Staff Recommendations, infra note 434 at 31. (12 letters commenting to BATF regarding prime time restrictions). In addition, the Australian government ban proposed restrictions on alcohol advertising during prime time and other children's'viewing times.

[409]Testimony of Al Mooney, M.D., Atlanta.

[410]Testimony of Barbara Emerich, Los Angeles.

(c) Required equal-time or counter advertising.

The model for this proposed reform is the "Fairness Doctrine" of the Federal Communication Commission (FCC).[411] Because of the continued legal validity of the rule, some critics have proposed extending it to the alcohol advertising issue as it was applied earlier to smoking which then resulted in a self-imposed ban.[412] The Doctrine itself has its own critics who argue that its application to alcohol as a public issue would be inappropriate and would in turn create an unwieldy precedent for enforcement against other legal products and issues.[413] There are legal precedents on both sides and recent legislative and agency considerations of this issue are discussed infra.[414]

(d) Required warning labeling on all alcohol products and on all alcohol advertising.

This option has been suggested due to the already well-documented serious health hazards relating to use of alcohol by pregnant women - Fetal Alcohol Syndrome[415] - and by other particularly vulnerable individuals such as children

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[411]Testimony of Richard Wiley, Esq., Los Angeles.

[412]Testimony of George Hacker, Esq., Princeton. See also Welling, What if the Americans Can't Hold Their Beer, Business Week 112 (Mar. 11, 1985).

[413]Testimony of Richard Wiley, Esq., Los Angeles. Proponents of equal-time messages, however, see this as a vehicle to offer public information as to health and safety risks involved with alcohol abuse.

[414]Rep. John Seiberling (D., OH), has expressed his support in sponsoring legislation which would amend the FCC Act and extend the Fairness Doctrine to alcohol advertising by requiring equal time for advertising health and safety messages.

[415]Fetal Alcohol Syndrome (FAS) has been widely studied both in the U.S. and abroad, and specific criteria was developed in 1980 to identify the related abnormalities. See, e.g., HHS, Fifth Special Report to the U.S. Congress on Alcohol and Health, Dec. 1983. That report concludes: "Heavy drinking during pregnancy adversely affects organs and behavioral fetal development and increases the risks of miscarriage." Id. at 78.

See also House Joint Res. 324, 98th Cong. 1st Sess.
(cont. on next page)

of alcoholics[416] - an increasing number of localities already require health warnings concerning alcohol.[417] The other serious health issues of alcohol include: dependence, heart and liver disease, cancer and a wide range of other physical and psychological dangers, as well as increased risk

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[415](cont.)

> To designate the week beginning January 15, 1984 as "National Fetal Alcohol Syndrome Awareness Week," Whereas fetal alcohol syndrome is one of three major cases of birth defects and accompanying mental retardation in the United States...;

See also Surgeon General's Advisory on Alcohol and Pregnancy, 11 FDA Bulletin at 2 (July 1981):

> The Surgeon General advises women who are pregnant (or considering pregnancy) not to drink alcoholic beverages and to be aware of the alcoholic content of foods and drugs. (emphasis added)

[416]The Children of Alcoholics Foundation has published statistics indicating that as many as 28 million Americans may be in this group. See, e.g., Consensus Statement from the Conference on Research Needs and Opportunities for Children of Alcoholics, April 18, 1984. See also Facing Life as Children of Alcoholics, Philadelphia Inquirer, J1, April 21, 1985 ("Twenty-seven million people have become victims of their parents' alcoholism.") See generally Sexias and Youcha, Children of Alcoholism: A Survivors Manual (Crown, 1985.)

[417]E.g., alcohol servers in Philadelphia and New York City must now display warnings related to FAS. Phila. Municipal Ord. No. 96-1984 (July 10, 1984) requires all alcohol servers to post a notice reading as follows:

> A healthy baby begins with you: Pregnancy and alcohol do not mix. Drinking beer and wine or liquor while you are pregnant or a nursing mother can be harmful to your baby. For more information, call...

Similarly, the 1983 N.Y.C. Law No. 63 S. 569-1.0 requires signs to read as follows:

> WARNING: Drinking alcoholic beverages during pregnancy can cause birth defects.

See also testimony of Sheila B. Blume, M.D., Princeton (regarding the American Medical Society on Alcoholism: A Position on Labeling, Oct. 19, 1979.)

of accidents, disabling injuries and suicide.[418] Besides tobacco, there are numerous other precedents for both labeling and advertising warnings for dangerous albeit, legal products.[419] The effectiveness of such proposals is one area of concern as is the level of proof required for warnings of the dangers of each product.[420]

Analysis

The arguments for and against each of these alcohol advertising proposals are often inextricably bound up with the resolution of other issues, in addition to the basic underlying issue of the problem of alcohol itself.[421] The debate, however, is no longer concerned with whether there is a serious youth alcohol problem, or whether there should be alcohol advertising if it contributes to that problem. Rather, the issue is whether any steps can be taken regarding the advertising which will help alleviate youth alcohol and other drug problems. The options include the proposed reforms and, possibly others as well.

The Commission's view is that the growing number of research studies,[422] the legislative and administrative record[423] and other still developing evidence concerning alcohol advertising[424] all support the consideration of the possibility and propriety of various remedial measures. While still more research and deliberation is needed, the mandate for proceeding with such a study does not require rendering a final decision at this time favoring any one proposal or remedy.

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[418]See e.g., Testimony of George Hacker, Esq., Princeton.

[419]Testimony of Timothy McFlynn, Esq., Los Angeles.

[420]Id. However, the serious health warnings for such risks as Reys Syndrome from aspirin and from phenylalanine in soft drinks are related to very low percentage risks but are required nonetheless. See, e.g., testimony of Sheila Blume, M.D., Princeton (3 - 4,000 phenylketonurics)

[421]E.g., the critics of the alcohol advertisers and alcohol producers continually debate the need for proof of the effects of alcohol advertising on consumption, as well as whether or not such effects are even relevant. See infra. part 5. As to the efficacy of warning labels, Mr. McFlynn has urged rotating or changing labels as well as standardized warning lables. See testimony of Timothy McFlynn, Los Angeles.

[422]Id.

[423]See infra part 4.

[424]See, e.g., Weekly Reader, supra note 393.

4. Current Legislative and Agency Proceedings

On February 7, 1985, the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, Committee on Labor and Human Resources, chaired by Senator Paula Hawkins (R., Fla.) held a hearing on the issue of alcohol advertising on the broadcast media. The Senate also heard testimony from the broadcasters, producers, critics, as well as leading advertising researchers and regulators.[425]

These recent hearings were not the first on the issue of alcohol advertising[426] and to date, additional Congressional hearings were held on May 2, 1985 before the House Select Committee on Youth, Children and Families, chaired by Representative George Miller (D., CA) and on May 21, 1985 before the House Subcommittee on Telecommunications, Consumer Protection and Finance chaired by Representative Tim Wirth (D., Col.) The questions to be considered by the latter committee will include the effects of alcohol advertising on consumption and the possible application of the Fairness Doctrine in this context. Scheduled witnesses include: Representative John Seiberling, Dr. Charles Aiken, Dr. Donald Strickland and Professor John Banzkaf, the original plaintiff in the "tobacco ban" case. In addition, on April 2, 1985, Representative Howard C. Nielson (R., Utah) introduced H.R. 1901 calling for a study of broadcast alcohol advertising to be completed within one year by the Bureau of Alcohol, Tobacco and Firearms (BATF) with the help of the

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[425]The complete transcript is not yet available from the U.S. Government Printing Office. The prepared statements are on file at the Advisory Commission. They include statements inter alia by Stephen K. Lambright, Vice President, Anheuser-Busch Company, Inc.; Martha Baker, President, National Council on Alcoholism; James C. Miller, III, Chairman, Federal Trade Commission; Edward O. Fritts, National Association of Broadcasters; Michael Jacobsen, The Center for Science in the Public Interest; Elaine Stienkemeyer, President, National Parents and Teachers Association; and Donald B. Shea, President, U.S. Brewers Association.

[426]See, e.g., Media Images of Alcohol: The Effect of Advertising and Other Media on Alcohol Abuse: Hearings of the Senate Subcommittee on Alcoholism and Narcotics, Before the Senate Labor and Public Welfare Committee, Mar. 8 and 11, 1976 (hereinafter the "1976 Senate Hearings"); Juvenile Alcohol Abuse, Hearings of Senate Subcommittee to Investigate Juvenile Delinquency, before the Senate Committee on the Judiciary, January 28, 1978; and The Role of Media in Drug Abuse Prevention and Education: Hearings of the Subcommittee on Alcoholism and Drug Abuse, Senate Committee on Labor and Human Resources, April 6, 1984.

Federal Communications Commission, the Surgeon General of the Public Health Service, and other federal agencies. The bill has been referred to the Committee on Energy and Commerce.

Until recently, the Federal Trade Commission (FTC) was in the process of reviewing the "Omnibus Petition for the Regulation of Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices" filed by the Center for Science in the Public Interest (CSPI) and others seeking, inter alia, action through FTC rulemaking, investigation and enforcement against broadcast alcohol advertising as "deceptive" and "unfair" under the Federal Trade Commission Act, 15 U.S.C. 45, 52, 55 and regulations. In a letter dated April 16, 1985, the FTC denied that petition in its entirety as to its requests for rulemaking, an industry-wide investigation and/or institution of any enforcement action challenging the legality of certain specified alcohol advertising campaigns.[427] The FTC letter stated:

> In reaching this decision, the Commission has carefully considered the issues raised in the petition, and the enormous personal tragedy and economic inquiry connected with alcohol abuse. It (the FTC) has found, however, no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse. Absent such evidence, there is no basis for concluding that rules banning or otherwise limiting alcohol advertising would offer significant protection to the public.[428]

The Commission then deferred to the ongoing BATF proceedings to be described below:

> For the Commission also to engage in rulemaking procedures would be needlessly duplicative governmental action.[429]

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[427]Letter to Michael F. Jacobsen, CSPI, from the FTC, dated April 15, 1985 at 1. See Henderson, FTC Won't Restrict Alcohol Ads, Will Review Issue on Case-by-Case Basis, The Wash. Post, April 17, 1985, at F1: "Any decision to ban or impose new restrictions on alcohol advertising should be made by elected officials rather than the FTC. Id. at F7.

[428]Id. at 2.

[429]Id.

Finally, the Commission noted the ongoing efforts of other federal agencies, state and local governments and the private sector in conducting public information campaigns, drunk driving programs and coordinating activities.[430]

FTC Commissioner Patricia F. Bailey filed a dissenting statement disagreeing with the Commission's decision "not even to engage in some factual inquiry with respect to certain questionable advertisements and practices."[431] She specifically noted various alcohol ads involving driving and what appeared to be alcohol abuse, in addition to college marketing promotions and chug-a-lug contests sponsored by brewers and college newspaper advertisers.[432] Commission Bailey concluded:

> Finally, companies that market alcoholic beverages have a keen awareness of the importance of brand loyalty and the benefits of establishing brand loyalty at an early age. Promotions aimed at youth, including those who are under-age, help to establish brand loyalty that can pay dividends well into the adult years of a company's customers.[433]

The release of the Commission's letter was accompanied by the release of the recommendations of its staff regarding the denial of the petition.[434] These recommendations consist of a 52-page review of the petition, the relevant law and scientific evidence, followed by a 53 page appendix entitled "Alcohol Advertising, Consumption and Abuse" prepared by the FTC Bureau of Economics, dated March 5, 1985. The staff does note the various remedies sought by the petition including the ban, counter-advertising and labeling, but the latter two are hardly discussed in the rest of the

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[430]Id. at 4. The FTC Staff Report noted that BATF has publicly stated that it will consider the use of athletes, celebrities and athletic events in a forthcoming rulemaking." Id. at 53.

[431]See specifically Dissenting Statement of Commissioner Patricia F. Bailey, Denial of the CSPI Petition to Regulate Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices, at 1 (April 15, 1985).

[432]Id. at 2-3. See on this issue the recommendation and report on college alcohol marketing.

[433]Id. at 4.

[434]Recommendations of the Staff of the Federal Trade Commission, re: Omnibus Petition for Regulation of Uniform and Deceptive Alcoholic Beverage Advertising and Marketing Practices, Docket No. 209-46, March, 1985. (cont. on next page)

document which is principally focused on the ban proposal.[435] The scientific evidence on causation is then dismissed as inconclusive, or contradictory, yet the staff report does not include any of the more recent studies.[436] Nevertheless, the FTC staff concludes:

> Most of the studies done so far seem to be the conscientious efforts of competent researchers, so the fact that they have not reached definition or even consistent results does not bade well for future studies.[437]

And further:

> When the substantial work is already done and the meager achievements gained in the face of severe methodological problems are combined, it is problematic whether further studies are warranted. It seems unlikely that a more striking result will be achieved than the standard one that the effect of advertising on sales is found to be small or more often statistically insignificant.[438]

The FTC letter was, therefore, issued without any apparent consideration of the factual record concerning the specific advertising and marketing practices noted and criticized by Commissioner Bailey. CSPI and the other petitioners may appeal the FTC denial, subject to the significant burden of overturning the agency's discretion. However, it can be argued that the record before the FTC was somewhat incomplete in terms of the factual record, the scientific studies, and possible remedies other than an absolute ban on broadcast alcohol advertising.

434(cont.)
("FTC Staff Recommendation") The recommendations are, however, prefaced as follows:

> NOTE: These recommendations reflect the views of the Commission's Bureaus of Consumer Protection and Economics. They do not necessarily reflect the views of the Federal Trade Commission or any of its individual Commissioners.

435Id. at 4-5.

436See infra part 5, for some of the more recent studies on broadcast alcohol advertising.

437FTC Staff Recommendations, supra note 434, at 2.

438Id. at 23.

As the FTC letter noted, BATF has pending before it a proposed set of regulations regarding alcohol advertising, including restrictions on the advertiser's use of athletes, celebrities, athletic events and other potentially "glamorizing aspects of alcohol advertising as well as proposals to extend the wine, beer and distilled spirits producers' voluntary advertising codes to other, non-consenting parties."[439]

The Wine Institute has proposed that the BATF permit the extension of the Code of Advertising Standards to non-signatories such as the other domestic and foreign producers.[440] However, there have already been questions raised by the FTC regarding the possible application of the antitrust laws to any coerced adherence to such advertising codes by non-parties. It is clear that even well-intentioned, public interest codes and standards promulgated by non-profit industry associations may still result in antitrust liability due to their potential anti-competitive effects.[441]

The DISCUS Code of Good Practice and the broadcaster's refusal to carry liquor advertising may also soon be under review. The recent Seagram's national newspaper advertising campaign raised questions about the propriety of the long-standing voluntary bans on broadcast advertising of distilled spirits. Seagrams had proposed broadcast

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439See BATF, Labeling and Advertising Regulation Under the Federal Alcohol Administration Act, 45 Fed. Reg. 83530, 83532 (Dec. 19, 1980). See also the FTC Staff Recommendation, supra note 434 at 34-36 for its discussion of the ongoing, voluntary efforts of the alcohol industry under the advertising codes.

440See testimony of John DeLuca, supra note 394.

441See e.g., American Society of Mechanical Engineers Inc. v. Hydrolend Corp., 456 U.S. 556 (1982) (non-profit industrial standards association held liable for treble damages).

advertising on the "equivalency" of wine, beer and distilled spirits alcohol content which the major networks have rejected.[442] The network's refusal to carry the Seagrams' ad may raise both First Amendment and antitrust issues due to the heavily regulated nature of the media in the first instance and, alternatively, to the complete absence of any government imprimatur by way of legislation, regulation or supervision of the voluntary ban on distilled spirits ads; especially since wine and beer ads are permitted.[443]

The BATF proceedings began in 1978 when the agency first issued its Advance Notice of Proposed Rulemaking.[444] Subsequently, BATF received almost 5,000 comments and 140 citizen petitions regarding its proposed rulemaking.[445] Final BATF action has not yet been promulgated.

5. Recent Scientific Studies on Alcohol Advertising

As the issue of the alcohol advertising has become increasingly popular and more defined, virtually every public debate has brought forth new studies and counter-criticisms of the pre-existing ones. To that extent, the current controversy has stimulated a new wave of research and abstracts. This new material approaches the question of the advertising of alcohol from a variety of perspectives designed to refute critics of the earlier "standard" while still defining new directions for further study. Some

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[442] See It's Time Americans Knew the Facts About Drinking, The Wash. Post, April 15, 1985, at A20; The N.Y. Times, April 15, 1985 at A15; The Wall St. Journal April 15, 1985, at 27; and The Phila. Inq., April 15, 1985, at 8B.

[443] See the issue of requirements for "state action" antitrust exemptions, recommendation and report on college alcohol marketing practices. See also, Southern Motor Carriers v. U.S., 105 S. Ct. 290 (1985).

[444] 43 Fed. Reg. 54266 (Nov. 21, 1978).

[445] See statement of James C. Miller, III, supra note 425.

new "qualitatively" orientated studies of the effects of media advertising on changing drinking patterns which may be harmful as well.[446]

On these scientific issues, there follows a list of some of the basic material as well as some of the more recent research on the issue of broadcast media alcohol advertising: Atkin and Block, CONTENT AND EFFECTS OF ALCOHOL ADVERTISING 1980 (this is the so-called "Michigan study," that resulted largely from the 1976 Senate Hearings described above. It was funded by BATF, FTC, NIAAA and DOT support); Pittman and Lambert, ALCOHOL, ALCOHOLISM AND ADVERTISING 1978 (This study subtitled, A Preliminary Investigation of Asserted Associations was supported in part by a grant from the United States Brewers Association, Inc."); Strickland, Content and Effects of Alcohol Advertising: Comment on NTIS Pub. No. PB 82-123142, 45 Jour. Stud. on Alcohol at 87 (1984). (This article is a critique of Atkin's Michigan study.) See also Atkin, Hoching and Block, Teenage Drinking: Does Advertising Make a Difference?, 34 Jour. of Commun. at 157 (April 1984); and McCarty and Ewing, Alcohol Consumption While Viewing Alcoholic Beverage Advertising, 18 Int'l. J. of Addiction at 1011 (1983). But see Estes and Heinemann, Alcoholism, Development Consequences and Intervention at 85 (2nd ed. 1982). There were other comments, in addition to a reply by Profs. Atkin, Kohn and Smart, The Impact of Television Advertising on Alcohol Consumption: An Experiment, 45 Jour. of Stud. on Alcohol at 295 (1984) (this is one of a number of Canadian studies as well as English, Australian and other foreign based research reports on this issue.) More recent articles and studies

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[446] See, e.g., Dorn and South, Alcohol and the Media: A Review and Critique of the 'Effects' Model, 3 Int'l Quot. of Comm. Health Educ., at 183 (1982-3). (The authors criticize the emphasis in previous studies on the amount of drinking as a function of advertising versus changes in drinking "styles" as a result of advertising emphasis. This may have equally as serious health consequences as increased amounts. The new brands and line extensions being introduced by the brewers may also reflect this concern. See Hume, Brewers Enlist New Brands to Battle Problems, Ad Age (Jan. 31, 1985).

include two new studies by different research teams both focusing on the M.A.S.H. television show which was criticized in the 1976 Senate Hearings described supra.[447]

Recently, also, the American Academy of Pediatrics issued its own Policy Statement on Children, Adolescents and Television concluding inter alia: "Television conveys unrealistic messages regarding drugs, alcohol and tobacco, and indirectly encourages their use."[448]

The full impact, however, of these more recent analyses and studies has yet to be felt in the legislature and courts. It seems clear that the stimulus of public debate over these issues is now being felt increasingly in the academic, professional and scientific studies research facilities. Where in the recent past, scientific studies were few and hard conclusions to be drawn therefrom even more rare, now the literature on the subject is growing both in sheer numbers and in sophistication. If the legislative, judicial and administrative bodies charged with oversight require a "critical mass" of data before acting on the issue of alcohol advertising, the current literature is surely fast approaching that level.

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[447]Rychterik, Fairbank, Allen, Foy and Drabman, Alcohol Use in Television Programming: Effects on Children's Behavior, 8 Addictive Behaviors at 19 (1983); and Futch, The Influence of Televised Alcohol Use on Children's Problem Solving, unpublished Ph.D. dissertation, SUNY Binghamton (1984) (University Microfilms No. 1 8416783). In addition, there are new studies by Prof. Atkin and his colleagues, including: Atkin, Neuendorf and McDermott, The Role of Alcohol Advertising in Excessive and Hazardous Drinking, 13 Jour. Drug. Educ., at 313 (1983) and Atkin, Alcohol Beverage Advertising: Its Content and Impact (1984).

[448]Any review of this literature is quickly outdated but some journals regularly update their texts and articles. See e.g., Rutgers Center on Alcohol Studies, Alcohol Studies Retrospective Bibliographies - B725, Advertising and the Media (Updated Oct. 1984). See also NAB Summary and Citation of Research Related to Beer and Wine Advertising, (Nov. 1984.) See also Strickland and Pittman, Social Learning and Teenage Alcohol Use: Interpersonal and Observational Influences Within the Sociocultural Environment, Jour. Drug Issues, at 137 (Winter 1984). In this new article, Professor Strickland and Pittman focus on the interplay between teenage peer influence and media exposure to alcohol use.

6. The Legal Authorities

(a.) The "Commercial Speech" Cases.

Both the critics of advertising and its proponents rely on the commercial speech cases. Some of the basic commercial speech, First Amendment cases worthy of note are as follows: Bigelow v. Virginia, 421 U.S. 809 (1975), (the Virginia "abortion advertising case" that first extended First Amendment constitutional protection to commercial speech); Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, (1975) (another commercial speech landmark case relating to advertising of drug price information in the professional setting of pharmacy); and Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, (1980) (the leading commercial speech case, involving a state ban on gas appliance advertising during the natural gas shortage). Central Hudson resulted in a decision by the U.S. Supreme Court establishing a four-part test for determining the legality of proposed limits on commercial speech.[449]

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[449]These commercial speech cases and the Central Hudson test are summarized and analyzed in: Note, Liquor Advertising: Resolving the Clash Between the First and Twenty First Amendment, 59 N.Y.U.L. Rev. 157 (1984) and Sackett, Alcoholic Beverage Advertising and the First Amendment, 52 U. Cinn. L. Rev. 861 (1983). The following is the Supreme Court's explanation of the four part test in the Central Hudson decision:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

Finally, two of the more recent commercial speech cases applying the Central Hudson test in the Supreme Court have been in the area of attorney advertising.[450] Both the FTC and the Antitrust Division of the U.S. Department of Justice have strongly advised bar authorities against any similar restrictions on truthful advertising by attorneys.[451] The FTC Staff Report is primarily an economic study of the price effects of advertising on legal fees designed to support the agency's prohibition on any advertising ban by the bar.[452]

The critics of alcohol advertising have contended that these leading commercial speech precedents are relatively new, still untried legal developments, and that they may not be controlling in this situation because of the more serious health and welfare hazards related to alcohol use and abuse, as opposed to public utilities or bar advertising. Further, they argue that even if Central Hudson, et al. are relevant to alcohol advertising, the proposed ban and other proposed restrictions would pass the four-part test.[453]

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[450]See Bates v. State of Bar of Arizona, 433 U.S. 350 (1977) and In re R.M.J., 455 U.S. 192 (1982) which concludes: "The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements." Id. at 207.

[451]See Letter from U.S. Department of Justice, Antitrust Division to State Bar Executives, September 21, 1984 (re: American Bar Association Model Rules of Professional Conduct Concerning Fees, Solicitation and Advertising); and Report of the Staff of the Federal Trade Commission, Improving Consumer Access to Legal Service: The Case for Removing Restrictions on Truthful Advertising (1984).

[452]See, e.g., Anderson, Birth of Salesman (Am. Bar Found., 1981).

[453]See, e.g., Letter to Senator Paula Hawkins from Prof. Marc A. Franklin, Stanford Law Professor, Feb. 2, 1985 (describing the commercial speech cases as "a very new area of law that [the Supreme Court] has been developing case by case in context totally unlike the one facing your subcommittee. But the Court has been sensitive to subtle fact differences in the commercial speech cases and to subtle fact differences between broadcasting and other media"). But see unpublished speech by Floyd Abrams, Esq. (Counsel to the NAB et al.), as amicus curiae in Capital Cities v. Crisp, see infra part 6(b), before the Law and Justice Committee, National Conference of State Legislatures, Boston, Mass, July 23, 1984. ("The Supreme Court has never upheld any ban on advertising of a lawful product that was not deceptive").

The broadcasters, alcohol producers, their allies and advisers have steadfastly maintained that the First Amendment, as interpreted by the commercial speech cases, prohibits any advertising restrictions on a legal products such as alcohol, so long as the advertising is not false, misleading or deceptive.[454] The critics, however, argue that as the proposed advertising restrictions move along the continuum set forth supra, from more to less restrictive, and from providing virtually no consumer product information to providing more such data, constitutionality may become less problematic.

To some extent, the issues of "equal time" or counter advertising tied to other products or services will be reviewed in the next term by the U.S. Supreme Court in Pacific Gas & Electric v. Public Utilities Commission, 105 S. Ct. 1840 (1985), where the question presented for review is "Does an order of a state public utilities Commission violate the First Amendment by compelling a privately-owned public utility to include in its monthly billing envelope funding solicitation messages of a third party?" In its ruling below, by the California Supreme Court refused to review the California Public Utilities Commission order requiring the inclusion of the third party mailing by a utility consumer group.[455]

Finally, as both proponents and critics of alcohol advertising have noted, there has already been a Supreme Court comment - in the context of attorney advertising - on the "special consideration" applicable to proposed restrictions on commercial speech over the broadcast media.[456] Thus, the legal stage has already been set for a review of any alcohol advertising restrictions regarding television and radio broadcasting.

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[454]Testimony of Richard Wiley, Esq., Los Angeles.

[455]Jurisdictional statement of Pacific Gas & Electric Co., 105 S. Ct. 1840 (1985).

[456]Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

(b.) The Alcohol Advertising Ban Cases - Thus Far

There have already been at least three noteworthy appellate cases on the issue of restricting alcohol advertising. To date, the courts have ruled 2 to 1 with regard to upholding such restrictions, but there is a wide divergence of opinion on what these decisions hold for the future. The advertising critics point to these cases as supporting their arguments regarding the "special" hazards of alcohol advertising.[457] Nevertheless, perhaps predictably, the broadcasters and producers have found their own grounds for solace in these decisions, supporting their views.[458]

The first of these cases, Queensgate Inv. Co. v. Liq. Con. Comm.,[459] involved a state ban on liquor retail price advertising. The Ohio Supreme Court upheld the ban under the four-part Central Hudson test noted infra.[460] The U.S. Supreme Court then dismissed the appeal by the advertisers "for want of a substantial federal question." Moreover, only two Justices dissented from the dismissal, Justices Brennan and Stevens, on the basis that they would have noted probable jurisdiction and heard the case.[461] The refusal of the Supreme Court even to hear the case has been relied upon by the proponents of alcohol advertising restrictions.[462]

In the next case, Dunagin v. City of Oxford, Mississippi,[463] the state of Mississippi enforced a ban on

[457]See, e.g., testimony of George Hacker, Esq., Princeton.

[458]Testimony of Donald B. Shea, Esq., Los Angeles.

[459]69 Ohio St.2d 361, 433 N.E.2d 138, (1982) appeal dismissed, 459 U.S. 807 (1982).

[460]433 N.E.2d at 141.

[461]459 U.S. 807 (1982). But see, as to the limited precedential value of such a denial, Anderson v. Celebreeze, 460 U.S. 780 (1983).

[462]See, e.g., testimony of George Hacker, Esq., Princeton.

[463]718 F.2d 738 (5th Cir. 1983) en banc, cert. denied, 104 S. Ct. 3554 (1984).

intrastate media advertising of liquor. The federal court of appeals for the Fifth Circuit upheld the ban as not being in violation of the First Amendment, notwithstanding the admitted absence of scientific proof linking such advertising to alcohol consumption. Dunagin and a companion case were taken to the U.S. Supreme Court by way of petitions for certiorari, which were then denied by the Court.[464]

For the alcohol advertising critics, Dunagin quickly proved to be a hollow, shortlived victory. In its Dunagin, opinion, the Court of Appeals had noted the fact that interstate media were not regulated by the state's ban on intrastate media. In Capital Cities Cable v. Crisp[465] the issue was the effect of a state's attempt to enforce its liquor advertising ban on interstate media, specifically on an out-of-state cable company carrying broadcast wine ads that were prohibited under the state statute. In its opinion, the U.S. Supreme Court held that federal law and federal communication regulation pre-empted the state's attempt to control the interstate media under its liquor law. The Court, however, specifically noted that it was not deciding the First Amendment question since it was unnecessary to do so given the other deciding factor, federal pre-emption of state law.[466]

Capital Cities was, in effect, the preliminary bout for the main contest. Virtually every interest group in the alcohol advertising controversy filed a brief amicus curiae in that case, including the broadcasters,[467] the alcohol industry[468] and the advertising critics.[469] The issue in the Supreme Court in Capital Cities was where the next battle in this issue would be fought. If the states could have regulated interstate media in each of their jurisdictions as they regulated intrastate media under Queensgate and

[464]Lamar Outdoor Advertising v. Mississippi State Tax Comm'n, 539 F. Supp. 817, cert. denied, 104 S. Ct. 3554 (1984).

[465]104 S. Ct. 2694 (1984).

[466]Id.

[467]Brief Amici Curiae of the National Association of Broadcasters, American Broadcasting Companies, Inc., CBS, Inc. and the National Broadcasting Company, Inc. (Floyd Abrams, Esq., Counsel of record).

[468]Brief Amici Curiae of the American Civil Liberties Union and the American Civil Liberties Union of Oklahoma in Support of Petitioners, Capital Cities Cable, Inc.

[469]Brief of S.A.N.E. Inc. as Amicus Curiae in Support of Respondent, Crisp.

Dunagin, then such one-state restrictions could have been sought in one state after the other. However, since the Supreme Court said that these states could not control interstate media in the face of federal pre-emption, the focus of the advertising critics has necessarily shifted back to Washington to the Congress and the federal agencies.

Thus Queensgate, Dunagin and Crisp were just the beginning of the first chapter in the last volume of this senario. Now, without a federal statute, action by the FCC under the Fairness Doctrine,[470] or other federal agency - the interstate media - such as cable television or satellite "super stations" - are beyond the reach of the states because of the gap left after Queensgate, Dunagin and Capital Cities Cable.[471] The current petition by Project SMART to the President and the Congress and the BATF proceedings are all reflections of this perceived need for a federal remedy rather than state-by-state bans. Such a federal remedy based on national concerns is necessary in order to be able to deal effectively after Capital Cities with all alcohol advertising by both intra and inter state media.

(c.) The Tobacco Ban Precedent

The critics of alcohol advertising point to the tobacco ban as precedent for their proposed restrictions.[472] In the testimony before the Commission and the Congress the tobacco advertising restrictions have been exhaustively described and compared to the alcohol proposals by the critics, alcohol industry, broadcasters and other interested parties.[473] As with so many other aspects of this issue, the relevance, if any, of the tobacco ban precedent is very much still in dispute.

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[470]See supra part 3.

[471]See supra part 3(a).

[472]See, e.g., testimony of Richard Wiley, Esq., Los Angeles; George Hacker, Princeton.

[473]We have already noted the history of the Fairness Doctrine in the tobacco cases. See also Note, supra note 449 at 184, n. 198 questioning the continued validity of the "tobacco ban" case, Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three judge court), aff'd mem. 405 U.S. 1000 (1972), as predating the commercial speech decisions. Also questioned for the same reasons, is Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). But see Weiliger, The Constitutional Rights of Puffery; Commercial Speech and the Cigarette Broadcast Advertising Ban, 36 Fed. Comm L.J., at 1 (July 1984).

7. Conclusion

For those who must decide the issue, the controversy over restrictive broadcast alcohol advertising is unlikely to fade away. Its continued vitality can be measured by the current petition to the President, Congress and the agencies, current public opinion polls and by the political process which reflects all public pressures.[474] The issues raised by these reform proposals are far too complex for a "quick fix"; some of the issues may in fact defy any final resolution. However, one issue on which all concerned can agree is opposition to broadcast media advertising which distorts or glamorizes alcohol to youth so as to encourage abuse. That issue, at least, is straightforward and calls for response and hopefully, agreement due to the tremendous harm being suffered by youth with alcohol and other drug problems.

This recommendation makes no case for any one solution to the broader issue of restricting alcohol advertising. It calls for more serious, thoughtful consideration of the issue of such media advertising and programming's unrealistic depiction of alcohol and its possible effects on our youth. The welfare of our youth in this regard is the Commission's mandate and the basis for all of our concern about alcohol advertising in the first instance.

6. Marketing on College Campuses

At its field hearings, the Advisory Commission heard repeated testimony criticizing youth-oriented alcohol advertising in college newspapers and marketing practices specifically directed at the college age group.[475] As described to the Advisory Commission, the alcohol industry, particularly the brewers, in addition to advertising heavily in college newspapers; produce college concerts; and provide low price, and at times free, promotional products to college groups.[476] In addition, critics of these college promotional activities note that the brewers have also used paid campus representatives and heavily sponsored "spring

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[474]Another indicator may be found in the amount of recent media coverage of the issue. See, e.g., Beer Today, Gone Tomorrow, CBS Sixty Minutes, May 5, 1985 (the media advertising of alcohol was the first segment of that program).

[475]See, e.g., testimony of Delores Napper, Atlanta.

[476]See testimony of Judge Leon Emmerson, Los Angeles.

break" activities.[477] It is clear that one of the motivations behind such activities is the huge potential future market represented by these youthful purchasers in the college age group.[478] As with the media alcohol advertising issue, college alcohol advertising implicates several concerns. These concerns include among others, the special susceptibility of the college population to such advertising, the high incidence of alcohol-related health problems and accidents in this age group, and the illegality of alcohol consumption by college age youths in the now 27 jurisdictions with an over 18 minimum drinking age.[479]

There is evidence of increasing concern regarding the effects of college marketing. For example, on April 16, 1985, the Michigan Liquor Control Commission held a public hearing to consider a proposed rule to ban promotion of alcoholic beverages on Michigan college campuses.[480] The Michigan proposal is scheduled for additional hearings and there have already been proposed amendments to permit exceptions for some industry activities such as advertising in college newspapers, "responsible" drinking campaigns and charitable contributions.[481] Meanwhile, other liquor commissions and campus authorities in Massachusetts, South Carolina and elsewhere have begun to question campus alcohol advertising and promotions.[482]

The National Council on Alcoholism (NCA) has issued its own Prevention Position Statement on Alcoholism and Alcohol-Related Problems as it Relates to College and University Campus Alcohol Advertising. The NCA statement calls for "the elimination of alcohol advertising and

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[477]Testimony of Delores Napper, Atlanta. See also testimony of Martha Baker, President, National Council on Alcoholism, supra note 388.

[478]Id.

[479]See, e.g., testimony of Delores Napper, Atlanta; See also the recommendation and report regarding the 21 minimum drinking age.

[480]Goldberg, Plan to Ban Liquor Ads on Campuses Cause Stir, Detroit Free Press, (Feb. 19, 1985).

[481]The Michigan proposal is attached hereto as Appendix C. See also opening remarks of Patricia J. Knox, Chairperson, Michigan Liquor Control Commission, April 16, 1985.

[482]Roberts, Controversy is Rising Over Beer Promotion on College Campuses, The Wall Street Journal, Jan. 30, 1985, at 15.

promotion in all forms from university and college campuses" noting the implication of alcohol consumption on college campuses in lowered school performance, vandalism, automobile and other types of accidents, illness and suicide.[483] On the federal level, officials of both the Federal Trade Commission (FTC)[484] and the Bureau of Alcohol, Tobacco and Firearms (BATF)[485] have recently indicated their growing concern over the college marketing activities of the alcohol industry.

Enforced bans are only one solution to these concerns. Another answer may be the voluntary self-restraint of the producers. One brewer has already voluntarily and unilaterally "pulled back" on its college marketing activities.[486] Other alcohol producers have openly criticized their own industry's promotional activities directed at college students.[487] The industry position, however, has more often

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[483]Id.

[483]See, e.g., Dissenting Statement of FTC Commissioner Patricia P. Bailey, supra note 431 at 3 noting in particular:

> ...(5)various beer companies promotion on college campuses involving chug-a-lug contests; and (6) various advertisements for alcoholic beverages in college publications in states where the drinking age is 21.
>
> ...The last two promotional practices encourage young people to drink alcohol in ways that are dangerous or in situations where it violates state law and public policy. Clearly, such promotional techniques could constitute deceptive or unfair practices and deserve further analysis by the Commission.

See also Henderson, supra note 427 at F1:

> FTC chairman James C. Miller, III said some ads 'are close to the margin' of legality. He cited beer ads and promotions that appear aimed at college students and urged beer advertisers to "clean up their act." Id. at F7.

[485]See Hume, Feds Rap Beer Promo Tactics, Advertising Age, Nov. 1, 1984 at 18.

[486]In a conversation on April 15, 1985 with Ellen S. Teller, Esq., Project Consultant to the Advisory Commission, William Weatherston confirmed that Stroh's had decided to cease sponsoring some college events and was evaluating its other activities in areas where there has been concern expressed.

[487]Sobczynski, Trouble is Brewing on Campus, Advertising Age, Jan. 16, 1984 at 23.

been to defend college marketing as being directed at influencing brand identification, or product choice, rather than encouraging youth alcohol consumption.[488] Regardless of the motivation, college marketing of alcohol raises many of the same health and safety concerns previously noted in the section on media advertising of alcohol.[489]

Alcohol-related youth problems may be critical to the legality of any cooperative action or inaction, by the alcohol industry regarding college marketing. Even without an actual agreement, the simultaneous, voluntary withdrawal of college ads and promotions might be subject to legal challenge under the antitrust laws.[490] If the college advertising ban, however, were regulated and supervised, the liquor industry could also be exempt under the "state action" exemption to the federal antitrust laws.[491] Alternatively a college advertising ban could be specifically exempt from the antitrust laws by amending those laws. In either exemption situation, one of the critical issues is the underlying social justification for banning college alcohol marketing. Under Parker v. Brown and the Southern Motor Carriers rationale, the states must clearly articulate and affirmatively express the

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[487] Id., See also, testimony of Donald B. Shea, President, U.S. Brewers Association, Los Angeles.

[488] See the recommendation and report on media advertising.

[489] See Letter, supra note 401. Mr. DeLuca also commented on the antitrust issue as follows in his prepared statement to the Senate Subcommittee on Alcoholism and Drug Abuse on February 7, 1985:

> In 1977 the Wine Institute requested permission of the Federal Trade Commission to enter into negotiations with media organizations, and vintners outside of California, to extend the California Code to the remainder of the industry. The FTC withheld permission on antitrust grounds. We subsequently proposed to the Bureau of Alcohol, Tobacco and Firearms that our Code be made mandatory for all vintners, both American and foreign. This is now under consideration. Id. at 5.

See the recommendation and report on media advertising for background on the BATF regulation proposal.

[491] See e.g., Parker v. Brown, 317 U.S. 341 (1943); Southern Motor Carriers v. U.S., 105 S. Ct. 290 (1985; See also, the companion case of Town of Hallie v. City of Eau Chaired, No. 82-1832 (decided March 25, 1985) (this case may permit municipalities to act under this "state action" exemption when they do so pursuant to state regulation and supervision) cf., Cal. Retail Dealers Ass'n. v. Medical Alum. Inc., 445 U.S. 97 (1980).

college ban as a state policy and then must actively supervise the ban.[492] The potential harm of alcohol abuse would be a critical part of the justification for such a state ban. Similarly, if the alcohol industry were to seek a specific antitrust exemption for a college ad ban, the "clearly paramount social purpose" for a ban would documenting be necessary to justify such an exemption.[493]

Given the alcohol industry's own expressed concerns regarding youth alcohol abuse,[494] the voluntary cessation of college alcohol advertising would seem to be a prime example of corporate social responsibility. Because voluntary restrictions may be feasible, industry support of proposed state or federal rules prohibiting such marketing, would seem appropriate to deal with the growing concern regarding alcohol abuse on our college campuses.

18. Legal Training on Alcohol and Other Drug Problems

Bar Evaluation and Training

Numerous witnesses urged the Advisory Commission to encourage the ABA to foster continuing legal education and other programs designed for lawyers to assist them in dealing with clients experiencing alcohol and other drug problems.[495] To some extent, the bar's own existing substance abuse programs[496] and knowledge could be tapped to provide expertise for such educational activities for lawyers. Another source is the Advisory Commission with its assembly of

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[492] The proposed Michigan Liquor Control Commission rule banning college alcohol marketing, supra, could be a case in point on the issue of what constitutes a Michigan state policy. After hearings, any rule promulgated by the Commission must be reviewed and approved by a joint-committee of the Michigan state legislature before enforcement can begin.

[493] See, e.g., the Jan. 1979 Report of the President's Nat'l Comm. for the Review of Antitrust Laws and Procedures at 17. See also, Business and the Law, Joint Research: Barriers Fall, N.Y. Times April 23, 1984 at D2,.

[494] See, e.g., testimonies of Donald B. Shea, and Patricia Schneider, Los Angeles.

[495] See, e.g., testimony of Hon. John Girardeau, Atlanta.

[496] See ABA, ABA MAP Program Models and Packages.

treatment and medical experts and bar community members involved in alcohol and other drug problems.[497] B. and C.

Training for Juvenile Justice and Family Court Program Personnel

Both recommendations address the need to train judges, court officers, lawyers and related justice system personnel specifically in alcohol and other drug problems. As one attorney who testified before the Advisory Commission stated:

> States should require juvenile and family court judges, juvenile probation officers and lawyers who represent children to periodically attend continuing education seminars on indentifying and recognizing alcohol and substance abuse problems.[498]

As has already been noted judges and others, the incidence of alcohol and drug problems in both juvenile and family court proceedings is very significant.[499] In response to these disturbing statistics, the Advisory Commission recommends special training as a means of identifying and interrupting the vicious cycle of family and juvenile alcohol and other drug problems.[500]

Coalitions

The witnesses before the Advisory Commission called for more involvement by the bar in community coalitions directed at participating in the solutions to the alcohol and drug problems

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[497] Approximately fourteen members of the Advisory Commission are attorneys.

[498] Testimony of Paul Mones, Esq., Los Angeles.

[499] See the statistics in the Introduction to these recommendations on the high percentage of alcohol and other drug problems involved in juvenile and family court proceedings.

[500] See e.g., testimony of Hon. John Girardeau, Atlanta; Phyllis Reilly, Princeton; and Paul Mones, Los Angeles. Both adult and teen witnesses before the Advisory Commission acknowledged the critical role that all school personnel, professionals and non-professionals, play in identifying and dealing with youth alcohol and drug problems. See, e.g., testimony of William Coletti, Atlanta; and Mark Byrne, Nia Anderson, Princeton. As with training of judges, lawyers and other court personnel, there is a great need for training of school personnel to recognize, identify and assist youth with these problems.

of youth.[501] Although the Commission is a good example of the bar's involvement as a national coalition, there are numerous other organizations composed of other groups "networking" and co-operating on these problems on all levels of local, state and national activities. As one Commission witness pointed out:

> The collaboration of professionals and self-help groups toward the adolescent is crucial. One should feed the other with support. The local ABA chapters should be aware of this resource and the need for cooperation.[502]

It is through this cooperative effort that the organized bar and the state and local organizations can effectively battle the war on alcohol an drug problems of youth.

Curricula

Several of the witnesses before the Advisory Commission emphasized the national need to develop and adopt uniform model curricula for youth education on alcohol and other drug problems.[503] To some extent, such model curricula have already been developed and adopted.[504] There is, however,

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[501] See, e.g., testimony of William Coletti, Atlanta; William Blatner, Princeton; and Bertha Smith, Lawrence Wallack, Los Angeles.

[502] Testimony of Denis Mansman, Princeton.

[503] See e.g., testimony of Robert Halford, Atlanta; Ellen Morehouse, Princeton.

[504] See, e.g., testimony of Ellen Morehouse, Princeton. Ms. Morehouse had developed the following program:

> a) a kindergarden through twelfth grade curriculum that provides information on alcohol and drugs, alcoholism and drug abuse and its effects on the family, values clarification exercises, and skills to resist using alcohol and drugs. The curriculum should be sequential and teachers should receive training on how to implement it. Parents should also receive training on how to talk to their children about alcohol and drugs so questions from their children can be handled with an informed response;
>
> b) a program and/or procedure for how to help elementary students who are living with an alcoholic or drug abusing parent; and
>
> c) a Student Assistance Program (SAP) for secondary schools.

[504] See parts A and B above.

still need for some additional uniformity and sponsorship in order to encourage wide use of such models.

19. Legal Community Peer Group Support Programs

Since 1980, almost every bar journal has carried at least one autobiographical article in which an attorney reveals his personal struggle with alcohol.[505] Typically, the articles begin: "Who am I? The name is not important. I am an experienced trial lawyer, but the important thing is that I am an alcoholic."[506]

The recent plethora of such articles indicates two things: First, they expose to the legal community--to the world--that there is an alcoholism problem in the legal community.[507] Second, these articles evidence the legal community's first step in confronting its problem. Each of these articles represents one attorney's admission of his own alcohol dependency, so as to make it easier for those who would follow.

Some experts suggest that as many as 40% of the attorney discipline cases stem from alcohol and/or drug use.[508] Discipline, however, should be viewed as the last resort in dealing with attorneys or judges with alcohol or other drug problems.[509]

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[505] See, e.g., O'Keefe, These Words Tell You Who I Am, What I Am and Where I Belong, Fla.Bar News, April 15, 1981; Anon., Concerned Lawyers, Inc., and a Battle with Booze, The Col. Lawyer, March, 1981; Anon. Lawyers and Liquor - Licking Alcoholism One Day at a Time, The Shingle, Spring, 1981 at 22.

[506] Anon. Facing My Most Difficult Trial, 45 Ala. Law. 100, 101 (1984).

[507] A number of articles establish that the alcoholic-attorney problem begins even before the attorney has graduated law school. These articles suggest two responses to this phenomenon: initiate treatment sooner; increase substance abuse education, and curricula in law school. See, Evans, and Kane, Young, Smart, Successful and Drunk, Barrister, Fall 1982 at 4; Sereda, Not Passing the Bar - Alcohol and Drug Abuse in Law School, 73 Ill. B.J. 46 (1984); Wolfson, Hope for Broken Lives and Careers - Lawyer's Assistance Program, 73 Ill. B.J. 20 (1984).

[508] Wolfson, supra note 507 at 20. But see ABA Model Assistance Programs (MAP), supra note 496 at 1.

[509] See, Recommendation and Report relating to attorney discipline.

Another mechanism by which attorney's can confront and cope with their alcohol or other drug problems is by contacting one of many lawyer assistance programs around the country.[510] These state and local programs are not part of any state's attorney discipline system. Rather, they are independent organizations of lawyers concerned about lawyers. For example, the Illinois Lawyer's Assistance Program (LAP) exists in order to: "Aid and assist lawyers and judges in Illinois, and their respective families, with emotional and and chemical dependency problems..."[511] All of LAP's work is conducted by volunteer lawyers and judges. There is no paid staff. LAP is indicative of similar efforts in every other jurisdiction in the United States.

Several of these programs concentrate on attorneys interrupting the course of attorney substance abuse by pointing the way toward treatment. Some groups expressly advocate attorney intervention. For example, Illinois' LAP has a mechanism by which an attorney suspected of chemical dependency is confronted with his problem by three of his/her peers. In order for the attorney-intervention to be made, LAP is notified, usually by the attorney's friends, family, or partners. If the caller is willing to pursue the situation, an intervention team is assigned, usually comprised of one judge and two attorneys. The intervention team conducts research into the nature and depth of the problem, meeting with all persons that are to help in the intervention. If necessary, an intervention meeting is called and the principal is invited. At the meeting, the team members and others present their concerns, and their options. If the principal agrees, plans are arranged, if he refuses, the refusal is accepted, but the team will present to the principal the likely consequences of continuing without help, and the door is kept open for him to ask for help in the future.[512]

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[510] The ABA MAP Program has already assembled an excellent package of sample materials on bench-bar alcohol and other drug abuse peer groups. MAP "Package #1" features detailed descriptions of over a dozen existing state and local bar association organizations including those of California, Illinois, Maryland, Michigan, Minnesota, New Jersey, New York and the state of Washington as well as San Diego County, Erie County (N.Y.), Dallas, New York City and Indianapolis. The Package is available from the ABA, Division of Bar Services, 750 North Lake Shore Drive, Chicago, Ill 60611.

[511] Illinois Lawyer's Assistance Program Statement of Purpose, in Wolfson, supra note 507 at 20.

[512] Wolfson, supra note 507 at 22.

From the perspective of the national, state and local bar, the peer group -- intervention models are preferable to disciplining attorneys and judges suffering from alcohol and other drug problems. The encouragement and fostering of these groups are therefore being recommended together with renewed attention to developing model disciplinary procedures to appropriately handle alcohol and other drug problems within the legal community.

20. Attorney Discipline, Referral and Treatment

As the ABA considers efforts regarding youth alcohol and drug abuse it does so with an awareness that the legal community itself is not immune to this disease which threatens the rest of the country. The legal community has not been satisfied with the mere awareness of this problem, but has already taken steps to identify, discipline, and treat those attorneys suffering from alcohol and other drug problems. Therefore, as attorneys focus on the problem of substance abuse among today's youth, they do so attendant to the voice which says "Lawyer, heal thyself."

The Advisory Commission addresses the bars' support of peer group programs for attorneys and judges suffering from alcohol and other drug problems supra. It is unfortunate, however, that peer group support, intervention and other voluntary programs cannot address all attorney substance abuse problems. Discipline in some intractable situations may be the only option to help the attorney and to protect the public.

Even in the context of discipline, the issue of attorney substance abuse can be raised in several different manners, each requiring different procedures and approaches. For example, cases occur in which attorneys are charged with professional misconduct,[513] such as misappropriation of

[513]See People v. Luxford, 626 P.2d 675 (Colo. 1981). (attorney suspended from the Colorado Bar for a year for negotiating insufficient funds checks, and failing to repay loans extended to him by clients, is given opportunity for reinstatement if within a year, he can demonstrate he has abstained from alcoholic beverages); In re McDonnell, 82 III 2d 481, 413 N.E.2d 375 (1980) (attorney disbarred after conviction for conspiracy to transport stolen securities, and for failure to file tax returns, is reinstated upon meeting burden of proving to court he had overcome his alcohol dependency; Attorney Grievance Commission of Maryland v. Aler, Md 389,301 483A.2d 56 (1984) See also Annot., Mental or Emotional Disturbance As Defense to or Mitigation of

(cont. on next page)

client's funds, or keeping inadequate financial records and the attorney raises his chemical dependency as a mitigating factor in his defense. Though such mitigating factors do not excuse violations of an attorney's professional responsibility, they are considerations in determining the nature and extent of the sanction to be imposed.[514]

Another context for attorney substance abuse is in regard to professional incapacity. Currently, most states possess rules governing attorney conduct which provide that attorneys may be placed on inactive status for incapacity not related to misconduct.[515] Yet, these rules often fail to define incapacity, resulting in little, if any practical use.[516] Thus, several state bars are presently working to rewrite their rules governing incapacitated attorneys.[517]

For example, a Florida Bar Legal Standards Commission submitted to the Florida Board of Governors a proposed modification to its impaired attorney proceedings rule.[518]

[513](cont.)Charges Against Attorney in Disciplinary Proceeding, 26 A.L.R. 4th 995,1029 (1984) (lawyer guilty of misappropriation of funds and similar offenses suspended without prejudice to right to reapply conditioned on continued rehabilitation, supervision in financial matters and restitution).

[514]ABA:BNA Lawyers Manual on Professional Conduct 101:3201.

[515]Florida Bar Integration Rule 11.01(4) states:

> Whenever an attorney who has not been adjudged incompetent, is incapable of practicing law because of physical or mental illness, incapacity or other infirmity, he may be placed upon an inactive list and shall refrain from the practice of law...

[516]Huller, Impaired Attorney Proceedings - A New Approach to an Old Problem, 57 Fla. B.J. 34 (1983).

[517]See the proposed Model Rules of Lawyer Disciplinary Enforcement, by the Standing Committee on Professional Discipline and the Center for Professional Responsibility. While these rules have not been approved by the House of Delegates, some jurisdictions researched have followed the Model Rules in regard to substance abuse. See, e.g., District of Columbia, District Ct. Rule 4-4. See also Pa. Disciplinary Enforcement Rule 301(d), 301(3); Pressler's N.J. Rule of Gen. App., 1:20-9.

[518]Proposal to change Florida Bar Integration Rule 11.01(4). But see Dunballurger, Bar Grapples with Member Drug and Alcohol Problems, 12 Fla. Bar News, May 15, 1985 at 3. (regarding the rejection of proposal).

The Florida proposal explicitly states, that where an accused attorney is brought before a grievance committee, and that committee has reasonable cause to believe that the attorney's ability to practice law and abide by the Code of Professional Responsibility has become impaired by reason of alcohol or drug use, the Committee may immediately hold proceedings to determine whether the attorney is so impaired. "The purpose of the change is to bring fully the problems of alcoholism, drug use, (...and) other matters of impairment before the grievance committee early in the process.[519]

The Florida Impaired Attorney proceedings can only be triggered through a complaint within the course of the normal grievance process. Other state bars provide that action may be taken absent a formal grievance.[520]

Again, without endorsing any specific model disciplinary rules or proposals, this Commission urges the state courts and bar authorities to develop and/or continue to develop disciplinary rules regarding attorney alcohol or other drug problems.[521]

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[519]See Muller, supra note 510 at 35.

[520]California Rules of Disciplinary Procedure, 644; See also ABA Center for Professional Responsibility, Disciplinary Procedures in the United States at 33, question 96 (1984) (38 jurisdictions provide for such proceedings without grievance).

[521]Another proposed set of model rules has recently been prepared by a committee chaired by Judge Phillip M. Saeta of the California Superior Court. See "Proposed Model Rule Relating to Discipline of Attorneys Impaired by Alcohol or other Drug Abuse."

Another aspect of the the problem of lawyer discipline and substance abuse is the problem of confidentiality of lawyer peer-group activities from the disciplinary process. Without such protection, the lawyer with an alcohol or other drug problem may be afraid to seek help voluntarily. Several states have already provided for such confidentiality. See, e.g., Kentucky Supreme Court Rule 3.130 and 3.150 (noted in The Impaired Lawyer - Help in Kentucky, 10 Ky. Bench Bar, Jan. 1984 at 14. Illinois Supreme Court Rule 4-101(f) (noted in Wolfson, supra note 507 at 20. See also Committee on Professional Ethics: Confidentiality of Communication to Member of Rehabilitation Committee, Opinion No. 531, N.Y. State Bar Assoc. Ethics Committee (no duty under DR-1-103A to report evidence obtained by Committee on Lawyer Alcoholism and Drug Abuse since the position of such a rehabilitative committee was analogous to that of an authority empowered to act in such situation), N.Y.S. B.J., January, 1984 at 20.

CONCLUSION

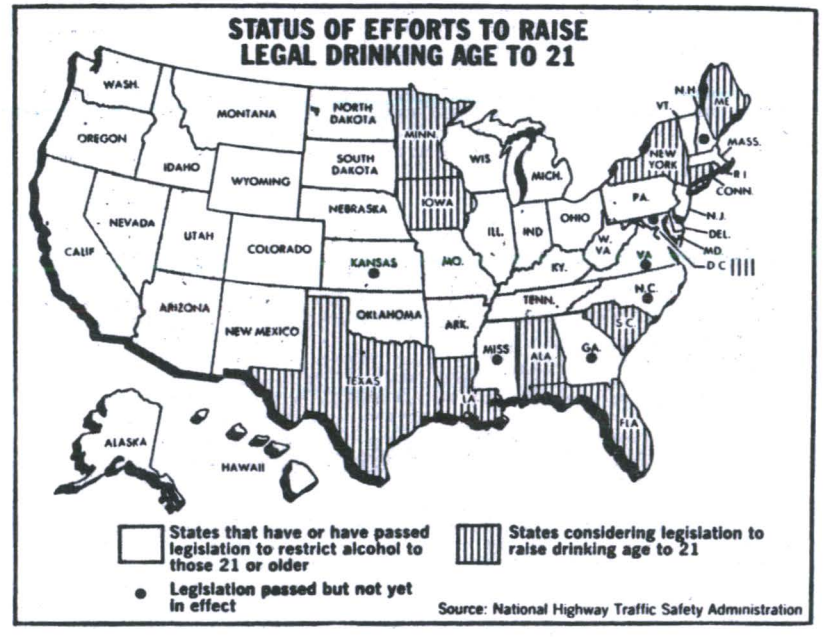
Adoption of this recommendation by the ABA House of Delegates would reaffirm and implement the commitment of the American Bar Association to addressing our serious national crisis of youth alcohol and drug problems.

Respectfully submitted,

J. David Ellwanger, Chairperson
Section of Individual Rights
and Responsibilities

APPENDIX A

STATUS OF EFFORTS TO RAISE
THE LEGAL DRINKING AGE TO 21



APPENDIX B

STATE-BY-STATE ANALYSIS OF DRAM SHOP LIABILITY

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Alabama	yes 6-5-71	yes 6-5-70 6-5-71		only parent or guardian may bring suit under 6-5-70		
Alaska	yes (drunken) 04.21.020:2	yes, if no id 04.21.020:1		licensees only		
Arizona					Brannigan v Raybuck 667 P2d 213 (1983)* negligence	Ontiveros v Borak 667 P2d 200 (1983)* negligence
California		yes, if obviously intoxicated B&P 25602.1				
Colorado			yes, prior notice required 13-21-103		Kerby v. Flamingo Club 532 P2d 976 (1974)ø negligence	
Connecticut	yes 30-102			$50000 limit, written notice within 60 days, 1 year S of L		
D. C.					Narusa v Dist of Columbia 484 F2d 828 (1973)ø negligence	

* State Supreme Court Case
ø Appellate Level Case

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Florida		yes, if willful and unlawful 768.125	yes, if knowingly 768.125			
Georgia		yes 51-1-18		only parent may bring cause of action		
Hawaii					Ono v Applegate 612 P2d 533 (1980)* negligence per se	
Idaho						Alegria v Payonk 619 P2d 135 (1980)* negligence
Illinois	yes 43-135		yes 43-135	$15000 limit for injury; $20000 limit loss of support, lessor also liable; 1 year S of L		
Indiana						Elder v Fisher 217 NE2d 847 (1966)* negligence per se
Iowa	yes 123.92 123.93			written notice to server in 6 months		Haafke v. Mitchell 347 NW2d 381 (1984)* negligence per se
Kentucky						Pike v. George 434 SW2d 626 (1968)# negligence per se

* State Supreme Court Case
\# Appellate Level Case

STATES WITH
DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Louisiana						Chausse v. Southland 400 So2d 1199 (1981)# negligence
Maine	yes 2002	yes 2002		actual and exemplary damages, lessor also liable		
Massachusetts					Adamian v Three Sons Inc. 233 NE2d 18 (1967)* negligence per se	
Michigan	yes (visibly intoxicated) 436.22			min = $50, 2 yr S of L		
Minnesota	yes 340.95, 340.951			written notice within 120 days, 2 yr S of L		
Mississippi						Munford Inc v Peterson 368 So2d 213 (1979)* negligence per se
Missouri					Carver v. Schafer 647 SW2d 570 (1983)# negligence	Sampson v. W.F. Enterprises 611 SW2d 333 (1981)# negligence per se
New Jersey						Rappaport v Nichols 156 A2d 1 (1959)* negligence per se

* State Supreme Court Case
\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
New Mexico	yes, if reasonably apparent 41-11-1	yes 41-11-1-E			Lopez v Maez 651 P2d 1269 (1982)* negligence	MRC Prop. v. Gries 652 P2d 732 (1982)* negligence
New York	yes Gen Obl 11-101	yes Gen Obl 11-101			Berkeley v Park 262 NYS2d 290 (1965)# negligence	
North Carolina		yes, if driving negligently 18B-120 etc.		$500,000 limit to recovery	Hutchens v. Hankins 303 SE2d 584 (1983)# negligence	
North Dakota	yes 5-01-06	yes 5-01-06				
Ohio	yes, notice required 4399.01		yes, notice required 4399.01	owner and lessee liable	Mason v Roberts 294 NE2d 884 (1973)* negligence	
Oregon	yes (visibly intoxicated) 30.950				Campbell v Carpenter 566 P2d 893 (1977)* negligence	
Pennsylvania	yes (visibly intoxicated) 47-4-497				Jardine v Upper Darby Lodge 198 A2d 550 (1964)* negligence per se	
Rhode Island	yes 3-11-1	yes 3-11-1	yes, notice required 3-11-2			

* State Supreme Court Case
\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
South Dakota					Walz v City of Hudson 372 NW2d 120 (1982)* negligence per se	
Tennessee					Mitchell v. Kotner 393 SW2d 755 (1964)# negligence per se	
Utah	yes 32-11-1	yes 32-11-1	yes 32-11-1	state immune from liability		
Vermont	yes 7-501	yes 7-501				
Washington						Young v Caravan Corp 663 P2d 834 (1983)* negligence per se
Wisconsin						Sorenson v. Jarvis 350 NW2d 108 (1984)* negligence per se
Wyoming		yes 12-5-502	yes 12-5-502	written notice required		McClellan v Tottenhoff 666 P2d 408 (1983)* negligence

* State Supreme Court Case
\# Appellate Level Case

STATES WITHOUT ESTABLISHED
DRAM SHOP LIABILITY

STATE	CASE LAW DENYING LIABILITY: STATE SUPREME COURT DECISIONS AGAINST	CASE LAW DENYING LIABILITY: STATE LOWER COURT DECISIONS AGAINST	NO APPELLATE CASES DECIDING ISSUE
Arkansas	Carr v. Turner 385 SW2d 656 (1965) no negl per se/ intoxicated person		
Delaware	Wright v. Moffitt 437 A2d 554 (1981) no negl or negl per se intoxicated person		
Kansas			no cases
Maryland	Felder v. Butler 438 A2d 494 (1981) no negligence intoxicated person		
Montana	Runge v. Watts 589 P2d 145 (1979) no negligence for social host/ intoxicated person		
Nebraska	Holmes v. Circo 244 NW2d 65 (1976) no negl per se/ intoxicated person		
Nevada	Hamm v. Carson City Nugget 450 P2d 358 (1969) no negl per se/ intoxicated person Yoscovitch v. Wasson 645 P2d 975 (1982) no negl per se/minor		

STATES WITHOUT ESTABLISHED
DRAM SHOP LIABILITY

STATE	CASE LAW DENYING LIABILITY: STATE SUPREME COURT DECISIONS AGAINST	CASE LAW DENYING LIABILITY: STATE LOWER COURT DECISIONS AGAINST	NO APPELLATE CASES DECIDING ISSUE
New Hampshire			not clear; see Burns v. Bradley 419 A2d 1069 (1980)
Oklahoma			no cases
South Carolina			no cases
Texas			no cases
Virginia			no cases
West Virginia			no cases

APPENDIX C

MICHIGAN DEPARTMENT OF COMMERCE
LIQUOR CONTROL COMMISSION
VENDOR REPRESENTATIVE AND SALESMAN RULES
REGARDING PROMOTIONS

DEPARTMENT OF COMMERCE

LIQUOR CONTROL COMMISSION

VENDOR REPRESENTATIVE AND SALESMAN RULES

Filed with the Secretary of State on
These rules take effect 15 days after filing with the Secretary of State

(By authority conferred on the liquor control commission by section 7 of Act No. 8 of the Public Acts of the Extra Session of 1933, as amended, being §436.7 of the Michigan Compiled Laws)

R 436.1861 of the Michigan Administrative Code, appearing on page 4539 of the 1979 Michigan Administrative Code, is amended to read as follows:

R 436.1861 Promotions.

Rule 51. ~~A vendor representative and a salesman may promote those brands of alcoholic liquor approved by the commission. This may include the use of the spirit special order form approved by the commission and sample bottles and cans.~~

(1) A BREWER, A VENDOR OF SPIRITS, A WINE MAKER, AN OUTSTATE SELLER OF BEER, AN OUTSTATE SELLER OF WINE OR A LICENSED WHOLESALER OF BEER OR WINE SHALL NOT DO ANY OF THE FOLLOWING:

(A) PROMOTE THE SALE OF ANY ALCOHOLIC LIQUOR ON THE CAMPUS OF ANY 2 OR 4 YEAR COLLEGE OR UNIVERSITY LOCATED IN THIS STATE.

(B) SPONSOR, CONTRIBUTE TO OR OTHERWISE IN ANY MANNER DEFRAY THE COST OF ANY EVENT, CONTEST, ACTIVITY OR UNDERTAKING HELD ENTIRELY OR IN PART ON THE CAMPUS OF ANY 2 OR 4 YEAR COLLEGE OR UNIVERSITY LOCATED IN THIS STATE.

(C) SPONSOR, CONTRIBUTE TO OR OTHERWISE IN ANY MANNER DEFRAY THE COST OF ANY EVENT, CONTEST, ACTIVITY OR UNDERTAKING ORGANIZED OR OPERATED BY ANY GROUP THE MAJORITY OF WHOSE MEMBERS ARE STUDENTS OF ANY 2 OR 4 YEAR COLLEGE OR UNIVERSITY LOCATED IN THIS STATE.

(2) A BREWER, A VENDOR OF SPIRITS, A WINE MAKER, AN OUTSTATE SELLER OF BEER, AN OUTSTATE SELLER OF WINE OR A LICENSED WHOLESALER OF BEER OR WINE SHALL NOT HIRE OR CAUSE TO BE HIRED ANY PERSON WHOSE DUTY OR RESPONSIBILITY IT IS TO PROMOTE, MARKET OR ENCOURAGE THE USE, SALE OR CONSUMPTION OF ALCOHOLIC LIQUOR ON THE CAMPUS OF, OR BY THE STUDENTS OF ANY 2 OR 4 YEAR COLLEGE OR UNIVERSITY LOCATED IN THIS STATE. THIS RULE SHALL NOT PROHIBIT A LICENSED WHOLESALER OF BEER OR WINE FROM MAKING A SALE OR DELIVERY OF BEER OR WINE TO A LICENSEE LOCATED ON THE CAMPUS OF A 2 OR 4 YEAR COLLEGE OR UNIVERSITY.

General Information Form

To Be Appended to Reports with Recommendations

No._____

Submitting Entity Section of Individual Rights and Responsibilities

Submitted By J. David Ellwanger, Chairperson

1. Summary of Recommendation(s)

The recommendation package relating to youth alcohol and drug problems includes the following proposals:

1. Illegal Sales to Minors - To provide for increased penalties for sales of hard drugs or alcohol to minors.

2. Juvenile Offender Treatment - To provide access to appropriate treatment for juvenile offenders with alcohol or other drug problems.

3. Revocation of Driver's License - To provide for complete or partial revocation or suspension of the driver's license of persons under the age of 21 upon conviction of an alcohol or drug related traffic offense.

4. Youth Paraphernalia Law - To provide for federal legislation prohibiting interstate transportation or shipment of drug paraphernalia to minors.

5. Age 21 Drinking Laws - To provide for uniform age 21 drinking laws.

6. Forfeiture - To provide for increased use of criminal forfeiture in drug convictions with revenues to be allocated for treatment of youth with drug problems.

7. Surcharge - To provide for surcharge fines on all alcohol or other drug violations to fund treatment for youth with alcohol and other drug problems.

8. Dram Shop and Host Liability - To provide for increased civil liability for persons selling or serving alcohol to youth.

9. Alcohol Excise Taxes - To provide for increased alcohol excise taxes with revenues to be allocated for treatment for youth.

10. Child Custody and Visitation - To provide for domestic relations judges in child custody or visitation matters to refer for evaluation parents whom the judge has credible evidence to suspect have alcohol and other drug problems.

11. Child Abuse and Neglect - To provide for courts the authority to treat alcohol and drug abuse as a contributing factor in child abuse and neglect cases.

12. Consent to Treatment - To provide procedures authorizing a minor to consent to treatment and for the involvement of parents, courts, counsel and treatment professionals in such consent procedures.

13. Discrimination in Schools - To provide for equal treatment by schools and other public services of youth who seek treatment for alcohol or other drug problems.

14. Qualified Immunity - To provide qualified civil immunity to teachers and school personnel for good faith reports of students suspected of alcohol or other drug involvement.

15. Mandated Insurance - To provide for mandated health insurance coverage of alcohol and other drug treatment.

16. Media Ads - To express concern over media programming which glamorizes alcohol use, to oppose alcohol advertising which is directed at youth and to encourage continued research on the effects of alcohol advertising on youth.

17. Marketing on College Campuses - To oppose alcohol marketing on college campuses which are directed at youth.

18. Legal Training on Alcohol and Other Drug Problems - To promote training of lawyers, judges and court personnel on alcohol and other drug problems.

19. Legal Community Peer Group Support Programs - To provide support for legal community peer group support programs for attorneys with alcohol or other drug problems.

20. Attorney Discipline - To encourage bar role models and development of model disciplinary rules relating to attorney alcohol and other drug problems.

2. Approval by Submitting Entity.

This recommendations was approved by the Council of the Section of Individual Rights and Responsibilities at its May 3-4, 1985 Spring Meeting in Boston, Massachusetts.

3. Background. (Previous submission to the House or relevant Association position.)

The American Bar Association has no prior recommendation related to the issues involved in the proposed recommendation except as follows:

1. Illegal Sales to Minors - In February, 1984, the House of Delegates adopted the ABA policy on "Mandatory Minimum Prison Sentences" which opposed such sentences for offenders "including those convicted of drug offenses." The present recommendation does not propose mandatory sentencing in any form, but only increased current maximum penalties for drug dealers to youth. Thus, there is no conflict with the earlier policy.

2. Juvenile Offender Treatment - In August, 1976, the House approved an "Alternate Dispositions" policy for the diversion of eligible defendents from the criminal justice process. This recommendation does not conflict with that policy.

   In February, 1974, the House also passed the "Drug Dependence Treatment and Rehabilitation Act" which provides for treatment services for all drug-dependent persons within the criminal justice system who desire treatment and for whom treatment is available. Both Acts are consistent with this recommendation. In February, 1972, the House supported the "Alcoholism and Intoxication Treatment Act" which provides for treatment of alcoholics and intoxicated persons instead of criminal penalties.

4. Paraphernalia - In 1973, the House of Delegates passed a recommendation regarding the discriminalization of the personal use or simple possession of marijuana. This present recommendation proposes legislation relating only to prohibiting drug paraphernalia transport or shipment to minors through interstate commerce. Thus, there is no conflict or other position taken in this recommendation with regard to the earlier policy.

20. Attorney Discipline - In 1979, the House of Delegates approved the Standards of Lawyer Discipline and Disability proposed by the Joint Committee on Professional Discipline of the Appellate Judges' Conference and the Standing Committee on Professional Discipline. These Standards, which do not specifically address alcohol or other drug problems, were then amended by the House in 1982 and 1983.

    The Standing Committee on Professional Discipline and the Center for Professional Responsibility has now proposed Model Rules of Lawyer Disciplinary Enforcement which will be submitted for approval to the House of Delegates at the Annual Meeting in July, 1985.

4. Need for Action at This Meeting.

There will be legislation at the Federal and state level on at least half of the issues comprising this recommendation. Presently the ABA does not have any policies which would allow it to testify on or advocate such legislation.

5. Status of Legislation. (If applicable)

No Federal or state legislation is pending in regard to the proposals within this recommendation except as follows:

4. Paraphernalia - The "Mail Order Drug Paraphernalia Control Act," S. 713, was introduced on March 20, 1985 to the Senate Committee on the Judiciary by Senator Pete Wilson (R., Ca), 131 Cong. Rec. S. 3319 (daily ed. Mar. 20, 1985). The bill prohibits interstate sales of drug paraphernalia regardless of the age of the purchaser. The present recommendation, limited to minors, is consistent with the bill.

5. Age 21 Drinking - To date ten states are considering legislation to establish age 21 drinking laws. The present recommendation supports these proposals.

8. Dram Shop and Host Liability - Several states are presently considering proposed amendments to expand their dram shop/host liability statutes. The present recommendation is consistent with those proposals.

9. Alcohol Excise Taxes - The state of Michigan has now pending a Petition Initiative submitted in 1984 by the Michigan Citizens for Substance Abuse, to amend the Michigan State Constitution to provide for dedication of 25 percent alcohol excise taxes to treatment programs. The present recommendation is consistent with that proposed rule.

12. Discrimination - Pending before the U.S. Supreme Court is the case of Scanlon v. Atascadero State Hospital, cert. granted, 53 U.S.L.W. 3403 (U.S. November 27, 1984)(No. 84-351) (argued March 28, 1985), which involves the applicability to the states of Section 504 of the Rehabilitation Act of 1973, to schools and other public services funded or regulated by the states as recommended here.

14. Mandated Insurance - There are two consolidated cases dealing with mandated health insurance coverage now pending before the U.S. Supreme Court, Metropolitan Life Insurance Company v. Commonwealth of Mass., cert. granted, 105 S. Ct. 320 (1984)(No. 84-325) and Atty. General v. Travellers Insurance Co., cert. granted, 103 S. Ct. 3563 (1983)(No. 84-356) (consolidated with Metropolitan Life, argued Feb. 26, 1985). These cases involve mandated coverage for mental health treatment and will presumably determine the legality of mandated coverage by the states, including alcohol and drug treatment as recommended here.

16. Media Ads - There is presently pending before the Congress, H.R. 1901, introduced by Rep. Howard Nielson (R., UT), calling for a study of alcohol advertising by the Bureau of Alcohol, Tobacco and Firearms (BATF) with assistance from other government agencies. The present recommendation is consistent with that bill.

17. College Marketing - There is presently pending before the Michigan Liquor Control Commission a rule to ban promotion of alcoholic beverages on Michigan college campuses. The present recommendation is consistent with that proposed rule.

6. Financial Information. (Estimate of funds required, if any.)

None.

7. Conflict of Interest. (If applicable)

None.

8. Referrals.

A copy of this report with the recommendation has been sent to the chairs of each of the ABA's member sections and divisions. To facilitate coordination and cooperation and an opportunity to comment, several advance copies of drafts were also circulated within the past months to various interested committees. A copy has also been sent to the directors for the ABA Division of Communications, Governmental Affairs Group, Public Services Group and Professional Services Group.

9. Contact Person. (Prior to meeting)

David G. Evans
Chairperson
I.R. & R. Committee on Alcoholism and Drug Law Reform
129 East Hanover Street, CN-362
Trenton, NJ 08625
(609)292-8947

10. Contact Person (Who will present the report to the House)

Martha Barnett, Section Delegate
P.O. Drawer 810
Tallahassee, FL 32302
(904)224-7000

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AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association recommends that policies regarding youth alcohol and drug problems include: prevention, education, treatment; criminal law reforms; and strategies for raising the necessary fiscal resources attendent to such policies. Accordingly, the American Bar Association recommends that:

1. Paraphernalia Law

Federal legislation be enacted to make it unlawful to 1) transport or ship drug paraphernalia to minors by mail through the United States Postal Service or 2) transport or ship to minors in interstate commerce drug paraphernalia as defined in the Model Drug Paraphernalia Act.

2. Forfeiture

(a) State and federal [civil and] criminal forfeiture provisions should be increased as avenues for curtailing drug trafficking.

(b) A significant portion of the revenues produced by civil and criminal forfeiture provisions should be specifically allocated to supplement alcohol and other drug abuse enforcement, prevention, intervention, treatment and research programs, especially for youth.

3. Surcharge

States should enact legislation providing for surcharge fines on all persons convicted of violations of the controlled substances and alcohol codes, to be used to supplement funding for prevention, intervention, treatment, and research on alcohol and other drug problems, especially for youth.

4. Illegal Sales to Minors

Criminal penalties for persons convicted of selling alcohol or other drugs to youth should be increased over current penalties for violations involving such sales to adults.

5. Juvenile Offender Treatment

When a juvenile offender is answerable within the juvenile justice system and has been evaluated and found to have alcohol and/or other drug abuse problems, any disposition of the case should include treatment. Any such juvenile must be given access to appropriate alcohol and/or drug treatment if detained pending trial.

6. Revocation of Driver's License

All states enact legislation authorizing [providing] a judge to completely or partially suspend or revoke [for the complete or partial revocation of] the driver's license of persons under the age of 21 upon conviction of an alcohol or drug related offense or upon refusal to submit to substance testing under existing state implied consent laws.

7. Alcohol Excise Taxes

Federal and state excise tax rates on alcohol be increased and that the tax on alcohol be uniform according to alcohol content. A significant portion of such increased tax revenues should be allocated to supplement existing funds for the prevention, intervention, treatment, and research on alcohol and other drug problems, especially for youth.

~~8.~~ 10 Child Custody and Visitation

Judges handling domestic relations cases should, exercise authority to require, in order to promote the best interest of the child, the evaluation by appropriate alcohol or other drug treatment professionals, parents whom the judge has credible evidence to suspect have [reasonably suspected of] alcohol and other drug abuse problems, whenever [before] decisions affecting custody and visitation rights are made.

~~9.~~ 11 Child Abuse & Neglect

(a) The [state legislatures and] courts should recognize that parental or guardian alcohol and drug abuse is a frequent contributing factor in child abuse and neglect incidents, and existing neglect and other child protection laws should be utilized [or amended] to assist families in dealing with alcohol and other drug abuse.

(b) Where existing child abuse and neglect laws do not enable the courts to deal with incidents in which alcohol and drug abuse are factors, these laws should be amended to provide such authority.

~~10.~~ 12 Consent to Treatment

In order to facilitate treatment of youth with alcohol and other drug problems and to remove any barriers to such treatment:

1) States should enact statutes authorizing a minor to consent to any non-custodial, non-invasive treatment.

2) States should enact statutes permitting a minor to obtain voluntarily custodial or invasive treatment at a state licensed facility, even if the parents after being notified fail to, or do not consent to such treatment programs, provided that in the absence of such consent, within 48 hours, that qualified counsel is appointed for the juvenile, that parents have the right to participate, and that an appropriate alcohol or other drug treatment professional promptly evaluates the juvenile and the proposed plan of treatment and that an appropriate judicial body reviews the treatment plan for the juvenile.

~~11.~~ 13 Discrimination in Schools

(a) School systems and other public providers of services to youth should not discriminate against a youth because he/she seeks treatment for alcohol or other drug problems.

(b) States should enact legislation as necessary to prevent such discrimination.

~~12.~~ 14 Qualified [Privilege] Immunity

(a) State and federal legislation should grant to teachers and other educational personnel, immunity [qualified privilege] in respect of civil liability [for libel, slander and malicious abuse of process], where they, in good faith and for reasonable cause, report in confidence to the proper school personnel [authority] the suspected abuse, possession or sale of drugs or alcohol by a student on school property.

~~13.~~ 15 Mandated Insurance

All laws that provide and regulate private and public health insurance should mandate adequate and reasonable coverage for treatment of alcohol and other drug problems, in freestanding and hospital-based, in-patient and out-patient, public and private programs, especially for youth.

8 ~~14.~~ Dram Shop and Host Liability

States should enact statutes to establish civil liability of persons who negligently sell or serve alcoholic beverages to a customer (guest) or guest (customer) whom the server knows or should know to be under the legal age [where that person], when, that customer or guest, as the result thereof, becomes intoxicated and injures himself, a third person, or such third person's property.

15. Age 21 Drinking Laws

(a) All states, territories and the Department of Defense should adopt 21 years as the minimum legal age for the purchase and public possession of all alcoholic beverages.

(b) Federal legislation be supported to provide significant fiscal incentives for each state to enact and/or maintain a law establishing 21 years as the minimum legal age of purchase.

16. Media Ads

[The ABA opposes media programming or advertising which glamorizes or promotes the use of alcohol or other drugs by youth or media programming which fails to portray accurately to youth the effects of alcohol and other drugs. Accordingly, appropriate entities should take and continue to take actions and further research aimed at limiting the effects which alcohol advertising, or media programming has upon the acceptance and use of alcohol and other drugs by youth.]

Concern be expressed over media programming which glamorizes or promotes the use of alcohol or drugs by youth, and opposes advertising of alcohol which is directed at youth.

Appropriate entities are encouraged to continue research and other efforts to limit the effect which media programming or advertising has upon the use of alcohol or other drugs by youth.

17. Marketing on College Campuses

Alcohol [advertising and] marketing strategies for college campuses be opposed that promote or tend to promote [either the heavy use of alcohol or] the use of alcohol by [underage] youth and encourages government action, if necessary, to permit cooperative activity toward ending these practices.

REVISE JUDICIAL TRAINING

18. Coalitions, Community and School Involvement

(a) The ABA, the local bar associations, and the legal profession should:

1). Provide through continuing legal education programs and other appropriate vehicles extensive curricula on alcohol and drug abuse education. Additional training should be given in order to properly identify, evaluate, counsel and refer young clients with alcohol and drug problems.

2) Appropriate justice system personnel, including lawyers, should be trained and educated in order for juvenile justice programs to be effective in understanding the role alcohol and other drug abuse by the offender and/or his family have in either delinquent conduct or status offenses.

3) Develop for judges and lawyers handling juvenile and domestic relations cases resources to increase awareness and intensify training and technical assistance efforts on alcohol and substance abuse issues. Resources should be developed to replicate these programs which are operating successfully within the nation's juvenile and family courts and communities.

19. Legal Community Peer Group Support Programs

State courts and bar authorities should establish and support peer support programs for attorneys suffering or recovering from alcohol or other drug abuse.

20. Attorney Discipline

(a) The legal profession, recognizing that lawyers often play leadership roles in the community and therefore serve as role models for youth, should provide leadership in dealing with substance abuse by caring for its members who suffer from alcohol and other drug problems, by use of appropriate disciplinary procedures and by providing examples of life styles without abuse of alcohol and other drugs.

(b) The state court and bar disciplinary authorities should place a high priority on the adoption of appropriate model disciplinary rules regarding attorney abuse of alcohol and other drugs.

May 6, 1985

ABA ADVISORY COMMISSION ON YOUTH ALCOHOL AND DRUG PROBLEMS

Evening meeting to review draft recommendations passed by Council of Individual Rights and Responsibilities. All recommendations passed with exception of alternative beverages at ABA functions. It was the council's opinion that alternative beverages were already available at ABA functions and that the recommendation could detract from other more important recommendations.

Burch, Wootton, and I raised vigorous objections to recommendation #4 on paraphernalia law as revised by the drafting committee and approved by the IR&R council. The recommendation could be interpreted to limit the law to minors. Under the rules the wording as approved by the Council can not be changed. After considerable discussion it was agreed that the report language would express the Commission's support for paraphernalia laws for minors and adults, but clarifying that the scope of the Commission was limited to youth and therefore the recommendation is limited to minors.

The next meeting of the committee is Thurs May 16 at 6:30 PM at ABA Wash office 18th and M.

Attendees: Burch, Wootton, Toups, Butynski, Teller, Raikin, Lacovara,Centifanti and Healy.

Contact: Ellen Teller
(202) 331-2273

DURRIN FILMS-- 'KEVINS STORY'

Ginny Durrin telephoned as follow up on previous conversation with Gail Healy. She had sent a video copy of the film for Gail's review. Durrin is looking for assistance and Office backing for distribution and marketing of film. I agreed to view the film but did not agree to Office support of any kind for the film. Copy of the film is supposed to be in the Office if not Durrin will forward copy.

Contact: Ginny Durrin
(202) 387-6700

[American Bar Association Alternative Beverages]

(a) [At all ABA programs, conferences and meetings where alcoholic beverages are served, non-alcoholic beverages should also be provided for the participants.]

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