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Typically, these sentencing laws, as they relate to drug selling, define a list of truly serious and harmful drug classifications including heroin, PCP ("angel dust") methamphetamine and methaqualone.¹⁰ Some proposals also include possession of very large quantities of marijuana.¹¹ The mandatory minimum sentencing aspects of these laws then typically provide for "no parole, no probation" from rigid custodial sentences for possession of these listed substances in the large quantities specified in the statutes.¹²

In 1983, however, the House of Delegates passed its recommendations against mandatory minimum sentencing.¹³ At that time the emphasis was on drug offenses in general, without any further qualification, rather than only on tougher sentences for selling large quantities of dangerous drugs to youth as is clearly the issue here. Moreover, despite the best efforts of law enforcement and judicial control, there have been numerous citations of ever-increasing alcohol and other drug use by our youth,¹⁴ and inappropriate punishments for the pushers.¹⁵ Finally, this recommendation is directed only at increased sentences for a class of crime-selling large quantities of alcohol or hard drugs to young people - not at mandatory minimum sentencing. Under this 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.

¹⁰Id. See also, on the quantities etc., Goldman, "Rendell, Greenleaf Propose Minimum Drug Sentences," Phila. Inq. Sec. B. at 1, March 6, 1985.

¹¹Goldman, op. cit., at 2.

¹²Id.

¹³A.B.A. Policy Statement on "Mandatory Minimum Prison Sentences," April 15, 1983:

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.

¹⁴See n. 1, 2, and 3 above.

¹⁵Goldman, op. cit., p. 2.

DRAFT

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11. Age 21 Drinking Laws

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT FURTHER RESOLVED that the American Bar Association supports federal legislation 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.

BE IT RESOLVED, that the American Bar Association recommends that 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.

BE IT FURTHER RESOLVED, that the American Bar Association supports federal legislation 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.

REPORT

The problem of "under 21" drinking and driving was repeatedly raised at the Advisory Commission Field Hearings.¹ It seems almost unnecessary to recite again here the appalling statistics on drunk driving-related deaths and injuries involving those under the age of 21.² If the only point were to prove the existence of the problem, it would indeed be largely redundant merely to restate the facts in the report of other commissions and agencies.³ At least some of the range of such statistics, however, must be set forth here in order to justify the Recommendation against some of the more likely and repeated criticisms of the 21 argument.

Accordingly, the statistics show that approximately 3,588 youngsters between the ages of 16 to 19 are killed in alcohol-related accidents each year, with the result that such accidents are the leading cause of death for that age group.⁴ Put another way, nearly half of all deaths of 16-19 year olds are due to motor vehicle crashes. Moreover, injuries, such as brain injuries to young people,⁵ are also high from teenage motor vehicle accidents.

¹See e.g. Testimony of Dr. Alan Stoudemire, Minuard McGuire, Dr. Al Mooney, William Coletti, Atlanta; George Hacker, Phyllis Schepps, John F. Vassallo, Jr., Princeton.

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³See also, AAA, "Why the Legal Drinking Age Should Be 21," 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 1.

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.

⁴Secretary's Conference, above at 2.

⁵Insurance Institute for Highway Safety, The Year's Work 1983-1984 at 5. See also, AAA, op. cit. at 3.

Depending on when the figures are reported, it appears that only 23 jurisdictions, less than half of the 50 states, the District of Columbia and Puerto Rico, have enacted 21 minimum drinking age laws.⁶ Of these, four enacted such provisions only as recently as last year.⁷ Historically, since the number has increased from 15 in 1981, it appears that the trend is clearly towards raising the drinking age to 21, thus reversing the trend between 1970 and 1975, when 29 states lowered their minimum drinking ages.⁹

Apart from the issue of state laws, the Commission also noted concern about the "under 21" drinking age among military personnel subject to the rules of the Department of Defense. A 1971 study from Congress by the Comptroller General had earlier noted the high incidence of alcohol problems among younger servicemen.^{9A} More recently the Federal Trade Commission

⁶ This figure is derived from the table entitled "State Legal Drinking Age Summary (9/30/84)", prepared and published by the U.S. Department of Transportation.

⁷Id.

⁸Cook and Tauchen, "The Effect of Minimum Drinking Age Legislation on Youthful Auto Fatalities, 1970-77," 13 J. Legal Stud. 169, (1984).

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^{9A}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 p. 6:

"(A)bout 38 percent of the problem drinkers identified by squadron commanders ... were in the 17 to 24 age group. ... (T)he younger servicemen who drinking was repetitive, was undisciplined...had caused their commanders problems..." Id., at 8.

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staff noted that "the Department of Defense has developed a number of informational and educational campaigns designed to combat alcohol abuse on military bases."^{9B} Similarly this 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.^{9C}

The 21 proposal is widely supported by public and private agencies across the country.¹⁰ 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 drunk driving related fatality statistics for that older group.¹¹ The most straight-forward answer to that criticism is contained in a report by one of the commentators on this issue:

(S)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 overrepresented 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.¹²

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

^{9B}See Recommendation of the staff of the Federal Trade Commission," Omnibus Petition for Regulation of Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices, 1 Docket No. 209-46, at 42 (March 1, 1985).

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off."¹³ As others have noted, there are qualitative as well as quantitative differences between the under and over 21 classification.¹⁴ Perhaps, the answer to the "why just under 21's?" 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.¹⁵ Additionally, as another commentator has aptly noted, we have to start somewhere.¹⁶

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. This militates in favor of "21" laws, since at least a clear plurality of states have set that age as the minimum.¹⁷ The only workable solution to the "blood borders" tragedy is a uniform minimum drinking age, and that uniformity has been set at 21.

In conclusion, it should be noted that this recommendation has been redrafted after comments were submitted criticizing the draft recommendations as being punitive and mandatory in tone, rather than hortatory and more in keeping with the current trend of states' rights. As has already been noted in connection with the recommendations and reports on mandating insurance for substance abuse treatment and Section 504 suits

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¹⁵See 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)

¹⁶See n.11 above.

¹⁷See n. 5 above.

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against the states,²⁰ the resurgence of states' rights is no longer debatable with regard to legislation in Congress and litigation in the federal courts. For this reason, the Recommendation provides for incentives rather than penalties for enactment of age "21" legislation by the states. There is ample precedent for such an approach to foster uniformity among the states by the federal government.²¹

²⁰See e.g. Metropolitan Ins. Co. v. Massachusetts, ___ U.S. ___ (1985) and Scanlon v. Atascadero State Hospital, ___ U.S. ___ (198_) as more fully described in those reports.

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In conclusion, it should be noted that this recommendation has been redrafted after comments were submitted criticizing the draft recommendations as being punitive and mandatory in tone, rather than hortatory and more in keeping with the current trend of states' rights. As has already been noted in connection with the recommendations and reports on mandating insurance for substance abuse treatment and Section 504 suits

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12. Child Abuse & Neglect

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association recommends that 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 be utilized or amended to assist families in dealing with alcohol and other drug abuse.

REPORT

In the United States it is estimated that there are more than 28 million children of alcoholics: one out of every 8 Americans.¹ Approximately 6,600,000 of these children of alcoholic parents are under the age of 18^{1A}. These children are over-represented in our medical and psychiatric facilities and in our juvenile justice system.² 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.

The instant recommendation on child abuse and neglect, does not imply that parents who are alcohol and drug abusers are per se abusive or neglectful towards their children. The goal of these recommendations is to eliminate the barriers to treatment for those children suffering from alcohol and other drug problems. The ABA supports the use of alternatives to criminal prosecution for the purposes of preserving the family, rehabilitating substance abusers, and protecting those who may suffer as a result of an alcohol or drug dependent parent.^{1A}

Historically, child abuse laws have been concerned with battered or abused children, and have defined these concepts in terms of physical harm.² Several states have redefined these terms to include emotional or psychological harm.³ 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.⁴

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

¹Testimony of Shelia 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, Special Report of the Off. of Juvenile Justice and Delinquency Prevention, U.S. Depart. of Justice at 11 (October 1984).

^{1A}But see generally, Juvenile Justice Standards Relating to Abuse and Neglect (ABA, 19-).

²Katz, Have & McGrath, Child Neglect Laws in America, Fam. L.Q. 1, 4 (Spring 1975).

³Id.

⁴Id. 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.⁵

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.⁶ These fears are more clearly being realized as more parents seek out treatment programs for their alcohol and other drug addictions.^{6A}

⁵Id. (citations omitted).

⁶See e.g., Densen-Gerber, Hutchinson & Levine, Interest and Drug-Related Child Abuse: Systematic Neglect by the Medical and Legal Professions, 6 Contemp. Drug Problems at 385, (1976). See also Panel Workshop: Violence, Crime, Sexual Abuse and Drug Addiction, 2 Contemp. Drug Problems at 383, (1974).

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^{6A}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, Princeton.

Due to the constitutionally protected parental right to be free from state interference in child-rearing,⁷ a state child abuse and neglect statute must not be overbroad. These 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,⁸ yet few statutes define child abuse and neglect to include parental or guardian alcohol or drug abuse as an express element contributing to the child's physical, mental or emotional impairment.^{8A} 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 adequately define those terms.⁹ 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,¹⁰ addressed the 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:

(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

⁷Besharov, State Intervention to Protect Children: New York's Definitions of "Child Abuse" and "Child Neglect", 26 N.Y. L. Rev. 723 (date).

⁸See generally, Child Neglect Laws in America, supra, n. 2.

^{8A}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 alcohol or drug abuse as a specific ground.

⁹Id.

¹⁰In 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 at 724, supra, n. 7.

(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.¹¹.

Thus, this statute creates the much-needed definition of neglect with respect to parental alcohol or drug abuse, yet provides an incentive for those parents to obtain treatment.¹²

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

¹¹N.Y. Fam. Ct. Act. S. 1011, et. seq., (McKinney 1975).

¹²However the New York statute also 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 (N.Y. Fam. Ct. Act. S. 1046(a)(iii)). 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... Id.

The statute assumes that if a parent or guardian, exhibits a 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.

¹³N.Y. Fam. Ct. Act S. 1046(a)(iii); (current case law on this point will be included).

abuse described supra.¹⁴ 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."¹⁵ There must as well be shown a resultant impairment or threatened impairment of the child to satisfy the 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.¹⁶ 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.¹⁷ Some states include within their definitions of child abuse and neglect those children in utero whose parents' 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.¹⁸ 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"¹⁹ which operates under the theory that "a vast majority of juvenile misconduct is a result of troubled family circumstances."²⁰ 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 alcoholic or drug dependent parent."²¹ This program also provides for

¹⁴See n. 12, supra.

¹⁵Id. at S. 1012 (f)(i)(B)

¹⁶See discussion of Fetal Alcohol Syndrome, Shelia B. Blume, M.D., Children of Alcoholic Parents: Policy Issues (Brown University 1983).

¹⁷See Practice Commentary at 261, supra, n.13.

¹⁸Children of Alcoholic Parents at 6, supra, n. 16.

¹⁹N.J. Fam. Ct. Act, NJSA S. 2A:4A-76.

²⁰Id. Senate Judiciary Committee Statement.

²¹Id. at S. 2A:4A-85.

specific action if there is reason to believe that the juvenile is an abused or neglected child as a result of the parents' alcohol or drug abuse.²²

In those cases where intervention measures fail to work and a drug or alcohol abusing parent is charged with child abuse and neglect, the ABA recommends that states adopt creative treatment measures whenever possible 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.²³ 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.²⁴

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 are certainly more productive avenues than incarceration, probation or termination of parental rights.

Therefore, because of the great potential for harm to children from alcohol or drug abusing parents, the child abuse and neglect laws should specifically refer to parental alcohol and drug problems as a possible cause of child abuse and neglect. These laws should provide for a means of arresting children and parents afflicted by alcohol and other drug problems.

²²The 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., Horonity, Upgrading Legal Practice in Juvenile Court at 868 in Protecting Children through the Legal System (ABA, 1981) There may also be a need for the appointment of a guardian ad litem for the child. See Horonity op. cit. and Davidson, The Guardian Ad Litem; An Important Approach to the Protection of Children, at 835 in the Protecting Children through the Legal System. See generally Walker, A Functional Approach to the Representing of Parents and Children. See also recommendation and report on Dependency and Neglect Proceedings at 126 in Protecting Children Through the Legal System (ABA 1981).

²³Children of Alcoholic Parents at 6, supra, n. 16.

²⁴Id.

III. Sources of Revenue

During the Commission field hearings it became clear that alcohol and drug problems among youth are enormous and costly in terms of dollar figures and human suffering. It also became clear that currently there are inadequate fiscal resources available to support prevention, intervention, treatment and research efforts related to these problems. While it is true that within the private sector treatment centers are available to those who can afford appropriate treatment, in many areas of the nation no public treatment programs exist which specifically provide alcohol and drug abuse services for youth because the funds are not available.

The Commission hereby recommends a set of proposals which may provide the needed sources of revenue for public treatment of youth alcohol and other drug problems. One such recommendation proposes mandating insurance coverage for such treatment. In addition, these financial recommendations also include monetary constraints that may have the effect of reducing consumption of alcohol and drugs by youth. These monetary measures include alcohol excise taxes, surcharges on offenders and forfeiture provisions relating to drug traffickers.

DRAFT

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

13. Revocation of Driver's License

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that all states enact legislation providing 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.

The Commission's concern about the youth drinking-driving issue has already been largely addressed in the Recommendation on the 21 year old minimum drinking age.¹ It also seems appropriate to adopt the provisional youth driving license recommendation of the Presidential Commission on Drunk Driving.² As that Commission noted, some 35 states already have some form of limitation on licenses for drivers under 18.³ The statistics on the under 21 involvement in traffic fatalities along with the "blood border" fatalities justify some limitation on licenses up to age 21.⁴ The provisional youth license is another logical step to begin solving the problem of alcohol traffic fatalities somewhere.

On April 10, 1985, Robert J. Mellow, a Pennsylvania State Senator, introduced PA Senate bill No. 660^{4A}, providing for

¹See the Recommendation and Report on this issue.

²See 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 DWI conviction or an implied consent refusal. Id.

³Id.

⁴See the Recommendation and Report on "21",

^{4A}S. 13202.5 Drug 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 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 133523 regarding the terms of revocation and reinstatement of such licenses.

provisional youth licenses, reportedly based largely on an existing California statutory provision for delaying or revoking driver's licenses of persons under 18 convicted of drunk driving.⁵ There have been similar proposals with regard to restricted adult licenses after DWI convictions.⁶ Some of these proposals, however, are not above question on constitutional grounds as cruel and unusual punishment.

Finally, it is clear that the consent provision is appropriate since the U.S. Supreme Court has repeatedly upheld state blood-alcohol and breathalyzer tests as well as a restriction resulting from a refusal to consent.⁷

Essentially, therefore, provisional youth licences subject to revocation upon conviction or refusal to consent are just extensions of already existing laws or recent proposals by the states and by others. The Commission endorses 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.

⁵PA Senate Bill 660, Printer's No. 755 proposes to amend the existing Pennsylvania driving law as follows:

Section 3731(e) of Title 75 of the Pennsylvania Consolidated Statutes is amended by adding a paragraph to read:

S. 3731 Driving under the influence of alcohol or controlled substance...

...e. Penalty

...(g) In addition to the other penalties prescribed under the section, any person under 21 years of age violating one provision of this section shall have his driver's license revoked until he reaches 22 years of age. Revocation shall occur for in-state violation of this section and for out-of-state violations of the laws of the sister state which conforms to this section.

See Cal. Veh. Code 13.202.5 (West's Supp. 1984).

⁶See e.g., the so-called "labelling" of DWI offenders in Oklahoma which has been widely reported. Associated Press "Oklahoma Town Tags Convicted Drunk Drivers," The Washington Post, February 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.

⁷See e.g. South Dakota v. Neville, _____, U.S. _____, 103 S. Ct. 3513 (1983); and Mackey v. Montrym, 443 U.S. 1 (1979).

14 Mandated Insurance

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that 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.

REPORT

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.¹ However, despite great changes in public attitudes toward alcohol and drug abuse and dependency problems many private health insurers have routinely excluded such coverage. Mandates are necessary to remove current exclusions, to increase access to treatment services and to deal with clients denial of alcohol and drug problems.² The Advisory Commission calls upon the American Bar Association to join with the other national organizations ranging from voluntary citizens groups to treatment professionals who are calling for mandated coverage for alcohol and other drug dependency treatment.³

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.⁴ This case concerns the issue of whether the state of Massachusetts can legally mandate minimum coverage of mental health treatment by private insurers. The insurers opposed the state's statutory requirement on the grounds that federal law, specifically 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 Massachusetts Supreme Judicial Court. The insurers then appealed to the U.S. Supreme Court.⁵

¹See e.g. Testimonies of Carolann Kane, Nancy Brach, Mia Andersen, Princeton. See also Fein, ALCOHOL IN AMERICA THE PRICE WE PAY at 44 (1974).

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

³See n.4 below, Briefs Amici Curiae of the American Psychiatric Association, et al.

⁴Originally Atty General v. Travellers Insurance Co., 385 Mass. 598 (1982). For argument before the Supreme Court, the two cases were consolidated at 84-325 and 84-356.

⁵See also, Olkin, "Preemption of State Insurance Regulation by ERISA," 13 Forum 652 (1982).

Putting aside the Metropolitan case for the moment, it is clear on policy grounds that the case for requiring insurance coverage of alcohol and drug abuse and dependency treatment is already well documented.⁶ 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.⁷ 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.⁸ As was demonstrated in the Metropolitan case, there is more than ample evidence that mandated coverage of these benefits is financially feasible.⁹ 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 insurers' claims of ruin.¹⁰

The record thus far is also clear that coverage of alcohol and drug dependency treatment is affordable for consumers,¹¹ increases availability of treatment,¹² and actually results in cost savings as compared to the enormous societal losses from continued alcoholism and drug abuse.¹³ For example, recently, a major study funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) was released. This study 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 occurring in the six months prior to treatment.

⁶See n. 2 above.

⁷See Butynski op. cit. n.2 plus verbal update in 1985, as well as appendix IIA to Brief Amicus Curiae of Health Insurance Association of America in Metropolitan.

⁸See Cooper, op cit. n. 2.

⁹See e.g., Brief American Curiae of the Coalition for Comprehensive Insurance Coverage in Metropolitan.

¹⁰Argument of Commonwealth of Massachusetts in Metropolitan, February 26, 1985.

¹¹See Fein op. cit. at 55.

¹²Id.

¹³See e.g., Testimony of Nancy Brach, n. 1.

Following the initiation of treatment, the health care costs of alcoholics drop significantly.^{13A}

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 nonalcoholic comparison group of 3,598 families. The total cost for alcoholism treatment was just over \$9 million, and there were no allegations of financial pressure on the company as a result of this coverage.^{13B}

Nevertheless, all of these arguments must await the final decision in Metropolitan. Argument was held before the Supreme Court on February 26, 1985 and a decision must come from the Court by the conclusion of the current term at the end of June, 1985. There are several grounds for optimism. First, the case for the state is strong. For example, ERISA contains a specific statutory exemption for any state laws regulating the business of insurance.¹⁴

Finally, even if Metropolitan were to be reversed, which is unlikely, 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 be turned to advantage.¹⁵

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 as well. Specifically, mandated coverage should provide insurance benefits for alcohol and drug abuse and dependency treatment in public and private, freestanding and

^{13A}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."

^{13B} Id. It is projected that within 2 to 3 years the cost of treatment is fully offset by decreases in other health care costs.

¹⁴29 U.S.C. 1144(b)(6)(A).

¹⁵This theory assumes that the Court decides that federal law controls in Metropolitan.

hospital-based, inpatient and outpatient programs when duly licensed by the appropriate governmental bodies, properly accredited and staffed.¹⁶

Given the huge social costs of untreated alcoholism and drug abuse (estimated to be \$ 176.4 billion in 1983) which are increasingly being documented,¹⁷ the mandating of insurance benefits for treatment by some level of government is a public policy imperative.¹⁸

¹⁶See e.g., the current New Jersey Medicaid Model Program which includes coverage of non-hospital, free-standing alcoholing treatment facilities pursuant to a HCFA Alcoholism Services Demonstration grant which even six states. See also Becker, "Managerial Report: The Illinois Medicare/Medicad Alcoholism Service Demonstration", Sept. 21, 1984.

¹⁷See Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980 (report submitted to the Alcohol Drug Abuse and Mental Health Administration by Research Triangle Institute in June 1984).

¹⁸See Fein, op. cit., passim. See also Los Angeles County Estimated Expenditure Due to the Misuse of Alcohol 1980 - 1981, submitted by Raymond A.E. Chavira, Los Angeles.

1029j

15. Forfeiture

AMERICAN BAR ASSOCIATIONSECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIESRECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the increased use of state and federal civil and criminal forfeiture provisions as avenues for curtailing drug trafficking.

BE IT FURTHER RESOLVED, that the American Bar Association recommends that 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.

REPORT

Background

The concept of forfeiture can be traced to the Book of Exodus in the Old Testament.¹ 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."²

Forfeiture of the property of a drug-related crime has proven to be an effective means of curtailing the problem.³

[Discussion of legislative research from Congressional Research Service, etc. on the effects of forfeiture.]**

Forfeiture is also important as a means of generating substantial revenue.⁴ This revenue is being used by some states to fund drug abuse treatment, prevention, education and enforcement programs.⁵ This additional revenue can provide a range of benefits to society related to drug abuse without using tax revenues.

Forfeiture statutes can either be civil or criminal. A civil forfeiture statute is a proceeding in rem, where the property is the defendant.⁶ 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.⁷

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

²United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, n. 1 (C.D. Cal. 1978).

³See MYERS & BRZOSTOWSKI, supra, note 1.

**[] More information is needed here.

⁴In 1979-80 the Drug Enforcement Assistance Administration seized assets totaling nearly one-half its annual budget. See MYERS & BRZOSTOWSKI, supra, note 1.

⁵See discussion, infra, at ____.

⁶Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931).

⁷See MYERS & BRZOSTOWSKI, supra, note 1.

Federal legislation governing controlled substances contains both civil and criminal forfeiture provisions. In 1970 Congress enacted two major pieces of legislation designed to curb drug trafficking: Racketeer Influenced and Corrupt Organizations ("RICO")⁸ and the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Controlled Substances Act").⁹ Each act contains a criminal forfeiture provision¹⁰ which requires forfeiture of illegally ensued property when the user has been convicted of the underlying crime.¹² The standard of proof for the civil forfeiture proceeding is probable cause; the standard for the criminal forfeiture proceeding is the higher standard of proof beyond a reasonable doubt that the property was connected to illegal activity.¹³

The Comprehensive Crime Control Act Amendments of 1984¹⁴ 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.¹⁵

⁸18 U.S.C. 1961-68.

⁹21 U.S.C. 841 et seq.

¹⁰18 U.S.C. 1962, 1963; 21 U.S.C. 848.

¹¹Id.

¹²21 U.S.C. 881(a).

¹³See MYERS & BRZOSTOWSKI, supra, note 1.

¹⁴Title II of Public Law 98-473, October 12, 1984, 98 Stat. 1976.

¹⁵S. REP. NO. 225, 98th Cong. 1st Sess. 6, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 195, 196.

Discussion

The Uniform Controlled Substances Act was drafted by the National Conference of Commissioners on Uniform State Laws and approved by that body in 1970.¹⁶ 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."¹⁷

The drafting of the Act came on the heels of the enactment of the "Controlled Substances Act"¹⁸ to enable the states to update and revise their own controlled substances laws.¹⁹ All but two states, New Hampshire and Vermont,²⁰ have adopted the Uniform Controlled Substances Act, including Puerto Rico, the Virgin Islands, Guam and the District of Columbia.

The American Bar Association recommends that the two remaining jurisdictions consider adopting the Uniform Controlled Substances Act as a means toward a national goal of curbing drug trafficking which has been a contributing factor to this country's mammoth drug abuse problem.

¹⁶9 U.L.A. 197 (1970)

¹⁷Id., Prefatory Note at 188.

¹⁸21 U.S.C. 841 et seq.

¹⁹9 U.L.A. 187, 188.

²⁰Id., as amended (198_).

The Model Forfeiture of Drug Profits Act was drafted by the Drug Enforcement Administration, U.S. Department of Justice in January 1981.²¹

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 the 1978 amendments²² to the Comprehensive Drug Abuse Prevention and Control Act of 1970 which expanded the civil forfeiture provision to include the forfeiture of illegally accumulated profits of criminal activity.²³ Prior to the amendment, only the tools of criminal activity were required to be forfeited. The new amendment greatly expanded the weapons that could be used to attack organized crime.²⁴

The Model Act amends the civil forfeiture section of the Uniform Controlled Substances Act,²⁵ which has been enacted by forty-eight states, the District of Columbia, Puerto Rico, Guam and the Virgin Islands.²⁶

The American Bar Association recommends that all states adopt this amendment so as to expand each state's ability to both control drug trafficking and to raise revenue for drug abuse enforcement, treatment, prevention and education programs.

[We need to find out whether any states have adopted it.]

²¹See MYERS & BRZOSTOWSKI, supra, note 1, at _____.

²²Pub. L 95-633.

²³21 U.S.C. 881(a)(6).

²⁴See MYERS & BRZOSTOWSKI, supra, note 1, at _____.

²⁵9 U.L.A. 197 (198_).

²⁶Id.

The American Bar Association recommends that those states with criminal forfeiture provisions also adopt civil forfeiture provisions.

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.²⁷

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.²⁸ It is an in rem proceeding: the property is the defendant.²⁹ No conviction of the person who used the property is required because the personal guilt of the individual is not at issue.³⁰ The government need only prove that it has reasonable grounds for believing that the property was connected to illegal activity.³¹

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.³² 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.³³

[We need to research which states have civil/criminal provisions and the results, if any, from changing from criminal to civil.]

²⁷See MYERS & BRZOSTOWSKI, supra, note 1, at ____.

²⁸Comment, California Forfeiture Statute: A Means for Curbing Drug Trafficking:" 15 Pac. L.J. 1035 (1984)

²⁹Id.

³⁰Id. at 1036

³¹Id.

³²Id. See also MYERS & BRZOSTOWSKI, supra, note 1, at ____.

³³Id.

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.³⁴ 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.³⁵

Fourteen states and the District of Columbia have made 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.³⁶

³⁴See MYERS & BRZOSTOWSKI, supra, note 1, at ____.

³⁵Id. at ____.

³⁶Alabama: Ala. Code S20-2-93 (1983): 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. S17.30.122 (1984): destroy property harmful to public; pay expenses of proceedings; use for enforcement
California: Cal. (____) Code S11489 (19__): 50% allocated to Department of Mental Health for primary prevention programs
District of Columbia: D.C. Code Ann. S____ (19__) 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. S893.12 - 932.704 (19__): 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 S16-6-8.5-5.1 (19__): pay expenses; balance shall be used for payment into the common school fund of the state
Michigan: Mich. Comp. Laws S33.7524 (19__): until Oct. 1, 1985, 25% balance to be credited to Dept. of Public Health for substance abuse
Minnesota: Minn. Stat. S152.19 (19__): balance to state drug abuse authority for distribution: one-half to hospital and drug treatment facilities for care and treatment - rest to appropriate state agency
North Carolina: N.C. Gen. Stat. S90-112 (1981): surplus to be paid to school fund of county in which drugs seized
Oklahoma: Okla. Stat. title 63, S2-500 (19__) drug enforcement
Oregon: Or. Rev. Stat. S160.725 (1983) general school fund
South Carolina: S.C. Code Ann. S44-53-580 (Law. Co-op 1983): all fines shall be used by Dept. of Mental Health exclusively for the treatment and rehabilitation of drug addicts
Tennessee: Tenn. Code Ann. S53.11-409 (1983): drug enforcement
Washington: Wash. Rev. Codes 69.50.505 (19__): 50% in criminal justice training account

[We should check with Congressional Research Service to get information on the effectiveness of these measures. We could discuss D.C. as an example, since it is a high drug abuse jurisdiction and statistics would be readily available.]

Twenty-two states and the Commonwealth of Puerto Rico³⁷ have adopted anti-racketeering statutes of their own in the wake of the enactment of federal RICO.³⁸

Federal RICO, by its own terms, is not preemptive.³⁹ 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."⁴⁰

RICO was enacted by Congress to strengthen law enforcement weapons against criminal infiltration of legitimate businesses.⁴¹ RICO provides for criminal penalties, civil remedies and a forfeiture provision designed to deprive racketeers of the benefits of their illegal activity.⁴² Existing state RICO statutes resemble the federal law, but contain significant differences.⁴³

³⁷5 Trade Reg. (CCH) 50,449.

³⁸Racketeering, Influenced Corrupt Organizations, 18 U.S.C. 1981-1968.

³⁹"'Big RICO' and 'Little RICO's': An Overview," 2 RICO Litigation REPORTER (RLR) 240 (Sept. 1984).

⁴⁰Id. See also Chapter XXII of the Comprehensive Crime Control Act Amendments of 1984, 98 Stat. 2192, 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, 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.

⁴¹See "Big RICO" and "Little RICO's", supra, note 39.

⁴²"The 1984 Amendments to the Forfeiture Provisions of RICO", 1 R.L.R. 586 (Jan. 1985).

⁴³"Big RICO", supra, note 39.

Federal RICO's forfeiture statute requires that the proceeds of any forfeiture action be deposited into the Department of Justice Assets Forfeiture Fund.⁴⁴ The monies in this fund are in turn disbursed by the Attorney General for, inter alia, reimbursement for costs of the forfeiture proceedings.⁴⁵ 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.

The 1984 Amendments⁴⁷ did, however, establish the Department of Justice Assets Forfeiture Fund,⁴⁸ 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."⁴⁹ No provisions are made for the disposition of these monies. The American Bar Association therefore recommends that the Attorney General promulgate regulations which would allocate these monies to drug abuse enforcement, treatment, prevention and education programs.

[We need to research the legislative history for the intent behind this fund. We also need to research at what the federal government does now with monies from forfeiture proceedings, if anything, beyond putting them into the general fund. If we decide this fund is a potential source for programs, the ABA should draft model regulations.]

⁴⁴28 U.S.C. 524, as amended by Pub. L. 98-472, Sec. 310.

⁴⁵Id.

⁴⁶18 U.S.C. 1963; 21 U.S.C. 848; 21 U.S.C. 881(a)(6).

⁴⁷Pub. L. 94-473, ___ Stat. ___.

⁴⁸Id. at Sec. 310.

⁴⁹Id.

The 1984 Amendments established the Customs Forfeiture Fund,⁵⁰ 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."⁵¹ The statute is silent as to the disposition of the monies beyond payment of the expenses of forfeiture proceedings and the payment of awards to informers. The American Bar Association therefore recommends that the United States Customs Service promulgate regulations which would also allocate a portion of this fund to drug abuse, enforcement, treatment, prevention, and education programs.

[We need to research the legislative history for the intent behind this fund. We also need to research what the federal government does with the monies from forfeiture proceedings, if anything, beyond putting them into the general fund. If we decide this fund is a potential source for programs, the ABA should draft model regulations.]

Chapter XIV of the Comprehensive Crime Control Act Amendments of 1984⁵² is the "Victims of Crime Assistance Fund of 1984."⁵³ The monies in this fund come directly from convicted criminals or public donations.⁵⁴ 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.⁵⁵ 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."⁵⁶

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 should redefine its statutory definition of victim to include juvenile alcohol and drug abusers, and should develop specific education and treatment programs targeted to this population.

⁵⁰Pub. L. 94-473, ___ Stat. ___, Sec. 317.

⁵¹Id.

⁵²98 Stat. 2170.

⁵³Id. Sec. 1401.

⁵⁴Id.

⁵⁵S. REP. NO. 225, 98th Cong. 1st Sess. 8, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 434.

⁵⁶Id. at 437.

[We are in the process of obtaining the "President's Task Force on Victims of Crime: Final Report" (December 1982) and the Hearings before the Senate Judiciary Committee, S. 2423, 98th Cong. for legislative intent behind the word "victim".

1022j

DRAFT

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

16. Surcharge

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the 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.

Report

It is apparent, from the testimony of many witnesses at the Advisory Commission field hearings, that there is a lack of adequate funding for substance abuse treatment facilities and prevention programs particularly those directed at substance abuse by young people.¹ The mandated insurance and state excise tax proposals offer two other 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 alcohol and drug law violators.

Based on the testimony of a New Jersey state health official² and various enforcement personnel, and others concerned³, this Commission believes that 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.⁴ Moreover, there are relevant legal precedents for such dedicated surcharges in

¹Cite to transcripts

²See 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 penalties 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.

³See e.g. Testimony of Mark J. Byre, New Jersey Department of Health, Nancy Brach, National Council on Alcoholism, Mia Anderson, New Jersey PTA, Princeton.

⁴See n. 2 above.

the area of drunk driving fines⁵, liquor license revenues⁶, excise taxes⁷ and other similar existing or proposed regulatory enforcement measures.⁸ In addition, if that surcharges are viewed as a form of "victim compensation," there are apt analogies to statutes across the country which compensate individual victims of specific crimes⁹.

⁵See e.g. New Jersey drunk driving law regarding dedicated charges for Intoxicated Driver Resource Centers, 39 N.J.S.A. 4-50(f).

⁶See ABC laws generally.

⁷See Alcohol Excise Tax Recommendation and Report.

⁸U.S. J. of Alcohol and Drug Dependence, at 15, (Jan. 1985), regarding a Texas state legislative proposal providing for dedication of substance abuse fines to fund treatment facilities.

⁹See 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 that issue.

To a great extent, drug and alcohol violations are societal as well as individual crimes. Substance abuse is costly to society as well as the individuals actually involved.¹⁰ 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.^{10A} 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 of the rehabilitation of his victims.¹¹ 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.¹²

¹⁰See e.g. Fein, Alcohol in America the Price We Pay (Care Institute) passim.

^{10A}Harwood, H., Napolitano, D., Kristiansen, P., Collins, J. Economic Costs to Society of Alcohol & Drug Abuse & Mental Illness, 1980, Report developed by the Research Triangle Institute the Alcohol Drug Abuse & Mental Health Administration, June 1984.

¹¹Id. See also Presidential Commission on Drunk Driving, Final Report, 5 (Because drivers under the influence are responsible for their problem with its great resulting human cost, it is appropriate that offenders should defray the costs of enforcement, prosecution, adjudication, treatment and education.)

¹²One Georgia witness estimated the total spending for alcohol and drugs for that state alone to be \$1 billion annually. Morrison, Atlanta.

1075j

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17. Alcohol Excise Taxes

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that 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.

REPORT

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.¹ The result, according to testimony before the Advisory Commission, is that in some areas, beer is price-competitive with soft drinks.²

The first 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 additional treatment facilities for young substance abusers.³ It seems clear that an observable inequity in alcohol taxation and a need for additional treatment facilities should be paired as a classic, matched "source" and "use" of funds.

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.

¹See e.g. Mosher and Beauchamp, "Justifying Alcohol Taxes to Public Officials," J. Pub. Health Pol'y, 422 (Dec. 1983).

²Id., at 435. See also testimony of James F. Mosher, San Diego, CA. Dept. of Health Services, "Alcohol Tape: A Rethinking of their Relationship to Prevention of Alcohol Problems," 30., Table XVII (Jan., 1984).

³See e.g., testimony of Richard Russo, Princeton.

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.

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.

Such "dedication" of tax revenues has been traditional in other areas, particularly as to bond issues relating to other 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.⁴

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."^{5A}

⁴See gen. Estes and Heenemann, Alcoholism, Development, Consequence, and Intervention at 86 (2nd ed. 1982) (regarding such dedicated taxes for prevention programs).

⁵See also San Diego CA. Dept. of Health Services, "Alcohol Tapes: A Rethinking of this Relationship to Prevention of Alcohol Problems." 7 (Jan. 1984).

^{5A}Testimony of Dr. Stoudemire, Atlanta.

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.⁶ The impact of such taxes seems also to be on consumption across the range of heavy to light drinkers, thus answering criticisms that only marginal consumers would be affected.⁷ 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.⁸

For all of these reasons, it seems practical both to increase alcohol excise taxes and to dedicate the increased revenue at least in part, to alcoholism prevention and treatment.

⁶See Cook, "The Effect of Liquor Taxes on Drinking, Cirrhosis and Auto Accidents," at 255 in Moore and Gerstein, Alcohol and Public Policy: Beyond the Shadow of Prohibition (Wash., D.C. 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) (regarding interalia "The Effect of Alcohol Taxes on Consumption").

⁷Grossman, 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.

⁸Id., at 35

⁹Mosher and Beauchamp, op. cit. at 436-7. See also Fein, Alcohol in America the Price We Pay (Care Institute 1984); Cook, op.cit at 281.

1054j

IV. Attorney Role Models

The final cluster of recommendations relate to the bar and legal community's responsibility as role models for youth. There seemed to be no question to Commission witnesses that the bar's community involvement on these issues is both wanted and needed by community groups, parents, schools and others.¹ Moreover, it is clear that these groups feel the bar can lead the way in recommending improved and continuing education efforts within the legal system, public and private schools and in the community, with regard to alcohol and other drug problems.²

The Coalition, Community and School recommendation reflects all of these concerns. This group of recommendations also includes the bar's internal activities regarding its own members' alcohol and drug problems, such as the recommendation on peer group support programs and bar discipline for substance abuse. Finally, there is the recommendation calling for the bar's own hortatory activities in setting examples of providing alternatives to alcohol at all bar functions.

This group of Recommendations is intended, therefore, to provide a good example for other organizations seeking to set their own houses in order and as a pre-condition to confronting the alcohol and other drug problems of youth.

¹See e.g., Testimony of William Coletti, Susan Haywood, Atlanta.

²Id.

18. Coalitions, Community and School Involvement

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the local bar associations, and the legal profession should:

- a). 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.
- b). 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.
- c). 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.

A. Bar Evaluation and Training

Numerous witnesses urged the Advisory Commission to encourage the ABA to foster continuing legal education and other programs for lawyers to assist them in dealing with clients experiencing alcohol and other drug problems.¹ To some extent, the bar's own existing substance abuse programs and knowledge could be tapped to provide expertise for such educational activities for other lawyers. One such source is the Advisory Commission with its assembly of lay and bar community members involved in alcohol and other drug problems.²

B. and C. Training for Juvenile Justice and Family Court Program Personnel

These two Recommendations are both addressed at the need to train judges, court officers, lawyers and related personnel specifically in alcohol and other drug problems. As one attorney who testified before the 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.^{2A}

As has already been noted, according to judges and others, the incidence of alcohol and drug problems in both juvenile and family court proceedings is very significant.³ In response to these disturbing statistics, the Commission recommends such training as a means of identifying a drug and/or alcohol problem and interrupting the vicious cycle of family and juvenile alcohol and other drug problems.⁴

¹See e.g., testimony of Hon. John Girardeau, Atlanta.

²Approximately fourteen members of the Advisory Commission are attorneys.

^{2A}Testimony of Paul Mones, Esq., Los Angeles.

³See 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.

⁴See e.g., testimony of Hon. John Girardeau, Atlanta; Phyllis Reilly, Princeton; and Paul Mones, Los Angeles.

D. 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 of youth.⁵ 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...⁶

It is the hope of this Recommendation that the Advisory Commission would act as the catalyst to bring together the various state and local organizations with their corresponding state and local bar associations. It is through this cooperative effort that the organized bar and the state and local organizations can effectively battle the war on alcohol and drug problems of youth.

⁵See e.g., testimony of William Colletti, Atlanta; William Blatner, Princeton; and Bertha Smith, Lawrence Wallack, Los Angeles.

⁶Testimony of Denis Mansman, Princeton.

E. and F. Curricula

Several of the witnesses before the Commission emphasized the national need to develop as well as to adopt uniform model curricula for youth education on alcohol and other drug problems.⁷ To some extent, such model curricula have already been developed and adopted.⁸ However, there is still need for some additional uniformity and sponsorship in order to encourage wide use of such models.

G. Training

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.⁹ As with training of judges, lawyers and other court personnel,¹⁰ there is a great need for training of school personnel as well, to recognize, identify and assist youth with these problems.

⁷See e.g., testimony of Robert Halford, Atlanta; Ellen Morehouse, Princeton.

⁸See 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.

⁹See e.g., testimony of William Colletti, Atlanta; Mark Byrne, Mia Anderson, Princeton.

¹⁰See parts A and B above.

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19. Legal Community Peer Group Support Programs

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that state courts and bar authorities should establish and support peer support programs for attorneys suffering or recovering from alcohol or other drug abuse.

It is safe to say that since 1980, almost every bar journal has carried at least one autobiographical article in which an attorney reveals his personal struggle with alcohol.¹ 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."²

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.³ Second, these articles evidence the legal community's first step in confronting its problem. Each of these articles represents one attorney's courageous 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.⁴ Discipline, however, should be viewed as the last resort in dealing with attorneys or judges with alcohol or other drug problems.⁵

¹See e.g. O'Keefe, "These Words Tell You Who I Am, what I am and Where I Belong," Fla.Bar News, April 15, 1981; Anonymous, "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.

²Anonymous, 45 Ala. L. Rev., 101 (Date?).

³A 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, D., and Kane, "Young, Smart, Successful and Drunk" Barrister 4 (Fall 1982). See, also, 73 Ill B.J. 46 (1984). See the Ark. Lawyer, Jan. 1982, and Wolfson, "Hope for Broken Lives and Careers - Lawyer's Assistance Program," 73 Ill. B.J. 20. (1984).

⁴Wolfson, W. 73 Ill. B. J. 20 (1984). But see ABA Model Assistance Programs (MAP) #1 n.7 below, at 1.

⁵See, Section IV (B) of these Recommendations and Reports 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.⁶ These state and local programs are not part of any state's attorney discipline system. Rather, they are 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..."⁷

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 U.S.

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.⁸ 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

⁶The 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.

⁷Illinois Lawyer's Assistance Program Statement of Purpose.

⁸73 Ill. B.J. 22.

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.

From the perspective of the national, state and local bar, the peer group -- intervention models are clearly 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 deal with alcohol and other drug problems within the legal community.

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20. American Bar Association Alternative Beverages

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends at all ABA programs, conferences and meetings where alcoholic beverages are served, non-alcoholic beverages should also be provided for the participants.

The Advisory Commission heard testimony from several witnesses, including high school students, concerning lawyers as role models in the community and for youth, in particular.¹ Specifically noted was the bar's role in setting examples with regard to the use of alcohol.² The basis for this Recommendation is, therefore, the largely self-evident goal of fostering the bar as a good role model for youth and the community generally.³ Other professional and national organizations have recently adopted similar resolutions because of the potential impact of their activities on youth.⁴

¹See e.g., testimony of Amy Haywood and William Colletti, Atlanta.

²Id.

³See also the Recommendation and Reports on attorney peer groups and referral, treatment and discipline.

⁴See e.g., testimonies of Dr. Jokichi Takamine, American Medical Association; Larry Stewart, Caucus of Writers, Producers, and Brian Dyak, Entertainment Industries Council, and Directors; Los Angeles.

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21. Attorney Discipline, Referral and Treatment

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

The American Bar Association recognizing that lawyers often play leadership roles in the community and therefore serve as role models for youth,

BE IT RESOLVED, that the American Bar Association recommends that the legal profession 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.

BE IT FURTHER RESOLVED that the American Bar Association recommends that 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.

REPORT

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 from 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's support of peer group programs for attorneys and judges suffering from alcohol and other drug problems infra. It is unfortunate, however, that peer group support, intervention and other voluntary programs cannot address all attorney substance abuse problems. Discipline at times may be the only option to help the attorney and to protect the public in some intractable situations.

Even in the context of discipline, the issue of attorney substance abuse can be raised in several different ways, each requiring different procedures and approaches. For example, cases occur in which attorneys are charged with professional misconduct,¹ such as misappropriation of clients' 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 completely excuse violations of an attorney's professional responsibility, they are considerations in determining the nature and extent of the sanction to be imposed.²

¹See, People v. Luxford, 626 P.2d 675 (Colo. 1981). Attorney suspended from the Colorado Bar for a year for negotiating insufficient funds checks, and failure 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, 413 N.E.2d 375 (Ill. 1980), an attorney disbarred after his conviction for conspiracy to transport stolen securities, and for failure to file tax returns, is reinstated once he has met burden of proving to court he had rehabilitated his alcohol dependency; Attorney Grievance Community of Maryland v. Aler, misc. docket (subtitle 8v) No. Md. Ct. App., (November 1, 1984). See also Annot., 26 A.L.R., Fed. 4th, 1029 (19__).

²ABA:BNA Lawyers Manual on Professional Conduct 101:3201.

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.³ Yet, these rules often fail to define incapacity, resulting in little, if any practical use.⁴ Thus, several state bars are presently working to rewrite their rules governing incapacitated attorneys.⁵

For example, a Florida Bar Legal Standards Commission submitted to the Florida Board of Governors a proposed modification to its impaired attorney proceedings rule.⁶ 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."⁷

³Florida _____ ...11.01(4) states:

Whenever an attorney who has not been judged incompetent, or 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...

⁴Muller, C. Impaired Attorney Proceedings - A New Approach to an Old Problem, 57 Fla. B.J. 34 (Jan. 1983).

⁵See 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., Rules of the United States District Court for the District of Columbia, Rule 4-4. See also Pa. Rules for Disciplinary Enforcement: Rule 301(d), 301(3); Pressler's N.J. Court Rules, Rules of Gen. App., 1:20-9.

⁶Proposal to change Florida Integration Rule 11.01(4).

⁷See Muller, A New Approach To An Old Problem, 57 Fla. B.J. 33, 35 (Jan. 1983).

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.⁸

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.⁹

⁸California Rules of Disciplinary Procedures, 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).

⁹Another 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 at 14 (Jan. 1984)). Illinois Supreme Court Rule 4-101(f) (noted in Wolfson, Hope for Broken Lives and Careers - The Lawyers Assistance Program, ___ Ill. B.J. at 20 (Sept. 1984)). 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. Bar J. at 20 (Jan. 1984).

1085j

American Bar Association

30 AUG 1985
2727

August 23, 1985

Dr. Carlton Turner
Drug Abuse Policy Office
The White House
Washington, D.C. 20001

Dear Dr. Turner:

Thank you for giving us your valuable time at the meeting on the marijuana resolution. My intent was to get the door open so that the resolution can be reconsidered by the ABA. Your knowledge and experience provided the opening that we needed. I believe the meeting was positive and that we now have some options we can pursue to reconsider the resolution or at least minimize the damage that has already been done. I appreciate your taking the time to help, and I hope that we can continue to rely on your assistance in the future.

I believe that we share many common goals. If my committee of the ABA can ever be helpful to you, please do not hesitate to call on me.

Sincerely,



David G. Evans, Esq.
Chair, Alcoholism and Drug
Law Reform Committee

DE/nd

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Issues:

Prevention

9. Responsibilities regarding illegal alcohol and drug sales to minors.
10. Responsibilities regarding alcoholic beverage advertising.

Treatment

1. Legal responsibilities to provide alcoholism and drug abuse treatment for children.
3. Responsibilities to children of alcoholics and drug abusers.
4. Family responsibilities and rights

Improvement of Law and Procedure

2. Responsibilities regarding confidentiality of medical records.
5. Responsibilities regarding domestic violence.
6. Responsibilities regarding school discipline.
7. Responsibilities regarding juvenile criminal justice.
8. Responsibilities regarding intoxicated driving.



ALCOHOL AND DRUG ABUSE REPORT

NATIONAL ASSOCIATION OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS
444 North Capitol Street, N.W. • Suite 530 • Washington, D.C. 20001 • (202) 783-6868

SPECIAL REPORT: July and August, 1985

TABLE OF CONTENTS

FORMAL POLICY STATEMENT ON YOUTH ALCOHOL AND DRUG PROBLEMS ADOPTED BY THE AMERICAN BAR ASSOCIATION ON JULY 10, 1985

I.	BACKGROUND INFORMATION ON THE AMERICAN BAR ASSOCIATION ADVISORY COMMISSION ON YOUTH ALCOHOL AND DRUG PROBLEMS	1
II.	FULL TEXT OF THE FORMAL POLICY STATEMENT ON YOUTH ALCOHOL AND DRUG PROBLEMS ADOPTED BY THE AMERICAN BAR ASSOCIATION	3
	1. Illegal Sales to Minors	3
	2. Juvenile Offender Treatment	3
	3. Revocation of Driver's License	4
	4. Youth Paraphernalia Law	4
	5. Age 21 Drinking Law	4
	6. Forfeiture	4
	7. Surcharge	5
	8. Dram Shop and Host Liability	5
	9. Funding	5
	10. Child Custody and Visitation	5
	11. Child Abuse and Neglect	6
	12. Consent to Treatment	6
	13. Discrimination in Schools	6
	14. Qualified Immunity	7
	15. Mandated Insurance	7
	16. Media Ads	7
	17. Marketing on College Campuses	7
	18. Legal Training on Alcohol and Other Drug Problems	8
	19. Legal Community Peer Group Support Programs	8
	20. Attorney Discipline	9

III. SELECTED REPORT LANGUAGE DEVELOPED BY THE ABA ADVISORY COMMISSION ON YOUTH ALCOHOL AND DRUG PROBLEMS TO SUPPORT THE POLICY RECOMMENDATIONS	10
1. Policy Recommendation Number 6: Forfeiture	11
2. Policy Recommendation Number 7: Surcharge	18
3. Policy Recommendation Number 8: Mandated Insurance	21

EDITOR'S NOTE: This Special Report consists primarily of excerpts from material developed by the staff and members of the ABA Advisory Commission on Youth Alcohol and Drug Problems. We are indebted to the ABA for permission to reprint this information. Special thanks for the development of the policy statement and report are due to the Chairperson of the Alcoholism and Drug Law Reform Committee of the ABA Section of Individual Rights and Responsibilities, David G. Evans, Esq., to the Chairperson of the ABA Advisory Commission on Youth Alcohol and Drug Problems, Abigail J. Healy, to each of the Advisory Commission members, and to the lead project staff person at the ABA, Ellen S. Teller, Esq. For information on the availability of the official version of the ABA policy statement on youth alcohol and drug problems as well as the complete report language which discusses the need for and supports each of the policy recommendations contact: Ellen S. Teller, Esq., Project Consultant, ABA Advisory Commission on Youth Alcohol and Drug Problems, American Bar Association, 1800 M Street, N.W., South Lobby - 200, Washington, D.C. 20036 Tel. (202) 331-2273.

I. BACKGROUND INFORMATION ON THE AMERICAN BAR ASSOCIATION ADVISORY COMMISSION ON YOUTH ALCOHOL AND DRUG PROBLEMS

On September 18, 1984 the President of the American Bar Association (ABA) announced the creation of an ABA Advisory Commission on Youth Alcohol and Drug Problems. Ms. Abigail J. Healy, Liaison for Alcohol Issues in the White House Drug Abuse Policy Office accepted an appointment to serve as Chairperson of the new Commission. The basic mission of the Commission was to gather information on alcohol and drug problems among the youth of our nation and to develop policy recommendations as to how the ABA and its members can most effectively work to prevent and alleviate such problems.

The Advisory Commission worked under the auspices of the ABA Section of Individual Rights and Responsibilities Committee on Alcoholism and Drug Law Reform chaired by David G. Evans. The goals of the Commission were to address a broad range of questions and issues relating to youth alcohol and drug problems, e.g., illegal alcohol and drug sales to minors, intoxicated driving by minors, and the availability of effective prevention and treatment services for youth.

A broad range of attorneys, professionals, concerned citizens and other experts in the alcohol and drug field were appointed to serve on the Advisory Commission. The Commission consists of persons from many different areas including health professionals, educators, treatment providers, law enforcement, private industry, the federal and state government, as well as representatives from various sectors of the legal profession. In addition to Abigail Healy and David Evans, the members of the Commission include: Rowland Austin, Director of the Employee Assistance Program for General Motors; Professor Dan Beauchamp, University of North Carolina School of Public Health; John Bland, Director of the Alcoholism Control Administration for the State of Maryland; Pat Burch, Legislative Liaison for the National Federation of Parents for Drug-Free Youth; Dr. William Butynski, Director of the National Association of State Alcohol and Drug Abuse Directors; Robert Carlson, Esq., from the ABA Special Committee on Youth Education for Citizenship; Hon. Andy Devine, from the National Council of Juvenile Court Judges; Scott Drexel, Esq., Assistant General Counsel for the State Bar of California; Thomas R. Dyson, Esq., a criminal defense attorney; Diane Grieder, a treatment program director; Hon. Orrin Hatch, U.S. Senator representing the State of Utah; Henry B. Hine, Esq., an attorney in private practice with training in pharmacology from Clayton, Missouri; John M. Joseph, Esq., from the ABA Young Lawyers Division; Hon. Gladys Kessler, Associate Judge with the Superior Court of the District of Columbia; Madeline E. Lacovara, counselor and psychology instructor at the Georgetown Preparatory School; Dr. Donald Ian Macdonald, Administrator of the Alcohol, Drug Abuse and Mental Health Administration of the U.S. Department of Health and Human Services; John M. McCabe, Esq., from the National Conference of Commissioners on Uniform State Laws; Hon. H. Carl Moultrie, Chief Judge of the Superior Court of the district of Columbia; David M. Oughton, Director of the National Association of

Alcoholism and Drug Abuse Counselors; Leopoldo L. Ramos, Esq., from the ABA Section on Individual Rights and Responsibilities; Mary Pat Toups, Esq., an attorney in private practice specializing in children's cases from Washington, D.C.; Wheelock Whitney, Chairman of the National Council on Alcoholism; James M. Wooton, Deputy Administrator of the U.S. Office of Juvenile Justice and Delinquency Prevention; and E. Paul Young, III, Esq., from the ABA Family Law Division.

The Advisory Commission publicized and held three public hearings in different areas of the country in order to gather information on youth alcohol and drug issues. These two day long field hearings were held in Atlanta, Georgia, Princeton, New Jersey and Los Angeles, California. Members of the Commission listened to personal testimony from over 160 witnesses and reviewed hundreds of pages of written testimony submitted both by witnesses and other concerned and interested individuals. Over 250 recommendations were submitted and considered by the members and staff of the Commission. Extensive and intensive discussions occurred among Commission members. Numerous recommendations were presented, analyzed, modified and debated. Finally, after due consideration, the Commission members formally voted to adopt a series of policy recommendations. Subsequent to these actions by the Advisory Commission the recommendations were considered, modified and adopted by the ABA Section on Individual Rights and Responsibilities (IR and R).

On June 6, 1985 the President of the ABA John C. Shephard, mailed out to all members of the ABA House of Delegates, to all ABA Section and Division Chairs, to all State and Local Bar Presidents and to other interested ABA entities the package of 20 policy recommendations and related report materials that had been developed by the Advisory Commission and IR and R Section. President Shephard specifically asked all of these individuals and groups to support the adoption of the policy recommendations at the ABA House of Delegates Meeting in July.

On July 10, 1985 the ABA House of Delegates formally voted, after some modification and revision of two resolutions, to adopt the full package of 20 policy recommendations on youth alcohol and drug problems. The final version of the 20 recommendations that were adopted is presented in the next section of this Special Report.

II. FULL TEXT OF THE FORMAL POLICY STATEMENT
ON YOUTH ALCOHOL AND DRUG PROBLEMS
ADOPTED BY THE AMERICAN BAR ASSOCIATION
ON JULY 10, 1985

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 2 3 4 5 6 7
1. <u>Illegal Sales to Minors</u>	8
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.	9 10 11 12
2. <u>Juvenile Offender Treatment</u>	13
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.	14 15 16 17 18 19 20 21 22 23

3.	<u>Revocation of Driver's License</u>	24
	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.	25 26 27 28 29 30 31
4.	<u>Youth Paraphernalia Law</u>	32
	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.	33 34 35 36 37 38
5.	<u>Age 21 Drinking Laws</u>	39
	(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.	40 41 42 43
	(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.	44 45 46 47
6.	<u>Forfeiture</u>	48
	(a) State criminal forfeiture provisions should be strengthened as avenues for curtailing drug trafficking.	49 50 51
	(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.	52 53 54 55 56 57 58

7.	<u>Surcharge</u>	59
	States should enact legislation providing for	60
	surcharge fines on all persons convicted of	61
	violations of the controlled substances and	62
	alcohol codes, to be used to supplement	63
	funding for prevention, intervention,	64
	treatment, and research on alcohol and	65
	other drug problems, especially for minors.	66
8.	<u>Dram Shop and Host Liability</u>	67
	States should enact statutes to establish	68
	civil liability of persons who personally	69
	and negligently sell or serve alcoholic	70
	beverages to a customer or guest whom the	71
	server knows or should know to be under the	72
	legal age when that customer or guest, as the	73
	result thereof, becomes intoxicated and injures	74
	himself, a third person, or such third	75
	person's property.	76
9.	<u>Funding</u>	77
	All projects recommended herein should be	78
	adequately funded. All possible revenue	79
	sources and methods to raise such funds for	80
	such purposes should be explored.	81
10.	<u>Child Custody and Visitation</u>	82
	Whenever decisions affecting custody and	83
	visitation rights are made, judges handling	84
	domestic relations cases should exercise	85
	authority to require, in order to promote	86
	the best interest of the child, the evaluation	87
	of a parent by appropriate alcohol or other	88
	drug treatment professionals, whenever the	89
	judge has credible evidence to suspect that	90
	the parent has alcohol or other drug abuse	91
	problems.	92

11.	<u>Child Abuse and Neglect</u>	93
(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.	94 95 96 97 98 99 100
(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.	101 102 103 104 105
12.	<u>Consent to Treatment</u>	106
	In order to facilitate treatment of youth with alcohol and other drug problems and to remove any barriers to such treatment:	107 108 109
(a)	States should enact statutes authorizing a minor to consent to any non-custodial, non-invasive treatment.	110 111 112
(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.	113 114 115 116 117 118 119 120 121 122 123 124 125 126 127
13.	<u>Discrimination in Schools</u>	128
(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.	129 130 131 132
(b)	States should enact legislation as necessary to prevent such discrimination.	133 134

14.	<u>Qualified Immunity</u>	135
	State and federal legislation should grant to	136
	teachers and other educational personnel	137
	immunity in respect to civil liability,	138
	where they, in good faith and for reasonable	139
	cause, report in confidence to the proper	140
	school personnel the suspected abuse,	141
	possession or sale of drugs or alcohol by a	142
	student on school property.	143
15.	<u>Mandated Insurance</u>	144
	All laws that provide and regulate private	145
	and public health insurance should mandate	146
	adequate and reasonable coverage for treatment	147
	of alcohol and other drug problems, in	148
	freestanding and hospital-based, in-patient	149
	and out-patient, public and private programs,	150
	especially for youth.	151
16.	<u>Media Ads</u>	152
	Concern should be expressed about media	153
	programming which glamorizes or promotes	154
	the use of alcohol or drugs by youth.	155
	Advertising of alcohol which is directed	156
	at youth should be opposed. Appropriate	157
	entities should be encouraged to continue	158
	research and other efforts to limit the	159
	effect which media programming or advertising	160
	has upon the use of alcohol or other drugs	161
	by youth.	
17.	<u>Marketing on College Campuses</u>	162
	Alcohol marketing strategies for college	163
	campuses that promote or tend to promote the	164
	use of alcohol by youth should be opposed,	165
	and government action should be encouraged,	166
	if necessary, to permit cooperative activity	167
	toward ending these practices.	168

18.	<u>Legal Training on Alcohol and Other Drug Problems</u>	169
	The ABA, local bar associations, and the legal profession should:	170
		171
	(a) Provide through continuing legal education programs and other appropriate vehicles	172
	extensive curricula on alcohol and drug abuse education. Additional training should	173
	be given in order to properly identify,	174
	evaluate, counsel and refer young clients	175
	with alcohol and drug problems.	176
		177
		178
	(b) Encourage the training and education of appropriate justice system personnel,	179
	including lawyers, regarding the	180
	contributory effect that alcohol and	181
	other drug abuse often has upon many	182
	offenders and their families in situations	183
	involving delinquent conduct or status offenses.	184
		185
	(c) Develop for judges and lawyers handling juvenile and domestic relations cases	186
	resources to increase awareness and	187
	intensify training and technical	188
	assistance efforts concerning alcohol	189
	and substance abuse issues. Resources	190
	should be developed to replicate these	191
	programs which are operating successfully	192
	within the nation's juvenile and family	193
	courts and communities.	194
		195
19.	<u>Legal Community Peer Group Support Programs</u>	196
	State courts and bar authorities should	197
	establish and support peer support programs	198
	for attorneys suffering or recovering from	199
	alcohol or other drug abuse.	200

20. <u>Attorney Discipline</u>	201
(a) Because lawyers often play leadership roles	202
in their communities and therefore serve	203
as role models for youth, the bar should	204
exercise leadership in dealing with	205
substance abuse by providing programs	206
for its members who suffer from alcohol	207
and other drug problems, by utilizing	208
appropriate disciplinary procedures and	209
by encouraging its members to avoid abuse	210
of alcohol and other drugs.	211
(b) The state court and bar disciplinary	212
authorities should place a high priority	213
on the adoption of appropriate model	214
disciplinary rules regarding attorney	215
abuse of alcohol and other drugs.	216

III. SELECTED REPORT LANGUAGE DEVELOPED BY THE ABA ADVISORY COMMISSION ON YOUTH ALCOHOL AND DRUG PROBLEMS TO SUPPORT THE POLICY RECOMMENDATIONS

A comprehensive report totalling over 130 pages was developed by the ABA Advisory Commission staff as support documentation to explain and clarify the intent of the 20 recommendations that were considered and formally adopted as ABA policy. It is not possible within this NASADAD Special Report to reprint all of that material. However, in order to provide readers with some indication of the scope and thoroughness of that documentation, we have reproduced the support narrative for three selected recommendations. Each of these recommendations attempts to address in somewhat different ways one of the primary areas of need identified by the Commission, the need to significantly expand the level and types of fiscal resources available to provide alcohol and drug abuse prevention, intervention, treatment and research services for youth:

o Policy Recommendation Number 6: Forfeiture -

This recommendation was selected since it is, in many respects, innovative and appears to be in the forefront of legislation being considered in many states to use civil and criminal forfeiture provisions both to curtail drug trafficking and to expand the availability of prevention, treatment and other services for youth.

o Policy Recommendation Number 7: Surcharge -

This recommendation was selected for similar reasons. It is not only innovative, but also its use might serve both as a deterrent to potential violators of alcohol and drug laws, as well as provide a significant increase in the level of revenue available for services.

o Policy Recommendation Number 8: Mandated Insurance -

This recommendation was selected because many States are currently considering the adoption of such mandatory insurance coverage statutes. The support information describes many of the most relevant policy considerations, outlines legal precedents and lists some of the major studies that document the cost benefit advantages of insurance coverage for alcohol and drug abuse treatment services.

The detailed report language developed by ABA staff to support each of these three policy recommendations follows.

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.

POLICY RECOMMENDATION NUMBER

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

¹²⁶See, 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.

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

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

¹²⁹This 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

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

¹³¹See MYERS & BRZOSTOWSKI, supra note 127.

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

¹³³Id.

¹³⁴Id. at 1036

¹³⁵Id.

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

¹³⁷Id.

¹³⁸See supra note 127 at 364.

¹³⁹Id. 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

¹⁴⁰Alabama: 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 (Controlled Substances Act).¹⁴² Each act contains a criminal forfeiture provision¹⁴³ which requires forfeiture of illegally ensued property¹⁴⁴ when the user has been convicted of the underlying crime.¹⁴⁵

The Comprehensive Crime Control Act Amendments of 1984¹⁴⁶ 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

¹⁴¹18 U.S.C. S. 1961 et seq. (1982).

¹⁴²21 U.S.C. S. 801 et seq. (1982).

¹⁴³18 U.S.C. 1962, 1963 (1982); 21 U.S.C. 848 (1982).

¹⁴⁴Id.

¹⁴⁵21 U.S.C. 881(a) (1982).

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

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

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

¹⁴⁹Id., 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 amendments¹⁵⁵ 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

¹⁵⁰21 U.S.C. S. 801 841 et seq. (1981).

¹⁵¹Unif. Controlled Substances Act, supra note 137.

¹⁵²Id. at 99 (as amended 1984).

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

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

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

¹⁵⁶21 U.S.C. 881(a)(6) (1982).

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

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

¹⁵⁹Id.

3. Anti-Racketeering Statutes

Twenty-two states and the Commonwealth of Puerto Rico¹⁶⁰ 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

¹⁶⁰5 Trade Reg. (CCH) 50,449.

¹⁶¹Racketeer 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).

¹⁶³Id. 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.

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

¹⁶⁵The 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 Amendments¹⁶⁹ 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

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

¹⁶⁸Id.

¹⁶⁹Id. at S. 1837.

¹⁷⁰Id. at S. 1837, 2052.

¹⁷¹Id. at S. 310.

¹⁷²Id. at S. 2054.

¹⁷³Id.

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 1984¹⁷⁴ 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.

POLICY RECOMMENDATION NUMBER

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

¹⁷⁴Id. at S. 2170.

¹⁷⁵Id.

¹⁷⁶Supra note 147, at 8. Cong.

¹⁷⁷Id. at 437.

¹⁷⁸See, 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 official¹⁷⁹ 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 taxes¹⁸⁴ and other similar existing or proposed regulatory enforcement measures.¹⁸⁵ In addition, if surcharges are viewed as

¹⁷⁹See 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 penalties 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.

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

¹⁸¹See supra note 179.

¹⁸²See, 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).

¹⁸³See, 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).

¹⁸⁴See alcohol excise tax recommendation and report.

¹⁸⁵See 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 crimes¹⁸⁶.

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

¹⁸⁶See, 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.

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

¹⁸⁸Harwood, 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.

¹⁸⁹Id. 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.")

¹⁹⁰One 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.

~~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.~~

POLICY RECOMMENDATION NUMBER

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

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

³⁵³See 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."

³⁵⁴Id.

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

³⁵⁶See 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.

³⁵⁶See, 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

³⁵⁷Attorney 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).

³⁵⁸In 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.

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

³⁶⁰See supra note 355.

³⁶¹See 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 Curiae 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.

³⁶²See Cooper, supra note 355.

~~***~~ NASADAD News Service Editor's Note: On June 3, 1985 the U.S. Supreme Court by an 8-0 vote rejected the arguments of the Metropolitan Life Insurance Company and Travelers Insurance Co. and thus reaffirmed the rights of the State of Massachusetts and other States to mandate specific types of health insurance coverage.

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 occurring 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

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

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

³⁶⁵See Fein supra note 242.

³⁶⁶Id.

³⁶⁷See, 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).

³⁶⁸Abstract: 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 programs³⁷³ the same cost savings arguments apply as in the private insurance sector. Recent studies involving

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

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

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

³⁷⁶See 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.

³⁷⁷The 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.

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

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

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

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