ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3336 HJUD HB 345

TESTIMONY OF CHARLIE SELMAN
President, CHARR
Presented to the House State Affairs Committee
February 5, 1986 - Juneau, Alaska

Madam Chairman, members of the Committee, I greatly appreciate the opportunity to appear before you again to testify on the latest version of House Bill 345. In past testimony, CHARR members have raised some of the problems which this legislation poses to the retail liquor industry in the State. Rather than rehash those concerns again today, we would like to instead direct your attention to several key public policy questions related to House Bill 345 which we believe must be addressed before you move the bill from Committee. And finally, we will offer a proposal which we hope the Committee will consider.

CHARR is strongly supportive of the basic concern which has triggered this legislation: getting the drunk driver off Alaska's streets and highways. Therefore, our questioning of the bill is not in regard to its intent, but is instead focused on what we believe is the pivotal public policy question facing the Committee: will passage of House Bill 345 truly have any effect on reducing the number of drunk drivers on Alaska's highways?

This bill essentially focuses on one narrow issue: changing the present criminal negligence standard to an ordinary negligence standard. This aspect of the bill traces its origin back to Governor Sheffield's Task Force on Drunk Driving which was appointed about 18 months ago. The Task Force recommended the criminal negligence standard change to the Governor in its

report. However, there were other key policy recommendations in the Task Force report which are not included in the bill which is before you today. We believe the Committee should carefully review each Task Force recommendation, not just the one which deals with changing the negligence standard.

We also believe this Committee must fash provisions in House Bill 345 which apply both policies and sanctions in an equitable, even-handed manner to all Alaskans who serve alcohol, whether in a commercial establishment, or in a social setting.

If the public policy objective of this legislation is to reduce or eliminate drunk driving, then all persons -including the social host--who serve alcohol to a driver who is subsequently involved in an alcohol-related accident should be subject to the same liability and sanctions. The family of a person who is injured or killed by a drunk driver who became intoxicated while at a friend's home will find it difficult to understand why the social host is insulated from lawsuits by this bill, while the bar owner and package store operator are not. Therefore, we strongly urge this Committee to carefully review the Task Force's recommendation regarding social host liability.

The need to review the social host issue becomes evident when one reviews Alaska's alcohol sales data. According to information which CHARR has received from a major wholesaler, only 28 percent of the liquor, 20 percent of the wine and 28 percent of the beer sold in Alaska is sold "on premises," which generally means consumed in a bar, restaurant or similar

establishment. If alcohol consumption on the ferries, airlines, military bases and a limited license category is subtracted, "on premise" sales drop to 18 percent for liquor, 15 percent for wine, and 19 percent for beer. Therefore, it appears that more than 80 percent of the alcohol consumed by Alaskans takes place in the home or other social settings. By excluding social host liability from this bill, the Committee could be turning its back on a significant aspect of Alaska's drunk driving problem.

In addition, we urge the Committee to address the following policy questions related to the latest version of House Bill 345:

1. If the bill passes in its present form, how will it affect the liquor industry's ability to obtain liability insurance?

2. What degree of legal protection accompanies the model business practices provisions in the Committee substitute, and have there been any court decisions which clearly define that protection?

3. Does information exist which can tell us if the public policy objectives of the bill will be attained? For example, how many lives will be saved, what property savings will occur, etc. if the bill becomes law?

4. Will this legislation encourage a multitude of lawsuits, and if so, what will its effect be on the State's already overloaded court system?

5. Will industry employees be more vulnerable to liability lawsuits, and if so, how will this affect industry's ability to attract and hold competent help?

6. Will the State, as the licensing agent, assume liability under the ordinary negligence standard, and if so, will it become the "deep pocket" when a person injured by a drunk driver cannot recover damages against an uninsured person who served the alcohol?

The list of unanswered policy questions goes on, but in the interest of time I will stop here.

As I stated earlier, the dram shop issue is a difficult one. A recent edition of the television show "20/20" had an excellent segment on the complexities of this issue. We have contacted ABC News to obtain a copy of the segment and should have it within 10 days. We would be happy to share the video tape with you when it arrives. It is the best overview of the issue which I have seen, and I urge you to take time from your busy schedule to view it.

Madam Chairman, in closing CHARR would like to offer a suggestion for the Committee's consideration. As I have noted, we believe the latest version of House Bill 345 raises as many policy questions as it answers. We realize the full Committee has a limited amount of time to wrestle with the issues raised in this bill. Therefore, we recommend that a small working group--either a subcommittee made up of this Committee's members or a group with expertise in the alcohol regulatory business, such as the ABC Board--be appointed to address the unanswered questions which revolve around this bill.

We realize that some may view this recommendation as a delaying tactic; it is not. Everyone familiar with legislative procedure knows that committee referrals can be waived, particularly at the end of the session when bills often magically sprout legs and gallop through the House and Senate. We also know there is an interest by key members of the House leadership to have this bill move, and if they want it to move, it will.

Therefore, our suggestion should be viewed for what it is: a request to have the major public policy questions and issues

raised by House Bill 345 addressed in a substantive manner. Hopefully, the end product of this effort will be legislation which possesses integrity, common sense and which will truly serve the public interest.

Thank you.

Model Act

## SECTION 10: RESPONSIBLE BUSINESS PRACTICES DEFENSE

(a) A defendant's service of alcoholic beverages is not negligent or reckless if the defendant, at the time of the service, is adhering to responsible business practices. Responsible business practices are those business policies, procedures and actions which an ordinarily prudent person would follow in like circumstances.

(b) The service of alcoholic beverages to a person with actual or constructive knowledge that such person is intoxicated or a minor constitutes an unreasonable business practice. Evidence of responsible business practices pursuant to this section is relevant to determining whether a defendant who does not have actual knowledge should have known of the person's intoxicated condition or age.

(c) Evidence of responsible business practices may include, but is not limited to, comprehensive training of defendant and defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures and actions which are in effect at the time of such service.

(d) For the purposes of service to intoxicated persons, evidence of comprehensive training includes, but is not limited to, the development of knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. Such training shall be appropriate to the level, kind, and type of responsibility for each employee and agent to be trained.

(e) For the purposes of service to intoxicated persons, evidence of responsible management policies, procedures, and actions may include, but is not limited to, those policies, procedures and actions which are implemented at time of service and which:

(1) encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises;
(2) promote availability of nonalcoholic beverages and food;
(3) promote safe transportation alternatives other than driving while intoxicated;
(4) prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent;
(5) establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community;
(6) implement comprehensive training procedures;
(7) maintain an adequate, trained number of employees and agents for the type and size of defendant's business;
(8) are written in a policy and procedures handbook, or similar format, and made available to employees;



(9) establish a standardized method for hiring qualified employees; and
(10) reprimand employees who violate employer policies and procedures.

(f) For the purposes of service to minors, evidence of responsible business practices may include, but is not limited to those listed in subsection (e) and the following:

(1) management policies which are implemented at the time of service and which insure the examination of proof of identification [as established by state law] for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors;
(2) comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

(g) Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and defendant's previous contacts with the intoxicated person or minor who is served. Proof of the existence or omission of one or more elements of responsible business practices does not constitute the proof or disproof of the responsible business practices defense.

### *Commentary*

*Overview*

The responsible business practices defense is a central provision of the Act. It provides a defendant a means of protection from liability if it can be shown that, at the time of the service of alcoholic beverages, the defendant was following those business practices which an ordinarily prudent person would follow with the same duty under like circumstances. The defense reaffirms the defendant's duty not to serve intoxicated persons and minors. Subsection (b) makes this clear by providing that when a defendant serves a person with actual knowledge that such person is a minor or intoxicated, the defense does not apply. Evidence of responsible business practices is needed to determine whether a defendant who did not have actual knowledge should have known of the person's intoxicated condition or age. Nor does the defendant have to pursue this defense in order to avoid liability. If the plaintiff cannot meet his or her burden of proof that the defendent served an intoxicated person or minor knowing or in circumstances where the defendant should have known of the intoxication or the underaged status, then liability will not attach, whatever business practices were in existence at the time of

the service. Thus, the defense does not create a new or alternative cause of action to those stated in Sections 6 and 7.

There are, however, numerous instances in which a defendant did not know of the person's intoxication, and the issue of liability rests on whether he should have known of this fact. The most common issue concerns whether the person's intoxication was "obvious" or "apparent." Frequently there is conflicting evidence regarding the obvious signs of intoxication, the number of drinks served and the other circumstances of the sale. Plaintiffs may be placed at an initial disadvantage due to the possible lack of evidence to make a prima facie case against a particular defendant; defendants in turn are put at a disadvantage if such a case is made due to the difficulty in recreating the particular circumstances of the sale and the very subjective and uncertain nature of the "obvious intoxication" standard. In such cases, where factual determinations are difficult to make, the responsible business practices defense may take on particular importance for the fact-finder in determining whether due care was exercised.

While this defense recognizes the difficulties in fulfilling the defendant's duty not to serve intoxicated persons and minors, it also provides that the defendant, as a member of the legitimate business operation, is in a position to take practical steps in the operation of that business to reduce the risk of harm to others. The Act's intent is to provide an incentive to adopt appropriate procedures, practices and actions in order to reduce those risks. Thus, the Act provides possible means of protection when an intoxicated person or minor is served, but only if the business is conducted in a responsible and prudent manner.

The defense is a relatively new concept in dram shop law, but not unprecedented. The North Carolina statute provides that evidence of "good practices" in cases involving service to minors, may be used as a defense.[1] In addition, business practices have been found relevant in some cases on the issue of negligence without any explicit standard in the state's dram shop statute.[2]

Responsible business practices encompass a broad range of business activities. The section provides a noninclusive set of practices to provide guidance to the fact-finder. Subsection (g) is critical in interpreting the intent of this listing. As stated in that provision, the defense may be available even if some of the practices (or others not listed) have not been met. The particular type of business, the existence of adequate resources

1. N.C. GEN. STAT. § 18B-122 (1983).
2. *See, e.g.*, Ewing v. Clover Leaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).



for implementation, particularly of training programs and the defendant's community, may all have an input on how a reasonable person would act in defendant's circumstances. Thus, the "totality of the circumstances" must be considered in applying the section to particular facts.

One possible objection that has been raised regarding the responsible business practices defense concerns the potential increase in liability of the licensee if certain business practices are adopted too enthusiastically (a "good samaritan" rule objection). This section is drafted to avoid this problem. The defendant has a duty to take reasonable steps to avoid serving intoxicated person and minors. This section, as well as Section 6, provides a basis for balancing this duty against the defendant's need to conduct a legitimate business and the difficulties of recognizing intoxicated persons. Thus, a defendant who decides not to take reasonable steps to fulfill this duty does so at his or her own peril. The duty remains the same. If a defendant takes actions that go beyond such reasonable steps, it provides not an increase in liability, but additional support for a responsible business practices defense. In addition, Section 6 provides specific limitations on the defendant's duty to investigate behavior of persons outside the defendant's premises.

*Training*

The section provides that responsible business practices include comprehensive training of defendant and defendant's employees and agents regarding responsible service of alcoholic beverages and handling of intoxicated patrons. Numerous training programs are now in existence, but they are at a preliminary stage of development and vary widely in format, duration and content. The section does not attempt to define responsible service of alcoholic beverages in recognition of this experimental stage of development, and recognizes the need for the fact-finder to judge the training programs in light of community and business standards at the time of the service in question.

A critical variable which is included in the section, concerns the development of both knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. This reflects the need to learn interaction skills in order to make the identification of intoxicated persons easier and to make interventions with patrons who drink heavily more effective. The inability to implement training procedures renders a training program useless. Several training pro-

(beginning in October 1983) and included three data components. In the first phase, all state appellate and supreme court dram shop cases were systematically reviewed and analyzed with the aid of a specially-designed computer program. The second phase consisted of detailed interviews with practicing attorneys for both plaintiffs and defendants primarily in three case-study states (Massachusetts, California and Michigan). The interviews were designed to determine how dram shop cases are currently being litigated, with particular attention to the role, if any, of server intervention programs and to the process of settling claims. Finally, an inventory of current server intervention programs was developed. During this final phase, program components and training topics were examined, which provided the data from which the model "responsible server defense" was developed (see below)[5]

The research established several key findings. The case law review revealed that the legal system was not establishing clear guidelines for applying dram shop liability provisions or concepts. The states vary widely in the type and extent of liability that is being imposed and, frequently, there is great uncertainty as to when liability will apply. Even in states where the legislature has acted to establish statutory guidelines, cases have reached conflicting interpretations of the provisions. This uncertainty has had a major impact on the litigation strategy of the parties, encouraging settlements of questionable claims, high insurance costs, and considerable debate and uncertainty in the legal community.

The research also found that courts and attorneys have ignored the recent efforts by the retail industry, educators, and others to develop server intervention programs as a means for the industry to meet its responsibility to the public safety. "Server intervention" refers to reforms in the mode of operation by retail establishments designed to reduce the risk of serving alcoholic beverages to intoxicated or underaged patrons and to promote alternative forms of transportation (other than drunk driving) for patrons who do become intoxicated. Such programs are being instituted throughout the country and consist of two types of trainings. Serving staff (e.g., bartenders and cocktail waitresses) are trained to recognize intoxicated persons and minors, and to intervene effectively. Management personnel are trained to adopt procedures to support the server intervention process, by promoting alternative nonalcoholic beverages and foods, alternative transportation programs and other business reforms. Efforts to formalize the training curricula are now in process.[6]

5. Detailed findings of the research are reported in the following: Mosher, *supra* n.2; Mosher, J., "Server Intervention: Present Status and Future Prospects," paper presented at the Research Workshops on Alcohol and the Drinking Driver sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, (May 1984); Mosher, J., "Server Intervention: A Guide to Implementing Local and State Programs," paper presented at a conference entitled "Control Issues in Alcohol Abuse Prevention II: Impacting Communities," Charleston, South Carolina, sponsored by the South Carolina Commission on Alcohol and Drug Abuse and other organizations, (Oct. 1984). Colman, V., Krelll, B., and Mosher, J., "Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective," *W.S.U. L. Rev.* (forthcoming); Colman, V., "Dram Shop Laws: A Prevention Tool," paper presented at the 40th Annual Conference on the National Council on Alcoholism, Detroit, Michigan, (Apr. 1984); Harrington, C., "Illustrative Dram Shop Settlement and Jury Verdict Cases: Further Evidence that Server Liability Is Expanding?" Prevention Research Group, (Dec. 1984).



This industry response to public pressure represents a first step toward establishing a definition of negligent service of alcoholic beverages within a dram shop context. Current law rests primarily on whether a patron was served while "obviously intoxicated," a subjective standard that has led to uncertainty in practice. By focusing the issues so narrowly, the courts have left out an evaluation of the management and server practices which led to the service in question. These practices can be evaluated by a fact-finder to determine whether a reasonable person in like circumstances could have acted more prudently, the classic definition of negligent behavior.

The Model Dram Shop Act is designed to address these problems. It provides a structured, comprehensive guide for drafting a dram shop law or deciding a dram shop case and addresses the uncertainties in current law that have been identified in the course of the research project. It also establishes a "responsible practices" defense as a means to coordinate the legal handling of dram shop cases and the recent development of server intervention programs. As such, it is a resource tool, based on systematic and thorough research, for those developing a comprehensive dram shop liability policy once a decision that such a policy is appropriate in a given state or court. Thus, it is not meant as a vehicle for advocating the imposition of liability but rather as a means to maximize its beneficial public health impact once the decision to impose liability has been made.

A first draft of the Model Act was circulated for comment in January 1985 to over 150 interested persons, including representatives of industry, citizen leaders, trial attorneys, health professionals, and government officials. Twenty responses were received, many of which offered detailed critiques and suggestions. The Act was revised based on the critiques and further study, and a final version of the Act was com-

6. *See*, Mosher, *supra* n.5; Peters, J. (ed.), *Proceedings of the First Northeast Conference on Alcohol-Server Liability*, January 12-13 1984, Boston, Mass. (Northampton, MA: Intermission Ltd., 1984). Intermission Ltd., a non-profit organization, is the leading institute developing such trainings and coordinating the efforts of all training programs. Services include consultations, the newsletter *Responsible Beverage Service*, trainings and a resource library. For further information, contact In-

# DRUNK DRIVING FACTS

ALCOHOL-RELATED FATAL ACCIDENTS, ALASKA, 1976-82

| YEAR | FATAL ACCIDENTS | INVOLVED ALCOHOL | PERCENT INVOLVING ALCOHOL | PERCENT ACCIDENTS DUE TO DRIVERS AGE 17-20 FATAL/ALCOHOL INVOLVED | | FATALITIES TOTAL | FATALITIES ALCOHOL RELATED |
|---|---|---|---|---|---|---|---|
| 1982 | 98 | 51 | 52.0% | 9% | 17% | 107 | 53 |
| 1981 | 90 | 66 | 73.3% | 21% | 25% | 100 | 76 |
| 1980 | 86 | 58 | 67.4% | 17% | 12% | 95 | 64 |
| 1979 | 81 | 59 | 70.4% | 34% | 33% | 91 | 69 |
| 1978 | 112 | 54 | 48.2% | not | not | 127 | not |
| 1977 | 130 | 64 | 49.2% | available | available | 136 | available |
| 1976 | 111 | 67 | 60.4% | " | " | 124 | " |
| TOTAL | 708 | 419 | 59.2% | | | 780 | |

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ALCOHOL ACCIDENTS BY AGE GROUP, ALASKA, 1979

| AGE | NUMBER OF ALCOHOL ACCIDENTS | PERCENT ACCIDENTS DUE TO AGE GROUPS | PERCENTAGE OF LICENSED DRIVERS |
|---|---|---|---|
| 15-18 | 220 | 11.3% | 3.4% |
| 19-29 | 922 | 47.2% | 36.5% |
| 30-39 | 407 | 20.9% | 27.8% |
| 40-49 | 238 | 12.2% | 15.2% |
| 50-59 | 134 | 6.9% | 10.3% |
| 60+ | 31 | 1.6% | 2.5% |
| TOTAL | 1952 | 100% | 100.0% |

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ARREST FOR DRIVING UNDER THE INFLUENCE, BY SEX, ALASKA, 1979-82

| | 1979 | | 1980 | | 1981 | | 1982 | |
|---|---|---|---|---|---|---|---|---|
| MALE | 2599 | 86.5% | 2240 | 87.0% | 3012 | 86.6% | 3962 | 86.4% |
| FEMALE | 453 | 13.5% | 335 | 13.0% | 469 | 13.4% | 626 | 13.6% |
| TOTAL | 3006 | 100% | 2575 | 100% | 3481 | 100% | 4588 | 100% |

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ARRESTS FOR DRIVING UNDER THE INFLUENCE, ADULT/JUVENILE STATUS
ALASKA, 1979-82

| | 1979 | | 1980 | | 1981 | | 1982 | |
|---|---|---|---|---|---|---|---|---|
| ADULT | 2922 | 97.3% | 2584 | 97.0% | 3384 | 97.3% | 4465 | 97.3% |
| JUVENILE | 84 | 2.7% | 91 | 3.0% | 97 | 2.7% | 123 | 2.7% |
| TOTAL | 3006 | 100% | 2575 | 100% | 3481 | 100% | 4588 | 100% |

This information has been prepared in the public interest by the State Office of Alcoholism and Drug Abuse, Department of Health and Social Services. Information was provided by the Department of Law and the Highway Safety Planning Agency.

# NOTICE

**In a further effort to crack down on drunk drivers in Alaska, the last legislature made important changes in the Driving While Intoxicated laws. Effective October 17, 1983 (12:01 a.m., Pacific Standard Time), the law provides:**

- If you are in a traffic accident or are suspected of having committed a moving traffic violation you may be required to take an on-the-spot preliminary breath examination. Refusal to take the preliminary breath examination is an infraction, punishable by a fine of up to $300.
- If you are convicted for the first time of D.W.I. you will be sentenced to a minimum of 72 consecutive hours in jail and a fine of $250.
- If you are arrested for D.W.I. you must take a breathalyzer or intoximeter test. Refusal to take a breath test is a separate crime, punishable upon a first conviction by a minimum of 72 consecutive hours in jail and a fine of $250.
- If you are convicted of D.W.I. or refusal to take a breath test and you have a previous conviction for either a D.W.I. or a refusal within the past 10 years you will be sentenced to a minimum of 20 consecutive days in jail and a fine of $500.
- If you are convicted of D.W.I. or refusal to take a breath test and you have two prior convictions for either D.W.I. or refusal within the past 10 years you will be sentenced to a minimum of 30 consecutive days in jail and a fine of $1,000. Additionally, your motor vehicle may be permanently forfeited to the state.
- The police must immediately seize your driver's license if you are arrested for D.W.I. and you refuse to take a breath test or your breath test shows a breath alcohol reading of .10 or higher. A temporary driver's license, valid for seven days, will be issued to you. Your license is automatically revoked by the Department of Public Safety unless, within the seven day period, you file a written request for an administrative hearing challenging the license revocation. A revocation for a first offense is for 90 days; for a second offense, one year; and for a third offense, 10 years.
- If your license was revoked after conviction for D.W.I. or refusal, and you drive during the revocation period, you may be prosecuted for the crime of driving while license revoked. Upon conviction, if your license revocation was for a first offense, you will be sentenced to a minimum of 30 days in jail and a $500 fine; if your license revocation was for a second or subsequent offense, you will be sentenced to a minimum of 90 days in jail and a fine of $1,000. You will also lose your license for an additional year.
- If you are a driver who has been involved in an accident which resulted in injury to another person, a sample of your blood may be drawn to be analyzed for alcohol content without your consent.

## Important Notice

- If you are suspected of drunk driving, the new law requires you to take two separate breath tests, a preliminary breath examination and a breath alcohol test. The preliminary breath examination is conducted on-the-spot with a small, battery operated, portable device. The breath alcohol test is conducted at a police station with an intoximeter or breathalyzer test instrument. These testing devices measure the alcohol concentration in your breath.
- Your driver's license will be automatically revoked by the Department of Public Safety for refusal to take a breath test, or for a breath test that shows a breath alcohol reading of .10 or higher. Your license remains revoked whether or not you're found guilty.
- If your driver's license is revoked for a first offense D.W.I., you may ask for a limited license, but only for the last 60 days of the required 90 day revocation period. If you refuse to take a breath test, or have been convicted before, you cannot get a limited license.

### Penalties for Driving While Intoxicated and Refusal to Take a Breath Test AS 28.35.030 and AS 28.35.032 - Class A Misdemeanor

| | Fines | | Imprisonment | | Driver's License Revocation | Possible Loss of |
|---|---|---|---|---|---|---|
| | Minimum | Maximum | Minimum | Maximum | Minimum | Motor Vehicle |
| 1st Offense | 250 | 5,000 | 72 hours | 1 year | 90 days | No |
| 2nd Offense* | 500 | 5,000 | 20 days | 1 year | 1 year | No |
| 3rd Offense* | 1,000 | 5,000 | 30 days | 1 year | 10 years | Yes |

* For purposes of 2nd or 3rd offenses, prior convictions for either D.W.I. or refusal will be considered. Prior convictions in Alaska as well as anywhere else in the United States will be considered as long as the conviction occurred within the previous 10 years. A conviction for both D.W.I. and refusal arising out of the same incident will be considered a single prior conviction.

**Driving While Intoxicated** means operating a motor vehicle with a breath alcohol content of .10 or higher, or operating a motor vehicle when the driver's ability is impaired by alcohol or a depressant, hallucinogenic, stimulant or narcotic drug.

***If you are driving while intoxicated and you cause an accident which results in injury or death to another, you may be charged with assault in the first, second, or third degree, negligent homicide, manslaughter, or second degree murder. These offenses are all felonies and may result in lengthy prison terms.***

# REPRESENTATIVE DON CLOCKSIN

**Alaska House of Representatives**

MAJORITY LEADER

1024 WEST SIXTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 274-4031

WHILE IN JUNEAU:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3704


Honorable William Sheffield
Governor
State of Alaska
Pouch A
Juneau, Alaska 99801

September 25, 1985

Dear Governor Sheffield:

I am aware of the national problems with liability insurance coverage for nearly all classes of risk groups, and many of the ways those problems are manifested in Alaska. We have seen drastically increased insurance rates and abruptly terminated policies for school districts, day care centers, bars, nurse-midwives, fishing boats, etc.

I am also aware of the meeting in Anchorage at which Mr. George, of the State Division of Insurance, a multitude of insurance industry executives and numerous attorneys representing the industry and defendants in liability cases called for a fundamental restructuring of the Tort Law system in Alaska and nationally, as "the" solution for the liability insurance problem. This restructuring entails major restrictions in the ability of victims to recover fully for their losses.

I am further aware of your formation of a "task force," to which Mr. George will be the principal staff, which will study the liability insurance matter from the State's perspective and suggest to you "reforms" that will help solve the problems of liability insurance coverage in Alaska.

I am concerned that your task force may not adequately consider the impact of proposed "reforms" in Alaska's Tort Law system on the rights and privileges of victims who are the plaintiffs in liability cases. I am equally concerned about the apparent lack of focus on the role of government regulatory agencies in enforcing various life, health and safety codes in order to reduce the risks to the public, diminish the exposure of insured groups to risk, and thereby to reduce losses. Put very simply, I doubt that the answer to our problem lies solely in rolling back government regulation of health and safety or restricting the rights of victims of negligence.

I am also concerned that your chief Administration official on insurance has apparently already made a judgement as to what's needed to solve the problem. He apparently feels that defects in the judicial system and the governmental regulatory structure are the problem, not the industry

itself. I would remind you that the Division of Insurance is supposed to protect consumers, not the industry. See AS 21.36 and Northern Adjusters, Inc. v. Dept of Revenue, 627 P. 2d 205 (Alaska 1981).

Nationally, some questions have been raised regarding whether the so-called insurance "crisis" has been artificially created by the industry. I've enclosed two articles, and I'm gathering more information.

I can certainly appreciate the problems that all groups of insureds are having in acquiring liability insurance at a reasonable rate. I am certain, however, that the sole solution to this does not reside in limiting victim's access to recovery in the Courts or in eliminating protection of public health and safety. I do not believe the public will support such exclusive "solutions" once they understand their impact. Such "solutions" strike at the heart of individuals' ability to be compensated for harm incurred through no fault of their own and to be protected from injury or loss they cannot control. The tort liability system provides substantial incentives to business to operate safely, at little or no cost to government. As you know, this this argument is at the heart of your proposal in HB 345 to make bar owners liable for negligence in the serving of alcohol.

I would like some assurance from you that the concerns of victims will be represented on your task force, and that attention will also be given by your task force to the role of enforcement of life, health and safety codes in reducing risk exposure and losses by groups of insured. Your assistance in bringing a balanced approach to the perspective of your own working group on this matter will save us all alot of unnecessary future aggravation when bills to rectify the problems of liability insurance come before the Legislature for consideration.

Thank you for your attention to this matter.

Sincerely,

Representative Don Clocksin
House Majority Leader
Alaska House of Representatives

DC:je encl.

# Consumer advocates decry huge insurance rate hikes

By JONATHAN EIG
Los Angeles Times

WASHINGTON — Midwives, day care centers, engineers and entire cities are losing their insurance policies or suffering huge premium hikes because insurers are fabricating an industrywide economic crisis, consumer advocates charged Thursday.

Consumer activist Ralph Nader said the dramatic step taken by insurers "in order to get high premiums from millions of Americans . . . reflects a major economic crisis, but one that is manufactured by a very wealthy insurance industry."

Insurance companies nationwide are looking to increase profits and reduce malpractice payments in light of the industy's smallest profit margin in years. And, activists charged at a news conference, they are accomplishing this by canceling policies, failing to renew them or by increasing premiums as much as 1,000 percent.

Dennis Connolly, vice president for liability at the American Insurance Association, disputed Nader's charges, saying insurers are being forced to drop riskier clients because they simply cannot afford the huge malpractice and negligence liabilities being assessed by courts. Insurers are not greedy, Connolly said, but simply trying to survive.

Jim Dinegar, a Washington representative for the Independent Insurance Agents of America, agreed that the industry cannot survive the huge lawsuits such as those brought against companies that allegedly cause environmental hazards. If legislators fail to offer more protection for insurers, Dinegar said, companies that rely on insurance protection might fold.

But Bob Hunter, president of the National Insurance Consumer Organization, said insurers were overreacting. The insurance industry, which he said is already showing signs of recovery, could easily reverse its fortunes with small premium increases and without imperiling businesses that rely on their insurance, Hunter said.

Some 1,400 members of the American College of Nurses-Midwives already have lost their malpractice insurance, as have many engineers who perform pollution-related work.

Moreover, the government of the Virg. Islands could soon be without its two principal insurers, and even tram operaters at Mount Rushmore could be forced out of business by threats to their coverage, Hunter said.



# Nader claims insurance industry manufacturing crisis

By JUDI HASSON
United Press International

WASHINGTON — Consumer advocate Ralph Nader told Congress Thursday the insurance industry is a "cash cow" that is manufacturing a phony crisis by canceling liability policies for daycare centers, nurse-midwives and other services.

Nader told a House commerce subcommittee the insurance industry is betting it can get mammoth rate hikes by refusing to sell policies or demanding excessive premiums to sectors of the economy it says are high risk.

"The insurance companies are using judges and juries as their favorite whipping boys, blaming verdicts and settlements for their troubles," Nader said. "The insurance industry should be more than a cash cow. It should be a safety bull to reduce the basis for claims."

The hearing on the problems of getting insurance coverage was called by Rep. James Florio, D-N.J., who said the crisis in property casualty insurance, the inability of some to get coverage for loss or damage to their property, is widespread and growing fast.

Among its victims are architects, midwives, hotels, taverns, ski resorts and day care centers, which have had a hard time getting insurance because of cases involving employees who abused children.

The expense and scarcity of insurance coverage has forced many businesses to close or greatly increase the cost for basic services, according to witnesses.

Robert Hunter, president of the National Insurance Consumer Organization, said Maryland obstetricians recently faced a 70 percent insurance hike, and malpractice insurance for lawyers and architects jumped 300 to 900 percent.

Day care centers, if they can get insurance at all, are facing a 200-500 percent increase in their rates, Hunter said.

The industry, however, told the congressional hearing it had to suspend coverage of certain areas because it was suffering huge losses, but it is working to find a solution to the problem.

Juneau Empire 4-3-85

Workings / 345

# 'Dram shop' bill deserves your support

Despite its two false starts, we hope the third time is a charm for Gov. Bill Sheffield's "dram shop" bill.

If adopted by the Legislature, the bill would allow persons involved in accidents with drunken drivers to more easily sue bar owners for negligence. In addition, the bill changes the test for negligence to make it easier to prove. Under current law, "criminal negligence" must be proved, which is all but impossible.

Though introduced and pulled twice, if the bill that debuted this week were passed it would provide a valuable tool for clamping down on alcohol abuse in Alaska. Much progress has been made in our state, especially in toughening the drunken driving statutes. But those statutes essentially place all of the responsibility on the individual.

In some cases, however, a bar could be considered an accomplice if the bartender had continued to serve a customer who was already obviously intoxicated. If that customer then climbed into a car and killed someone, there would be plenty of blame to go around. Not only would the individual be negligent but the bar would, too—under the new legislation.

That only makes sense, since giving a drink to someone who is already obviously drunken is just like cocking a gun. It not only hurts the individual, it transforms him into a threat to himself and the public.

It should be noted that the majority of bar owners and bartenders are responsible individuals who would not serve an obviously intoxicated customer. Unfortunately, though, there are those who try to bend, if not break, the law.

That, combined with the inadequate enforcement of the state's liquor laws — there are five enforcement officers for the entire state — makes it all too easy for an accident to happen. Too often, when a drunken driver is involved, someone gets hurt or killed.

It has happened in Juneau, Anchorage and almost every community in Alaska. A drunken driver has killed a pedestrian, a passenger in another car or a passenger in his car. It is a tragedy when that happens, but that tragedy is made even worse if that driver was knowingly served 10 drinks in a bar before driving.

In the past there has been resistance to a better "dram shop" bill from the liquor lobby. Any fears that lobby has, however, would be minimized by its members refusing to serve customers who are obviously intoxicated.

We urge you to contact your legislators in support of this bill.

APR 18 1985

# REPRESENTATIVE DON CLOCKSIN

## Alaska House of Representatives

1024 WEST SIXTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 274-4031

WHILE IN JUNEAU:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3704

MAJORITY LEADER

MEMORANDUM

TO: Representative Katie Hurley
Chair
State Affairs Committee

DATE: April 18, 1985

FROM: Representative Don Clocksin
Majority Leader

SUBJECT: Liquor Industry

Two issues affecting the liquor industry are pending in the Alaska State Legislature. The first of those is proposed revisions to DRAM Shop Liability appearing in House Bill 345. That bill is scheduled for its first hearing in your committee today. I am a strong supporter of that legislation, as you know, and believe that it will operate as a substantial deterrent to the serving of alcohol to drunken persons.

The second issue is the liability insurance problem. In case you have not seen it, attached is a letter and materials distributed by Senator Joe Josephson regarding this issue. His proposal, simply put, is to appropriate up to $10 million to capitalize a "public insurance corporation" and recoup the $10 million with a doubling of the state tax on alcohol.

It is my judgement that insufficient time remains in this legislative session to do what Senator Josephson is proposing. While many of us recognize the serious problem faced by the liquor industry, that problem is not unique to them and also applies to crab boats, day care centers, architects, etc. Furthermore, I am concerned that the consumers will pay for this problem with drastic increases in alcohol at a time when many of us do not believe that consumer taxes need to be increased.

I recommend that you consider establishing as a formal interim project of the State Affairs Committee a review of both of these situations. It would require extensive research, hearings, and ingenuity. Please be advised that my original position was to completely separate the issues and urge passage of House Bill 345 regardless of how the insurance problem was resolved. Political realities dictate otherwise.

I would be happy to talk to you about this proposal in detail. Thank you.

DC:blg

cc: The Honorable Bill Sheffield
Representative Ben Grussendorf
Representative Al Adams
Senator Joe Josephson
Catherine Bigler, M.A.D.D.
Jerry Reinwand, C.H.A.R.

Alaska State Legislature

House of Representatives

Committee on State Affairs

Pouch V
State Capitol
Juneau, Alaska 99

(907) 465-4183

Official Business

To: Mr. John George, Director
Division of Insurance

From: Nevette Bowen, Committee Staff
House State Affairs Committee

Date: November 6, 1985

Subject: Dram shop - liability insurance

As per our conversation please review the model act, particularly the Responsible Business Section and determine whether or not it has the potential of reducing insurance premiums for Alaska licensees who can show compliance.

Also, has the cost of insurance for the liquor liability actually decreased since 1980 and if so can it be attributed to the change in Alaska'a dram shop statute?

Please return the Model Act to the committee after you have had a chance to review it as we are very short on copies.

Thank you very much for your time and effort.

PRC PREVENTION RESEARCH CENTER
2532 Durant Avenue
Berkeley, California 94704
(415) 486-1111



June 7, 1985

George Mundell
Regional Program Coordinator
Office of Alcoholism and Drug Abuse
Pouch H 05F
Juneau, Alaska 99811

Dear Mr. Mundell:

My name is Victor Colman, an associate of Jim Mosher's. I was substantially involved in the drafting of the Model Dram Shop Act, and have been following the legislative processes that the Act has undergone these past sessions. California was one state where the Act had wide dissemination and interest, and part of the Act was introduced into the state Assembly, but the proponents of the bill pulled out just before the first committee hearing for lack of support. Other states have also taken more than a token interest in the Act, including Oregon, Hawaii, and Florida.

Thank you for forwarding the Task Force materials, the industry comments were most enlightening. I hope that the Model Act will get a full briefing in your state. Please keep us abreast of any such developments. Of course, if any additional background material is needed in the liquor liability area, feel free to call or write me. One possible issue is the rising insurance premium costs when dram shop is instituted or enlarged. As we mention in the commentary to the Model Act, a premium should be reduced if the licensee can show compliance with responsible server practices, usually by undergoing a bona fide server training course. There now exist several insurance companies who are giving discounts for such responsible servers. Innovative ideas like this are excellent retorts to the same old arguments against the imposition of civil liability.

Please keep in touch.

Sincerely,

Victor Colman

Victor Colman, J.D.
Legal Research Analyst

cc. Jim Mosher, J.D.

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT**

*DIVISION OF INSURANCE*

*POUCH D*
*JUNEAU, ALASKA 99811*
*PHONE: 465-2515*

January 28, 1986

Honorable Katherine T. Hurley
Alaska State House of Representatives
P.O. Box V
Juneau, AK 99811

Attention Navette Bower

Dear Representative Hurley:

Re: "Liquor Liability"

Thank you for the opportunity to review the "model act" regarding liability of retail license premises. From the copy you provided to me, I am unable to tell if this particular "model act" is one also promulgated by the Uniform State Law Commissioners, who promulgate most uniform and model acts. If it is not, promulgation by that body always appears to give impetus to enactment.

Liability for serving liquor is not new, and the fact that something over three-fourths of the states "tamper" with common law liability is evidence that the system has not worked very well for some time. The effect is that legal liability connected with licensed premises is the center of a now visible ongoing controversy which has been around legal circles for decades, in fact, a couple of centuries.

Insurance companies writing liquor liability business in Alaska have run into the expected wide variety of "results." Even though it is my understanding we have about 600 licensed premises, that number is still very small in dealing with insurance matters. Insurance coverage is based on "the law of large numbers," and, as in so many areas, Alaska's situation just does not supply these numbers. To worsen matters, it is not typical for insurance companies to break out their losses on liquor liability as opposed to other and more general types of liability. We have recently undertaken efforts to secure more definite information on liquor liability losses.

Enactment of the model act would, at the very least, send a signal to insurance underwriters that Alaska was trying to do something to at least stabilize and make more predictable the liability of bar owners, package stores, etc. Model acts tend to build up case law in the various jurisdictions in which they were enacted, and frequently some enterprising scholar collects reports of all of the cases by way of a synopsis behind each section of the law, and a force for real stabilization of the law nationwide is created. To the extent that this would happen, enactment of a model act, such as the one you present, would be very, very useful in dealing with Alaska matters pertaining to liquor liability insurance. Many underwriters have told us that it is not so much the size of judgments that causes them so much grief, rather the inconsistency of courts in North America in awarding such damages and judgments. Size they can deal with, inconsistency they cannot, they often say.

To respond in the manner you would wish us to, a complete review of this bill based on the impact on consistency of awards in appropriate liability cases would have to be undertaken by a relatively knowledgeable liquor liability tort attorney/researcher. Once the effect on present Alaska law was established, this material could be presented to underwriters, and, if the material was favorable, an increase in availability and, perhaps, a reduction in premiums might be achieved.

As to past results in this area, the most graphic material is presented on attachment 1. Note that during the period 1980-1983, insurance companies writing liquor liability in Alaska lost $1.41 for every dollar of premium they collected. The economics are stark. It is doubtful that an insurance carrier would tie presenting liquor liability to the market as a means of getting other general liability business from the same clients. The nature of most liquor establishments, with the exception of large liquor store chains in Anchorage, just does not make that marketing approach attractive. (Insurance companies have been known to market unprofitable lines in order to fill out a liability package to present to upper-middle sized and large businesses.)

In the past several years, most insurance companies that have attempted to be in the liquor liability business in Alaska were in business for only one year. They wrote at grossly inadequate rates. (I use inadequate here as a technical rating term, and not generically. An inadequate rate is one that is not sufficient to allow the insurance company to stay in business.) Their products were priced from 30¢ to 85¢ per $100 of gross liquor sales. It appears that only the companies which wrote at a rate of about $3.00 or slightly more per $100 of gross liquor sales have an adequate rate and provide an ongoing market. Currently, the only insurer for the classifications of bars and taverns, the Alliance, is experiencing difficulties and delays in obtaining reinsurance. Without reinsurance, essentially, there is no insurance.

As you are aware, insurance companies basically "lay off" their risks in large part, not infrequently 95% and even 100%, to other insurance companies. Only an insurance company buys reinsurance. It is not regulated by this or any other state. Market forces control it.

For a retail liquor sales outlet in 1986, we know of one market charging $4.50 per $100. The rate trend we perceive indicates premiums of $4.50 to $5.25 per $100, certainly for the next 18 months.

Educating and training employees of licensed premises is a current popular trend. There is no question that such proper loss control techniques and "packaging" of a particular liquor store or bar to a broker will allow a broker to go into the marketplace and achieve more success in "selling" the client's risk. However, in a period of emphasis of liquor liability in the public press that increases public awareness, coupled with the trend of increasing frequency of loss and increasing size of judgment, it appears that such useful practices as sound risk management would dictate are bucking a strong head wind. Short-term price reduction is unlikely.

It is obvious that society, through common law or statute, has insisted that a seller of liquor in some way be responsible for his or her acts related to intoxicated patrons, selling to the incompetent or minors, and otherwise. However, the realities of the situation are that many liquor establishments, estimated by some as 40-60% of all such establishments in the State, "go bare" without any liability insurance whatsoever. The nature of many of those businesses hardly makes them a "deep pocket" for recovery for injuries for which they are found to be the proximate cause.

The exact dollars spent on liquor liability premium in Alaska is impossible to establish because many companies are writing in the so-called surplus lines, otherwise known as the nonregulated or nonadmitted market. That is true simply because the insurance is not available from "licensed companies." Between 1980 and 1983, a mere $724,000 was spent on premiums for liquor liability which we can trace through financial statements. Given the fact that Alaska produces something over $800,000,000 premium a year and is dead last among the states, this liquor premium is clearly an insignificant amount of premium in the overall business of insurance.

As you are aware, the Alaska Supreme Court reportedly reversed itself on a major liquor liability case known generally as "Tommy's Elbow Room," and apparently found liability where they had before rejected finding liability on the same set of facts and circumstances. We have here a situation of wide publicity which will further depress the market. Underwriters clearly would rather put their underwriting capacity into areas where risks are at least more predictable.

Given the nature of insurance, no one can make anyone sell insurance in Alaska. The industry is actually regulated in a manner similar to the way airlines were regulated, as opposed to utility regulation whereby granting monopolies or partial monopolies is in the system. Therefore, insurance, a totally portable commodity, can pick up and go whenever the company decides that is the best course of business action to take.

We hope very much that the legislative legal division or other appropriate researchers will delve into this model act, and we note that, as with most model acts, commentary on each section is provided. A body, such as Alaska's former Code Revision Commission is, in our experience, a good method of dealing with these matters which allows academic and legal study to be closely focused. In a time of crises, perhaps that simply can't happen.

We are continuing to inquire of appropriate sources what the effect on liquor liability would be, but, as with other proposed reforms of the civil justice system, insurance companies cannot give an answer based on speculation. Only the actual collection of premiums and payment of claims to establish loss experience will prove or disprove the effect of any statutory reform on legal liability.

Please contact me if I can provide any further information or assist you in any way in this most compelling matter.

Sincerely,

John George
Director

JG/mst3267m
ul2786a
Enclosures

LIQUOR LAW LIABILITY EXPERIENCE 1980-1983

| STATE | # CLAIMS | EARNED PREMIUM | PREM RANK | INCURRED LOSS | LOSS RANK | LOSS RATIO | POPULATION | PER CAP PREMIUM | PER CAP LOSS |
|---|---|---|---|---|---|---|---|---|---|
| ALABAMA | 2 | $139,257 | 29 | $11,648 | 40 | 8.36% | 3,943,000 | $0.04 | $0.00 |
| ALASKA | 3 | $724,250 | 15 | $1,021,061 | 5 | 141.09% | 438,000 | $1.65 | $2.33 |
| ARIZONA | 10 | $845,473 | 13 | $184,454 | 21 | 21.82% | 2,860,000 | $0.30 | $0.06 |
| ARKANSAS | 0 | $16,973 | 51 | $0 | - | 0.00% | 2,291,000 | $0.01 | $0.00 |
| CALIFORNIA | 122 | $11,164,614 | 1 | $3,749,303 | 2 | 33.58% | 24,724,000 | $0.45 | $0.15 |
| COLORADO | 10 | $895,008 | 12 | $358,761 | 16 | 40.08% | 3,045,000 | $0.29 | $0.12 |
| CONNECTICUT | 82 | $1,840,891 | 7 | $964,817 | 9 | 52.41% | 3,153,000 | $0.58 | $0.31 |
| DELAWARE | 1 | $81,825 | 43 | $28,806 | 35 | 35.20% | 602,000 | $0.14 | $0.05 |
| DIST COLUMBIA | 1 | $205,910 | 25 | $1,290 | 46 | 0.63% | 631,000 | $0.33 | $0.00 |
| FLORIDA | 12 | $938,786 | 11 | $146,189 | 22 | 15.57% | 10,416,000 | $0.09 | $0.01 |
| GEORGIA | 3 | $210,734 | 24 | $6,856 | 43 | 3.25% | 5,639,000 | $0.04 | $0.00 |
| HAWAII | 16 | $1,057,030 | 10 | $558,560 | 14 | 52.84% | 994,000 | $1.06 | $0.56 |
| IDAHO | 7 | $71,065 | 44 | $8,945 | 42 | 12.59% | 965,000 | $0.07 | $0.01 |
| ILLINOIS | 71 | $4,700,297 | 4 | $606,222 | 13 | 12.90% | 11,446,000 | $0.41 | $0.05 |
| INDIANA | 13 | $547,209 | 19 | $234,079 | 19 | 42.78% | 5,471,000 | $0.10 | $0.04 |
| IOWA | 34 | $677,111 | 16 | $295,208 | 17 | 43.60% | 2,905,000 | $0.23 | $0.10 |
| KANSAS | 1 | $31,616 | 50 | $69 | 48 | 0.22% | 2,408,000 | $0.01 | $0.00 |
| KENTUCKY | 5 | $152,191 | 28 | $70,397 | 29 | 46.26% | 3,667,000 | $0.04 | $0.02 |
| LOUISIANA | 1 | $276,863 | 22 | $748 | 47 | 0.27% | 4,362,000 | $0.06 | $0.00 |
| MAINE | 5 | $163,765 | 26 | $19,532 | 36 | 11.93% | 1,133,000 | $0.14 | $0.02 |
| MARYLAND | 3 | $100,559 | 36 | $14,719 | 38 | 14.64% | 4,265,000 | $0.02 | $0.00 |
| MASSACHUSETT | 10 | $645,671 | 17 | $727,341 | 12 | 112.61% | 5,781,000 | $0.11 | $0.13 |
| MICHIGAN | 186 | $3,999,556 | 5 | $3,708,008 | 1 | 94.96% | 9,109,000 | $0.44 | $0.42 |
| MINNESOTA | 97 | $5,552,592 | 3 | $2,996,558 | 3 | 53.97% | 4,133,000 | $1.34 | $0.73 |
| MISSISSIPPI | 2 | $137,193 | 31 | $34,275 | 34 | 24.98% | 2,551,000 | $0.05 | $0.01 |
| MISSOURI | 5 | $100,456 | 37 | $101,015 | 26 | 100.56% | 4,951,000 | $0.02 | $0.02 |
| MONTANA | 1 | $51,237 | 48 | $4,877 | 44 | 9.52% | 801,000 | $0.06 | $0.01 |
| NEBRASKA | 6 | $58,174 | 47 | $41,480 | 33 | 71.30% | 1,586,000 | $0.04 | $0.03 |
| NEVADA | 12 | $346,130 | 21 | $70,156 | 30 | 20.27% | 881,000 | $0.39 | $0.08 |
| NEW HAMPSHIRE | 3 | $137,419 | 30 | $100,164 | 27 | 72.89% | 951,000 | $0.14 | $0.11 |
| NEW JERSEY | 93 | $3,504,020 | 6 | $1,504,013 | 6 | 41.95% | 7,433,000 | $0.48 | $0.20 |
| NEW MEXICO | 5 | $82,517 | 42 | $66,610 | 31 | 80.72% | 1,359,000 | $0.06 | $0.05 |
| NEW YORK | 68 | $7,171,545 | 2 | $2,457,751 | 4 | 34.27% | 17,659,000 | $0.41 | $0.14 |
| NORTH CAROLIN | 7 | $152,872 | 27 | $81,685 | 28 | 53.43% | 6,019,000 | $0.03 | $0.01 |
| NORTH DAKOTA | 2 | $97,578 | 38 | $56,924 | 32 | 58.34% | 670,000 | $0.15 | $0.08 |
| OHIO | 11 | $799,321 | 14 | $137,754 | 23 | 17.30% | 10,791,000 | $0.07 | $0.01 |
| OKLAHOMA | 4 | $62,674 | 45 | $256,625 | 13 | 409.46% | 3,177,000 | $0.02 | $0.08 |
| OREGON | 41 | $1,500,884 | 8 | $2,132,333 | 5 | 142.07% | 2,649,000 | $0.57 | $0.80 |
| PENNSYLVANIA | 11 | $1,351,711 | 9 | $922,871 | 10 | 68.27% | 11,865,000 | $0.11 | $0.08 |
| RHODE ISLAND | 0 | $107,572 | 33 | $0 | - | 0.00% | 953,000 | $0.11 | $0.00 |
| SOUTH CAROLIN | 1 | $60,191 | 46 | $9,945 | 41 | 16.52% | 3,203,000 | $0.02 | $0.00 |
| SOUTH DAKOTA | 2 | $97,004 | 39 | $14,034 | 39 | 14.46% | 691,000 | $0.14 | $0.02 |
| TEXAS | 17 | $411,308 | 20 | $113,581 | 24 | 27.61% | 15,280,000 | $0.03 | $0.01 |
| TENNESSEE | 5 | $123,497 | 32 | $789,409 | 11 | 639.21% | 4,651,000 | $0.03 | $0.17 |
| UTAH | 4 | $94,930 | 40 | $387,890 | 15 | 408.60% | 1,554,000 | $0.06 | $0.25 |
| VERMONT | 3 | $102,000 | 34 | $19,373 | 37 | 18.83% | 510,000 | $0.20 | $0.04 |
| VIRGINIA | 2 | $102,173 | 35 | $1,480 | 45 | 1.45% | 5,491,000 | $0.02 | $0.00 |
| WASHINGTON | 18 | $800,534 | 10 | $1,159,568 | 7 | 193.09% | 4,245,000 | $0.14 | $0.27 |
| WEST VIRGINIA | 0 | $42,340 | 49 | $0 | - | 0.00% | 1,948,000 | $0.02 | $0.00 |
| WISCONSIN | 10 | $271,303 | 23 | $209,246 | 20 | 77.13% | 4,765,000 | $0.06 | $0.04 |
| WYOMING | 2 | $86,320 | 41 | $101,490 | 25 | 114.91% | 502,000 | $0.16 | $0.20 |
| PUERTO RICO | 0 | $1,455 | 52 | $0 | - | 0.00% | 3,196,520 | $0.00 | $0.00 |
| NATIONAL TOTA | 1003 | $92,773,228 | - | $26,578,990 | - | 30.26% | 234,731,520 | $0.22 | $0.11 |

Evergreen Inn

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February 5, 1986

Phone (907) 895-4666

Testimony of Bob Cramer
Delta Junction

Presented to the Alaska House, State Affairs Committee by Teleconference from Delta Junction to Juneau, Feb. 5, 1986

Relating to CSHB 345

My name is Bob Cramer. I am owner of the Evergreen Inn, located in Delta Junction.

Good afternoon, Chairman Hurley, Vice-Chairman Navarre, and members Cato, Boucher, Miller, Collins and Jenkins.

The Evergreen Inn provides lodging, meals, and beverage, on a year around basis for highway traverler, construction crews, military personnel, local residents, and visitors to Alaska. A number of legislators have been served meals in my restaurant, including your committee member, Bette Cato.

As a supplier of lodging, meals, and beverage to residents and visitors, I would like to talk with you on CSHB 345 as it refers to the ALASKA VISITOR INDUSTRY.

My business is a provider of hospitality services to the visitor industry....and I am an advisor to the Alaska Visitors Association Board of Directors.

As we all appreciate, the Visitor Industry is the second largest industry in Alaska, generating over $700 million per year.

Each one of you who traveled to Juneau, from your home in Anchorage, or Kenai, Wasilla or Valdez is a part of the Visitor Industry. That is because everyone who travels 100 or more miles from home is by definition, a visitor.

Therefore, every one of us is a part of the Visitor Industry.

The Visitor Industry creates thousands of "local hire" jobs in Alaska. For example, the Alaska Dept. of Labor states that 9,000 jobs are created in Alaska from non-resident visitors and 7,000 jobs from residents traveling within the state. This totals 16,000 jobs directly dependent upon the Visitor Industry.

In addition to these 16,000 direct jobs, another 22,000 jobs are partially supported by the Visitor Industry. This total of 38,000 jobs in Alaska is documented by Dept. of Labor studies. The Visitor Industry is the fourth largest employer in Alaska.

The point is, we are all part of the Visitor Industry...as residents, as business people, and as Legislators...and we all benefit.

In the Visitor Industry in Alaska, the Dept. of Labor again tells us there are 14,500 people employed in "stand-alone" food and beverage operations and another 4,500 people employed in the hotel (lodging + food + beverage) operations, for a total of some 19,000 people. Thus, 50 percent of the state's Visitor Industry employees are working for the lodging and food and beverage portion of the Visitor Industry.

The majority of the lodging and food establishments in Alaska have licenses to serve alcoholic beverages to our state's residentd and visitors.

With the present crisis in liability insurance in our state, it is estimated that less than 20 percent of the licensed premises are covered by liability insurance.

Insurance counselors advise that without liquor liability insurance, premise insurance will not be available.

Therefore, at least 19,000 workers in Alaska may be working for employers that are not properly insured.

It would appear that legislation such as CSHB 345, that would create a further loss of insurability for the Visitor Industry, and force workers to be employed by uninsured employers, would not be in the best interest of the State of Alaska.

Further, the former Tourism Rovolving Loan Fund, as developed by the Alaska Industrial Development Authority (AIDA), has financed and is now carrying the paper on millions of dollars of loans to many of the hotel, lodging, food and beverage businesses in our state.

Legislation such as CSHB 345, would further create loss of insurability of the visitor facilities financed by the state. This would not be in the best interest of the state either.

For example, if the state was holding the loan on a visitor facility and that loan amounted to $500,000.....a million dollar liquor liability suit and judgement against the uninsured visitor facility would cause the state to loose up to $1 million for that facility.

How many such visitor facilities is the state now financing?

Chairman Hurley, it is respectfully suggested to your State Affairs Committee, that additional time and research be devoted to resolving the reality of the affect on the Visitor Industry and the 19,000 employees in the state, and the large dollar amount of loans carried by the Tourism Revolving Loan Fund.

Is it possible to work with the Dept. of Labor and the Dept. of Revenue to determine the potential affects of creating a further loss of insurance coverage and larger damage awards against the Visitor Industry?

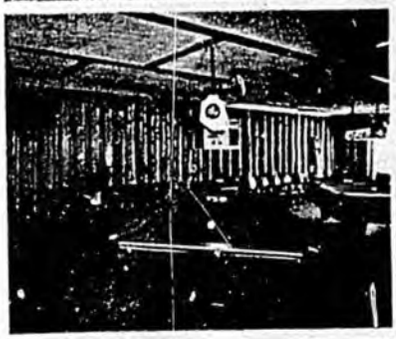
It seems a direct conflict for the state to be encouraging visitor travel to and within Alaska, while at the same time writing legislation that harms the Visitor Industry, it's visitor facilities, 19,000 employees, and threatens the state's loan funds.

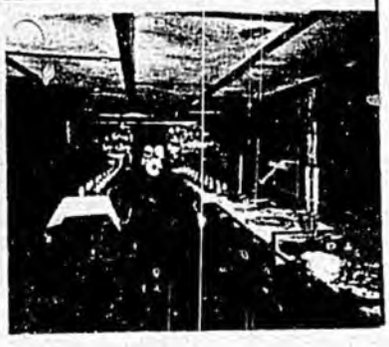
In conclusion, please explore the affect on the employees and the loan fund as part of your legislative mission.

Thank you,

Bob Cramer

# DELTA JUNCTION
# ALASKA
# THE EVERGREEN





HB 345

# MADD

*MOTHERS AGAINST DRUNK DRIVERS*

*Fairbanks Northern Lights Chapter*
**P.O. Box 1167**
**Fairbanks, Alaska 99707-1167**
**(907) 456-3964**

Tuesday, February 11, 1986

Honorable M.Mike Miller
Chps. House Judiciary Com.
Room 124, Capitol Blg.
Juneau, Ak 99811

Honorable M.Mike Miller;

We understand that HB 345 will be moved to your committe this week. Dram Shop legislation is the #1 legislative priority for the Fairbanks Northern Lights Chapter of Mothers Against Drunk Driving, all Alaska state MADD chapters, and MADD National.

MADD views this particualr bill, HB 345, as a deterrant rather than a punitive measure for liquor license holders.

It seems only sensible to us that those administering the drug alcohol for profit accept responsibility for its safe administration. Once a patron has imbibed alcohol judgement can become impaired. If, as **professional** servers of this drug (bearing in mind that social hosts are **already** held accountable under **common law** liability), liquor licensees refuse to employ reasonable standards of care to prevent intoxicated persons from harming themselves or others, why should they expect their "privilege" to hold liquor licenses to continue?

Alaska is the only state in the union to require its liquor license holders to be held accountable to "criminal negligence" in civil court. All other industries in the state of Alaska are held to ordinary negligence standards. Obviously merchants in other industries are asked to exercise ordinary care to protect customers, to do otherwise would not only be amoral, it would be poor business practice. It is heinous that an industry whose product is a recognized drug is **not** currently held to the same standard of accountability. We are not asking that liquor license holders be held to stricter standards of care, only that they be required to adhere to the **same** standards of care that every other Alaskan industry is held to.

Furthermore we urge your committee to recognize HB 345 for what it is, a **return** of the standard for civil liability of vendors of alcoholic

MADD
MOTHERS AGAINST DRUNK DRIVERS
*Fairbanks Northern Lights Chapter*
**P.O. Box 1167**
**Fairbanks, Alaska 99707-1167**
**(907) 456-3964**



beverages to ordinary negligence under the common law. In 1980 when Title IV statutes were rewritten a liquor industry supporter inserted the word "criminal" into the statute concerning liquor license holders' liability, thereby allowing the liquor industry to enjoy unheard of protection from victim lawsuits. It is hoped that your committe realizes that the action of that legislator might have benefited him, but it denied all Alaskan constituents the right to protection from harmful drug dispensing practices.

Please don't confuse Dram Shop legislation with the current hysteria regarding all liability insurance. They are separate questions. Prior to "buying" into the "insurance crisis" issue it is hoped that our legislators will investigate insurance premiums charged in this state and hire an actuary to determine whether those premiums are warranted. Preliminary investigation on this subject by MADD members has established that 1)National Insurance carriers "record losses" in 1985 were attributable to claims made on "natural catastrophes", i.e., floods, tornadoes, etc. Losses were <u>not</u> attributable to high jury awards. 2.)The Insurance Industry has historically been cyclical in its losses and gains. Low premiums in the late '70's and early '80's might account for the pendulum swing to higher premiums currently. Legislators might also do well to remember that the Insurance Industry is exempt from anti-trust laws, see 1945 Congressional Act, McCarran-Ferguson. The point here is <u>not</u> to confuse Dram Shop legislation with any percieved insurance industry crisis.

We hope that your committe is able to retain perspective on HB 345 and recognize that its intent is only to return liquor license holders' liability to ordinary negligence under the common law.

If you schedule a teleconference on HB 345 may we make a suggestion? Last week the House State Affairs Committee scheduled a teleconference for 3:00 p.m. on February 5. Actual public testimony did not begin until 4:15 p.m. If legislators and/or guests are to speak prior to public testimony could you please advertise the appropriate time for

# CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

# MADD

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public comment? Many of our members signed in at Legislative Affairs by 2:45 p.m., and needed to return to work before they had an opportunity to speak. Your consideration on this matter will be greatly appreciated.

Thank you in advance for your informed decision to support the passage of HB 345 during this legislative session.

Sincerely,

Phyllis Tugman Alexander
MADD Executive Director
Northern Lights Chapter

PRC

PREVENTION RESEARCH CENTER

2532 Durant Avenue
Berkeley, California 94704
(415) 486-1111

Nevette Bowen
Rep. Katie Hurley
Pouch V
Juneau, Alaska 99801

January 28, 1986

Ms. Bowen:

I had several suggestions and comments to make regarding HB 345, and thought that I should just include them within my written testimony, which is enclosed.

I realize that introduction of a server training bill might be untimely, but we just finished drafting it several weeks ago. But because it fits in so well with the Responsible Business Practices section, and because the city of Anchorage has been mandating server training, I thought it would be appropiate to recommend it at this time.

Thank you again for giving me the ability to testify at the upcoming hearing. I assume that each committee member will be given a copy of my written testimony before the hearing begins.

Please let me know if you have any questions on the suggested changes that I proposed.

Very truly yours,

Victor Colman

Victor Colman, J.D.
Legal Research Analyst

Enc

# MODEL RESPONSIBLE SERVER TRAINING ACT - 1986

Council on Alcohol Policy
National Association for
Public Health Policy
The Trauma Foundation
Building One, Room 40
San Francisco General Hospital
San Francisco, CA 94111

Prevention Research Center
Pacific Institute for
Research and Evaluation
2532 Durant Avenue
Berkeley, CA 94704
(415) 486-1111

Contact:
Victor Colman
Deborah Kleinman

# RESPONSIBLE SERVER TRAINING ACT

**PURPOSE:** To establish a commission that will develop a statewide alcohol server training and hospitality program. This commission will establish the curriculum and standards for training courses that licensees, managers, servers and store clerks will be required to complete. A certificate of completion will be required to hire any person to dispense alcohol. The program will remain voluntary until January, 19__ after which it will become mandatory.

## THE ACT

### SECTION 1 Legislative Intent

This act shall be known as the Responsible Server Training Act. The legislature is acting in direct response to the exorbitant number of deaths and injuries attributable to alcohol intoxication, particularly those related to drinking and driving. This legislature further recognizes the important role the licensed server of alcoholic beverages can contribute to the reversal of this trend. The primary training of management and staff personnel that furnish alcohol is an important step in creating environments that are conducive to responsible service and consumption of alcoholic beverages.

### SECTION 2 Definitions

(A) Alcoholic beverage—Alcoholic beverage includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed or combined with other substances.

(B) Service of Alcoholic Beverage; Service means any sale, gift or other furnishing of alcoholic beverages.

(C) Licensee means any person holding a license issued by the State Department of Alcohol Beverage Control.

(D) Manager—A manager is a person employed by the licensee as the responsible party to run the day-to-day operation.

(E) On-Sale licensed establishment is one that can allow consumption of alcoholic beverages on the premises.

(F) On-Sale Server is a person employed by an on-sale license to sell and serve alcoholic beverages.

(G) Off-Sale licensed establishment is one that can only sell alcoholic beverages for private consumption.

(H) Off-Sale Server is a person employed by an off-sale licensee to sell alcoholic beverages.

(I) Certificate—a certificate issued to all successful applicants.

(J) Certificate of Approval—certificate issued to all approved training programs.

**SECTION 3** Responsible Server Training Commission

(A) Goals - The Responsible Server Training Commission, hereinafter referred to as the Commission, shall be responsible for the development and implementation of responsible server training programs throughout the state. The Commission will also develop a renewal process, a certification process for all servers and licensees, enforcement procedures, penalties, and fines, and renewal.

(B) Formation of Commission - The Department of Alcohol Beverage Control (or applicable liquor control board), hereinafter referred to as the ABC, shall establish the commission of 12 members to include representatives of: the Department of Alcohol and Drug Programs (or applicable state Board); local law enforcement agencies; County Alcohol Program Administrators; Attorney General; Department of Alcohol Beverage Control; the Insurance Commission; the retail alcohol industry; those presently employed in a licensed establishment; the Community College Board (or applicable state vocational education commission/board); those trained in alcoholism and alcohol-related problems; those trained in the treatment of such problems; and a citizen's group active in preventing drinking-driving problems. Members of the Commission shall not represent more than one of the above specified categories and there shall be an appropriate representation of both sexes, racial and ethnic minorities and the various geographic regions of the state.

(C) Compensation - The members of the commission shall serve without compensation but shall be reimbursed for actual expenses incurred on Commission business, including necessary travel expenses as determined by the State Board of Control (or applicable state Board).

(D) Prohibition on Use of State Funds - No appropriations, loans or other transfer of state funds shall be made to this Commission except for a temporary line of credit for initial start-up costs as provided in this Act.

SECTION 4 Implementation

(A) Within six months of the effective date of this act, the Commission shall be formed. The Commission shall, during the first two years of this act, facilitate the development of training courses and materials, establish fee structures,

enforcement procedures, penalties and fines, graduation requirements (which may include final examinations), and certification procedures for instructors and schools.

(B) The Commission shall oversee the establishment and licensing of regional schools, for the purpose of providing training courses which shall be evaluated and modified to provide the most comprehensive and efficient training.

(C) During the first two years after the effective date of this Act participation in these programs shall be voluntary, but shall fulfill the requirements of this act for the purpose of obtaining a permit as described fortnwith. During the third and subsequent years of this act, the ABC shall require that all applicants for new licenses or renewals of existing issued under applicable state code sections shall demonstrate that all managers and employees have attended and successfully completed approved training, and that such employees shall acquire certificates for employment in establishments licensed under applicable state code sections as described forthwith. All licensees and staff personnel must be certified at all times and keep a copy of such certification on premises available for the ABC on request.

(D) The Commission shall issue a certificate to all applicants who have successfully completed the server training course and who pay to the Commission the initial or renewal certificate fee.

**SECTION 5** Curriculum

(A) The curriculum of the Responsible Server Training Program shall be determined by the Commission and shall include three levels of training, as herein specified. The Commission shall include, but not be limited to, the following topics and skills development:

(1) Level 1 - Off-Sale Server (4 hours minimum)

a) Alcohol as a drug and its effects on the body and behavior, including the operation of motor vehicles.

b) Effects of alcohol in combination with commonly used drugs, legal and illegal, prescription and nonprescription;

c) Methods for dealing with intoxicated customers and recognizing potential underaged customers;

d) Relevant state law for off-sale licensees, with special attention to ABC and criminal laws concerning sales to minors, sales to intoxicated person, driving while under the influence laws and penalties, hours of operations and penalties for violation of these laws;

e) State law regarding civil liability suits against employees who illegally furnish alcoholic beverages.

(2) Level 2 - On-Sale Server Beverages (8 hours minimum

a) Same as level 1 plus;

b) Intervention with the problem customer. Effective methods for serving customers to minimize chances of intoxication, methods of cutting off service and protecting the safety of customers;

c) Alternative means of transportation to insure that intoxicated customers reach home safely;

d) Methods for dealing with belligerent customers;

e) Knowledge of mixology, including marketable alternatives to alcoholic beverages;

f) Methods to appropriately pace customer drinking so that the customer will not leave the premises in an intoxicated condition.

(3) Level 3 - Managers and licensees (16 hours minimum)

a) Same as levels 1 and 2 plus;

b) Legal responsibilities of licensees;

c) Recognition of signs and symptoms of problems with employees and methods to develop Employee Assistance Programs;

d) Advertising and marketing for safe and responsible drinking patterns;

e) Development of standard operating procedures for dealing with the problem customer;

f) Methods to support employees in their dealings with the problem customer and maintenance of record relating to such incidents;

g) Understanding of management practices and their relation to safe and responsible drinking patterns including but not limited to the following: the number of employees on the job, the number of patrons allowed on the premises, the interior of the design of the premises, hours of operation, and the use of promotional techniques;

h) Procedure for developing and disseminating written policy guidelines for operationalizing responsible server practices in a given establishment.

(B) Upon successful completion of the course, the instructor will certify that the individual has met the necessary requirements for graduating from the course at the appropriate level. This certificate will be required for employment for that specific position. The certificate may not be transferred from one job type to another. Thus, a level 3 curriculum will qualify a person for any position serving or selling alcohol. A level 2 curriculum will qualify a person for a level 1 and 2 position and a level 1 curriculum will qualify an individual only for a level 1 position.

**SECTION 6** Approval of Training Programs

(A) The Commission shall examine the qualifications of programs for the education and training of servers and licensees. The Commission shall also issue certificates of approval for those programs which meet Commission standards.

(B) The Commission shall adopt and publish minimum standards to insure that all approved programs meet all the minimum curriculum standards established pursuant to this act. The Commission shall periodically review the quality of the curriculum, faculty and the facilities of such programs.

**SECTION 7** Fines and Penalties

(A) The Commission, with approval from the ABC, shall establish guidelines for fines and penalties of violations in this chapter. These shall include, but not be limited to, the following violations:

(1) Establishments employing workers without certificates;

(2) Employees working without certificates;

(3) Failure of an approved training school to teach the endorsed curriculum;

(4) Falsification of certificates.

(B) Penalties against licensees shall not exceed $250 per violation and/or revocation of their licenses.

(C) Penalties against servers shall not exceed $100 per violation.

(D) Penalties against training schools and instruction shall not exceed $500 per violation and/or revocation of their certificates of approval.

SECTION 8 Evaluation

The Commission will establish an evaluation study of the impact of this Act, to be conducted for four years. The evaluation shall include: a report on the impact of the Act on licensee practices and on various measures of alcohol-related problems, including drunk driving; a comparative analysis of different types of trainings; and recommendations for amendments to this Act and to Commission standards.

# BRIEFING PAPER
# RESPONSIBLE SERVER TRAINING ACT

Victor J. Colman, J.D.
Legal Research Analyst
Prevention Research Center
Pacific Institute for
Research and Evaluation
2532 Durant Avenue
Berkeley, CA 94704

Deborah Kleinman
Research Assistant
Prevention Research Center
Pacific Institute for
Research and Evaluation
2532 Durant Avenue
Berkeley, CA 94704
(415) 486-1111

and Legal Consultant
Council on Alcohol Policy
National Association for
Public Health Policy

January 1986

## RESPONSIBLE SERVER PRACTICES-A DEVELOPING TREND

Responsible server training is the education of persons who sell or serve alcohol to the general public. As with any hospitality service, such licensed establishments provide a benefit to the public. They provide us a place to socialize, a place to buy our dinner wine or our party supplies, and a place to relax. However, alcohol outlets have important responsibilities to the citizenry. Drunk driving is a problem that must be attacked on several fronts. But treatment of the problem drinker will be of limited value unless efforts are made to better shape the environment that is conducive to responsible service of alcohol. Persons who furnishes alcohol and attend to our needs are in a key position to insure that we are having an enjoyable and safe time. Yet these people have not been systematically educated as to the effects of alcohol on our bodies; the current status of the laws relating to civil, criminal and administrative liability; and those skills and techniques that are the foundation of safe and responsible beverage service.

Growing public concern over intoxication-related injuries have led some licensees to voluntarily seek out server training. The available programs have ranged widely in time commitments and curriculum. But all programs recognize the important role servers and managers can play in the prevention of alcohol-related problems. Oregon is the first state to mandate that all persons selling and serving alcoholic beverages must receive training. Other municipalities have mandated training or provided positive incentives for owners to train their employees.

The Responsible Server Training Act will establish and mandate minimally adequate training for the 67,098 licensed establishments in California.

## A UNIQUE ALTERNATIVE: SERVER INTERVENTION

Numerous approaches have been developed in reaction to the growing awareness of alcohol misuse and alcohol-related problems, particularly drinking and driving. Educational efforts, treatment programs, and legal sanctions each play a role in addressing these problems.

Server intervention is an innovative strategy that public policymakers are now looking to as an effective complement to existing prevention efforts. Server intervention has two major goals: (1) to reduce risk of intoxication; and (2) to reduce the risk that intoxicated persons will harm themselves or others.

Comprehensive server intervention combines training of staff personnel with management training and extensive policy review. Management policies, if properly drafted and followed, will set the tone of the establishment's responsible serving practices. Unfortunately, present server training programs ignore the necessary emphasis on management training and policy review, resulting in inadequate training that will have a negligible impact in reducing drunk driving and other alcohol-related problems.

The first evaluation that measures the effectiveness of server intervention is now taking place at Prevention Research Center, one of nine national alcohol research centers, and the only one with a primary focus on prevention. The development and implementation of a comprehensive training program was evaluated for its effect on servers at a Navy Enlisted Club in San Diego, California. Quantitative data will be forthcoming.

## CONCLUSION

The Responsible Server Training Act is an important step in developing comprehensive public policies that aid in preventing drunk driving and other alcohol-related problems. The Act would not constitute an unusual burden upon the retail alcohol beverage industry. Rather, it is a reflection of changing industry and community standards and expectations. Server and management training represents an innovative and significant public health measure that deserves support from the retail alcohol beverage industry, health and safety constituencies, concerned citizens and policymakers.

APPENDIX A

RESPONSIBLE SERVER TRAINING ACT
QUESTIONS AND ANSWERS

(1) WHAT IS THE INTENT OF THE RESPONSIBLE SERVER TRAINING ACT?

By requiring server and management training and certification, this Act is designed to provide the foundations of responsible server practices.

(2) WHAT ARE RESPONSIBLE SERVER PRACTICES?

Responsible server practices are practical, professional techniques relating to the service of alcoholic beverages. They include prudent hiring procedures, training and supervising methods, as well as appropriate management policies, procedures and actions.

(3) HOW WILL SERVER TRAINING ASSIST THE RETAIL ALCOHOL BEVERAGE INDUSTRY?

Server training will instruct licensees and their employees on those legal requirements found in the state Alcoholic Beverage Control Act. This knowledge, coupled with proper implementation of responsible business practices, will help to avoid civil, criminal, and administrative problems.

(4) IS SERVER TRAINING A NOVEL CONCEPT IN THE HOSPITALITY INDUSTRY?

No. The city of Madison, WI has mandated server training since 1981. Numerous municipalities and the state of Oregon have also mandated server training. In addition, the alcohol beverage industry has been active in providing some access to voluntary programs since 1982.

(5) WHY SHOULD SERVER TRAINING BE LEGISLATED?

The intent of this mandated act is to upgrade the competence of the entire alcohol beverage service profession. While voluntary programs are a step in the right direction, they do not uniformly provide all Californians with the benefits inherent in responsible beverage service. Voluntary programs vary

considerably in quality, and are currently being implemented in only a small fraction of licensed establishments within the state.

(6) IS THE CERTIFICATION OF A SPECIFIC CLASS OF EMPLOYEES A NEW ROLE FOR THE STATE TO UNDERTAKE?

No. A growing number of jobs require licensing or certification, including: stenographers, morticians, physician's assistants, hairdressers, horse stewards and pest control workers.

(7) CAN SERVER TRAINING ACTUALLY AID IN COMBATING THE PROBLEMS RELATED TO ALCOHOL CONSUMPTION?

Yes. Licensed sellers of alcohol control the "spigot" of alcohol in that community. Thus, the potential of these businesses to help effectively reduce alcohol-related problems is obvious, manageable, and until lately, highly overlooked. Educating server and management personnel will only enhance the social atmosphere of a retail establishment by teaching skills and techniques that will aid in preventing problem situations before they occur.

APPENDIX B

## CURRENT STATUS OF SERVER TRAINING

| States | Legislative Introduction | Enactment |
|---|---|---|
| Florida | X | |
| Michigan | X | |
| Massachusetts | X | |
| Hawaii | X | |
| Oregon | | X |
| Rhode Island | | |
| **Municipalities** | | |
| Stowe, VT | | X |
| San Mateo, CA | | X (voluntary) |
| Lake Charles, LA | X | |
| Anchorage, AK | | X |
| **Wisconsin** | | |
| Madison | | X |
| Eau Claire | | X |
| La Cross | | X |
| Monona | | X |
| Watertown | | X |
| Waukesha | | X |

APPENDIX C

## SUGGESTED FEE CERTIFICATION STRUCTURES

Suggested fees: Level (1) - $10

Level (2) - $15

Level (3) - $20

Estimated revenue:

| | | |
|---|---|---|
| On-sale licenses | * 1 manager | $ 797,600 |
| 39,880 licenses issued | 2 employees | $1,196,400 |
| | total | $1,994,000 |
| Off-sale licenses | 1 manager | $ 544,360 |
| 27,218 licenses issued | 1 employee | $ 272,180 |
| | total | $ 816,540 |
| Total estimated income | | $2,810,540 |

* The numbers used are minimum estimates. There are no figures available to determine the exact number of employees in this field. This chart is only intended to show that this program will remain self-funding at a token cost to employees and employers.

# THE MODEL ALCOHOLIC BEVERAGE RETAIL LICENSEE LIABILITY ACT OF 1985

Reprinted from
WESTERN STATE LAW REVIEW
Volume 12, Number 2, Spring 1985

APPENDIX A

# The Model Alcoholic Beverage Retail Licensee Liability Act of 1985*

## (Model Provisions and Comrnentaries)

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* Preparation was supported by Grant #RO1 AA0621-01 (Prevention Research: Server Intervention and the Law) to the Medical Research Institute of San Francisco.

** Reprinted with permission of Matthew Bender Co. Tables will appear in a forthcoming treatise entitled LIQUOR LIABILITY LAW to be published by Matthew Bender Co.

## INTRODUCTION

### *Background and Purpose*

The Model Dram Shop Act (officially entitled the "Alcoholic Beverage Retail Licensee Liability Act") represents the culmination of an 18-month research project on dram shop liability law conducted by the Prevention Research Group (PRG) and funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA). It is designed as a resource tool for legislators, policymakers, court officials, attorneys and others interested in the prevention of alcohol-related problems who seek to develop a comprehensive approach to this rapidly-changing area of law.

"Dram shop liability" is a term of art referring to the potential legal liability of servers of alcoholic beverages for the injuries caused by their intoxicated and underaged patrons. Originally established in several states in the nineteenth century, dram shop statutes fell into disuse during and immediately following Prohibition.[1] The concept reappeared in the legal community during the late 1940's and 1950's and has had a major resurgence since 1979, concurrent with the recent wave of concern for the societal costs of drunk driving. Legislatures and courts in several states have expanded the liability of commercial servers of alcoholic beverages in an effort to prevent drunk driving and as a means to compensate victims.[2]

This trend has become increasingly apparent and represents a national phenomena. Currently, 37 states and the District of Columbia impose dram shop liability in some form as a matter of state law (either through statutes or State Supreme Court opinions) and several additional states have adopted it de facto, through lower court cases.[3] Many cases are settled out of court, even in states where liability in the particular circumstances is debatable, because of the possibility that courts will reverse previous decisions. In addition, the number of governmental, public interest and private groups supporting the imposition of dram shop liability is expanding, with the Presidential Commission on Drunk Driving being perhaps the most notable group to do so in the recent past.[4]

The PRG research project was conducted over an 18 month period

---

1. "Dram Shops" were establishments in the nineteenth century which sold alcoholic beverages by the "dram", a unit of measure. For a discussion of the history of dram shop laws, *see* Mosher, J., "Dram shop law and the prevention of alcohol-related problems," 40 J. OF STUDIES ON ALCOHOL, 773 (1979).

2. See Mosher, J., "Legal Liabilities of Licensed Alcoholic Beverage Establishments: Recent Developments in the United States," paper presented at "Public Drinking and Public Policy: A Symposium on Observational Studies" Banff, Alberta, Canada (Apr. 1984).

3. *Id.*

4. Presidential Commission on Drunk Driving, *Final Report* (1983).

(beginning in October 1983) and included three data components. In the first phase, all state appellate and supreme court dram shop cases were systematically reviewed and analyzed with the aid of a specially-designed computer program. The second phase consisted of detailed interviews with practicing attorneys for both plaintiffs and defendants primarily in three case-study states (Massachusetts, California and Michigan). The interviews were designed to determine how dram shop cases are currently being litigated, with particular attention to the role, if any, of server intervention programs and to the process of settling claims. Finally, an inventory of current server intervention programs was developed. During this final phase, program components and training topics were examined, which provided the data from which the model "responsible server defense" was developed (see below)[5]

The research established several key findings. The case law review revealed that the legal system was not establishing clear guidelines for applying dram shop liability provisions or concepts. The states vary widely in the type and extent of liability that is being imposed and, frequently, there is great uncertainty as to when liability will apply. Even in states where the legislature has acted to establish statutory guidelines, cases have reached conflicting interpretations of the provisions. This uncertainty has had a major impact on the litigation strategy of the parties, encouraging settlements of questionable claims, high insurance costs, and considerable debate and uncertainty in the legal community.

The research also found that courts and attorneys have ignored the recent efforts by the retail industry, educators, and others to develop server intervention programs as a means for the industry to meet its responsibility to the public safety. "Server intervention" refers to reforms in the mode of operation by retail establishments designed to reduce the risk of serving alcoholic beverages to intoxicated or underaged patrons and to promote alternative forms of transportation (other than drunk driving) for patrons who do become intoxicated. Such programs are be-

5. Detailed findings of the research are reported in the following: Mosher, *supra* n.2; Mosher, J., "Server Intervention: Present Status and Future Prospects," paper presented at the Research Workshops on Alcohol and the Drinking Driver sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, (May 1984); Mosher, J., "Server Intervention: A Guide to Implementing Local and State Programs," paper presented at a conference entitled "Control Issues in Alcohol Abuse Prevention II: Impacting Communities," Charleston, South Carolina, sponsored by the South Carolina Commission on Alcohol and Drug Abuse and other organizations, (Oct. 1984). Colman, V., Krelll, B., and Mosher, J., "Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective," *W.S.U. L. Rev.* (forthcoming); Colman, V., "Dram Shop Laws: A Prevention Tool," paper presented at the 40th Annual Conference on the National Council on Alcoholism, Detroit, Michigan, (Apr. 1984); Harrington, C., "Illustrative Dram Shop Settlement and Jury Verdict Cases: Further Evidence that Server Liability Is Expanding?" Prevention Research Group, (Dec. 1984).

ing instituted throughout the country and consist of two types of trainings. Serving staff (e.g., bartenders and cocktail waitresses) are trained to recognize intoxicated persons and minors, and to intervene effectively. Management personnel are trained to adopt procedures to support the server intervention process, by promoting alternative nonalcoholic beverages and foods, alternative transportation programs and other business reforms. Efforts to formalize the training curricula are now in process.[6]

This industry response to public pressure represents a first step toward establishing a definition of negligent service of alcoholic beverages within a dram shop context. Current law rests primarily on whether a patron was served while "obviously intoxicated," a subjective standard that has led to uncertainty in practice. By focusing the issues so narrowly, the courts have left out an evaluation of the management and server practices which led to the service in question. These practices can be evaluated by a fact-finder to determine whether a reasonable person in like circumstances could have acted more prudently, the classic definition of negligent behavior.

The Model Dram Shop Act is designed to address these problems. It provides a structured, comprehensive guide for drafting a dram shop law or deciding a dram shop case and addresses the uncertainties in current law that have been identified in the course of the research project. It also establishes a "responsible practices" defense as a means to coordinate the legal handling of dram shop cases and the recent development of server intervention programs. As such, it is a resource tool, based on systematic and thorough research, for those developing a comprehensive dram shop liability policy once a decision that such a policy is appropriate in a given state or court. Thus, it is not meant as a vehicle for advocating the imposition of liability but rather as a means to maximize its beneficial public health impact once the decision to impose liability has been made.

A first draft of the Model Act was circulated for comment in January 1985 to over 150 interested persons, including representatives of industry, citizen leaders, trial attorneys, health professionals, and government officials. Twenty responses were received, many of which offered detailed critiques and suggestions. The Act was revised based on the critiques and further study, and a final version of the Act was com-

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6. *See*, Mosher, *supra* n.5; Peters, J. (ed.), *Proceedings of the First Northeast Conference on Alcohol-Server Liability*, January 12-13 1984, Boston, Mass. (Northampton, MA: Intermission Ltd., 1984). Intermission Ltd., a non-profit organization, is the leading institute developing such trainings and coordinating the efforts of all training programs. Services include consultations, the newsletter *Responsible Beverage Service*, trainings and a resource library. For further information, contact Intermission, Ltd., 56 Main Street, Northampton, MA 01060.

pleted in March 1985."

*Design and Structure*

The Model Act is divided into 14 sections covering all major aspects of the tort liability of commercial alcoholic beverage retail outlets subject to the limitations defined in Section 14. Each section provides model statutory language and is followed by a detailed commentary discussing the section's background, rationale, and relationship to other provisions and other state laws. For convenience, Appendix A includes the model provisions without the commentaries. Support materials are found in Appendices B and C.

All states have enacted comprehensive legislation regulating the commercial sale of alcoholic beverages (Alcoholic Beverage Control (ABC) Acts) administered by a separate state agency (referred to here as ABC Agencies, although various names and administrative structures have been created). The Model Act is designed to be included in the state ABC Act and made part of the ABC state structure generally. Several model sections refer specifically to related ABC statutes. In some cases, amendments to existing ABC provisions may be necessary in order to implement an effective dram shop act.

Although the Model Act is conceived of an integral unit, it may nevertheless be advisable or necessary to modify various sections or to adopt only a limited number of sections, depending on the perceived needs and circumstances of a particular state. Several sections specify these limitations in their Commentary and discuss options that are available. Thus, the Model Act should be viewed as a guide for legislative drafting, but each state should evaluate the appropriateness of each section and its exact working. Current ABC Agency practices, the structure of the state retail industry, current law and court decisions, practices of the state insurance industry, and the availability of server intervention programs may all affect the application of the Model Act. It remains important, however, to carefully review all of the topics raised in the model provisions to insure that clear guidelines are established and that uncertainties regarding when and how liability is imposed do not remain.

In addition, various topics generic to negligence actions are not covered by the Act, e.g., issues involving causation. It is anticipated that such issues will be resolved by reference to common law or statutory

7. Summaries of the responses and the resulting revisions are available on request from the Prevention Research Center, 2532 Durant Avenue, Berkeley, CA 94704.

provisions applicable to all negligence claims and that special provisions applicable only to dram shop claims are not necessary.

The Model Act is designed to contribute to the legislative process and therefore does not address many of the issues that arise in applying dram shop liability in particular court cases. Because courts must adopt dram shop principles only within factual situations based on existing state legislation and previous court decisions, they may be unable to adopt the Model Act provisions as such. Nevertheless, several sections may provide a basis for court decisions, and both the specific statutory language and the commentaries may prove to be useful in litigating and deciding particular dram shop cases. The model "Responsible Business Practices" defense (Section 10) may be of particular interest as a means to maximize the preventive potential of the dram shop liability concept.

*Optional Provisions*

The Model Act includes one optional provision, regarding advance notice to the defendant. Strong public policy arguments can be made for and against the inclusion of a notice provision, and the Model Act takes no position in that debate. If, however, a notice provision is deemed appropriate, the Model Act section provides the best type of provision currently available.

*Mandatory Liquor Liability Insurance*

In recent years, general insurance liability policies for licensed establishments have excluded dram shop liability from their coverage. Defendants are thus required to purchase separate coverage, which may be very expensive. Many choose to forego coverage or to purchase inadequate coverage despite the potential risks involved either because of the cost or the perception that lawsuits are unlikely. In addition, dram shop insurance may be difficult to purchase at any price. In Minnesota, for example, the state Commerce Commissioner recently warned that unless insurance companies begin providing coverage at reasonable prices an assigned risk pool will be established in that state.[8]

These trends may deny an injured plaintiff recovery even though a valid claim has been established, thus defeating the purposes of the Model Act. To deal with this problem, states should evaluate the need for a statutory provision that requires all licensees to show proof of insurance (or equivalent bond) as a condition of doing business. If enacted, a

8. "Dramshop Insurance Source Dry Up," Minneapolis Star and Tribune, Jan. 8, 1985, at 88, col. 1.

minimum coverage should be established, and although the Act does not specify an amount, at least $500,000 coverage is recommended. Licensees who show proof of responsible alcoholic beverage service practices (as defined in Section 10) should also be given a discount on the premium rate due to the reduced risks of acting negligently or recklessly. States should encourage voluntary reductions in premiums by the insurance industry and consider appropriate regulations if reductions are not forthcoming.

A mandatory insurance provision is not included in the Model Act for several reasons. First, a thorough legislative review may be warranted before enactment, with attention to issues or enforcement and feasibility, and a comprehensive set of provisions may be required in order to implement the mandatory insurance provision effectively. The research conducted as part of the Model Act development did not include a careful analysis of insurance practices and policies and their impact on dram shop liability claims. Thus, the development of comprehensive legislation is beyond the scope of the Model Act. Second, the mandatory insurance provision may appropriately belong in a state code other than the ABC code, an existing state law may substantially influence the type of provision to be enacted. Finally, states may wish to delay enactment of the provision until after the main body of the Act has been evaluated and the need for mandatory insurance is clearly established. Although it is not included, the issue of mandatory insurance should nevertheless be carefully considered as part of the enactment of the Model Act.

*Topics Not Addressed*

The Model Act does not cover several aspects of dram shop liability either because they fall beyond the law's scope and purpose or because they involve policy decisions that will vary from state to state. Those using the Model Law may decide to incorporate additional provisions in the areas outlined below, depending on the circumstances existing in a particular state.

(1) *Social Host Liability*: The Model Act does not cover the potential liability of noncommercial servers of alcoholic beverages and takes no position regarding this form of liability. See Section 5 commentary for further discussion.

(2) *Definition of Licensees and Licensed Premises*: The Act relies on existing state law regarding who is required to obtain a license to serve alcoholic beverages and what constitutes a licensed premise. Guidelines for modifications of these provisions are provided in Section 3.

(3) *Mandated Server Training*: No state now requires training as a condition of employment in a licensed premise or of obtaining a license, although at least two states are considering such legislation. The Model Act does not take a position on this topic, although it may provide a means to standardize the reasonable practices defense found in Section 10. Appendix C provides a model mandated training bill introduced (in modified form) into the Massachusetts and Hawaii state legislatures.

(4) *Minimum Legal Drinking Age*: The Model Act takes no position on what age should be established for legal consumption and possession of alcoholic beverages. This issue falls beyond the scope of the Act. See section 3(e) for further discussion.

(5) *Recovery by Intoxicated Minor for Negligent Service of Alcoholic Beverages*: The Act does not permit an intoxicated adult to recover damages from the party serving that adult for self inflicted injuries unless the server acts recklessly. The Act takes no position as to whether this rule should apply to those under the legal drinking age. See Sections 4, 6, and 7 for further discussion.

(6) *Recovery Caps*: The Model Act does not establish a limit on plaintiff's award. See Section 8 Commentary for discussion.

## SECTION 1: SHORT TITLE

This Act shall be entitled the [State] Alcoholic Beverage Retail Licensee Liability Act of ]year].

## SECTION 2: PURPOSE

(a) The primary legislative purpose of the Act is to prevent intoxication-related traumatic injuries, deaths and other damages, as specified in Section 8, among [State]'s population.

(b) The secondary legislative purpose is to establish a legal basis for obtaining compensation to those suffering damages as a result of intoxication related incidents in accordance with the provisions of this Act.

### *Commentary*

Current dram shop legislation and court opinions cite numerous purposes for imposing liability on retail licensees. In several states, courts have characterized their states' dram shop statute as either remedial or penal, or both.[1] These characterizations have led to some confu-

1. *See, e.g.*, Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961); Camille v. Barry Fertilizer, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972).

sion and frequently appear to be contradictory. The penal nature of the statutes is used as a rationale for strictly construing their provisions, for example, by not extending coverage to damages caused by social hosts who negligently serve alcoholic beverages.[2] The remedial nature of the statues is used as a rationale for giving them a broad or liberal reading.[3] As noted by at least one court,[4] the statutes may thus appear to be remedial or penal depending on the outcome which the court seeks to justify. A further problem with the penal justification is that it frequently rests on a finding that the particular statute imposes strict liability upon the licensee. This denies defendants certain defenses, creates uncertainty and arbitrary results, and may impose an unwarranted burden on the alcoholic beverage retail trade.

Cases based on common law negligence principles, on the other hand, have cited both the preventive and compensatory purposes of the liability rule. Courts frequently point to the incidence of drunk driving fatalities and injuries as a justification for imposing liability on licensees and assert that the duty toward third parties will encourage them to exercise caution.[5] These opinions, however, have failed to analyze the standards of conduct which have been imposed to determine whether they are sufficiently certain to be understood and followed. To avoid this problem, the courts appear to rely heavily on a more certain justification—that the rule will provide a means for at least some victims to obtain compensation. Because of the lack of complete analysis, the compensation rationale appears to be the dominant justification for adoption of the new common law rule which imposes liability.

Section 2 specifically rejects the "penal" rationale and the strict liability rule adhered to in many states and explicitly adopts the prevention and compensation rationales found in *Rappaport* and other cases. This recognizes the grounding of the Act in common law negligence principles. The Act provides prevention as a primary purpose for two reasons:

(1) unless the Act does in fact prevent injuries and deaths, the burden placed on the alcoholic beverage retail industry may not be justified, particularly since alternative, fairer means for compensating victims maybe available;

(2) it places a responsibility on the judicial system to apply the provisions of the Act in such a way that they will encourage responsible practices among licensees.

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2. *See, e.g.*, Camille Berry Fertilizer Co., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975).

3. For review, *see* V ge of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir.1961).

4. *Id.*

5. *See, e.g.*, Coulter v. perior Court, 145 Cal. Rptr. 534, 577 P.2d 669 21 Cal. 3d 144, (1978); Kelly v. Gwinnell, 96 .J. 538, 476 A.2d 1219 (1984); Rappaport .. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

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Compensation is a secondary purpose of the Act in recognition of victims' rights to recover damages from those with a duty to protect them who act negligently. In this respect, the provision merely recognizes the basis upon which our system of civil liability law rests. By placing compensation as a purpose secondary to prevention, it provides guidance to the judicial system for weighing alternative courses of action during the litigation process.

This section is not intended to impose a new burden of proof on either party or to exonerate the intoxicated tortfeasor from liability. It does, however, serve to emphasize the need for the judicial system to devise standards of conduct on the part of the alcoholic beverage retail industry which will actively deter intoxication-related injuries and deaths and to establish procedures which will encourage adherence to those standards. See in particular Section 10 (Responsible Business Practices Defense). At the same time, it is not intended to reduce the responsibility of those who become intoxicated and cause injuries and deaths.

## SECTION 3: DEFINITIONS

(a) *Adult* means any person of legal age to purchase alcoholic beverages, as defined by [state statutory provision].

(b) *Alcoholic beverages* means [definition used in state Alcoholic Beverage Control (ABC) Act].

(c) *Intoxicated person* means an individual who is in a state of intoxication as defined by this Act.

(d) *Intoxication* means an impairment of a person's mental or physical faculties as a result of drug or alcoholic beverage use so as to diminish that person's ability to think and act in a manner in which an ordinary prudent and cautious person, in full possession of his or her faculties and using reasonable care, would act under like circumstances.

(e) *Licensee* means any person who is required to be licensed to serve alcoholic beverages [including any governmental entity permitted by law to serve alcoholic beverages] pursuant to [state ABC Act].

(f) *Minor* means any person under the legal age to purchase alcoholic beverages as defined by [state statutory provision].

(g) *Person* means any individual, governmental body, corporation or other legal entity.

(h) *Premises* means [definition used in state ABC act].

(i) *Service of Alcoholic Beverage; Service* means any sale, gift or other furnishing of alcoholic beverages.

*Commentary*

*Subsection (a): Adult*

The Act relies on the legal age of purchase of each state (see Appendix B for listing). Because the Act only applies to service of alcoholic beverages by licensees or by those who should be licensed but are not, the rules and exemptions applicable to the service by licensees to minors are applicable (see Commentary to Section 6 for further discussion). For states with differential purchase ages depending on the type of alcoholic beverage, a slight modification of the definition may be necessary. The Act takes no position regarding an appropriate state legal purchase age.

*Subsection (b): Alcoholic Beverages*

Because the Act is designed as an integral part of the state's ABC Act, it is appropriate to define alcoholic beverages in accordance with the definition used for the entire Act. It is anticipated that the ABC Act includes all beverages designed for human consumption which are capable of inducing a person's intoxication. If this is not the case, the ABC Act definition should be amended to avoid confusion and to insure a comprehensive approach to alcoholic beverage control.[1]

*Subsection (c): Intoxicated Person*

See Commentary to subsection (d).

*Subsection (d): Intoxication*

The intoxication definition incorporates use of either alcoholic beverages or controlled substances. Thus, use of any combination of the two which deprives a person of his or her normal use of mental and physical capabilities is considered intoxication. The definition is based in part on that found in the Uniform Vehicle Code,[2] which also includes both drug and alcoholic beverage use in its definition. Although both alcohol and drug use are included, other sections of the Act provide that defendants do not have a duty to recognize signs of intoxication other than those associated with the use of alcoholic beverages (see Section 6, Commentaries to Sections 6, 10).[3]

The Act's language regarding the "impairment of mental or physical facilities" is based in part on the intoxication definition found in the

1. *See*, Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981), for a discussion of the problems associated with definitions of alcoholic beverage that are not sufficiently inclusive.

2. UNIFORM VEHICLE CODE § 11-902 (Supp. 1979).

3. Surprisingly, no reported dram shop case or state statute has addressed this specific issue.

Model Penal Code, which states that intoxication is the "disturbance of mental and physical capabilities resulting from the introduction of substances into the body."[4] The Act incorporates this language into the "reasonable care" and "prudent person" standards appropriate to a negligence-based cause of action. This is commonly done in applying an intoxication definition to driving while intoxicated cases.[5]

Early definitions of intoxication did not rely upon this impairment standard specifically, defining intoxication more generally, e.g., as a state in which a person does not possess that clearness of intellect and control that the person would otherwise have.[6] The Act's definition provides a more definite basis for the factfinder to determine the existence of intoxication.

The requisite impairment of mental and physical faculties provided under the Act can come at either high or low blood alcohol levels (BALs), depending on the reactions of a particular individual to alcohol use. Thus, the Act specifically does not incorporate a per se BAL rule, a common provision in drunk driving statutes.[7] This recognizes that the Act is directed primarily at the actions of servers of alcoholic beverages rather than drinkers, although drinkers do remain the primary tortfeasor. The key issue is thus whether the server knows or should know that the person being served is impaired due to intoxication such that additional alcoholic beverages should not be provided. See Commentaries in Sections 6 and 10 for further discussion. A per se BAL rule would tend to impose liability on a defendant whenever a patron is at the requisite BAL level without regard to the defendant's actual or constructive knowledge of intoxication. This is manifestly unfair, since signs of intoxication may not appear until BAL levels are reached that are much higher than those relied upon by existing per se rules.

*Subsection (e): Licensee*

The Act relies upon the state licensing provisions for determining what parties are licensed to serve alcoholic beverages. States that permit sales by governmental entities and do not wish to grant governmental

4. MODEL PENAL CODE § 2.08 (1980).

5. *See, e.g.*, Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 140 Cal. Rptr. 897 (1977) (interpreting CAL. VEHICLE CODE § 23152).

6. *See, e.g.*, Commonwealth v. Buoy, 128 Pa. Super. 264, 193 A. 144 (1937).

7. This is in accord with all dram shop cases that have addressed this issue. *See, e.g.*, Seeley v. Sobczak, 281 N.W.2d 372 (Minn. 1979) (a .269 BAL did not establish as a matter of law that decedent drinker was obviously intoxicated when served). *Accord*, King v. Ludlow, 165 Cal. App. 2d 620 332 P.2d 345 (1958) (results of having a .15 BAL is not such a law of nature that the court must take judicial notice that driving therewith is intoxication as a matter of law).

immunity should include the phrase in brackets. See Commentary to Section 5 for further discussion.

*Subsection (f): Minors*

See Commentary to subsection (a).

*Subsection (g): Person*

The Act does not distinguish between individuals and corporate entities. This is in accord with most state ABC statutes and prevents efforts by defendants to avoid liability by attributing personal actions to a corporate body. The lack of such a definition has created ambiguities and confusion in several dram shop cases.[8] See Sections 4 and 5 for further discussion.

*Subsection (h): Premises*

It is anticipated that each state will define a licensee's premises in an identical fashion to the definition used in the state's Alcoholic Beverage Control Act. Attention should be placed on the inclusion of areas both inside and outside of a licensee's physical establishment which are under the licensee's exclusive control and which are accessible to the licensee's customers. This may include parking areas or rooms where alcoholic beverage consumption is not permitted.

*Subsection (i): Service of Alcoholic Beverages; Service*

The Act's definition encompasses all dispensing of alcoholic beverages by defendants in their capacity as commercial vendors. This insures that defendants will not circumvent the intent of the Act by resort to transactions not traditionally associated with actual sales. The definition is in accord with other dram shop statutes and case law.[9] This Act is not intended to cover the potential liability of social hosts for serving alcoholic beverages. See Commentary to Section 5 for discussion.

## SECTION 4: PLAINTIFF

(a) Any person who suffers damage, as provided in Section 6, may bring an action pursuant to this Act subject to the limitation found in subsection (b) of this Section.

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8. *See, e.g.*, Fowler v. Rome Dispensary, 5 Ga. 36, 62 S.E. 660 (1908); Rosenthal v. Dunphy, 18 Conn. Supp. 271 (1953).

9. *See, e.g.*, MICH. COMP. LAWS. § 436.22(5) (1983); Guitar v. Bielek, 402 Mich. 152, 262 N.W.2d 9 (1978); IOWA CODE ANN. § 123.92 (West 1981).

(b) A [person/adult] who becomes intoxicated may not bring an action pursuant to Section 6 of this Act (negligent service of alcoholic beverages) against a defendant for serving alcoholic beverages to such person.

*Commentary*

Any person (or corporate entity) suffering damages may bring a cause of action, subject to the limitations imposed by other provisions of the Act and subject to the limitation imposed in section (b). This is in accord with most negligence-based dram shop statutes,[1] and avoids ambiguities and confusion found in statutes with enumerated classes. Many such provisions list relatives, employers, etc., and "other persons" as possible plaintiffs, and courts have had difficulty determining the legislative intent of the listing particularly the identity of "other persons."[2] Statutes which limit the class of plaintiffs are sometimes interpreted to impose strict liability and in some cases create a cause of action not known at common law (e.g., for loss of support).[3] These ancillary issues are not present in the Act.

The Plaintiff Section, in subsection (b), makes one exception to the general rule that any person suffering damages may bring a cause of action pursuant to the Act. Under most existing dram shop laws, intoxicated persons, at least those who are not minors, are not permitted to recover for self-inflicted injuries due to their contributory negligence.[4] This rule has been established based on inferred legislative intent, even though most statutes are silent on the topic.[5]

The Act adopts this restriction in light of its near universal acceptance in states with dram shop liability and the tenet that one should not be permitted to benefit from one's own negligence. The Act does permit potential actions by intoxicated persons for reckless misconduct on the part of defendants (see Section 7). This recognizes the traditional common law rule that contributory and comparative negligence are not defenses to claims based on recklessness.[6]

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1. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602.1 (West 1980); ILL. REV. STAT. CH. 43 § 135 (Supp. 1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983); N.C. GEN. STAT. § 188-120 (1983).

2. *See, e.g.*, OHIO REV. CODE ANN. § 4399.01 (1982); Dworak v. Tempel, 17 Ill. 2d 181, 161 N.E.2d 258 (1959).

3. *See* Commentary to § 8, *infra*.

4. *See, e.g.*, Robinson v. La Mott, 289 N.W.2d 60 (Minn. 1979); Sager v. McClendon, 296 Or. 33, 672 P.2d 697 (1983).

5. *Id.*

6. In cases of aggravated misconduct short of intentionally harmful behavior, courts in comparative fault jurisdictions have been divided, with some holding that the plaintiff's contributory

The Act takes no position regarding the appropriateness of this rule for claims by intoxicated minors. The Alaska Supreme Court, in a landmark decision, has held that the minimum age drinking law (MADL) is designed to protect minors from their own alcohol-related injuries; thus their intoxication can not be used to reduce or bar their recovery from those who serve them in a negligence-based claim.[7] The California Supreme Court reached a similar result in its interpretation of that state's dram shop law.[8] Age does not appear to be a distinguishing factor for other courts interpreting statutory provisions that bar recovery for intoxicated persons.[9] It is too early to evaluate the impact of the Alaska and California decisions. MADL's are undergoing rapid changes, reflecting changes in social attitudes. This issue should therefore be carefully evaluated in light of current social policies and attitudes in each state and community.

Subsection (b) is specifically limited to claims based on negligent services of alcoholic beverages to the plaintiff ("to such person"). Claims against defendants for service to third parties are not barred under the subsection even if the defendant also served plaintiff and the intoxicated person in the drinking event. Several states have created the doctrine of "complicity," which bars claims by plaintiffs who "actively participate" in the drinking episode of another, who later injures plaintiff. Courts have had difficulties defining "active participation," and considerable confusion and litigation has resulted.[10] Complicity is especially prevalent in states which have "strict liability" statutes.[11] These provisions have been interpreted to preclude contributory and comparative negligence defenses, an added rationale for imposing the complicity doctrine.

The Act follows the better rule, that issues of participation in the drinking event should be presented to the fact-finder as an issue of comparative or contributory negligence and should not create a bar to recovery as a matter of law. This procedure is in accord with standard negligence principles and will avoid litigation of what is, in essence, a factual determination.

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negligence should reduce the recovery. *See*, PROSSER AND KEETON, THE LAW OF TORTS, 5th ed., § 67 (1984).

7. Morris v. Farley Enterprises Inc., 661 P.2d 167 (Alaska 1983).

8. Cory v. Shirloh, 29 Cal 3d 430, 174 Cal. Rptr. 500, 629 P.2d 8 (1981).

9. *See, e.g.*, Randall v. Village of Excelsior, 103 N.W.2d 131 (Minn. 1960).

10. *See, e.g.*, Nelson v. Araiza, 43 Ill. App. 3d 685, 357 N.E.2d 207, 2 Ill. Dec. 230 (1976), *aff'd* 69 Ill. 2d 534, 374 N.E.2d 637 (1977); Heveron v. Village of Belgrade, 288 Minn. 395, 181 N.W.2d 692 (1970).

11. *Id.*

## SECTION 5: DEFENDANTS

The following persons who commit an act giving rise to liability, as provided in Section 6 and 7, may be made a defendant to a claim under the provisions of this Act:

(a) an alcoholic beverage retail licensee, and any employee or agent of such a licensee;

(b) any person who, at the time of such act, was required by law to have had an alcoholic beverage retail license under the provisions of [State ABC Act], and any employee or agent of such person.

### *Commentary*

Section 5 provides that the Act only addresses the actions of persons licensed (or those who should have been licensed at the time of the act and were not) to serve alcoholic beverages. Thus, the Act does not include claims against nonlicensees ("social hosts"). This limitation has been imposed for three reasons:

(1) as several courts have noted, the service of alcoholic beverages in noncommercial settings is a fundamentally different activity than such service in commercial settings, involving distinct standards of conduct;[1]

(2) the Act relies heavily on related provisions in the states' ABC Acts, which are not applicable to nonlicensees;

(3) because licensees are in the business of providing alcoholic beverages and anticipate profits from such activities, it is reasonable to expect responsible practices in the conduct of the business.

### *Social Host Liability*

Several courts have had to determine the extent, if any, of a social host's liability, and there is a substantial conflict of authority. Liability has most readily been imposed in situations involving service to minor, particularly when the facts show a lack of adequate adult supervision. Only a small number of appellate cases (in California, Minnesota, Iowa and New Jersey) have imposed liability on all social hosts for service to intoxicated adults.[2] All but the case in New Jersey, decided in 1984, have been overruled by legislative action. The New Jersey Supreme Court stated that imposing liability was justified in part by the changing social attitudes regarding drunk driving. It is too early to determine

1. Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975).

2. *See, e.g.*, Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669 145 Cal. Rptr. 534 (1978); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

whether this precedent-setting opinion will be followed by other states or will also be overruled by legislative enactment.

Social host liability may arise in a diverse set of circumstances; an employer's service to intoxicated employees; service to University students at University-sponsored events; wedding receptions where alcohol is served by a caterer; or service of alcoholic beverages to social acquaintances at a social host's home. Alternative theories of liability in these circumstances may be appliable. For example, some cases have imposed liability on employers under a respondeat superior theory for serving alcoholic beverages to intoxicated employees who subsequently injure a third party if the service occurred during the course of employment.[3] Universities have a special duty of care for their students that may be applicable. Service of alcoholic beverages to a person with a disability that is known to make him or her particularly sensitive to alcoholic beverages has also been held to be the basis of liability.[4] The Act takes no position regarding the appropriateness of these and other alternative theories of liability regarding social host service of alcoholic beverages.

*Licensee Liability*

The distinction between social hosts and commercial servers of alcoholic beverages has created much confusion in the courts. The Act relies on the licensing provisions of the State Alcoholic Beverage Control (ABC) Act in order to avoid this uncertainty and to emphasize the Act's integral relationship to other ABC Act provisions. Nonlicensees required to obtain a license are explicitly included in the Act in order to eliminate any incentive on the part of licensees to avoid the relevant licensing provisions.[5]

Many courts have based the distinction between social hosts and licensees on whether an actual sale has occurred.[6] This may create an arbitrary result, as the social host may be acting substantially as a licensee even though actual payment for the service by those being served is lacking. For example, in some states, caterers are not required to obtain a license as a condition of serving alcoholic beverages at catered events. A licensee catering a social event may be potentially liable under the Act while a caterer which is not required to obtain a license would be protected.

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3. *See, e.g.*, Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

4. Cantor v. Anderson, 178 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).

5. *See*, Guitar v. Bieniek, 402 Mich. 152, 262 N.W.2d 9 (1978).

6. *See, e.g.*, Bartkowiak v. St. Adalbert's Roman Catholic Church Society, 40 A.D.2d 306, 340 N.Y.S.2d 137 (1973).

This suggests that the licensing provisions of the State ABC Act should be carefully reviewed so that all those acting in the role of a licensee (in the business of providing alcoholic beverages on a commercial basis) are required to obtain a license. One-day licenses, caterers' licenses, etc. may provide a means for reaching this result. It is anticipated that the licensing provisions will require a license for all commercial transactions of alcoholic beverages where a direct pecuniary gain for the sale is anticipated. This would exclude situations where the alcohol is served in a social setting in order to further an unrealted business venture or when those at a social gathering pool their resources to purchase a collective amount of alcoholic beverages.

## SECTION 6: NEGLIGENT SERVICE OF ALCOHOLIC BEVERAGES

(a) A defendant, as defined in Section 5, who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this Act.

(b) Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances, adhering to responsible business practices as defined in Section 10, would know that the person being served is a mior or is intoxicated.

(c) Proof of service of alcoholic beverages to a minor without request for identification shall form a rebuttable presumption of negligence.

(d) Service of alcoholic beverages by a defendant to an adult person who subsequently serves a minor off the premises [or who is legally permitted to serve a minor] does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur [and is illegal].

(e) A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

(f) A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises unless the person's appearance and behavior, or other facts known to defendant, would put a reasonably prudent person on notice of such consumption.

(g) A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in

part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

COMMENTARY

*A. Service of Alcoholic Beverages to Minors*

Service of alcoholic beverages to an underaged person violates the licensing laws of every jurisdiction, and is punishable by criminal sanctions in all but one state.[1] These statutes are indicative of the universal legislative recognition that minors are neither physically nor emotionally equipped to handle the consumption of alcoholic beverages,[2] and that such consumption leads to tragic injuries and deaths. Civil liability for service to minors is already widely recognized by common law in at least 15 jurisdictions and by statute in at least 18.[3] This Act codifies an exclusive remedy for negligently providing alcohol to minors, while confining liability to circumstances reasonably within the control of licenses.

The liability imposed by this section is based on the premise that the hazards created by the intoxication of minors can be prevented in many cases by responsible licensee practices. The negligence standard imposes the duty on licensees to exercise reasonable care in avoiding service to minors. However, licensees may inadvertently cause the intoxication of minors because of convincing false identification, collusion with an adult, or apparent majority.

Subsections (d) and (e) address the most common means for minors to obtain alcoholic beverages—by collusion with a person of legal drinking age. Subsection (d) specifically exempts the defendant from liability when there is such collusion unless the defendant should reasonably have known that the collusion would occur affirmative duty to investigate subsequent service of alcoholic beverages off the premises.[4] These subsections also include optional provisions that may be applicable in states where certain adults (e.g., parents, spouses) are legally permitted to serve minors.

Checking the identification of patrons is a simple and effective means of reducing the risk of service to minors. Subsection (c) explicitly recognizes that failure to check the identification of a minor is evidence of negligence. The provision is similar to one included in a North Caro-

1. *See*, Appendix A. In North Carolina service to an underaged person is punishable as an administrative penalty, rather than as a criminal offense, with fines of up to $500.

2. *See, e.g.*, Young v. Caravan Corporation, 99 Wash. 2d 655, 663 P.2d 834 (1983).

3. *See, e.g.*, Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Sorensen v. Jarvis, 119 Wisc. 2d 627, 350 N.W.2d 108 (1984); N.C. Gen. Stat. § 18B-120 (1983).

4. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979) (applying Pennsylvania law).

lina statute providing licensee liability for sale of alcoholic beverages to minors.[5] However, when presented with convincing false identification, a licensee cannot reasonably be expected to prevent service to a minor, absent actual or constructive knowledge of the patron's minority. Implementation of the practices specified in Section 10 or due care in the use of reasonable alternative practices provide a defense to liability under this Act. States with statutory or regulatory provisions regarding checking identification without official documentation may wish to incorporate them by reference into this section.

Finally, unusual circumstances may arise where a licensee cannot reasonably be expected to suspect a patron is underaged. This will not normally arise, since current business practices recognize that age identification without documentation is extremely difficult and that, in general, proof of age should be required even when a patron appears to be several years older than the legal drinking age. Nevertheless, a situation may arise where, due to highly unusual physical characteristics or mode of dress, a patron's appearance may be sufficiently deceptive as to allay any reasonable suspicion on the part of the licensee. In these circumstances, the existence of a Responsible Business Practices Defense pursuant to Section 10 may be determinative.

Service of alcoholic beverages to a minor by a defendant may lead to liability even though the minor is not intoxicated when served. This is in accord with most state dram shop statutes and common law cases.[6] However, as in any negligence action, liability will not attach unless the service of alcoholic beverages is shown to be a substantial cause of subsequent damages.

### *B. Service of Alcoholic Beverages to Intoxicated Persons*

Service of alcoholic beverages to intoxicated persons is negligent provided that the defendant knew or should have known that the person being served was intoxicated. Such service is illegal in all but seven states,[7] although liability under this section is not based on violation of criminal statutes but rather on common law negligence principles. Negligence per se claims are not permitted, as the Act provides the exclusive remedy for damages caused by negligent services of alcoholic beverages (see Section 14).

The statutory enactments will support a legislative finding that service to intoxicated persons creates a substantial risk of harm to both the

5. N.C. GEN. STAT. § 18B-121 (1983).
6. *But see* CAL. BUS. & PROF. Code § 25602(a)(1) (West 1980); *see* cases cited *supra* notes 3,4.
7. *See*, Appendix C.

intoxicated person and to others that is foreseeable to the defendant. This section codifies this finding within a negligence context.

The Act does not provide for liability for serving a nonintoxicated adult, even if the service leads to intoxication.[8] The defendant's duty is to avoid increasing the intoxication of the person being served once a state of intoxication has been reached. This recognizes the inability of a defendant to determine whether a given amount of alcoholic beverages will produce intoxication and the fact that risks of harm increase substantially as the level of intoxication increases. (In order to avoid attempts to circumvent the defendant's duty in this regard, multiple-drink service should be treated as distinct service.)

A California case, *Cantor v. Anderson*,[9] provides a limited exception to this rule, which is not followed in the Act. There, it was alleged that the social host served a person with a known disability whom the host should have known would lose control and become violent due to the intoxicating effects of alcoholic beverages on him. This limited cause of action is not recognized under the Act (nor is it recognized under any existing dram shop act) unless the defendant's conduct reaches the level of recklessness (see Section 7). This is in recognition of the potential for widespread abuse of such a cause of action, including the possibility of actions based on service known alcoholics, and the unfair burden that such a duty of care would place on defendants.

If a defendant knows of a person's particular sensitivity to alcoholic beverages, he may be on notice that intoxication of that person may result after a very limited number of drinks. Thus, a cause of action based on service to an intoxicated person may arise after a very limited number of drinks are served, depending on the particular facts of the case (see discussion this Commentary). Service to a nonintoxicated adult, however, may not give rise to a cause of action based on negligence.

A defendant may have either actual or constructive knowledge of the intoxication of the person being served. Constructive knowledge may be based on observations of the intoxicated person or on facts known to the defendant that would lead a reasonably prudent person to conclude that the person is intoxicated. Several courts and commentators have documented the observable signs of intoxication.[10]

A defendant is under a duty to ascertain whether a patron is intoxi-

8. *Cf.* ILL. REV. STAT. CH. 43 § 135 (Supp. 1983).

9. 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).

10. *See, e.g.*, Strand v. Village of Watson, 245 Minn. 28, 70 N.W.2d 609 (1955); INTERMISSION, LTD., RESPONSIBLE BEVERAGE SERVICE TRAINING PROGRAM: PARTICIPANT'S MANUAL, 11 (Northampton, MA 1984).

cated by taking those steps which a reasonably prudent person would regard as adequate to ascertain whether the conduct of the prospective purchaser manifests the loss of control of actions or emotions that constitutes intoxication.[11] The Supreme Court of Minnesota gives a list of such steps which may be required of a seller to avoid a charge of negligence:

> . . . engage the prospective purchaser in conversation, to note specifically the details of the purchaser's physical appearance, to observe his conduct during the course of his drinking at the supplier's establishment, or to scrutinize his actions in other ways by which the supplier may detect intoxication which is observable even though not obviously.[12]

A defendant may also be held liable when he or she has actual knowledge of facts which would lead a reasonable person to the conclusion that the person being served is intoxicated. A seller who does not know of a patron's intoxication and cannot reasonably observe it may still be found negligent if the service took place under circumstances in which he should have known of the patron's intoxication. This may occur when a large quantity of alcoholic beverages is served to a person in such a short period of time that intoxication is bound to result.[13] Sellers of alcoholic beverages may be charged with knowing the effects of quantities of alcoholic beverages on their patrons, since they are in the business of purveying them. Other situations in which knowledge of intoxication may be imputed are when the server is told the number of drinks a person has consumed prior to the service.

These duties are also reflected in the Act in the Responsible Business Practices Defense (see Section 10 for further discussion), which is specifically cross referenced in this section. Thus, if a defendant can show that reasonable steps were taken to ascertain whether a person being served was intoxicated then a defense may be established.

Subsections (f) and (g) deal with particular problems that can arise when attempting to determine the intoxication of another. Subsection (f), modeled after a provision in the New Mexico dram shop statute,[14] deals with consumption of alcoholic beverages by a person prior to entering the premises. A defendant cannot reasonably be expected to know of such behavior unless he is told of it or unless he is given a reasonable time to observe the person. His duty is therefore substantially affected compared to service to a person who is sober upon entering the premises. Subsection (f) applies to both off- and on-premises defendants. Fact-find-

11. Mjos v. Village of Howard Lake, 287 Minn. 427, 178 N.W.2d 862 (1970).
12. *Id.* at 435, 178 N.W.2d at 868.
13. Cimino v. Milford Keg, 385 Mass. 323, 431 N.E.2d 920 (1982).
14. N.M. STAT. ANN. s 41-11-1 (Supp. 1983).

ers should take into account that off-premises defendants have only a limited time to observe a customer before service of alcoholic beverages occurs, which may substantially affect their ability to determine the intoxicated condition of the person being served.

Subsection (g) provides that a defendant does not have a duty to recognize signs of intoxication other than those commonly associated with alcoholic beverage consumption. Many persons combine alcoholic beverages with other drugs. This may lead to intoxication that is not observable to a defendant not familiar with drug impairments other than those associated with alcoholic beverages. This subsection recognizes that a defendant's duty is related directly to the service of alcoholic beverages. However, if the defendant permits the use of other drugs on the premises, a duty may arise because of having knowledge of facts which would lead a reasonable person to the conclusion that the person being served is intoxicated (see discussion *supra*, this Commentary).

## SECTION 7: RECKLESS SERVICE OF ALCOHOLIC BEVERAGES

(a) The service of alcoholic beverages is reckless when a defendant, as defined in Section 5, intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

(b) A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

(c) Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(1) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages;

(2) Service of alcoholic beverages to a person, sixteen years old or under, when the server has actual or constructive knowledge of the patron's age;

(3) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning;

(4) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

*Commentary*

*Subsection (a): General Definition*

The general definition of reckless service of alcoholic beverages is a codification of the Restatement (Second) of Torts § 500[1] within the server liability context. The Restatement defines three key components of recklessness:

(1) *Intentionally serving alcoholic beverages*: The act of serving alcoholic beverages must first be intentional in order for the server's conduct to be reckless. It must be deliberate. "It . . . must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertance, or simple inattention. . . ."[2] For example, a server who brought a drink to one patron who later passed it on to a customer who was visibly intoxicated, may be negligent, but not reckless. The server must know that he or she is providing an alcoholic beverage to a particular patron in order for the service to be intentional.

(2) *Creating an unreasonable risk of physical harm to the drinker or to others*: There can be two types of reckless conduct in the service of alcoholic beverages. In the first, the server knows that the service creates a high degree of risk of physical harm to the drinker or to others. S/he appreciates the risk but acts in conscious disregard of the consequences. A second type of reckless conduct involves a server who know that s/he is serving a particular patron but s/he does not appreciate the risk that the service is creating, although a reasonable person would be conscious of the risk. In either situation, it does not matter that the server did not intend for the consequences to result. "If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it willful misconduct . . ."[3] Recklessness is often used interchangeably by courts with willful and wanton misconduct.

In sum, reckless conduct involves a risk taken by the server of the alcohol that is unreasonable, such that physical injury is not merely a possible result, but a probable one. However, even when appreciated, it is not necessary that the server perceive the risk as being extremely hazardous in order to be considered reckless. "The risk must be of such

1. RESTATEMENT (SECOND) TORTS § 500 Reckless Disregard of Safety, defined (1965).
2. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS 185 (5th ed. 1984).
3. Ewing v. Cloverleaf Bowl, 20 Cal. 3d 395, 402, 572 P.2d 1155, 1158, 143 Cal. Rptr. 13, 17 (1978).

nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[4]

(3) *Distinguishing negligent and reckless conduct*: The Restatement (Second) of Torts labels the risk presented by both negligence and recklessness as being unreasonable, with the degree of unreasonable risk as the key factor in distinguishing the two concepts.[5] (For discussion of negligence, see Section 6, *supra*). "The difference between reckless misconduct and conduct involving only such quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."[6] A defendant may be negligent in serving alcohol to a patron, but absent a showing of a greater degree of risk disregarded by him, such conduct is not reckless.

*Subsection (b): Liability for the Reckless Service of Alcoholic Beverages*

The rules for finding a defendant liable for reckless conduct are based on Section 501 of the Restatement (Second) of Torts. That section states that the rules for determining whether a person is liable for reckless disregard of another's safety are the same as those which determine his liability for negligence,[7] with three exceptions.

First, to be held liable for negligence, the actor's conduct must be a substantial factor in bringing about the harm. In an action for recklessness, the jury need only find that the actor's conduct bears a sufficient causal relation to another's harm to find him liable. In a recklessness action, then, the standard for finding a causal relation to a plaintiff's harm must be "sufficient" to warrant a finding of liability but not necessarily "substantial," even though, under negligence no such finding would be permissible.[8]

Second, the treatment of the plaintiff's conduct and its effect on the defendant's liability is handled differently under negligence and recklessness rules. In a negligence action, the plaintiff's contributory or comparative negligence may bar or reduce his recovery, while in an action involving a defendant's recklessness, it at worst would only reduce recov-

4. BLACK'S LAW DICTIONARY, p. 1142 (5th ed. 1979).
5. RESTATEMENT (SECOND) TORTS, § 500.
6. *Id.* § 500, Comment g.
7. *Id.*, §§ 430, 431.
8. *Id.*, § 501, Comment a.

ery. Third, a finding of recklessness may give rise to punitive damages. See the discussion concerning defenses and damages in Section 9 and 8, respectively, for the impact of a finding of recklessness.

*Subsection (c): Admissible Evidence of Reckless Conduct in the Service of Alcoholic Beverages*

The server practices that evidence reckless conduct which follow are not meant to be an exhaustive list. They serve as illustrations of the recklessness concept, and provide examples in the context of alcohol service. They do not create a presumption of recklessness and are subject to certain defenses as defined in Sections 9 and 10.

*Subsection (c)(1): Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages*

Serving practices that actively encourage intoxicated patrons to consume substantial amounts of alcoholic beverages can be evidence of recklessness. These practices center around an active urging or coaxing of intoxicated patrons to drink. These should be distinguished from practices which encourage sober patrons or intoxicated patrons, whom a server would not reasonably have known were intoxicated, to continue drinking. Thus, serving practices such as happy hours, free drinks, or other drink promotions, which are promoted only to patrons who are not known to be intoxicated may be evidence of negligence but not of recklessness. If such practices are applicable to all patrons, regardless of their intoxication, it may be evidence of recklessness.

The subsection also provides that patrons be encouraged to consume "substantial amounts" of alcoholic beverages. A showing that only one drink was offered to an intoxicated person is insufficient; rather, evidence of repeated serving is required. This requirement is included in recognition that determining intoxication of a patron is an inexact science and that reckless service of such persons must clearly be highly abusive in order to meet the standards set forth in the recklessness definition.

As in the proof of negligence, BAL levels may be used as evidence that "substantial amounts" were served, but are not conclusive. No set BAL is established, and the circumstances of each case will be critical (see Commentary to Sections 2 and 10). Nevertheless, BAL levels substantially above a state's legal or presumptive definition of intoxication, which normally can only be reached with extremely heavy consumption of alcoholic beverages, may be relevant in the determination of this element of the definition.

The subsection also required that the server "actively encourage" the continued drinking by the intoxicated person. This standard has been adopted in recognition that the reckless conduct must be intentional and deliberate (see Commentary, *supra*, this section). Evidence that a server inadvertently permitted such drinking to occur, or that another patron helped to deceive the server could be used to show the lack of recklessness even though it might be sufficient to show negligence.

The conduct described in this subsection is defined as reckless in part because of the substantial risk it creates of harm to the drinker and others that is substantially greater than mere negligent service. The risk of injury rises dramatically as the drinker's intoxication level increases to ranges of BALS substantially greater than those normally associated with intoxication. The act of encouraging continued drinking beyond intoxication is thus evidence that the server is ". . . indifferent to the consequences it may impose. . . ."[9]

*Subsection (c)(2): Service of alcoholic beverages to persons 16 years of age and under*

This subsection recognizes the substantially greater risk of harm involved in serving a person 16 years of age or under. Children are known to be exposed to great risk of harm to themselves and others if they come under the influence of alcohol, and are also recognized as not capable of bearing the responsibility of their own drinking behavior. Thus, servers are held to a higher standard of conduct in their handling of very young patrons, and the latters' contributory or comparative negligence does not necessarily provide a defense to the server.

The subsection also recognizes that the failure to identify the underaged status of those 16 years and under evidences a much greater degree of carelessness and disregard for safety of others than service to those who are over 16 years of age but still under the legal drinking age. Although there may be circumstances in which a 16 year old might appear to be over the drinking age, it is unlikely that such a person would not appear to be an age that would clearly require the careful checking of identification. The evidence of recklessness would thus be more persuasive as the age of the patron decreases.

Service of alcoholic beverages to minors who are over 16 years of age may be reckless, depending on other circumstances, and the evidence of minority may be relevant to that determination. The mere service of alcoholic beverages to those over 16 years of age, even if intoxicated,

9. *See* Ewing v. Cloverleaf Bowl, 30 Cal. 3d at 402, 572 P.2d at 1158, 143 Cal. Rptr. at 17.

however, is not alone sufficient for a finding of recklessness. Other factors that may be relevant to the determination of recklessness include (but are not limited to) those found in other subsections of this provision.

Criminal laws in all states prohibit the furnishing of alcoholic beverages to minors generally. These laws evidence a legislative finding, well documented in research literature, that all those under the legal drinking age are particularly sensitive to alcohol and are at a greater risk to cause harm to themselves and others. This provision recognizes that those over 16 years of age have a greater degree of responsibility for their own conduct than their younger counterparts.

As with the service of alcoholic beverages to minors generally, evidence of responsible serving practices, particularly regarding false identification, may apply. However, the standards of responsible practices clearly become more strict as the age of the patron decreases.

*Subsection (c)(3): Continuous and excessive service of alcoholic beverages*

Alcohol is a drug that can act as a poison when ingested in large quantities. As a poison, it is second only to carbon monoxide as the agent responsible for the most deaths in the United States.[10] "Slow alcohol ingestion generally leads to unconsciousness before the drinker consumes enough to reach lethal blood level. Rapid alcohol ingestion while sober often causes vomiting. However, because intoxication depresses the brain's emetic mechanisms, rapid alcohol ingestion by a person already intoxicated can be fatal."[11] The liver is unable to metabolize the alcohol fast enough and therefore the amount of alcohol in the body reaches a toxic level.

The risk of alcohol poisoning is substantial when the patron's blood alcohol is already elevated to a high degree or when the amount of alcohol already consumed has the potential for creating a high blood alcohol level. In *Ewing v. Cloverleaf Bowl*,[12] an experienced bartender was alleged to have served a patron (who had just turned 21) 10 straight shots of 151 proof rum, 1 vodka collins and 2 beer chasers in less than an hour and a half. The patron died of acute alcohol poisoning. The court held that a jury could find that the bartender's conduct was not merely a want of ordinary care, but constituted reckless conduct.[13]

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10. L.J. WEST, ALCOHOLISM AND RELATED PROBLEMS: ISSUES FOR THE AMERICAN PUBLIC, 9 (1984).
11. *Id.*
12. 20 Cal. 3d 395, 572 P.2d 1155 143 Cal. Rptr. 13 (1978).
13. *See also* Davis v. Butler, 95 Nev. 763, 602 P.2d 605 (Nev. 1979).

*Subsection (c)(4): Assistance of patron into an automobile*

A bartender followed an intoxicated patron out to his car and gave the patron instructions on how to turn his steering wheel so that he might drive out of the parking lot. The court stated that "[i]t is not at all unlikely that a trier of fact could find the action of this defendant in helping a man with a morning-acquired state of intoxication into a car and sending him out on a public highway might well be considered reckless and wanton conduct on defendant's part."[14]

Clearly, a patron who is so intoxicated that, without aid by another, he would be unable to enter an automobile by himself, should not be driving. A responsible licensee practice would be to make alternative transportation arrangements for intoxicated patrons. But under no circumstances should active aid to an intoxicated patron into an automobile be rendered.

## SECTION 8: DAMAGES

(a) Damages may be awarded for all injuries recognized under [State] common law (or codified common law provisions).

(b) Punitive damages may be awarded in all actions based on reckless conduct, as defined in Section 7. Punitive damages may not be awarded for actions based on negligent conduct, as defined in Section 6.

(c) Damages may be recovered under [wrongful death statute] and [survival statute] as in other tort actions.

### *Commentary*

The damages section has been drafted in accordance with the intent of this Act which states the negligent or reckless service of alcohol by licensed vendors be governed primarily by ordinary principles of tort liability.

Review of all existing licensee liability statutes has revealed two primary approaches to damages. One approach specifies that damages be allowed for injuries to persons, property or means of support.[1] Some states allow additional or fewer types of specified damages.[2] These statutes have led to numerous interpretations as to the scope of the categories enumerated, which have in turn led to uncertainty and unnecessary

14. Galvin v. Jennings, 289 F.2d 15, 17 (3rd Cir. 1961).

1. *See, e.g.*, ILL. ANN. STAT. CH. 43, § 135 (Supp. 1983); IOWA CODE ANN. § 123.92 (West Supp. 1983); OHIO REV. CODE ANN. § 4399.01 (1982); Vt. Stat. Ann. tit. 7, § 501 (1972).

2. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602.1 (West 1980); CONN. GEN. STAT. ANN. § 30-1-2 (West 1975); MICH. COMP. LAWS § 436.22 (1978); MINN. STAT. ANN. § 340.95 (Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983).

litigation. Terms such as "persons," "property" and "support" have taken on specialized meanings in these states, not necessarily coinciding with ordinary tort principles of the jurisdictions.[3]

The other major statutory approach has been to allow recovery for "injuries," without specifying the meaning of the term.[4] Again, the lack of specificity of this type of statute has led to litigation over the intent of the term.

This Act explicitly rejects the view that the provision of licensee liability for serving alcohol is a special species of statute governed by principles differing from the common law. The damage provisions of this Act have been specifically linked to state policy as enunciated by the common law or by legislative common law codifications.[5] These well established bodies of law should provide the basis for uniform state rules on such issues as recovery for intangible injuries, e.g., loss of consortium and mental anguish.

The provision regarding punitive damages is intended to clarify the application of such damages in dram shop cases. The general rule in effect in most states is followed, that punitive damages are only allowed when aggravating circumstances are present.[6] Under this Act, reckless conduct presents aggravating circumstances that authorize imposition of punitive damages. The provision is structured so as to avoid litigation over whether reckless conduct also involves wilful or wanton conduct, malice, fraud, oppression, or other conduct associated with punitive damages.

The provision regarding damages under wrongful death and survival statutes is again intended to extend general tort law principles to liability arising under this Act. Wrongful death and survival provisions have been enacted in most jurisdictions to cure defects in the common law which deny recovery under various circumstances involving the death of a tort victim or the tortfeasor.[7] Although some current licensee liability statutes set out wrongful death or survival provisions in their text,[8] this Act incorporated existing provisions by reference for two reasons. First, wrongful death and survival provisions vary from state to state, and in-

3. *See, e.g.*, Kelly v. Hughes, 33 Ill. App. 2d 314, 179 N.E.2d 273 (1962); Podbielski v. Argyle Bowl, Inc., 392 Mich. 380, 220 N.W.2d 397 (1974); State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963).

4. *See, e.g.*, ALASKA STAT. § 04.21.020 (1980); FLA. STAT. ANN. § 768.125 (West Supp. 1984); OR. REV. STAT. § 30.950 (1980); PA. STAT. ANN. tit. 47 § 4-497 (Purdon 1969).

5. *See, e.g.*, GA. CODE ANN § 105-2002 (1982).

6. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 2 (5th ed. 1984).

7. *Id.* § 125A (5th ed 1984); SPEISER, RECOVERY FOR WRONGFUL DEATH, p. 407 (2d ed. 1975).

8. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983); N.D. CENT. CODE § 5-0106 (Supp. 1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983).

corporation by reference facilitates a uniform state policy. Second, incorporation provides a well-settled body of law, eliminating litigation over the meaning of new provisions.

Legislatures may desire to incorporate an additional provision requiring that any wrongful death action be brought at the same time as the action under this Act. This would eliminate disputes that have arisen as to whether the Act's remedies are coextensive with those afforded under the wrongful death act, and whether relief in separate actions under both statutes would amount to an improper double recovery.[9] It was not possible to include such a provision under this Model Act, since a uniform provision could not respond to the varying statutory schemes presented by State wrongful death statutes.

*Recovery Caps*

Three states (Connecticut, Illinois, and North Carolina) have established limits on total awards on all claims brought under the states' dram shop acts.[10] Several other states are considering similar legislation. The Connecticut and Illinois recovery caps are very restrictive ($50,000 and $20,000 respectively), while North Carolina imposed a $500,000 limitation. The primary rationale for recovery caps concerns the cost of insurance. Dram shop liability may cause large increases in insurance premiums, particularly because of the uncertainty of the law and the potential for multi-million dollar claims. In Illinois, the statute imposes a strict liability approach such that a defendant may be found liable even if the patron who was served was not intoxicated at the time of service.[11] The recovery cap thus tends to counterbalance the potential unfairness of the statute, which is not based in negligence principles. Connecticut also has a "strict liability" statute,[12] although it has not been as broadly interpreted as the Illinois statute.

The Model Act addresses these concerns in part by creating the new "responsible practices" defense in Section 10. It is anticipated that if the law is enacted, insurance companies will offer discounts to those who adopt appropriate management and serving practices, thus alleviating the insurance cost issue at least to some degree.[13] The Act is also negligence-

9. *See, e.g.*, Wendelilin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966); Fitzer v. Bloom, 253 N.W.2d 395 (Minn. 1977).

10. CONN. GEN. STAT. ANN. § 30-1-2 (West 1975); ILL. REV. STAT. Ch. 43 § 135 (Supp. 1983); N.C. GEN. STAT. § 18B-123 (1983). The limitations apply to all claims arising from a single incident; Connecticut and Illinois place lower limits for each plaintiff's claim.

11. *See, e.g.*, Tate v. Coonce, 97 Ill. App. 3d 145, 421 N.E.2d 1385 (1981).

12. *See, e.g.*, Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606 (1957); Passini v. Decker, 39 Conn. Supp. 20. 467 A.2d 442 (1983).

13. According to Intermission, Ltd., at least one insurance company has already offered a dis-

based; thus defendants are given adequate defenses and are not facing strict liability. States may wish to take appropriate regulatory action so that insurance premiums accurately reflect costs. Unfortunately, very little is known regarding the insurance cost issue, and the debate regarding its impact is thus based on speculation and conjecture. A detailed evaluation of the topic is therefore warranted.

The Model Act therefore does not include a recovery cap. If a cap is deemed necessary, it should be imposed with caution and at a high enough level to cover the costs of most intoxication-traumatic injuries. Any recovery caps should not apply to punitive damages, as a cap may defeat the purpose of discouraging extremely inappropriate behavior. In general, recovery caps are in conflict with basic tort law principles, which assume that a plaintiff has a right to full recovery, regardless of amount, if he or she can prove defendant's fault and the amount of loss.

## SECTION 9: COMMON LAW DEFENSES

Defenses applicable to tort actions based on negligence and recklessness in [state] may be asserted in defending actions brought pursuant to this Act.

### *Commentary*

Because the Act codifies causes of action based on the negligence and recklessness of servers of alcoholic beverages, all defenses normally available to such actions may be asserted under the Act. Comparative negligence (or contributory negligence, depending on state law) and assumption of the risk are the most commonly asserted defenses to dram shop claims.

The Act takes no position regarding whether a state should adopt comparative negligence, and, if so, in what form. Most states, however, do not permit the person who becomes intoxicated to recover damage from the person who served him, a doctrine recognized in Section 4, *supra*. It should be noted that, in some jurisdictions, contributory/comparative negligence defenses are not available in actions based on recklessness. Thus, assuming a bar to a negligence claim is available to the defense the intoxicated person must show recklessness on the part of the defendant to recover.

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count if certain server training courses are attended. Personal interview with James E. Peters, Executive Director, Intermission, Ltd., 56 Main Street, Northampton, MA, December 10, 1984.

(9) establish a standardized method for hiring qualified employees; and
(10) reprimand employees who violate employer policies and procedures.

(f) For the purposes of service to minors, evidence of responsible business practices may include, but is not limited to those listed in subsection (e) and the following:

(1) management policies which are implemented at the time of service and which insure the examination of proof of identification [as established by state law] for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors;
(2) comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

(g) Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and defendant's previous contacts with the intoxicated person or minor who is served. Proof of the existence or omission of one or more elements of responsible business practices does not constitute the proof or disproof of the responsible business practices defense.

*Commentary*

*Overview*

The responsible business practices defense is a central provision of the Act. It provides a defendant a means of protection from liability if it can be shown that, at the time of the service of alcoholic beverages, the defendant was following those business practices which an ordinarily prudent person would follow with the same duty under like circumstances. The defense reaffirms the defendant's duty not to serve intoxicated persons and minors. Subsection (b) makes this clear by providing that when a defendant serves a person with actual knowledge that such person is a minor or intoxicated, the defense does not apply. Evidence of responsible business practices is needed to determine whether a defendant who did not have actual knowledge should have known of the person's intoxicated condition or age. Nor does the defendant have to pursue this defense in order to avoid liability. If the plaintiff cannot meet his or her burden of proof that the defendent served an intoxicated person or minor knowing or in circumstances where the defendant should have known of the intoxication or the underaged status, then liability will not attach, whatever business practices were in existence at the time of

the service. Thus, the defense does not create a new or alternative cause of action to those stated in Sections 6 and 7.

There are, however, numerous instances in which a defendant did not know of the person's intoxication, and the issue of liability rests on whether he should have known of this fact. The most common issue concerns whether the person's intoxication was "obvious" or "apparent." Frequently there is conflicting evidence regarding the obvious signs of intoxication, the number of drinks served and the other circumstances of the sale. Plaintiffs may be placed at an initial disadvantage due to the possible lack of evidence to make a prima facie case against a particular defendant; defendants in turn are put at a disadvantage if such a case is made due to the difficulty in recreating the particular circumstances of the sale and the very subjective and uncertain nature of the "obvious intoxication" standard. In such cases, where factual determinations are difficult to make, the responsible business practices defense may take on particular importance for the fact-finder in determining whether due care was exercised.

While this defense recognizes the difficulties in fulfilling the defendant's duty not to serve intoxicated persons and minors, it also provides that the defendant, as a member of the legitimate business operation, is in a position to take practical steps in the operation of that business to reduce the risk of harm to others. The Act's intent is to provide an incentive to adopt appropriate procedures, practices and actions in order to reduce those risks. Thus, the Act provides possible means of protection when an intoxicated person or minor is served, but only if the business is conducted in a responsible and prudent manner.

The defense is a relatively new concept in dram shop law, but not unprecedented. The North Carolina statute provides that evidence of "good practices" in cases involving service to minors, may be used as a defense.[1] In addition, business practices have been found relevant in some cases on the issue of negligence without any explicit standard in the state's dram shop statute.[2]

Responsible business practices encompass a broad range of business activities. The section provides a noninclusive set of practices to provide guidance to the fact-finder. Subsection (g) is critical in interpreting the intent of this listing. As stated in that provision, the defense may be available even if some of the practices (or others not listed) have not been met. The particular type of business, the existence of adequate resources

1. N.C. GEN. STAT. § 18B-122 (1983).
2. *See, e.g.*, Ewing v. Clover Leaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

for implementation, particularly of training programs and the defendant's community, may all have an input on how a reasonable person would act in defendant's circumstances. Thus, the "totality of the circumstances" must be considered in applying the section to particular facts.

One possible objection that has been raised regarding the responsible business practices defense concerns the potential increase in liability of the licensee if certain business practices are adopted too enthusiastically (a "good samaritan" rule objection). This section is drafted to avoid this problem. The defendant has a duty to take reasonable steps to avoid serving intoxicated person and minors. This section, as well as Section 6, provides a basis for balancing this duty against the defendant's need to conduct a legitimate business and the difficulties of recognizing intoxicated persons. Thus, a defendant who decides not to take reasonable steps to fulfill this duty does so at his or her own peril. The duty remains the same. If a defendant takes actions that go beyond such reasonable steps, it provides not an increase in liability, but additional support for a responsible business practices defense. In addition, Section 6 provides specific limitations on the defendant's duty to investigate behavior of persons outside the defendant's premises.

*Training*

The section provides that responsible business practices include comprehensive training of defendant and defendant's employees and agents regarding responsible service of alcoholic beverages and handling of intoxicated patrons. Numerous training programs are now in existence, but they are at a preliminary stage of development and vary widely in format, duration and content. The section does not attempt to define responsible service of alcoholic beverages in recognition of this experimental stage of development, and recognizes the need for the fact-finder to judge the training programs in light of community and business standards at the time of the service in question.

A critical variable, which is included in the section, concerns the development of both knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. This reflects the need to learn interaction skills in order to make the identification of intoxicated persons easier and to make interventions with patrons who drink heavily more effective. The inability to implement training procedures renders a training program useless. Several training pro-

grams currently in existence lack this skills development component.[3]

Training programs concerning potential sales to minors have more specific components, reflected in Subsection (f)(2). A realtively short training program can provide employees with skills for identifying whether an identification is authentic or false. In evaluating a defendant's training program, the fact-finder needs to take into account any on-the-job training efforts as well as the availability of training from outside sources. Comprehensive training is currently available only on a limited basis. Thus, a defendant's good faith effort to meet this standard may fall short of its goal. The type of training, if any, needed for different levels of employees may also vary signficantly. It is anticipated that current training programs will be expanded both in content and in geographic availability in the near future and that their effectiveness will be enhanced with further research, implementation, and evaluation. Thus this portion of the defense may change in its applicability both over time and by geographic location.

*Management Policies, Procedures and Actions*

The second major component of responsible business practices concerns management policies, procedures and actions designed to fulfill the defendant's duty not to serve intoxicated persons. As with the training component, the development of appropriate management procedures is in its infancy, with more research, implementation and evaluation necessary. Nevertheless, sufficient experimentation and consensus has occurred to devise general guidelines, found in Subsection (e)(1)-(7).[4]

As with the training component, management policies regarding potential service to minors can be more specifically ascertained. Management may establish procedures to insure that all identification of possible underaged persons is adequately inspected. Such procedures may be critical in cases in which the factual issues regarding place of service and type of identification are in doubt. This section provides a possible defense for the defendant if the fact-finder determines that such procedures were in place and being regularly followed at the time of the alleged service. (See Commentary to Section 6 for further discussion).

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3. For further discussion, *see*, Mosher, J. "Server Intervention: Present Status and Future Prospects," presented at the Research Workshop on "Alcohol and the Drinking Driver" sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, May 1984.

4. *Id.*; *see also*, Peters, J., ed. *Proceedings of the First Northeast Conference on Alcohol Server Liability* (Intermission, Ltd., Boston, MA) 1984; Intermission, Ltd. Minutes from a meeting to plan a comprehensive server and manager training curricula, Detroit, MI, April 16, 1984.

## SECTION 11: STATUTE OF LIMITATIONS

Any action under this Act against a defendant alleging negligent conduct shall be brought within —— year(s) of the conduct complained of. Any action under this Act against a defendant for reckless conduct shall be brought within —— year(s) of the conduct complained of.

*Commentary*

The statute of limitations provisions are left blank to allow jurisdictions to create limitations periods consistent with state policy. Given that the thrust of this statute is to extend ordinary principles of tort law to the serving of alcoholic beverages by a licensee, it is anticipated that limitations periods will be adopted that are consistent with the limitations periods for analogous actions. Separate limitations provisions are included for actions based on negligent and reckless conduct, as analogous actions may be governed by different limitations periods under state law.

## SECTION 12: PRIVILEGES

(a) No defendant, as provided in Section 5, may be held civilly liable for damages resulting from a good faith refusal to serve alcoholic beverages to any person who:

(1) fails to show proper identification of age; or
(2) reasonably appears to be a minor; or
(3) is refused service of alcoholic beverages by defendant in a good faith effort to prevent excessive consumption of alcohol by a person.

(b) No defendant, as provided in Section 5, may be held civilly liable for holding a person's identification documents presented to defendant as proof of the person's age for the purposes of receiving alcoholic beverages provided:

(1) such holding is for a reasonable length of time in a good faith effort to determine whether the person is of legal age or to summon law enforcement officers; and
(2) the person whose identification is being held is informed of the reason for defendant's action.

(c) No defendant, as provided in Section 5, may be held civilly liable for using reasonable force to detain for a reasonable period of time necessary to summon law enforcement officers a person who, in the defendant's presence, is committing or has committed a breach of the peace or felony or is attempting to operate a motor vehicle while intoxicated.

(d) This section does not limit a defendant's right to assert any other defense to a civil liability claim otherwise provided by law.

*Commentary*

Defendants who establish procedures for minimizing consumption of alcoholic beverages by minors or intoxicated persons may face potential liability claims by those affected by the procedures. False imprisonment, intentional infliction of emotional distress, and conversion are among the most likely civil claims that may arise. Most frequently, such claims are for minimal damages and are more in the nature of harassment. No reported case has been found which imposed liability on a defendant for acting in good faith to prevent service to minors or intoxicated persons. Indeed, existing defenses under common law may be adequate to provide protection to defendants.

The privileges found in Section 12 are nevertheless included in the Model Act as a means to prevent harassment claims and to promote responsible serving practices. However, nothing in this section should be interpreted as mandating any given action or procedure for the purposes of establishing or disproving a responsible practices defense as defined in Section 10. The privileges should be interpreted as a minimal protection available; as stated in Subsection (d), defendants have a right to assert any additional defenses available by law. It should be noted that the right to possess alcoholic beverages is restricted and more in the nature of a privilege than a right.[1] Thus, the state interest in preventing unlawful consumption and in preventing service to minors and intoxicated persons may be broadly construed when claims against defendants for failure to serve alcoholic beverages are made.

*Subsection (a)* provides a defendant a defense against claims based on the defendant's refusal to serve alcoholic beverages to those suspected of being minors or of being intoxicated or nearly intoxicated. Subsections (a)(1) and (a)(2) are substantially the same provisions found in the North Carolina dram shop act.[2] The provision complements Section 10, which provides a potential defense to a claim under the Act if a defendant reasonably relies on proof of age identification. Because of the potential for liability and the societal interest in preventing minors from consuming alcohol beverages, the defendant's privilege is broadly drawn to include refusal to serve alcoholic beverages to anyone who reasonably appears to be a minor, even when proof of identification is presented.

1. *Cf.*, California v. LaRue, 409 U.S. 109 (1972).
2. N.C. GEN. STAT. § 18B-129(a) (1983).

Defendants are required by law in most states not to serve anyone who appears intoxicated. Thus, no civil liability claim may be based on the defendant's refusal to serve such persons. Subsection (a)(3) extends this basic protection to situations in which defendant's refusal is based on a good faith effort to prevent a person's intoxication. The provision again complements Section 10, which provides a defense to a claim under the Act if defendant is adhering to responsible business practices. However, the failure to refuse service to a person in order to prevent his or her intoxication does not constitute negligence under Section 6, and the inclusion of this privilege in no way implies that the failure to do so constitutes unreasonable business practices. It is included as a means to protect defendants who may act more cautiously than is required by law in order, to insure that they are not punished for exercising that caution. The societal interest in preventing intoxication-related offenses and injuries is sufficient to justify this minimal restriction on an individual's right to possess alcoholic beverages, provided that the refusal of service is applied such that it does not violate some other paramount state interest (e.g. race discrimination).

*Subsection (b)* is based substantially on a provision found in North Carolina dram shop act[3] and provides explicit protection to defendants against the imposition of civil liability for holding identification papers for a reasonable time to determine their authenticity. It is anticipated that, if reasonably believed to be false, they may be held until law enforcement officers can be summoned to determine whether a crime has been committed. The protection found in this subsection may already be established in many states and may thus be unnecessary.

*Subsection (c)* is based on provisions found in the Restatement (Second) of Torts[4] and is a codification of common law principles.[5] A private citizen has a right to make a citizen's arrest if a breach of the peace or a felony is being or has been committed in his or her presence.[6] Subsection (c)(2) provides explicit protection from civil liability to defendants who detain a person attempting to commit a drinking driving offense. It is unclear whether this right of detention exists under subsection (c)(1) since, arguably, the detention may occur before the crime is actually being committed. In many states, such a right may be explicitly recognized, making this provision unnecessary. In addition, the rights of those

3. N.C. GEN. STAT. § 18B-129(b) (1983).

4. RESTATEMENT (SECOND) TORTS § 119 (1965).

5. *See* W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, 5th ed., § 26 (1984).

6. *Id.*; RESTATEMENT (SECOND) TORTS § 119 (1965); Commentary to Restatement §§ 115-119 for discussion of definitions and principles associated with this right.

making a legal citizen's arrest may be broader than those granted here (to detain for a reasonable time for the summoning of law enforcement officials). States may wish to broaden this language to conform with state law. Alternatively, subsection (d) will provide an avenue for a defendant to assert such rights.

## SECTION 13: SETTLEMENT; RELEASE; CONTRIBUTION; INDEMNITY

(a) A plaintiff's settlement and proper release of either the intoxicated tortfeasor or a defendant, as defined in Section 5, will not bar potential claims against any other defendant(s).

(b) The amount paid to a plaintiff in consideration for the settlement and proper release of any defendant will be offset against all other subsequent judgments received by plaintiff.

(c) The liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages, shall be joint and several.

(d) In cases of negligent conduct, the liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages shall have a right of contribution and not a right of indemnification.

(e) In cases of reckless conduct, nonreckless defendants have a right of either indemnification or contribution from any reckless defendants.

### *Commentary*

Several issues may arise when a plaintiff settles with and releases a joint tortfeasor from liability. Courts will usually recognize a release from liability, although courts may strike down such an agreement if it is contrary to public policy.[1] Subsection (a) recognizes this principle, and requires that the release be "proper" in the sense that it does not violate public policy. Furthermore, courts are divided on the impact of a settlement and release upon other defendants. The old common law rule held that any other defendants would be subsequently released from liability.[2] Modern case law has permitted plaintiff to bring subsequent actions and allowed defendants to offset previous settlements by other defendants against any later judgments.[3] The Model Act, in Subsections (a) and (b),

1. *See, e.g.*, Scheff v. Homestretch, Inc., 60 Ill. App. 3d 424, 377 N.E.2d 305 (1978) (defendant raceway company obtained a release form from all participants in a racing event which it sponsored).
2. *See, e.g.*, Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947).
3. *See, e.g.*, Larabell v. Sesbuknecht, 308 Mich. 419, 14 N.W.2d 50 (1944).

adopts this modern view, which is based on equitable principles.

Contribution, a concept that allows one who is liable to another to shift a portion of that liability to a third person, has a fairly uneven case history within a dram shop context. However, some general rules have been established by the courts. Licensed vendors will have a right of contribution among themselves,[4] and intoxicated wrongdoers have been able to recover contribution from the server.[5] On the other hand, there is conflicting authority as to whether servers can claim a right of contribution from their intoxicated customers. Courts which have not permitted servers to seek contribution from their intoxicated patrons have relied at least in part on the penal nature of the dram shop act. The Model Act therefore permits a right to such contribution [in subsection (d)], as do most courts which analyze dram shop liability within a negligence context, because the Act is not penal in nature (see Section 2), and because there is not a wide disparity of fault between the parties.[6] The North Carolina dram shop statute has substantially the same provision.[7]

Indemnity shifts the entire loss from one tortfeasor to another.[8] Within a dram shop context indemnity issues are rarely involved, as indemnity will only be allowed when there exists a wide disparity in the gravity of fault between tortfeasors. Licensees and intoxicated persons are usually not considered to have wide disparities in the gravity of fault,[9] thus precluding any right of indemnification. This principle is adopted in subsection (e), which provides that indemnification is permitted only if one defendant has committed reckless conduct.

## SECTION 14: EXCLUSIVE REMEDY

This Act is the exclusive remedy against defendants, as defined in Section 5, for claims by those suffering damages based on the defendants' service of alcoholic beverages.

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4. *See, e.g.*, Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1973).

5. Morgan v. Kirk Bros., Inc., 111 Ill. App. 3d 914, 444 N.E.2d 504 (1982) (court relied on interpretation of newly enacted Illinois Contribution Act, which clearly stated that where two or more persons are subject to liability in tort arising out of the same injury there exists a right of contribution among them).

6. *See.* Pautz v. Cal-Ros, Inc., 340 N.W.2d 3[illegible] Minn. 1983) (to deny the vendor a right of contribution would be a repudiation of the essential principle of contribution). *But see*, Virgilio v. Hartfield, 4 Mich. App. 582, 145 N.W.2d 367 (1966) (court denied vendors a right of contribution from the intoxicated wrongdoer based on the theory that the parties were not joint tortfeasors, despite a single, indivisible injury)

7. N.C. GEN. STAT. § 18[illegible] 124 (1983).

8. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 51 (5th ed. (1984).

9. Geocaris v. Bu[illegible]gs, 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968).

*Commentary*

A pressing legal issue in many states with dram shop liability statutes is whether plaintiffs may seek alternative remedies at common law outside the statutory remedy. Although there is a conflict in authority, the modern trend is toward permitting common law actions based either on negligence per se or common law negligence standards.[1] Some state legislatures have addressed this issue explicitly. For example, in California, the dram shop statute purports to be the exclusive remedy for all service of alcoholic beverages; in North Carolina, the statute provides that it does not exclude common law claims.[2]

The primary reason for permitting alternative actions is that the statutory provisions in question are usually antiquated and are not based on common law principles.[3] In many cases, suits are permitted only by a limited class of plaintiffs and the acts giving rise to liability are defined very narrowly.[4] Courts have thus turned to common law principles as a means to avoid otherwise harsh results.

This Act codifies a common law negligence cause of action for the commercial service of alcoholic beverages. It therefore is the exclusive remedy, and an alternative set of duties, defenses, and other provisions are not permitted.

Section 14 is carefully worded so as to not preclude possible causes of actions outside this Act in at least two closely related circumstances:

(1) cases in which the licensee has acted negligently in a manner not related to the service of alcoholic beverages;
(2) cases that involve the service of alcoholic beverages by someone not included as a potential defendant in Section 5.

See Commentary to Section 5 for discussion of potential liability of noncommercial servers of alcoholic beverages. State legislatures may wish to preclude such suits as a matter of law.[5]

## SECTION 15: EVALUATION

The Alcoholic Beverage Control Agency shall conduct an evaluation of the impact of this Act, to be completed within two years of its

1. *See, e.g.*, Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Mason v. Roberts, 294 N.E.2d 884 (Ohio 1973); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983). *But see* Nunn v. Comidas Exquisitos, Inc., 166 Ga. App. 796, 305 S.E.2d 487 (1983).
2. CAL. BUS. AND PROF. CODE § 25602 (West 1980); N.C. GEN. STAT. § 18B-128 (1983).
3. *See, e.g.*, McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
4. *Id.*; *see also*, Kerby v. Flamingo Club, Inc., 532 P.2d 975 (Colo. 1974).
5. At least two states have taken such action. *See* CAL. CIVIL CODE § 1714 (West 1980); N.M. STAT. ANN. § 41-11-1(E) (Supp. 1983) (liability permitted only if recklessness is proven). *But see*, OR. REV. STAT. § 30.955 (1983), which permits such liability.