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COMMENTS

RESPONSIBLE SERVICE OF ALCOHOL: A WAY TO REDUCE INJURIES AND PROTECT AGAINST LIABILITY

I. INTRODUCTION

Two boisterous young men walk into the bar at about 12:30 a.m. They don't slur their words, but they stumble a bit and it is clear they have been drinking and making the bar scene that night.

One of the men slaps his money down on the bar and orders two shots of tequila and a pitcher of beer. It's almost closing time, and the bartender knows that the two will be driving soon after they finish drinking, and they could be a menace behind the wheel of a car.

Does the bartender oblige their request or cut off service?

That question is being asked all over the country today as sellers and servers of alcohol face increasing liability for the actions of people who purchase liquor from them. The strong tide of public outcry against the drinking driver and the proliferation of dram shop laws—civil liability acts which make the seller of alcoholic beverages liable when the purchaser injures a third party[1]—have led to the advent of server intervention training programs.

Although server training programs vary in content and approach, their common goal is to educate and train managers and servers in ways to pace and cut off service of alcohol, encourage

1. BLACK'S LAW DICTIONARY 444 (5th ed. 1979).

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the offering of food and non-alcoholic beverages and provide alternative transportation for customers who are unable to drive. The programs sometimes delve further into an establishment's overall business practices, addressing everything from the number of employees on duty at a given time to the design, lighting and seating availability.

In some states, completion of a server training program can absolve the licensee of liability, while in others the training qualifies as a responsible business practice and can be a defense to liability.[2]

The push for server training is motivated by both the need for affordable liquor liability insurance and by public health concerns. Public health advocates see management and server training as a way to control intoxication at the source—the licensed sellers of alcohol. Research has shown that more than one-half of the drinking drivers on the road did their drinking in a licensed establishment.[3] The public health approach aims to manipulate the drinking environment to reduce alcohol-related injuries.[4]

Large jury awards in dram shop suits and the skyrocketing costs of liquor liability insurance are also strong incentives for the implementation of server training. The lack of affordable insurance has resulted in licensees in many states "going bare," that is, operating without liquor liability insurance.[5]

This comment will explore the origins of dram shop liability and server training's evolution from liquor liability laws. The comment will also survey existing server training laws, identify the goals of server training and discuss the obstacles facing the movement.

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2. TEX ALCO. BEV. COMM'N. Ch. 50, tit. 16, (1988); N.H. REV. STAT. ANN. § 507-F:6 (1987); R.I. GEN. LAWS § 3-14-12 (1987).

3. O'Donnell, *Research on the Drinking Locations of Alcohol-Impaired Drivers: Implications for Prevention Policies*, J. PUB HEALTH POL'Y 6:514-15. (1985).

4. *Dram Shop Liability and Server Training, 1986: Hearings Before the California Assembly Select Committee on Alcohol and Related Problems* (1986) [hereinafter *Hearings*] (testimony of Victor Colman, legal research analyst for Prevention Research Group).

5. *See infra* note 173 and accompanying text.

II. DRAM SHOP LIABILITY

Dram shop liability is not a new concept, though it has experienced a significant rebirth since the movement against drunk driving began in the 1970s. Dram shop laws have existed since 1849, but the issue was not litigated during and immediately following Prohibition.[6]

Before the temperance movement of the 19th century, a tavern owner could not be held liable for damage caused by an inebriated customer. The courts held that the proximate cause of the damage was the drinker, and the tavern owner's role was too far removed to be considered the proximate cause.[7]

However, there were exceptions to the rule when the sale of alcohol was reckless or a flagrant violation of the law. In *Harrison v. Berkeley*,[8] a South Carolina court found a vendor liable for the value of a slave who became intoxicated and died of exposure. In another case, *Ridden v. Gremm*,[9] a wife recovered for her husband's death which was caused by liquor the defendant sold him.[10] The sale, which violated a penal statute prohibiting the sale of alcohol to habitual drunkards, occurred after the defendant received written notice to stop sales to that patron.[11]

Today, 24 states have dram shop statutes.[12] Some reject

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6. MODEL ALCO. BEV. RET. LIC. LIAB. ACT (1985) 12 W.ST. L. REV. 442 (1985) [hereinafter *The Model Act*]. The term "dram shop" comes from establishments in the 1800s that sold alcoholic beverages by the dram, a unit of measure.

7. NATIONAL ALCOHOLIC BEVERAGE CONTROL ACT, INC., ALCOHOL SERVER LIABILITY (1987) 2.

8. 32 S.C.L. (1 Strob.) 525, 47 Am. Dec. 578 (1847).

9. 97 Tenn. 220, 26 S.W. 1097 (1896).

10. *Id.* at 223, 26 S.W. at 1099.

11. *Id.*

12. ARIZ. REV. STAT. ANN. § 4-311 (Supp. 1988); COLO. REV. STAT. § 12-46-112.5 (Supp. 1988); CONN. GEN. STAT. ANN. § 30-102 (West Supp. 1988); FLA. STAT. ANN. § 768.125 (West 1986); IDAHO CODE § 23-808 (Supp. 1988) (limiting liability to sale to minors or obviously intoxicated persons); IND. CODE ANN. § 7.1-5-10-15.5 (Burns Supp. 1988); IOWA CODE ANN. § 123.92 (West 1987); ME. REV. STAT. ANN. tit. 28-A, § 2506, 2507 (Supp. 1988); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1988); MINN. STAT. ANN. § 340A.801 (West Supp. 1988); MISS. CODE ANN. § 67-3-73 (Supp. 1988) (applies only to sale to visibly intoxicated persons); MO. ANN. STAT. § 537.053 (Vernon 1988); MONT. CODE ANN. § 27-1-710 (1987); N.H. REV. STAT. ANN. § 507-F:4, 507-F:5 (1987); N.J. STAT. ANN. § 2A:22A-5 (West 1987); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); OHIO REV. CODE ANN. § 4399.01 (Anderson 1982); OR. REV. STAT. § 30.950 (1988); PA. STAT. ANN. tit. 47, §

entirely the common law notion that the drinker is solely responsible for his actions and that the consumption of alcohol is the proximate cause of any injuries.[13] Others limit liability to the sale of alcohol to minors or obviously intoxicated persons.[14]

But dram shop legislation does not always tighten laws. Legislative action in California in 1978 illustrates a trend in some states away from dram shop liability and back to the common law notion of proximate cause. The state Legislature amended Section 1714 of the California Civil Code in 1978 to abrogate three Supreme Court holdings.[15] The statute now restates the rule of common law that the "furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."[16]

4-497 (Purdon Supp. 1988), (no liability unless the liquor was furnished when the customer was visibly intoxicated); R.I. GEN. LAWS § 3-14-1 (1987); TENN. CODE ANN. § 57-10-102 (Supp. 1988); TEX. ALCO. BEV. CODE ANN. § 2.02 (Vernon Supp. 1988); UTAH CODE ANN. § 32A-14-1 (Supp. 1988) (Title 32A terminates on July 1, 1989); VT. STAT. ANN. tit. 7, § 7, § 501 (Supp. 1988). *See* Colman, Reavis, *State Trends in Server Intervention*, COUNCIL ON ALCOHOL POLICY, CALIFORNIA AFFILIATE, c/o Trauma Foundation, San Francisco (January 1988).

13. IOWA CODE ANN. § 123.92 (West 1987); MINN. STAT. ANN. § 340A.901 (West Supp. 1988); N.Y. GEN. OBLIG. LAWS § 11-101 (McKinney 1978); OHIO REV. CODE ANN. § 4399.01 (Anderson 1982).

14. ARIZ. REV. STAT. ANN. § 4-311 (Supp. 1988). COLO. REV. STAT. § 12-46-112.5 (Supp. 1987); CONN. GEN. STAT. ANN. § 30-102 (West Supp. 1988); FLA. STAT. ANN. § 768.125 (West 1986); IDAHO CODE § 23-808 (Supp. 1988) (limiting liability to sale to minors or obviously intoxicated persons); IND. CODE ANN. § 7.1-5-10-15.5 (Burns Supp. 1988); ME. REV. STAT. ANN. tit. 28-A, § 2506, 2507 (Supp. 1987); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1988); MISS. CODE ANN. § 67-3-73 (Supp. 1988) (applies only to sale to visibly intoxicated persons); MO. ANN. STAT. § 537.053 (Vernon 1988); MONT. CODE ANN. § 27-1-710 (1987); N.H. REV. STAT. ANN. § 507-F:4, 507-F:5 (1987); N.J. STAT. ANN. § 2A:22A-5 (West 1987); OR. REV. STAT. § 30.950 (1988); PA. STAT. ANN. tit. 47, § 4-497 (Purdon Supp. 1988), (no liability unless the liquor was furnished when the customer was visibly intoxicated); R.I. GEN. LAW § 3-14-1 (1987); TENN. CODE ANN. § 57-10-102 (Supp. 1988); TEX. ALCO. BEV. CODE ANN. § 2.02 (Vernon Supp. 1988); UTAH CODE ANN. § 32A-14-1 (Supp. 1988) (Title 32A terminates on July 1, 1989); VT. STAT. ANN. tit. 7, § 501 (Supp. 1987).

15. CAL. CIV. CODE § 1714(b) (Deering Supp. 1988) abrogated the holdings of *Coulter v. Superior Court*, 21 Cal. 3d 144, 145 Cal. Rptr. 534, 577 P.2d 669 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976), *cert. denied*, 429 U.S. 859 (1976); *Vesely v. Sager*, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151 (1971).

16. CAL. CIV. CODE § 1714(b) (Deering Supp. 1988).

A. The Model Dram Shop Act

The Model Dram Shop Act, officially known as the Model Alcoholic Beverage Retail Licensee Liability Act of 1985, attempts to define guidelines for applying current liquor liability concepts.[17] The Act, developed by the Prevention Research Group of the Medical Research Institute of San Francisco, is the product of 18 months of research.

In testimony before the California Assembly Select Committee on Alcohol and Related Problems in 1986, Victor J. Colman, a legal research analyst, said two main goals in drafting the Model Act were to refocus the purpose of dram shop laws to prevention of injuries and to direct judges and juries to the defendant's business practices rather than just the intoxication issue.[18]

The Act defines who can be plaintiffs and defendants for dram shop suits, sets out elements of negligent and reckless service of alcohol and provides guidelines for damages, common law defenses, the responsible business practices defense, privileges, settlements and evaluation by the state of the Act's impact.[19] The Act deviates from the general maxim that anyone who suffers damage has a cause of action. Instead, the Act adheres to the widely accepted rule that intoxicated persons, excluding minors, should not be able to recover for injuries caused by their contributory negligence.[20] The Act takes no position regarding minors.[21]

The Act sets out two concepts of liability—one for negligent service and one for reckless service of alcohol.[22] Under the Act, service of alcohol to a minor or an intoxicated person is negligent when the defendant knows, or a reasonably prudent person in like circumstances adhering to responsible business practices would know, that the person being served is a minor or is intoxi-

17. *The Model Act*, *supra* note 6, at 443.
18. *Hearings*, *supra* note 4.
19. *The Model Act*, *supra* note 6, at 454-84.
20. *Id.* at 455.
21. *Id.* at 449.
22. *Id.* at 459-64.

cated.[23] Reckless service occurs when defendants intentionally serve alcohol when they know, or a reasonable person in their position should know, that the service creates an unreasonable risk of physical harm to the drinker or to others.[24] The risk must be substantially greater than that risk necessary to make the conduct negligent.[25] Intoxicated persons have potential actions against servers for reckless misconduct.[26]

The Act does not set a standard blood alcohol level rule because the required level of impairment can be reached at either high or low levels, depending on individual reactions to alcohol.[27] The authors specifically state that the Act does not address social host liability,[28] the definition of licensees and licensed premises,[29] mandated server training,[30] a minimum legal drinking age,[31] recovery by an intoxicated minor for negligent service of alcoholic beverages or recovery caps.[32]

B. The Responsible Business Practices Defense

One of the key provisions of the Model Act is Section 10, the Responsible Business Practices Defense.[33] Under this provision, service of alcohol is neither negligent nor reckless if the defendant adhered to responsible business practices at the time of service.[34] Evidence of such practices includes comprehensive training of all personnel and maintenance of an adequate number of trained employees and agents for the type and size of the business.[35]

Responsible policies under the Model Act encompass those which encourage persons not to become intoxicated on the de-

23. *Id.* at 459.
24. *Id.* at 464.
25. *Id.*
26. *Id.* at 464.
27. *Id.* at 467.
28. *Id.* at 448.
29. *Id.*
30. *Id.* at 449.
31. *Id.*
32. *Id.*
33. *Id.* at 474.
34. *Id.*
35. *Id.*

fendant's premises and promote the availability of food, nonalcoholic beverages and safe transportation alternatives. These policies also include prohibiting employee drinking on the job and utilizing promotional and marketing efforts that publicize responsible business practices. [36]

Some states, like Rhode Island and New Hampshire, do not require server training but allow proof of responsible serving practices to serve as evidence that a defendant was not negligent or reckless.[37]

A prominent expert in the server training field has identified an establishment's written policies as the primary element of responsible business practices.[38] A good policy should define the owner's commitment to responsible business practices, how the procedures are to be implemented, the chain of command for implementing the policy and the penalties for violation of the policy.[39] Examples of responsible business practices, according to this expert, include providing alcohol education to employees, promoting discounts on food and nonalcoholic beverages, giving equal billing to nonalcoholic beverages, banning happy hours, measuring drinks and enforcing rules regarding on-the-job drinking by employees.[40]

III. EXISITING SERVER TRAINING PROGRAMS

A. THE MODEL RESPONSIBLE SERVER TRAINING ACT OF 1988

One of the major goals of dram shop liability and server training laws is to encourage change in traditional hospitality industry practices. The Model Responsible Server Training Act of 1988 sets out a sample curriculum for a training program.[41] The

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36. *Id.*

37. R.I. GEN. LAWS § 3-14-12 (1987); N.H. REV. STAT. ANN. § 507-F:6 (1987).

38. J. Peters, *Responsible Business Practice Laws, Promise to Change Litigation Procedures in Dram Shop Cases and Help Insurers in Assessing Risks*, INSURANCE TIMES, June 30, 1987. (Peters is the executive director of the Responsible Hospitality Institute. The Institute was formed in 1983 and has earned national recognition. Its philosophy is prevention rather than intervention.)

39. *Id.* at 12.

40. J. Peters, *Are You Responsible for the Drunk Driver*, RESTAURANTS AND INSTITUTIONS, (1983).

41. MODEL RESPON. SERVER TRAINING ACT, § 6 (1988) [hereinafter *Server Training Act.*] (The Server Training Act was prepared by the Alcohol Policy Initiatives Project of

curriculum is designed for three levels of training — the off-sale server, the on-sale server and managers and licensees.[42] The Server Training Act recommends that all programs provide information on alcohol as a drug and its effects on the body, the effect of alcohol combined with other drugs and ways to deal with intoxicated customers.[43] Additionally, the programs should cover recognition of underage customers and state laws relating to civil and criminal liability.[44]

Among the topics to be covered in a course for on-sale servers are state and local laws for on-sale licensees, intervention with the problem customer and ways to minimize the chances of intoxication.[45] It is also recommended that the on-sale server understand the use of alternative means of transportation to ensure that intoxicated customers get home safely, ways to deal with belligerent customers, knowledge of mixology, including marketable alternatives to alcoholic beverages and methods to pace customer drinking.[46] In addition, the suggested topics in the course for managers and licensees include the legal responsibilities of licensees and those in supervisorial roles, how to recognize signs of alcohol-related problems among employees and development of employee assistance programs.[47] The Act also recommends that managers and licensees learn to advertise and market for safe and responsible drinking patterns, develop standard operating procedures for dealing with problem customers, support employees who interact with them and maintain records relating to those incidents.[48] Finally, the course should explain how management practices affect safe and responsible drinking patterns, and it should cover procedures for assessing, developing and disseminating written guidelines for implementing responsible serving practices.[49]

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the Trauma Foundation in San Francisco, California.)

42. *Id.* at § 6.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

B. Voluntary Vs. Mandatory Programs

The concept of server training has manifested itself in mandatory programs in three states,[50] voluntary programs in numerous other states[51] and legislative debate throughout the country.[52] Oregon was first to mandate server training.[53] Utah and Vermont followed.[54]

Oregon will not issue or renew liquor licenses until the applicant or licensee has completed an approved alcohol server training program.[55] Utah's regulations resemble Oregon's in several respects. Utah requires all employees who sell or serve alcoholic beverages within the scope of their employment to complete an alcohol training and education seminar.[56] Licensees whose employees fail to complete a program may have their licenses revoked or suspended.[57]

In Vermont, licensees are required to complete a state program every three years.[58] The licensees are then responsible for training their employees whether it be in-house or through the state.[59] The state furnishes information and materials to licensees who want to train their own employees.[60]

Texas has a voluntary program, which, if completed by a licensee's employees, can provide the licensee with immunity from liability.[61] In Arizona, the superintendent of the Department of Liquor Licenses and Control may, within his or her discretion, require applicants, licensees, managers and managing agents to take state-approved training courses.[62]

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50. Or. Rev. Stat. § 471.542 (1988); Utah Code Ann. §§ 32A-17-1 to 32A-17-4 (1986); Vt. Stat. Ann. tit. 7, § 501 (Supp. 1988).

51. Texas, Arizona, Maine and Rhode Island have voluntary programs.

52. Server training bills were introduced in the Florida, New York, Maryland and Hawaii legislatures this last session. All failed.

53. Colman, Reavis, *supra* note 12, at 9.

54. *Id.*

55. Or. Rev. Stat. § 471.542 (1988).

56. Utah Code Ann. § 32A-17-2 (1986).

57. *Id.* at § 32A-17-3(3)(a).

58. Vt. Stat. Ann. tit. 7, § 239(b) (Supp. 1988).

59. *Id.* at (c).

60. *Id.*

61. Tex. Alco. Bev. Code Ann. § 106.14 (Vernon Supp. 1988).

62. Ariz. Rev. Stat. Ann. § 4-112(G)(2) (Supp. 1988) Neither the current superin-

C. Advisory Committees

The Model Responsible Server Training Act calls for each state to form an advisory commission to develop and implement its training programs.[63] The Model Act's commission would consist of representatives of: 1) the Department of Alcoholic Beverage Control, or applicable state agency; 2) the Department of Alcohol and Drug Problems, or applicable state agency; 3) county alcohol administrators; 4) the state attorney general; 5) the state insurance commission; 6) local law enforcement agencies; 7) retail alcoholic beverage industry; 8) community college board, or applicable state vocational education commission/board; 9) those in the alcoholic beverage manufacturing industry who sponsor server training programs; 10) those trained in the prevention of alcoholism and alcohol-related problems; 11) those trained in the treatment of alcoholism and alcohol-related problems; and 12) a citizens' group active in preventing drinking-driving problems.[64]

Some states have followed the Model Act's lead and set up advisory committees. For example, Utah's Alcohol Training and Education Advisory Commission completed its work this year and turned over administration of the program to the Division of Substance Abuse of the Department of Social Services.[65] The Utah commission consisted of two members of the Citizens' Council on Alcoholic Beverage Control, two representatives of the Department of Alcoholic Beverage Control and two members of the Division of Alcoholism and Drugs of the Department of Social Services.[66] Members of the general public and associations representing alcoholic beverage retailers and wholesalers were also invited to sit on the commission.[67]

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tendent nor his predecessor have instituted mandatory server training. Telephone interview with Lynn Pace, of the Business Council for Alcohol Education in Phoenix, Ariz., June 22, 1988. The Business Council for Alcohol Education, a private non-profit group, has trained 15,000 people on a voluntary basis in the last three years. *Id.* The Business Council has worked especially close with grocery and convenience stores. *Id.*

63. *Server Training Act*, *supra* note 41, at § 4 (a).

64. *Id.* at (b)(1) - (12).

65. Utah Code Ann. § 32A-17-1 (1986). (This section created the commission on July 1, 1986.)

66. *Id.* at § (1).

67. *Id.*

Maine's Liquor Liability Act,[68] while not mandating server training, vests the state commissioner of public safety with power to approve alcohol server education courses that meet the criteria established by an advisory committee. The committee has seven members representing the Maine Criminal Justice Academy, the Bureau of Liquor Enforcement, the state Attorney General, the Department of Human Services, the Department of Educational and Cultural Services, a statewide liquor licensee organization and a statewide trial lawyers association.[69]

Oregon also has an advisory committee charged with developing guidelines, curriculum and materials for server training programs.[70] Members of Oregon's advisory committee represent the Oregon Liquor Control Commission [hereinafter OLCC], the state police, the Office of Alcohol and Drug Problems, the Traffic Safety Commission and associations representing retail licensees and insurance companies.[71] A seat on the commission originally slated for a representative of the state Attorney General has been filled by a member of a district attorney's office.[72]

D. Serving Training Providers

Providers, the individuals or organizations who conduct the server training programs, are subject to various standards in different states. While state-run programs are still in the minority, a number of private groups sponsor server training programs throughout the country. In Pennsylvania, major brewers such as Miller, Anheuser-Busch and Stroh's and some of the large hotel chains, including Sheraton and Holiday Inn, sponsor private programs.[73]

The more widely-known private programs include Training for Intervention Procedures by Servers of Alcohol [hereinafter T.I.P.S.], Techniques in Alcohol Management [hereinafter

68. Me. Rev. Stat. Ann. tit. 28-A, § 2519 (Supp. 1988).

69. *Id.* at § 2519(2).

70. 1985 Or. Laws Sess. §1 (S. Res. 726, 63rd Leg.)

71. *Id.*

72. Roth, Goetz, *Oregon's Experience With Mandatory Server Education; A Case Study*, 15 (1988) (Draft—confidential).

73. Telephone interview John Gaspich of the Pennsylvania state Liquor Control Board (May 23, 1988).

TAM], and Bartenders Against Drunk Driving [hereinafter BADD]. T.I.P.S., supported and marketed by Anheuser-Busch and Miller, states that its programs are designed to increase servers' awareness of how their "people skills" can be employed to influence patrons' drinking behavior.[74]

TAM is a national server education program sponsored by the National Licensed Beverage Association and the Stroh Brewery Company.[75] The TAM program includes a 60-minute videotape and discusses federal, state and local laws, rules and regulations, and topics such as the "clinical" effects of alcohol, techniques of alcohol management, customer disturbances and how to recognize false identification.[76]

BADD's server training program bills itself as a program that will improve defense of and reduce liquor liability lawsuits, increase business by keeping customers coming back, increase tips for servers through positive attitudes and practices and help save lives by encouraging and teaching responsible serving and drinking habits.[77]

The TAM and T.I.P.S. programs have been described as "conceptually good" and are said to cover the material in a systematic way.[78] While T.I.P.S. is said to be more interactive than TAM, its two-day instruction for trainers has been criticized for providing little quality control.[79]

Although T.I.P.S. has become a model for all other programs, some experts say its credibility is wearing down, and it has been criticized for lack of follow-up.[80] T.I.P.S. reportedly recruited 17 people to be trainers in Oregon, but actually trained just 600 of 20,000 servers there.[81] Critics say T.I.P.S. did not

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74. T.I.P.S., *Server Manual*, 1983.

75. Letter from Jeffrey G. Becker, Director TAM, to Katherine Mahoney (June 6, 1988) (discussing TAM program).

76. *Id.*

77. BADD Informational Brochure. BADD's server training program is called T.I.M.E.S., Training in Management Effectiveness and Service.

78. Interview with Jim Peters (June 27, 1988). *See supra* note 38.

79. *Id.*

80. *Id.*

81. *Id.*

know how to promote or market its program.[82] Although T.I.P.S. had initially sought decertification in Oregon, citing state-ordered requirements that made it difficult to do business there, it has since asked to be reinstated.[83] T.I.P.S. has had its greatest success through Anheuser-Busch and Miller, which have used the program as a marketing tool for their products.[84] The programs are not money-makers, but they are an effective public relations tool.[85]

In the long-term, community colleges or vocational schools appear to be ideal providers of server training programs. These institutions can provide the training at low cost, with the proceeds going back into the community. Another alternative is mandatory state licensing and certification just as driving and hairdressing schools are currently licensed.[86]

With 40 programs in operation, Texas exemplifies the need for regulation. Experts believe the market there is going to become somewhat chaotic, and the industry will begin to demand better standards.[87] A chief feature of the Texas regulations prohibits in-house or industry sponsored server training programs.[88] Under the rule, neither licensees, permittees nor their agents, servants, or employees, nor any subsidiaries or affiliates, may directly or indirectly conduct, sponsor, or support a seller training program.[89] The rule further prohibits any person, licensee, permittee, or agent, servant or employee of any of those engaged in the manufacturing or wholesaling level of the alcoholic beverage industry from directly or indirectly conducting or sponsoring a seller training program for retail level employees or the public.[90]

Although manufacturers, wholesalers and licensees are prohibited from conducting or sponsoring a program, the rules do allow for an "arm's length" contribution or involvement.[91] Such

82. *Id.*
83. Roth, Goetz, *supra* note 72, at 20.
84. Interview with Peters, *supra* note 78.
85. *Id.*
86. *Id.*
87. *Id.*
88. TEX. ALCO. BEV. COMM'N. Ch. 50, tit. 16 (Nov. 5, 1987).
89. *Id.*
90. *Id.*
91. *Id.* at § 50.16(c).

a gesture is allowed only if not directly or indirectly tied to the actual offering of training to employees of any retailer, group of retailers or the general public.[92] In addition, such involvement must be in a primarily non-commercial manner.[93]

The rules in Texas allow a bona fide state trade association to train its own membership and nonmembers at the same level of the alcoholic beverage industry.[94] Retail trade associations may also train the general public.[95] The trade associations, however, must be statewide organizations with members in at least ten Texas counties.[96]

As for other states, provider standards in Oregon require that program sponsors post a $2,000 bond before any course can begin.[97] A new bond or continuation certificate is required upon recertification.[98] Providers must agree to regularly evaluate instructors and trainers, notify the OLCC of any change of an authorized representative or corporate officer, and maintain student enrollment and course completion records.[99] Providers, along with instructors and trainers in Oregon, must not have a history of liquor law violations.[100]

Initial certification of providers in Utah is for one year.[101] The provider's performance is then evaluated and may be extended for another year.[102] If the provider does not meet the program standards, the certification may be suspended or revoked.[103] In addition to showing that they have adequate facilities, equipment, materials and personnel, applicants must have sufficient resources to support the program one year from the certification or recertification date.[104]

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92. *Id.*
93. *Id.*
94. *Id.* at § 50.16(b).
95. *Id.* at § (b)(1); (2).
96. *Id.*
97. OR. LIQ. CONT. COMM'N. REG. § 845-16-015(8); Liquor Liab. L. Rep., (CCH) 39,251-18 (1987).
98. *Id.*
99. *Id.* at § 845-16-060.
100. *Id.* at § 845-16-015(7); 845-16-020(2)(j).
101. UTAH DEPT. OF SUBSTANCE ABUSE ADMIN. RULES § R96-13-11(3) (1987).
102. *Id.*
103. *Id.* at § R96-13-6(4).
104. *Id.* at § R96-13-7.

Vermont provides state-trained licensees with an Alcohol Servers Awareness Program manual, a booklet on Vermont's laws and regulations regarding the sale of alcohol and a copy of the annual report of the Vermont Liquor Control Board to use in training their employees.[105]

E. Trainer Qualifications

Standards for program trainers also vary. The Model Server Training Act does not specify trainer qualifications but does direct the state agency that approves the programs to examine the trainer's background and experience.[106]

Oregon requires its trainers to have a minimum of two years full-time employment in one of several fields, including education, law, law enforcement, substance abuse, rehabilitation, the hospitality industry or other alcohol-related fields.[107] In addition, instructors and trainers must have a minimum of two years of post-secondary education in one of the same fields.[108]

Texas, as noted above, specifically prohibits in-house or industry-sponsored programs and allows only an "arm's length" involvement by manufacturers or wholesalers.[109] The only requirements Texas trainers must meet is that they have no ties to the alcoholic beverage industry and no criminal record.[110] The providers certify that trainers are competent, and the state monitors the trainers on a random basis.[111]

Utah does not require its trainers to have training in any particular fields.[112] As one official noted, the state basically "makes a judgment call" as to whether someone is qualified.[113]

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105. Vt. Stat. Ann. tit. 7, § 239(c) (Supp. 1988).
106. *Server Training Act*, *supra* note 41, at § 7.
107. Or. Rev. Stat. § 471.542(2) (1988).
108. *Id.* at § 845-16-020(1)(a) and (b).
109. Tex. Alco. Bev. Code Ann. § 50.18(a)(b) (Vernon Supp. 1988).
110. *Id.*
111. Telephone interview with Roy Hale, Texas state coordinator of seller-training (May 24, 1988).
112. Telephone interview with Patrick Fleming of the Utah Division of Substance Abuse (June 15, 1988).
113. *Id.*

It has been suggested that trainers should, at the minimum, have worked as supervisors, managers or as trainers for another seminar or course.[114] Trainers should also have some teaching experience, specifically in adult education.[115] Secondly, trainers should have some post-secondary education, an associate degree at the minimum,[116] preferably in a related field, such as hospitality management, psychology or education.[117] Thirdly, trainers should have some experience working in the hospitality business, although this requirement may be the least important.[118] Further suggested requirements are a minimum of 100 hours of training and an undergraduate degree.[119]

F. Quality Control And Certification

Once a program is approved by the state, controls need to be in place to ensure that standards are maintained. Oregon has implemented a "Quality Assurance Plan."[120] Under the program, staff analysts visit a training site at least twice a year to evaluate the program.[121] The server education staff also reviews student evaluations of the program.[122]

Oregon's providers must agree to regularly evaluate instructors and trainers, notify the OLCC of any change of an authorized representative or corporate officer and maintain student enrollment and course completion records.[123] The courses must be six to eight hours long.[124] The OLCC prepares and grades the exam that each certified provider must administer to students.[125] Trainees must score at least 70 percent on the exam, which may be taken orally or in writing.[126] Those who fail may retake the exam up to two times.[127] Upon a second failure, applicants,

114. Interview with Peters, *supra* note 78.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Roth, Goetz, *supra* note 72, at 20.
121. *Id.*
122. *Id.*
123. Or. Liq. Cont. Comm'n. Reg. § 845-16-060 (1987).
124. *Id.* at § 845-16-015(1)(c).
125. *Id.* at §§ 845-16-035(1)-(4).
126. *Id.* at §§ 845-16-120(1); 845-16-125.
127. *Id.* at § 845-16-120(2).

licensees or permittees must complete the course again and pass the exam before the commission will issue or renew their licenses or service permits.[128]

In Utah, the programs must be four hours long, present an overview of state alcohol laws and include instruction on alcohol as a drug and its effect on the body and behavior.[129] The programs must also cover how to recognize and deal with problem drinkers and problem customers, including ways to terminate service and provide alternate transportation for the customer.[130]

Rhode Island, which does not mandate training but allows proof of responsible serving practices to serve as a defense in a dram shop suit, established a commission to evaluate the number and type of server and manager training programs in the state.[131] The commission must also examine the curricula of the programs and the number of successful defenses based on evidence of responsible serving practices.[132]

G. Tracking Trainded Servers

One way to assure the integrity of server training programs is to maintain a list of trained servers. However, a uniform system for identifying and classifying those who have successfully completed the programs has not yet been achieved. Before mandating server training for all alcohol servers, Oregon required specific servers to obtain a permit and certain licensees could only hire those with permits.[133] However, the state's service permit requirement has not been strenuously enforced.[134] In fact, little effort is apparently made to ensure that alcohol servers have obtained their permits.[135]

In Utah, the Division of Substance Abuse of the state Department of Social Services oversees the program and maintains

128. *Id.* at § 845-16-120(n).

129. Interview with Fleming, *supra* note 112.

130. Utah Code Ann. §§ 32A-17-2(1) to (5) (1986).

131. R.I. Gen. Laws §§ 3-14-15(4), (5), (8) (1987).

132. Telephone interview with Wes Forcier of the Rhode Island Liquor Control Commission (July 18, 1988). The commission is expected to issue a report in 1989

133. Roth, Goetz, *supra* note 72, at 30

134. *Id.*

135. *Id.* at 30-31.

a list of servers who have completed a training program.[136] This information is provided to licensing agencies and licensees.[137]

The Texas Alcoholic Beverage Commission is charged with maintaining a current, public list of certified seller trainees.[138] Each certificate is valid for two years and can be suspended or revoked if trainees are convicted three times within one year of violating regulations pertaining to minors or intoxicated persons.[139] Trainees are required to report any conviction to the commission.[140] Failure to do so is grounds for revocation.[141]

Vermont requires its managers to complete a program and then vests them with responsibility to train their employees but has no way to ensure that employees are trained or certified.[142] Officials of the state Department of Liquor Control say at least one representative from an establishment must be trained by the state.[143] But licensees can send other employees through the state program.[144] As the program now exists, an honor system operates regarding the training of employees. Officials say more controls may be instituted in the future.[145]

In Maine, trainees who successfully complete a program receive certificates and are evaluated before and after taking the course.[146]

The management side of the hospitality industry has resisted establishment of a list of trained servers because of industry's fear of unionization.[147] The general concern is that if training is mandatory and a centralized list of trained servers is available labor will have access to the list and use it to organize

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136. UTAH CODE ANN. § 32A-17-4 (1986).
137. *Id.*
138. TEX. ALCO. BEV. COMM'N. Ch. 50, tit. 16 § 50.20(e) (Nov. 5, 1987).
139. *Id.* at § 50.21(a).
140. *Id.* at § 50.21(b).
141. *Id.*
142. VT. STAT. ANN. tit. 7, § 239 (Supp. 1988).
143. Telephone Interview with officials in the Enforcement Division of the Vermont Department of Liquor Control (June 6, 1988).
144. *Id.*
145. *Id.*
146. ME. REV. STAT. ANN. tit. 28-A § 2519(3)(D) (Supp. 1988).
147. Interview with Peters, *supra* note 78.

workers in smaller shops.[148]

Additionally, although evidence that a staff has been trained can lead to reduced insurance rates, some claim that the server certification process is often meaningless because the insurance industry accepts just about anything as proof of training.[149]

H. Server Training Programs On A Local Level

Server training has been implemented on a local level in some areas even though no state action has been taken. Madison, Wisconsin instituted mandatory server training about six years ago.[150] The Madison ordinance requires that applicants for operators and managers licenses complete the city's approved Alcohol Awareness Training Program before a license can be issued.[151]

Anchorage, Alaska, also requires server training.[152] Anchorage's regulations require that applicants for issue, transfer or renewal of alcoholic beverage licenses demonstrate "prospective or continued" compliance with an approved server training program.[153] The city monitors compliance with server training programs by asking licensees questions on their liquor license renewal applications.[154] The licensees must state the number of liquor servers they employ and the names of servers who have completed training programs and submit a copy of each server's program certificate.[155] Licensees must also indicate whether they require new employees to complete a server training program before beginning work.[156] The licensees must list the names of servers who have not completed a program and the

148. *Id.*

149. *Id.*

150. Madison, Wisc. Alco. Bev. Reg. § 38.05(3)(i) *amended* Ord. 9428 (March 11, 1988). Telephone interview with officials in the city clerk's office (June 27, 1988).

151. *Id.*

152. Anchorage, Alaska, Alco. Bev. § 10.50.035 (B) (6) (1986).

153. *Id.*

154. Municipality of Anchorage, Alaska, Alcoholic Beverage Licensee Compliance Form.

155. *Id.* Part I(A) and (B).

156. *Id.* at (C).

date they are scheduled for training.[157]

I. Pending Server Training Legislation

While server training is required by law in only a few states, attempts are being made throughout the country to implement it in some form. Legislation that died in the New York state Assembly last year and is expected to be reintroduced next session would give liquor liability insurance discounts to managers who complete voluntary training programs.[158]

Three bills, tagged the Responsible Vendor Act, were introduced in the last Florida Legislative session.[159] Each bill required vendors seeking state certification by the Division of Alcoholic Beverages and Tobacco to provide a comprehensive server training program.[160] The bills, which were introduced late in the legislature's 1988 session, are expected to be reintroduced next session.[161]

About eight bills have been introduced before the Hawaii Legislature regarding server training. None have passed.[162] A 1987 case, however, *Bertelmann v. Taas Associates*,[163] stated that a bar or tavern owner owes a duty to avoid affirmative acts that increase the peril to an intoxicated customer. But in the absence of harm to an innocent third party, merely serving liquor to an already intoxicated customer and allowing the customer to leave the premises does not alone constitute actionable negligence.[164]

House Bill 1042 in Maryland required certain licensees to have an employee who had completed training in an alcohol

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157. *Id.* at (D).

158. S. 8990, introduced in the New York State Legislature on June 9, 1988. The state senate approved the bill on August 1, 1988. However, the bill died in the Assembly. The bill is expected to be reintroduced in the same form this session. (Telephone interview with Carol Cardell, an aide to the bill's sponsor, Sen. Guy Velella, February 2, 1989).

159. S. 983 (Sen. McPherson), S. 1138 (Sen. Stuart), H.R. 1630 (Reps. Titone and Bloom), introduced in 1988 Florida Legislative Session.

160. *Id.*

161. Telephone interview with Sen. McPherson's office (July 1988).

162. Telephone Interview with Hawaii Legislative Council (May 19, 1988).

163. 735 P 2d. 930, 934 (1987).

164. *Id.*

awareness program on the premises at all times. The bill, however, failed to garner enough votes in the state Legislature.[165]

J. PROGRAM ADMINISTRATORS

The Model Server Training Act envisions the server training program to be administered by the state Department of Alcoholic Beverage Control.[166] Most existing programs are administered by the state Alcoholic Beverage Control agency. Oregon's program is administered by the OLCC.[167] Vermont's Department of Liquor Control approves training programs there.[168] In Texas, where training is voluntary, the Alcoholic Beverage Commission oversees the programs.[169] Alcohol servers in Anchorage, Alaska, must complete a server training course approved by the state Alcoholic Beverage Control Board.[170]

At least two states differ from the Model Act's recommendation. Utah's mandatory server training program is administered by the Division of Substance Abuse of the Department of Social Services.[171] And in Maine, where training is not compulsory, the commissioner of public safety has the power to approve alcohol server education courses.[172]

IV. LIABILITY INSURANCE

As dram shop litigation has increased over the years, so has the size of damage awards and the cost of liquor liability insurance. Soaring insurance rates have resulted in many liquor licensees "going bare," that is operating without liquor liability insurance. For example, in New York, it is estimated that more than 55 percent of the state's retail liquor industry has no liability insurance of any kind.[173] Legislation expected to be reintroduced

165. Telephone Interview with Maryland Legislative Council (May 19, 1988).
166. *Server Training Act*, *supra* note 41, at §§ 4-5.
167. OR. LIQ. CONT. COMM'N. REG. § 845-16-001 (1987).
168. VT. STAT. ANN., tit. 7, § 239 (Supp. 1988).
169. TEX. ALCO. BEV. CODE ANN. § 106.14 (Vernon Supp. 1988).
170. ANCHORAGE, ALASKA, ALCO. BEV. § 10.50.030(B) (1986).
171. UTAH CODE ANN. § 32A-17-4 (1986).
172. ME. REV. STAT. ANN. tit. 28 A, § 2519 (Supp. 1988).
173. Telephone Interview with Carol Cardell of N.Y. State Sen. Guy Velella's Office (June 22, 1988).

this year before the state Legislature there would give licensees reduced rates for personal injury or property damage liability insurance if the licensee's managers complete a certified training program.[174]

Some insurance companies already offer discounts or "considerations" for establishments with personnel trained through certified programs.[175] A recent newsletter published by BADD lists seven companies that consider server training completion in writing their policies.[176]

But even insured licensees face problems with insurance companies inserting surreptitious exclusionary clauses into lengthy boilerplate policies. A 1987 California appellate court decision held that a liquor liability exclusion in the body of an insurance policy is not enough to relieve the insurance company of its responsibilities where the company's agents knew the insured sold alcoholic beverages and was exposed to a special risk of liability yet did not make the insured aware of the exclusion.[177]

One answer to the insurance crisis has been insurance pooling, an alternative to the statutory approach and mandatory server training. Massachusetts enacted legislation in 1985 establishing a mandatory insurance company pooling of commercial server risks.[178] The Joint Underwriting Association issues liquor liability policies to licensees who prove they cannot obtain liability insurance by other means.[179] Under the law, the state insurance commissioner sets up the operation plan and assesses members for initial expenses.[180] The commissioner also establishes specific limits of coverage based on the type of license, volume of liquor sales and employee participation in alcohol awareness

174. *See, supra* note 158.

175. BADD and The Alliance for Safe Alcohol Service, 5 *T.I.M.E.S.* No. 1 (July 1988).

176. *Id.* (Insurance companies considering server training are: Alexander & Alexander; Carnegie Insurance Service Corporation; CIGNA Property and Casualty Companies; Express Protection Liquor Liability Insurance; Frontier Insurance; Home Insurance; Liquor Liability Joint Underwriting Association of Massachusetts.)

177. *Aetna Casualty and Surety Co. v. Velasco*, 194 Cal. App. 3d 1441, 1446-47, 240 Cal. Rptr. 290, 293-94 (1987), *modified* 195 Cal. App. 3d 956e, (1987).

178. Colman, Reavis, *supra* note 12, at 28.

179. *Id.*

180. *Id.*

training programs.[181]

Michigan has taken another approach to the liquor liability crisis by giving the state liquor control commission power to require licensees to file their liability insurance policies with the commission.[182] The commission may designate the limits of liability to be not less than $10,000 to any one person and not less than a total of $25,000 to all persons.[183] The insurance commissioner can waive the filing requirements if it is determined that liquor liability insurance is not available at a reasonable premium in the state.[184]

Minnesota has a similar law which conditions issuance, maintenance or renewal of licenses upon proof of liability insurance.[185] Minnesota requires a dram shop policy limit of not less than $300,000 per year and establishes a market assistance program and assigned risk plan.[186] Minnesota also allows its local governments to require higher insurance or bond coverage.[187]

Other proposed solutions to the liquor liability insurance crisis include caps on liability[188], assigned risk plans and more clearly defined risk.[189] Caps are likely to meet with strong opposition from victims and lawyers groups, although they would be an incentive to insurers to write more coverage.

Assigned risk is a plan where policies are assigned to carriers on a rotating basis. In defining risk of liquor liability, three areas should be evaluated: 1 risk of selling alcohol to a minor; 2 risk of selling alcohol to an intoxicated person; and, 3 practices which allow or encourage excessive alcohol use.[190]

The assessment, whether preventive—drafting standards for

181. *Id.*
182. MICH. COMP. LAWS ANN. § 436.22(2) (Supp. 1988).
183. *Id.* at (a)(1).
184. *Id.* at § 436.22a(3).
185. MINN. STAT. ANN. § 340A.409(1) (West Supp. 1988).
186. *Id.*
187. *Id.*
188. Peters, *Liquor Legislation; State By State Analysis,* RESTAURANT BUSINESS (Sept. 20, 1985).
189. Peters, *Defining the Risk of Liquor Liability*, RESTAURANT BUSINESS (Feb. 10, 1986).
190. *Id.*

obtaining insurance, drafting new legislation, adapting to changes in the marketplace or establishing a responsible business practices defense, or reactive—developing or defending a dram shop liability case, should focus on four categories: 1) personnel—recruiting; 2) marketing—advertising, promotion, food to beverage ratios; 3) community—location, access to transportation; and, 4) environment—clientele, seating arrangement.[191]

V. HINDRANCES TO SERVER TRAINING

Server training, while still in its infant stage, faces some obstacles before it becomes a widespread practice in the hospitality industry. One particular impediment is the nature of the business. Employee turnover is great in the hospitality industry, a factor which can discourage management from paying for server training. Turnover can be as great as 200 to 300 percent a year.[192] That means a restaurant with 10 positions may have 30 different people fill them in one year, with each position filled three times. This high turnover can be attributed in part to the employees' nebulous work environment.[193] Some experts maintain that as long as turnover remains great the industry will not get involved in server training.[194]

The problem of economics is manifested not only in the dispute over who pays for the training but also in competition among providers. In Oregon, for example, competition had materialized not only between private and public providers but among providers in general.[195] One part of the dispute is that the community colleges are able to offer the programs at a lower cost than the private providers.

With increased competition also comes fierce advertising. Oregon has tight controls on advertising.[196] Such precautions are imperative to ensure that providers do not promise more than

191. *Id.* at 222.

192. Interview with Peters, *supra* note 78.

193. *Id.* (Their anxiety and frustration makes them want to leave and look for work elsewhere).

194. *Id.*

195. Roth and Goetz, *supra* note 72, at 21.

196. OR. LIQ. CONT. COMM'N. REG. § 845-16-065 (1987).

they can deliver, especially in the way of insurance discounts for completion of the programs.

VI. CONCLUSIONS AND RECOMMENDATIONS

Server training must still clear several hurdles to become the prevailing avenue for reducing intoxication-related injuries. One obstacle is insurance. Mandatory liquor liability insurance alone is not a solution. Insurance must be tied to server training. This can be accomplished by offering discounts to insureds who train an entire staff and institute management policies that encourage responsible service and responsible consumption of alcohol. If the insurance industry balks, programs such as Massachusetts' mandatory insurance pooling or assigned risk plans can be viable options. Financial incentives can also be offered through reduced license fees or tax rates for licensees who participate in server training.

Another way to ensure that servers are trained would be to legislate a presumption of liability against licensees. The presumption could be rebutted by evidence that the licensee's employees had been trained.

The training process itself could be improved by requiring that managers be trained first. Management training would focus on how to create policy and the server training would concentrate on responsible service.[197] Training of managers would help to facilitate the implementation of policies in establishments.

An effort to train all managers might be a more realistic goal. Management level employees are likely to remain on the job longer than are servers. Also, management level employees number substantially less than servers. It may be more pragmatic, in terms of sheer number, to train managers first. Furthermore, a properly trained and enlightened manager has the power to implement "Responsible Business Practices" in an establishment. If these policies are implemented, then the servers who are eventually trained will have the support of management to practice what they have learned from the program.

197. Interview with Peters, *supra* note 78.

Standards for providers and trainers also need to be defined. Community colleges may be the most effective training approach for those concerned about quality and industry involvement in server training programs. If community colleges or vocational schools are not a viable channel, then strict standards must be established and followed for providers and qualifications identified for trainers. Definite qualifications for trainers are needed to maintain quality control and ensure that the courses are worthwhile and do not become a mere formality to maintain a license.

Lastly, there must be a system to verify that employees and managers are trained. Without guidelines, a setup such as Vermont's so-called "honor system" takes over with virtually no assurance that servers are being trained.

With training through effective, comprehensive programs, the bartender confronted with borderline patrons who pose a risk to themselves or others will be better equipped to deal with such precarious situations.

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