DWI UPDATE

By James E. Peters

These are difficult times for alcoholic beverage retailers, and the hospitality industry in particular. The industry has been plagued by passage of the federal warning label bill, demands for increases in excise taxes on alcoholic beverages at the state and federal levels, proposals to eliminate certain types of promotions and require equal-time health advertisements on broadcast media, and legislation to reduce blood alcohol content for driving while intoxicated.

Last December, the Surgeon General's office joined more than a dozen other federal agencies in sponsoring the Surgeon General's Workshop on Drunk Driving. Organized to provide "an umbrella for diverse groups to meet and discuss issues," the meeting was challenged on its purpose and structure.

A lawsuit filed by the National Beer Wholesalers Association attempted to stop the meeting on the grounds the workshop did not represent all perspectives, and because the workshop sessions were to be closed, it violated federal rules for meetings of this type. Joining in the protest was the National Association of Broadcasters (NAB). In a letter to Surgeon General Everett Koop, NAB president and chief executive Edward O. Fritts claimed that, "at best, this workshop is designed to politicize the emotional tragedy of drunk driving. At worst, it is a total abuse of the policy-setting process."

For many of the Surgeon General's workshop participants, the objective is to "decouple" drinking alcoholic beverages with driving. Recommendations to accomplish this goal are to lower the legal blood alcohol content (BAC) limit for driving from its current 0.10% to at least 0.08%, preferably to 0.05%. The state of Maine joined Oregon and Utah in lowering the BAC to 0.08% in 1988. The American Medical Association supports a 0.05% BAC.

Another proposal is to adopt administrative *per se* driver's license laws, in which the license is suspended as part of the arrest procedure rather than through the courts. Taking the license of the driver away immediately instead of waiting to go through the courts avoids delays, and increases the deterrent effect.

Key areas of dispute are advertising and taxes. While these issues may have an indirect impact on the retailer, a number of other recommendations could create even more changes in the way retail alcohol businesses operate.

TAXES AND CONSEQUENCES. The big debate in 1989, particularly at the national level, will be about excise taxes. The bottom line to the debate is the potential to raise billions of dollars for reducing the federal deficit.

The battle lines are being drawn, and the reaction to the Surgeon General's Workshop on Drunk Driving demonstrates the threat felt by the producers of alcoholic beverages, particularly the beer industry. Organized under the umbrellas of the National Alcohol Tax Coalition, more than 100 national groups are lobbying for a doubling of the excise tax on alcoholic beverages with an equalization of the rates for beer, wine, and spirits.

Proponents make the following points in support of the tax increase:

- Until a 19% increase in spirits taxes (not on beer and wine) became effective October 1, 1985, federal excises on alcoholic beverages had not been increased since 1951.
- Due to inflation since 1951, the real dollar value of tax revenues on alcoholic beverages declined by 75%. Inflation during this period cost the U.S. Treasury $40 billion to $75 billion in lost revenues.
- Government reports estimate the annual toll from alcohol abuse at between 100,000 and 200,000 deaths and $120 billion in economic damage.
- Doubling spirits taxes and then equalizing the rate of tax on alcohol for beer, wine, and spirits would provide approximately $12 billion in additional federal revenues.

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continued on page 154

The big debate in 1989, particularly at the national level, will be about the imposition of excise taxes.

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sumption and therefore less tax revenue. Higher prices could also result in more illegal production and cross-border purchases.

Paul F. Gavaghan, vice president of the Distilled Spirits Council of the United States, argues that "worldwide research examining the failure of restrictions to suppress alcohol abuse has convinced us that the lessons of past futility will be repeated by the control of availability theory, if it is adopted as public policy in the U.S. Warning labels, restrictions on advertising, conditions of sale, and other forms of curtailment will only tar all forms of drinking with the same simplistic brush, reawaken the 'forbidden fruit syndrome' and perhaps revive the problem of illegal production and 'unregistered' sale in this country."

Gavaghan adds that if spirits, beer, and wine are taxed beyond the reach of those with low and moderate incomes, sheer economics will encourage the revival of illegally made alcohol.

REGRESSIVE? Jeff Becker, director of alcohol issues with the Beer Institute, adds that an excise tax is "regressive, meaning a tax that affects only those least able to pay, and forces them to shift to products containing alcohol not usually consumed." In addition, some argue that these same consumers will shift to other, less expensive drugs.

So, the argument from the proponents of an increase is that taxes have to be raised a sufficient amount to decrease consumption and abuse, while the alternative perspective is that raising the price of alcoholic beverages too high can precipitate illegal production reminiscent of Prohibition.

What impact will the proposed increase in excise tax have on the retailer? For on-premise businesses, pro-tax advocates say the added cost for spirits and wine will be about 20¢ per drink, and for beer it will be 10¢, a relatively small perceived increase compared to that for the off-premise retail business, where the price for a case of beer will increase $2.40 (almost a 50% increase over the current price for domestic beer). But according to Becker, studies evaluating manufacturer excise taxes on other products show the price to the retailer is usually higher than the actual tax.

SERVER LIABILITY. Of more immediate concern to the hospitality industry is the question of server liability. "While tort reform has refocused liability against the commercial server of alcohol, it has not eliminated it," observes James Goldberg, editor of "Alcohol Server Liability," a compilation of dram shop and related statutes and judicial rulings published annually by the National Alcoholic Beverage Control Association.

Goldberg adds, "By limiting legal action to innocent third parties, removing joint and several liability, and allowing the responsible business practices defense, the industry and insurance companies can better judge and control risk."

Jerry Williams, executive vice president of the North Carolina Restaurant Association, expects that his association will introduce liability reform legislation this year. Although there have been no major court decisions since passage of the state's dram shop act in 1983, the potential for liability is great and insurance rates are high. "The primary problem is that in addition to the statute, we also have common law liability. We recognize that some version of a dram shop law is necessary, but we want to make the statute an exclusive remedy, and define risks more specifically."

With changes in liability laws, insurance is becoming increasingly more available and affordable, especially for low-risk businesses. However, this type of insurance is more susceptible to market trends, and, as the market gets tight, high-risk lines are the first that an insurance company will drop.

INSURANCE ASSISTANCE. To respond to this "spotty" market, and to assist retailers in getting a consistent insurance program, the Consortium of Licensed Beverage Retailers Association (COLBRA) was founded. The Beverage Retailers Insurance Company (BRICO) was formed as a result of the Liability Risk Retention Act of 1986. The six sponsoring associations are the National Licensed Beverage Association, the National Restaurant Association, the American Hotel & Motel Association, the National Liquor Stores Association, the Wine and Spirits Guild of America, and the Alcohol Beverage Legislative Council.

According to Craig Loughrin, a representative with Victor O. Schinnerer & Company Inc., underwriting manager for BRICO, "As a not-for-profit organization, the members will not benefit individually, but they are in it for the benefit of their total membership. They want to create a stable market that is not susceptible to unpredictable premium fluctuations."

While tort reform has refocused liability away from beverage servers, it has not eliminated it.

Richard Walk, vice president for Victor O. Schinnerer & Company Inc., adds that "BRICO is unlike other insurance companies because it does not operate on a profit motive. Any surpluses are returned to members in the form of reduced rates."

Walk notes that the current liquor liability insurance market is soft, with insurance generally available, but adds that some companies avoid high-risk states. However, BRICO intends to offer coverage in all 50 states.

"When insurance companies pay their 1988 tax bills," predicts Walk, "premiums are bound to increase drastically, or high-risk lines will be eliminated." Changes brought about by the 1986 Tax Reform Act will add to the tax liability of insurance companies. The insurance market will tighten up, and in late 1989 through 1990, obtaining liquor liability insurance protection may become as difficult as it was in 1985 and '86.

The groundwork is being laid to establish risk management programs. Rates will be set according to risk. Server training will be an important criterion in judging risk, thereby lowering rates.

The American Express Company undertook a similar venture: It estab-

continued on page 156

lished the Select Establishment Purchasing Group to provide affordable insurance to any establishment that accepts the American Express card. Like BRICO, the insurance is offered in all 50 states. It is underwritten by the National Union Fire Insurance Company of Pittsburgh, PA, a subsidiary of the American International Group (AIG).

Steven Gapp, assistant vice president of AIG risk management, says the goal is to "keep rates stable and consistent with changes in the legal environment." He adds, "Because AIG and its subsidiary companies have been in the business of writing liquor liability coverage for many years, we have a data base of otherwise unavailable information. We can use this data base to establish rates that are more consistent with risk."

In addition, because other insurance companies and risk retention groups offer coverage to a broader range of licensees, their pools have higher risks. The American Express program is more selective and provides coverage to predominantly full-service restaurants, thereby lowering overall risk and potential claims. This allows the company to reduce rates.

RESPONSIBLE SERVICE. The First International Conference on Responsible Hospitality Practices was held in Brisbane, Australia, last summer. This month, the Canadian Government sponsored a national conference on server training, and in April 1989, The Responsible Beverage Service Council will hold its third annual forum. Server training is truly an international concept gaining ground each year.

In less than five years, the number of formal training programs has grown from less than a dozen to many hundreds throughout the U.S., Canada, Australia, and other countries. In Texas, legislation passed in November, 1987, provides a licensed business protection from liability if all servers are trained in an approved program.

Roy Hale, coordinator of seller training programs for the Texas Alcoholic Beverage Control Board, reports that 45 programs with 350 trainers have trained more than 65,000 servers during the first year the program was in effect. Average cost for the training is $25 per person. "Considering the depressed economic condition in the state, we are pleased with the level of participation," comments Hale. With an estimated 500,000 servers in 40,000 licensed businesses, the training market in Texas is sure to expand.

MANDATED TRAINING. Other states like Oregon and Utah have mandated training. Similar proposals are pending in other states, and many local communities are undertaking their own initiatives to get servers trained.

Carl Sanford, executive vice president of the Maine Restaurant Association, is fighting mandatory training. "What frustrates me," notes Sanford, "is that our industry has worked so hard at prevention efforts that are having an effect. Drunk driving deaths are down. I do not know why we cannot continue to cooperate and find a better solution than this."

In Newark, DE, for instance, hospitality businesses formed a cooperative task force with the city government, law enforcement, and public health groups. The task force developed community standards in the form of the "Responsible Beverage Service Covenant." The city allocated funds to prepare printed copies of the covenant to hang in participating establishments.

Barry Zehnder, enforcement agent for the Delaware Alcoholic Beverage Control Association, reports that his office received a request from the Newark Restaurant Association to provide training. He is pleased that the members of the industry are volunteering for the training, and are taking the community initiative seriously.

Server training will be an important criterion to judge liability risk, and, therefore, insurance rates.

COMMUNITY COMMISSIONS. The Surgeon General's Workshop on Drunk Driving recommended that "each community should form or expand a task group to review and implement in a systematic way, interacting policies and priorities as to alcohol service and alternative transportation. Such groups should include, but not be limited to, representatives of public transportation; taxi associations; alcohol and drug abuse authorities; traffic safety professionals; hospitality industry, zoning, and licensing officials; citizen support groups; insurance companies; educational institutions; and other public and private sector groups."

In Oregon and Maine, such a task force has been established for the purpose of reviewing and approving server training programs. The New York State Restaurant Association (NYSRA) introduced legislation in 1988 that would establish a similar commission, as well as require insurance companies to provide a premium discount to establishments that train managers and servers in approved programs.

The NYSRA legislation was one of the most creative responsible beverage service proposals of 1988. While some insurance companies offer premium discounts for training, their policies are often vague or confusing. The companies are inconsistent as to how they qualify training programs, and availability of insurance varies from state to state.

According to Fred Sampson, vice president of the NYSRA, the bill will be reintroduced in 1989 and is expected to have a favorable hearing. Sampson adds, "Other components of the bill include allowing as a defense to liability reliance upon an apparently valid government-issued age identification. New York does not have a 'possession law' so the only party punished for serving a minor is the licensee." Sampson wants to see the underage person using false identification punished equally.

continued on page 158

Studies demonstrate that server training cuts the number of intoxicated people leaving an establishment.

Raymond Murgia, executive vice president of the Massachusetts Restaurant Association (MRA), concurs: "We first tried to get judges to impose a penalty of community service for minors using false identification, but were unsuccessful. Then, we introduced legislation, which was passed last year, that absolves a licensee from criminal and civil liability if the server relied upon a Massachusetts driver's license or liquor purchase card that appeared to be valid." In addition, Murgia says the new legislation allows the judge to order the motor vehicle department to suspend the minor's license for six months.

Though no formal commission exists in Massachusetts, Murgia was able to get legislation passed by meeting with a variety of groups, working out compromises, and developing coalitions. To support the licensees, the MRA is developing a video-based training program called Project Stop. The video will include interviews with underage people talking about the ways they deceive servers, and will provide techniques for recognizing underage people and false identification.

According to some state regulatory commissions, pressure from community groups to enforce the drinking age law is becoming greater. Roger Morris, director of the Colorado Liquor Division, however, contends that raising the drinking age to 21 created a new class of potential offenders and increased the demand for obtaining the product illegally. This makes the job of the regulatory enforcement agent more difficult.

RESEARCH. During the past decade, the role of the retailer of alcoholic beverages in preventing alcohol-impaired driving has become the focus of research. Several studies conducted over the past few years clearly demonstrate that training servers reduces the number of intoxicated people leaving an establishment, especially when the training is implemented in conjunction with changes in management policy and practices.

In a study conducted at a private Navy club in San Diego, the rate of intoxicated males at the club was reduced by more than half, from 32% to 15%, after the policy changes and training. More important, there was no reduction in the profitability of the club, and in fact, sales of food and alcohol-free beverages increased.

This study is being duplicated in Monterey and Santa Cruz Counties in California using six test sites, comparing different types of training programs. Two sites will involve server training coupled with policy changes; two other sites will have server training alone; and the last two sites will serve as control groups.

Robert Saltz, senior scientist at the Prevention Research Center and principal researcher on both the Navy study and Monterey/Santa Cruz project, believes research shows that "the hospitality industry can play a major role in reducing alcohol-related injuries. But, when some incur the costs of training and policy change, they believe they are at an economic disadvantage with their competitors." Saltz believes there have to be economic, social, and legal incentives to encourage the industry to be involved.

In line with Saltz's prediction, the National Highway Traffic Safety Administration is funding a project to evaluate the relationship of state dram shop laws and case decisions to highway safety, industry practices, and insurance rate setting. As part of the study, leading experts met to assess the "exposure to liability" faced by licensees in each state. According to James Mosher, legal consultant to the project and author of *Liquor Liability Law*, "The resultant 'exposure to liability' scale will rate each state's law based on 26 legal factors common to dram shop law and litigation. Findings should be available in the summer of 1989."

CENTRAL SOURCE. With all this activity, it is becoming increasingly important to centralize information about new legislation, research, legal decisions, available training programs, and insurance. The Responsible Beverage Service Council (RBSC), formed in 1987, is an international interdisciplinary association organized to serve this central focus.

Martin Yenawine, president of I'm Smart of Central New York and founding chair of the RBS Council, believes, "The partnership of industry, government, and public groups to formulate reasonable and effective standards on responsible beverage service is necessary for balanced public policy to be developed."

This task of developing standards has been delegated to the RBS Council Standards Committee, chaired by H.A. "Andy" Divine, director of the School of Hotel, Restaurant and Institutional Management at Pennsylvania State University and member of the National Restaurant Association's Alcohol Task Force. Divine observes, "Because of the diversity of training programs, the operator is at a disadvantage in making the most appropriate choice. And, insurance companies have no standards for setting rates."

This lack of standards is already creating problems for the operator. For instance, in Texas an operator may participate in a training program approved by the state, only to later find out the same program does not qualify for an insurance discount. Divine notes, "Issues such as this are raising concern, and we hope to be able to develop appropriate bi-partisan recommendations to be used by policy-makers."

There are no easy solutions. Hospitality means satisfying the needs of the guest and providing a safe, comfortable environment. The foodservice operator must work with concerned members of the community to develop workable solutions to common problems. Failure to become active and involved will result in one-dimensional solutions.