

TEXAS ALCOHOLIC BEVERAGE COMMISSION
COMMISSION MEETING
MONDAY, FEBRUARY 28, 2000

The Texas Alcoholic Beverage Commission met in Room 185 at 5806 Mesa Drive, Austin, Travis County, Texas. Members present: Allan Shivers, Jr., Chairman; Martha S. Dickie, Member and John T. Steen, Jr., Member. Staff present: Doyne Bailey, Administrator; Randy Yarbrough, Assistant Administrator; Lou Bright, General Counsel; Jeannene Fox, Director of License & Compliance; Greg Hamilton, Chief of Enforcement; Rolando Garza, Director of Resource Management and Buck Fuller, Director of Compliance. The following were present and presented Bert Ford Awards: Lee Vela, Eller Media Company; Blanca Vela, Lamar Outdoor Advertising; Nancy Russell, Lamar Outdoor Advertising; Bill Horn, Reagan National Advertising; Glenn Brooks, Criminal Justice Division of the Governor's Office and Susie Walch, Criminal Justice Division of the Governor's Office. Public comment was received from: Fred Niemann, Texas Package Stores Association; Glen Garey, Texas Restaurant Association; Doug DuBois, Texas Petroleum Marketers and Convenience Store Association; Chuck Courtney, Texas Retailers Association; Don Hansen, Texas Hotel & Motel Association; Robert Sparks, Licensed Beverage Distributors, Inc. and Wade Spilman, Wholesale Beer Distributors of Texas.

The agenda follows:

1:30 p.m. - Call to order.

1. Recognition of agency employees with 20 or more years of services.
2. Approval of minutes of January 24, 2000 meeting; discussion, comment, possible vote.
3. Administrator's report:
 - a. discussion of staff reports;
 - b. recognitions of achievement;
 - c. discussion of strategic plan; and
 - d. discussion of management controls.
4. Acknowledge acceptance of billboard advertising space from Eller Media Company, Lamar Outdoor Advertising and Reagan National Advertising.
5. Fiscal stewardship of agency; discussion, comment, possible vote.
6. Consider publication of amendments/new sections to 16 TAC Chapter 50; discussion, comment, possible vote. (Alcohol Awareness and Education)
7. Public comment.
8. Announcement of executive session:
 - a. consultation with legal counsel regarding Lucio v. TABC;
 - b. consultation with legal counsel regarding Dickerson v. TABC; and
 - c. the commission may go into executive session to consult with legal counsel regarding items 5, 6 or 8 of this agenda pursuant to Texas Government Code, §551.071.

Continue open meeting.

9. Adjourn.

The meeting was called to order at 1:50 p.m. by Chairman Shivers.

MR. SHIVERS: I call this meeting of the Texas Alcoholic Beverage Commission to order. It's Monday, February 28, 2000 at one fifty in the afternoon.

The first agenda item is recognition of agency employees with 20 years or more of service.

Jack Jett is an Agent V stationed in our Jasper Outpost. He has been a member of the commission since August 1974. A native of Conroe, Agent Jett has been stationed at numerous locations during his career with TABC, including Beaumont, Galveston, Angleton, Bryan, Houston and headquarters. During his tenure with TABC, Agent Jett has also served as our training supervisor and deputy chief of enforcement. We congratulate Agent Jett on his 25 years of service with the TABC and to the citizens of the State of Texas. He could not be here today, and we will send him his certificate.

Next - approval of the minutes of our January 24, 2000 meeting. The minutes have been mailed to the commissioners. Are there any changes?

MS. DICKIE: I move approval.

MR. STEEN: Second.

MR. SHIVERS: All in favor?

MS. DICKIE: Aye.

MR. STEEN: Aye.

MR. SHIVERS: Aye.

Administrator's report? Mr. Bailey?

MR. BAILEY: Mr. Chairman, I think that the issues that I wanted to cover are listed elsewhere in the agenda, so I pass.

MR. SHIVERS: We will move on to agenda item number four - acknowledge acceptance of billboard advertising space from Eller Media Company, Lamar Outdoor Advertising and Reagan National Advertising.

MR. BAILEY: Chief Hamilton?

MR. HAMILTON: Commissioners, first of all, I'd like to say that I appreciate the opportunity to recognize this group of people who have participated in an initiative that we started up in November of 1999.

I approached a gentleman from Eller Media, who also represents the National Advertising Association. He's a board member there, and I was talking to him about possibly starting up a 1-888-THE-TABC hotline number. I wanted to advertise this particular number, and I went to him and asked him how we go about doing it as far as putting it up on the billboards?

He quickly volunteered to do this, and he gave me names because of his company only being in certain areas of the state. He gave me names of the other individuals from Lamar Outdoor Advertising and Reagan National Advertising. These individuals are here today.

One of the stumbling blocks that we had was trying to finance the publications of these signs and the maintenance around the State of Texas. So, we went to the Governor's Office, the Criminal Justice Division and approached them about funding this particular initiative, and they voluntarily did that.

This is the billboard. We put up over 250 billboards across the State of Texas. Some of you have probably seen this, and we have averaged probably 120 to 140 phone calls reporting underage drinking across the state over the last three and a half, four months. I believe it's a real good initiative.

We plan on continuing this particular initiative and adding different components to it. When we first kicked off this particular initiative, we also had business cards printed up, and we are passing these out to everybody that we come in contact with, preferably high schools, law enforcement agencies, anybody that wants them.

Also, another component of this underage drinking hotline was a poster that we have put in schools. We have presently put this in 702 schools across the State of Texas, and probably about 98 law enforcement agencies have contacted us to try to get these posters so they can put them in and around courthouses and some of their city buildings or county buildings. We have gotten real good response from everybody that's been involved.

We just recently received contact from a cell phone company out of East Texas that has volunteered to place our number and allow all of their users to use this particular number on their cell phone free of charge, either putting in TABC or calling 911 as far as this particular initiative.

I've been working also with a movie company out of New York that owns all of the Cinemarks (sp) around the State of Texas, and they are putting our billboard or some kind of message on the back-end of all the movies in the movie theaters. We've been negotiating that. I think it's going to come into play probably within a month and half to two months. We are working with them, and that's going to be pro-gratis, also.

Today, we would like to present these four different agencies with the Bert Ford Commendation. You all know that one of the things that Mr. Ford tried to espouse on all of his employees was cooperation and partnership. I truly believe that these four agencies have done it and have done it well. They not only talk the talk, they walk the walk by giving us the opportunity to do this.

I would like for Mr. Lee Vela, who is the director of public affairs with the Eller Media Company out of the Houston division, to come forward. Also, from Lamar Outdoor Advertising, the southwest region, Blanca Vela who is the public affairs director and Nancy Russell who is the general manager to come forward. Also, I would like Mr. Bill Horn from Reagan National Advertising to come up and, from the Governor's Office, from the Criminal Justice Division, we have Glenn Brooks and Susie Walch. I'd like for them to come up, also.

MR. SHIVERS: Thank you very much.

MR. HAMILTON: I would also like to note that the billboard space presented to us was valued at about 70 thousand dollars worth of billboard space across the State of Texas.

MR. SHIVERS: That's very generous of all of you. Thank you.

In recognition of this very generous contribution, the commission needs to acknowledge acceptance of this gift.

MS. DICKIE: I would move that we acknowledge acceptance of these gifts.

MR. STEEN: Second.

MR. SHIVERS: Discussion? All in favor?

MS. DICKIE: Aye.

MR. STEEN; Aye.

MR. SHIVERS: Aye. Thank you very much. That's very generous.

Fiscal stewardship of the agency. This refers to a letter received from the Governor's Office reminding the commission of its responsibility to ensure the good fiscal stewardship of the state's financial resources. Mr. Steen?

MR. STEEN: I got the letter, and I just thought we ought to put it on the agenda and talk about it.

MR. BAILEY: The staff has prepared a response to each of the questions. As you know, this was a little bit on a short time frame for us because we were also at the same time doing strategic planning. Fortunately, they pretty well deal with the same issues, and what staff did was went through and responded essentially to each of the statements that was made by the Governor's Office in regards to our stewardship and have made some attachments to that.

What we thought would be appropriate, if it's okay with you, is for you to take it back and study it and find out what additional things you would like for us to provide you. I'm very pleased, as I think each of you will be, that all those issues that were mentioned have been consistently and effectively dealt with by our agency. I think we are well on track.

MR. SHIVERS: Put it on the agenda for our next meeting, and that will give the commission time to review all of these documents and have questions or suggestions at our next meeting. After we are satisfied with that, I think it would be appropriate for the commission to write the Governor's Office a letter in response to their letter.

MR. BAILEY: In the meantime, if you can communicate with me on this document or any of the other things that you would like to see, we will get that for you in advance for the next meeting.

MR. SHIVERS: Good.

MR. STEEN: Thank you for putting this together.

MR. SHIVERS: Number six - consider publication of amendments/new sections to 16 TAC Chapter 50. This is Alcohol Awareness and Education. Buck?

MR. FULLER: Mr. Chairman, Members, for the record my name is Buck Fuller, and I'm with the TABC compliance department. As you know, we've been working on reviewing our seller training rules, Chapter 50, Alcohol Awareness and Education.

As we went through this review process, we established three goals that we were trying to develop for this review process.

Goal one was to create a body of owners, operators and managers who are knowledgeable about and committed to the principles of responsible hospitality.

The second goal was to create a body of alcoholic beverage employees who are similarly knowledgeable, competent and committed to the principles of responsible hospitality.

Our third goal was to promote an industry of trainers who provide appropriate information through knowledgeable and competent staff.

During our review process, we met with members of community groups. We met with representatives of retailers and we met with seller-server schools, themselves, to try to get input to develop this rule. We have a rule before you that we would like for you to consider for publication of the amendments and the new sections to Chapter 50, Alcohol Awareness and Education.

Thursday afternoon, I received some correspondence signed by six associations - the Texas Package Stores Association; Texas Restaurant Association; Texas Licensed Beverage Association; Texas Retailers Association; Texas Petroleum Marketers and Convenience Store Association and the Texas Hotel & Motel Association. They have some concerns about 50.2(a)(4) which defines employee. They also have some concerns about 50.9(d) which deals with the indirect encouragement of law within the meaning of Section 106.14 of the code.

I think their concerns have some merit...

MS. DICKIE: Tell me those sections again.

MR. FULLER: 50.2(a)(4) and 50.9(d).

I think their comments have merit. What we would like to do is ask for you to publish the rules that we have proposed before you today. We will probably need to do some further discussion to maybe refine this language a little bit. I think, in spirit, we are pretty much in agreement. There just needs to be some discussion about the actual language in these two sections.

Also, one other thing I'd like to point out. In our proposed draft we did not include any language in there regarding setting a set fee or a minimum fee that schools could charge. The consensus out of our meetings was that we should probably leave this alone and let the free marketplace dictate what schools can charge for their classes.

MR. SHIVERS: Do the commissioners have any questions for Mr. Fuller?

MR. STEEN: First, I want to compliment you. I know it's been a thorough review process and you have put a lot of effort into this. I appreciate your good work.

Tell me the group of people that wrote you the letter. What are their concerns?

MR. FULLER: I think they are here and prepared to make some comments and maybe even offer some proposed language that they'd like to submit in view of these two sections. The Texas Package Stores Association; Texas Restaurant Association; Texas Licensed Beverage Association; Texas Retailers Association; Texas Petroleum Marketers and Convenience Store Association and the Texas Hotel & Motel Association.

MR. STEEN: They have two issues, and they are all in agreement?

MR. FULLER: Yes, sir. We are pretty close in spirit. I think it's just fine-tuning some of the language and maybe some legalese that the attorneys need to work out.

MR. SHIVERS: I have a couple of questions for you. 50.4(i). Do you have it?

MR. FULLER: Continuous blocks?

MR. SHIVERS: Yes. "Each program session will be presented in a continuous block of instruction. While instruction shall be interrupted for brief breaks, these should be limited in number and duration." Are you sure you want to say, "shall" instead of "may?"

MR. FULLER: That's true. We should probably change that to "may." Thank you.

MR. SHIVERS: I've got one other. It is 50.3(e)(1) and (2). Have you found it, Buck?

MR. FULLER: Yes, sir.

MR. SHIVERS: "To qualify under this subsection a trade association must be a statewide organization with members in at least ten Texas counties and have been in existence as a statewide organization for at least 20 years." Why?

MR. FULLER: Mr. Chairman, this language was inserted here from the inception and, quite frankly, the committee left that alone.

MR. SHIVERS: It seems anti-competitive on its face to prevent any new associations from providing this service. Say an association is in one large county or two large counties, a metroplex, so an association that wants to offer this instruction...is it not in our interest to have more instruction rather than less?

MR. FULLER: Yes, sir. As we put this out, we received no comment, whatsoever, regarding this section.

MR. SHIVERS: Will you accept this as a comment?

MR. FULLER: Yes, sir.

MS. DICKIE: Twenty is wrong.

MR. SHIVERS: I understand the desire not to have someone calling themselves an association and springing up overnight, but I think this is overly restrictive.

MR. YARBROUGH: Mr. Chairman, if I can shed some light where it may have come from. I don't know that it carries any weight now or not. When this was first passed, these were all to be privately taught schools, no industry involvement, whatsoever. I think the next session of the legislature there was some change made to allow trade associations. Subsequent to that, there has been quite a bit of broadening to allow individual companies, in fact, to train their own if they have a certain number of employees. This was never changed. It may, in fact, as you suggest, be meaningless now in light of the other changes in the law.

MR. SHIVERS: Take a look at it during our comment period and see if there is really a

need for that restriction in here.

MR. FULLER: Okay.

MR. SHIVERS: John?

MR. STEEN: Mr. Fuller, what's the most recent number we have on the percentage of the retail licensees and permittees that have their employees seller-server trained?

MR. FULLER: The recent number of percentage that we have overall is 47 percent. Of the mixed beverages, private clubs and private club exemptions, 64 percent are requiring their employees to take the classes.

MR. STEEN: What was that breakout?

MR. FULLER: Of all of our mixed beverages and private clubs and private club exemptions, 64 percent of those permittees are requiring their employees to take the classes.

MR. STEEN: Maybe you could speak to this. This is supposed to be an incentive-based system. Why don't we have a better percentage than 47? I know, looking at the last few years, it's always hovered in the 40 percent range.

MR. FULLER: Yes, sir. We know of some restaurant associations, large chains that have their own in-house programs where they train their employees and they are committed to responsible hospitality service. There are some of those chains like that that do not require their employees to take these seller training schools unless they violate the law, unless they have sold to a minor or intoxicated persons. Then, they would do it on a store-by-store basis. Also, we've had some comments from other operations that where alcohol may be a small percentage of their total receipts, and they are not requiring their employees to take these classes.

MR. STEEN: Are we going to hear from some other people?

MR. SHIVERS: Yes. Thank you, Buck.

Fred Niemann indicates he's going to be the lead speaker. Are you going to be the only speaker or....

MR. NIEMANN: I think the others will be very brief, at least that are part of our coalition. It may just be in support.

My name is Fred Niemann. I'm the attorney for the Texas Package Stores Association. I am here for the sake of making this hearing more efficient, with a common message from both our association, the Texas Licensed Beverage Association; the Texas Petroleum Marketers and Convenience Store Association; the Texas Restaurant Association; the Texas Retailers Association and the Texas Hotel & Motel Association.

First, we would like to thank Mr. Fuller and all of the TABC staff for the efforts they made in promulgating this rule and the process they used in doing so, of drafting proposed regulation, then seeking input from all parties they could identify that might be affected from it, giving us opportunity to meet face-to-face and give input and now responding to that input with language and then we, in turn, now are responding once again where we feel it's close to the mark but not quite where we need it to be.

We believe that the model Mr. Fuller used is a model for all for what the rulemaking process should be in state agencies, and you should be proud of the implementation that has happened here. They really did an excellent job, and it's just come real near to developing a consensus on all of these rules.

The process has now refined the rules down to where there are only two issues that are of major concern left to the groups that are listed in the letter. The good news is that all of us, both the agency and the groups, agree with the underlying goal and spirit behind both of those issues that are still left unresolved. The disagreement comes in the details of how to clearly implement those goals.

The first goal is that there should be more involvement of supervisors in the seller training process. We agree with this goal. The problem with the draft is that when you read the rules and apply it to a particular business organization, it is not crystal clear which human beings must be trained and who do not need to be trained. Our fear is that, after an illegal sale occurs, the agency will say that while you trained this supervisor, you also should have trained this other supervisor and, therefore, you are losing your safe harbor.

We must know clearly in advance which management personnel must be trained. The solution that we propose is to require the permittee to designate in advance who the supervisors are that are primarily responsible for alcohol beverage sales and require those people to have seller training. That's proposed in the letter that we presented. We've given specific language at the end that would accomplish that on both of the issues that

we are addressing.

The second goal where there is a problem is that - again, we agree with the goal, and the goal is this - that all businesses should adopt policies requiring seller training. That they should post that policy prominently for employees to see, and they should make sure that all employees read the policy and sign evidence that they have read it and understand the policy. We agree with those goals.

The problem with the draft is that the way it is drafted it is presumed that a business is encouraging illegal sales if they have a technical violation of failing to have a single signature in the file or if one of 100 employees has had their seller training lapse. Our fear is that there will be an after the fact focus on technical violations rather than a bigger picture focus on is the business making a reasonable effort to adopt these policies?

Our solution is to shift the presumption from a presumption that we must have a hearing if there is a single signature missing in your file to a presumption that if you have these policies in place, and if you are reasonably enforcing them, then we are going to presume that you are a good operation and entitled to the safe harbor. Of course, other facts may defeat that presumption.

Essentially, we strongly support the goals that have been laid out. We have problems with the specific implementation. The groups that are represented in the letter formally oppose the adoption of the rules in their current form, however, with these two amendments, which we've laid out, we would enthusiastically support the adoption of the rules. The TPSA and the other groups that are listed in that letter urge publication of the rules with these two amendments.

Thank you, and I would be happy to answer any questions.

MR. SHIVERS: Mr. Steen?

MR. STEEN: Tell me again the group you specifically represent.

MR. NIEMANN: My personal client is the Texas Package Stores Association, the liquor stores.

MR. STEEN: You heard me ask Mr. Fuller earlier about this percentage, and I just reiterate that I'm concerned, that even with all of these incentives, that currently less than 50 percent of the permittees and licensees have their

employees seller-server trained. Can you speak to that - why we aren't doing better in that area?

MR. NIEMANN: We, as an association, encourage all of our members to do so. So, I think all good businessmen, all smart businessmen, I believe, should go through the seller training program. I think the carrot is a strong enough one that most people should. Why people don't, I don't know.

Quite frankly, when the statute was passed several years ago, the Texas Package Stores Association, working with many of the people in this same coalition, led the charge to adopt this seller training program. The way we were able to convince the industry to actually initiate it and pass the bill was by using the carrot rather than the stick approach. Historically, that's the reason for the carrot rather than the mandatory approach. Also, because of that, I think it's a statutory matter as to whether it's mandatory, and I don't think rulemaking, alone, could change that. It would be a matter for the legislature to make it mandatory.

Philosophically, we don't have a problem with the concept of all businesses having seller training, and I think the rules actually have taken a step in that direction, because for the first time these proposed rules - and it's a part that we do support - provide that where a business has not put their people through seller training, and they have made an illegal sale, the agency can require, as part of their punishment, that they put the people through seller training. We think that's a step in the right direction that can be done with the rulemaking process.

MS. DICKIE: Let me just observe that you are really watering down 50.9(d).

MR. NIEMANN: Which one is that, ma'am?

MS. DICKIE: 50.9(d). You've got it to where...

MR. NIEMANN: That's the presumption?

MS. DICKIE: If you just take a stab at it then you get the statutory protection, as opposed to insuring that it occurs.

MR. NIEMANN: Actually, all it does is it creates a presumption, and the presumption disappears the moment...I mean if there is a bigger picture - other evidence that the employers are indirectly encouraging violation of the law - the presumption would disappear.

MS. DICKIE: Right, but you turn a pretty bright line, that's in the proposed rules, into a pretty fuzzy line with your language.

MR. NIEMANN: Whereas, the proposed rules take the current law and draw a bright line that isn't there right now at all, saying we are going to presume that you have to have a hearing. We are going to establish these new policies and presume that you have to have a hearing if you are missing a single signature. What we are urging the agency to do, and it's possible that there can be some tweaking with the language to do it more effectively, but what we strongly urge is that this not be something where the agency is looking for a technicality with which to take away the safe harbor, but instead to look at the totality of a business's policies of are they generally trying to prevent the sale to minors? Look at the big picture. Don't just look at a technicality as a way to say we've got you. That's our concern.

MR. SHIVERS: You've turned a mandate into a suggestion. Let me give you a for instance. Suppose you've designated A, B and C employees as supervisors, but employee D and E are acting de facto as supervisors. They are not covered by this. We don't have any enforcement ability because they are not the designated supervisors, even though they were acting in a supervisory capacity.

MR. NIEMANN: The real question...

MR. SHIVERS: Where is the public interest served there?

MR. NIEMANN: How do you strike a balance of easily identifying who...getting someone in management trained so that someone in management, who officially, on paper, is the one that's responsible if a sale occurs. That's what we are trying to do. One person may have multiple supervisors within an operation, and that's part of the problem that we have is being able to clearly define who is the one that is responsible for action of an employee when it comes to sale of alcohol beverages. The best that we could come up with was saying let's have the employer designate a human being in advance that is responsible that the ABC looks to. Now, if there's a better solution, it's fine, but the concern we have is how do we prevent an after the fact pointing match of, "Well, you had him trained, but you should have also had him, him and him trained." Right now, no one in management is required to be trained, and we think this is a good important step forward of bringing management into more of an awareness.

MR. SHIVERS: What's the objection to requiring everyone to be trained?

MR. NIEMANN: There may be some wisdom to that. There are real practical business problems in doing that.

MR. SHIVERS: How do you effectively manage someone when you don't have an eminent knowledge of the requirements that the employee has to follow, and they have to be seller-server trained? If the manager is not familiar with the course curriculum, how can they effectively manage and help the employee do their job properly?

MR. NIEMANN: Actually, the essence of seller training is known by anyone with a permit because they are required to comply with the law of not selling to minors and not selling to intoxicated persons. The specific mechanics of how to recognize people and that sort of thing, that are emphasized in the courses, it's valuable for everybody to know, but it is critical for the people to know on site.

We agree it is wise to have whatever manager is being designated as responsible for that aspect of the employee's performance to also be aware of that, and that's what we are agreeing to in the rules. What we have a problem with is anyone who might conceivably be a manager in any fashion, it makes it very difficult because people come in and out - on site, off site - time of day. They may supervise someone from one aspect of their duties but not another. All we are saying is that a permittee should have a responsibility to clearly designate who is the supervisor for purposes of preventing sales to minors. That's really what we are asking, so we can have a clearly identifiable standard.

MR. SHIVERS: If, in our investigation, we discover that someone other than the designated person was acting in a supervisory role, would that be a violation under your proposed language?

MR. NIEMANN: If the person who was designated actually had no role, top-side or bottom, possibly so. There might be people who have multiple levels of responsibility. Everyone trying to watch all the eggs in the basket. But, we do think it is helpful to have one person who is in the chain of command that when an organization gets in trouble for a sale to a minor, you can look to that supervisor and say, "You screwed up. It was your job to make sure this didn't happen."

Primarily, what our concern is after the fact...we need to know before the fact which of our people need to be trained. That's the concern. That's the problem. How do we clearly identify before the fact who must we train? We are open to creative solutions, but that's the one that seemed to

us the most obvious and it would also permeate in a management's consciousness this is important. Someone in management has to be responsible in overseeing to make sure that sales to minors don't happen. It's trying to focus the responsibility.

MR. SHIVERS: Any other questions for Mr. Niemann?

MR. STEEN: Yes. I just wanted to verify something that you said earlier. I guess you are aware that in at least 10 states seller-server training is mandatory?

MR. NIEMANN: Yes, sir.

MR. STEEN: Did I understand you to say earlier that philosophically you had no problem with that?

MR. NIEMANN: First, I have to differentiate myself from the other groups that are represented in the letter. The Package Stores Association, at one point, actually supported a bill in the legislature that would have changed the seller training rule to make it more mandatory - not completely mandatory. Philosophically, it's a good process that should happen, but I don't think it's something that can be changed under current statute by rule to make it mandatory.

To be real candid with you, too, we have concerns. We believe in the importance of the safe harbor provision of the law and were seller training to be made mandatory, we would also like to see some other aspects added to the law so that an employer could satisfy those additional steps and qualify for a safe harbor. If everyone has to seller train their people, we need to have something where a good employer could say, "I'm good and I'm going to take extra special steps so that we can convince you in advance that a sale was a renegade employee and not us encouraging the employee to sell." That's one of the logistical problems of mandatory. There are also logistical problems of new hires and that sort of thing. It's a much more complicated system than the voluntary system.

Like I say, I'm real proud that the industry volunteered to pass the voluntary system. This was not a TABC initiative. It was an industry initiative. But, I can understand if voluntary is good, why isn't mandatory better? But, I can say this, mandatory has a lot more problems.

MR. SHIVERS: Thank you.

Glen Garey?

MR. GAREY:

Commissioners, for the record, my name is Glen Garey. I represent the Texas Restaurant Association. Chairman Shivers, you brought up the deal about the statewide trade associations. I don't know where that came from. I'll try and find the background on it. Frankly, I don't care who gets in the business. The more people, the merrier, as far as I'm concerned on this training.

You then went on, Commissioner Steen, and asked why more people aren't getting trained? I think probably my industry is a good example of why that doesn't occur within all of the permittees, and that is we sometimes have units where alcohol sales are one, two, three percent of the total. You go to the Red Lobster, we are just not turning out a whole lot of people who are getting intoxicated. In fact, Red Lobster doesn't do the state training, but they do have an in-house training program and just don't go to the state training because it costs them more to do it than do it in-house. They don't find the need to go out and spend that extra money because they don't really need the safe harbor. Then they don't see the risk there for themselves.

Another reason you may not see people getting their employees trained is it's not available everywhere in the state on a regular basis. I know Buck and the rest of the staff have been working with us in this rule process to look toward internet-based training. So, at some point, I'm hopeful that we will have that available statewide, 24 hours a day, seven days a week, so that will help remove that problem or that barrier to training. But, certainly we aren't there yet, and there's no program out there that I know of yet. I think there's one video program, but it's not even widely distributed. So, we are stuck with dealing more with population centers as far as the availability of training.

Why not mandatory? Again, that gets back to those two reasons why we have members who aren't training now - availability in all areas and also sometimes it just doesn't make practical sense for them to be doing that through the school systems. They may be doing it internally.

I don't know if you have any more questions. I would say that I support what Freddie has been bringing forward to you and the comments that he made, and if you have any other questions, I'd be happy to answer them.

MR. SHIVERS:

Questions for Mr. Garey?

MR. STEEN:

The point you brought up that we can't do it because we can't reach all these people in rural areas. Why? I guess I would ask Ms. Fox that, too.

MS. FOX: We are working on that with the internet base that Glen spoke of, with the video that we approved in the last year with CD-based training. We are working on trying to alleviate that problem, but there are not a whole lot of schools in smaller areas, but you will find schools that particularly, say in Austin or other metropolitan areas, who are very willing to travel out. They do travel and they do book them, but it's not on a widespread basis that every single person is doing it at this time. We recognize that that is a challenge and we are trying to address it with the type of programs and schools that we do approve.

MR. GAREY: If I can give you some benefit of our past experience. We, when this first came out, started training. We were one of the first in the market, so we had the Houston's, the Dallas's and the San Antonio's to sort of support and underwrite us doing training for the rest of our members. As we lost those markets to the junior colleges and the training schools, and what have you, the cost of you traveling and putting a trainer out there, renting a space to bring all the people in and then train them, then means that the cost per employee of doing this training gets so high that it's prohibitive for people to go out there and do it. So, unless we can find some better delivery mechanisms...

MR. STEEN: What about self-study, using a CD-Rom?

MR. GAREY: That's what we are trying to aim for, CD-Rom and testing through the internet, and that sort of thing, so we can begin to alleviate some of these barriers to training.

MS. FOX: Part of that issue is those are independent programs and independent owners that put those schools together. Since the state is not providing that particular schooling - we only approve and certify those programs - some of those up-front costs are pretty large for a lot of these small independent entities to put all that together and do the research and get it approved. At least, that's some of the answers that we've been given.

You know, we have done a number of things internally to try to make retailers aware of seller training schools, where they are, their addresses. Each time we issue a permit or a license, at renewal or the original permit, we provide a listing of all the schools. We provide a sheet basically explaining the program, why it's a good benefit for them. When a new business comes in for their initial interview, one of the things that we discuss with them is seller training programs, what benefits it has for them. So, we are making an effort in trying to get that information out and known among the retailers so they will know what advantages they have in

taking part in those types of programs.

MR. STEEN: I'm just concerned that despite all those efforts and all the incentives, we are still not cracking that 50 percent.

MS. FOX: One thing I will say about the percentage that I would just have to qualify. We do use the information - and we give it to you when you ask about the percentage of people participating in seller training or requiring their employees to be seller trained - but that information is based on voluntary information they give us on the application. Simply, "Do you require seller training for your employees? Yes or No?" I have found, when I was doing some research, when we started looking at this committee and reviewing the rules, that they may answer "no" when, in fact, they do. They may not require it at the time they get their permit, but three months later they change their mind and require it. I think the number is probably a little higher, overall, than what our percentages show, but I can't tell you what that firm and final figure might be.

MR. GAREY: I had two other observations. One, because of the impact seller-server training has on the dram shop actions, you will find a lot of the insurance companies are forcing people toward training.

The last thing is you were asking about why not get all managers certified? In a restaurant environment, that may not be as problematic, but we certainly do have like the kitchen managers who have nothing to do with sale or service of alcoholic beverages. They don't manage the people who do the sale of alcoholic beverages and have no need, whatsoever, for that knowledge, nor do we need to send them off for training for that. Really what we are trying to aim at with that is to say, "Who is it that's in charge of or directing the sale of alcohol?" Those people, yes, I think there's great value in getting them certified, and I think there is value in making sure they understand the same things that their servers are required to understand. Again, a kitchen manager, there's no need for that, whatsoever.

MR. STEEN: The other side of it...how long does the course take?

MS. FOX: Four hours. 200 minutes.

MR. STEEN: What's the cost on the average?

MS. FOX: The prices range anywhere from, I think, probably a low of 12 to 15 dollars up to 35 or 40. Those higher ranges are pretty rare. Mainly, 15 is

generally the average.

MR. STEEN: Why not get all those people certified?

MR. GAREY: There's no need to make that guy who's the kitchen manager go do this. He doesn't have anything to do with it. Why are we going to drag him around for four hours on something that he has nothing to do with? I mean it would be like me needing to pass the medical exam to be a lawyer. I don't want to do it.

MR. SHIVERS: Depends on how much rum he pours on top of bread pudding, I guess.

Thank you.

MR. GAREY: Certainly. Thank you, commissioners.

Doug Dubois?

MR. DUBOIS: Mr. Chairman, for the record, my name is Doug Dubois with the Texas Petroleum Marketers and Convenience Store Association. In the interest of time, I support Mr. Niemann's and Mr. Garey's comments with one additional comment, and to Commissioner Steen regarding, as Ms. Fox has referred to, the percentage of employers who require training. Again, if somebody has the availability...and one thing we would like to suggest is that possibly the requirement for 150 employees be reduced to 50 employees or so, so that companies could implement their own in-company training. This would provide them more accessible training and not have to rely on outside contractors, especially when we are talking about the diversity of locations in West Texas in some areas where certified trainers are hard to come by. These in-company trainers would, of course, follow the TABC's seller-server training certification as a trainer and would implement that on a much more timely basis.

Any questions? I will be happy to answer.

MR. SHIVERS: I think that's an interesting suggestion.

MR. STEEN: Ms. Fox, what about lowering it to 50?

MS. FOX: At one time, we did have a recommendation that we might want to lower it to 100. I think we just probably need to look at that. Is that 50 employees that would be certified or 50 employees that are just employed in that particular business? Did you have an idea of...

MR. DUBOIS: Probably, within our industry, the convenience stores, it would be 50 certified employees, which would be most everyone in there, except we get into food service operations, too.

MR. STEEN: If it would result in more people being seller-server trained, why not?

MS. FOX: That's certainly something that we can look at. It wasn't an issue that was brought out during our time of review or meetings.

MR. SHIVERS: Thank you very much.

Chuck Courtney?

MR. COURTNEY: Mr. Chairman and Members, my name is Chuck Courtney. I am vice president of the Texas Retailers Association. Our association represents supermarkets and grocery stores, and we would also like to reiterate and echo what Freddie and Glen and Doug have gone before me and said in support of these two changes.

Freddie struggled a little bit, but coming from an independent owner's perspective on the management aspect of it, when you look at a large supermarket these days, we have many managers within that framework. So, again, we are trying to tie the person who's responsible for those cashier's, making those off-premise sales, to be the person that is designated by the permittee holder. That's the reason, rather than having the vice president of finance or the manager for floral or whatever else that might be involved in that situation.

MR. SHIVERS: But it might be the wine department manager or something like that in addition to the checkers.

MR. COURTNEY: Right, within that department. Again, I think it goes back also to Mr. Steen's question. Again, when you have a supermarket operation where you have hundreds of people and the turnover so constant...many of our members operate across state lines, and so they try to go for a standard educational program. So, they try to train their people based on a standard, and sometimes that's difficult to meet for individual states to make it Texas certified, for example. The training is actually being conducted. It might not be reflected in the actual statistics. That's a point to be considered, but that's one reason why some corporations do that. They prefer, as Glen said in the Red Lobster situation, to have their own in-house training tailor-made to their operation, and they usually add on to that tobacco awareness training or it might be other aspects that they want

to focus in on. So, I think those numbers are maybe not reflective on what is actually going on out there.

I think that's my only basic two comments, but we do echo that and urge you to look at tying down that definition of the immediate supervisor. I think that strengthens the rules in that respect. Thank you.

MR. SHIVERS: Questions?

MR. STEEN: What are your thoughts on making the training mandatory?

MR. COURTNEY: I think Freddie hit it pretty good. The incentive approach, ever since I've been with the association, I think we've always taken the posture that if you can incentivize someone to do it, you have better results, better attitude, cooperation and everything else. The mandatory takes it to that next burden, and I think Freddie hit upon several of the concerns we might have on that, especially, when you look into the safe harbor provision.

MR. STEEN: Are you saying you have members of your association that are doing training, but they are not doing it in a way that...

MR. COURTNEY: They might not be doing training through a Texas certified program, and that's simply because they prefer to do it, as Glen said, through CD-Rom or other means that haven't been available until now.

MR. SHIVERS: So, therefore, they are not concerned about the safe harbor provisions?

MR. COURTNEY: No, not necessarily. I think it depends on the legal situation that you get internally. Again, you have to remember that our industry has a very high turnover of employees, and you are talking about hundreds of employees within a supermarket format and not four or five, say, within a package store format.

MR. SHIVERS: Thank you.

Don Hansen?

MR. HANSEN: Commissioners, my name is Don Hansen. I represent the Texas Hotel & Motel Association. I would like to shed just a little bit of light, if I may, with respect to statewide associations. I think when the seller training program was originally thought about, the commission and those of us who run state associations thought that maybe the biggest and quickest and best bang for the buck was to allow the hotel associations and the

restaurant associations to conduct training. If I remember correctly, that's the way that started.

We ran training programs around the state for probably two or three years, and then the explosion of trainers, trainer companies who are exclusively doing the training, came out and we abandoned it. We stopped doing it because we couldn't, frankly, compete with the trainers and the training companies in all the other cities. I think that was the genesis for the original statewide trade association.

With respect to the other comments that were made by those who have preceded me, I won't take your time up anymore and suffice it to say that we agree with those comments. I will be happy to try to answer any questions.

MR. SHIVERS: Questions?

MR. STEEN: No.

MR. DICKIE: No. Thank you very much.

MR. SHIVERS: Thank you. Do we have any other comments on this one?

MS. DICKIE: I move that we order publication of the amendments to 16 TAC Chapter 50 with the change in 50.4(i), from "shall" to "may," which is pretty easy. The other change that we spoke of in 50.3(e)(1) and (2), I think we can consider that after we publish the rules as is and look at what the appropriate standard should be in that area. I move publication with that one change.

MR. SHIVERS: Second?

MR. STEEN: I've got a question before I second it. Mr. Bright, I know I asked you about this in the fall of '98, and some of the speakers here have talked about this today. Under our rulemaking authority, could we make seller-server training mandatory?

MR. BRIGHT: In true and honorable lawyer fashion, let me say to you that I do not believe there is a clear answer to that question if the proposal is to make it mandatory for all retail level permittees in this state. Let me tell you why I say that.

The general language the courts use in considering regulatory authority

kind of questions, as you've heard me say before when regulatory agencies that have broad authority, like we do, the standards they use are pretty broad, and you've heard me say those things. Is there a reason for the adoption of this rule and does this rule comport with the general objectives of the act considered as a whole? They also say that you cannot, by your rulemaking, contravene the - quote - plain meaning of a statute.

Now where we fall into ambiguity is all the different ways that lawyers and others can argue about what the plain meaning of the statute is. For example, if our statute says you have to have 50 employees to do such and such, we cannot pass a rule that says you can do it with 45 employees.

I have not found a case that discusses these kinds of issues that is very analogous to the kind of situation we would be presenting if we made it mandatory for all permittees. One argument, and the argument against that rule, would be to say that the plain meaning of this statute is to erect an incentive-based program, and by making it mandatory for all people, then you have essentially taken away the sense of that statute, and that statutory structure in 106.14 is now kind of moribund.

The opposing argument to that, however, would be this. There have been, since the late 60's, a series of cases that challenge rules that say that what's wrong with this rule is that essentially it imposes a burden that the legislature did not impose on us as a regulatory community, and the courts have been pretty unreceptive to that kind of argument. They have said that broad rulemaking authority like ours allows us to impose those extra burdens if, indeed, it will carry on the mission of this agency. We can then well argue that we have some information and good information from which to show that the general common sense proposition that educated people generally do better than people who are not educated, so that we would make it mandatory and it would not vitiate this safe harbor. Everyone would then have the safe harbor consistently with our rules and the statute.

I can't tell you with great precision how a court would respond to that argument, and I apologize for that. It's probably a personal failing. But, it is a case that is not directly analogous to any of the ones that I have found looking into this.

MS. DICKIE: The answer is maybe.

MR. SHIVERS: With great respect for my two colleagues here with me on the dias, you lawyers can sometimes argue about the meaning of a two letter verb.

MR. BRIGHT: Not this one, Mr. Chairman. It means what my clients say it means.

MR. SHIVERS: Wise answer.

MR. STEEN: To tell my colleagues where I'm coming from on this, I'm thinking about these 1998 statistics that were provided to me by Claire Myers, and Texas still leads the nation in the number of alcohol-related traffic fatalities. We are also pretty high up on the list on a per capita basis. I think this is an area where maybe we can do something. I'd like to be more aggressive in this area and make it mandatory. I'm not sure I have the support of the staff. I don't know what your thoughts are on it. That's the direction I would like to move in. Maybe I could get your comments. If I feel like I don't have the support, then I will second that motion that's on the table.

MR. SHIVERS: I'm not unmindful of your comments and I'm certainly in sympathy with the thrust of them. I think we ought to publish these with the change as Commissioner Dickie has suggested. But, I think the idea of providing an incentive with a strong disincentive for not getting everyone trained is the direction we ought to go in, and I don't know whether we can do that regulatorily or whether we have to go to the legislature next session.

MS. DICKIE: That's what I would be troubled by, John, is whether we actually have the authority to do it, given that the legislature has spoken on this topic in terms of how they provided the safe harbor. I would be concerned about that.

I will tell you, in light of what you said, the modifications that everybody just proposed seem to me to be watering down this program and that troubles me greatly.

MR. SHIVERS: I agree with you.

MS. DICKIE: I'm not saying that these sections can't be tinkered with. I'm just troubled, particularly, on 50.9(d) that we are essentially emasculating that section, and that troubles me greatly. On the larger question of...

MR. SHIVERS: I don't think that provides an incentive to get seller-server trained. I think it's more of an escape clause.

MS. DICKIE: I'm not saying that's something we shouldn't explore. I just think we need to go ahead and publish these.

MR. STEEN: Having said that, I will second the motion.

MR. SHIVERS: Any other discussion? I'd like to suggest to the staff, having heard all of our comments, that you look strongly at what we can do in rulemaking to give an incentive to as many people as possible who are seller-server trained and provide appropriate penalties without unduly burdening well-meaning and well-managed businesses. If you don't understand that, see me after the meeting and I'll see if I can't clear it up.

We have a motion and a second. All in favor?

MS. DICKIE: Aye.

MR. STEEN: Aye.

MR. SHIVERS: Aye. Opposed?

MS. DICKIE: I bet we'll hear a lot more about this.

MR. SHIVERS: Number seven - public comment. We have a couple of speakers who have indicated they would like to speak. Mr. Sparks has signed up for public comment.

MR. SPARKS: Mr. Chairman, Members of the Commission, my name is Robert Sparks. I represent the Licensed Beverage Distributors. I'm here to talk about the Dickerson decision out of the Houston federal district court. We'll call it the direct shipment case.

I have provided you with some remarks. I won't read those back to you. I'll let you read them. To me, this is a clear case that falls under the 21st Amendment along with the Webb-Kenyon Act which creates an exception to the Commerce Clause pertaining to alcoholic beverages. Texas has a scheme where people in the business of alcoholic beverages are required to fall under certain statutes and regulations, either passed by you or the legislature.

The legislature has also provided a situation where, for personal use, citizens of Texas are allowed to import beverages for their own personal use not to go into commerce.

I think the judge was in error in her decision, personally, and I would hope that you let the case proceed on up the chain in the judicial system. If you have any questions, I will be happy to try to answer them.

MR. SHIVERS: It's my understanding we do not yet have a final judgment from the court.

MR. SPARKS: That is correct, sir.

MR. SHIVERS: So, there is nothing to appeal.

MR. SPARKS: I may be a little early, but I thought I'd let you know how I felt.

MR. SHIVERS: Okay. Any questions for Mr. Sparks?

MR. STEEN: No.

MR. SHIVERS: Mr. Spilman, I assume you want to speak on this?

MR. SPILMAN: Very, very briefly. My name is Wade Spilman. I represent the Wholesale Beer Distributors of Texas. We similarly believe that the decision handed down by Judge Harmon merits review by the 5th Circuit on a number of grounds. We have, heretofore, furnished members of the commission and some of the senior staff members, who we believe are involved in this issue, with a very brief memorandum, the jest of which is simply that if the decision of Judge Harmon is entered into judgment, which we think will be forthcoming fairly soon one way or another, that it will bring about a rather anomalous situation in this respect. It will permit wine sales to the ultimate consumers in Texas. Without the requirement that those out-of-state wine sales, no matter where they are located, must have some kind of non-resident license in Texas, the regulatory scheme in Texas will be without any teeth as to those sales in the sense that you will not need to know who is making the sale, who they have made them to, the volumes, whether they are in dry counties, where they are. It will simply be no regulatory control over those sales. We think that is not what should be permitted under the application of the 21st Amendment and, therefore, we think it is most appropriate for the appellate courts to review this decision if the judgment reflects her decision. If there are any questions, I'll be glad to try to answer them.

MR. SHIVERS: Questions?

MR. STEEN: None at this time, but I think we are going to go into executive session and talk about this and maybe when we come back out of executive session, if you don't mind remaining here, we might have some questions.

MR. SPILMAN: We certainly don't mind that.

MR. SHIVERS: Thank you, Wade.

Let me say a couple of things. One, although we are going to discuss this in detail in executive session, I'm not going to reference the specific case. The internet is changing the way the world works and the way we all do business. It's having at least two major effects that I can see. One, it is squeezing the margins out of retail sales of any kind. It's making everyone have to be a lot more competitive, a lot more efficient.

Two, it is turning on its head any regulatory taxation schemes that the individual jurisdictions have enacted. There was a fairly good article in yesterday's paper, Austin paper, on this subject. The train is coming down the track, folks. The consumers want this to happen because they find it convenient. If they didn't, you wouldn't see the rapid growth in retail sales on the internet. It is doubling almost annually, if not tripling.

I would suggest to all industry members here that in the upcoming session of the legislature that you look at your own businesses and figure out how to get on board the train rather than standing on the tracks, because it's my judgment that if you continue to stand on the tracks, you are going to get run over. Take that for what it's worth. I understand the desire to slow the train down as long as possible to maintain your margins, but this is inevitable in my view.

John?

MR. STEEN: Not at this time.

MR. SHIVERS: Thank you.

We will now go into executive session to consult with general counsel on agenda item number eight.

The commission convened in closed session at 2:59 p.m. and reconvened in open meeting at 3:50 p.m.

MR. SHIVERS: The commission meeting of February 28, 2000, is now back in open session. During the executive session we deliberated several matters, specifically Dickerson v. TABC, and we will take that up now. Mr. Steen?

MR. STEEN: I just wanted to make a statement and then a motion. I have reviewed Judge Harmon's February 10th memorandum and order. As recounted by

Judge Harmon, the plaintiffs, three Houstonians, complained because they could not, by direct shipment, purchase wines from an Arkansas winery whose products were unavailable or at least not easily obtainable in their hometown stores.

If all Judge Harmon did was, in a very limited way, allow consumers to get certain wines shipped directly, when the wines were not otherwise available, I might not be as concerned with the outcome of the lawsuit. Enhanced competition and increased consumer choice are things that I favor.

However, in striking down two sections of the Texas Alcoholic Beverage Code, the judge's actions go far beyond that. Unless narrowed by her final judgment, Judge Harmon's holding will allow the unregulated sale of wine into Texas by out-of-state sellers. Without getting into the fine points of law about standing or the reach of the 21st Amendment or the interplay between the 21st Amendment and the Commerce Clause, as well as other parts of the U.S. Constitution, the practical implications of Judge Harmon's holding create real problems for the TABC. In destroying the ability of Texas to regulate shipments of wine to consumers from outside the state, the order has created the situation where at least until the Texas Legislature meets in 2001, out-of-state wine sellers may ship to Texas with no effective controls other than those that their own state or country might impose on their activities. I say no effective control because no existing statutes authorize the TABC to issue permits to out-of-state wine sellers who sell directly to consumers, to monitor activities of these sellers or to obtain records of how much they ship to whom and where. So, without a right to monitor records on a continuing basis, how can the TABC control whether these wines are being shipped to minors or into dry counties in violation of our criminal statutes? Furthermore, this activity would unfairly escape taxation.

Therefore, I move the following: that we instruct our administrator, Doyne Bailey, to write the attorney general to formally request that he take whatever steps necessary at this time to protect the interests of the TABC and the State of Texas, including a possible appeal to the 5th Circuit, and that we also seek an order to sustain the status quo pending the outcome of any appeal.

MR. SHIVERS: Second. Any other discussion on this motion? All in favor?

MR. STEEN: Aye.

MR. SHIVERS: Aye. Opposed? Okay.

Anything else to come before us today? We are adjourned at three fifty-three.