

State of New Mexico

*Governor's
Organized Crime
Prevention Commission*

1978
Annual Report

Santa Fe, New Mexico

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State of New Mexico

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Organized Crime
Prevention Commission

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ACQUISITIONS

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THE GOVERNOR'S ORGANIZED CRIME PREVENTION COMMISSION

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January 1979

The Honorable Jerry Apodaca, Governor
The Honorable Bruce King, Governor

The Honorable Members
New Mexico State Legislature

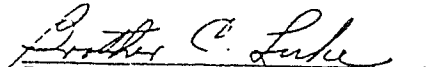
Enclosed is the Commission's report for the calendar year 1978.


This is our final report to one administration and our introduction to a new administration and a new legislature. It is also a transitional report in that it is our first public report to be based in part on information obtained through our subpoena power.

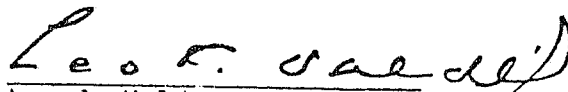
We hope that in this report and in the coming years we can provide the facts and recommendations to help the citizens and public officials of New Mexico in performing our common task of protecting New Mexico from organized crime.

Respectfully,

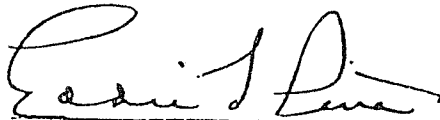
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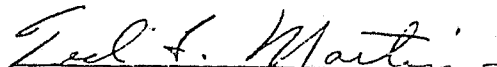

Brother C. Luke, Chairman

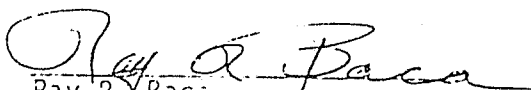

Robert H. Beck, Vice Chairman

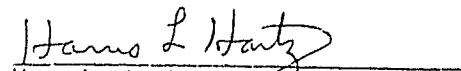

Leo J. Valdes


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Executive Director

I. THE COMMISSION'S INVESTIGATION OF THE LIQUOR INDUSTRY

A. INTRODUCTION

On June 1, 1977, the Governor's Organized Crime Prevention Commission adopted the following resolution:

RESOLUTION AUTHORIZING INVESTIGATION

WHEREAS the Governor's Organized Crime Prevention Commission has a statutory obligation "to forestall, check and prevent the infiltration and encroachment of organized crime into public and private affairs within New Mexico," and

WHEREAS the distribution and sale of liquor and other alcoholic beverages is a major industry in the state of New Mexico;

WHEREAS it is the concern of the Commission that what is commonly referred to as the "liquor industry" in New Mexico be free of the influence or domination of organized crime and racketeering; and

WHEREAS the involvement of organized crime in the liquor industry has been reported throughout the country;

NOW THEREFORE BE IT RESOLVED that the Commission shall conduct an investigation of the liquor industry in New Mexico in order to determine:

1. The extent to which organized crime and racketeering has or has not infiltrated the liquor industry in the state;
2. Whether conditions exist which have facilitated or may facilitate such infiltration into the liquor industry, including, but not limited to:
 - a. Inadequacy of state laws and regulations governing the liquor industry
 - b. Inadequacy of the number of public officers and employees devoted to enforcing those laws and regulations and of the budget provided for them to perform their duties
 - c. Incompetent or corrupt conduct by public officers and employees charged with the duty of upholding and enforcing those laws and regulations.

The Commission staff, under the direction of the Commission, then began its investigation of the liquor industry in New Mexico. This report outlines the objectives of the investigation and the Commission's recommendations based on the investigation that has thus far been completed. Some of the facts uncovered by the investigation are presented in this report to illustrate the need for implementation of the recommendations. But much of the information discovered is not included. Under the Commission's statute, a witness before the Commission has the right to refuse to allow "the content or details" of his testimony or records to be released publicly. Because so many witnesses refused permission, the facts presented here can tell only part of the story. However, the statute permits full disclosure to law enforcement agencies, and the Commission will report to them, as appropriate, in the near future.* The Commission is confident that the more complete the disclosure of the facts, the more compelling the recommendations will be.

B. THE COMMISSION'S TASK

The Commission's task was twofold. First, we looked for evidence of infiltration of the liquor industry by organized criminal groups. How serious is the problem now; can we ignore it; is it so overwhelming that there is little hope of correcting it; or are we somewhere in between?

Second, we looked for conditions that may lead to such infiltration in the future. Are there vulnerabilities in the manner in which the liquor industry is now supervised which could facilitate organized crime infiltration? Examples of such vulnerabilities were pursued to see if they facilitated illegal or improper conduct, regardless of whether the misconduct was performed by organized criminal groups. Organized crime can certainly exploit a weakness in the system if less sophisticated groups and individuals can.

The task is not yet completed. As indicated in Section V of this Annual Report, we have more work to do in investigating infiltration of legitimate businesses by organized crime. In addition, we have not yet had the opportunity to examine completely certain aspects of the liquor industry, such as wholesaling, so there may be future recommendations on these matters. But the Commission feels it is appropriate to present its findings to date.

C. THE EXTENT OF ORGANIZED CRIME INFILTRATION IN THE NEW MEXICO LIQUOR INDUSTRY

Law enforcement agencies throughout the country have long recognized the attraction that the liquor industry holds for organized crime. A

*After that report is prepared, another effort will be made to obtain from witnesses their consent to public release of those portions of their testimony and evidence which have been included in the report.

recent survey of federal law enforcement agencies revealed that of all the specific "legitimate" businesses identified as being controlled by organized crime, more were in the liquor industry than in any other line of endeavor. Therefore, even though the Commission began its investigation without any firm evidence of the involvement of a national syndicate in the state's liquor industry, we made a special effort to be alert to reports of such involvement and to pursue them.

Fortunately, the Commission did not uncover massive organized criminal involvement in liquor establishments in the state. This can be a source of comfort; because New Mexico appears to have the time it needs to strengthen its capacity to keep organized crime from the liquor industry before such infiltration becomes too much to handle.

Nevertheless, there was significant evidence of organized crime involvement in New Mexico liquor establishments. Some of the organized criminals involved were of the "home-grown" variety. Several establishments have been identified with major drug trafficking, fencing operations, gambling, and prostitution. In addition, the Commission has under active investigation several liquor businesses with apparent ties to La Cosa Nostra. There is evidence of funding for liquor establishments coming from out-of-state organized crime sources. In one case there is evidence that the process was the reverse and profits from the business went to finance an organized crime operation in another state. The Commission also developed evidence that a New Mexico resident already identified as an associate of major organized crime figures and a recipient of funding from an organized crime source had a hidden interest in a New Mexico liquor business; further communication with out-of-state law enforcement agencies provided information from several sources that the business has substantial ties to organized crime throughout the country. The owners of another establishment have been tied to organized crime by law enforcement and other sources, and the business has served as the meeting place for important organized crime figures visiting New Mexico.

Of course, the Commission is far from satisfied that these are the only examples. But they inform us that the threat of infiltration is real; and the state must earnestly prepare itself to deal with it.

D. CONDITIONS THAT MAY LEAD TO ORGANIZED CRIME INFILTRATION

The chief concern of the Commission in its investigation was to determine in which ways the state is most vulnerable to organized crime infiltration into the liquor industry. Given the experience throughout the country of organized crime involvement in liquor businesses, and recognizing the evidence of limited involvement already in New Mexico, it is incumbent on the state to halt practices that would facilitate such infiltration and to institute procedures that would impede infiltration.

The Commission concentrated its attention on the operations of the Department of Alcoholic Beverage Control (ABC). It is the one agency in the state uniquely charged with enforcement of the state liquor laws and the proper operation of liquor establishments. Moreover, as a regulatory agency with authority to deny and revoke licenses and to penalize licensees, it can be the most efficient means of dealing with problems in the liquor industry. Regulatory action against a liquor license can have greater financial impact, in a shorter period of time, with less investigative effort, than any other means of penalizing misconduct associated with liquor businesses. Experts in the control of organized crime are more and more learning the advantages of using regulatory measures, rather than just traditional prosecution procedures, to counter sophisticated criminal activity.

We considered three general areas. First, how competent is the ABC in detecting and dealing with the type of activities that could be expected if organized crime figures take control of a liquor license? Bars or package stores can be, and have been, used for a variety of illegal purposes. Such an establishment can be a front for criminal activity such as loan sharking, gambling, prostitution, or narcotics trafficking, being conducted on the premises or in the back room. It can be used for laundering funds obtained through illegal methods or for providing an ostensibly legitimate source of income for one engaged in criminal ventures. It can be a means for disposing of hijacked or bootleg liquor. The operators can skim funds to avoid taxes or can defraud creditors through bankruptcy fraud. Or the business may simply serve as a secure place to meet for discussion of criminal ventures. Could the ABC detect such conduct and act to stop it?

Second, can the ABC prevent organized crime activities associated with liquor establishments by detecting unsuitable applicants and denying them licenses to own or operate bars and package stores. Persons recognized by law enforcement as being involved in organized crime do not apply for licenses to own or manage bars in their own names. They use front men and thus conceal their own interests. The truth about who controls the establishment often can be determined only by thoroughly auditing its finances. What does the ABC do to examine applicants in order to discover hidden interests?

Finally, what are the protections against corruption--bribery and conflicts of interest--in the ABC? Organized crime's best investments are often in public officials and employees. There is no way to guarantee against corruption; but it is important to institute all possible measures to hinder and discourage it. Are there problems of corruption within the ABC and are changes needed to prevent them?

The Commission's conclusions follow. The recommendations are designed to combat organized crime. But it will be obvious to the reader that for the most part they are sound administrative practices that should be instituted for numerous other reasons as well. As this Commission has

observed on a number of occasions, the best deterrent to organized crime is simply efficient, honest government.

1. FINDINGS

The ABC is not competent to detect or prevent the infiltration of organized crime into the New Mexico liquor industry. In particular, the opportunities for corruption are far too attractive. The people of New Mexico and its public officials can no longer tolerate the misconduct and incompetence which have characterized the administration of the ABC if they wish to discourage the infiltration of organized crime into the state's liquor industry.

The Commission's recommendations and commentary regarding the ABC are presented under three headings: Decision-making, Administration, and Investigation.

a. DECISION-MAKING

RECOMMENDATIONS:

(i) A felony statute should be enacted to prohibit conflicts of interest involving all persons who administer the state's liquor laws. Such a person should be prohibited from having any financial involvement with a licensee or applicant for a license. He should not share any business interests with a licensee, solicit funds on behalf of anyone from a licensee, or borrow money or accept gifts or reduced prices from a licensee or applicant. Neither he nor any member of his immediate family should be employed by a licensee or an applicant. The statute of limitations for this offense and bribery should be five years.

(ii) A statute should be enacted requiring that every decision by the liquor director with respect to a citation to a licensee or the granting, transfer, or suspension of a license should be accompanied by a written opinion containing findings of fact and the reasons for the disposition. Reliance on an ABC regulation providing for a specific penalty or other disposition should be considered an adequate explanation of the decision.

(iii) The state liquor law (Section 46-6-8) should be clarified to prohibit the liquor director from dismissing a charge to which a licensee has pleaded guilty or nolo contendere.

(iv) A statute should be enacted requiring that all persons receiving compensation for acting in any capacity in the obtaining or transferring of a liquor license must disclose that capacity to the ABC. Such persons would include brokers, lawyers, accountants, finders, etc.

(v) The liquor director should be one of the most carefully selected officials in state government. Unquestioned integrity, administrative talent, and knowledge of investigative techniques are essential qualifications. Failure to perform up to these standards should be cause for immediate dismissal.

COMMENTARY:

The area of greatest concern to the Commission is decision-making at the ABC. The essence of the problem is a combination of (1) inadequate control over corrupting influences and (2) inadequate control over arbitrary decision-making. Nothing could be more inviting to organized criminals seeking unlawful favors from a public official than a situation in which the official has a free hand to make virtually unreviewable decisions in their favor and the official has the opportunity to engage in conflicts of interest and similar misconduct without fear of serious punishment.

New Mexico law entrusts great discretion to the ABC director. He may compromise any violation of the Liquor Control Act and Regulations whenever he deems it to be in the best interests of the state to do so. With the licensee's consent, he may dispense of citations through an informal hearing process in which he is not required to give any justification for his ruling. The Liquor Control Act and Regulations set certain specific qualifications concerning persons who may not hold licenses and locations where licenses may not be operated. But once those minimum standards are met, the director has wide discretion to grant or deny transfers of location or ownership or to pick and choose among qualified applicants for new licenses solely on the basis of his determination of the "public health, safety, and welfare." In practice, the director has the power to select among qualified applicants for new licenses on the slightest whim, or with more sinister motives.

A public official with such unfettered discretion may be viewed with cynicism in any event. But cynicism will rise in proportion to the opportunity for him to be influenced improperly in the exercise of his discretion. The existence of any relationship between the director and holders of liquor licenses engenders justifiable concern about his even-handed application of the law. Yet under the present director the Commission found instances in which license holders (1) hired the director's minor son to work in a package liquor store; (2) joined the director in the purchase of an expensive airplane through a corporation in which the director had a substantial interest; (3) purchased a large tract of land and engaged in business jointly with the director; and (4) wrote a ten thousand dollar check made out to the liquor director (regardless of who was the ultimate beneficiary of the funds, the name on the check was that of the director). Not only can such relationships improperly color the judgement of the director so that he acts favorably toward the license holder; but such relationships can also be a convenient means for bribing the director. For example, to funnel funds for the benefit of the director, the licensee need only overpay the son or pay more than his share of the asset or company.

Two steps are essential to ameliorate the problem. First, appropriate sanctions must be imposed for conflicts of interest and bribery involving the liquor director. The recommendation outlines some of the conflicts that must be prohibited. It is no hardship on the director to stay at arm's length from those he regulates. There is no countervailing public policy that would support the existence of such conflicts of interest; so there should be no reason against adoption of tough legislation. Likewise, the prohibition against conflicts of interest should be imposed on lower level ABC employees with enforcement powers; corruption on their part could keep a matter from even coming to the director's attention. The statute of limitations for this offense and for bribery needs to be at least five years, rather than the three years presently provided for 3rd and 4th degree felonies in New Mexico. Prosecution of the crime often cannot occur until years after the offense; because the commission of the crime is usually not apparent (as with a robbery) and the necessary financial investigation is frequently very time-consuming. During this investigation the statute of limitations expired on several possible crimes being examined.

Second, to impose some check to prevent arbitrariness of decision-making by the director, he should have to explain his rulings. The potential for favoritism is clear. In one instance the present director granted a new quota license to the brother of a liquor inspector rather than to another applicant for a nearby location. On another occasion, before a hearing was held on the transfer of ownership of a liquor license, he granted the transfer to a partnership including the man who later hired the director's son as an employee and joined the director in the purchase of an airplane. The public, as well as applicants and licensees, will have no confidence in the fairness of such actions unless the director can demonstrate that he has been consistent with his rulings in similar cases. The only way to establish such consistency is for the director to give a written statement of his findings of fact and his reasons for the decision. To ease the burden of explaining the rationale for each individual decision, regulations could be promulgated which specifically prescribe the result for the more common factual situations.

In line with the need to impose limitations on the discretion of the liquor director Recommendation "(iii)" would eliminate one element of discretion presently exercised by the director. State law provides that citations issued by the ABC should be litigated before a hearing officer appointed by the Governor. But the law permits the director to "compromise and settle" the liability of a licensee. Under this provision of the statute, and a corresponding regulation, the director has gone so far as to dismiss charges to which a licensee has pleaded nolo contendere (no contest). In one case he imposed a fine on a licensee who pleaded nolo contendere, but then four months later he dismissed the charge without citing on the record any reasons for his action. Since a plea of nolo contendere is treated as a plea of guilty for purposes of sentencing in criminal proceedings, the liquor director should have no authority to dismiss a charge after such a plea.

The fourth recommendation, requiring disclosure of intermediaries in license transactions, is intended as a device to guard against bribery and the peddling of improper influence. Bribes can readily be concealed as brokerage fees or even attorneys' fees. But now there is no requirement of disclosure to the public, or even to the ABC, of intermediaries. The Commission uncovered one license sale in which four to six intermediaries were to receive 60 to 80% of the purchase price of a license. Only one of these intermediaries appeared anywhere in the ABC records and nowhere was his financial interest in the transaction disclosed. Regardless of whether there was any bribery in this transaction, the opportunity is clear. Problems with intermediaries have been sufficiently severe in New York that the state's license application form begins with a warning that it is not necessary to employ anyone to assist in filing the application.

Finally, laws may deter misconduct, but they cannot prevent an official from acting arbitrarily. The term of the present ABC director provides a number of examples. He reinstated license number 859, which had been cancelled ten years earlier; failed to take action against a license improperly issued to Fortuna Corporation, which was controlled by a convicted felon; and wrote a letter to a liquor wholesaler stating that the wholesaler was exempt from a provision of the State Liquor Law

on the ground that beer is not an "alcoholic beverage." In the first case he was eventually thwarted, at considerable expense to the State. In the second case he succeeded in preserving the license for the convicted felon and his family until they could sell it. In the third case the egregious error in the letter to the wholesaler was corrected when the Federal Bureau of Alcohol, Tobacco, and Firearms learned of it and sought an opinion from the State Attorney General seven months later; but the correction was through no effort of the liquor director. These experiences underscore the need for the highest standards in the selection and retention of the state liquor director. Correction of abuses by a director often comes too late or not at all. Therefore, a director must have unquestioned integrity, administrative skills, and a sound understanding of sophisticated investigative procedures. Actions which fall short of the highest standard of conduct, even if not clear-cut violations of law, should result in dismissal.

One mechanism which may be of value in assuring that the ABC has a highly qualified director is the formation of a volunteer citizen board to oversee his performance. The ABC has the responsibility for far too many decisions for a part-time board to be able to assume the director's present responsibilities, or even to act as an appellate forum. But the board could serve the very useful functions of establishing regulations to guide and control the director, appointing hearing officers, and disciplining the director for misconduct. In addition, since the board would remove the director one step from the political process, it may be easier to attract to the position of director a professional who would otherwise be concerned that his job would end with a change of administration. The most important qualification for members of such a board is that they have the courage to support their director in the vigorous steps necessary for effective enforcement of the state's liquor law.

b. ADMINISTRATION

RECOMMENDATIONS:

(i) Procedures must be established to ensure that documents and whole files are not lost or stolen and to indicate when important documents are received.

(ii) Responsibility must be assigned within the ABC to ensure prompt processing and complete disposition of all citations for violations of the state liquor law.

(iii) Files must be indexed so that an individual's prior history with the ABC can be readily determined.

(iv) The ABC should maintain for each licensed establishment a record of all inspections, warnings, and complaints relating to the establishment.

COMMENTARY:

Record-keeping at the ABC leaves much to be desired.

One major problem has been the absence of procedures necessary to ensure the integrity of the ABC files. Early in the Commission's investigation it was learned that the ABC could not account for the whereabouts of several license files and one proved to be totally missing. The ABC then instituted a policy of requiring files to be checked out if they were to be used either in or out of the office. But there is still no control over whether a specific document has been removed from a file, because documents within a file are not numbered in serial order. Such serialization should be instituted. Another procedure that can ensure against manipulation of ABC files is date-stamping of incoming documents. Under present ABC procedure, most documents are date-stamped when they arrive; but some important ones are not. In particular, on one letter submitted to the ABC, apparently as evidence that an agreement had been reached in sufficient time to permit a "Canopy" license to be grandfathered in under a former regulation, the year on the letter had been altered. Since there was no date stamp on the letter and the documents in the file were not given serial numbers as they were entered in the file, reconstructing the sequence of events to determine if there had been improper conduct becomes much more difficult.

Another problem has been in keeping track of pending matters. In checking the disposition of citations during the past few years, Commission investigators found several cases in which citations had been pending for excessive periods of time, in one instance more than four years. Most of the pending matters required the involvement of other parties, the Attorney General and a hearing officer; but the

ABC must bear responsibility for not taking steps to induce action, since it is the party with the responsibility for seeing that violators of the liquor laws are properly punished.

Record-keeping is also deficient in that important information obtained by the ABC with respect to a licensee is not adequately indexed and therefore the information is difficult or impossible to retrieve when it is needed. For example, there is no index of the ABC files which gives all licensed premises with which an individual has been associated. If an applicant for an agent-manager's license has been responsible for a number of violations of the liquor laws at other establishments where he has served as agent-manager, the ABC could be certain of that information only if the members of the staff remembered the incidents or someone looked through all the ABC files. Citations are indexed only by the names of owners of the license and the license number.

What is worse, the ABC cannot even readily retrieve all the information it has with respect to the conduct of one license. When an ABC agent inspects a liquor business, he reports on his daily report forms that he made an inspection. But no information is indexed by license number unless a citation is issued. There is no compilation of visits to a licensee. In particular, there is no compilation of warnings that have been issued to the licensee. Also, complaints about a business from citizens or law enforcement agencies are not maintained according to license number unless a citation is issued. As a result, when the hearing officer or director decides what penalty to impose on a licensee for a violation, he does not have a ready means of determining if the violator has a "clean" record or has been given a number of "breaks" despite violations. This situation can be easily remedied and the appropriate record-keeping procedures should be instituted.

Improvement of record-keeping procedures may seem the most trivial of recommendations. But gross misconduct and corruption could easily be concealed within a maze of lost files, missing or inaccessible documents, and unprosecuted violations.

c. INVESTIGATIONS

RECOMMENDATIONS

(i) Procedures must be adopted by the ABC to ensure that agents in the field are performing their duties.

(ii) All ABC agents should receive the basic enforcement course at the State Law Enforcement Academy and should also receive at least one week's training in ABC laws, regulations, and procedures. An operations manual should be prepared and provided to ABC agents and they should receive at least one training session per year for updating ABC laws, policies, and procedures.

(iii) Communication and cooperation between the ABC and other law enforcement agencies must be greatly improved, and other law enforcement agencies should take a more active role in enforcement of the state liquor laws. A statute should be enacted requiring state and local law enforcement agencies to submit to the ABC within 30 days of the event

- (a) an affidavit describing each violation of the state liquor laws, and
- (b) a report of each arrest in the immediate vicinity of a licensed establishment.

In addition, the statute should require that all ABC citations, and the resulting dispositions, must be reported to the state police and local law enforcement agencies whose jurisdictions include the licensed establishment.

(iv) The ABC should have a central core of skilled, experienced investigators to work throughout the state conducting investigations, such as complete audits of licensed businesses and undercover operations, to detect illegal conduct with respect to such establishments. To facilitate the auditing function, the Taxation and Revenue Department should be authorized to disclose to the ABC the results of any audit it conducts of a licensed business; and all applicants for licenses or renewals should be required by law to submit to the ABC complete financial data, including:

- (a) A list of all persons with an ownership or leasehold interest in the license, the premises, or the business, together with a description of that interest.
- (b) A list of all loans to the licenseholder or the business, including the names of the lenders, all cosigners, guarantors, etc., and all persons pledging collateral.

In addition, the ABC should conduct thorough background checks of applicants for licenses.

(v) Consideration should be given to amending the state liquor law to clarify the director's power to deny a new license or a renewal to an unfit individual.

COMMENTARY

Agents for the ABC now perform relative routine duties. They post notices of applications for new licenses and transfers of ownership or location. They conduct hearings on license transfers and inform the director of any protests. And they patrol liquor establishments to detect such violations as sales after hours, sales to minors, sales by holders of club licenses to those not belonging to the club, and operation of establishments by unlicensed agent-managers. Ten to twelve agents and investigators cover the state. In the three-year period beginning July 1, 1975, the ABC processed approximately 425 citations, or a little more than one per month per agent. There were approximately the same number of arrests, many of which arose out of the same incidents as the citations.

There are several respects in which the present operations of ABC agents are ineffective in detecting organized crime. The first short-coming is elementary: insufficient attention is devoted to determining whether ABC agents actually work. A noteworthy and instructive example is that of former inspector Albert Marsh. The Commission conducted a surveillance of Mr. Marsh on nine days during three weeks and found that he performed no work. The period of surveillance included 30 hours when Mr. Marsh's daily reports reflected that he had been working and had inspected a number of liquor establishments. Shortly after being questioned under oath by the Commission on these matters, Mr. Marsh resigned from the ABC.

Because agents are assigned throughout the state, it is impossible for them to have daily physical contact with headquarters in Santa Fe. But it is still possible to have some checks on the performance of the agents. For example, Mr. Marsh's inadequate performance should have been detected by ABC supervisors on the basis of his having issued only two citations on his own during his year of employment with the ABC. Moreover, the director knew that Mr. Marsh operated a flight school and pilot service; in fact, Mr. Jaramillo was a passenger on flights by Mr. Marsh or one of Mr. Marsh's pilots, and Mr. Marsh leased a plane owned by a corporation in which Mr. Jaramillo was an officer and director. In addition to scrutinizing daily reports with greater care, the ABC could reinstitute the practice of requiring an agent inspecting an establishment to sign a form which is retained at the establishment. The practice was discontinued by the present director, but it can provide a useful check against an agent's totally neglecting his duties.

Another useful procedure would be for the immediate supervisor of the agents to make periodic field inspections. But for more than two years the director has assigned the man with the title "Director of Law Enforcement and Field Coordinator" to stay at the Santa Fe office and handle fingerprinting and other paperwork. Finally, the best check on agent performance is to employ and retain only conscientious agents of integrity. Any report of misconduct by agents must be investigated thoroughly by the ABC. In contrast, on at least one occasion when a serious charge was made against an ABC agent by another law enforcement officer, there was no independent investigation by the ABC.

Similarly, insufficient attention is devoted to determining how ABC agents work. ABC agents varied widely in how they described to the Commission their exercise of discretion in the field. One almost always gives citations when a violation is detected, but another usually gives a warning the first time, and a third makes his determination on the basis of the attitude of the violator and the severity of the violation. The director gives no guidance on when to issue warnings rather than citations, even though there may be situations in which he would always dismiss a citation. In addition, inspectors are not properly instructed on the law under which they work. There is no manual for ABC agents other than the compilation of liquor laws and regulations. There has been no formal academy or similar training for ABC agents, even newly employed ones, for more than five years. Also, under present ABC practice the agent generally does not learn the disposition of a citation he issues, so even that type of feedback is not available for the agent to learn ABC law, policy, and priorities.

The problem with the lack of training and supervision of ABC agents is three-fold. First, even an honest, intelligent agent cannot perform his task effectively if he is not properly trained and supervised. Violations will go undetected or unpunished because of errors by the inspector. Second, without adequate supervision, department priorities cannot be enforced. If the director believes emphasis on a certain unlawful practice is in order, he must communicate with the agents or they will not give the proper priority to the matter. Third, corruption is facilitated by the absence of effective oversight. If the ABC cannot detect an inspector who is not doing his work at all, it surely cannot detect one who is "overlooking" violations at an establishment because of a bribe or conflict of interest. The greater the agent's discretion in deciding whether to issue a warning or a citation, the easier it is to conceal a decision not to issue the citation as an exercise of his discretion rather than as the result of a bribe or other improper influence.

Another significant shortcoming in the investigative work of the ABC has been its lack of attention to any criminal conduct at bars or by bar owners and operators, except for liquor violations in the narrowest sense--sales to minors, after-hours operations, etc. What has been overlooked is that if organized criminals took over a bar for the purpose of conducting gambling, loan sharking, prostitution, or the like, the most efficient measure to deal with the problem might well be loss of the liquor license. For the ABC to control effectively such misconduct associated with liquor establishments, new efforts by ABC personnel and

greater communication and cooperation with other law enforcement agencies will be required. The most sophisticated operations now being conducted by the ABC involve sending agents from another part of the state into a community to see if private clubs will serve liquor to non-members. An investigation of whether there is gambling or prostitution at a bar is a bit more complex; and determining if a bar is selling hijacked liquor or is being used for loansharking is another matter altogether. The ABC should develop the expertise and conduct such investigations. But without a greatly expanded staff, a staff beyond the resources of the state of New Mexico, much of the work on such matters must come from other law enforcement agencies. It is therefore important for the ABC to maintain extensive communication, including regular personal contact, with other law enforcement agencies concerning all unlawful behavior associated with liquor establishments and their owners and operators. Unfortunately, now the communication is limited almost entirely to routine liquor law violations, and even that communication is not good in several areas of the state. (Some agencies explained to the Commission that they stopped conveying information to the ABC because they received no cooperation.) The ABC makes no effort to obtain information concerning general criminal conduct associated with liquor establishments, and other agencies do not pass the information to them. As a result, the Commission noted one bar which had received no special attention from the ABC even though there were police reports of 145 incidents on the premises and in the parking lot in less than three years. In the future the ABC should solicit information on problem bars from local law enforcement, and local law enforcement should volunteer such information to the ABC. In particular, state law should require that any arrest at a liquor establishment should be reported to the ABC within a reasonable time. In addition, if other law enforcement agencies take a more active role in the enforcement of the state liquor laws, some resources of the ABC can be freed to concentrate on complex investigations. Therefore, state law should also require state and local law enforcement to report all liquor law violations to the ABC. In return, the ABC should report all of its citations, together with dispositions on the cases, to the local law enforcement agencies for the jurisdiction involved; so that these agencies can keep informed with respect to liquor law enforcement. An expanded effort to investigate the conduct of licensed establishments should produce significant changes in enforcement. There is a long way to go. In New Mexico the suspension of a liquor license has been uncommon and revocation is a rare event.

The final area of this Commission's concern with respect to the investigative performance of the ABC is the processing of license applications. The conduct of the ABC with respect to determining the fitness of applicants and licensees is intolerably deficient in several respects. First, an individual can take over control of a liquor establishment before the ABC licenses him. It is current ABC practice to allow a purchaser of a license to assume control of the business simply by becoming agent-manager of the business while the process for the transfer of the license (which may take months) is underway. Although an agent-manager must be licensed, the ABC will not penalize someone for acting as an agent-manager without having a license, so long as the individual has submitted an application for the agent-manager license,

or even if the individual agrees to submit an application as soon as possible . Thus, an unqualified applicant for a license could operate an establishment for a substantial period of time before the application was rejected.

A second failing is that the background check on the application is very superficial. Some applicants do not even have their fingerprints submitted to the FBI for a criminal record report; they are licensed merely on the basis of their affidavit that they have no prior convictions. There is no independent investigation conducted of the background of the applicant and law enforcement agencies are not contacted to determine if they have helpful information. So long as the applicant does not have a felony conviction, the ABC is not interested in his character.

Third, and most importantly, the ABC does nothing to determine who is the real owner of the business or who can exercise control of the operation. There is an ABC form which every applicant to own a license must fill out which requires disclosure of all those with an ownership interest in the license. But these forms are not verified by the ABC and the Commission discovered several examples of persons with financial interests in the licenses who were not to be found in the ABC license file. The extent to which the ABC can close its eyes to the possibility of hidden ownership is illustrated by the example of the holder of three liquor licenses who was arrested on a felony drug charge. He then transferred the licenses to a newly formed corporation of which his son was president. After the man was convicted of the felony charge, the ABC approved the transfer of the licenses without any inquiry whatsoever into whether he maintained an element of control over the licenses.

It is clear from the above that the present practice of licensing owners of liquor licenses would never prevent organized crime infiltration into the state's liquor industry. An overhaul of that practice is essential. Communication and cooperation with other law enforcement agencies is necessary in the detection and investigation of infiltration. In addition, the ABC must improve the skills of its own staff. Agents capable of sophisticated investigations are needed. In particular, the ABC needs financial analysts to audit thoroughly the financial background and business practices of licensed operations. The number of cases in which the Commission discovered that persons with substantial interests in liquor licenses concealed those interests demonstrate the necessity of such financial analysis. To assist in this analysis, it is essential to require more detailed financial information from applicants and for each annual renewal of a license. Also, because the ABC will undoubtedly not have enough financial analysts to examine every license properly, the ABC should be permitted to obtain audits of licensed premises from the Taxation and Revenue Department.

There should be no impediment under present law to the director's exercise of authority to deny licenses to those who are unfit.* The New Mexico statute states that the sale of alcoholic liquors "shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in this state;..." (Section 46-5-1). The New Mexico Supreme Court has relied on that language as support for the proposition that the director "is vested with a wide discretion in granting or refusing applications for liquor licenses." Since the holders of dispenser, retailer and club licenses hold no vested property right as against the state (Section 46-5-15F), and since all licenses expire June 30 of each year (Section 46-5-16), that discretion should also apply to the annual renewal of licenses. One district court, however, has issued a decree which might be interpreted as stating that an applicant cannot be denied a license on the ground that his ownership or management of the bar would be contrary to the public health, safety, and morals. The scope of the ruling is not clear; and since there was no appeal, there is no definitive holding by the State Supreme Court. But consideration should be given to determining whether it is necessary to amend the language of the state liquor law to clarify that the granting of a license or a renewal can be denied on the ground that the applicant's unfitness (including his inability to operate an establishment in a proper manner) would make approval of the license contrary to the public health, safety and morals.

E. CONCLUSION

Implementation of the Commission's recommendations will not be cheap. In particular, the Department of Alcoholic Beverage Control will not be able to perform a significant role in preventing organized crime without the addition of more and higher paid staff members. It is therefore necessary for this Commission to offer its views on a possible source for the necessary funds.

Because the function of the ABC is to ensure that liquor establishments are operated in accordance with the public policy of the state, the Commission believes it is reasonable that holders of the licenses bear the burden of proper regulation. Licensees now pay the state only \$50.00 a year, yet licenses range in value across the state from \$10,000 to more than \$200,000. With approximately 1,500 retailer, dispenser, and club licenses in the state, it would not take a substantial increase in the annual fee to fund an expansion and improvement of the ABC staff which could start that agency on the road to effective detection and prevention of misconduct by licensees.

*Such authority is common in other jurisdictions. A 1973 publication of the Joint Committee of the States to Study Alcoholic Beverage Laws listed 37 states (including New Mexico) as requiring by statute that a license applicant be of good repute and moral character; and in at least one of the other 13 states the requirement of good character is assumed in the regulations for the state liquor authority.

II. FENCING:

The law enforcement "sting" operation is now a common weapon in the arsenal of sophisticated police agencies. The public is familiar with the technique in which undercover officers pose as criminals and use a small business as a front to purchase stolen goods from burglars, robbers, and fences while they videotape the transactions through hidden cameras.

But when the Albuquerque Police Department and the Commission began their first such operation in 1974, they were conducting an experiment. The experiment was a success and it has born much fruit. The Commission's manuals describing the operation have been circulated by request around the nation. In addition, further operations have been conducted in Albuquerque, with greater sophistication and the additional invaluable participation of the FBI.

Some of the success is apparent from the statistics from the first four Albuquerque operations:

<u>TIME PERIOD</u>	<u>NUMBER OF PERSONS CHARGED</u>	<u>VALUE OF PROPERTY RECOVERED</u>
1975	39	\$ 71,000.00
1975	34	\$375,000.00
1976-77	99	\$897,794.22
1977-78	92	\$556,574.00

In addition, in 1977-78 the Commission assisted in establishing a "sting" successfully conducted by the State Police and the Santa Fe Police Department, Sheriff's Office, and District Attorney, which resulted in 21 felony arrests and the recovery of \$53,000 in stolen goods.

What cannot be measured by statistics, however, is the intelligence information acquired and the expertise gained in penetrating the underworld. Joint operations of the Albuquerque Police Department, the FBI, and the Commission have developed beyond the "storefront" approach, and the results have been promising. Results in 1978 included participation in solving cases involving arson, drug trafficking, and attempted murder, as well as halting infiltration by organized crime. The Commission will continue to contribute to these worthwhile efforts.

III. UPDATE ON PRIOR REPORTS:

A. HORSE RACING

The Commission's 1977 Annual Report was devoted primarily to problems in the regulation of horse racing in New Mexico. For several years the Commission's concern had focused on the handling of the license granted to Fortuna Properties Inc., a private corporation whose majority shareholder is a convicted felon.

In 1977 the Commission's efforts bore their first fruit and the Commission was encouraged by the announcement by Fortuna that it would be selling its interest in New Mexico racetracks. But the Commission, concerned that problems would keep recurring unless reforms were undertaken, urged the adoption by the Racing Commission of a detailed set of regulations which could prevent future scandals and would serve as effective tools in deterring organized crime and racketeering from involvement in New Mexico horse racing.

In 1978 we are further encouraged by the fact that Fortuna has now disposed of its interests in its former race tracks in New Mexico. But the Commission has not been satisfied with the response of the Racing Commission to its recommendations. Almost one year after the recommendations were first proposed to the Racing Commission, the Racing Commission had taken no steps to even consider them, much less enact them. Then, in October 1978, the Commission met with Racing Commission Chairman George Maloof and Assistant Attorney General Thomas Dunigan, who has acted as attorney for the Racing Commission, to discuss matters of common concern. From that meeting came a commitment from the Racing Commission Chairman to undertake serious study and consideration of the recommendations. This Commission is hopeful that there will be action soon with respect to the proposed regulations. Because of the vulnerability of the horse racing industry to infiltration by corrupt individuals, we will continue our active concern with the vigorous enforcement of the state's racing laws.

B. DRUG TRAFFICKING

In May 1978 the Commission issued a 112-page report entitled, "Drug Abuse and Organized Crime in New Mexico: A Report on the Problem and the Resources." The report analyzed the situation in the state and presented 29 recommendations.

To implement the recommendations will require a concerted effort by a number of agencies. But one of the most important recommendations, and perhaps the key to implementation of the others, was implemented in November. At that time Governor Jerry Apodaca appointed a Drug Enforcement Coordinating Council (DECC). The membership includes one federal official and 11 state and local officials. The Commission is hopeful that the membership on the DECC is based broadly enough to attract the support of law enforcement agencies throughout the state. Since the membership on

the DECC will rotate among law enforcement agencies, that support should grow with time.

As proposed in the Commission's Drug Report, the DECC can be the mechanism for establishment of a much-needed statewide Drug Intelligence Information Network. The Network, which would belong to all the law enforcement agencies in the state, would provide for the exchange of information on criminal activity and the analysis of that information so essential to effective investigation and prosecution. In addition, the DECC can act as the clearinghouse for proposals relating to drug enforcement and can assist the legislature in its decisions with respect to legislation and funding. Implementation of the Drug Report's recommendations could be greatly accelerated if the DECC decides to give them its backing.

Because of expressions of support for the Drug Report already received from incoming Governor Bruce King and members of the legislature, the Commission is optimistic that its recommendations will be given the most serious attention.

IV. LITIGATION & LEGISLATION

A. Subpoena Power

1. Proposed Legislation

1978 was a landmark year for the Commission's subpoena power. After more than two years of controversy concerning what standard should be applied in judging the validity of a Commission subpoena, the New Mexico Supreme Court upheld the constitutionality of the Commission's statutory power to subpoena witnesses in the case of State, ex rel. The Governor's Organized Crime Prevention Commission, vs. Jaramillo. The Supreme Court ruled that a Commission subpoena is valid if the evidence sought is "relevant" to the Commission's investigation. This is the same standard imposed by the United States Supreme Court in federal cases and by the courts of other states that have ruled on this issue.

The Commission seeks no greater power to obtain subpoenas; but the present procedure for obtaining subpoenas is unduly cumbersome and costly. It should be replaced by the procedure employed by every other administrative agency, state or federal.

The procedure for enforcement of subpoenas under the present Commission statute is a multistage process:

1. First, the Commission decides that it wishes to subpoena a witness.
2. Then the Commission staff petitions a district judge to order issuance of the subpoena.

3. The judge decides whether or not to order issuance of the subpoena.
4. If the judge orders the subpoena to be issued, the Commission serves the subpoena on the witness.
5. Although a court has ordered the subpoena, the witness has the right to ignore it or obey it, as he sees fit.
6. If the witness ignores the subpoena, the Commission then seeks a court hearing on the validity of the subpoena. The individual who is subpoenaed must be given written notice of the hearing and has the opportunity to raise objections to the subpoena.
7. Only after the hearing can the court order the witness to obey the subpoena. Disobedience to this order constitutes contempt of court.

From this description of the subpoena procedure, it is clear that the first written petition to the district court (steps 2 and 3) serves no function except to consume the time of the court and the Commission staff. The rights of the witness are fully protected at the hearing before the court which is conducted after the witness is served with the subpoena (step 6). The witness cannot be compelled to comply with a subpoena before he has an opportunity to object in court.

No other administrative agency in the country is required to go through this cumbersome process. Other agencies simply issue their own subpoenas, without having to go to court first (eliminating steps 2 and 3). These subpoenas are of two types. One is simply a written invitation. The witness is free to ignore it. If the agency wants the subpoena enforced, it must petition a court and have a hearing at which the witness may object to the subpoena. These subpoenas have essentially the same effect as the court-ordered subpoenas now obtained by the Commission (compare steps 5, 6 and 7). The other type of subpoena does have legal force and must be obeyed. But before the date that the witness is scheduled to testify, he may go to court to seek quashing of the subpoena. The real difference between the two subpoenas is that if the witness objects, with the first type of subpoena the agency must take the initiative in court to obtain enforcement of the subpoena, whereas with the second type of subpoena the witness must take the initiative to quash the subpoena.

The Commission will seek legislation in 1979 to enable it to issue subpoenas of the first type. The Commission would be able to issue a subpoena without prior judicial approval. But if the witness objects to the subpoena, the Commission would then have to go to court to seek enforcement of the subpoena. This change in the law will save many hours of time for the courts and the Commission staff, with no reduction in the rights of witnesses.

A second change being sought by the Commission would enable it to deal more effectively with witnesses who may hide or flee the state after being served with a subpoena. In these cases the Commission may never have the opportunity to seek enforcement of the subpoena in court because an enforcement hearing cannot be conducted unless the witness is served with written notice of the hearing (step 6); service of notice is impossible if the witness has fled or hidden. The proposed change would give the Commission the option of seeking a second type of subpoena. If the Commission feared that a witness would hide or flee, it would petition a court for issuance of a subpoena that the witness would have to obey unless he went to court to quash the subpoena. The witness would still be entitled to a full court hearing if he objects to the subpoena; but he, rather than the Commission, would have the burden of initiating court proceedings.

2. Enforcement Problems

The Commission has encountered substantial delays in its investigative efforts because of the time consumed in litigating the validity of Commission subpoenas. For example, seven months elapsed from the time that the district court ordered issuance of a subpoena for bank records of Carlos Jaramillo until the time that the Supreme Court upheld the subpoena, and not until a number of months later were all the records covered by the subpoena obtained by the Commission. In another case eight months elapsed between the time of issuance of the subpoena and delivery of all records covered by the subpoena. A number of shorter, but still lengthy, delays have also occurred.

Obviously such delays greatly hinder the Commission's investigations. These delays in court are understandable when legal issues are being decided for the first time in New Mexico. In such cases the courts need to seek fully researched briefs from the parties to the litigation and they need time to resolve the issues in their own minds. But this "breaking-in" period is now coming to an end. Although difficult novel issues will still arise in litigation concerning Commission subpoenas, they will be infrequent. The Commission anticipates that now litigation will pose much less of a burden to the expeditious handling of its investigations.

Nevertheless, the Commission will need the assistance of the judiciary in this regard. Under present practice a witness can delay delivery of records to the Commission by seven weeks or more even though he has no grounds to object to a subpoena except that he does not wish to be bothered by searching for and collecting records. For example, in one case a witness was subpoenaed to bring records to the Commission nine days after he was served with a subpoena. He failed to appear; so the Commission petitioned the court for enforcement of the subpoena. The court set a hearing for eleven days after the date on which the witness was scheduled to appear before the Commission. At this hearing the witness simply asked for more time to obtain the records. The court allowed the witness an additional thirty days to produce the records for the Commission. On the day that the records were due,

the witness sought an additional day, and was granted the day by the judge. When the records were finally produced, they consisted almost entirely of bank records for personal and business accounts from which statements and checks for a number of months were missing. It is unrealistic to believe that in order to gather the records together the witness needed anything like the fifty-one days from the date he was served with the subpoena to the date he turned over the records. The Commission is certain that the judge was in no way attempting to obstruct the investigation. But the Commission asks that the court recognize that time is often of the essence in investigative matters, and accelerating the enforcement process generally will impose no substantial burden on the witness or the court.

B. Public Hearings and Reports

Under the present Commission statute, it is impossible for the Commission to report fully to the public on the results of its investigations. For example, the Commission's investigation of the liquor industry has uncovered extensive evidence relating to matters of serious public concern. But the section of this annual report devoted to that investigation can provide only a smattering of those facts, and unfortunately the public is not fully informed of the basis for the recommendations. Even some of the limited factual information included is available only because of various litigation that was conducted during the course of the investigation; ordinarily it could not be released publicly by the Commission.

The reason for this restriction is that every witness before the Commission has the statutory right to refuse to testify publicly or to have the content and details of his private testimony released publicly. The same restriction applies to tangible evidence, such as documents, brought by the witness to a Commission hearing. This statutory right has been invoked by the great majority of witnesses before the Commission, including those who are merely custodians of business and banking records.

No other investigatory commission in the country has a similar provision restricting public release of information obtained in an investigation. On the contrary, the issue has more often been whether private hearings should be permitted. Until 1978 the Hawaii Crime Commission was required to conduct all its hearings in public. A blue ribbon study of the New Jersey Commission of Investigation considered the issue of publicizing the results of investigations and concluded that the public interest requires such dissemination.

In the 1979 session of the State Legislature this Commission will be seeking legislation enabling it to release evidence publicly when the majority of the Commission believes it to be in the public interest.

V. THE FUTURE

The efforts of the Commission during the past few years have been directed at the "system." We have examined how the State of New Mexico handles drug trafficking, licenses race track owners, and regulates the liquor industry. The emphasis has been on where the state is vulnerable to organized crime infiltration, rather than the extent to which such infiltration has already occurred. The philosophy of this approach has been, "A stitch in time saves nine." If we strengthen our defenses, we can avoid serious injury.

Unfortunately, the Commission is faced more and more with evidence that significant damage has already been suffered. While continuing to provide constructive criticism of our regulatory agencies and completing investigative leads already undertaken, the Commission will now be concentrating its efforts on exploring the infiltration of organized crime into legitimate business in New Mexico and, insofar as legally possible, informing the public of its findings and recommendations.

The Commission intends its investigations in these matters to be exhaustive. All reasonable leads and sources of relevant evidence will be pursued. Every attempt will be made to maintain the confidentiality of the investigations; but the Commission has learned that nothing it does can prevent the publicity that arises when witnesses tell others about the investigation or litigate in court issues relating to the investigation. If such publicity occurs, the Commission seeks the understanding of the public in one important matter: whatever the nature of an investigation, most witnesses are innocent of any wrongdoing; it would be unjust to stigmatize an individual as being associated with organized crime on the mere basis that the Commission seeks evidence from that person.

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