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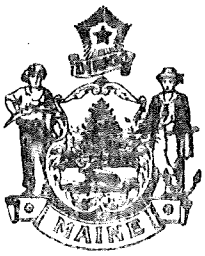
JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 14, 1981

The Honorable Joseph E. Brennan
Governor of Maine
State House
Augusta, Maine 04333

Dear Governor Brennan:

This will respond to your letter of May 8, 1981 in which you seek our advice as to the constitutionality of L.D. 104 (H.P. 67) being "An Act to Prohibit the Sale and Use of Drug Paraphernalia." You have informed us that L.D. 104 has been passed by both Houses of the Legislature and is presently before you. You have also advised us that, pursuant to art. IV, pt. 3, §2 of the Constitution of Maine, you must take action on L.D. 104 by May 14, 1981 and, therefore, you have requested a prompt response from us. In view of the time constraints involved, our response to your inquiry will be somewhat conclusory in nature.

If enacted into law, L.D. 104 would add a new section 1111-A to the Maine Criminal Code (Title 17-A of the Maine Revised Statutes Annotated). Subsection 1 of the bill defines "drug paraphernalia" as

> "...all equipment, products and materials of any kind which are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a scheduled drug in violation of chapter [45] or Title 22, section 2383."

Subsection 1(A) through 1(K)(13) then lists 24 examples of what may constitute "drug paraphernalia," although the list does not purport to be an exhaustive categorization of the objects which may fall within the scope of the statutory definition. Subsection 3 of the bill contains a list of 14 evidentiary factors which a court or other authority "should consider, in addition to all other logically relevant

factors," in determining whether "an object is drug paraphernalia."

Subsection 4 of the bill would make it a civil violation "for any person to use, or to possess with intent to use, drug paraphernalia to plant [etc]...or otherwise introduce into the human body a scheduled drug in violation of this chapter [45] or Title 22, section 2383." Subsection 5 of the bill would make it a Class E crime for any person

> "...to traffick in or furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant [etc.] ...or otherwise introduce into the human body a scheduled drug in violation of this chapter [45] or Title 22, section 2383." [1]

Subsection 6 of the bill would make it a Class E crime for any person

> "...to place in any newspaper, magazine, handbill or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia."

Finally, subsection 9 of the bill provides that durg paraphernalia "is declared to be contraband and may be seized and confiscated by the State."

The "Statements of Fact" accompanying L.D. 104 and the admendment adopted by the Judiciary Committee (Committee Amendment "A," Filing No. H.-233), explicitly state that the bill has been patterned upon the Model Drug Paraphernalia Act, drafted by the Drug Enforcement Administration in August, 1979. Indeed, a comparison of L.D. 104 with the Model Act reveals that, with minor variations, the two are virtually identical.

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1. Under subsection 8 of the bill, a violation of subsection 5 becomes a Class D crime "if the actor trafficks or furnishes drug paraphernalia to a child under 16 years of age...."

The Model Drug Paraphernalia Act was drafted by the Drug Enforcement Administration of the United States Department of Justice in response to a request from the Drug Policy Office of the President's Domestic Policy Council. Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 919 (6th Cir. 1980). See also Prefatory Note to the Model Act; Statement of Deputy Assistant Attorney General Irvin B. Nathan, before the House Select Committee on Narcotics and Drug Abuse Control, November 1, 1979. Moreover, the Model Act was drafted in an effort to meet and satisfy constitutional objections which had resulted in the invalidation of earlier attempts to prohibit drug paraphernalia. See, e.g., Flipside, Hoffman Estates v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981); Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980); Record Head Corp. v. Sachen, 498 F.Supp. 88 (E. D. Wis. 1980); Hejira Corp. v. MacFarlane, No. 80-F-824 (D. Colo. Sept. 5, 1980); Magnani v. City of Ames, 493 F. Supp. 1003 (S.D. Iowa, 1980); Smith v. Roark, No. 80-2110 (S.D.W.Va., 1980); Music Stop, Inc. v. City of Ferndale, 488 F.Supp. 390 (E.D. Mich., 1980); Knoedler v. Roxbury Township, 485 F.Supp. 990 (D.N.J., 1980); Indiana Chapter, N.O.R. M.L. v. Sendak, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980); Record Museum v. Lawrence, 481 F.Supp. 768 (D.N.J., 1979). But see Tobacco Road v. City of Novi, 490 F.Supp. 537 (E.D. Mich., 1979)(upholding ordinance not based on Model Act.). Most of these decisions invalidated the drug paraphernalia laws in question on the grounds that the definition of "drug paraphernalia" was too vague to satisfy constitutional standards, and that the laws prohibited conduct without requiring proof of criminal intent or knowledge. See also Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J., 1979)(invalidating local ordinance on overbreadth grounds).

In response to these judicial decisions, the Model Drug Paraphernalia Act was drafted in August, 1979. Since that time, numerous states and municipalities have adopted drug paraphernalia laws based, in substantial part, on the DEA's Model Drug Paraphernalia Act. See Delaware Accessories Trade Assoc. v. Gebelein, 497 F. Supp. 289 (D.Del. 1980). Moreover, these laws have generated a considerable amount of litigation in Federal District Courts challenging their constitutional validity. As will be discussed in greater detail below, most of the attacks on the constitutionality of these laws have been rejected by the courts, although, in some cases, portions of the laws have been invalidated.

To date, the only decision from a Federal Court of Appeals to directly confront the constitutionality of a law based upon the Model Drug Paraphernalia Act is Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980), rev'g 492 F.Supp. 1157 (N.D. Ohio, 1980).[2] In Record Revolution,

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2. It should be noted that in Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980) the Eighth Circuit invalidated a drug paraphernalia law which was not based upon the Model Act. However, in dicta, the Court suggested that the Model Drug Paraphernalia Act would satisfy constitutional requirements. 618 F.2d at 28, n.4.

supra, the Court of Appeals for the Sixth Circuit held that the portion of the Model Act which defines "drug paraphernalia" in terms of how an object is "used" or "intended for use" is not vague or overbroad. However, the Court also concluded that the portion of the Model Act which defines "drug paraphernalia" in terms of those objects "designed for use" is vague and overbroad. Other courts have agreed with this conclusion. See, e.g., Flipside, Hoffman Estates v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981)(not based on Model Law); Indiana Chapter, N.O.R.M.L. v. Sendak, No. TH 7-142-C (S.D. Ind., Feb. 4, 1980) (law not based on Model Act); Record Revolution No. 6, Inc. v. City of Parma, 492 F.Supp. 1157 (N.D. Ohio, 1980)(law based upon Model Act). On the other hand, several Federal District Courts have held that the phrase "designed for use" is sufficiently precise to meet the constitutional tests of vagueness and overbreadth. See e.g., Brache v. County of Westchester, 507 F.Supp. 566 (S.D.N.Y. 1981);New England Accessories Trade Assoc., Inc. v. Browne, 502 F. Supp. 1245 (D.Conn. 1980);Nova Records, Inc. v. Sendak, 504 F.Supp. 938 (S.D. Ind. 1980); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F.Supp. 834 (D. Md.,1980); Delaware Accessories Trade Assoc.v. Gebelein, 497 F.Supp. 289 (D. Del. 1980); World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J., 1980); Tobacco Accessories and Novelty Craftsmen Merchants Assoc. v. Treen, 501 F.Supp. 168 (E.D.La. 1980).

The Sixth Circuit in Record Revolution, supra also held that the evidentiary factor of being a "legitimate supplier" is vague and overbroad. See L.D. 104, subsection 3 (k). Other courts have agreed. See, e.g., The Casbah, Inc. v. Thone, No. 80-0-271 (D. Neb., Sept. 26, 1980); Record Revolution No. 6, Inc. v. City of Parma, 492 F.Supp. 1157 (N.D. Ohio, 1980). Several Federal District Courts, however, have reached the opposite conclusion. See, e.g., Brache v. County of Westchester, 507 F.Supp. 566 (S.D.N.Y. 1981); Nova Records, Inc. v. Sendak, 504 F.Supp. 938 (S.D. Inc. 1980); New England Accessories Trade Assoc., Inc. v. Browne, 502 F.Supp. 1245 (D.Conn. 1980); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F.Supp. 834 (D.Md. 1980); Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157-Civ.- NCR (S.D. Fla. Aug. 29, 1980); Delaware Accessories Trade Assoc. v. Gebelein, 497 F. Supp. 289 (D. Del. 1980); World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428 (D.N.J., 1980).

The Sixth Circuit in Record Revolution also concluded that the phrase "under circumstances where one reasonably should know," which appears in the Model Act, is vague and overbroad. See L.D. 104, subsections 5 and 6. Other courts have agreed that the imposition of criminal liability on the basis of "constructive knowledge" is impermissible. See e.g., The Casbah, Inc. v. Thone, No. 80-0-271 (D. Neb., Sept. 26, 1980); Record Revolution No. 6, Inc. v. City of Parma, 492 F.Supp. 1157 (N.D. Ohio, 1980); New England Accessories Trade Assoc. v. Browne, 502 F.Supp. 1245 (D. Conn. 1980); Knoedler v. Roxbury Township, 485 F.Supp. 990 (D.N.J. 1980)(not based on Model Act); Gasser v. Morgan, 498 F. Supp. 1154 (N.D. Ala., 1980)(not based on Model Act). Once again, however, several courts have reached the opposite conclusion and have upheld the "constructive knowledge" standard of the Model Act. See, e.g., Mid-Atlantic Accessories Trade Assoc. v. Maryland,

500 F. Supp. 834 (D. Md. 1980); Delaware Accessories Trade Assoc. v. Gebelein, 497 F.Supp. 289 (D.Del. 1980); Nova Records, Inc. v. Sendak, 504 F.Supp 938 (S.D. Ind.1980); Florida Businessmen for Free Enterprise v. Florida, 499 F.Supp. 346 (N.D. Fla. 1980); Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157-Civ.-NCR (S.D. Fla., 1980); World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J. 1980).

Finally, the Sixth Circuit in Record Revolution, supra held that the portion of the Model Act prohibiting the placement of advertisements for drug paraphernalia violates the First Amendment right of free speech. The Court held that while states and municipalities may constitutionally prohibit the placement of advertisements about the availability of drug paraphernalia within their territorial jurisdictions, the Model Act, as presently drafted, could be read as prohibiting advertisements about the availability of "legal" drug paraphernalia in other jurisdictions. Other courts, however, have upheld the advertising ban as a reasonable regulation of commercial speech. See Florida Businessmen for Free Enterprise v. Florida, 499 F.Supp. 346 (N.D.Fla.1980); Nova Records, Inc. v. Sendak, 504 F.Supp. 938 (S.D. Ind. 1980); World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J. 1980). See also Record Revolution No. 6, Inc. v. City of Parma, 492 F.Supp. 1157 (N.D. Ohio, 1980), rev'd, 638 F.2d 916 (6th Cir. 1980). Furthermore, the Sixth Circuit in Record Revolution also held that the advertising ban contained in the Model Act is vague and overbroad "for its use of the terms 'reasonably should know' and 'designed for.'" 638 F.2d at 937, n.32. As noted earlier, however, other courts have reached the opposite result.

In view of the foregoing, it is apparent that there is a divergence of opinion among the Federal Courts as to the constitutionality of the Model Drug Paraphernalia Act, upon which L.D. 104 is based. Accordingly, we do not believe we can provide a definitive opinion as to the constitutionality of L.D. 104. However, we can make some general observations about L.D. 104, and the Model Act, on the basis of the case law which presently exists. Initially, there is a substantial body of authority which has upheld the constitutionality of the Model Drug Paraphernalia Act. Moreover, our research has not uncovered any case which has declared the Model Act unconstitutional in its entirety.[3] Furthermore, we are cognizant of the fact that all

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3. We should also point out that we are aware that the United States District Court for the District of New Mexico has apprently held that a city ordinance based on the Model Drug Paraphernalia Act is unconstitutionally vague and overbroad. See Weiler v. Carpenter, 29 Crim.L. Rptr. 2017 (U.S.D.C.N.M., February 11, 1981). Since this decision was recently issued and since you have requested a prompt response to your letter of May 8, 1981, we have not had sufficient time to obtain a copy of the full text of this opinion.

Acts of the Legislature are presumed to be constitutional. See, e.g., Nadeau v. State, Me., 395 A.2d 107 (1978); National Hearing Aid Center, Inc. v. Smith, Me., 376 A.2d 456 (1977); Union Mutual Life Ins. Co. v. Emerson, Me., 345 A.2d 504 (1975). In view of the fact that the Model Drug Paraphernalia Act has been declared to be constitutional by a considerable number of Federal Courts throughout the country, and recognizing that one who attacks the validity of a legislative enactment bears a heavy burden of proving its unconstitutionality, we believe that, should L.D. 104 become law, reasonable arguments exist to defend its constitutionality.

Finally, we should point out that those courts which have found constitutional deficiencies in the Model Act have also upheld substantial portions of it. Consequently, it would appear that if L.D. 104 becomes law and is subsequently challenged on constitutional grounds, there is a strong likelihood that substantial portions of it would be upheld. In the event that portions of L.D. 104 are declared to be unconstitutional, we believe that those portions would be severed from the ramainder of the Act. While L.D. 104 does not contain a severability clause, we would note the existence of the general severability clause appearing in 1 M.R.S.A. § 71(8)(1979).

We hope this information is helpful to you. Please feel free to call upon us if we can be of further assistance.

Sincerely,

Stephen L. Diamond

STEPHEN L. DIAMOND
Deputy Attorney General

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