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January 31, 1985

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ATTORNEY GENERAL OPINION NO. 85- 13

The Honorable Joseph C. Harder
State Senator, 25th District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages -- Licensing and
Related Provisions -- Farm Winery; Serving of Samples
in Tasting Room

Constitution of the State of Kansas -- Miscellaneous --
Intoxicating Liquors; Prohibition on Open Saloon

Synopsis: A farm winery licensed under K.S.A. 1984 Supp. 41-308a may manufacture, store and sell domestic table wines. While a provision which would have allowed a farm winery to provide free samples of its products was included in a 1983 bill (Substitute for House Bill No. 2551), such a provision was deleted before the measure became law. L. 1983, ch. 161, §3. In view of Article 15, Section 10 of the Kansas Constitution and cases which have interpreted its prohibition against the operation of an "open saloon" in this state, samples of wine could not be distributed, even on a complimentary basis, to persons who were not "guests" of the owner. As used in the intoxicating liquor laws, the term "guest" is defined to exclude those individuals who are not personally known to the owner. Therefore, only a private party organized by the owner of the winery to which guests are invited would be in compliance with the constitution and with provisions of Kansas liquor laws dealing with consumption of liquor in public and private places. Cited herein: K.S.A. 1984 Supp. 41-102; 41-308a; K.S.A. 41-719; 41-803; 41-2602; 41-2604; K.A.R. 1983 Supp. 14-18-4; L. 1983, ch. 161; Kan. Const., Art. 15, §10.

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Senator Joseph C. Harder
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Dear Senator Harder:

As Senator for the 25th District, which consists of all or a portion of McPherson, Harvey and Marion Counties, you request our opinion on a question concerning farm wineries. Specifically, you inquire whether a farm winery may have a tasting room on the premises, where samples of the available products could be tasted by customers prior to an actual sale. This is a common practice in wineries located in other parts of the country, most notably in California. In the event that we conclude such a facility is prohibited, you ask if the prohibition is statutory or constitutional in nature.

Farm wineries were recognized by the Kansas legislature only very recently. In 1983, the legislature enacted Substitute for House Bill No. 2551 (L. 1983, ch. 161) which contained provisions providing for the licensing, operating and taxing of farm wineries. Prior to its passage, the bill contained [at §3(a)] certain language which allowed a licensed farm winery to serve "complimentary" samples of its products to prospective customers. Presumably, the customers would be able to make a more intelligent decision as to the type and quantity of wine they purchased if they could sample various types before doing so. For whatever reason, the provision for complimentary samples was deleted from the bill prior to its enactment into law.

Following the repeal of prohibition at the state level in 1948 through the amendment of Article 15, Section 10 of the Kansas Constitution, liquor consumption has been regulated by the Liquor Control Act, K.S.A. 41-101 et seq., and, since 1964, by the Private Club Act, K.S.A. 41-2601 et seq. Both of these acts give practical effect to Article 15, Section 10, which states:

"The legislature may provide for the prohibition of intoxicating liquors in certain areas. Subject to the foregoing, the legislature may regulate, license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors. The open saloon is hereby forever prohibited."

(Emphasis added.)

The term "open saloon" has been defined by both the legislature [K.S.A. 41-803(b)] and the courts [State ex rel. v. Kennedy, 225 Kan. 13, 24 (1979)] to mean any establishment open to the public, without discrimination, where alcoholic beverages are dispensed or sold or served for consumption on the premises.

While the general prohibition against open saloons underlies Kansas liquor laws, practical guidelines permitting the regulated consumption of liquor are contained in the statutes. Consumption of liquor in public places is regulated by K.S.A. 41-719, which is part of the original Liquor Control Act of 1949. It states as follows:

"(a) Except as provided in subsection (b), no person shall drink or consume alcoholic liquor upon the public streets, alleys, roads or highways; in beer parlors, taverns, pool halls or places to which the general public has access, whether or not an admission or other fee is charged or collected; upon property owned by the state or any governmental subdivision thereof; or inside vehicles while upon the public streets, alleys, roads or highways.

"(b) The provisions of subsection (a) shall not apply to the drinking or consumption of alcoholic liquor:

"(1) Upon real property leased by a city to others under the provisions of K.S.A. 12-1740 to 12-1749, inclusive, and amendments thereto, if such real property is actually being used for hotel or motel purposes or purposes incidental thereto.

"(2) In any state owned or operated building or structure and upon the surrounding premises which are furnished to and occupied by any state officer or employee as a residence.

"(3) In a club which is licensed by the director and which is located upon property owned or operated by an airport authority created pursuant to chapter 27 of the Kansas Statutes Annotated.

"(4) In a club which is licensed by the director and which is located upon property owned or operated by an airport authority established by a city having a population of more than 200,000.

"(5) Upon property exempted from the provisions of subsection (a) pursuant to subsection (c) or (d).

"(c) Any city having a population of more than 200,000 may exempt, by ordinance, specified property, title of which is vested in such city, from the provisions of subsection (a).

"(d) The board of county commissioners of any county having a population of not less than 150,000 may exempt, by resolution, specified property, the title of which is vested in such county, from the provisions of subsection (a).

"(e) Violation of any provision of subsection (a) is a misdemeanor punishable by a fine of not less than \$50 or more than \$200 or by imprisonment for not more than six months, or both."

As noted by at least two prior opinions of this office (Attorney General Opinions No. 82-116 and 84-51), the above provisions must be read in pari materia with statutes contained in the Private Club Act, K.S.A. 41-2601 et seq. Unlike K.S.A. 41-719, which speaks only to the prohibition of the consumption of liquor in public places, the latter statutes provide a comprehensive system of regulation for consumption anywhere, in public or in private. K.S.A. 41-2604 prohibits all consumption of liquor which is not in conformity with the parameters laid down by K.S.A. 41-2602, which states:

"The consumption of alcoholic liquor by any person shall be authorized in this state:

"(a) Upon private property by those occupying such private property as an owner or as the lessee of an owner and by the guests of said owner or lessee provided that no charge is made by the owner or lessee for the serving or mixing of any drink or drinks of alcoholic liquor or for any substance comixed with any alcoholic liquor; and if no sale of alcoholic liquor in violation of K.S.A. 41-803 takes place on said private property;

"(b) at a club licensed by the director under the provisions of ths act;

"(c) in a lodging room of any hotel, motel or boarding house by the occupant of said lodging room or his guests provided the occupant is not engaged in a sale of liquor in violation

of K.S.A. 41-403; and if the occupant makes no charge for (1) serving or mixing any drink or drinks of alcoholic liquor, and (2) for any substance comixed with any alcoholic liquor;

"(d) in a private dining room of a hotel, motel or restaurant when said dining room is rented or made available on a special occasion to an individual or organization for a private party and if no sale of alcoholic liquor in violation of K.S.A. 41-803 takes place at said private party." (Emphasis added.)

It should be noted that the above statute makes three references to K.S.A. 41-803 ("no sale of alcoholic liquor in violation of K.S.A. 41-803 takes place"), which statute contains the definition of open saloon discussed earlier in this opinion.

Accordingly, given the above statutes and constitutional provision, what may be concluded about a proposal to distribute free samples of wine produced at a farm winery? In that any such winery would presumably be privately owned, the prohibitions of K.S.A. 41-719 relating to public consumption would not be invoked. However, K.S.A. 41-2602 also regulates private consumption, and so would be applicable. Subsection (a) of the statute permits consumption on private premises by the owner(s) thereof, as well as the "guests" of the owner. Although the statutes do not provide a definition for the term "guest, K.A.R. 14-18-4, an administrative rule and regulation of the Alcohol Beverage Control Division of the Department of Revenue, states:

"(a) Members of licensed private clubs may bring guests upon club premises provided the guests are accompanied by the member. The relationship between member and guests necessarily requires that the member shall be acquainted with the guest and not be a total stranger before the time that the privilege of access is extended.

"(b) Every club shall require the name and address of all persons who enter the club premises as guests of management or club employees. These guests shall be registered in a permanently bound book kept on the club premises for that purpose. The relationship between management or employees and their guests necessarily requires that the management or employee shall

have been acquainted with the guest for some period of time before the privilege being extended, which would exclude a total stranger."
(Emphasis added.)

This concept of the term "guest" is necessary in view of the definition given to the phrase "open saloon" as being a place where liquor is served to members of the general public at large. Hence the need to have some type of connection between "guest" and the "member," or, in the case of liquor being served on private premises, between the "guest" and the "owner."

Clearly, any proposal to distribute samples of wine [an alcoholic liquor as defined by K.S.A. 1984 Supp. 41-102(2)] to anyone visiting a farm winery would encounter problems both with the Private Club Law and the constitutional prohibition against the operation of open saloons in Kansas. While licensure under K.S.A. 1984 Supp. 41-308a would allow the sale of wine for consumption elsewhere, consumption on the premises, even in the form of complimentary samples is controlled by K.S.A. 41-2602 and 41-2604. In that a farm winery could not qualify as a licensed club [K.S.A. 41-2602(b)], a lodging room of a hotel, motel or boarding house [K.S.A. 41-2602(c)], or a private dining room of a hotel, motel or restaurant [K.S.A. 41-2602(d)], it would have to qualify, if at all, under K.S.A. 41-2602(a) (consumption on private property by an owner and his guests). Given the problem with the definition of "guest" discussed above, however, in our opinion even this option is not available.

Further, even if K.S.A. 41-2601 et seq., were amended to include farm wineries (i.e. to make them private clubs), they could still not invite members of the general public to drink free samples of wine in a tasting room. While private parties of individually invited guests would be permissible, a "come one, come all" policy is irreconcilably at odds with the language of Article 15, Section 10 of the state constitution. So, while the concept of a wine tasting room faces difficulties under existing statutes, the amendment of such statutes would not remove the underlying obstacle presented by the ban on open saloons.

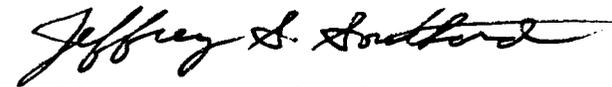
In conclusion, a farm winery licensed under K.S.A. 1984 Supp. 41-308a may manufacture, store and sell domestic table wines. While a provision which would have allowed a farm winery to provide free samples of its products was included in a 1983 bill (Substitute for House Bill No. 2551), such a provision was deleted before the measure became law. L. 1983, ch. 161, §3.

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Very truly yours,


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