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ATTORNEY GENERAL OPINION NO. 86- 157

Richard C. Dearth
City Attorney
P.O. Box 1037
Parsons, Kansas 67357

Re: Intoxicating Liquors and Beverages -- Misdemeanors
and Nuisances -- Possession, Transportation and
Consumption of Alcoholic Liquors and Cereal Malt
Beverages by Vehicle Passengers

Synopsis: Kansas law allows transportation and possession of
alcoholic liquors and cereal malt beverages in
vehicles when the seal of the container is
unbroken, the container is locked in the trunk, or
when the liquor or cereal malt beverage is in the
exclusive possession of a passenger in a
recreational vehicle or bus and is not directly
accessible to the driver. K.S.A. 41-804; 41-2719.
Consumption of alcoholic liquors in vehicles is
prohibited by K.S.A. 41-719. However, under
specifically delineated circumstances, consumption
of cereal malt beverages by a passenger in a
recreational vehicle or bus is permissible under
Kansas law. Cited herein: K.S.A. 8-1406; K.S.A.
1985 Supp. 41-102; K.S.A. 41-719; 41-804; K.S.A.
1985 Supp. 41-2701; K.S.A. 41-2702; 41-2719;
41-2720; 75-1212.

* * *

Dear Mr. Dearth:

As attorney for the City of Parsons, you request our opinion regarding K.S.A. 41-804. Specifically, you are concerned with whether passengers in a limousine operated by a limousine service may possess and consume alcoholic beverages.

K.S.A. 41-804(a) states:

"(a) No person shall transport in any vehicle upon a highway or street any alcoholic liquor unless such liquor is:

"(1) In the original unopened package or container, the seal of which has not been broken and from which the original cap, cork or other means of closure has not been removed;

"(2) in the locked rear trunk or rear compartment, or any locked outside compartment which is not accessible to any person in the vehicle while it is in motion; or

"(3) in the exclusive possession of a passenger in a vehicle which is a recreational vehicle, as defined by K.S.A. 1980 Supp. 75-1212, or a bus, as defined by K.S.A. 8-1406, who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver is not directly accessible."
(Emphasis added.)

K.S.A. 41-2719(a) contains the identical provisions in regard to cereal malt beverages.

K.S.A. 41-804(a) (3) and 41-2719(a) (3) allow possession and transportation of alcoholic liquors and cereal malt beverages by passengers sufficiently removed from the driver. Subsections (a) (1) and (a) (2) of each statute place the barrier of a sealed container or locked trunk between the alcoholic beverage and any person in the moving vehicle. Subsection (a) (3) of each statute, on the other hand, allows passengers to possess alcoholic and cereal malt beverages in certain types of vehicles so long as such passengers are not

in the driving compartment or directly accessible to the driver of the vehicle.

It would appear initially, therefore, that under specifically delineated circumstances these exceptions would allow consumption of alcoholic beverages by passengers in the described vehicles. However, a reading of the two statutes in their entirety, an analysis of their legislative history, and synthesis with other applicable law reveal that this is not entirely the case. In our opinion, Kansas law prohibits the consumption of alcoholic liquor inside vehicles while operating upon the streets, alleys, roads and highways of Kansas. K.S.A. 41-719. This prohibition is limited to alcoholic liquor, however, and under the specifically delineated circumstances outlined in K.S.A. 41-2719(a)(3), does not extend to cereal malt beverages as that term is defined in K.S.A. 1985 Supp. 41-102(b) and 41-2701(a).

K.S.A. 41-804(a) grants three exceptions for liquor transportation and possession in vehicles; subsection (b) provides for monetary and penal penalties for violating the transportation prohibition; subsection (c) provides for suspension of the person's driver's license; subsection (d) states the procedure for reinstating the person's driver's license; subsection (e) defines "highways" and "streets;" and subsection (f) grants judicial discretion to restrict a person's driver's license in lieu of suspension. K.S.A. 41-804. The provisions of K.S.A. 41-2719(a) through (f) are virtually identical to these.

K.S.A. 41-804 and 41-2719 were enacted to combat drinking and driving. K.S.A. 41-804 was enacted in 1949 as part of the Kansas Liquor Control Act. The statute has been amended only once. The 1981 Legislature enacted Senate Bill No. 99, which in essence added (a)(3) through (f) to K.S.A. 41-804. The bill also created K.S.A. 41-2719, the parallel of K.S.A. 41-804 for cereal malt beverages.

Careful analysis of the statutes and the committee minutes reveal the intent of K.S.A. 41-804 and K.S.A. 41-2719. By simply prohibiting transportation of alcoholic beverages in open containers, the burden of proof required to convict drinking drivers was lowered. Pursuant to the new law, a passenger and driver sharing a single drink could no longer circumvent the law. To convict the driver, the state merely had to show transportation of an open container within the reach of the driver. State v. Erbacher, 8 Kan.App.2d 169, 170 (1983).

Conversely, legitimate transportation of alcoholic beverages was granted relief. Subsection (a) (1) through (a) (3) of each statute allowed for the bonafide transport of unopened containers, open containers locked in the trunk, and beverages in the exclusive possession of passengers sufficiently removed from the driver. These subsections strike a balance between the lowered burden of proof to convict drinking drivers and the legitimate transportation of alcoholic beverages.

K.S.A. 41-719(a), enacted in 1981 along with K.S.A. 41-804 and 41-2719, states:

"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. (Emphasis added.)

K.S.A. 41-719 was also enacted as part of the Kansas Liquor Control Act of 1949. K.S.A. 41-719 has been amended seven times since 1949, but the proscription against the consumption of alcoholic liquor in vehicles has never been altered. The seven modifications currently a part of K.S.A. 41-719 grant exemptions only to certain hotels, private clubs, airports and specified government properties. Alcoholic beverage consumption inside vehicles upon the streets, alleys, roads and highways of Kansas continues to be prohibited, for drivers and passengers alike.

The explicit prohibition contained in K.S.A. 41-719 requires a narrow reading of K.S.A. 41-804. Transportation and possession of alcoholic liquor and cereal malt beverages by passengers who are not directly accessible to the driver are allowed by K.S.A. 41-804(a) (3) and 41-2719(a) (3); consumption of alcoholic liquors is prohibited.

K.S.A. 41-719 addresses alcoholic liquor. K.S.A. 1985 Supp. 41-102(b) defines "alcoholic liquor" as follows:

"(b) 'Alcoholic liquor' means alcohol, spirits, wine, beer and every liquid or

solid, patented or not, containing alcohol, spirits, wine or beer and capable of being consumed as a beverage by a human being, but shall not include any beer or cereal malt beverage containing not more than 3.2% alcohol by weight." (Emphasis added.)

K.S.A. 1985 Supp. 41-2701(a) states:

"As used in this act unless the context otherwise requires:

"(a) 'Cereal malt beverage' means any fermented but undistilled liquor brewed or made from malt or from a mixture of malt or malt substitute, but does not include any such liquor which is more than 3.2% alcohol by weight."

Cereal malt beverages are not included in the K.S.A. 41-719 prohibition against consumption. The only prohibitions pertaining to cereal malt beverages and vehicles are found in K.S.A. 41-2719 and K.S.A. 41-2720(a), also drafted in 1981, which states:

"No person shall consume any cereal malt beverage while operating any vehicle upon any street or highway." (Emphasis added.)

Pursuant to K.S.A. 1985 Supp. 41-102(b) and 41-2701(a), the K.S.A. 41-719 prohibition does not apply to cereal malt beverages. K.S.A. 41-2719, drafted to reduce drinking while driving, carves out three exceptions for transportation and possession of cereal malt beverages while operating a vehicle. K.S.A. 41-2719(a)(1) and (2) allow the transportation of cereal malt beverages if the beverage is in the original unopened package or locked in the rear trunk, rear compartment or outside compartment. K.S.A. 41-2720 prohibits consumption of cereal malt beverages by the driver.

K.S.A. 41-2719(a)(3) allows for the transportation of cereal malt beverages if the beverage is "in the exclusive possession of a passenger in . . . a recreational vehicle . . . or a bus . . . who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver

is not directly accessible." (Emphasis added.) State v. Erbacher, 8 Kan.App.2d 169, 170 (1983) states in part:

"The legislative aim of this statute is clearly demonstrated by the scope of the exclusions from its coverage. K.S.A. 41-2719 is intended to indirectly prevent the intoxication of motor vehicle drivers by prohibiting the presence of open containers of beer within the reach of a driver. Thus, so long as the beer is unopened or in a place in the vehicle which is inaccessible to the driver, it may be transported or consumed."
(Emphasis added.)

In our opinion, K.S.A. 41-2719(a) (3) allows for the transportation, possession and consumption of cereal malt beverages by certain passengers in certain places in certain vehicles. It is recommended that the following procedure be followed to remain within the bounds of the law.

The vehicle involved must be a recreational vehicle as defined by K.S.A. 75-1212(f), or a bus, as defined by K.S.A. 8-1406. Those definitions are as follows:

"'Recreational vehicle' means a vehicular-type unit built on or for use on a chassis and designed primarily as living quarters for recreational, camping, vacation or travel use and which has its own motive power or is mounted on or drawn by another vehicle, and which has a body width not exceeding eight (8) feet and a body length not exceeding forty (40) feet; but such term shall not include a unit which has no electrical system which operates above twelve (12) volts and has no provisions for plumbing, heating and any other component or feature for which a standard is adopted by this act." K.S.A. 75-1212(f).

"'Bus' means every motor vehicle designed for carrying more than ten (10) passengers and used for the transportation of persons; and every motor vehicle, other than a taxicab, designed and used for the

transportation of persons for
compensation." (Emphasis added.) K.S.A.
8-1406.

While a limousine service operated for compensation does not fit within the definition of "recreational vehicle," it does appear to fall within the definition of "bus." The limousine must be operated for compensation. A personal vehicle driven for no compensation would not meet the definitional requirements. A fiscal separation between driver and passenger is required.

The passenger possessing the cereal malt beverage must not be in the driving compartment. Alternatively, the passenger must be in a portion of the vehicle from which the driver is not "directly accessible." K.S.A. 41-2719. Given this language, it is our opinion that a passenger who is in possession of or consuming a cereal malt beverage cannot be in the driving compartment of the limousine. However, if such passengers remain in the passenger compartment, or in a portion of the vehicle from which the driver is inaccessible, possession and consumption would be lawful.

The presence of a glass between the driving and passenger compartment would serve to augment the inaccessibility of the driver, however, we do not believe that it is required by the statute. The fiscal separation between driver and passenger, the physical separation by distance or otherwise, and the threat of prosecution for a drinking driver are sufficient deterrents to meet the intent of the statute.

The consuming passengers must be of legal age. K.S.A. 1985 Supp. 41-2701(g) states:

"'Legal age for consumption of cereal malt beverage' means: (1) With respect to persons born before July 1, 1966, 19 years of age; and (2) with respect to persons born on or after July 1, 1966, 21 years of age, except that 'legal age for consumption of cereal malt beverage' shall mean 18 years of age if at any time the provisions of P.L. 98-363 penalizing states for permitting persons under 21 years of age to consume cereal malt beverage are repealed or otherwise invalidated or nullified."

As to whether the limousine service may sell or give away the cereal malt beverages to its passengers, it is our opinion that the limousine service may not do so. In order for the limousine service to sell cereal malt beverages, a license would have to be secured. K.S.A. 41-2702. Given the mobile nature of sales in vehicles, the licensing requirement of stating the location of the premises appears to be unachievable.

On the other hand, if the limousine service were to give away cereal malt beverages, no retail license would be required. K.S.A. 41-2702; Attorney General Opinions No. 80-52; 84-51. However, the limousine service would have to prove that no portion of the compensation rendered for the ride was used to purchase the cereal malt beverage. Attorney General Opinions No. 80-52; 84-51. Given the pecuniary nature of any business venture, this philanthropic gesture would be extremely difficult to prove, thus making this alternative impractical.

In conclusion, Kansas law allows transportation and possession of alcoholic liquors and cereal malt beverages in vehicles when the seal of the container is unbroken, the container is locked in the trunk, or when the liquor or cereal malt beverage is in the exclusive possession of a passenger in a recreational vehicle or bus and is not directly accessible to the driver. K.S.A. 41-804; K.S.A. 41-2719. Consumption of the alcoholic liquor in vehicles is prohibited by K.S.A. 41-719. However, under specifically delineated circumstances, consumption of cereal malt beverages by a passenger in a recreational vehicle or bus is permissible under Kansas law.

Very truly yours,



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