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ATTORNEY GENERAL OPINION NO. 84- 51

Mr. Jerry L. Harper
Douglas County District Attorney
Seventh Judicial District
Judicial & Law Enforcement Center
Lawrence, Kansas 66044

Re: Intoxicating Liquors and Beverages--Prohibited Acts and Penalties--Consumption on Premises to Which the General Public has Access

Intoxicating Liquors and Beverages--Cereal Malt Beverages--When a Sale Occurs

Synopsis: State law prohibits the sale or consumption of alcoholic liquor at any location to which the general public has access regardless of whether or not the premises are privately owned. Criminal responsibility for allowing consumption in violation of state law is a question of fact that can be determined only on a case by case basis. In the absence of a cereal malt beverage license, cereal malt beverages may be dispensed at functions where an admission is charged only if no part of the admission charge is directly or indirectly used to pay for the cereal malt beverage. Cited herein: K.S.A. 21-3201, 41-719, 41-2602, 41-2603 and 41-2604.

* * *

Dear Mr. Harper:

As District Attorney for the Seventh Judicial District, Douglas County, Kansas, you have requested our opinion as to the legality of certain social events at which alcoholic liquors are allowed to be consumed. These events include concerts, dances or similar public entertainment events, and may take place in halls rented or otherwise made available, in parking lots or other open-air locations. The promoters of these events generally advertise the events widely

and either sell tickets or collect an admission fee at the door. While there usually is no sale of alcoholic liquor at these events either directly or indirectly, the promoter often sells soft drinks and ice. Frequently, the advertising for such events encourages those attending to bring their own liquor. Even without such advertising, the promoter will permit people to attend who bring their own liquor. In general, you ask whether it is legal to encourage or to allow the consumption of alcoholic liquor at such a public function on premises that are not licensed as a private club by the State of Kansas; and, if consumption at such an event is illegal, who is criminally liable for allowing or encouraging such acts.

Based on this general question you have posed several specific hypothetical fact situations. However, several preliminary matters of general concern need to be considered before your specific questions can be answered.

The selling or consuming of alcoholic liquor by the drink in public has been regulated by the State of Kansas at all times since the sale of alcoholic liquor was legalized in 1949. The primary legal standard is stated in Article 15, Section 10 of the Kansas Constitution, which provides:

> "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 shall be and is hereby forever prohibited."

The foregoing was adopted as a constitutional amendment in 1948, ending total prohibition in the State of Kansas. In 1949 the Kansas legislature adopted the Kansas Liquor Control Act (L. 1949, ch. 242, now Chapter 41, Kansas Statutes Annotated) for the purpose of regulating the buying, selling and consuming of alcoholic liquor.[1]

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1. The constitutional prohibition against the open saloon in Article 15, Section 10 and K.S.A. 41-803 are not directly applicable to the questions that you have posed. The Kansas Supreme Court defined the open saloon in the following terms:

> "We hold an open saloon is any establishment open to the public, without discrimination, where alcoholic beverages are dispensed or sold or served for consumption on the premises." State ex rel Schneider v. Kennedy, 225 Kan. 13, 24 (1978).

Since your question involves the allowing of consumption of alcoholic liquor, but not the serving, selling or dispensing of alcoholic liquor by the promoter of the event, it could not be construed as a true open saloon violation.

The Liquor Control Act addresses the issue of the consumption of alcoholic liquor in the following terms:

> 41-719. "(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."

In 1965 the Kansas legislature passed the Private Club Licensing Act, which also addresses the question of where alcoholic liquor may be consumed.

> 41-2602. "(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 co-mixed 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 this 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. 41-803; and if the occupant makes no charge for (1) serving or mixing any drink or drinks of alcoholic liquor, or (2) for any substance co-mixed 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."
>
> 41-2603. "On and after July 31, 1965, the consumption of alcoholic liquor at any place other than that provided in this act shall be deemed to be the consumption of alcoholic liquor in a place to which the general public has access."

As you state in your letter, one of the key inquiries to be made is what is meant by the term "guests" in K.S.A. 41-2602(a). To resolve this matter, some attempt must be made to ascertain the legislative intent, the first and most important inquiry in matters of statutory construction [Southeast Kansas Landowners Assn. v. Kansas Turnpike Authority, 224 Kan. 357, 367 (1978)]. To determine legislative intent, one should first look to the plain language of the statute:

> "A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning beyond the plain terms of the Act. (Citations omitted.)" City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973).

Another well-recognized canon of statutory construction is that, in determining legislative intent, statutes in pari materia should be read together in such a way as to harmonize their respective provisions, if it is reasonably possible to do so [Callaway v. City of Overland Park, 211 Kan. 626, 650 (1973)]. It is not necessary that statutes were enacted at the same time for them to be regarded as in pari materia [Claflin v. Walsh, 212 Kan. 1, 8 (1973)].

With the above principles of statutory construction in mind, it is quite clear that K.S.A. 41-2602 must be interpreted in pari materia with K.S.A. 41-719. K.S.A. 41-719 prohibits the consumption of alcoholic liquor "...upon...places to which the general public has access..." K.S.A. 41-2602 authorizes the consumption of alcoholic liquor at private locations, including clubs that are licensed by the director of Alcoholic Beverage Control. Such clubs are private in that they are open to members only, who have been granted membership only after paying a membership fee, waiting ten days, and being screened for "good moral character". K.S.A. 41-2601(b). It also authorizes consumption of alcoholic liquor "in a private dining room of a hotel, motel or restaurant... on a special occasion...for a private party..." K.S.A. 41-2602(d). In our opinion, this limitation of consumption to private clubs or private parties does not conflict with K.S.A. 41-719. Only if the use of the term "guests" in K.S.A. 41-2602(a) and (c) is interpreted as restricting consumption of alcoholic liquor to private functions can K.S.A. 41-2602 be interpreted in such a way that the statute as a whole will not conflict with K.S.A. 41-719.

The proper interpretation of K.S.A. 41-719 and K.S.A. 41-2602 was discussed at some length in Attorney General's Opinion No. 82-116, issued June 1, 1982. While that opinion looked primarily to the proper interpretation of K.S.A. 41-719, and did not discuss any reasons for concluding so, it also interpreted K.S.A. 41-2602 as limiting consumption of alcoholic liquors to private functions. That Opinion stated:

> "By application of these well-accepted rules of statutory construction to the provisions of K.S.A. 41-2602, it is our opinion that consumption of alcoholic beverages in the Herington Community Building must comport with the limitations of subsection (a) of that statute. That is, such consumption is limited to private gatherings. Assuming that a private club, hotel, motel or restaurant will not be located on the premises of this building, consumption of alcoholic liquor on these premises is limited to situations where the premises are leased to an individual or organization, and only the lessee and guests of the lessee may drink or consume alcoholic beverages..." (Attorney General's Opinion No. 82-116, page 10.)

Clearly that Opinion assumes that "guests" as that word occurs in K.S.A. 41-2602 is to be interpreted as limiting consumption to private gatherings. For the reasons stated earlier, we re-affirm and adopt this interpretation of K.S.A. 41-2602. Further, the language of K.S.A. 41-2603 previously quoted only rein-

forces this result. This statute makes it clear that the provisions of the Private Club Licensing Act have created the only exceptions to the provisions of K.S.A. 41-719.

Your request has also raised certain questions regarding cereal malt beverage (3.2% beer). K.S.A. 1983 Supp. 41-102(b) defines "alcoholic liquor" to specifically exclude cereal malt beverages. As a result, cereal malt beverages are not subject to the restrictions in the Kansas Liquor Control Act or the Private Club Licensing Act, but are regulated by K.S.A. 41-2701 through 41-2721 inclusive. While there are no restrictions on consumption comparable to K.S.A. 41-719 or K.S.A. 41-803, cereal malt beverages may be sold in Kansas only by licensed businesses (K.S.A. 41-2702). Licenses to sell cereal malt beverage at retail for either on or off-premise consumption are issued by city or county governing bodies.

With these preliminary considerations in mind, it is no longer necessary to discuss separately your specific hypotheticals which relate to the sale or consumption of alcoholic liquor, for each describes a situation in which alcoholic liquor is to be consumed at a premises to which the general public has access. The fact that in each of your hypotheticals an admission charge is assessed does not alter this result because, in your hypotheticals, it is clear that any one who pays the admission charge will be allowed in. By comparison, see the discussion of the meaning of the term "guest" in K.A.R. 14-18-4(a). Thus, the sale or consumption of alcoholic liquor under any of the situations you propose would be illegal.

Your final hypothetical involves a host of a concert or dance who charges admission and offers free beer and soft drinks. Kansas law draws a clear distinction between strong beer and cereal malt beverage (beer that contains not more than 3.2% alcohol by weight). Strong beer is classified as an alcoholic liquor (K.S.A. 41-102(b)) and thus could not be legally served or consumed at a dance to which the general public has access. We assume therefore that you refer to the 3.2 variety in your question.

Cereal malt beverage is treated differently than alcoholic liquor under Kansas law, and can be consumed in public legally. However, it cannot be sold without a valid cereal malt beverage license. As it pertains to cereal malt beverage, your last hypothetical is therefore reduced to the question of whether or not there is a sale. That question has already been discussed and decided in Attorney General's Opinion No. 80-52. That Opinion states (at page 3):

> "When no part of the cover charge is used to pay for the beer being consumed or to reimburse the funds from which the beer is purchased, or when the beer is contributed by a third party without receipt of consideration, then no transfer of ownership occurs for a price and hence no retail sale is consumated. Under these facts no retail license is required."

Thus under the principles enunciated in that earlier opinion, compliance with the cereal malt beverage laws of Kansas could occur only if no part of the proceeds from the admission price are used to reimburse the purchaser or purchasers of the cereal malt beverage that is served at that event.

In several of your hypotheticals, you raise the question of criminal liability, i.e. whether the lessor of the premises where illegal consumption of alcoholic liquor took place, the lessee of such premises, or both the lessor and the lessee, can be held criminally liable.

The question of liability for these situations is addressed by K.S.A. 41-2604:

> "Any person allowing consumption of alcoholic liquor in violation of this act on any property owned, leased or otherwise under his control shall thereby subject himself and the property on which said illegal consumption takes place to the penalties hereinafter provided."

In our opinion, the use of the word 'allow' in this statute implies knowledge, and is consistent with the general criminal intent requirements of K.S.A. 21-3201. K.S.A. 41-2604 also requires a degree of control over the premises before criminal liability can be assessed (see also K.S.A. 41-805).

Whether or not a lessor or lessee in a particular situation possesses the requisite knowledge and control over the premises is a question of fact that must be dealt with on a case by case basis. Such elements as physical presence at the event, the particular relationship between the lessor and lessee, the exact language of the written lease if there is one, and prior advertising of the event may be relevant to the issues of knowledge and control. This is a question that must be dealt with in each situation by the prosecuting authority or agency and, if charges are filed, by the trier of fact.

In conclusion, it is our opinion that alcoholic liquor may not legally be sold or consumed at any function or on any premises to which the general public has access under any of the circumstances that you have proposed in your hypothetical questions. Cereal malt beverage may be dispensed at a function where an admission is charged only if there is an applicable cereal malt beverage license or if no part of the admission charge is directly or indirectly used to pay for the beverage. The question of criminal liability for allowing the illegal consumption of alcoholic liquor is a fact question that must be dealt with on a case by case basis.

Very truly yours,

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