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October 18, 1984

ATTORNEY GENERAL OPINION NO. 84- 109

John A. Lamb
Director
Alcoholic Beverage Control Division
Department of Revenue
700 Jackson, 2nd Floor
Topeka, Kansas 66603

Re: Alcoholic Liquors and Beverages -- Prohibited Acts
and Practices -- Sale of Liquor to Intoxicated Persons

Synopsis: K.S.A. 41-715 prohibits the dispensing, whether through sale or gift, of alcoholic liquor to persons who are incapacitated or who are physically or mentally incapacitated through the consumption of liquor, and makes a violation of the statute a misdemeanor. As a criminal statute, the language of K.S.A. 41-715 must be strictly construed, and cannot be read so as to include the sale of liquor to a person who is not intoxicated at the time of sale, even if such person is known to have a history of alcohol abuse. Cited herein: K.S.A. 41-715; 59-3002; K.S.A. 1983 Supp. 77-201, Thirty-First; L. 1965, ch. 277, ch. 505; L. 1983, ch. 191.

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Dear Mr. Lamb:

As the director of the Alcoholic Beverage Control Division of the Department of Revenue, you request our opinion on a question concerning the application and interpretation of K.S.A. 41-715.

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That statute, which is part of the intoxicating liquor statutes, states in pertinent part as follows:

"No person shall knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any person who is an incapacitated person, or any person who is physically or mentally incapacitated by the consumption of such liquor. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars (\$200) or by imprisonment for not to exceed thirty (30) days, or both such fine and imprisonment in the discretion of the court."

You inquire whether this statute includes within its prohibition the sale of intoxicating liquor to a person who is known to be an alcoholic or an abuser of alcohol, but who is not "incapacitated" at the time of the actual sale. Your inquiry stems from an existing situation in which a retailer is faced with a customer who makes repeated visits, at the beginning of which he is sober, but who becomes more intoxicated with each trip.

The statute in question was enacted into law in 1949 as an original part of the Kansas Liquor Control Act. Until 1965, the statute prohibited the sale, gift, etc. of intoxicating liquor to "mentally incompetent" persons, as well as those who are physically or mentally incapacitated by the consumption of liquor. In that year, the legislature amended the statute to its present form by substituting the phrase "incapacitated person" for "mentally incompetent." L. 1965, ch. 277, §8.

While on the surface this change would appear to alter the meaning of the statute very little, if at all, the significance of the amendment appears when another 1965 enactment of the legislature is considered. In chapter 505 of the session laws of that year, the legislature amended K.S.A. 77-201, which statute contains various definitions of terms that are to be used whenever a statute containing one or more of the terms is construed. Among several additions made by the bill was a definition of the term "incapacitated person," which stated:

"Thirty-first. The term 'incapacitated person' shall mean any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic narcotic drug addiction, chronic intoxication, or other cause to the extent that such person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning either his or her person or estate."
(Emphasis added.)

Given the inclusion of chronic intoxication within the definition of incapacitated person following the 1965 amendment, in our opinion K.S.A. 41-715 at that time did in fact prohibit the sale of intoxicating liquor to persons who, even though presently sober, were known by the seller to be suffering from chronic alcoholism. In that the statute contains a scienter requirement ("knowingly sell, give away, . . ."), the facts of each particular situation would be critical in determining whether a violation took place.

However, due to further amendments to K.S.A. 77-201, such is not our conclusion today, in 1984. In 1983, as part of a comprehensive overhaul of the guardian and conservator statutes (L. 1983, ch. 191, 823), the legislature substantially changed the definition of "incapacitated person" found in K.S.A. 77-201, Thirty-First. As it now reads in K.S.A. 1983 Supp. 77-201, Thirty-First, the definition states:

"'Incapacitated person' means disabled person as that term is defined in K.S.A. 59-3002 and amendments thereto."

Reference to K.S.A. 59-3002 reveals that in place of the specific listing of incapacitating conditions formerly found in K.S.A. 77-201, Thirty-First, "disabled person" now is defined very generally to mean [at subsection (a)]:

"Any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources or to meet essential requirements for such person's physical health or safety, or both."

In our opinion, the effect of this latest change is to alter the scope of the prohibition contained in K.S.A. 41-715, for "incapacitated persons" no longer has as a part of its definition the individual who is chronically intoxicated. While this result may not have been intended by the legislature when it made the changes last year to the guardian and conservator statutes, the definition of "incapacitated person" cannot continue to be read to include the chronically intoxicated, as it must be presumed that the legislature intended by its actions to remove such a specific reference. Linson v. Johnson, 223 Kan. 442 (1977), Frontier Ditch Co. v. Board of Agriculture, 1 Kan.App.2d 186 (1977). Accordingly, as K.S.A. 41-715 is a penal statute, and so must be strictly construed, the phrase "incapacitated person" must be read in light of K.S.A. 59-3002, by way of K.S.A. 1983 Supp. 77-201, Thirty-First. While the prohibition could still be applied in the case of a person who is mentally-disabled or senile, the lack of any specific reference to chronic alcoholism or intoxication in any of the three statutes leaves us of the opinion that sale of intoxicating liquor to such a person is not clearly within the terms of the prohibited conduct. As such, a court would not extend the scope of K.S.A. 41-715 to include acts which are not readily found therein. State v. Doyen, 224 Kan. 482 (1978), Mitchell v. Rayl, 8 Kan.App.2d 690 (1983).

Having concluded that the term "incapacitated person" does not prohibit the sale of intoxicating liquor to a person who is not currently intoxicated, even though he or she is known to be in such a condition chronically, it remains to consider whether such persons are included within the phrase "any person who is physically or mentally incapacitated by the consumption of [intoxicating] liquor."

In our opinion, for the same reasons set out above, the plain language of the statute cannot be stretched to make it a criminal offense to serve liquor to those persons who may be incapacitated in the future by consumption of alcohol, but who are not presently so. Clearly, had the legislature wished to include such persons, it could have done so, as have other states. Some representative examples include:

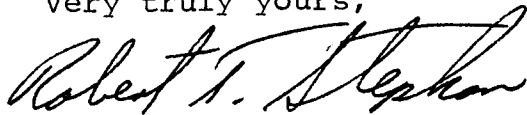
- (1) West's Ann.Cal.Bus. & Prof. Code §25602(a) ("Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.")

- (2) Ann.L.Mass., ch. 138, §69 ("No alcoholic beverage shall be sold or delivered . . . to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding.")
- (3) 47 Pa.C.S.A. §4-493(1) ("It shall be unlawful for any licensee . . . to sell, furnish or give any liquor or malt or brewed beverages . . . to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.")

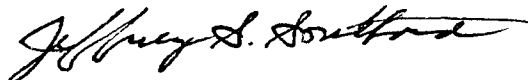
Instead of containing such specific language, the Kansas statute resembles that of Illinois (43 Ill.Anno.St. §131), which prohibits the sale of liquor to "intoxicated persons" and which has been construed as thereby permitting sales to persons who are not intoxicated at the time of purchase. Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959). However, it should be emphasized that our conclusion regarding the lack of criminal liability on the part of a seller of intoxicating liquor should not be automatically extended to the area of potential civil liability, especially where, as here, the individual in question spends a considerable amount of time in the seller's place of business in an intoxicated condition, with at least the potential for harming other patrons.

In conclusion, K.S.A. 41-715 prohibits the dispensing, whether through sale or gift, of alcoholic liquor to persons who are incapacitated or who are physically or mentally incapacitated through the consumption of liquor, and makes a violation of the statute a misdemeanor. As a criminal statute, the language of K.S.A. 41-715 must be strictly construed, and cannot be read so as to include the sale of liquor to a person who is not intoxicated at the time of sale, even if such person is known to have a history of alcohol abuse.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General