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To: House Committee on Federal & State Affairs

From: R.E. "Tuck" Duncan, Special Counsel, KLBA

RE: SB203, Club & Drinking Establishment Act.

I am appearing today as Special Counsel for the Kansas Licensed Beverage Association, to address SB203. First a brief background, much of my law practice relates to the licensing of and representation of on-premise licensees, including national hotel and restaurant chains. I have represented such licensees in various administrative proceedings before the Kansas Alcoholic Beverage Control.

Over the years the KLBA has expressed concern about the "unknowingly" standard found in K.S.A. 41-2615. They have asked that it be removed and the Legislature has deferred.

41-2615. Possession or consumption by minor prohibited. (a) No licensee or permit holder, or any owner, officer or employee thereof, shall knowingly or unknowingly permit the possession or consumption of alcoholic liquor or cereal malt beverage by a minor on premises where alcoholic beverages are sold by such licensee or permit holder, except that a licensee's or permit holder's employee who is not less than 18 years of age may serve alcoholic liquor or cereal malt beverage under the on-premises supervision of the licensee or permit holder, or an employee who is 21 years of age or older.
(b) Violation of this section is a misdemeanor punishable by a fine of not less than $100 and not more than $250 or imprisonment not exceeding 30 days, or both.
(c) It shall be a defense to a prosecution under this section if: (1) The defendant permitted the minor to possess or consume the alcoholic liquor or cereal malt beverage with reasonable cause to believe that the minor was 21 or more years of age; and (2) to possess or consume the alcoholic liquor or cereal malt beverage, the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document that reasonably appears to contain a photograph of the minor and purporting to establish that such minor was 21 or more years of age. **History:** L. 1965, ch. 316, §15; L. 1987, ch. 182, § 70; L. 1993, ch. 173, § 3; L. 1994, ch. 300, § 2; L. 2008, ch. 126, § 9; July 1.

However, in discussing this matter recently, it became clear to me that removal is not required, as we know the Kansas ABC would object. Rather, the Legislature should codify the Kansas Supreme Court's application of the statue as found in In *State v. J.C. Sports Bar, Inc.*, 253 Kan. 815 (Kan. 1993).

In that decision written by Chief Justice Holmes, the court reviewed this statute and stated:

"Bar and its owner could not be found guilty of violating statute prohibiting "knowingly or unknowingly" permitting consumption of alcohol by minor where there was no evidence that owner or any employee or agent of bar sold or gave minor beer which minor drank ... and where there was no evidence that owner or any employee of bar even knew that minor had taken a drink of someone else's beer."

You need understand that albeit the Kansas A.B.C.'s administrative hearings are not required to meet a "beyond reasonable doubt " standard, The Club and Drinking Establishment Act and rules and regulations promulgated thereunder constitute a criminal statute.

41-2633. Violations of act or rules and regulations; criminal penalty. Violation of any provision of the club and drinking establishment act, and amendments thereto, or any rule or regulation adopted thereunder, for which a penalty is not otherwise specifically provided is punishable by a fine not to exceed $500 or imprisonment not to exceed six months, or both.

Basically, the Kansas Alcoholic Beverage Control has taken the position that there is strict liability. That is, if a 21 year old buys the drink, gives it to his/her 19 year old acquaintance who drinks same, and even though management has no knowledge of same, the licensee is guilty of violating K.S.A. 41-2633. The same standard is applied as though one drives through a stop sign.

Chief Justice Holmes found that because under the statute "[V]iolators are subject to a fine or imprisonment or both. As a result. the statute must be considered from the stricter standards applied to criminal statutes rather than the more liberal standards applied to non-criminal statutes."

So how do we resolve this problem, and maintain the "unknowingly" standard to ensure that licensees take their responsibly seriously? Well, here is our solution, codify the evidentiary requirements.

Amend K.S.A. 41-2516 to provide as follows, consistent with Chief Justice Holmes rule:

A licensee may not be found guilty of violating this statute prohibiting "knowingly or unknowingly" permitting consumption of alcoholic liquor or cereal malt beverage by minor, whether in an administrative or criminal proceeding, where there is no evidence that owner or any employee or agent of licensee sold or gave the minor the alcoholic liquor or cereal malt beverage which the minor possessed or consumed and where there is no evidence that owner or any employee of bar even knew that minor had taken a drink of the alcoholic liquor or cereal malt beverage."

Such an evidentiary rule will still require and encourage the licensee to "police" their patrons, but will not impose an impossible standard as currently interpreted by the agency. Even when there is strict liability for running a stop sign, the driver knew there was a stop sign.

The Senate committee declined to amend the bill accordingly, but did adopt the provisions in new section 3, beginning at page 4.

This new section has its origin from an Alaska statute which further deters underage efforts to purchase beverage alcoholic and makes the licensee a partner with the state in enforcing the prohibition of minors possessing and consuming.

This law is known as the "Brown Jug law". Several years ago a para-legal, who also happened to be vice-president of the Brown Jug liquor store in Anchorage, initiated a new Fake ID law for Alaska. He promoted the notion that the market for fake IDs could be better regulated, based on the following logic: When a minor uses a false identification or misuses a valid ID to attempt to circumvent the law, a crime has been committed, and that's the case in almost every jurisdiction. But too often the business that has been hoodwinked gets charged with the crime when it is in reality the business that is the victim. In Alaska, they took a different tack: a business that is the victim or attempted victim of such fraud can confiscate the ID, then sue the perpetrator in civil damages.

Licensees that are part of the solution are no longer part of the problem.

Thank you for your attention to and consideration of these matters.