

Date Issued: April 21, 1981 (AGO 81-42)

Requested by: Richard P. Gallagher, Mandan City Attorney

- QUESTION PRESENTED -

Whether the owner of an off-sale retail liquor license can dispense free samplings of alcoholic beverages on the licensed premises.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that state law does not prohibit the dispensement of free samples of alcoholic beverages on the licensed premises of an off-sale establishment. However, a local governing body may regulate or restrict such an activity pursuant to section 5-02-09 and 40-05-01(29) of the North Dakota Century Code.

- ANALYSIS -

Pursuant to sections 5-02-03 and 5-02-04 of the North Dakota Century Code, beer and liquor can be sold at retail in two possible manners, i.e., "on-sale" or "off-sale". The North Dakota Century Codes does not define the terms "on-sale" and "off-sale". However, the definition of general acceptance is found in a case entitled Affiliated Distillers Brands Corp. v. Gillis, 130 N.W.2d. 597, 598 (S.D. 1964), wherein the terms were defined as follows:

As the terms imply the off-sale store sells liquor by the package for use off the premises where sold and the on-sale establishment sells it by the drink for consumption on its premises.

Thus, an alcoholic beverage may be sold "on-sale" which means it must be sold by the drink and consumed on the licensed premises (in the bar), or it may be sold "off-sale" which means it must be sold by the package for consumption off the licensed premises. It is not permissible with either an on-sale or off-sale license to sell an alcoholic beverage by the drink for consumption off the premises. Nevertheless, the critical issue in the present case is whether a sale has in fact taken place.

In the instant case, the alcoholic beverages are to be dispensed free of charge to persons on the licensed premises of an off-sale establishment, and therefore no sale has occurred. State law does not specifically prohibit the mere dispensing and consumption of alcoholic beverages on the off-sale licensed premises so long as the prohibitions as to days and hours outlined in section 5-02-05, N.D.C.C., are adhered to. However, if it can be shown that a sale has taken place through indirect means, i.e., a cover charge at the door, then the above-mentioned activity would not be permissible. The facts of each particular case would have to be carefully reviewed in order to determine whether a sale has occurred.

Although state law does not specifically prohibit the consumption of free alcoholic beverages on the licensed premises of an off-sale establishment, it should be noted that

pursuant to sections 5-02-09 and 40-05-01(29), N.D.C.C., the local governing body may, by ordinance or resolution, regulate or restrict such an activity.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Daniel Hovland
Assistant Attorney General