

February 7, 2000
OPINION 00-01

55 Intoxicating Liquors
R.S. 26:596 and R.S. 26:714

The law permits a Louisiana producer of native wine to direct ship and sell native wines to Louisiana consumers who are domiciled in the state, notwithstanding that a consumer might live in prohibition territory. Insofar as solicitation may be part of an actual sale, a Louisiana producer who is licensed pursuant to the Louisiana Native Wine Law may legally solicit and receive the order for native wines within prohibition territory as part of the sale. An out-of-state manufacturer or retailer of sparkling wine and still wine is allowed to direct ship its product to a Louisiana consumer, as the point-of-sale is defined by the legislature as occurring outside of prohibition territory at the domicile of the manufacturer or retailer. The out-of-state manufacturer or retailer of sparkling wine and still wine is still prohibited by law from soliciting orders within prohibition territory, and also continues to be prohibited by law from selling those products within prohibition territory which have been denied by the electorate via local option.

Honorable Joseph Toomy
State Representative
P. O. Box 157
Gretna, LA 70054

Dear Representative Toomy:

In your correspondence of recent ate you advise that a question has arisen regarding the legality of the sale and shipment of sparkling wines and still wines into political subdivisions voted "dry" by the electorate. It has been suggested that to sell and ship sparkling wines and still wines directly to consumers within prohibition areas may violate state law.

Of concern is R.S. 26:714, which provides:

§ 714. Soliciting sale of alcoholic beverages in prohibition area; penalty

- A. No person shall seek, solicit, or receive orders from anyone for the purchase of alcoholic beverages within the limits of any municipality, ward, or parish in which the retailing of such beverages is prohibited.
- B. Whoever violates this Section shall be fined not more than one hundred dollars or imprisoned for not more than six months, or both.

The core of the offense of R.S. 26:714 is the solicitation of orders in prohibition territory. The prescribed penalties are imposed upon liquor dealers whether the dealer is located in or out of state, where the act of "seeking, soliciting, or receiving" the order occurs within the geographical limits of prohibition territory, regardless of whether or not the sale is actually consummated in prohibition territory.

R.S. 26:714, enacted by Act 46 of the 1906 Regular Legislative Session, may have been passed by the legislature in response to the holding of the Louisiana Supreme Court in the 1903 case of State vs. Shields, 34 So. 673 (La. 1903). The defendant in Shields was arrested for selling liquor in prohibition territory. The defendant had solicited and taken orders for the sale while in prohibition territory, but the goods had

been delivered to a common carrier for delivery outside of prohibition territory. The court held that no sale had occurred in prohibition territory; the sale was instead perfected outside of prohibition territory when ownership and risk transferred at the point of delivery to the common carrier. The defendant's conviction for selling liquor without a license in prohibition territory was reversed in Shields, but as current law reflects, the defendant's act of solicitation in dry territory is now prohibited by R.S. 26:714.

R.S. 26:326, as amended by Act 71 of the 1998 Regular Legislative Session¹, now authorizes any Louisiana producer, who is properly permitted by law, to engage in the production of native wines. The law further allows a Louisiana producer to sell and ship his product to consumers domiciled in the State of Louisiana, regardless of whether that consumer is domiciled in a wet or dry area. R.S. 26:326 as amended now provides:

§ 326. Native winery; wholesale and retail sales; intrastate shipment

Any person who has properly obtained a producer's permit, as provided for in R. S. 26:325, may engage in the production of native wines and may also sell the manufactured beverage at wholesale and at retail for consumption on or off the licensed premises, including by direct sale and shipment by common carrier to any consumer domiciled in the state of Louisiana. Sales of the manufactured beverage completed by delivery to the consumer through shipment by common carrier shall not be subject to the taxes levied by R.S. 26:341(B). (Emphasis added).

Those statutes which permit the production and sale of native wines are found within the provisions of the Louisiana Native Wine Law, R.S. 26:321, et seq. These statutes are collectively considered to be special legislation, and as such, those provisions prevail over any conflicting statutes dealing with alcoholic beverages in general. In Attorney General Opinion 99-228, this office concluded that a native winery in compliance with law may legally be operated in prohibition territory, notwithstanding the dry status of the municipality. Our research reflects the case of Martin vs. State of Mississippi, 501 So.2d 1124 (MS 1987), which, while not controlling in our jurisdiction, is nonetheless instructive, as the Mississippi Supreme Court held its own Native Wine Act controlling over conflicting statutes dealing with alcohol in general. We attach a copy of the case for your review.

In accord with Opinion 99-228, we similarly conclude that the provisions of R.S. 26:326 are controlling over R.S. 26:714 as special legislation and as the most recent expression of legislative will. Inasmuch as an act of solicitation within prohibition territory might constitute part of the sale of a direct shipment of Louisiana native wines to a Louisiana consumer, such act is now permitted by the Louisiana Native Wine Law.

¹ Attached is a copy of Act 71 of the 1998 Regular Legislative Session.

We note the legislature made no effort in Act 71 to define the act of sale of Louisiana native wines as occurring outside prohibition territory; rather, the legislature in R.S. 26:324 made it legal to produce and sell native wine within the state, regardless of local option, as R.S. 26:324A(1) provides, in pertinent part:

It shall be lawful to produce native wine in the state of Louisiana, including the production of nonalcoholic native wines and juices to be used for sacramental purposes, and to sell such native wine inside or outside of this state.....(Emphasis added).

In contrast, the legislature in Act 71 amended R.S. 26:359 to allow an out-of-state producer of sparkling wine and still wine to direct ship to consumers domiciled in Louisiana, but pointedly included a provision defining the sale to occur at a place outside of prohibition territory, specifically, placing the sale at the out-of-state domicile of the manufacturer or retailer. Note that R.S. 26:359, as amended, currently provides:

§ 359. Importation of alcoholic beverages by wholesalers only

- A. Except as provided in Subsection B of this Section, no alcoholic beverages as defined in R.S. 26:241(1) produced or manufactured outside of this state shall be sold or offered for sale in Louisiana, or shipped or transported into the state, except to the holder of a wholesaler's permit. Delivery of alcoholic beverages produced or manufactured outside of this state shall be made at the place of business of the wholesaler shown on the wholesaler's permit, and must be received and warehoused by the wholesaler at that place of business, where such alcoholic beverages shall come to rest before delivery is made to any retailer.
- B. (1) Notwithstanding the provisions of Subsection A of this Section, sparkling wine or still wine may be sold and shipped directly to a consumer in Louisiana by the manufacturer or retailer of such beverage domiciled outside of Louisiana, provided both that all taxes levied in R.S. 26:341(B) have been paid in full and that all of the following apply.....

*****.

- (2) For all purposes under this Title, the point of sale for transactions made pursuant to this Subsection shall be the place of domicile of the manufacturer or retailer. Delivery to the consumer in Louisiana shall be deemed to have occurred upon the placing of such beverages into the possession of a common carrier for transport into the state of Louisiana. (Emphasis added).

Because the foregoing language of R.S. 26:359 defines the point of sale outside the state of Louisiana at the place of domicile of the manufacturer or retailer, we conclude the legislature acted in recognition of the continued validity of those ordinances which prohibit the sale of alcoholic beverages within dry areas. Thus, both the act of solicitation as defined by R.S. 26:714 and the act of sale of alcoholic beverages, where either act occurs within prohibition territory, continue to be illegal conduct penalized as defined by law, noting again our exception with respect to those producers acting under authority of the Louisiana Native Wine Law.

Finally, we are aware you had concerns regarding the potential applicability of R.S. 26:596 which pertinently provides:

§ 596. Illegal transportation or delivery in prohibition areas

- A. When the sale of any alcoholic beverage containing more than one-half of one percent alcohol by volume is prohibited in any subdivision of this state, no wholesale or retail dealer or carrier for either of them shall deliver such beverage or cause such beverage to be transported or delivered in such subdivision to any retail or other dealer who participates or has participated in the purchase, barter, or exchange of such beverage, even though the purchase, barter or exchange be transacted outside of such subdivision.....

In response, the Louisiana Native Wine Law is controlling over R.S. 26:596 to the extent that the statutes conflict, as special legislation and also as the latest expression of legislative will. We find the amendments made by the legislature in 1998 to R.S. 26:359 via Act 71 to be controlling over R.S. 26:596 as the most recent pronouncement of the legislature. We note that 26:596 may not be entirely relevant to this discussion, insofar as that statute pertains to transactions between wholesale and retail dealers. Our discussion herein is limited to an examination of the legality of intrastate shipment of Louisiana native wines and interstate shipment of sparkling wine and still wine made directly to a Louisiana consumer.

In summary, the law permits a Louisiana producer of native wine to direct ship and sell native wines to Louisiana consumers who are domiciled in the state, notwithstanding that a consumer might live in prohibition territory. Insofar as solicitation may be part of an actual sale, a Louisiana producer who is licensed pursuant to the Louisiana Native Wine Law may legally solicit and receive the order for native wines within prohibition territory as part of the sale.

An out-of-state manufacturer or retailer of sparkling wine and still wine is allowed to direct ship its product to a Louisiana consumer, as the point-of-sale is defined by the legislature as occurring outside of prohibition territory at the domicile of the manufacturer or retailer. The out-of-state manufacturer or retailer of sparkling wine and still wine is still prohibited by law from soliciting orders within prohibition territory, and

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also continues to be prohibited by law from selling those products within prohibition territory which have been denied by the electorate via local option.

Should you have other questions in which we may provide assistance, please contact this office.

Very truly yours,

RICHARD P. IEYOUNG
ATTORNEY GENERAL

BY: _____
KERRY L. KILPATRICK
ASSISTANT ATTORNEY GENERAL

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Honorable Joseph Toomy
Representative
P. O. Box 157
Gretna, LA 70054

Date Received:
Date Released: February 7, 2000

KERRY L. KILPATRICK
ASSISTANT ATTORNEY GENERAL