

Playing “Who’s the Buyer”

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Somebody just bought an alcoholic beverage in your licensed premises. How the purchase was made, who participated, who observed what, and where the money came from may suddenly all become very important. All these factors may be the subject of an administrative hearing before a judge from the ABC.

In the old days, your customer would buy that beer with real money, hopefully U.S. currency. Now that’s still an option, but there are other acceptable methods of payment. There are credit cards, debit cards, ATM cards and other plastic keys to the wonderful cashless world of electronic money transfer. In those good old days, if an adult brought beer to the counter or ordered a beer from a bartender, and a minor paid for the product in the observant presence of your selling employee, the ABC would come after your license with an accusation alleging a violation of Bus. & Prof. Code Section 25658(a), that is, a simple sales to a minor case since it was a minor who purchased the product.

With the advent of broad acceptance of credit and debit cards and alternate means of electronic transfer, the ABC is racing to keep up with the changes and maintain its prosecutorial abilities. Here are some examples of cases the ABC may or may not choose to prosecute; you decide which ones. Some are easy to find the violation, some not so easy.

Three customers are together. They look like they could be in their late teens (because they are) to early twenties. One of the three takes a Corona to the counter (or orders it at the bar) and another puts \$5 on the counter. The third takes the beer out of the store or away from the bar. No ID is requested or shown. The sale is completed. Who bought? Who sold? The ABC doesn’t much care who bought since all three are only 19 years old. Your seller will get the ticket, and you will get the ABC accusation.

Your regular customer who you know to be in his late thirties buys a six pack of Bud, and a four pack of some high alcohol volume sweet drink you’ve seen advertised with cartoon characters in sports magazines. Unfortunately the sweet stuff labeled as being around 15% alcohol by volume was selected by a teenager whose \$4.99 paid for it. Violation or no violation? It depends. If the seller was in a position where he saw or reasonably should have seen the transaction where the teen gave the adult the \$4.99, there is a violation since the seller knew who was really buying the product using the adult as a subterfuge. There will be an accusation filed. Be aware that some police decoys engage in similar activities where they “shoulder tap” an unsuspecting adult who takes their funds and buys the product. If done in the presence of the seller, there are two citations issued: one to your seller and one to the willing adult patron who furnished the alcohol to the decoy.

Three kids (all under 21) run up a tab at your excessively pricey restaurant. No one checks their identification. No one finds out they're all under 21. The tab is paid by credit card. Lucky for the kids they have mom's credit card. Unlucky for you, the ultimate source of the dollars doesn't influence the ABC. The Department's thought is: "The kid paid, we don't care where the kid got the money." It really doesn't make any difference here whether the visible source of money is plastic or paper. Here the decision for the ABC is even easier, because the kids ordered, possessed, consumed and paid for the alcohol. The tab? Exactly \$250. The ABC fine? Between \$750 and \$1500. Calling your lawyer at midnight? Priceless.

Revisit the above scenario exactly and change one thing. The tab is run up against a debit card. What changes in that case? Nothing of import. The results will still be an ABC accusation.

Once again: same bar, same night, different table. There's a group of college seniors, all nearing twenty-two. Or they're college seniors on the football team, all nearing twenty-five. Each orders and receives a mug of wonderfully expensive imported beer. However, one kid has his freshman girlfriend there. She's eighteen. She pays for everyone with her credit card and signs the credit slip. She had been earlier ID'd and refused service, because she was underage. Clearly the seniors had received, possessed and consumed the beer. But when your waitress later accepted payment from the minor, the ABC may well take the position that the minor purchased the beer. An informed high level source at the ABC indicated that the Department would have to evaluate that circumstance and would consider what the reasonable employee should do in that situation. You might be well served to warn your staff about from whom they take payment. It would be clearer if the buy point were at an off-sale counter where the seniors take the product to the cashier and the minor reaches into her pocket to pay for the entire purchase. There, the seller would be required to recognize that the buyer is under 21 and refuse the sale.

Lurking under the surface of these transactions are several key questions: What constitutes a sale? Who can be the designated buyer? With what level of powers of observation should your employees be charged? The courts in California have defined "sale" as the moment when title or possession has transferred for consideration (i.e. payment). The intent of the parties plays a role in that definition.

Another scenario: Three kids come up to the sales counter. One is known to be twenty-two and has an armful of beer bottles. He is asked for and shows a Driver's License showing him to really be over twenty-one. The second kid is standing next to the first. She's eighteen and is holding nothing. The beer really is just for the adult. The third kid is in the general vicinity and is wandering around the other two not paying much attention. The clerk asks, "How do you want to pay for the beer?" The adult says, "Debit card." The clerk turns his back to the counter to find a plastic bag. At that moment, the eighteen year old gets a debit card from the third kid and swipes it. She keys in the PIN number. No signature is required. The cash register prints a receipt that the adult takes with the product, and the three leave the store. By the way, the debit card belongs to the

mother of the third kid. When the ABC files the accusation, the allegation is that the eighteen year old purchased the beer and furnished it to the adult. The fact that mom's account actually supplied the funds doesn't matter to the Department.

The ABC's proceeding in this case may depend on whether the clerk knew or should have known of the activities of the eighteen year old. The questions the ABC will ask in analyzing this case is what the clerk saw or should have seen. Was the clerk aware of the eighteen year old's involvement? Should the clerk have been aware of the eighteen year old's involvement? What are reasonable expectations and what reasonable precautions should be taken in this instance. There is difficulty in this since the debit card does not require a signature. It must be swiped through a scanner and verified by the PIN number, but those acts don't require the clerk's participation. Those acts can be done quickly and surreptitiously. A fair analogy may be where a minor slips money to the purchasing adult. If that act is done in a way to alert the clerk so that the clerk knew or should have known who the purchaser was, the violation may be established according to Department reasoning.

The Department may be placing an unfair burden on its licensees, and those precautions that the Department seems to be requiring may be difficult and even unrealistic. The Department's constitutional mandate is to protect public welfare and morals. However, that mandate has to be balanced against the concept that a licensee cannot be disciplined except for good cause. In the cold hard review where lawyers dissect the above sales transactions, the key in each circumstance may turn on what a reasonable seller would do faced with those various facts. It's better to train your staff as to all possibilities within the operation and layout of your establishment. The violation may be more defensible. Even more importantly, the errant sale may be avoided. After you've warned your clerk about the possibility of a silent minor participant, your seller exercises all best efforts and actually sells to an adult only to be told later by an ABC investigator that he/she just sold to a minor who quietly paid for the alcohol by stealthy use of a debit card, it's time to defend.

Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."