

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 10

ALCOHOLIC BEVERAGES - Consumption of alcoholic beverages on licensed premises after closing time;

ALCOHOLIC BEVERAGES - Operation of poker game on licensed premises during closed hours;

GAMBLING - Operation of poker game on premises of establishment licensed to sell alcoholic beverages during hours when establishment is required to be closed;

ADMINISTRATIVE RULES OF MONTANA - Sections 42.12.123, 42.13.106;

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MONTANA CODE ANNOTATED - Sections 16-3-304, 16-3-305, 23-5-311, 23-5-321, 23-5-322;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 67 (1977).

- HELD: 1. When an establishment licensed to sell alcoholic beverages is operated in conjunction with the lawful conduct of a poker game, the part of the licensed premises where alcoholic beverages are sold is not required to be closed off during the hours of closure set forth in section 16-3-304, MCA.
2. Persons on the licensed premises, including the poker room, may not consume alcoholic beverages during the hours of closure, even if the beverages were purchased prior to the closing time.

18 March 1987

James A. Johnson
Shelby City Attorney
860 Oilfield Avenue
Shelby MT 59474

Dear Mr. Johnson:

You have asked my opinion on several questions which concern the request of a local bar owner to conduct a poker game between the hours of 2 a.m. and 8 a.m. on the licensed premises but in a separate room adjacent to the bar area.

The bar owner, who holds an all-beverage license, operates a poker game during bar hours in a room separated from the bar by a wall with windows and a door. The poker room has access to the outside, and the inside door may be locked to prevent persons in the poker room from entering the bar area. However, the rest rooms are located in the bar area, and persons in the poker room must enter the bar room in order to use the rest rooms.

The owner of the bar would like to conduct a poker game in his poker room after 2 a.m. and has inquired as to the circumstances under which he may lawfully do so. My review of the provisions of sections 16-3-304 and 16-3-305, MCA, as amended by the Legislature in 1985, leads me to conclude that, in the absence of local regulations to the contrary, the inquiring licensee may

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operate a poker game on the licensed premises between the hours of 2 a.m. and 8 a.m. without closing off the bar room; however, the licensee may not allow the consumption of alcoholic beverages on the licensed premises, including the poker room, during the hours of closure.

Section 16-3-304, MCA, sets the hours of closure for establishments licensed to sell alcoholic beverages and allows a city or town to further restrict the hours:

Closing hours for licensed retail establishments. Except as provided in 16-3-305, all licensed establishments wherein alcoholic beverages are sold, offered for sale, or given away at retail shall be closed each day between 2 a.m. and 8 a.m.; provided, however, that when any municipal incorporation has by ordinance further restricted the hours of sale of alcoholic beverages, then the sale of alcoholic beverages is prohibited within the limits of any such city or town during the time such sale is prohibited by this code and in addition thereto during the hours that it is prohibited by such ordinance. During such hours all persons except the alcoholic beverage licensee and employees of such licensed establishment shall be excluded from the licensed premises.

Section 16-3-305, MCA, provides a limited exception to the exclusion requirement in situations where the licensed establishment is operated in conjunction with a lawful business:

Sale of alcoholic beverages during closed hours unlawful -- lawful business need not be closed. During the hours when the licensed establishments where alcoholic beverages are sold at retail are required by this code to be closed, it shall be unlawful to sell, offer for sale, give away, consume, or allow the consumption of alcoholic beverages. When an establishment licensed to sell alcoholic beverages is operated in conjunction with a hotel, restaurant, bus depot, railway terminal, grocery store, pharmacy, or other lawful business other than that of the sale of alcoholic beverages, then such other lawful business need not be closed.

Section 16-3-305, MCA, assumed its present form in 1985 when the Legislature enacted SB 357, entitled "An Act

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Removing The Requirement That A Business Operated On The Same Premises As An Establishment Licensed To Sell Alcoholic Beverages Close Off From 2 A.M. To 8 A.M. The Part Where Alcoholic Beverages Are Sold." Among other changes, the legislation specifically removed a provision from the prior version of section 16-3-305, MCA, which required closure of that part of a licensed establishment where beer or liquor is sold whenever some other lawful business operated in conjunction with the licensed establishment remained open after 2 a.m. This change is significant since in State v. Perez, 126 Mont. 15, 243 P.2d 309 (1952), the Montana Supreme Court held that former sections 16-3-304 and 16-3-305, MCA, were violated when a licensee, who conducted a restaurant in conjunction with his liquor establishment, allowed patrons to dine and dance in the bar room after 2 a.m., even if no liquor was sold. The Court viewed the statutory terms "closed" and "excluded" as requiring the licensee to prevent admission to the liquor establishment, i.e., the bar room, particularly where the restaurant business could be conducted without using the bar room.

Interpreting the earlier version of these statutes, the Montana Department of Revenue adopted a rule in 1975 (§ 42.12.123, ARM) which required the licensee to close off the facilities and equipment of the licensed premises from any on-premises gambling activities during the hours of closure. This administrative rule required absolute closure of the bar room for all purposes. The rule was amended, effective February 15, 1985, to require only that the licensee restrict persons from gaining access to alcoholic beverages located in a room or service area which was used for the purpose of selling or serving alcoholic beverages. See 1985 MAR, p. 167. Following the enactment of SB 357, the Department completely repealed section 42.12.123, ARM, effective August 16, 1985. See 1985 MAR, p. 1155.

Several canons of statutory construction are relevant to your inquiry concerning the effect of SB 357. First, the intention of the Legislature controls the proper interpretation of a statute. Montana Department of Revenue v. American Smelting & Refining Co., 173 Mont. 316, 567 P.2d 901 (1977). Second, in construing an amendatory act, such as SB 357, the Legislature will be presumed to have intended to make some change in the existing law. Pilgeram v. Haas, 118 Mont. 431, 167 P.2d 339 (1946). Third, the title of an act is presumed to indicate the Legislature's intent. Lastly, great deference must be shown to the interpretation given a statute by the agency charged with its administration.

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Department of Revenue v. Puget Sound Power & Light Co.,
179 Mont. 255, 587 P.2d 1282 (1978).

I am guided by these rules of statutory construction to the conclusion that the 1985 amendments to sections 16-3-304 and 16-3-305, MCA, removed any requirement that the local bar owner close off the bar room or restrict access to alcoholic beverages during closed hours in order to conduct another lawful business on the same premises. Since poker is an authorized card game under the provisions of section 23-5-311, MCA, and may be licensed and regulated by local governing bodies pursuant to sections 23-5-321 and 23-5-322, MCA, I conclude that the operation of a poker game is a lawful business for purposes of section 16-3-305, MCA. While I have previously held that a city may restrict by ordinance the hours of licensed gambling (37 Op. Att'y Gen. No. 67 at 271A (1977)), state law does not prohibit poker games during the hours of closure. In the absence of a local regulation to the contrary, a bar owner may lawfully conduct a poker game on the licensed premises between 2 a.m. and 8 a.m.

However, the plain and unambiguous language of section 16-3-305, MCA, absolutely forbids the consumption of alcoholic beverages on the licensed premises during the hours when the licensed establishment is required to be closed. It is clear that the statute does not permit the consumption of alcoholic beverages in the poker room or anywhere else on the licensed premises after 2 a.m., even if the beverages were purchased prior to 2 a.m.

Finally, I call your attention to section 42.13.106, ARM, which provides that a licensee may not change the manner of operation of the licensed premises without the prior written consent of the Department of Revenue. If the local bar owner intends to conduct an all-night poker game, he must comply with the requirements of this administrative rule.

THEREFORE, IT IS MY OPINION:

1. When an establishment licensed to sell alcoholic beverages is operated in conjunction with the lawful conduct of a poker game, the part of the licensed premises where alcoholic beverages are sold is not required to be closed off during the hours of closure set forth in section 16-3-304, MCA.
2. Persons on the licensed premises, including the poker room, may not consume alcoholic beverages during the hours of closure, even if

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the beverages were purchased prior to the closing time.

Very truly yours,

MIKE GREELY
Attorney General