

April 1, 2014

Telephone: (717) 783-9454

Fax: (717) 787-8820

Joseph Grappone, Esquire

RE: Estate Planning and License Ownership

Dear Mr. Grappone:

ISSUE: This is in response to your e-mail of February 12, 2014, in which you state that you represent an unidentified brewery licensee (“G”) held by wife individually, as well as a restaurant licensee (“R”) held by a Pennsylvania limited liability corporation (“LLC”), the sole member of which is a Pennsylvania corporation. Wife’s husband is the majority stockholder of that Pennsylvania corporation.

You are doing some estate planning for wife and husband, and you submit four (4) specific license ownership models with a request for guidance as to the legality of each. The four (4) models will be set forth below in the response section. You do not indicate that the G and the R licenses are part of a couplet, so it will be assumed for purposes of this response that the G and the R are completely independent from one another.

OPINION: As you likely know, the Liquor Code imposes strict interlocking business prohibitions. A brewery license is a manufacturing license, whereas a restaurant license is a retail license. Section 438(c) of the Liquor Code generally prohibits a person from possessing more than one (1) class of license. [47 P.S. § 4-483(c)]. Furthermore, section 411 of the Liquor Code generally prohibits a person or entity from holding an interest in both a retail and a manufacturing license. [47 P.S. § 4-411].

Section 411(c) of the Liquor Code, in relevant part, states that:

Excepting as herein provided, no manufacturer, or officer, director, stockholder, agent or employe of a manufacturer shall in any wise be

interested, either directly or indirectly, in the ownership or leasehold of any property or the equipment of any property or any mortgage lien against the same, for which a hotel, restaurant or club license is granted; nor shall a manufacturer, importer or sacramental wine licensee, or officer, director, stockholder, agent or employe of a manufacturer, importer or sacramental wine licensee, either directly or indirectly, lend any moneys, credit, or give anything of value or the equivalent thereof to, or guarantee the payment of any bond, mortgage, note or other obligation of, any hotel, restaurant or club licensee, his servant, agent or employe, for equipping, fitting out, or maintaining and conducting, either in whole or in part, a hotel, restaurant or club licensed for the selling of liquor for use and consumption upon the premises.

[47 P.S. § 4-411(c)]. Likewise, section 411(d) has a similar prohibition, and states:

Excepting as herein provided, no hotel licensee, restaurant licensee or club licensee, and no officer, director, stockholder, agent or employe of any such licensee shall in any wise be interested, either directly or indirectly, in the ownership or leasehold of any property or the equipment of any property or any mortgage lien against the same, used by a manufacturer in manufacturing liquor or malt or brewed beverages; nor shall any hotel, restaurant or club licensee, or any officer, director, stockholder, agent or employe of any such licensee, either directly or indirectly, lend any moneys, credit, or give anything of value or the equivalent thereof, to any manufacturer for equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment used for the manufacture of liquor or malt or brewed beverages.

[47 P.S. § 4-411(d)].

The issue of sales of beer by the G to the R will become critical to the analyses of your various license ownership models because of a limited exception to the above section. A person who holds a five percent (5%) or less interest in a publicly or privately-held entity owning a restaurant or eating place retail dispenser license is not deemed to have a “financial interest” and is not subject to the interlocking business prohibitions if the person is not an officer or employee of, nor has an interest in, nor exercises any control over any other licensed entity that engages in

any sales to or from the restaurant or eating place retail dispenser licensee. [47 P.S. §§ 4-411(e), 4-443(g)]. All of these elements must be met, the most relevant one for your present purposes being the “interest in” another license.

An additional exception exists for a manufacturer’s license or limited winery licensee located at the same location as a hotel or retail dispenser license. This is the aforementioned “couplet” which is presumed not to be applicable to your scenario, but will be briefly addressed. Specifically, sections 411 and 438 state:

An entity may acquire both a manufacturer's license or a limited winery license and a hotel, restaurant or retail dispenser license for use at the same location and more than one location may be so licensed. The licenses and a person's interest in the licenses or in the entity holding the licenses shall not be subject to this section.

[47 P.S. §§ 4-411; 4-438(c)].

As a threshold matter, it is permissible, under the Liquor Code, for a wife to hold a manufacturing license and her husband to hold a retail (restaurant) license, as long as the finances pertaining to each license are kept completely separate from the other. You do not provide any information regarding ownership or leasing of the real property or the personal property of either the G or the R, so it will be presumed for purposes of this response that all aspects of ownership, operation, financing and the like are in compliance with all applicable rules and regulations.

Turning now to the proposed license ownership models, in the first model you ask whether, if ownership of the G is changed to a Pennsylvania corporation or LLC that is a trust for family members, beneficiaries of that trust may also be individual stockholders of the Pennsylvania corporation that is the sole member of the existing R license-holding LLC. That is, certain individuals would hold an interest in the G by virtue of being beneficiaries of the ownership trust, as well as holding an interest in the R by virtue of being stockholders of the R’s member company.

This scenario would violate the above-mentioned interlocking business prohibition if the G makes any sales of its malt or brewed beverages to the R. If the G does not make any sales of its malt or brewed beverages to the R, then it may be possible to fit into the exception to sections 411 and 438 regarding “financial interest,” depending on the precise percentages of interest in the trust that each trust beneficiary holds. The Board’s Bureau of Licensing (“Licensing”) would

make an investigation into all aspects of the ownership of the G trust as well as the R LLC and the Board has the discretion to accept or reject an exception regarding ownership structure.

In your second license ownership model, you ask whether, if ownership of the G is changed to a Pennsylvania corporation or LLC that is a trust for family members, beneficiaries of that trust may also be beneficiaries of another trust that owned stock of the Pennsylvania corporation that is the sole member of the existing R license-holding LLC. That is, certain individuals would hold an interest in the G by virtue of being beneficiaries of the ownership trust, as well as holding an interest in the R by virtue of being beneficiaries of an ownership trust that is the R LLC's member company.

The response regarding this second license ownership model is the same as that for the first license ownership model. The first key point is whether the G makes any sales of its malt or brewed beverages to the R. If so, then the ownership model would violate the interlocking business prohibition for the same reasons as outlined above. If not, then further analysis would have to be undertaken to determine whether the limited exception regarding "financial interest" would be met.

In your third license ownership model, you introduce the concept of a marital Q-TIP trust. You ask whether wife may still hold the G license if a marital Q-TIP trust in which she has only income rights also owns stock in the Pennsylvania corporation that is the sole member of the R LLC. That is, wife would remain as sole individual owner of the G license, but a Q-TIP trust of which she is a beneficiary would have an ownership interest in the R license. You do not indicate whether husband would retain his current interest in the R license.

As before, any changes in corporate structure would be subject to a full investigation by Licensing, including but not limited to a legal review of all relevant trust and corporate documents. It is the general understanding of this office that a "Q-TIP trust" refers to a restrictive marital trust that provides limited access to the trust assets by a surviving spouse. For example, the surviving spouse may be granted certain levels of annual income from the trust, but that surviving spouse may not withdraw assets from the trust or make any dispositions of the trust assets. The trust assets are bequeathed separately to a third party or parties.

It is important to note that a Q-TIP trust does not contain any assets while the creating spouse is still alive, and the creating spouse retains full control of the

assets that are otherwise designated to the Q-TIP trust. In the instant case, it is assumed that you intend for husband to establish a Q-TIP trust for the eventual benefit of wife.

Without benefit of the full documentation that a Licensing investigation would provide, it is the general position of this office that this scenario would likely violate section 411(d) and/or (e) of the Liquor Code. That is, as beneficiary of the Q-TIP trust, wife would be seen to have an interest in the R license. As stated, this is impermissible. [47 P.S. § 4-411(d), (e)]. The result would be the same regardless of the type of trust involved. That is, the fact of the scenario involving an income-only Q-TIP trust is not the decisive factor; rather, it is that wife is the beneficiary.

In your fourth license ownership model, the fact pattern of the third model is altered slightly such that the G license would be held by a trust of unspecified type of which wife is the beneficiary. That is, wife would not individually hold the G license; rather, a trust for her benefit would be the licensee. In addition, wife would be an income-only beneficiary of a Q-TIP trust ultimately holding the R license. As in the above scenario, this model would also violate the interlocking business prohibitions as wife is seen to have interests in both the manufacturing and the retail licenses.

Finally, since you did not inquire, it is presumed that you are aware of the process to be undertaken in the event of a compliant change in business structure. In short, if the actual entity holding a license is changing, then a person-to-person transfer application would need to be filed. Although change in the ownership of the stock of a corporate license is not considered to be a transfer, the transaction still needs to be reported to the Board within fifteen (15) days of the change.

The Board's Regulations require that retail liquor licensees reporting a change in officers, directors or stockholders that would constitute a change in majority ownership or controlling interest post notice of the change (Form PLCB-1296). [40 Pa. Code § 3.13(b)]. Change of business structure forms for changes of corporate officers [Form PLCB-866] shall be accompanied by a fee of two hundred dollars (\$200.00) when the change of officer does not constitute a change in majority/controlling interest. [40 Pa. Code § 5.91(d)].

If the change of corporate officer constitutes a change in majority/controlling interest, fees will be assessed in accordance with section 614-A of The

Administrative Code of 1929 (71 P. S. § 240.14A). [Id.]. In that event, the Form PLCB-866 must be accompanied by a fee of six hundred-fifty dollars (\$650.00). Please also note that Form PLCB-2018, Request for Criminal History Check and a ten dollar (\$10.00) fee must be submitted for each new owner.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police,
Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 14-116