

Are You Practicing Safe Sales?



By Sara Schorske

LIFE USED to be so simple. In the "good old days," wineries were ready to make a sale to any willing customer, anywhere, any time. As far as we were concerned, selling to a wine lover was not just a transaction between consenting adults, it was a match made in heaven. Only five years ago, it never would have occurred to anyone in the wine industry that sales could be dangerous to the winery's health and even threaten its future existence. Now, all that has changed. The compliance risk factor in wine sales has never been higher, at least not since Prohibition was repealed. Not only have several states made a felony of the simple, natural act of interstate wine sales to consumers, but many states have also beefed up enforcement activities intrastate as well.

Here in California, the Business Practice Section of our ABC has gone from a tiny staff whose activities were necessarily mostly administrative, to a whole enforcement branch operating two field offices and several active investigators. How is an innocent winery to stay that way? Here are some helpful tips for making safe sales to out of state consumers.

Most states still prohibit personal transportation or direct shipment in ALL forms and of course, a few states have made direct shipment a felony. Enforcement activity in this area is growing and restrictions are tightening. States have so far failed to make

their enforcement actions stick in the courts, but they have not given up hope that a new approach (a new law HR 1063, a federal bill proposing to make Webb, Kenyon enforceable by the states) will turn the tide in their favor. For this reason, all wineries should arm themselves with a bit of sales education.

The Hidden Speed Traps of Reciprocal Shipping

Wineries may believe that sales to consumers in reciprocal states are always safe. If you have been proceeding without caution, it is time to put on the brakes. The reciprocal shipment privilege is very restricted. Each state has its own limitations on quantity and some also prohibit advertising or impose other requirements. Learn the laws of each state to stay in full compliance. (Note: The advertising restriction generally focuses on print or direct mail advertising sent right to residents of the state, but at least one state, Minnesota has specifically outlawed Internet solicitations.)

Unexpected Speed Bumps on the Superhighway

A few non-reciprocal states allow shipments of small quantities under certain circumstances. Louisiana is currently leading the pack in permissiveness allowing limited shipments as long as the shipper registers with the State ABC, reports shipments annually, and pays state and local taxes. Wineries across the country hope that other states will follow Louisiana's example in this regard, and California will most likely enact a similar law this year. But there are still risks, even in this widest open of all states. Like many states in our country, Louisiana has dry areas with local jurisdictions as small as single voting precincts where residents have elected to opt

for total or partial prohibition in their area. Some of these areas are totally dry, while others allow sales of beer but not stronger alcoholic beverages, and still others allow sales of low alcohol 3.2% beer only.

The Louisiana ABC has done its best to compile a list of dry areas, but to date has not been able to provide complete information; it is just too complicated! This uncertainty exposes wineries to the possibility of inadvertently soliciting in a dry area. Beware: state and local laws in Louisiana provide for penalties of up to \$100, six months in prison, or both, for solicitations or sales of alcoholic beverages into dry areas. Even though administrative and criminal actions against violators in other states have been thrown out of court due to insufficient jurisdiction, the Louisiana shipper's registration may create a nexus (legal connection) sufficient to establish jurisdiction.

Minimizing the Risks of Illicit Sales

Most wineries are abstaining from sales among high risk groups (residents of the felony states), but many wine sellers (retailers as well as some wineries) are continuing to be hotly pursued by customers from the rest of the country who have a passion for fine wine. If you want to play the field in other states, proceed with these cautions:

- Generally it is safer for the consumer who purchases at your tasting room to ship the wine back to themselves. Even if you make the shipping arrangements for your customers, show the purchaser's name and address in the shipper's return address. The states are not prosecuting their own citizens in their efforts to curtail direct shipping.
- Make sure out of state customers

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know (state this on sales documents) that you consider the sale to be made at your winery and that the purchaser is responsible for delivery to their chosen location.

Tax note: Here in California, you must remit excise and sales taxes when you sell to a tourist who visits your tasting room and carries the wine home. However, when you ship to an out of state customer by common carrier, our tax laws specifically exempt the wine from both excise taxes and sales taxes. Even if you consider the sales to be made at the winery, and even if the customer is responsible for making the shipping arrangements, you do not have to collect and remit these taxes.

- Many of the enforcement actions to date have involved purposely constructed stings, using underage decoys to place and receive orders. The best way to protect yourself from painful stings is to always get the consumer to state his or her birth date or age when you accept a mail order or phone order sale. If the decoy lies about his or her age, the enforcement action is invalidated by the fraudulent misrepresentation and you are off the hook.

- Some, but not all, states allow residents to bring wine back after a visit in another state. However, the risks here are small: if consumers transport only small quantities, they almost always get away with it.

- It is NEVER legal to send wine through the US Postal Service.

Safe Sales Within Your Own State

The risks of intrastate sales are entirely different and more complex than the risks involved with direct interstate shipping. In this regard, state laws vary from state to state, but there are overall patterns. In general, privileges are restricted to the licensed premise, as defined when the license was obtained. Promotional activities are limited, especially when it comes to giving things of value to retailers or consumers in connection with the sale of alcoholic beverages. Under this category fall restrictions in the area of sampling, credit terms, accepting returns, conducting consumer merchandise programs, and participation in promotional events, especially those involving retailers.

With these generalizations in mind,

here are a few tips based on California law that will give wineries in other states a feel for when they may be at risk:

- Check to see how your licensed premises are defined and make sure that all the areas where you regularly pour tastes, etc. are included in its boundaries.

- Never take orders away from your licensed premises. Orders may not be taken at a winetasting sponsored by an organization, or at a winery-sponsored tasting held away from the winery. Order forms may not be distributed either.

- Be aware of possible violations, such as parents furnishing alcoholic beverages to minors, at unsupervised outdoor areas such as picnic tables. Even if these areas are not on your defined licensed premises, if they are on your property they are under your control and are your responsibility.

Often, exceptions to general prohibitions are allowed, but very strict restrictions apply. When exercising this type of privilege, learn the limits and drive between the lines! For example, California wineries and importers are allowed to participate in winemaker dinners, but must be careful how they advertise such events. Also, under no circumstances may wine be provided for free to the retailer!

California wineries may donate wine to non-profit organizations and assist at organization sponsored tastings, even when covered by a one-day license. But beware of participating in events in which permanent retailers are involved. If a caterer is coordinating the event, or if the hotel or restaurant where the event is held is operating a no-host bar in the same room, stay away!

Sometimes an illegal promotion can be restructured to make it legal and sometimes a change in semantics is all it takes. For example, it is illegal to make an offer such as the following: Get a *free* corkscrew with every purchase of a case. However, it is legal to make the identical offer if you explain it as follows: A corkscrew is *included* in the price when you purchase a case.

A famous talk show host in the Bay Area closes his broadcast each day with the statement: It is better to ask forgiveness than permission. That may sometimes be true, but in a regulated industry like ours, it is always best to know and minimize the risks ahead of time, before you decide your course of action.



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