

# MINUTES OF OLCC ADVISORY COMMITTEE MEETING

## OAR 845-007-0020(2) Restrictions (Happy Hour)

Tuesday, November 24, 2009 at 9:00 AM in Room 103A,  
Commission Offices, Portland

Present: Bill Johnstone (Oregon Association of Broadcasters); Joanie Sveinbjornsson (DISCUS); Hobie Pearson (Elk Rock Bar & Grill/Action Server Education); Judy Craine (Holman Bar & Grill); Dan Zilka, Ron Mitchell (Fish Grotto); Brian McMenamain (McMenamins); Lise Gervais (Public Action Management); Bill Perry, Kara Thallon (Oregon Restaurant Association); Judy Cushing, Pete Schulberg (Oregon Partnership); Jeff Ruscoe (Mental Health & Addictions Services); Theresa Marchetti (Office of Neighborhood Involvement); Donna Vandall, Lynne Johnson, Juliet Follansbee, Linda Ignowski, Christie Scott, Laura Paul, Jennifer Huntsman (OLCC Staff).

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Invited but not Present: Michael DeKalb (LaurelWood Public House & Brewery); Janice Krem (Attorney); Dan Lenzen (Gypsy, Barracuda); Chuck Hayes (Governor's Advisory Committee on DUII); Kathy Stromvig (MADD); Pamela Erickson (Public Action Management); Stephanie Soares Pump (Alcohol & Drug Abuse Prevention Advocate); Officer Charles Harris (Portland Police Bureau); Gretchen McKenzie (ODOT).

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The meeting began at approximately 9:10 a.m. in Room 103A of the OLCC's Milwaukie office. Jennifer Huntsman, OLCC Rules Coordinator, moderated the discussion and opened the meeting with a review of the process, history of how this rulemaking came about and introductions of those in attendance and their interest in this rule. Ms. Huntsman reminded everyone of the purpose of this meeting.

Ms. Huntsman explained that the Legislature has said (through Oregon's Administrative Procedures Act) that it wants agencies to involve interested parties in policy development. Rulemaking is one way agencies develop policies and Advisory Committees are a good way to hear from people or groups likely to have an interest in a particular issue - or who are likely to be impacted by a policy or change an agency is considering. She explained that Advisory Committees are just that: advisory. The purpose of an Advisory Committee is to give everyone a chance to express their thoughts on issues. The Commissioners are not bound by what we discuss or decide in these meetings. They are the policy-makers, and will make the final decision on whether to adopt the proposed amendments. Under Oregon's Public Meeting Law, this meeting is open to the public. We will take and retain minutes of the meeting. The discussion today will be informal; the minutes will

reflect the main points that are made. We do not identify who said what, except for Ms. Huntsman. Everyone on the mailing list for this rule will be sent a copy of the minutes; attendees were reminded to record their name and email address on the sign-in sheet.

Ms. Huntsman explained that we are meeting to discuss the possible amendment of OAR 845-007-0020(2) Restrictions (Happy Hour). This rule restricts the type of alcohol advertising that liquor licensees may use. Section (2) specifically regulates advertising outside a licensed premises of alcoholic beverages for on-premises consumption. Due to recent case history, staff is recommending amendment of section (2) of this rule in order to make it more enforceable and clearer to licensees.

The proposal includes eliminating the prohibition against certain temporary price reduction terms such as “happy hour” and instead replacing it with a prohibition against temporary price reductions expressed as a specific price, in order to prevent price wars on alcoholic beverages to be consumed on a licensed premises.

Ms. Huntsman explained that we would be discussing the rule language in detail and that this discussion and suggestions will be used in the permanent rulemaking process.

There will be a formal rulemaking hearing on this matter on Tuesday, February 9, 2010 at 10:00 am in Room 103A. Ms. Huntsman advised that she will repeat that information at the end of the meeting, but asked everyone to please note the dates on their agendas for the hearing and public comment period. Staff plans to have this back to the Commissioners for the April 2010 meeting for final action to adopt any amendments to the rule.

Ms. Huntsman asked members to introduce themselves before proceeding to discuss the proposed amendments.

The discussion began with the committee members supporting the proposal to add a cross-reference to the Prohibited Conduct rule (OAR 845-006-0345(10)); this rule prohibits certain promotional practices such as unlimited drinks for a fixed price during a set time period and reduced price drinks after midnight. The new proposed language would emphasize that not only are these practices prohibited but so is advertising them.

One committee member asked whether the temporary price reduction rule language covers only on-premises licensees or both on and off-premises. It was explained that section (1) of the Restrictions rule applies to all liquor licensees, but section (2), both the current and proposed language, only applies to on-premises locations. One member raised the issue of a possible constitutional conflict with rule language that may restrict free speech based on content and suggested that the

Commission seek legal clarity.

The discussion then turned to “happy hour” and temporary price reductions. All committee members were in agreement that the current language prohibiting terms such as “happy hour” should be deleted, but what language to replace it with made up most of the committee’s discussion.

There was agreement that drink advertising is everywhere, much of it is being done by non-licensees (Facebook, Twitter, “Barfly” magazine), and that this is out of the Commission’s control. The goal of what the Commission does regulate is to strike a balance – to provide flexibility for businesses to compete and survive using reasonable business practices while also meeting public safety concerns by preventing over-consumption and underage drinking.

Some committee members were opposed to any new language where licensees would be using cheap drinks to get people in the door, and they were most concerned with underage drinking. They would rather keep the focus on food specials advertising. Other members felt that it is not the “happy hour” drinks that are getting people to come in and drink a lot of drinks, and they don’t believe this will draw minors to a bar. Some licensees expressed that they can not remain viable with customers just buying cheap drinks; they want them to buy/eat food too.

Much of the committee’s discussion centered on trying to define “temporary” price reduction. Some members thought that whatever your highest advertised price, that would be the standard/regular price and any other price would then be considered a temporary price reduction and thus prohibited. Others brought up that many licensees use a tiered pricing structure where they have a set price for different times of the day and week. So the question was raised, “What if I charge \$4 for a well drink during the majority of my business hours and then raise the price to \$5 on Friday and Saturday nights to cover entertainment costs? Then advertising the \$4 price would be prohibited?” Under that scenario, some saw this as a temporary raising of prices, not a temporary reduction.

Others members thought that your lowest price should be considered the temporary price reduction and therefore what you would be prohibited from advertising outside the licensed premises. However, some members were concerned that a small percentage of bad operators could take advantage of such language by setting an extremely low price for a very small time period each week and thus making advertising of all their other price reductions o.k.

As the group was having great difficulty defining “temporary” price reduction, one member suggested prohibiting all drink prices (including regular prices) from being

advertised outside the premises, as that would certainly make it clearer for licensees and easier to enforce. This suggestion was met with a lot of opposition as many licensees contend that advertising their regular prices, whether on a menu placed in their window or on a website, is integral to their business. A majority of members were o.k. with allowing advertising of regular prices outside the premises.

A committee member stated that although terms such as “happy hour”, which are much more food driven now, should be allowed, they didn’t think terms such as “two for one” should start being allowed as these are the types of over-consumption practices we want to prevent. Staff shared that Washington State has language prohibiting the use of advertising where in order to receive a price reduction a customer needs to buy more than one drink at a time, such as “two for one” and “buy one – get one free”. The committee liked the idea of adding such language to our rule, perhaps in the section (1) advertising prohibitions.

Ms. Huntsman reminded the group that a lot of the public safety concerns are already addressed by the promotional practices that are prohibited such as no drink specials after midnight, and now we are suggesting additional language prohibiting “two for one”. She asked the group, “With these restrictions, do we also need restrictions on price advertising?”

Some committee members felt strongly that there shouldn’t be any advertising of discounted drink prices; they felt that the ability to utilize terms such as “happy hour” and advertise food specials should be enough. They believe that if there is more advertising of drink price reductions, there will be more consumption. It was acknowledged that price competition is happening already, but they stressed that the more it is made public (outside the premises) the greater the increase in consumption and underage drinking.

Other members felt that it was not just about food, but also about alcohol – both make up their business. With all of the laws already in place to prevent over service, they felt that further advertising restrictions should be minimal. They further shared that they are ultimately responsible for their liquor licenses and that they are not going to over serve during a “happy hour”.

From the broadcasters’ perspective, they would be happy with the added ability to say “happy hour” and “food & drink specials” in their advertising. Some members felt that the term “specials” was o.k. but were concerned about allowing “drink specials” to be advertised, even without a specific price. Many licensees on the other hand want to be able to advertise both food and drink specials. They contend that customers already know when “specials” are advertised that the specials will be on what the business sells – food and drink, and also that licensees would just come up with other creative words for “drink” if “drink special” were prohibited.

A number of members felt that the proposed language was going in the right direction and that while price advertising should be allowed, reduced pricing if totally off the regular price should not. It was pointed out that a lot of people are just looking for a deal because they have a very limited entertainment budget, and that their main purpose is not to get drunk. Licensees want to be able to refer to alcohol, without making it all about the alcohol. Others pointed out that for some people it is about getting drunk and that their main concern is advertising that targets a very specific demographic, such as \$1 ladies night drinks.

So the group found itself back to needing to define “temporary” price reduction. It was agreed that clear language is needed so that all licensees across the state will understand what they can and can’t say in their external advertising. It was also pointed out that we need a rule that is more enforceable while also maintaining some restrictions on practices we believe are a public safety risk.

One member stated that it is the price equated with “happy hour” that is the problem. So another member suggested that instead of defining temporary price reduction as a price relative to other prices, what if we prohibit price together with a specified time period? The committee was receptive to this idea, and after further discussion agreed that the rule language should include discount amounts, such as half off, in the price prohibition part of the equation. They also suggested that the time period prohibition part of the equation should include not only references to specific hours such as 4:00 – 6:00 p.m., but also terms referencing a special event or time period such as ladies “night” and thirsty “Thursdays”.

The group reached overall consensus that terms such as “happy hour” would be o.k. and could be combined with a specific time period. It was also clarified that a menu with a listing of regular prices and then the mention of say “happy hour Fridays 4:00 – 6:00 p.m.” at the bottom would be o.k.

It was also agreed that what would be prohibited would be advertising the drink price, discount or percentage off combined with a specific time period when that price is available, such as 3:00 – 5:00 p.m., happy “hour”, or ladies “night”. This should also be easier from an enforcement perspective since inspectors would be triggered to check for a potential violation when they see a drink price/discount included in promotional advertising.

One last issue was discussed related to seeking clarification on “advertising outside the licensed premises”. Staff clarified that the prohibited drink promotion advertising would include advertising via a recorded message on a telephone answering machine, but that verbally answering a customer’s questions regarding drink specials over the phone would not be considered advertising and thus would

be o.k. It was also clarified that while the Commission has no jurisdiction over citizens spreading the word about drink specials via Facebook, Twitter, etc., it would be considered illegal advertising by the licensee if they did so, or paid or otherwise influenced others to use such practices on their behalf.

### Fiscal Impact Statement

Ms. Huntsman led the committee through a discussion of the Fiscal Impact Statement and the need to quantify (if possible) fiscal impacts this rulemaking will have in general, as well as any adverse impact on small businesses. During the discussion on the Fiscal Impact Statement, the following points were made:

Committee members felt that there should be an overall positive impact for on-premises licensees. Not only will they have more flexibility to promote their business, the amended rule language should be easier for their staff to understand and thus comply with.

In regards to small businesses, virtually all on-premises licensees fall in this category and the only impacts foreseen for them would be positive. As to off-premises licensees, no direct financial impact is expected.

On the one hand, some members saw a potential increase in public safety costs if over-consumption increases. On the other hand, some foresaw potential public safety benefits from regulatory staff no longer having to spend time pursuing the pervasive yet elusive “happy hour” violations.

Ms. Huntsman stated that a new draft of the proposed rule amendments will go out with the Advisory Committee minutes within the next few weeks. This will be the version of the proposed rule amendments that folks will be asked to comment on at the hearing and in this next written comment period.

Ms. Huntsman reminded members of the rest of the process: the rulemaking hearing is currently scheduled for Tuesday, February 9, 2010 at 10:00 am in Room 103A. Written comment would then be received into the rulemaking record until 5:00 pm on Tuesday, February 23, 2010. The tentative plan is to present a report to the Commissioners at their April 2010 meeting for possible final action on this matter.

Ms. Huntsman closed the meeting by thanking members for their attendance and participation. The meeting ended at 11:05 am.