



June 19, 2023

Via Electronic Mail

Norina Foster, Assistant Counsel
 Pennsylvania Liquor Control Board
 401 Northwest Office Building
 Harrisburg, PA 17124
Ra-lblegal@pa.gov

David Sumner, Executive Director
 Independent Regulatory Review
 Commission
 333 Market Street, 14th Floor
 Harrisburg, PA 17101
irrc@irrc.state.pa.us

Re: Proposed Rulemaking to Amend Existing Regulations Relating to the Duties and Rights of Licensees Under Subchapter C Pertaining to Amusements and Entertainment, 40 Pa. Code §§5.30, 5.32, Regulation Reference No. 54-104

Dear Ms. Foster and Mr. Sumner:

The Independence Law Center is a civil rights law firm and appreciates the opportunity to comment on proposed Pennsylvania Liquor Control Board regulations. Specifically, the proposed regulations would remove the prohibition on “lewd, immoral or improper conduct” at liquor licensed establishments.

As a law firm specializing in civil rights issues, our attorneys recognize the need for broad freedoms. At the same time, regulations, like this one, serve a purpose that will benefit patrons of liquor licensed establishments and our larger communities. Therefore, the Independence Law Center recommends keeping this language in the regulations.

The proposed rulemaking deletes section 5.32(e)(1), suggesting that the section is unenforceable under *Conchatta, Inc. v. Miller*, 458 F.3d 258 (3d Cir. 2006). At issue in *Conchatta* was a different section, 5.32(b), which prohibited entertainment with a “lewd, immoral, improper or unlawful purpose.” The plaintiff in that case only challenged section 5.32(b), not 5.32(e)(1), and the court only struck down section 5.32(b), not section 5.32(e)(1), and that for good reason.

Section 5.32(b) provided:

A licensee may not permit an employee, servant, agent, event/tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or place connected therewith, to be in contact or associate with the patrons in the establishment, room or place for a lewd, immoral, improper or unlawful purpose.

The court determined that the language was overbroad and would allow for prosecutions not

simply of “live dancing involving exposure of genitals or involving physical sexual contact between patrons and dancers” but other performances at other establishments. *Conchatta*, 458 F.3d at 265. In other words, section 5.32(b) did “not solely apply to nude dancing, which ‘falls only within the outer ambit of the First Amendment’s protection.’” *Id.* at 266 (quoting *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000)).

To be clear, it was not the words “lewd,” “immoral,” or “improper” that were unenforceable, but the section 5.32(b) as a whole that did not have limiting text. By contrast to the phrase “lewd, immoral, improper or unlawful *purpose*” in section 5.32(b) (emphasis added), section 5.32(e) states, “There may not be lewd, immoral or improper *conduct* by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants.” (emphasis added)

Such *conduct* is most assuredly able to be prohibited. For instance, “open lewdness” is prohibited by Pennsylvania law. The offense is defined as follows: “A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.” 18 Pa.C.S.A. § 5901. Liquor licensed establishments should continue to prohibit this kind of lewdness on its premises.

Again, the dance club in *Conchatta* did not challenge section 5.32(e)(1), and the court did not strike down section 5.32(e)(1) for good reason. This section is constitutional – and useful. Removing this section would not be an exercise of complying with *Conchatta*, but would be a substantive change – a change that is not in the interest of either visitors to liquor licensed establishment or our communities as a whole. The Independence Law Center therefore advises that section 5.32(e)(1) not be deleted.

Respectfully submitted,



Randall L. Wenger
Chief Counsel