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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 10, 1995

The Honorable Glenn G. Reese
Senator, District No. 11
502 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Reese:

Attorney General Condon has referred your recent letter to me for reply. You have asked several questions regarding the regulation of "topless" dancing.

This Office has previously issued a number of opinions concerning the appearance of a female, "topless", in public. For example in Opinion No. 3165, p. 127 (August 12, 1971), we concluded that appearing "topless" as a waitress in a restaurant, club or other place to which the public is invited, whether the same is designated "private" or otherwise, thereby resulting in a total exposure of the female breasts or similar appearance is contrary to the customary standards of decency within this State and thus in violation of the Indecent Exposure statute codified at S.C. Code Ann., Section 16-15-130. There, we stated:

> [c]learly, a restaurant, night club or bar would be a "public place" within the meaning of the statute and this would seem to be so whether labeled "private" for purposes of liquor licensing. Moreover, indecent exposure by a female on property other than her own would come within the statute's prohibition thus avoiding the "private v. public" controversy.

We reiterated that opinion on February 26, 1986, observing that

> [f]or purposes of the indecent exposure statue, the malice requirement contained in the statute would be met if there is

> no legal justification or excuse for the exposure and such exposure is done so recklessly or wantonly as to show a depravity of mind and disregard of others. As with any other offense, involving malice this could be inferred from the surrounding facts and circumstances. Such would, of course ultimately be a question for the jury; however, a jury could consider facts such as the degree of exposure, the likelihood of exposure to others, the actual state of mind of the offender, monetary gain, etc. While again, each case would turn on its own facts, it is certainly possible that the act of appearing "topless" as a waitress in a restaurant or bar could constitute the offense of indecent exposure pursuant to § 16-15-130.

Moreover, in a letter, dated September 21, 1981, we noted that the state statutes which could be deemed applicable to "topless" dancing are the obscenity statutes, S.C. Code Ann. Sections 16-15-260 through 16-15-440, as well as the "indecent exposure" statute, referenced above. We cautioned that "[i]t is important that the obscenity statute be read in its entirety as many of the definitions and sections are inter-related." Subsequent to that opinion's issuance, South Carolina's obscenity statutes have been upheld as constitutional. Beigay, Inc. v. Traxler, 790 F.2d 1088 (4th Cir. 1986).

An additional statute was enacted in 1987 and codified at Section 16-15-365 proscribing exposure of one's "private parts" in a "lewd and lascivious" manner. The text of that statute is as follows:

> [a]ny person who wilfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or aids or abets any such act, or who procures another to perform such act, or any person who as owner, manager, lessee, director, promoter, or agent, or in any other capacity knowingly hires, leases or permits the land, building or premises of which he is owner lessee, or tenant, or over which he has control, to be used for purposes of any such act, is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than six months or fined more than five hundred dollars or both.

An opinion dated, July 18, 1991 concluded that, for purposes of Section 16-15-365, "private parts" as referenced therein, includes female breasts.

Another opinion, dated March 28, 1991, dealt with the state's police power to regulate "bottomless entertainment" at places which sell alcoholic beverages. Citing a number of authorities, including the United States Supreme Court's decision in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), we concluded that the State's power to regulate alcoholic beverages under the Twenty First Amendment was virtually plenary. Quoting the Idaho Supreme Court in State ex rel. Richardson v. Pierandozzi, 117 Idaho 1, 784 P.2d 331 (1989), it was stated:

> LaRue should not be understood to stand for the proposition that the Twenty-First Amendment overrides the First Amendment, but rather for the notion that "the Twenty-First Amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served" ... Thus although nude dancing does involve First Amendment considerations ... in the narrow context of liquor licensing the State has the power to regulate nude and sexually explicit conduct in licensed establishments without offending the Constitution ... .

See also, Connor v. Town of Hilton Head Island, _____ S.C. _____, 442 S.E.2d 608 (1994).

Finally, in an opinion issued on February 2, 1994, we commented on the validity of proposed state legislation which would prohibit nudity in a public place, on property of others or to the view of a person on a street or highway in light of the Supreme Court decision in Barnes v. Glen Theatres, Inc., 501 U.S. ___, 111 S.Ct. 2456, (1991). The Court, in Barnes, upheld the enforcement of the public indecency law of Indiana which proscribed the appearance in a state of nudity in a public place. Two Indiana businesses desiring to present totally nude dancing in their establishment, had sued to block enforcement of the Indiana statute which required the dancers to wear pasties and a G-string. The Court recognized that

> ... nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity ....

111 S.Ct. at 2460. Relying upon the constitutional test earlier established in United States v. O'Brien, 391 U.S. 367 (1968), the court further elaborated:

> [t]his Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms ... [w]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

111 S.Ct. at 2461. Using the O'Brien test, the Court determined that the statute was constitutionally valid:

> ... we do not think that when Indiana applies its statute to the nude dancing in these night clubs it is proscribing nudity because of the erotic message conveyed by the dancers ... [w]hile the dancing to which it applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

111 S.Ct. at 2463.[1]

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[1] In Connor v. Town of Hilton Head, supra, our Supreme Court recently recognized that Sections 16-15-305 (C)(1)(b) [obscenity], 16-15-130 [indecent exposure] and 16-15-365 [willful and knowing exposure of private parts in a lewd and lascivious manner] could be applicable, depending upon the facts, to a situation involving nude dancing. The Court, citing Barnes, supra, also concluded that the 4-part test enunciated therein and stated above, must be met to be constitutional under the First Amendment. Further, the Court was clearly cognizant that

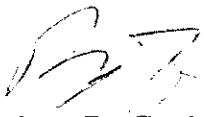
> "'[i]n the context of liquor licensing, the Twenty-first Amendment confers broad regulatory powers on the States .... This regulatory authority includes the power to ban nude dancing as part of a liquor license control program.'"

(continued...)

as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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