

MEMORANDUM TO THE COLUMBUS DIVISION OF POLICE

July 18, 2018

TO: Chief Kimberly Jacobs

FROM: City Attorney Zach Klein 

SUBJECT: Ohio Revised Code § 2907.40 Illegally operating sexually oriented business; illegal sexually oriented activity in sexually oriented business.

The City Attorney's Office advises that O.R.C § 2907.40(C)(2) should not be enforced at this time, and that charges filed pursuant to this subsection subsequent to this memo will not be prosecuted. O.R.C § 2907.40(C)(2) states in relevant part (*emphasis added*):

(C) (2) No employee who regularly appears nude or seminude on the premises of a sexually oriented business, while on the premises of that sexually oriented business and while nude or seminude, shall knowingly touch a patron....

In order to violate O.R.C § 2907.40(C)(2), an employee must regularly (consistently or repeatedly) appear nude or semi-nude on the premises of a specific (or the same) sexually oriented business. This is legally problematic because it creates an inequitable application of the law that is dependent on how "regular" the employee appears. In one instance, a performer who travels from one sexually oriented business to another, perhaps even from city to city or state to state, but who does not regularly perform at one specific sexually oriented business, may engage in touching of patrons that is not actionable under the current law. But in another instance, a performer who regularly appears at a specific club, and who engages in the very same touching as the irregular or traveling individual, may be charged because he or she performs nude at that sexually oriented business regularly. Thus, based on the plain language of O.R.C. § 2907.40(C)(2), the very same actions/touching are treated completely differently depending on the regularity of the employees' appearances, and each have drastically different outcomes for the employee.

There is also another concern in the application of O.R.C. § 2907.40(C) generally, and that is the definition of "patron." For purposes of this law, a "patron means any individual on the premises of a sexually oriented business except ... a public employee ... acting within the scope of the public employee's ... duties as a public employee...." O.R.C. § 2907.40(A)(8)(c). The plain language of this exempts a police

officer while on duty, regardless of whether the officer is in uniform or undercover. This clearly creates a legal problem when the police officer is the recipient of any alleged touching that would trigger a potential violation of O.R.C. § 2907.40(C)(2). If a police officer is not a “patron” under the definition provided in the law, then touching the officer would not be a violation of the statute.

Nothing in this memorandum is meant in any way to prevent the Division of Police from conducting undercover investigations relative to other vice-related offenses, narcotics, or human trafficking. This memo is only directed to the enforceability of O.R.C § 2907.40(C)(2).