

Chapter 5: Time Regulation - Hours of Operation

Quick Guide to Chapter 5:

How many hours can you require an SOB to be closed each week?

In the leading federal appeals court case, the state of Delaware required all SOBs to be closed from 10 p.m. to 10 a.m. Monday through Saturday and all day on Sunday. (5.4)

What if the SOB can prove that it will lose a majority of revenue because its most profitable hours are during the overnight period?

An SOB did prove that in the Delaware case, but the court upheld the law anyway because it was content neutral and designed to prevent negative secondary effects. (5.3)

Is such a restriction narrowly tailored, and does it provide reasonable alternative avenues of communication?

The court held that the 3,600 hours per year for sexually explicit speech allowed by the ordinance was reasonable and sufficient under the Constitution. (5.4)

One of the simplest and yet most effective ways to restrict the negative secondary effects of sexually oriented businesses is through the first element of time, place and manner regulation. Although the U.S. Supreme Court has not specifically ruled on hours of operation limitations applied to SOBs, limiting the hours in which SOBs can be open for business has been upheld by a number of state and federal courts, including two five federal appeals courts. *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3001 (June 11, 2002)(No. 01-18); *DiMa Corp. v. Town of Hallie, Wis.*, 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1365 (11th Cir. 1999); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986).

Among the most sweeping of such regulations, was a regulation enacted statewide by Delaware in 1991 as an amendment to existing regulations of sex businesses. In 1992, a federal court upheld the amendments, which restricted the hours of operation of any sexually oriented business in Delaware to between 10 a.m. and 10 p.m. Monday through Saturday, and also eliminated use of closed peep show booths. Later, the U.S. Court of Appeals for the Third Circuit affirmed the district court decision in a thorough opinion. *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir. 1993).

In *Mitchell*, the 1991 amendments were challenged by an existing establishment which had operated in the same location since 1976. The SOB complied with the new law after its effective date even as it brought a court challenge. It attempted to show that complying with the statute had cost it between two-thirds and three-fourths of its business, but was unable to provide any specific documentation other than changes in total revenue. According to the Third Circuit, the SOB "did not produce any cash receipt entries for January through December 1991 in support of the alleged decrease in patronage." 10 F.3d at 129. But whether the business suffered economic loss was not a significant issue for the court.

The court also detailed the SOB's history prior to the change in hours of operation:

Before enactment of the 1991 amendments, Adult Books served about 200-500 patrons per day. Its business hours were typically from 10:00 a.m. until 3:00 a.m. on Monday through Saturday, and from 10:00 a.m. until 2:00 a.m. on Sunday. ... [I]t was busiest on weekends and holidays. On any given day, patronage became heavier after the end of the work day and steadily increased through the early morning hours. On a number of occasions, Adult Books had to ask patrons to leave at the 3:00 a.m. closing time. There has been only one criminal complaint or recorded incident about a patron's conduct outside Adult Books' business premises.

10 F.3d at 128.

5.1 – Content Neutral

The Third Circuit analyzed the statutory amendments as a content-neutral time, place and manner regulation because they were "directed at curbing the side effects of Adult Books' speech-related activity." 10 F.3d at 131. The court noted that the government's purpose needed to be substantial or significant because a fundamental right -- free speech -- was at stake, as compared with hours of operation restrictions on other businesses in which the government need only show a rational basis. *Id.* at 131, n.8. The court held that there was "no evidence" the legislature adopted the amendments because of disagreements with the message conveyed by SOBs, but rather they intended to limit "... traffic congestion, parking problems, the performance of sexual acts in public, and the littering of discarded sexually explicit materials near residential communities." *Id.* at 132.

5.2 - Adequate Factual Basis

The SOB acknowledged that the legislature intended for the amendments to serve a substantial governmental interest, but contended that Delaware "did not have an adequate factual basis to support its conclusion that the asserted undesirable secondary effects it seeks to regulate resulted from the protected activity, or, if it did, that the closing-hours amendment would reduce them." *Id.*

The SOB attacked the law because the Senate received no documents or sworn testimony before enacting the bill, nor did it hold any public hearings or conduct any studies of SOBs' impact on neighborhoods. The only pre-enactment evidence of need came from the Senate sponsor, who established that the amendments were concerned with secondary effects. He also offered to have a state policeman testify if there were any questions.

At trial, the district court recognized that evidence of secondary effects was presented in a "cursory fashion," and allowed the state to submit supplemental, post-enactment evidence of need through the testimony of members of the Commission on Adult Entertainment Establishments. The Third Circuit agreed with the district court that a "synopsis of the amendment, referring to other jurisdictions' recognition and treatment of the problem, coupled with [the sponsoring senator's] statements and his willingness to put forth testimony from the State Police, was pre-enactment evidence of need and effect sufficient to justify the district court's further consideration of the Commissioner's post-enactment deposition testimony." 10 F.3d at 135.

Despite the absence of direct evidence, the Third Circuit held that pre- and post-enactment evidence and the experience of other jurisdictions was sufficient to prove that:

Delaware had a substantial governmental interest in regulating the incidental adverse effects of Adult Books' speech-related activity and that its decision to impose the restriction the closing-hours amendment entails was for that purpose and not for the purpose of regulating the

content of the sexually explicit speech or expressive activity Adult Books purveys. The perceived effects are akin to those created by a public nuisance. The operation of an establishment like Adult Books may have a place in our society but like the proverbial pig, it can be regulated out of the parlor and off the lawn.

10 F.3d at 137.

Similarly, in *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), a group of lingerie shops that offered nude dancing challenged, among other things, the city's regulation requiring them to close from 10 a.m. to noon each day. The ordinance also mandated closures at other times, but the shops limited their "hours of operation" challenge to these mandated closure hours.

The court of appeals and legal counsel for the city acknowledged that they could think of no reason for the rule. Nevertheless, the court held that it need not come up with a reason and it refused to analyze the regulation on a hour by hour basis. It was sufficient that the city had a substantial governmental interest in adopting time regulations and that the provision in question was narrowly tailored since it left open reasonable alternative avenues of communication. 176 F.3d at 1365.

5.3 - Narrowly Tailored

In *Mitchell*, the SOB also challenged whether the hours of operation amendments were narrowly tailored to affect only the category of establishments known to cause secondary effects. It argued that "its location on the northbound side of an eight-lane divided highway, without any residences on that side within two miles of it, and its practical inaccessibility to pedestrians" should have made it off-limits for regulation, since the amendment's purpose was to prevent noise, crime and litter in neighborhoods near SOBs.

The Third Circuit rejected this argument as well, citing *Renton* for the propositions that a state legislature doesn't need to survey every existing establishment to determine the law's impact on each, and that states must be able to "experiment with solutions to admittedly serious problems." 10 F.3d at 138, *quoting Renton*, 427 U.S. at 71. It was sufficient, the court held, to "show that adult entertainment establishments as a class cause the unwanted secondary effects the statute regulates," and to prove that the regulations did not "wholly or practically prevent access to the expressive material..." *Id.* The court stated that "Delaware's decision to regulate the closing hours of adult book stores instead of concentrating them in a single area is also an appropriate exercise of the legislative power to choose a particular means to accomplish a legitimate legislative end." *Id.* at 139.

5.4 – Reasonable Alternative Avenues of Communication

Finally in *Mitchell*, the SOB attacked the ordinance for failing to allow reasonable alternative

avenues of communication by prohibiting adult entertainment during the time of greatest customer demand. The Third Circuit derided that contention in short order:

Even when the closing-hours amendment's weekday restrictions are coupled with the prohibition on their operations on sixty-four days of the year (fifty-two Sundays and twelve designated state holidays), the closing restrictions cannot be considered to suppress or unduly restrict the dissemination of sexually explicit materials in that state. The amendment allows those who choose to hear, view or participate publicly in sexually explicit expressive activity more than thirty-six hundred hours per year to do so. We think the Constitution requires no more.

Id. at 139.

5.5 – Other Cases

One of the cases relied on by the legislature and the court in *Mitchell* is *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986). In that case, the Fifth Circuit rejected an SOB's request for a preliminary injunction to prevent Biloxi's ordinance from going into effect. The ordinance prevented certain regulated uses located in certain areas from operating before 10 a.m. and after midnight, Mondays through Saturdays, and required closure on Sundays. The Fifth Circuit held that this was a reasonable time, place and manner restriction on speech because it did not "suppress all sexually explicit speech within Biloxi." 779 F.2d at 1079. It rejected First Amendment and equal protection challenges to the ordinance.

In *Broadway Books v. Roberts*, 642 F.Supp. 486, 493 (E.D.Tenn. 1986), a federal court quickly rejected an SOB's contention that its constitutional rights were violated by a Chattanooga ordinance that required it to close between 3 a.m. and 8 a.m. Monday through Saturday and 3 a.m. to noon on Sunday. The court gave short shrift to First Amendment claims: "Certainly it cannot be said that the required closure of these places for a few hours is any impingement on first amendment rights." *Id.*

A number of other courts have upheld hours of operation restrictions on various kinds of sexually oriented businesses. See e.g. *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570 (6th Cir. 2002) (upheld midnight to 8 a.m. restrictions on weekdays which treated cabarets offering live entertainment differently than other types of sexually oriented businesses); *DiMa Corp. v. Town of Hallie, Wis.*, 185 F.3d 823 (7th Cir. 1999) (upheld closure from 2 to 8 a.m. on weekdays, 3 to 8 a.m. on Saturday, and 3 a.m. to noon on Sunday although the factual basis for ordinance was minimal); *National Amusements v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995) (upholding prohibition on any licensed entertainment from operating between 1 a.m. and 6 a.m.; aimed at ending "midnight movies."); *Tee & Bee, Inc. v. City of West Allis*, 936 F.Supp. 1479, 1492 (E.D. Wis. 1996) (closing from 3 to 8 a.m. on weekdays and 3 a.m. to noon on Sunday "rationally relates to the goal of preventing crime"); *Ellwest Stereo Theater, Inc. v. Boner*, 718 F.Supp. 1553, 1577 (M.D.Tenn. 1989) (minimal First Amendment infringement justified by "difficulty of policing and enforcing the ordinance in wee hours of the morning"); *City of Colorado Springs v.*

2354, *Inc.*, 896 P.2d 272, 297 (Colo. 1995) (required closure between 2 and 7 a.m. Tuesday through Saturday, 2 to 8 a.m. Sunday and midnight to 7 a.m. Monday; "narrowly crafted and affect performance, audiences and expressive creation in minimal ways only," and not preempted by less restrictive state law affecting hours of operation for nude dancing bars); *7250 Corporation v. Board of County Commissioners for Adams County*, 799 P.2d 917 (Colo. 1990) (nude dancing establishment without liquor license limited to 4 p.m. to midnight Monday through Saturday); *Moody v. Board of County Commissioners*, 697 P.2d 1310 (Kan. 1985) (required closure of "adult entertainment studios" between 11 p.m. and 8 a.m.).

5.6 – California Caution

California municipalities need to be cautious, however, because of an old case written for a divided California Supreme Court by former Chief Justice Rose Bird in 1980.

In *People v. Glaze*, 614 P.2d 291 (Cal. 1980), the court rejected a Los Angeles ordinance that required "picture arcades" to close between 2 a.m. and 9 a.m. daily. The city attempted to justify the ordinance as necessary to prevent public acts of masturbation during hours when law enforcement problems were greatest. The court rejected this rationale, concluding that a more narrowly tailored approach to deal with the problem would involve arresting those who engage in public masturbation, or requiring greater supervision by managing employees of these establishments. Further, the court held that the ordinance was overbroad in that it applied to picture arcades whether or not they dealt with sexually explicit material.

California pornography defense lawyers have argued *Glaze* for years to intimidate municipalities into dropping any proposed hours of operation limitations from drafts of ordinances. But several things should be kept in mind: (1) this decision was a 4-3 vote of the California Supreme Court, authored by liberal justices who later were tossed from the court by the voters because of their extreme views (the dissenting justices believed it was a reasonable time, place and manner restriction); (2) the case was decided prior to the *Renton* decision (which was heavily relied on by the *Mitchell* court) and prior to all of the significant hours of operation cases; and (3) the rationale for the restrictions was limited, and the limitations applied to establishments other than SOBs.

Given those factors, it would seem that a well-drafted and justified hours of operation ordinance written for a California municipality today might receive a different outcome, although the municipality would need to be prepared to face inevitable litigation.

For example, in *Sundance Saloon, Inc. v. City of San Diego*, 261 Cal. Rptr. 841 (Cal. Ct. App. 1989), a cabaret owner sought an injunction against the enforcement of a San Diego ordinance requiring cabarets to close between 2 and 6 a.m. unless open under special permission from the Chief of Police. The ordinance stated that the city was concerned with "excessive noise generation and disorderly conduct by patrons." 261 Cal. Rptr. at 844. *Sundance* argued, among other things, that *Glaze* dictated a favorable decision in their case. The court, however, thought differently. Finding that the ordinance in *Sundance* was more "narrowly drawn when adopted for

legitimate governmental reasons” as compared to the one in *Glaze*, 261 Cal. Rptr. at 847, the court stated:

A closing hour regulation implemented in order to control masturbation [as in *Glaze*] is far different than a closing regulation designed to help control the potential for excessive noise and disorderly conduct associated with cabarets. The control or failure to control masturbation seldom has an immediate impact on the community and the policing problems involved with it are narrow. On the other hand the generation of excessive noise and the potential for disorderly conduct by the patrons of establishments that serve alcoholic beverages and provide live entertainment are often immediate, intrusive and dangerous to control.

261 Cal. Rptr. at 849.

The court went on to point out that San Diego’s ordinance left 20 hours in the day for the cabaret to conduct business. Thus, the ordinance was “reasonable and narrowly drawn device which compromises well the desire of some for constant and unending entertainment and the desire of others for a reasonable assurance of peace and quiet in the early morning hours.” 261 Cal. Rptr. at 850.

5.7 Conclusion

The implications of the *Mitchell* case and others are clear: (1) stringent closing requirements can be justified by reference to general, already existing evidence of negative secondary effects; and (2) such requirements help protect neighborhoods by limiting the volume of activity occurring in SOBs. Closing hours requirements should therefore be an important part of any ordinance regulating sex businesses, and should be considered at the state legislative level in most states.