No can dance

The Liquor Commission and Court say dancing isn't a right. Here's why they're out of step - and why you should care.

by Kate Bradshaw write the author

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If you dance naked for an audience in a bar or club you're protected by the First Amendment. But in Maui County, you don't have the right to dance in a liquor-selling establishment even when fully clothed—unless you're in an area specifically designated for dancing, and *only* dancing.

That paradox was spelled out recently by Wailuku attorney Lance Collins, addressing a handful of reporters outside Judge Joseph Cardoza's courtroom on March 27. Moments earlier, Judge Cardoza had denied Maui Dance Advocates' (MDA) petition for summary judgment in their lawsuit against the county, a suit that asks the Liquor Control Commission to change its rules on dancing, or at least to clearly define what "dancing" means.

This was just the latest turn in MDA's two-and-a-half year crusade against the LC's social dancing policy.

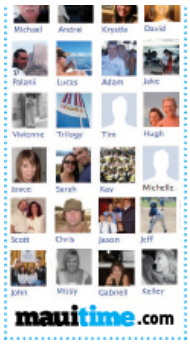
It all started in October 2006 when MDA president Ramoda Anand, who is bound to a wheelchair by cerebral palsy, questioned the LC on §08-101-23, which states that "[a]ny dancing or entertainment provided shall be in areas designated and approved by the director," and goes on to describe the parameters of these licensed areas.

Since Anand, an avid practitioner of the dance form 5 Rhythms, cannot safely dance on a crowded dance floor, he wanted to know what degree of rhythmic movement the LC thinks constitutes dancing so he could avoid being in violation.

"I'm a dancer, and I think it's my Constitutional right to dance," Anand says plainly. He says dancing is an avenue for social interaction he otherwise wouldn't have.

The LC responded to his question in a letter stating that the commission doesn't know how to define dancing, but that according to *Webster's*, to dance is "to move the body, especially the feet, in rhythm, ordinarily to music." When asked to expand on that definition, LC Commissioner Frank Silva (who we were told was unavailable to comment for this story) offered up the familiar refrain: "I know it when I see it."

Beyond that, it's up to individual LC inspectors to decide what's dancing and what's not when they're patrolling bars, clubs and restaurants in search of code violations.



It's not the dancer who gets penalized for grooving in a no-groove zone. It's the venue, which is why, if your toe-tapping gets a little overzealous when watching a band as you wait to order a beer, the staff will politely ask you to stop. Otherwise, the liquor-selling establishment in question could get slapped with a fine.

The rule may stem from concern for the safety of bar staff and patrons, but Collins says it's vague and overbroad. It's easy to see why the commission would want to prevent the flailing limbs of enthused bar patrons from socking a waitress who's carrying a tray of drinks across the room. But mildly swaying to a rhythm?

MDA co-founder Anthony Simmons says he's felt the brunt of the LC's restrictions on dancing quite frequently. As manager of a band that generates dance-conducive music he has had to deal with gigging at venues where no one was allowed to dance. He says he's even seen people get asked to stop "keeping rhythm"—tapping toes, swaying hips and the like—in "consumption areas."

"It's not that I have a fight with the LC," Simmons says. "I believe regulations are good, but you can't regulate how I move."

Simmons offers the following hypothetical example: what if a guy who walks with a swagger unwittingly "danc es into a bar"? Is that dancing? Maybe. Plus, you have bar patrons who are moved by a musical performance, but don't want to be put on the spot.

"In reality," Simmons says, "most people are afraid to dance. And to force them to be on display on the dance floor?"

Anand and Simmons are longtime friends and Simmons also serves as Anand's caretaker. They say they formed MDA because they felt that the LC responded inadequately to their request and was essentially brushing them off. That's when they stepped up their game.

In 2007 they got 86 signatures on a petition asking the LC to change its dancing rules, a request the LC denied. Collins, sympathetic to the cause, offered to represent Anand and Simmons pro bono in early 2008.

"I had a concern that the Liquor Commission was not dealing with Maui Dance Advocates' requests seriously or attentively," Collins wrote in an email. "The attitude felt very dismissive and paternalistic and that was unfortunate in my mind."

They first attempted to appeal the LC's decision, but Judge Cardoza threw the case out on the grounds that he didn't have jurisdiction to rule on an appeal of an LC decision.

They petitioned the LC for a declaratory order, which the LC denied, so they decided to sue the county directly. Collins filed for summary judgment, and the county cross-filed for summary judgment.

The First Amendment factored heavily into Collins' argument, but the connection wasn't as clear-cut as it seems.

While it's commonly believed that the First Amendment provides for freedom of expression, the amendment's wording does not include "expression." The question, which the courts have yet to directly answer, is whether social dancing can fall under the umbrella of "speech" or "assembly."

Anand and Simmons think so.

"I think everybody has the right to move moderately," Simmons says. "If I hear the rhythm I should be able to take it in with my whole body. Not just my ears, but my entire body."

The Supreme Court has dealt indirectly with social dancing as a First Amendment issue on a few occasions, but has never recognized it as protected speech or association.

Among the cases First Deputy Corporation Counsel Jane Lovell, representing the county, cited in her argument was Dallas v. Stanglin, a case decided in 1989 that involved a city ordinance restricting the age of dance hall attendees in order to protect minors.

"It is possible to find some kernel of expression in every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment," the decision for that case reads.

"Basically, there is no First Amendment protection for recreational activities," Lovell says.

Dancing to music at a bar, she says, is like skateboarding or any other activity subject to safety regulations.

If a dance conveys some kind of meaning—like a hula performed in protest—then the First Amendment would factor in, she says.

Collins says that Dallas v. Stanglin does not apply, and that the statements within the decision that deny First Amendment protection to recreational dancing are dicta, which are non-binding. Lovell disagrees and says that the "kernel of expression" argument is the crux of the decision.

Collins cites Tinker v. Des Moines School District, a 1969 case involving students who wore black arm bands to show solidarity with the anti-war movement. "Although the U.S. Supreme Court has not recognized a Constitutional right to dance, the Court has consistently recognized that 'nonverbal conduct,' also known as symbolic expression, is protected by the First Amendment," Collins wrote in a memorandum accompanying his request for summary judgment.

The challenge, of course, is convincing the Court that social dancing has a value beyond that of individual enjoyment, that it conveys a message of community, of concurrence, of comfort, even if the importance of such messages is lost on those who create and interpret laws.

The Supreme Court's overbreadth doctrine also factored into Collins' argument. The doctrine aims to identify laws that restrict unprotected speech (fighting words, for example), but also stamp out speech that *is* protected.

"The danger of prohibiting something in a vague or overbroad way," Collins says, "is that it gives unelected, unappointed liquor inspectors standardless discretion to determine what expression is permitted and not permitted. It short-circuits the legislative and judicial functions of government and creates the appearance of arbitrary or capricious government acts."

The threat of being in violation of a rule that has undefined boundaries, he says, has a chilling effect on expression. But he didn't get to argue that point.

Cardoza ruled in favor of the county in a matter of minutes at the March 27 hearing, concluding that there is "no constitutional right to engage in recreational

dancing in a liquor-selling establishment." He issued no opinion and declined further comment.

It was obviously not what MDA and Collins were hoping for, they say, but it wasn't a surprise.

Anand says it's "absurd" that the right to social dancing isn't protected. He says protecting that right "benefits the community as a whole."

MDA intends to appeal, and Anand says he is "looking forward to the next chapter."

For Maui Dance Advocates and others who care about this issue, it goes beyond a brief, ambiguous rule in the LC's books. Underlying this fight is a belief that without public vigilance, governments can make policies that erode the liberties we take for granted.

"I want people to think about their freedom," says Simmons.

For example, another LC rule bans the use of obscenity by performers in liquor-selling establishments, including foul language, which is *clearly* a violation of the First Amendment.

Some time back, Simmons says he took the question "What is dancing?" to the governing body that supposedly has the ultimate say—the people. He asked numerous individuals in various settings to define dancing. Some gave definitions not unlike the one from *Webster's* that the LC uses, while others offered abstract, spiritual or esoteric interpretations.

The answer Simmons got most? "People said, 'dancing is free.'" *MTW*