

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Cloak & BRIEFCASE

'My Cousin Mikey,' or surely there's a law

By **MICHAEL A. BURGER**
Daily Record Columnist

As a lawyer I am routinely consulted by friends and family. When I get those calls, I'm proud to help, and I find it difficult to reject a case or charge for services when the prospective client used to change my diapers.

Last fall my Aunt called to ask me to defend my cousin, we'll call her Boozey (at least for the next few decades), against the charge that she possessed alcohol as a minor with intent to consume on her college campus on St. Patrick's Day. I accepted the case.

At first it didn't seem like a big deal: Surely there is an exception allowing college freshmen to have a drink on St. Patrick's Day. My family is not Irish by descent, but America being the melting pot it is, there must be enough Erin Go Bragh in all of us to permit responsible celebration of St. Patrick's valiant and victorious conquest over his homeland's serpent population.

Upon examining the accusatory instrument, I learned Boozey was charged under New York's Alcoholic Beverage Control Law section 65-c. It did not seem like the "intent to consume" part would be overly difficult for the prosecution to prove — in my little co-ed cousin's words, "Shah! What else are you going to do with it?!"

Ah, youte.

A bit of research revealed the existence of no Irish exception; fortunately, there were other statutory exceptions to explore.

The law

New York's Alcoholic Beverage Control Law section 65-c states in pertinent part: "Unlawful possession of an alcoholic beverage with the intent to consume by persons under the age of 21 years: 1. Except as hereinafter provided, no person under the age of 21 years shall possess any alcoholic beverage, as defined in this chapter, with the intent to consume such beverage. 2. A person under the age of 21 years may possess any alcoholic beverage with intent to consume if the alcoholic beverage is given: (a) to a person who is a student in a curriculum licensed or registered by the state education department and the student is required to taste or imbibe alcoholic beverages in courses which are a part of the required curriculum, provided such alcoholic beverages are

used only for instructional purposes during class conducted pursuant to such curriculum; or (b) to the person under 21 years of age by that person's parent or guardian," NY ABCL §65-c.

It did not take long to establish we could not prove such exceptions applied to Boozey, but further research revealed we did not have to prove exceptions applied: The prosecution had to prove exceptions did not apply.

It is well-settled that "[e]ssential allegations are generally determined by the statute defining the crime. If the defining statute contains an exception, the indictment must allege that the crime is not within the exception," *People v. Kohut*, 30 N.Y.2d 183, 187 (1972); accord *People v. Santana*, 7 N.Y.3d 234, 237 (2006).

In *People v. Rodriguez*, 68 NY2d 674 (1986), the New York State Court of Appeals dismissed an indictment, adopting the reasoning that: "Had the Legislature wished to relieve the People of the burden of proving that possession was outside the home or place of business unless the defendant first presented some evidence to the contrary, it could readily have made the exception a defense. It chose not to do so, and I do not believe

such clear expression of legislative purpose can be avoided by judicial imposition of a burden-shifting device that allows the people to obtain a conviction for the more serious crime without establishing both of the elements of the crime that serve to distinguish it from the lesser crime," *People v. Rodriguez*, 113 A.D.2d 337, 346 (Second Dept. 1985) (Lazer, J., dissenting), rev'd, 68 NY2d 674, 675 (1986) (adopting Lazer, J. dissent).

The majority of the Appellate Division panel that decided *Rodriguez* before it went up to the Court of Appeals agreed that "the 'home or place of business' exception [in Penal Law §265.02(4)] is a material element of the crime of unlawful possession of a weapon in the third degree. As such, an indictment ... must affirmatively allege that the statutory exception does not apply in order to meet the necessary jurisdictional requirements," *Id.* at 340 (citing *Kohut*, *supra*).

The accusatory instrument fatally failed to allege the statutory exceptions did not apply to my cousin, so we had a defense after all. And it seemed unlikely the prosecution could remedy the defect by amendment without significant investigation enabling it

Continued ...



THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

to attest, under oath, to facts of an evidentiary character sufficient to prove such exceptions do not apply, *See People v. Alejandro*, 70 NY2d 133, 517 NYS2d 927 (1987); *People v. Dumas*, 68 NY2d 729, 506 NYS2d 319 (1986); CPL §§100.15(3), 100.40(1)(a), 170.35, 170.45 & 210.45.

How would the prosecution ever establish that my Aunt and Uncle did not give the alcoholic beverage to Boozey as a St. Patrick's Day present?

It also would take some extra leg work for the prosecution to prove Boozey was not enrolled "in a curriculum licensed or registered by the state education department" anywhere in the world. Boozey likely would win dismissal of the charge, albeit a little wiser about the consequences of her actions.

I want it to be clear that Boozey did not get off scot-free and that, as an officer of the court and a citizen, I do not condone her breaking the law. Boozey, separately, was disciplined by her college and that punishment did not trigger double jeopardy protections allowing her to avoid the court prosecution. See CPL §40.30(1) (defining a previous prosecution for purposes of double jeopardy as one commenced "by an accusatory instrument filed in a court of this state").

On several mornings, Boozey had to wake up before noon and go to court with me, sit on a hard bench and wait until she was told to stand before a judge and a prosecutor in front of a large audience of strangers and answer the charge. Boozey also had to put up with ridicule — admittedly, from me and her parents, mostly — and, now, a published account of her ordeal.

To some, the aggravation of successfully defending such prosecution may even be as bad as pleading guilty. Notably, the authorized sentence for the non-criminal offense is minor: "If a determination is made sustaining such charge the court may impose a fine not exceeding \$50 and/or completion of an alcohol awareness program established pursuant to section 19.25 of the mental

hygiene law and/or an appropriate amount of community service not to exceed 30 hours," NY ABCL §65-c (3).

Also, "[n]o such person shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction," ABCL §65-c (4). The police are not even authorized to arrest a suspect for a violation of the statute, and instead must issue a ticket, ABCL §65-c (3).

Did the Legislature know it was passing a not only an anemic law, but one that's nearly impossible to enforce? I guess so. I imagine that a balance had to be struck between enforcing the minimum drinking age and the overall severity of a violation. The Legislature also may have considered, among other factors, parents' fundamental rights to raise their children as they see fit, see, e.g., *Matter of Jung*, 11 NY3d 365 (2008) ("Parents have [a] fundamental interest in the liberty, care and control of their children"), legitimate educational goals (e.g., a sommelier or wine-tasting course of study). Perhaps also considered the significant and solemn responsibilities and rights applicable to college-aged men and women in New York State to vote, marry, bear arms, go to war and fight, be wounded and die for their country.

With public safety resources stretched thin, and all of the extra work involved in prosecuting such offenses, I wondered what would give police and district attorneys the incentive to enforce the law in the absence of other serious criminal activity?

Then I read the final subsection: "The official to whom the beverage has been delivered shall ... dispose of or destroy the alcoholic beverage seized or cause it to be disposed of or destroyed," ABCL §65-c (6).

Do you think running the alcohol through some sort of official kidney-like filter would satisfy the statutory mandate?

Slainte!

Michael A. Burger is a partner in the law firm of Davidson Fink LLP (www.davidsonfink.com). He dedicates his essay to Boozey and the common law burden of proof.