



# KANSAS NEWSPAPER Advertising Law Guide

# KANSAS ADVERTISING LAW GUIDE, Third Edition

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John H. Stauffer, Jr.,  
Colmery, McClure, Letourneau, Merriam & Stauffer, P.A.  
Topeka, Kansas

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Michael W. Merriam  
Topeka, Kansas

Third Edition ©2006, Kansas Press Association  
Michael W. Merriam  
Topeka, Kansas

<sup>1</sup> Mr. Merriam is a graduate of the University of Kansas and Washburn Law School. He has practiced First Amendment, media and communications law for nearly 30 years, counseling clients and appearing before the courts of many states and jurisdictions on behalf of access, privilege, defamation defense and similar press interests, and has conducted numerous seminars and informational sessions with editors, reporters and journalism students. Representing dozens of media, he has also assisted and represented the Kansas Press Association in many projects. Chris Schultz assisted in the research of the Third Edition. He attends the University of Kansas School of Law.



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## INTRODUCTION

A fundamental understanding of newspaper advertising starts with our understanding of constitutional law. Much like the news and editorial functions of a newspaper, advertising rights and restrictions are governed by the First Amendment to the United States Constitution and the interpretations by the courts of what the framers of the Constitution intended.

It is clear the U.S. Supreme Court does not consider the First Amendment to be absolute. Despite a “free press,” there are limitations on how much freedom of speech, or of the press, is allowed. Reasonable regulation of speech and press has been permitted to safeguard or accommodate valid societal interests.

In Kansas, the state’s constitution includes a Bill of Rights stating, in part, “The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights . . .” Kansas Constitution Bill of Rights <sup>11</sup>.

Kansas statutes have a greater impact on advertisers than on newspapers. Since many advertisers expect their local newspaper advertising representative or advertising agency representative to know how state law governs specific advertising practices, many of the state statutes governing advertising are addressed in this guide. All law is subject to interpretation and the final responsibility of knowing what the legal liability could be rests with the person who is ultimately liable. This guide should provide enough information for newspaper advertising representatives to advise their advertising clients to seek legal counsel or opinions from the governmental body having jurisdiction in administering a particular advertising restriction, and to be aware of newspaper’s own responsibility.

This guide is intended primarily for use by newspapers, but contains general advertising law discussion which will inform both advertisers and advertising agencies. However, non-newspaper users and those persons dealing with newspapers should always seek advice from their own legal counsel.

**Kansas Press Association member newspapers may call KPA’s Legal Hotline for free initial advice at 1-800-394-9415.**

## CHAPTER 1

### CONTRACTS: NEWSPAPER-ADVERTISER RELATIONSHIP

The relationship between the newspaper and the advertiser usually begins with a contract for advertising, advertising space or facilities contract.

#### A. PARTIES TO CONTRACT.

*If the advertising or facility contract is between the newspaper and advertising agency,*

- The advertiser may be disclosed and is obligated under the facilities contract. The advertising agency has declared in the contract it is acting as the agent for the advertiser, or has acted within the scope of its authority with the advertiser, or advertising has been consented to by the advertiser.
- The newspaper has a right to assume the agency had the right to bind the advertiser until the advertiser notifies the newspaper of the termination of the advertising agency relationship.
- An advertiser in a facilities contract may still be a party to the contract if it is an undisclosed principal.
- The inclusion of a sole liability clause in the facility contract may limit the liability of an advertiser but the advertiser remains a party to the contract. Rights and duties involved in the contract still rest upon the advertiser with the exception of payment.

#### B. CONTRACT FORMATION.

*Elements in the formation of a contract:*

- The capacity of the parties to contract.
- An offer by one party.
- An acceptance by the other party.
- “Consideration” on the part of both parties.
- The contract must be for a legal purpose.
- The terms of the contract must be sufficiently definite and unambiguous to allow a court to interpret and enforce the contract.
- The contract between the newspaper and the advertiser may be either written or oral, and may

reference other written documents, such as rate cards, which may be incorporated in the contract or become a function of the oral contract.

- A contract for more than one-year term must be in writing to be enforceable. An agreement to enter into an agreement is not an agreement and is not enforceable.

## C. CONTRACTUAL DUTIES.

Even if a sole liability clause is included in the contract, the newspaper's obligations are owed to the advertiser, not the advertising agency.

### *Requirement to provide space.*

- The primary duties of a newspaper are to provide space and distribution of the newspaper.

### *Limitations.*

- Technical difficulties sometimes limit the ability to place advertising, but once accepted, a newspaper has liability for failure to place and publish. This liability should be limited by the terms of the contract to the cost of the advertising placed.
- Strikes beyond the control of the newspaper relieve the newspaper from the obligation to publish. The contract should include provisions requiring a republication of the advertisement at a different date or location, or a refund of all or a portion of advertising cost.
- Force Majeure. Parties are not liable for acts of God and extreme and unpreventable occurrences, such as a terrorist act, war or weather-related events creating an impossibility of performance on the newspaper's part. The duty to publish is terminated and the advertising contract eliminated.
- Refusal of advertising. Newspapers are private enterprises and therefore may contract or refuse to contract with whomever they desire, and need not cite reasons for refusal.<sup>2</sup> A newspaper has the absolute right to edit advertising copy or to refuse any advertising matter it deems inappropriate, even if the refusal is arbitrary, subject to the exceptions below.

*Notwithstanding a written contract, advertisements that contain any of the following could create liability for the newspaper and may be refused:*

- Antitrust violations;
- Copyright violations or violations of trademarks or trade names;
- Deceptive or misleading trade practices;
- Defamation or invasion of privacy;
- Fraudulent schemes;
- Gambling information;
- Harmful medical advice;
- Obscene, indecent or profane language;
- Content regulated by statute, including Fair Housing regulations and EEO and other anti discrimination laws;
- Contractual exclusion matter. A newspaper's policy restrictions on advertising, even where not dictated by legal concerns, should be stated in the contract or rate card incorporated into the contract. Policies may also be published in the newspaper.

*Exceptions to right to refuse advertising.*

- Where the refusal of the advertisement is a violation of antitrust statutes or is part of a conspiracy.<sup>3</sup>
- Publications owned by a state or a political subdivision, may not refuse advertising in circumstances where it is discrimination or sometimes merely unfair because of having accepted advertising from competing entities. State universities, colleges and secondary schools with campus newspapers, law reviews, medical journals and similar publications are subject to this rule. These same concepts apply where media are owned or controlled by government entities, such as advertising on buses, subways or governmental facilities.<sup>4</sup>
- A contractual relationship may require advertising.
- Advertisement refusal must not be based upon illegal reasons, such as race, color, religion, sex, age, national or ethnic origin of the advertiser, or where contrary to federal laws such as the Fair Housing Act.<sup>5</sup>
- Political advertising implicates special rules. See Chapter 5A.

When a newspaper has sold its assets and the new owner assumes the old newspaper's obligations, advertising (or facility) contracts are not necessarily assignable to the new owner. However, in a stock sale of a newspaper to the new owner, such contracts are not affected.

#### **D. CHARGES AND DUTIES.**

- Rate cards should be referred to in the contract and should contain chargeable rates, frequency discounts and early payment discounts. They then become a part of the contract and the contract should provide that the card, if changed, will supersede an earlier rate card.
- Discriminatory Rates. Rates which differ depending upon the number or volume of advertising are called "discriminatory rates." Section 2(a) of the Clayton Act as amended by the Robinson Patman Act<sup>6</sup> prohibits price discrimination in the sale of commodities in commerce, where such discrimination may result in substantial lessening of competition, but most courts hold newspaper space is not a commodity. However, in *United States v. Wichita Eagle-Beacon Publishing Company*,<sup>7</sup> a Kansas decision held newspaper advertising space was a commodity and was subject to the Clayton Act. Because discriminatory rates or volume rarely result in substantial lessening of competition, this case should not be considered to prohibit the practice.<sup>8</sup>
- Political advertising discrimination is illegal under Kansas law.<sup>9</sup>

#### **E. MISCELLANEOUS DUTIES.**

- Errors. Newspapers are liable for their errors committed in advertisements. An advertisement is merely an offer to make an offer by the advertiser's customer so a mistake in an advertisement on price can be rectified by the advertiser at the time the customer comes into the store to make the offer, notwithstanding the error in the ad. A newspaper is liable for damages caused by any error in the advertising, unless liability is limited by contract, but the advertiser must take steps to reduce the damages. Damages are difficult to prove but a newspaper will not want to argue that its advertising space is ineffective or of lesser value.

Nonpublication, incorrect dates and similar errors should be covered by contract terms.<sup>10</sup>

- **Limiting damages.** A newspaper may limit its liability by contract terms. In *Willie v. Southwestern Bell Telephone Co.*, a limitation of liability clause in a telephone company yellow page advertising contract was not held unconscionable under the Uniform Commercial Code.<sup>11</sup> Newspaper advertising contracts should contain a limitation of liability provision, depending on the situation with given advertisers, as to what the liability will be for incorrect or wrongly placed advertising. The contract should specify the remedy of republication or refund of actual cost of the advertising and specifically exclude any liability for consequential damages.

- **Restraints in adjacent advertisements.** Absent contractual obligations, newspapers are under no prohibition and conversely are under no requirement to limit, exclude or allow adjacent advertising of the same or similar products.

## **F. ADVERTISER'S DUTIES TO NEWSPAPERS.**

- **Payment.** The primary duty of an advertiser or an advertising agency is to remit payment on a timely basis. Advertisers may be relieved of this duty if the payment is received from the advertising agency and is operating under a sole liability clause.

- **Submission.** The advertiser has the duty to timely submit advertising material. A newspaper may be liable for publishing advertising material that is in contravention of existing law, and must receive the copy in time to review the advertising material.

## **G. ADVERTISING CONTRACT TERMINATION.**

- **Written contracts.** The contracts should have termination clauses.

- **Death or bankruptcy of advertiser.** The death of a sole proprietor advertiser would terminate the advertising contract, unless the business is carried on by the advertiser's estate. The contract should cover penalty provisions due to discounts not earned over the life of the contract. Bankruptcy normally does not automatically terminate the contract, but contract terms should cover future placement and acceptance, payment terms and dealing with executory contracts (contracts to be performed in the future).

## **H. REMEDIES FOR BREACH OF CONTRACT.**

The breach must be material and cause damage. The non-defaulting party may collect sums due it by the failure of the other party to perform. Specific performance, the remedy to require a newspaper to publish the advertisement or the advertiser to provide the advertisement is not available. Advertising contracts are generally deemed to be personal-service contracts that preclude this remedy.

## **I. FEDERAL REGULATION**

The federal regulation of advertising is pursuant to the Commerce Clause of the United States Constitution. The U.S. Supreme Court ruled in 1953 that newspapers are engaged in interstate commerce. Advertising is subject to regulation falling under the jurisdiction of the FTC.

Advertising or “commercial speech” has limited protection under the First Amendment of the U.S. Constitution.<sup>12</sup> The United States Supreme Court listed five types of advertising not worthy of First Amendment protection. *These are:*

- Deceptive or fraudulent advertising;
- Relating to an illegal commodity or service;
- Promoting criminal schemes;
- Invasion of privacy;
- Messages thrust upon a captive audience

In *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*,<sup>13</sup> the Supreme Court invalidated New York State’s attempt to prohibit electric utilities from advertising promotion of electricity use. The Court determined state regulation was subject to a four-stage analysis.

- The commercial speech is protected by the First Amendment, i.e., not unlawful or misleading.
- There is substantial governmental interest in regulating the speech.
- The regulation directly advances the achievement of the substantial governmental interest.
- There must be a reasonable fit<sup>14</sup> between the regulation and the governmental interest it seeks to promote.
- The FTC can order corrective advertising or cease-and-desist orders, often by negotiated terms with the parties, but orders from the FTC rarely apply to newspapers.<sup>15</sup>

However, these rules, and most of those that follow covering false, deceptive or misleading advertising, apply to the advertiser and not to a newspaper, except where the newspaper has assumed a duty. See the discussion in Chapter 3 on newspaper duty.

## CHAPTER 2

### SPECIFIC STATEMENTS IN ADVERTISING

Statements in advertising should be truthful and representative of the product advertised.<sup>16</sup> The law has always prohibited one seller to pass off an article of trade as that of a rival seller.<sup>17</sup> Copying or imitating circulars and advertisements can be fraudulent, especially where it is intended to deceive the public and to pass off the goods as those of another seller.<sup>18</sup>

#### **NEWSPAPER LIABILITY FOR STATEMENTS.**

If a newspaper knowingly publishes a advertisement violating laws protecting competitors or customers of their advertisers, it is as liable as the advertiser unless it is exempt under state law. In Kansas, the publisher or owner of a newspaper who intends to publish an untrue or deceptive advertisement, commits a deceptive commercial practice, unless the publisher or owner of the newspaper had no knowledge of the intent, design or purpose of the advertisement.<sup>19</sup> Courts have uniformly held that publishers, unless they have assumed a duty are not liable for negligent publications of inaccurate and misleading advertising.<sup>20</sup> However, in one case, Soldier of Fortune Magazine was found to be liable under a negligence theory for an advertisement which, on its face, was found to be one that would alert reasonably prudent publishers of a clearly identifiable reasonable risk of harm.<sup>21</sup>

If a newspaper assumes a duty of care, it may have independent liability. If it endorses an advertised product, then it has assumed such a duty, and may also have assumed duty by contract.<sup>22</sup> Such situations might arise in product reviews, restaurant reviews and similar circumstances.

#### *Examples of permitted statements.*

- Representations of duration of a business existence, as long as the general substance of the business activity has not changed. For instance, a wholesale business changed to a retail business cannot use the existence of both businesses to represent the duration of business existence.<sup>23</sup>
- Claims of being large or the largest business in an area, as “puffing.”<sup>24</sup> The Federal Trade Commission holds that such a statement will be held to be true or false if it is interpreted by the ordinary purchaser to be fact.<sup>25</sup>
- Use of colloquial “famous”, as puffing, but it could also rise to the level of a deceptive practice if used to confuse the consumer as to the identity of the business selling the product.<sup>26</sup>
- Representations as to financial status, except where such a fact might be important, such as if the business gives guarantees or grants credit.
- Use of the term wholesaler, importer or exporter, unless not so qualified.<sup>27</sup>
- The use of words connotating a university, college or institute, unless the institution is not authorized to grant the degree it professes to teach. Some commentators think that these

institutions must be accredited. Correspondence schools regularly have trouble with these rules and some also have misrepresented that “graduates” would get work, receive their money back or gain opportunities upon graduation, when in reality, the evidence was to the contrary.<sup>28</sup>

*Examples of Non-Permitted Statements.*

- Misrepresenting items as “hand-made” or “tailor-made” when mechanically produced.<sup>29</sup>
- Misrepresenting a business concern as affiliated with the government or with another larger concern.<sup>30</sup>
- The business falsely calling itself a foundation or society.
- Falsely describe a consumer’s rights under the law concerning the seller’s liability for a product or service.
- Falsely advertising the origin of a product, or advertising goods as those of a particular producer as both an unfair method of competition and a deceptive practice. A false claim that a product originates from a particular area is normally because of an attribute placed on such origin, so one may not falsely imply a product comes from a particular state or region which is renowned for the product.<sup>31</sup>
- Mark or advertise a product made abroad as “Made in the USA” or “American made.” Problems in this area arise when parts are made abroad but assembled in the USA. The Federal Trade Commission advisory opinions have taken the position that such markings presuppose that all of the component parts are domestically made. The rule tends to be “substantiality of imported parts.” Thus, if the imported parts are not substantial either as a percentage of the total cost or as a percentage of the whole product, “Made in USA” type language is usually allowed. The general measure of this rule is that the foreign components must not exceed 15% and the cost must not exceed 10%. The Federal Trade Commission retained an “all or virtually all” standard for those wanting to use a “Made in the U.S.A.” label.<sup>32</sup> When in the process of domestic production foreign components lose their separate identities, disclosure of foreign origin is no longer necessary. Finished products imported from abroad require marks of origin on the article itself unless such disclosure would be impracticable. If the disclosure cannot be put on the product, the disclosure must be made on the package. The disclosure must not only state it is imported, but the actual country of origin. The labeling or advertisement of domestic products as imported is also an unfair and deceptive practice.<sup>33</sup>
- Stating a scope of business with words such as “national” although the use of the word in the business name can be allowed. The false use of the word “association” in the business name is deceptive.<sup>34</sup>
- Claims by an advertiser of staff personnel not actually present.
- A dealer or agent falsely advertising as a manufacturer by words such as factories, builders or publishers.

## **A. REPRESENTATIONS AS TO QUANTITY.**

- When only limited quantities are advertised, and in fact there are substantial quantities of an item, the Federal Trade Commission has suppressed much of such representation through consent orders.<sup>35</sup>
- Falsely advertising that an offer is only available for a limited time may not be material enough to act upon in the public interest, but should be avoided.
- The product may also be advertised as widely available when it is not, which is deceptive. It is also deceptive to imply a multi component product is sold as set when in fact it is being offered separately from other components pictured in the ad.
- The use of bait-and-switch tactics. Proscription of bait-and-switch advertising is not dependent on the intent of the advertiser.<sup>36</sup>
- Expressed misrepresentations as to size or quantity are improper. Implied misrepresentations of size or quantity may be made by “slack filling” or by marking a package “economy size” where in fact it is no cheaper per unit. Both are prohibited by the Fair Packaging and Labeling Act.<sup>37</sup>
- The treatment by Federal Trade Commission of specific words and phrases concerning the quality or effect of advertised products is a test subject. Some words acting as mere puffing are permissible. Other more specific misrepresentations such as age, materials or performance characteristics are prohibited.
- False toothpaste advertisements claiming one toothpaste is better than another or removes stains or film, but does not contain abrasives, have been prohibited. False claims of preventing hair loss or actually growing new hair have been proscribed as well as false claims concerning the effect of hair transplants.<sup>38</sup> It is deceptive to claim a deodorant or antiperspirant stops perspiration and kills odor, if it only masks odor or only stops perspiration for a few hours (without an appropriate disclosure of the temporary nature of the effect).<sup>39</sup> Advertisements of soaps are treated in the same way.
- Cosmetics for the skin involving creams or powders have been found to be wrongfully advertised as having rejuvenating effects, helping to remove stains, stopping wrinkles and having other benefits to the skin (especially facial cream).<sup>40</sup>
- A drug deemed to “cure” or to be a “remedy” must have a healing effect that is complete and permanent. The term “relief” sometimes has been termed as a “cure” but is more temporary in nature, but advertisements meant only for medical professional view do not have to meet these tests.<sup>41</sup>
- Advertisements for allergy remedies, arthritis, analgesics and anemia remedies have been prohibited where they might tend to deceive. Claims that a product relieves colds or flu have also been found to be deceptive.<sup>42</sup>
- Diet plans or pills without scientific evidence that they work are deceptive advertisements. The Federal Trade Commission sometimes requires disclosures concerning the use of drugs in weight-loss programs. Preparations for hemorrhoids, laxatives and other illnesses have been involved in false and misleading advertisements that have been prohibited.<sup>43</sup>

■ “Health foods,” may have positive health effects but some advertisers claim other positive effects. The Food and Drug Administration (FDA) tends to watch those advertised products closely since by virtue of the claimed effect, they may be more like drugs, and may need extensive testing such as drugs receive.<sup>44</sup>

## **B. REPRESENTATIONS AS TO PRICE.**

■ A “bargain,” can be deceptive representation when the representation of “bargain” is untrue or deceptive. An advertiser may falsely claim the reason for the bargain is that the goods are repossessed goods or were obtained at a “distress sale” which is unfair and deceptive. Representing a price as either wholesale or a so-called “factory price” is allowed, unless untrue or deceptive.<sup>45</sup>

■ A claim of “reduced price,” must actually have been reduced from a bona fide price that was higher. An advertisement of some sort of “special” price is prohibited if there is nothing special about the price.

■ “Preticketing” is the practice of placing price tags on merchandise, showing a suggested retail price and then showing or selling at a lower price. If the preticketed price is different from the market, excessive or fictitious, or if the goods are routinely marketed at a lower price than is shown, it is a deceptive practice.<sup>46</sup>

■ Merchandise offered as a free gift, either outright or in combination with the purchase of other merchandise is deceptive when the merchant includes the cost of the “free” goods in the price charged for the principal merchandise, without making an appropriate disclosure. The offer may be made under the guise of a “two-for-one” offer. Even if a full disclosure is made, the merchandise may not be held out as given free if its cost is figured into the goods that must be bought as a prerequisite.<sup>47</sup>

■ Misrepresentations that goods are offered at discounts or at a percentage of the normal price are unlawful. Statements of “savings” or “value” beyond what a buyer paid, must be within the range stated in the advertisements as would be expected by a reasonable consumer.<sup>48</sup>

■ Price comparisons to show prices are lower or more advantageous than the competitor’s price are legal.

## **C. TESTIMONIALS AND ENDORSEMENTS.**

Testimonial for advertisements must be qualified without using the testimonial deceptively for another product.<sup>49</sup> Exaggeration concerning the source of goods, that the entire assembly of the product is by a certain producer, the number of product endorsements, or use of testimonials the advertiser knows contain false statements that would be important to the buyer, are all illegal. Unauthorized testimonials or endorsements are unfair and deceptive as are expressed or implied statements of affiliation. Celebrities have sued for the unauthorized use of their reputation in connection with the advertisement of a product for invasion of privacy, public disclosure of private facts and commercial exploitation of their names and likeness (the right of publicity). In Kansas, if a name or words acquire a secondary meaning, the user has what amounts to a proprietary right to it and may prevent competitors from using it.<sup>50</sup>

Liability can extend to the publishers and distributors of offending publications but their liability is limited to compensatory damages and injunctive relief, since the publisher or distributor does not usually have knowledge of the misrepresentation involved. Injunctive or compensatory relief may be available.

In states such as New York and California having specific statutory provisions in this area, the measure of damages are much easier to ascertain. Punitive damages may also be appropriate where the statute or the state case law allows.<sup>51</sup>

#### **D. PICTORIAL REPRESENTATIONS.**

There is generally no difference between representations made either by word, print or picture. The courts and the Federal Trade Commission are reluctant to concede that picture representations are mere puffing because of the validity the public places upon pictures.<sup>52</sup>

##### *Examples of Non-Permitted Representation:*

- Pictorial representations falsely implying the seller is a manufacturer or is affiliated with or endorsed by a certain manufacturer or governmental body.<sup>53</sup>
- Falsely depicting the quality or effect of a product or service or disparaging a competitor's product by downgrading picture quality.
- The use of "mark ups" if the advertising public is supposed to believe the advertisement is objective proof of the product claim. The shortcomings of the medium (newspapers, magazines, televisions, etc.) cannot be overcome by mark ups, even if the advertised claims are true.
- Misrepresentations and puffing are limited in comparison advertisements, especially when the false claims can be objectively measured.<sup>54</sup>

Courts also have expanded interpretation of Section 43(a) of the Lanham Act to cover explicit and implicit false advertisements. Section 43(a) prohibits one company from making materially false representations about another company's economic or commercial activity. To establish liability under the Lanham Act, one must show the advertisement misrepresents or creates a reasonable likelihood consumers will be confused about the origin, identity or sponsorship of the advertised goods. Competitors may use a rival company's trademark in advertising as long as the use is not false or misleading.<sup>55</sup>

Remedies are available to competitors since the general public is not specifically injured by the act (except the consumer claim of tort or breach of warranty theory). Consumers lack standing.<sup>56</sup> It is the duty of the FTC to bring any public interest cases.

If an advertiser chooses to use comparative advertising, it should be truthful, avoid subjective claims, use reliable testing data and avoid the appearance of disparaging a competitor's product.<sup>57</sup>

A newspaper cannot accept advertisements prepared and submitted by an advertiser without itself reviewing the advertisement for errors or defamatory material. The ordinary standard of care is applied to the newspaper's actions. The courts look to whether the newspaper took reasonable steps to avoid publishing the unlawful statement and if the newspaper had actual knowledge of the unlawful nature of the advertisement.<sup>58</sup>

#### **E. RELEASE FORMS.**

*A release form should be obtained for use of the following:*

- Photographs (models, non-models, property, etc.);
- Copyrighted material;

- Names used in contest promotions, including parents of minors;
- Testimonials (celebrities, employees, general public, etc.);
- Syndicated writers and artists;
- Branded products for use in national advertising promotions.

Pictures and stories having appeared in a newspaper are not necessarily cleared for use in promotional materials. News stories or pictures do not become available for commercial exploitation without permission of the subject, although they may be used for self-promotion of the newspaper if the use is incidental.

## **F. POSTAL REGULATIONS.**

The United States Postal Service does not regulate ad copy per se, but uses the defined term “advertising” in connection with eligibility for periodical mailing privileges.

*Ineligible publications are those which:*

- Contain more than 75% advertising in more than half of the issues published during any 12 month period.
- Are owned or controlled by individuals or business concerns and conducted as an auxiliary to and essentially for the advancement of any other business or calling of those who own or control the publications.
- Consist principally of advertising and articles about advertisers in the publication.
- Have only a token list of subscribers and that print advertisements free for advertisers who pay for copies to be sent to a list of persons furnished by the advertisers.
- Are published under a license from individuals or organizations and that feature other businesses of the licensor.

*The United States Postal Service defines advertising to be:*

- All material for the publication of which a valuable consideration is paid, accepted, or promised, that calls attention to something to get people to buy it, sell it, seek it, or support it.
- Reading matter or other material for the publication of which an advertising rate is charged.
- Articles, items, and notices in the form of reading matter inserted by custom or understanding that textual matter is to be inserted for the advertiser or the advertiser’s products in the publication in which a display advertisement appears.
- A newspaper’s or periodical’s advertisement of its own services or issues, or any other business of the publisher, whether in display advertising or reading matter.

Public Service Announcements (promotions of programs, activities or services of governments or non-profit organizations or matters in the public interest) are not advertising.<sup>59</sup>

## CHAPTER 3

### COPYRIGHT AND TRADEMARK

#### A. COPYRIGHT.

A copyright is an intangible incorporeal right granted by statute to the author or originator of original works of authorship, whereby he is vested, for a limited period, with the sole and exclusive privilege of copying, distribution, public display, public performance, and making derivative works. Federal copyright laws are found in Title 17 of the United States Code. The relief for copyright infringement cases can be injunctive relief, damages and profits, attorney fees, costs of litigation, forfeitures and criminal prosecution. Advertising is subject to copyright protection.<sup>60</sup> Copyright laws specifically provide that advertising is subject to copyright and can be copyrighted by a newspaper. Newspapers generally copyright an entire edition by setting forth the appropriate copyright notice somewhere in the newspaper. Such a general notice will not copyright all specific advertisements.

In order to claim copyright ownership of advertisement prepared and published on behalf of an advertiser, a newspaper must give specific notice in the advertisement of its copyright claim, in addition to any general copyright notice covering the newspaper as a whole.<sup>61</sup> In order to obtain copyright, a particular advertisement must be subject to the copyright laws. If the contents of the advertisement are false, copyright protection has been denied.

If the advertisement is in fact copyrightable, the newspaper must have a copyrightable interest in that advertising. Most courts have held that advertisements are not owned by the newspaper, unless the advertisement was created by newspaper employees.<sup>62</sup> Advertisements placed in the newspaper are “works for hire” and belong to the advertiser, unless there is a written agreement specifying otherwise. This result creates problems for the newspaper to protect its interest in the advertisement appearing in its paper from republication by a rival or competing newspaper. This should be covered in the contract.<sup>63</sup>

- Additional charges could be made for the production of advertising;
- Contractual relationships could be established between the newspaper and the advertiser concerning the ownership interest and the right of the advertiser to refuse or republish the advertisement.

Even if the advertisement is copyrightable under certain circumstances, an idea (which cannot be copyrighted) may be republished. The ability to use the copyright material in incidental ways is known as “fair use.”<sup>64</sup> A non-exclusive list of considerations determining whether fair use has occurred is set out in 17 U.S.C. 107.

*Fair Use is always a facts and circumstances test. The relevant issues are:*

- the purpose of the use; commercial or educational; furthering the public interest;
- nature of the copyrighted work: consumable, marketable, previously exploited by the owner;
- quantity of the work copied;
- impact on commercial value of the work copied.

As an example of fair use, Knight-Ridder reproduced the cover of plaintiff's TV guide both in broadcast and printed comparative advertisements.<sup>65</sup> The court found no infringement had occurred, finding the use was fair use in the comparative advertising that occurred in that publication.<sup>66</sup> Other examples of fair use included photocopying of copyright materials in libraries, (however, reprinting of 92% of copyrighted story is not fair use). Use of quotations in news articles is fair use. Use of political advertisements derived from a copyrighted recording constitutes fair use.

Temporary and permanent injunctions are available against any copyright infringements. The newspaper must be able to show irreparable injury as a prerequisite to the injunctions. However, some judicial opinions have found that irreparable injury is presumed in copyright cases, and one has the option to choose statutory damages instead of proven damages, in a range between \$750 to \$30,000 (or up to \$150,000 if infringement is willful) at the discretion of the court. In order to establish copyright infringement, the owner must show ownership of a valid registered copyright, copying of original constituent elements of the work, access by the defendant to the copyrighted work, and substantial similarity between the works. The plaintiff must prove the defendant copied the plaintiff's copyrighted work, through direct or indirect evidence. The plaintiff must also prove that the copying of the copyrighted material was so extensive that it rendered the infringing and copyrighted works "substantially similar."<sup>67</sup>

Newspapers are not entitled to any criminal sanctions for negligent or innocent infringement of copyright. Criminal sanctions for willful infringement of a copyright for profit may result in a fine of up to \$250,000 and imprisonment for not more than 10 years or both.<sup>68</sup>

## **B. TRADEMARKS.**

A trademark is a name or symbol that is identified with a certain product. Generic terms and descriptive words are not trademarks unless they are so identified with a product that they have achieved a secondary meaning. Trade names serve as a type of advertising but unlike some advertisements, trade names are not protected by the First Amendment.

The Lanham Act of 1946,<sup>69</sup> is the legal foundation for trademarks. A trademark can be any number of things, but it must meet four requirements:<sup>70</sup>

- The trademark must be a word, name, symbol, or device or any combination of these which the court or federal agency would identify as a valid trademark;
- It must be adopted and used by a person or seller; and<sup>71</sup>
- The person must use the trademark to identify his goods and set them apart from those manufactured or sold by others.
- The person must have a bona fide intention to use the mark in commerce and applies to register such work on the principal register.

Words in general or common use cannot be trademarked thereby precluding use by anyone else. These are words describing what a product does, what it is made of, how it looks, tastes or feels or any other characteristic of the product.

*Logos, symbols and marks may be trademarks.*

- If a logo or corporate symbol is unusual, it may be granted protection. Examples are the Pillsbury doughboy, the RCA dog and the General Electric name and symbol.

■ Service marks may also be protected as trademarks. This mark refers to the services of a person to identify its service and separate that service from those of others. Some examples are the symbols used by H & R Block or the Holidome symbol for Holiday Inn.<sup>72</sup>

■ House marks are used by companies throughout its business on generic items. House marks might appear on business cards, stationery or advertising. House marks are trademarks. If house marks are used, the company will usually have separate trademarks for particular products. For example, General Motors may have a house mark but there are separate trademarks for Oldsmobile or Buick.<sup>73</sup>

■ Trade names are names of a business. A trade name may not be registered and thus protected as a trademark unless the name is actually used as a trademark.

Trademarks are generally registered under the Lanham Act and requirements are reviewed by an examiner. If approved, published in the Official Gazette, and after successfully passing any objections, the registrant is granted a trademark. Once registered, the owner has the exclusive right to use the mark in connection with interstate commerce. Kansas has a state trademark statute, providing for registration within Kansas. Registration requirements are less burdensome than under federal law, but protects the mark only in Kansas.<sup>74</sup> No substantive rights are granted by the Kansas law and no remedies are afforded, but registration does establish priority of use.

### **C. LIABILITY.**

■ Newspapers may be held liable even if there is an innocent violation. Caution should be taken whenever reprinting any previously published or printed material.

■ A newspaper may be found liable for trademark infringement if it knows of actual or potential infringement. Care should be taken to properly use a trademark and to stop using a trademark in advertising, particularly if notified that the use is an infringement of an existing trademark. Trademark disputing parties sometimes attempt to assert their claims by involving a newspaper which only published an advertisement. If a demand claiming trademark infringement is received, the ad in question should be suspended pending resolution of the dispute by the parties or submission of non-infringing replacement ad copy.

### **D. FEDERAL REMEDIES.**

Other seldom used federal remedies are the Federal Trade Commission Act, the Federal Communications Act, Federal Food, Drug and Cosmetics Act, the Consumer Credit Protection Act, the Consumer Product Safety Act and the Federal Antitrust Acts (Sherman, Clayton and Robinson-Patman Acts).

## CHAPTER 4

### COMMON LAW AND STATUTORY ACTIONS

“Unfair competition” is generally construed as a term of art, meaning the common law equivalent of “palming off.” Palming off is to represent one’s goods as those of a competitor in the act of competition.

The Federal Trade Commission created the concept of an “unfair method of competition.” The definition of unfair method of competition is left to the Federal Trade Commission and is developed on a case by case basis. The Federal Trade Commission has no authority to declare acts unlawful unless such acts will cause substantial injury to consumers which consumers cannot avoid and are not outweighed by the benefits of competition.<sup>75</sup>

An unfair or deceptive act or practice should not be confused with an unfair method of competition. The general criterion of unfair or deceptive acts or practices is the “tendency to deceive.” A lawsuit for an unfair or deceptive act or practice requires only that the act or practice is used and that the public interest requires action by the Federal Trade Commission.

It has been long held that a seller who merely “puffs” his goods is not guilty of an actionable misrepresentation. But in the more recent times, puffing has not been treated as favorably. Concepts such as “the buyer beware” and mere “dealer talk” have been restricted. The state of mind of the prospective consumer is important in considering puffing. The courts use the standard of the reasonable man and what would be deceptive to such a person. The Federal Trade Commission uses a slightly lower standard of what would deceive the consumer who is acting reasonably. As the courts can be sympathetic to such misled consumers, care should be taken when making puffing statements.

There is a general concurrence of jurisdiction between state and federal laws over competitive torts. If a state has traditionally occupied a field of law, there is a rebuttable presumption against federal law preempting state law. To rebut the presumption, there must be a clear and unmistakable manifestation of intent to pre-empt on the part of Congress. Commentators generally agree there has been no manifest intent on the part of Congress to pre-empt state law on unfair competition.

#### **A. PALMING OFF.**

Palming off is the wrongful conduct on the part of a seller or manufacturer that may deceive buyers as to the source or origin of goods.<sup>76</sup> Jurisdictions differ on the amount of wrongful conduct required, whether actual deception of the buyers is required, or whether only a tendency to deceive is required.

Intent has no bearing on the remedy of injunction, since the idea is to stop the practice, no matter what the intent. The payment of damages, costs and attorney fees are dependent on the degree of wrongful or fraudulent intent. This is also the practice under the Model Uniform Deceptive Trade Practices Act. A competitor seeking relief must not only show that the defendant tried to “palm off” the goods, but the act did, or was likely to, confuse the buyer as to the source or origin of the goods in question.<sup>77</sup>

Injunctions, damages, costs and attorney fees are all possible remedies for palming off. Injunctions present the problem of prior restraints and the reluctance of the courts to enjoin publications. Some state courts

are reluctant to enforce state laws beyond state borders, because such laws indeed vary from state to state.<sup>78</sup> Injunctions are normally only granted if the remedy at law (for example, money damages) is inadequate and irreparable injury would result. Since the damage of palming off is to a seller's goodwill and future customers, money damages are difficult if not impossible to measure. The inadequacy of the remedy at law is inherent in palming off cases.

Damages must be proven for a palming off state action. A seller whose goods are palmed off by a competitor shows damages. Damages are more difficult to show when the defendant is in a different market or geographical area. Allowance of attorneys fees is in the discretion of the court, unless there are binding statutes or an enforceable contract to the contrary.

In Kansas, the only requirement is a likelihood of confusion. Kansas also only requires a likelihood of damage occurring from the act; no actual damages need be shown. Kansas requires a showing of intent to deceive before an injunction against palming off may be issued.<sup>79</sup>

## **B. COMMERCIAL DISPARAGEMENT.**

Commercial disparagement of advertising is any publication of material that falsely puts down, holds up to ridicule or otherwise disparages a competitor's product. Federal legislation applying to disparagement comes from the FTC Act. State law in this area comes from common law, uniform acts and individual state statutes.<sup>80</sup>

The elements of the claim are a false statement, willfully uttered or published, which causes special damages. The special damages need not be pecuniary and may consist of loss of customers. The Uniform Deceptive Trade Practices Act (where it has been enacted) abolishes the requirement to prove actual monetary damages. The statement must concern a commercially relevant subject matter and there must be a subjective factor to show either actual intent or in some cases negligent disparagement. The plaintiff has the burden of truthfulness of the statement. Disparagement often is present in comparative advertisements. The plaintiff needs to prove special damages. The difficulty of proving this makes these cases rare. But other recovery may be had if the statement could qualify as libel "per se" against the plaintiff personally. Any injunction prohibiting publication is a prior restraint. The Supreme Court's view is that prior restraint is allowed if and when the restrained act is subject to criminal prosecution. In recent years, the court has indicated civil process may also suffice if it furnishes sufficient safeguards.

## **C. LIBEL.**

Defamation is meant to protect the character and reputation of the seller. An action meant to disparage a product may assume a form of libel against a competitor.

Libel is a communicated, (i.e., published to a third person), unprivileged and false and defamatory writing (or pictorial) statement of and concerning another person, due to fault and causing damage to reputations.<sup>81</sup>

The Supreme Court has dispelled the idea that commercial speech is not protected by the First Amendment. The First Amendment applies to the context of the communication, not the particular speech form. Therefore, a commercial advertisement with a statement about a public figure or public official is protected by the Constitution. Traditional libel laws now apply to advertising as they do to other speech forms.

Because of the adequacy of legal remedies (money damages) and the aversion of courts to restricting speech, injunctions are not a remedy in libel cases.

In some states, newspapers have been held liable for falsely reporting a person's death where such report contained additional false information that was derogatory or defamatory.<sup>82</sup> But a merely incorrect obituary is not actionable.

#### **D. FALSE ADVERTISING.**

The Federal Food, Drug and Cosmetic Act prohibits the misbranding of food, drug or cosmetics in interstate commerce.<sup>83</sup> The term misbranding includes false or misleading advertisements.<sup>84</sup> A false advertisement is one that is "misleading in a material respect."<sup>85</sup> For false advertisements, the commission must also show "that the advertisement was to induce the purchase of the product, and the purchase was in commerce or had an affect on commerce." An advertisement may be false by misstating a fact, failure to disclose a material fact or by failure to give sufficient facts to correct a misimpression created by the ad.<sup>86</sup>

■ A deceptive advertisement makes a representation or omission likely to mislead a consumer who is reasonably acting under the circumstances. The advertising target, the representation of the advertisement as a whole and the clarity of qualifying disclosures are important in making this determination. The FTC finds some representations are likely to deceive the reasonable consumer: subjective claims, i.e., taste or appearance, honest opinions, puffing (exaggerations not likely to be taken seriously) or items subject to repeated sale thus giving the consumer easy evaluation of the item.

■ A deceptive advertisement must make a material representation or omission. A claim is material if it is "likely to affect" a consumer's choice regarding a product, i.e., affecting the purchase decision. This includes expressed claims, implied claims, claims relating to the health and safety of the consumer, claims regarding a central characteristic of the product, informative claims regarding the purpose, warranty or quality of the product and findings concerning the product by a governmental agency.<sup>87</sup>

■ "Fantasy" advertising, such as an advertisement using Santa Claus, is not deceptive because it is not likely to deceive a significant number of ordinary consumers. An advertisement may not be deceptive if the untruth is immaterial or there is no public interest served in prohibiting an untruth. Advertisements containing value judgments such as, "the best," or "highest" are explicitly untruthful only if an ordinary consumer would be deceived by the claim and the public interest is served by its prohibition.

■ An advertisement must be viewed as false in its entirety. A false statement qualified by other language is still false if the qualification is not clear, not next to the false statement or if the qualification is printed so that it is not as noticeable as the false statement. A competitor's use of the same practice is not a defense to continued use of the falsity.<sup>88</sup> An advertisement concerning health claims of a certain product is more closely scrutinized, as are advertisements dealing with a topic of particular public concern at the time the advertisement is published.

■ A deception occurs when a truthful statement creates an untrue impression, as where some element or conclusion of the advertisement is missing so as to leave the conclusion to the consumer. If the conclusion the ordinary consumer would make is not the truth, the advertisement is considered deceptive. Ambiguities in advertisements are generally construed against the advertiser so if there is more than one interpretation by the ordinary consumer, any deceptive interpretation will be the one on which to rely.<sup>89</sup>

- A claim that a product is unique is deceptive unless it is actually unique or the claim is considered a mere “puffing.” The FTC has required expressed and implied performance claims to have at least a “reasonable basis” for the claim.<sup>90</sup>
- Actions for common law fraud involving advertising are unusual because of the difficulty of proof and the money and time normally involved. A number of states have enacted consumer protection statutes to help in recovery on consumer deception.<sup>91</sup> Claims under the Kansas Consumer Protection Act do not apply to a publisher, printer or another engaged in the dissemination of information, in printed or pictorial form if reproduced for another without knowledge it violated the Consumer Protection Act(s).
- The confession of the actual facts before purchase but after a deceptive advertisement is not a valid defense to deceptive advertising. The truth of an alleged deceptive statement does not necessarily cure the fact that it is deceptive, but it can eliminate the claim of an expressed deception.<sup>92</sup>
- If an advertisement would not deceive a consumer because of overwhelming knowledge of falsity, it would not be deceptive under the FTC Act.<sup>93</sup> In a related area, if an advertisement has a “secondary meaning” so well established the ordinary purchaser would not be deceived, then there is no deception. A “secondary meaning” is another meaning to a term not expressly stated but widely understood to be associated with the item. Such terms as swiss cheese, which does not necessarily come from Switzerland, or hamburger, which is not made from ham, are examples of secondary meaning terms.

## **E. DISCRIMINATORY ADVERTISING.**

- Among the kinds of discrimination prohibited under the Civil Rights Act of 1964,<sup>94</sup> is discriminatory job advertising, dealing with “help wanted ads” listing employment using separate male and female headings. Such distinctions are discriminatory unless it is a “bona fide occupational qualification.”<sup>95</sup> The use of these want ads headings is improper. But, “situation wanted” advertisements have been treated differently. When the job seeker represents oneself as an advertiser, the advertisement has been protected under the First Amendment. Because the employee and not the publisher describes themselves using “forbidden criteria” such as sex, age, or race, any discriminatory effect has been seen as speculative.<sup>96</sup>
- The view is also supported in Kansas law.<sup>97</sup> Under Kansas laws and regulations, it is discriminatory for a publisher to place help wanted advertisements including discriminating criterion. Kansas regulations specifically list “male and female” column headings as a discrimination determination.<sup>98</sup>
- Discrimination in advertisements for the sale or rental of housing is prohibited. Private parties may bring a civil suit to enforce the rights under the Civil Rights Act.<sup>99</sup> An advertiser may not advertise a preference for people speaking certain languages or from a certain national origin. A private party can enjoin a newspaper from publishing the discriminatory advertisements. It has been held the First Amendment’s guarantee of freedom of speech and press it not violated by a court enjoining a newspaper from publishing discriminatory housing advertisements.<sup>100</sup> See Chapter 5.G below.

## F. OBSCENITY.

The Supreme Court set the basic standard for what is considered “obscene” in the case of *Miller v. California*.<sup>101</sup>

*The test for determining obscenity is as follows:*

- Whether the average person, applying contemporary community standards (meaning statewide standards) would find that the work (in the advertisement) taken as a whole, appeals to the prurient interest . . . ; (meaning obsessively interested in improper matters especially of a sexual nature).
- Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- Whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.”
- Under Kansas law, promoting obscenity is knowingly or recklessly publishing, distributing, circulating or advertising any obscene material or offering to agree to publish, distribute circulate or advertise any obscene material.<sup>102</sup> Evidence that materials were promoted to emphasize their prurient interest or sexual content is relevant in determining the obscenity question. Such evidence also creates a presumption the person promoting the obscene material did so knowingly or recklessly.<sup>103</sup>
- Obscene matter is unprotected by the First Amendment guarantee of free speech and free press. Obscene advertising is normally defined within the context of a person’s perception. A test for obscene advertising is what is perceived as obscene by the ordinary and prevalent consumer within the relevant community.
- Obscene advertisements are specifically prohibited from the mails.<sup>104</sup> But note that this section does not place an obligation on newspapers and magazines to investigate each of their advertisers. Online advertisements are subject to the same three-part test established in *Miller*.<sup>105</sup>

## CHAPTER 5

### SPECIFIC TYPES OF ADVERTISING

#### A. POLITICAL

##### 1. Federal Regulation

The United States Congress has enacted the Federal Election Campaign Act to regulate federal elections.<sup>106</sup> This act covers both primary and general elections for federal offices. The federal offices covered by the Act are the Office of President or Vice President, or of Senator or Representative in the Congress. The Act limits the contributions to candidates and the amount of their expenditures. The Act affects publishers as follows and supercedes state law in federal elections.

- An advertisement expressly advocating the election or defeat of a clearly identified candidate must state the advertisement has been authorized by the candidate or his authorized political committee, or if not authorized by the candidate or his committee, it shall state the name of the person who made or financed the advertising and state that it was authorized by the candidate.<sup>107</sup>

*Examples:*

- Paid for by John Smith, Candidate for Congress;
- Paid for by Al Jones and authorized by John Smith for Congress Committee;
- Paid for by Concerned Citizens Committees and not authorized by any candidate.
- The allowable charge for the space cannot exceed the charge for comparable use of the space.<sup>108</sup> This means the allowable charge for political advertisements is whatever is charged a national or general rate advertiser. It is lawful to allow discount privileges to political candidates. However, all political candidates covered by the Federal Election Campaign Act must be given this privilege or an illegal campaign contribution by the newspaper has occurred for the candidates who are allowed an advertising discount.<sup>109</sup>
- The means of extending credit to candidates by corporations is regulated.<sup>110</sup> If a newspaper is owned in a corporate form of business, it must meet these regulation requirements. The requirements for extending credit to candidates and their political committees in a federal election by a corporation are as follows:
  - Corporations are prohibited from making contributions in any election for any local, state and federal political office.<sup>111</sup> Note that non-profit corporations are exempt.<sup>112</sup>
  - The credit must be extended in the corporation's ordinary course of business.

- The terms must be substantially similar to extensions of credit to non-political debts of similar risk and size of obligation.
- A corporation may not forgive prior debts or settle debts incurred by a candidate or political committee in a federal election for less than the amount of the debt unless the debt was settled or forgiven in a commercially reasonable manner. A “commercially reasonable manner” of settlement is defined as:<sup>113</sup>
- The initial extension of credit was made in accordance with the regulations;
- The candidate or political committee has undertaken all commercially reasonable efforts to satisfy the debt; and
- The corporate creditor has pursued its remedies in a manner similar to that employed against a non-political debtor, including lawsuits filed in similar circumstances.

If these steps have been taken, then the corporation and/or the debtor must file a settlement statement with the Federal Election Commission disclosing initial credit terms, steps taken by the debtor to satisfy the debt and remedies undertaken by the creditor.

*The Federal Election Campaign Act does not affect newspapers in these important ways:*

- A newspaper is free to refuse political advertisements;
- A newspaper does not have to keep special records on the advertisements it does accept; and
- The Act does not specify the particular size or type face for disclaimers included in the advertising.

## **2. State Regulation**

- Corrupt political advertising is publishing or causing to be published, a political advertisement not containing the word “advertisement” or the abbreviation “adv.” together with the name of the person or organization paying for the advertisement.<sup>114</sup> This statute applies to any paid matter designed or tending to “aid, injure or defeat any candidate for political office on the national, state or local government level or to any question submitted to the public, such as a constitutional amendment or a bond issuance election. Failure to comply with this statute constitutes a Class C misdemeanor and is punishable by confinement in the county jail for not more than one month or a fine not exceeding \$500 or both.<sup>115</sup>
- A newspaper should accept no political advertising not containing the word “advertisement” or “adv.” along with the name of the person or organization paying for and responsible for the advertisement.
- The Kansas Campaign Finance Act of 1981 deals with abuses in campaign contributions and expenditures. The allowable charge for political advertisements cannot exceed the charges made for comparable use of such space for other purposes.<sup>116</sup> Charging an excessive amount for political advertising is deemed an intentional violation, and is punishable as a Class A misdemeanor.<sup>117</sup> A Class A misdemeanor is punishable by confinement in the county jail for not more than one year or a fine not exceeding \$2,500.00 or both.<sup>118</sup>

The scope of the Kansas Campaign Finance Act has been narrowed by decisions of the Governmental Ethics Commission (formerly the Public Disclosure Commission), and the Attorney General, who are in charge of interpreting and administering the Act. The Act is only applicable to candidates for offices elected on a statewide basis. “State office” means “officers elected on a statewide basis, members of the house of representatives and state senators, state board of education members, district magistrate judge, and district attorneys.”<sup>119</sup>

*The Kansas Public Disclosure Commission interpreted the meaning of K.S.A. 25-4156 as follows:*<sup>120</sup>

“ . . . As we understand newspaper advertising, space is charged at different rates depending upon, among other issues, the number of advertisements, the size of the advertisements, the ability to collect payment, and the likelihood of future advertisements. Once these issues have been reviewed, a business judgment is made and the newspaper offers a rate for the particular advertiser. Obvious, from a review of the issues to be considered, a political campaign would not likely receive the lowest rate available to, for example, a large, established commercial concern, and we do not think the statute so requires. Rather, it is our opinion that so long as the rate charged is within a broad range of charges available and is based on a reasoned business judgment, that the statute permits rather than the lowest possible charge.”

A newspaper can charge any reasonable rate for political advertising if based upon a sound business decision. There should not be any discrimination in rates between candidates for the same office and rates should be the same as that charged for similar type advertisements. For example, national campaign advertisements should carry national rates and local campaigns should be charged local rates. A newspaper may require payment in advance.

## **B. GAMBLING**

### ■ Lotteries.

Lotteries and the sale of lottery tickets are prohibited in Kansas by Article 15 Section 3 of the State Constitution. However, the legislature may adopt a state-owned and operated lottery. A lottery is defined as a scheme for the distribution of money or property among those who have given valuable consideration for a chance. The three elements necessary for a distribution scheme to be a lottery are: (1) consideration, (2) prize and (3) chance.<sup>121</sup> Raffles, even those conducted by charitable, religious and educational entities, are illegal and cannot be advertised.

It is a violation of federal law to mail lottery advertisements or tickets contained in any newspaper, circular, pamphlet or publication. Advertisements and tickets may be mailed within a state if that state conducts a lottery. Advertisements may also be mailed from states conducting lotteries to connecting states conducting lotteries. Advertisements of lotteries may be mailed into a state prohibiting lotteries if the advertisements are contained within a newspaper published in a state conducting a lottery.<sup>122</sup>

### ■ Bingo.

Under the Kansas Constitution Article 15 Section 3a, Bingo operations may be conducted by licensed nonprofit religions, charitable, fraternal, educational and veteran organizations.<sup>123</sup> Advertisements of any bingo game must include the full name of the organization licensed to conduct the bingo game.<sup>124</sup> Postal laws also currently still technically prohibit bingo advertisements. It is doubtful that the Postal Service would enforce a stop or cease and desist order as a response to advertisements for State licensed bingo games under this law.<sup>125</sup>

### ■ Bet Making (Gambling).

Gambling advertisements are prohibited in Kansas except for state licensed pari-mutual wagering (horse and dog racing) and the State Lottery. Under Federal law it is unlawful to transmit over a wire communication facility information assisting in the placing of bets or wagers on any sporting event or contest. This restriction does not apply to newspapers and to valid news reporting of sporting events or contests.<sup>126</sup>

### ■ Casino Gaming.

Under the Charity Games Advertising Clarification Act,<sup>127</sup> it is illegal to mail a newspaper containing any advertising of a lottery, gift, enterprise or scheme offering prizes dependent in whole or in part or chance, unless it is operated by the State or is a) otherwise legal in the state and (b) conducted by a not-for-profit organization, or by a commercial enterprise and is clearly occasional and incidental to its primary business. As discussed, above, schemes constituting lotteries are illegal in Kansas and may not be advertised. The “non-profit” and “incidental” exceptions do not apply in Kansas because all such schemes are prohibited.

Games legally conducted by Indian tribes are not governed by these laws and may be freely advertised.<sup>128</sup>

### ■ Poker.

Kansas does not regulate poker tournament advertisements,<sup>129</sup> but poker is considered a lottery and is therefore illegal if any consideration to enter a tournament is given by the contestant. Accordingly, such tournaments may not be advertised since the underlying scheme is illegal. Consideration for this purpose would include entry fees, door or cover charges, required minimum drink or food purchase. A truly free poker contest is not prohibited.<sup>130</sup>

## C. PROFESSIONAL

A professional is a person using special and usually advanced education and skill in that person’s vocation or occupation. Typical professionals are lawyers, medical professionals and engineers. Professionals are usually regulated in their conduct of business on two levels – by the profession’s societies and associations and by state authority granting licenses to practice.

As long as the advertising is not false, misleading, fraudulent, deceptive, self-laudatory or contains unfair statements or claims, then it will comply with professional ethics rules and with state licensing authorities rules. The United States Supreme Court in *Bates and Osteen v. State Bar of Arizona*,<sup>131</sup> held professional advertising has limited protection under the First Amendment as commercial speech. To regulate commercial speech by professionals, the state licensing authorities must draw restrictions narrowly and the regulation must further a substantial state interest, such as protection of the general public welfare.<sup>132</sup>

### *Examples of advertising by professionals:*

#### ■ Accountants.

Accountants are permitted to advertise as long as the advertising is not false, fraudulent, misleading, deceptive or contains certain unfair statements or claims. Accountants are regulated by the Kansas Board of Accountancy.<sup>133</sup>

#### ■ Attorneys

An attorney may advertise such facts as his name, address, telephone number and office hours, biographical information, including educational background, language abilities and legal publications. Information concerning the cost of initial consultation, the availability of a

fee schedule, the range of fees for services, contingent fee rates, hourly rates, and fixed rates for specific services may be advertised. Any advertisement must include the name of at least one lawyer responsible for its contact.<sup>134</sup> Kansas has adopted the Model Rules of Professional Conduct, effective March 1, 1988.<sup>135</sup>

#### ■ Dentists

The American Dental Association has adopted its Principles of Ethics and Code of Professional Conduct addressing advertising by dentists. These rules indicate a dentist should not misrepresent his training and competence in any false or misleading way. A dentist may not use a false or misleading trade name or assumed name, nor use the name of a dentist who has not been actively associated with the practice for more than one year. A dentist may advertise specialization as long as the dentist has met all existing educational requirements and standards set forth by the American Dental Association.

#### ■ Dental Hygienist

A dental hygienist is a professional who assists a dentist by making routine oral examinations and cleaning teeth. Dental hygienists are required by most states to work under direct dentist supervision. The Kansas Dental Board has adopted regulations permitting dental hygienic advertising.<sup>136</sup> A dental hygienist may not advertise independently.

■ Dispensers of hearing aids are regulated by the Board of Hearing Aid Examiners.<sup>137</sup>  
Psychologists are regulated by the Behavioral Science Regulatory Board.<sup>138</sup>

#### ■ Engineers

The Engineers Council for Professional Development and National Society of Professional Engineers have adopted Canons of Ethics for Engineers and Rules of Professional Conduct. These Canons and Rules address the issue of engineer advertising. Canon 5 states engineer will avoid deceptive acts in the solicitation of professional employment. Rule 3 states that engineers shall avoid statements that contain puffery or any material misrepresentation of fact.<sup>139</sup> Rule 5 states that an engineer may advertise his practice and availability but only in media necessary to directly reach an interested and potential client or employer and only in a dignified and reputable media.<sup>140</sup>

#### ■ Other

Medical Professionals and Medically Related Professions - Optometrists are regulated by the Board of Examiners in Optometry.<sup>141</sup> Generally, such advertising must not be fraudulent.<sup>142</sup> Pharmacists are regulated by the Board of Pharmacy.<sup>143</sup> Nurses are regulated by the Board of Nursing.<sup>144</sup>

#### ■ Physicians

The American Medical Association currently encourages and assists all physicians to report all false or deceptive advertising to the appropriate state agency. The AMA's current Principles of Medical Ethics does not define what can and cannot be advertised by physicians. In the past, these principles have been very restrictive. The guiding principle of the current Principles of Medical Ethics is that physicians should observe all laws, uphold the dignity and honor of the profession and accept its self-imposed disciplines. If a physician advertises to offer a free service, the physician shall only perform such service. The physician shall explain further procedures and costs before performing any other services.<sup>145</sup> Most state licensing authorities exercise very little control over advertising by physicians and depend on regulation by local and state medical societies. Physician's and other health care providers are regulated by the Kansas Board of Healing Arts.

- Veterinarians

General false advertising restrictions apply which prohibits false advertising by veterinarians.<sup>146</sup>

## D. CURRENCY

The printing or republication of U.S. currency and stamps illustrations is governed by federal law.<sup>147</sup> The U.S. Supreme Court in *Reagan v. Time, Inc.*<sup>148</sup>, altered currency republication law. Newspapers and advertisers may now print or photograph any currency likeness for any purpose as long as the illustrations comply with certain restrictions of size, color, and disposition of plates and negatives:

- Illustrations of currency and stamps must be either undersized (less than 3/4 size of actual currency), or oversized (more than 1 and 1/2 of the original) and must be in black and white. Negatives and plates used in making the illustrations must be destroyed after use.

- The publishing restrictions do not apply to illustrations, such as scribbled drawing merely suggesting currency but not actually “in the likeness of” genuine currency. These types of illustrations could be in color without violating the laws since they are not likenesses nor could they be construed to be a likeness of currency.

## E. ALCOHOLIC BEVERAGE

The control exercised by state and federal governments over alcoholic beverage advertising is dependent upon the First and Twenty-First Amendments to the United States Constitution. These two amendments provide conflicting directives. The First Amendment protects the liquor industry’s freedom of speech in its commercial advertisements, while the Twenty-first Amendment grants the states authority to regulate alcoholic beverages.

- First Amendment Protection. Historically, commercial speech has not received the same heightened protection given other areas of free speech. Alcoholic beverage advertising, as a form of commercial speech, suffers because of this lack of protection. The United States Supreme Court in *Central Hudson Gas and Electric Corp. v. Public Service Comm.*<sup>149</sup> provided a four-part test to determine if a particular governmental regulation on commercial speech was constitutional. See Chapter Two for decision of *Central Hudson*. The courts have found an advertisement proposing a sale of alcoholic beverages is a lawful activity.

The Tenth Circuit Court of Appeals has concluded that, since that advertisement is intended to promote alcohol, there is a direct connection between the state’s interest in the consumption of alcohol and the regulation of alcoholic advertisement. An advertising restriction only restricting the time, place and manner of the advertisement will be held constitutional, while a complete ban on advertisements will be stricken as unconstitutional.

- Twenty-first Amendment. State police powers are defined as the ability to regulate matters concerning the health, safety and welfare of citizenry. Under the traditional state police powers, the states have broad authority to regulate alcoholic beverages. This broad authority has been expanded to more than normal state authority over the health, safety and welfare of the citizens by the language of the Twenty-first Amendment. Section 2 of the Twenty-first Amendment states: “The transportation or importation into any state, territory, or possession of the United States or delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

■ **State Restrictions.** Kansas prohibits advertisements by means of handbills, which is broadly interpreted, advertising by means of billboards, and displaying liquor in the store's window.<sup>150</sup> There are no Kansas restrictions upon advertising of cereal malt beverages or alcoholic beverages in Kansas newspapers, except advertising of a farm winery or micro brewery (which must be approved by the Director of Alcohol Beverage Control prior to placement). Price, brand and similar matters may be freely advertised. "Handbills" can mean any separately distributed printed matter not included in a newspaper.

While administrative regulations still prohibit certain advertising practices, the stated policy of the ABC is that there will be no enforcement, except as to handbills and below cost advertising.

*Certain illegal practices by licensed alcohol beverage and cereal malt beverage sellers and clubs cannot be advertised:*

- Free drinks;
- Drinks below cost;
- Unlimited drinks at fixed cost;
- Preferred pricing to certain individual;
- Free larger size drink; and
- Games and contests including drinking.

Questions regarding advertising of these products and practices may be directed to Alcohol Beverage Control (785) 296-7015 or email at abc\_email@kdor.state.ks.us.

■ **Federal Regulations.**

Both the FTC and the Bureau of Alcohol, Tobacco and Fire Arms (BATF) regulate alcoholic beverage advertisements. The FTC merely restricts false and/or misleading advertisements. This would necessarily encompass alcoholic beverage advertisements. The BATF, however, heavily regulates the advertisement of alcoholic beverages.<sup>151</sup> The BATF divides alcoholic beverages into three separate categories: wine, distilled spirits and malt beverages.

Certain statements are mandatory for alcoholic beverage advertisements. The BATF requires the advertisement to provide a known address of the responsible advertiser and the class in which the product belongs. Wine advertisements must state the wine type and any distinctive designation.<sup>152</sup> Also, distilled spirit advertisements must state the alcoholic content and the percentage of spirits from which it is distilled.<sup>153</sup>

*Prohibited statements for all products.*<sup>154</sup>

- False or misleading statements;
- Statements that are disparaging of a competitor's product;
- Obscene or indecent statements;
- Statements relating to analysis, standards, or tests which the director finds to be misleading to the consumer;
- Statements relating to a guarantee which the director finds to be misleading to the consumer;

- Statements that the product is made, bottled, labeled or sold in accordance with governmental authorization, law or regulations;
- Statements inconsistent with the labeling of the product;
- Statements or pictorial representation of flags, seals, coat of arms, crests and other insignia which are likely to mislead the consumer;
- Statements using the word “bond” or any form thereof unless specifically permitted; and
- False or misleading statements regarding the curative or therapeutic effects of the beverage.
- Prohibited statements for wine:
  - Statement of alcoholic content;
  - Words which create the impression that the wine is similar to any distilled spirits;
  - Statements of age;
  - Statements of bottling date or other dates; can state simply “bottled in (year).”<sup>155</sup>
  - Statements indicative of origin unless the same statements also appear on the label; and
  - Use of the word importer or similar words.
- Prohibited statements for distilled spirits advertising:
  - The use of the word “pure”;
  - The word “double distilled,” “triple distilled,” or similar words;
  - Statements of age unless the same is also on the label of the product; and
  - Statements of origin other than the actual place of origin.
- Prohibited statements for malt beverages:
  - Statements as to alcoholic content;<sup>156</sup>
  - Use of the word “beer,” “lager,” “ale,” “porter,” or “stout,” if the product contains less than one half of one percent of alcohol by volume.

Comparative advertising must not “disparage” a competitor’s product; including taste tests. Taste test ads must be non-deceptive, not misleading and based on scientifically accepted procedures.<sup>157</sup>

## **F. FINANCIAL INSTITUTIONS**

The right of a financial institution to advertise is implicit in its right to engage in the banking business.<sup>158</sup> Deposit advertising is subject to the regulation and supervision by Federal Bank Regulatory agencies. Credit advertising is regulated under federal law, specifically the Truth in Lending Act and regulations thereunder. State law affects financial institution’s advertising rights.

### ■ Deposit Advertising

Advertising by deposit institutions is regulated by one of several federal agencies regulating the specific type of institutions. National banks are regulated by the Office of the Comptroller of the Currency. The Federal Reserve Board regulates the advertising allowed by member national banks and member state banks. The Federal Deposit Insurance Corporation (FDIC) regulates the advertising practices of Federal Reserve system non-members. The Federal Home Loan Bank Board regulates advertising practices of savings and loan associations and federal savings banks. The Federal Savings and Loan Insurance Corporation (FSLIC) regulates advertising by member insured institutions not chartered by the Federal government.

The National Credit Union Administration supervises advertising of federally chartered or insured credit unions. In addition, the financial industry itself has issued a "Statement of Principle of America Bankers Association as a voluntary code of ethics for bank advertising. The code itself is not legally binding on a bank, however the Comptroller of the Currency has included it in his handbook for consumer examinations and code violations are cited by National Bank Examiners. The basic principles to be followed in financial institution depository advertising is all statements must be truthful, statements must be presented so the intended audience can reasonably understand the message presented and it is not necessary for the advertisement to contain all the details, but rather the important features so no false impressions are created or a person misled.

If the rate of interest is advertised, regulations require it be advertised in terms of an annual rate of simple interest. The advertisement may also contain a statement of yield achieved through compounding interest during one year, as long as the simple interest and compound interest rates are displayed in equal type and print. If the advertised interest rate requires funds to be held in the deposit account for a certain length of time, that must be disclosed. If there is any penalty for early withdrawal, it must be disclosed.

Interest rates for a minimum deposit and a higher rate on any money in excess must be disclosed clearly and in a manner leaving no confusion as to the interest rates being paid. If an account offers a higher rate for a short initial period and then a lower rate for the time thereafter, it must be clearly disclosed.

Ordinary and recurring service charges must be disclosed. If a minimum balance is required, that fact must be disclosed. A deposit institution must disclose in its advertising enough information to not mislead or confuse its customers.

### ■ Credit Advertising

Advertisements by lending institutions for consumer credit must comply with the Truth in Lending Act and the regulations promulgated by the Federal Reserve Board entitled Regulation Z. Regulation Z defines an advertisement as "a commercial message in any medium that promotes, directly or indirectly a credit transaction." The Truth in Lending Act applies only to consumer credit and consumer credit transactions. A consumer credit transaction is a transaction in which credit is offered or extended to a person primarily for personal, family or household use. The Truth in Lending Act prohibits any advertising that aids, promotes or assists directly or indirectly any extension of consumer credit offering credit or credit terms that are not "usually or customarily offered."

In addition to the Truth and Lending Act and Regulation Z, credit advertising must also comply with the Equal Credit Opportunity Act, which is directed at discriminatory treatment in extending credit by financial institutions. The Equal Credit Opportunity Act and Regulation B promulgated

by the Federal Reserve Board prohibits advertising to applicants or prospective applicants that would discourage an application for credit on the basis of the applicant's race, color, religion, national origin, sex, marital status or age. The Fair Housing Act requires lending institutions to not discriminate on the basis of race, color, religion, sex or national origin. Advertisements promoting the extension of credit to purchase, improve or repair a dwelling, must contain a statement the institution makes its loan without regard to race, color, religion, sex or national origin and contain a specific logo required under the Fair Housing Act.

#### ■ Miscellaneous Advertising Requirements

A national bank must include the word "national" in any advertising. Federal savings and loans are required to have the word "savings" in their name and indicate they are federally chartered in their advertising.<sup>159</sup>

If a bank is insured by the Federal Deposit Insurance Act, then advertisements regarding deposits must contain a statement that the institution is a member of the Federal Deposit Insurance Corporation. The FSLIC requires insured institutions to advertise they are a member of the FSLIC. Credit unions insured by the National Credit Union Administration must state they are insured by the National Credit Union Administration. National banks are required by the Office of the Comptroller of Currency to retain copies of all advertising for at least two years.

Kansas has regulated financial institution advertising in certain instances. With regard to a consumer credit transaction, the representation and statement of the interest rates, terms and credit offered must not be false, misleading or deceptive. The Savings and Loan department of the State of Kansas has also promulgated a regulation to the effect that lack of required insurance must be disclosed with sufficient prominence.<sup>160</sup>

#### ■ Violating Advertising Restrictions on Financial Institutions

Depository institutions violating advertising-related regulations on deposits are penalized by a cease-and-desist order from the regulatory agency in charge of regulating that institution. It is possible for the regulating agency to impose stricter penalties, such as removal of its right to operate as a financial institution.

Credit advertising not complying with the Truth in Lending Act or any of the other regulations can result in penalties from both the regulatory agency in charge of advertising regulation and in a civil action by a person who has been damaged by the misleading or inaccurate advertising. Under the Truth in Lending Act, the creditor violating the advertising restrictions can be held liable to the person injured in amount of \$100 or in any amount equal to twice the finance charge required in connection with such transaction – whichever is greater. Such liability shall not exceed \$1,000 on any credit transaction. Newspapers are specifically excluded from liability for disseminating advertisements violating the Truth in Lending or Regulation Z. It is still important for financial institution advertising to be truthful accurate and not misleading in any manner, whether it be credit advertising or depository advertising.

## G. FAIR HOUSING

Section 804(c) of the Fair Housing Act prohibits the making, printing and publishing of advertisements which state a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. The prohibition applies to publishers, such as newspapers and directories, as well as to persons and entities who place real estate advertisements. It also applies to advertisements where the underlying property may be exempt from the provisions of the Act, but where the advertisement itself violates the Act.<sup>161</sup>

Publishers and advertisers are responsible under the Act for making, printing, or publishing an advertisement that violates the Act on its face. Thus, they should not publish or cause to be published, an advertisement that on its face expresses a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. To the extent that either the Advertising Guidelines or the case law do not state that particular terms or phrases (or closely comparable terms) may violate the Act, a publisher is not liable under the Act for advertisements which, in the context of the usage in a particular advertisement, might indicate a preference, limitation or discrimination, but where such a preference is not readily apparent to an ordinary reader.

*Examples:*

■ Race, color, national origin

Real estate advertisements should state no discriminatory preference or limitation on account of race, color, or national origin. Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (i.e., white family home, no Irish) will create liability under this section.

However, advertisements which are facially neutral will not create liability. Thus complaints over use of phrases such as master bedroom, rare find, or desirable neighborhood should not be filed.

■ Religion

Advertisements should not contain an explicit preference, limitation or discrimination on account of religion (i.e., no Jews, Christian home). Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home), or those which contain a religious symbol, (such as a cross), standing alone, may indicate a religious preference. However, if such an advertisement includes a disclaimer (such as the statement “This Home does not discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status”) it will not violate the Act. Advertisements containing description of properties (apartment complex with chapel) or services (kosher meals available) do not on their face state a preference for persons likely to make use of those facilities, and are not violations of the Act.

The use of secularized terms or symbols relating to religious holidays such as Santa Claus, Easter Bunny or St. Valentine’s Day images or phrases such as “Merry Christmas”, “Happy Easter” or the like does not constitute a violation of the Act.

■ Sex

Advertisements for single family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation or discrimination based on sex. Use of the term master bedroom does not constitute a violation of either the sex discrimination provisions or the race discrimination provisions. Terms such as “mother-in-law suite” and “bachelor apartment” are commonly used as physical descriptions of housing units and do not violate the Act.

■ Handicap

Real estate advertisements should not contain explicit exclusions, limitations, or other indications of discrimination based on handicap (i.e., no wheelchairs). Advertisements containing descriptions of properties (great view, fourth-floor walk-up, walk-in closets), services or facilities (jogging trails) or neighborhoods (walk to bus stop) do not violate the Act. Advertisements describing the conduct required of residents (non-smoking, sober) do not violate the Act. Advertisements containing descriptions of accessibility features are lawful (wheelchair ramp).

■ **Familial status**

Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Advertisements describing the properties (two bedroom, cozy, family room), services and facilities (no bicycles allowed) or neighborhoods (quiet streets) are not facially discriminatory and do not violate the Act.

■ All publishers should use an “equal housing opportunity logo” or statement in advertising of residential real estate for sale, rent, or financing.<sup>162</sup>

All publishers should print at the beginning of their real estate advertising section a notice as set forth in the federal regulation.

“All real estate advertised herein is subject to the Federal Fair Housing Act, which makes it illegal to advertise any preference, limitation, or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or intention to make any such preference, limitation, or discrimination.

We will not knowingly accept any advertising for real estate which is in violation of the law. All persons are hereby informed that all dwellings advertised are available on an equal opportunity basis.”

**For more information about Fair Housing guidelines and a list of preferred advertising terms, visit [www.aptassoc.com/text/adguide.html](http://www.aptassoc.com/text/adguide.html)**

## **H. BUSINESSES.**

A “Going Out Of Business” sale is not specifically neglected by state or federal law, except laws generally regulating fraud, deceptive and misleading advertising, or consumer protection laws. Many municipalities in Kansas have adopted a more or less uniform code of city ordinances which regulate such sales. In addition to a required permit, the dates of the sale must be stated and cannot be more than 60 days after the issuance of the permit, and at least two years must elapse between “fire sales” and similar promotions. Retailers must refrain from “employing any untrue, deceptive or misleading advertising” but newspapers are exempted from any liability so long as they act in good faith without any knowledge of any false deceptive or misleading character or without knowledge that the ordinance was not followed.<sup>163</sup>

## **I. FIREARMS.**

There are no specific regulations of firearms advertising per se. Gun sale regulations are numerous, however, and the chief issue for newspapers is avoiding any knowing publication of an offer for an illegal sale.

■ Firearm sales fall into two general categories: licensed dealers and unlicensed individuals. Dealers must comply with any federal, state and local laws. They may not sell firearms to residents of other states than where the dealers’ premises are located, or to any person under 18, for ammunition or 21, for handguns. Dealers may sell firearms at gun shows within the dealer’s state and may take orders at shows in other states, but then must either deliver the guns within the dealer’s state or ship to a dealer in the purchaser’s state for delivery.

■ Unlicensed persons may only sell to a person of legal age in the seller’s own state.<sup>164</sup>

Newspapers are now under interest group pressure to discontinue accepting classified ads for gun sales as a matter of editorial policy. The self-called “Campaign to Close the Newspaper Loophole” emphasizes that individual sellers do not have to conduct background checks on purchasers and urges newspapers not to accept ads from unlicensed sellers. But, to repeat, such ads are legal.

## H. MISCELLANEOUS SPECIFIC

### ■ Adoption

Kansas law prohibits advertising by a person which is not a licensed child placement agency, that such person will adopt, find an adoptive home or otherwise place a child for adoption.<sup>165</sup> The Kansas Attorney General has ruled this law unconstitutional at least as far as the “will adopt” proscription,<sup>166</sup> so individuals may place advertising seeking to find a child to adopt by themselves.

### ■ American Flag and Paraphernalia

It is unlawful to use the American Flag for any advertising purposes in any manner.<sup>167</sup> Another restrictive prohibition is contained in 4 U.S.C. Section 3 where substantial prohibitions are set out for any person, who, within the District of Columbia, in any manner for exhibition or display uses the flag to advertise a product. This statute does not apply to other states. However, early Supreme Court decisions indicate Congress could, at any time impose the same restrictions upon the states. There are no specific penalties contained in federal or state statutes regarding the use of flags in advertisements, and the statute uses only cautionary language.

### ■ Employment

It is unlawful in Kansas for an employer, employment agency or labor organization to advertise employment opportunities or membership including any form of discrimination on basis of race, religion, color, sex, physical handicap, national origin or ancestry. Licensed employment agencies shall not publish or cause to be published any false or fraudulent advertisement concerning or relating to work or employment.<sup>168</sup>

### ■ Funeral Homes

Kansas law regarding the licensing of embalmers states that embalmers can use general advertisements regarding the services they offer, but cannot solicit business. Also, it is improper to use any untrue, misleading or improbable statements in advertising by embalmers and funeral homes.<sup>169</sup>

### ■ Legal Notices and Legal Advertisements

To have legal effect, legal notices and advertisements may only be advertised in official newspapers. *An official newspaper is a newspaper:*

- that has been published at least weekly, fifty times a year;
- has been so published for at least one year prior to becoming a qualified legal publication;
- be entered at the post office as a periodical class mail matter;
- has a general circulation on a daily, weekly, monthly or yearly basis in the county in which the newspaper is the official legal publication; and
- printed in the state of Kansas and published in the county where it is the official publication, unless there is no newspaper printed in that county with a general circulation.<sup>170</sup>

A legal notice or advertisement is any matter required by law to be published by political subdivision or a part of a court proceeding in this state.<sup>171</sup> The allowable charges for publishing a legal notice or advertisement is that charged to commercial customers or a rate established by statute.<sup>172</sup>

Legal rates may not be increased by more than 15 percent per year.<sup>173</sup> The Kansas Attorney General believes that once the legal rates have been chosen, a newspaper is prohibited from changing the commercial rate if that would cause more than a 15 percent increase. In addition, the publisher of the official newspaper which publishes legal advertisements must file a card with the county clerk in which the newspaper is located showing the rate for legal advertisements which shall be effective for a period of one year from July 1 on or before which the filing is made.<sup>174</sup>

#### ■ Publication Oversight

Kansas law provides a remedy when a newspaper fails to publish all of the notices required by a particular statute. Whenever any legal notice or advertisement is required to be published three or more consecutive times, no action taken or authority exercised by a public body is deemed invalid on account of the newspaper's oversight in failing to publish one of the notices if compliance with the number of publication requirement is achieved prior to the taking of such action or exercise of authority.<sup>175</sup>

#### ■ Regulated Sports

Kansas statutes allow a commission to regulate professional boxing, kickboxing, martial arts and karate. The commission may petition a court to stop an unlicensed event from advertising.<sup>176</sup>

#### ■ Registered Securities

Securities registered with the Kansas Securities Commissioner cannot be advertised in any misleading manner calculated to deceive the purchaser, or investor or the registration statement of the securities can be denied effectiveness, suspended or revoked.<sup>177</sup>

#### ■ 900 Telephone Numbers

Federal law requires that all 900 advertisements must disclose the charge per call or minute together with any additional fees (with details of all types of costs and charges), and if the caller is under 18 years old, that the consent of parent or guardian is required. The disclosure must be in the same language as the advertisement, in contrasting color, parallel to the base of the copy, placed adjacent to the presentation of the pay per call number, and be at least one-half the size of the type used for the number display.<sup>178</sup>

#### ■ Tobacco Products

Cigarette advertisements must carry one of the forms of Surgeon General's warnings and conform to the format used by the Cigarette Liability Act.<sup>179</sup> The label with warning must be conspicuous and legible, contrasting in typography, layout and color with all other material in the advertisement. Smokeless tobacco advertising must carry labels approved by the FTC in one of the three circle and arrow formats which must be rotated every four months.<sup>180</sup> The warning statement must be in a "conspicuous and prominent location, in conspicuous and legible type in contrast with all other printed material in the advertisement."<sup>181</sup> It must be located within the trim areas other than the margin and not next to other text or similar geometric forms. A picture of the product bearing the statement is sufficient only if it occupies at least 80% of the space of the advertisement.

### ■ Auto Dealers

Many states provide advertising guidelines for auto dealers, however Kansas does not.<sup>182</sup> Auto dealers are governed by the Consumer Protection Act.<sup>183</sup> However, certain practices are prohibited and therefore may not be advertised. These include sale off premises and sales by dealers who do not disclose their dealer status.<sup>184</sup> No retailers are permitted to “pay the sales tax” on a retail sale (except for vending machines). K.S.A. 79-3605.

### ■ Lease purchase contracts (rent to own).<sup>185</sup>

Recently, “rent to own” stores have become popular in Kansas. Kansas law now regulates advertisements involving the lease-purchase of personal property. Advertisements which state the dollar amount of any payment and the right to acquire ownership of the property must also “clearly and conspicuously” state:

- The transaction advertised is a lease-purchase agreement.
- The total number of payments necessary to acquire ownership of the property.
- The consumer acquires no ownership rights if the total amount necessary to acquire ownership is not paid.

The law expressly states that the owners and personnel of a newspaper or other advertiser are not liable for violations of the lease purchase law.<sup>186</sup>

### ■ Miscellaneous

Kansas law contains many other advertising restrictions. These advertising restrictions mainly apply to the advertiser and not to the advertisement publisher. The following list contains examples of various other existing prohibitions.

- Commercial feeding stuffs for livestock, poultry and pets.<sup>187</sup>
- Commercial fertilizer.<sup>188</sup>
- Certified or registered agricultural seeds.<sup>189</sup>
- Eggs.<sup>190</sup>
- Vehicle and mobile home dealers and salesmen.<sup>191</sup>
- Life insurance.<sup>192</sup>
- Swine that are specific pathogen free.<sup>193</sup>
- Kansas Food, Drug & Cosmetic Act.<sup>194</sup>
- Prescription drugs.<sup>195</sup>

**KANSAS NEWSPAPER STATUTES**  
**AS OF JANUARY 1, 2006**

**K.S.A. 64-101. Newspapers in which legal publications may be made.**

(a) The governing body of each city of the first class shall designate by resolution a newspaper to be the official city newspaper. Once designated, the newspaper shall be the official city newspaper until such time as the governing body designates a different newspaper. No legal notice, advertisement or publication of any kind required or provided by any of the laws of the state of Kansas, to be published in a newspaper shall have any force or effect unless the same is published in a newspaper which:

- (1) Is published at least weekly 50 times a year and has been so published for at least one year prior to the publication of any official city publication;
- (2) is entered at the post office as periodical class mail matter;
- (3) has general paid circulation on a daily, weekly, monthly or yearly basis in the county in which the city is located and is not a trade, religious or fraternal publication; and
- (4) is published in the county in which the city publishing the official publication is located. If there is no newspaper published in the county, the newspaper shall be published in Kansas and shall have general paid circulation in the county.

(b) The board of county commissioners of each county shall designate by resolution a newspaper to be the official county newspaper. Once designated the newspaper shall be the official county newspaper until such time as the board designates a different newspaper. The newspaper selected for the official publications of a county shall be a newspaper which:

- (1) Is published at least weekly 50 times each year and has been so published for at least one year prior to the publication of any official county publication;
- (2) is entered at the post office in the county of publication as periodical class mail matter, which county shall be located in Kansas;
- (3) has general paid circulation on a daily, weekly, monthly or yearly basis in the county and is not a trade, religious or fraternal publication; and
- (4) is published in the county publishing the official publication. If there is no newspaper published in the county, the newspaper shall be printed in Kansas and have general paid circulation in the county.

(c) Whenever the board of education of a school district is required to publish a legal notice, advertisement or other publication in a newspaper having general circulation in the school district, such newspaper shall be one which:

- (1) Is published at least weekly 50 times each year and has been so published for at least one year prior to the publication of any school district publication;
- (2) is entered at the post office in the school district of publication as periodical class mail matter;
- (3) has general paid circulation on a daily, weekly, monthly or yearly basis in the school district and is not a trade, religious or fraternal publication; and
- (4) is published in the school district publishing the official publication. If there is no newspaper published in the school district, the newspaper shall be published in Kansas and shall have general paid circulation in the school district.

(d) Nothing contained in this section shall invalidate the publication in a newspaper which has resumed

publication after having suspended publication all or part of the time that the United States has been engaged in war with any foreign nation and six months next following the cessation of hostilities if such newspaper resumes publication in good faith under the same ownership as it had when it suspended publication. Nothing in this section shall invalidate the publication in a newspaper which has simply changed its name or moved its place of publication from one part of the county to another part, or suspended publication on account of fire, flood, strikes, shortages of materials or other unavoidable accidents for not to exceed 10 weeks within the year last preceding the first publication of the legal notice, advertisement or publication. All legal publications heretofore made which otherwise would be valid, that have been made in a newspaper which, on account of flood, fire, strikes, shortages of materials or other unavoidable accident, has suspended publication for a period of not exceeding 10 weeks, are hereby legalized.

**K.S.A. 64-102. Same; publication on certain day of week.**

All legal publications and notices of whatever kind or character that may by law be required to be published a certain number of weeks or days shall be and they are hereby declared to be legally published when they have been published once each week in a newspaper which is published at least once each week, such publication to be made on any day of the week upon which the paper is published: Provided, That successive publications of the same notice shall be made on the same day of the week except that when there is no issue of the newspaper published on such day that it may be made on the preceding or following day: And provided further, That any newspaper publishing such notices or publications, as hereinbefore provided, must be otherwise qualified under existing law to publish such notices and publications.

**K.S.A. 64-103. Publication of acts of legislature, official documents, and constitutional amendments.**

(a) All acts of the legislature which shall provide for their taking effect on publication in any newspaper or in the Kansas register shall be published in the Kansas register, which shall be deemed the official publication. Except as otherwise provided in this subsection, all proclamations, orders, notices and advertisements authorized by any state officer shall be printed and published in the Kansas register. Payment for such publication shall be made by the state at the rates prescribed by law. The provisions of this subsection shall not apply to:

- (1) Resolutions making propositions to amend the constitution; or
- (2) proclamations issued by the governor which are not required by law to be issued by the governor. All proclamations issued by the governor which are not published in the Kansas register shall be published on the official Kansas internet website.

(b) For the purpose of informing the electors of the propositions to be voted on at the election thereon, the secretary of state shall cause resolutions making propositions to amend the constitution to be published in one newspaper in each county of the state where a newspaper is published, once each week for three consecutive weeks immediately preceding the election at which the proposition is to be submitted

**K.S.A. 64-104. Validation of prior publications in newspapers having patent insides or outsides.**

All legal publications heretofore made in newspapers having one side of the paper printed away from the office of publication, and known as patent insides or patent outsides, shall have the same force and effect as if published in newspapers wholly printed and published in such county where such publication was made.

**K.S.A. 64-105. Publications in newspapers having patent insides or outsides, when.**

All publications and notices required by law to be published in newspapers in this state, if published in newspapers having one side of the paper printed away from the office of publication, known as patent outsides or insides, shall have the same force and effect as though the same were published in newspapers printed wholly and published in the county where such publication shall be made: Provided, One side of the

paper is printed in said county where said notices are required to be published.

**K.S.A. 64-108. Official court paper in counties of 45,000 or over.**

In any county of this state, having a population of 45,000 or over, the judge of the district court of said county may designate a court paper to be the official court paper for the publication of court calendars, assignments of cases and motions, daily findings and other proceedings as the judge of the district court and other courts of record may direct. Nothing herein shall in anywise affect the jurisdiction over or the regularity of proceedings, trials or judgments except as otherwise provided by law.

**K.S.A. 64-109. Official court paper in counties of 45,000 or over; what may be published.**

When any court paper shall have been designated as an official court paper, as provided in K.S.A. 64-108, any legal notice, advertisement or publication now required by law to be published in any newspaper in any action or proceedings pending before the district court may be published in such court paper so designated by the direction and order of the court in which said action is pending and such publication shall be deemed a compliance with K.S.A. 64-101.

K.S.A. 28-137. Fees for publication of legal notices and legal advertisements in newspapers; proof of publication; taxation and collection in actions or proceedings in court.

- (a) A newspaper shall charge and receive for publishing a legal advertisement a rate not exceeding the lowest regular classified advertising rate charged by the newspaper to its commercial customers.
- (b) On or before July 1 of each year, the publisher of each newspaper that publishes any legal advertisement in this state shall file with the county clerk of the county in which the newspaper is located a card showing the newspaper's rates for legal advertisements, which shall be effective for a period of one year from the July 1 on or before which the filing is made.
- (c) Any contract rates or volume discounts given to commercial customers by the newspaper shall be available to persons or political subdivisions causing publication of legal advertisements, under the same terms and conditions as for commercial advertisements.
- (d) The classified rate for legal advertisements shall not in any year be increased by more than 15% in excess of the rate for the next preceding year.
- (e) Proof of the publication of all such notices shall be made in the manner required by law or the order or citation of court or summons, and each such proof of publication shall be accompanied by a verified statement of the fees and charges therefore. The fees and charges of all such publications when made in any action or proceeding in any court of this state shall be taxed as costs and collected in the same manner as other costs in the action or proceeding.
- (f) Failure to charge rates in accordance with this section shall in no way affect the validity of any official public notice or legal advertisement and shall not subject any such notice or advertisement to legal attack upon such grounds.
- (g) As used in this section, "legal advertisement" and "political subdivision" have the meanings provided by K.S.A. 28-137b and amendments thereto.

**K.S.A. 28-137b. Legal notices and advertisements; definitions.**

As used in K.S.A. 28-137b and 28-137c:

- (a) "Legal advertisement" means any matter required by law to be published by a political subdivision or as part of a court proceeding in this state.
- (b) "Political subdivision" means any county, city, township, school district, drainage district, library district, cemetery district, hospital district, community college district or municipal utility.

**K.S.A. 28-137c. Legal notices and advertisements; affidavit of publisher; proof of publication.**

When attached to a copy of a legal advertisement, the affidavit of the publisher or proprietor of a newspaper stating that the advertisement has been published in the newspaper and the dates the advertisement was published shall constitute prima facie evidence that publication was made as stated in the affidavit. Proof of the publication shall be made in the manner required by law or by court order, and each such proof shall be accompanied by a verified statement of the fees and charges therefore.

**K.S.A. 12-1651. Official newspaper in cities of second and third classes; qualifications.**

(a) The governing body of each city of the second and third class shall designate by resolution a newspaper to be the official city newspaper. Once designated the newspaper shall be the official city newspaper until such time as the governing body designates a different newspaper.

(b) The newspaper selected for the official publications of cities of the second and third class shall be one which has the following qualifications:

(1) It must be published at least weekly 50 times each year and have been so published for at least one year prior to the publication of any official city publication.

(2) It must be entered at the post office of publication as second-class mail matter.

(3) More than 50% of the circulation must be sold to the subscribers either on a daily, weekly, monthly or yearly basis.

(4) It shall have general paid circulation on a daily, weekly, monthly or yearly basis in the county and shall not be a trade, religious or fraternal publication.



## MODEL STORY AND PHOTO RELEASE

The undersigned does hereby consent to publication of his or her name, identity, photographs and story details in, for and by [NAME OF NEWSPAPER], for purposes of publication in any of its editions, background information, or other news related uses, or for promotional advertisements, regarding the investigation and reporting of a news, feature, sports or other story, lead or idea, or for advertising purposes as the case may be.

The undersigned does hereby release [NAME OF NEWSPAPER], its owners, and any person employed by it, its successors and assigns, from any and all claims of defamation, invasion of privacy, breach of contract, or any other claim in tort or contract, arising out of the use in its publications or otherwise, of the information or photographs described above.

---

Date

---

Name (printed)

---

Witness

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Signature

## MODEL CHILDREN AND BIRTH RELEASE

The undersigned parent or legal guardian does hereby consent to publication of the name, identity, photographs and story details regarding the undersigned's minor child, in, for and by [NAME OF NEWSPAPER], for purposes of publication in any of its editions, background information, or other news related uses, or for promotional advertisements, regarding the investigation and reporting of a news, feature, sports or other story, lead or idea, or for advertising purposes as the case may be.

The undersigned on behalf of the said minor child does hereby release [NAME OF NEWSPAPER], its owners, and any person employed by it, its successors and assigns, from any and all claims of defamation, invasion of privacy, breach of contract, or any other claim in tort or contract, arising out of the use in its publications or otherwise, of the information or photographs described above.

Mother must sign for Birth Announcements; parent or legal guardian for other purposes. For Birth Announcements, Father must sign this release for his name to appear in Announcement.

---

Date

---

Date

---

Mother's Name (printed)

---

Father's name (printed)

---

Address & Telephone

---

Address & Telephone

---

Signature

---

Signature



**BIRTH INFORMATION** (for birth announcements only):

---

Name and sex of child

---

Place of Birth (and hospital if desired)

---

Date of birth

---

Witness

## MODEL COPYRIGHT LICENSE

[For publication of photographs and duplication of writings and graphics subject to copyright and not in the course of fair use.]

The undersigned is the owner of copyrights associated with the material described below and has the right to authorize others to copy, reproduce and use the material protected by such copyrights, and does hereby grant to [NAME OF NEWSPAPER] a non-exclusive right and license, subject to the terms of this agreement, to copy, reproduce and publish the copyrighted material in its newspaper including its electronic edition and electronic archives and for promotional activities and advertising, as the case may be. Any limitations or restrictions as to duration of this license, consideration, scope and similar matters are specified below; otherwise, this non-exclusive license is unlimited and the consideration therefor is the enlarged degree of exposure the undersigned will gain from such uses. The publication of any copyrighted material shall carry an attribution to the undersigned as the copyright owner. This license shall inure to the benefit of the parties, and their successors, but may not be assigned by [NAME OF NEWSPAPER] except to subsequent owners of the newspaper (which shall be broadly defined), in the event of which, consent to assignment is hereby given without any further action required.

SPECIAL TERMS OF LICENSE:

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Date

---

Name of Copyright Owner (printed)

---

Witness

---

Signature

## MODEL DISPLAY ADVERTISING CONTRACT

1. The undersigned hereby agrees to a minimum of \_\_\_\_\_ inches of display advertising space for the term of \_\_\_\_\_ months commencing \_\_\_\_\_, in [NAME OF NEWSPAPER]. Billing will be made each month according to the rate card provided with this agreement and subject to change from time to time according to the newspaper\_s then published applicable rate card; provided, however, that this agreement may be canceled at the option of the advertiser in the event that such rates increase. All terms of the then published rate card will automatically be incorporated into this agreement by reference.
2. Whenever lineage utilized exceeds the amount designated above during any billing period, the rate will automatically be adjusted to the new level. If the designated lineage is not achieved during a billing period, any shortage will be billed at the level achieved.
3. Advertiser will give the newspaper at least 15 days written notice of any changes in its ownership and of any material changes in any of the informational representations contained herein.
4. Because this agreement is subject to credit approval, it shall not be binding upon the newspaper until approved by the newspaper\_s Advertising Manager and bears that signature. When monthly credit is granted to an advertiser, the account is due and payable on receipt of monthly billing and will be considered delinquent after the 25th day of the month. Any delinquent account may be closed and the contract terminated. Advertising placed during the contract period may then be charged at non-contract rates. Delinquent accounts will be assessed 1.5% per month (18% annual rate) until paid in full. When credit is not extended, payment must be received in advance of publication. The responsibility for payment always rests with the advertiser, even when the advertiser has engaged an agency or has paid the agency for advertising placed. The newspaper has no obligation to seek payment from any agency.
5. Advertisements will be set to follow the copy and style of layout submitted as closely as possible. Camera ready copy is preferred. Excessive changes on proofs from original copy submitted, and advertisements which have been set have thereafter canceled, will be charged at prevailing rates. Cancellation deadlines are the same as placement deadlines.
6. The newspaper shall not be responsible for copy errors or typographical errors. If the newspaper is in error on published copy, its liability is strictly limited to comparable reprint, or credit that portion of the advertisement in which the error occurred. In no event will the newspaper be liable for any other damages of any kind whatsoever.
7. This agreement may be canceled by the newspaper at any time with 30 days written notice to the advertiser in the event that publishing costs or other conditions beyond its control make an adjustment in rates necessary, in which event, advertiser shall retain all discounts received during the time the contract remained in force. Advertiser may cancel this agreement at any time upon 30 days written notice and upon surrendering all discounts received during the time the contract remained in force.

8. The consideration paid hereunder is for the use of advertising space in the newspaper. Except for copy art furnished by advertiser, all advertising layouts, copy work and art work which constitute the makeup of any advertisement, together with the advertisement itself as it appears in published form, constitute instruments of service and remain at all times the exclusive property of the newspaper. No person or entity including advertiser may re-use, reproduce or republish any portion of any advertisement for any purpose whatsoever, without the consent of the newspaper.

9. The following information provided by advertiser is an integral part of this agreement and the newspaper will rely upon the accuracy of any representations made. Any misstatements shall be grounds for immediate termination of this agreement.

**NEW OR CHANGE FROM PRIOR CONTRACT**

Corporate or Company Legal Name [doing business as (if applicable)] \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Telephone No. \_\_\_\_\_

Fax No. \_\_\_\_\_ Authorized Person & Title \_\_\_\_\_

Corporation \_\_\_ Partnership \_\_\_ Limited Partnership \_\_\_ Proprietorship \_\_\_ Other \_\_\_

**Mail Monthly Statement to:**

Name \_\_\_\_\_ Business Name \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Telephone No. \_\_\_\_\_

**DATE ALL SIGNATURES:**

\_\_\_\_\_ [NEWSPAPER] Advertising Manager

\_\_\_\_\_ [NEWSPAPER] Advertising Sales Manager

\_\_\_\_\_ [NEWSPAPER] Sales/Marketing Executive

\_\_\_\_\_ Advertiser Signature

## NOTES

- . 18 ALR d. 1286.
- . [Lorain Journal Co. v. U.S.](#), **342 U.S. 143**, 96 L.Ed 162, 72 S.Ct. 181 (1951) and *.C. Star Co. v. U.S.*, 240 F.2d 643 (8th Cir. 1959) cert. denied 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438.
- . *Radical Lawyers Caucus v. Pool*, 324 F.Supp. 268 (DC Tex. 1970). The fact that a publication is sponsored by a state agency is not sufficient in itself to establish state action. *Estiverne v. Louisiana State Bar Association*, 863F.2d 371.
- . *Evenson v. Ortega*, 605 F.Supp. 1115 (D. Ariz. 1985).
- . Clayton Act -- 15 U.S.C.A. ' et seq. Applies to newspapers. See, *Times-Picayne Pub. Co. v. U.S.*, 73 S.Ct. 872, 877n.11 (1953) (discussing tying arrangements in newspaper).
- . 1959 trade case & 69,400 (D. Kan.).
- . The U.S. Supreme Court has yet to decide this issue. See, 73 S.Ct. 872n.27 (1953).
- . K.S.A. 25-4142, et seq.
- . Offers by the publisher to publish a correction in the newspaper can be considered when damages are at issue. *Meridan Star v. Kay*, 41 So.2d 30 (Miss. 1949).
- . 219 Kan. 755 (1976).
- . Currently, statutory prohibition of truthful, non-misleading commercial advertisements is subject to strict scrutiny, and therefore such truthful advertisements will likely be allowed under the First Amendment. 44 *Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495, 1508 (1996).
- . [447 U.S. 557](#) (1980).
- . *Board of Trustees v. Fox*, 492 U.S. 469 (1989)
- . *Warner Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) cert denied 435 U.S. 950. See, Trade Reg. Rep. (CCH & 7548).
- . The F.T.C. test determining whether an advertisement is misleading is "First, [if] there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *Cliffdale Associates*, 103 F.T.C. 110 (1984). Intent to deceive and knowledge by the advertiser are not necessary elements for an FTC finding of deception. *FTC v. Alyoma Lumber Co.*, 291 U.S. 67, 54 S.Ct. 315 (1933).
- . *Midwest Plastic Corp. v. Protective Closures Co.*, 285 F.2d 747 10th Cir. (1960). But see *Vornado AirSystems v. Duracraft Corp.*, 58 F.2d. 1498, 1505 n.14 (10th Cir. 1995) suggesting defendants have a right to copy "even where defendants were found to have deliberately palmed off their goods in an effort to deceive consumers."
- . *Parsons Mobile Products, Inc. v. Remmert*, 216 Kan. 256 (1975). Similarly, the Lanham Trade-Mark Act prohibits advertisements which mislead consumers into believing that the trademark owner authorized, endorsed or sponsored the use of the trademark or that such owner is otherwise affiliated with the competitor's product. *Paramount Pictures v. Video Broadcasting Systems*, 724 F.Supp. 808, 814 (D. Kan. 1989). See also Chapter Six infra.
- . *State v. Beacon Publishing Co.*, 141 Kan. 734 (1935), [K.S.A. 21-4403 \(1995\)](#).
- . *Pittman v. Dow Jones & Co.*, 662 F.Supp. 921 (E.D. La. 1987): "A newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisement placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised."
- . *Braun v. Soldier of Fortune*, 968 F.2d 110 (1992)
- . *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969).
- . *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir. 1982) cert denied 375 U.S. 944 (1964).
- . [Puffing](#) is defined by the FTC as "expression of opinion not made as a representation of fact." *Wilmington Chemical Corp.*, 69 F.T.C. 828, 865 (1966).
- . Kraft, Inc., 5 Trade Reg. Rep. (CCH) & 22937. And also see *Parliament T. v. Tube Sales, Inc.*, 59 F.T.C. 127 (1961).
- . Trade Reg. Rep. & 7579.
- . *FTC v. Royal Milling Co.*, 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706 (1933).

- . [16 CFR 254](#). See also 62 Fed. Reg. 19703, April 23, 1997.
- . Trade Regulation Reporter (CCH) & 7725.
- . *U.S. Navy Weekly v. F.T.C.*, 207 F.2d 17 (C.A.D.C. 1953).
- . [Houbigant, Inc. v. F.T.C.](#) 139 F.2d 1019 (C.C.A. 2 1944) cert denied 65 S.Ct. 116, 323 U.S. 763, 89 L.Ed. 611.
- . [Complying with the Made in the USA Standard](#).
- . *Oxwell Tool Co.*, 59 F.T.C. 1408 (1961) and Trade Reg. Rep. (CCH) & 7551.
- . *Commonwealth v. Mirror World, Inc., Clearinghouse no. 26,022* (Pa. C.P. Phila. Cty. 1978) and Trade Reg. Rep. (CCH) & 7577.
- . *U.S. v. Golden Fifty Pharmaceutical Co., Inc.*, 421 F.Supp. 1199 (N.D. Ill. 1976) and 16 C.F.R. ' 424. See also *General Motors Corp.*, 93 F.T.C. 328 (1977).
- . [16 C.F.R. ' 238](#).
- . [15 U.S.C. " 1451-1461](#)
- . Trade Reg. Rep. (CCH) & 7739.
- . Trade Reg. Rep. (CCH) & 7849.
- . Trade Reg. Rep. (CCH) & 7739.
- . Trade Reg. Rep. (CCH) & 7741.
- . Trade Reg. Rep. (CCH) & 7751.
- . Trade Reg. Rep. (CCH) & 7747.
- . Trade Reg. Rep. (CCH) & 7747.
- . [16 C.F.R. ' 233](#).
- . [16 C.F.R. ' 233](#).
- . *Kalwajtys v. F.T.C.*, 237 F.2d 654 cert denied 77 S.Ct. 591, 352 U.S. 1025, 1 l.Ed.2d 597.
- . Trade Reg. Rep. (CCH) & 7835.
- . *F.T.C. v. Standard Education Soc.*, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937).
- . *American Fence Co. of the Midwest, Inc. v. Gestes*, 190 Kan. 393 (1962). See also *Manor of Burlingame, Inc. v. SHCC, Inc.*, 22 Kan. App.2d 437 (1996). 16 C.F.R. ' 255.
- . National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, ' 6.5.1 (3d ed. 1991).
- . Trade Reg. Rep. (CCH) & 7567.
- . Trade Reg. Rep. (CCH) ' 7567.
- . Trade Reg. Rep. ' 7865.
- . *New Kids on the Block v. New America Pub. Inc.*, 971 F.2d 302, 307 (9th Cir. 1992).
- . See *Barnes v. Sylvania*, 55 F.3d 468 (9th Cir. 1995), see also, Trade Reg. Rep. (CCH) & 5200.
- . Trade Reg. Rep. (CCH) & 7865.
- . But see *Pittman v. Dow Jones & Co.*, 662 F.Supp. 921 (E.D. La. 1987) 14 Media L.R. 1284, aff'd 834 F.2d 1171 (5th Cir. 1987) 14 Media L.R. 2384, suggesting that newspapers are under no broad duty to investigate the accuracy of advertisements.
- . Domestic Mail Manual §4.12.2
- . *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).
- . *Canfield v. Ponchatoula Times*, 759 F.2d 493 (5th Cir. 1985). See also *Easter Pub. & Adv. v. Chesapeake Pub. & Adv.*, 831 F.2d 488, 490 (4th Cir. 1987).
- . See *Brunswick Beacon, Inc. v. Schock-Hopchas Pub. Co.*, 810 F.2d 410 (4th Cir. 1987).
- . 17 U.S.C.A. ' 101. See also *Community for Creative Non-Violence v. Reid*, 108 S.Ct. 2166, 490 U.S. 730 (1989).
- . See also *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 104 S. Ct. 774 (1984), rev. den. 465 U.S. 1112, 104 S.Ct. 1619.
- . See 17 U.S.C. ' 107, Historical and Statutory Notes. *Triangle Publications v. Knight Ridder-Newspapers*, 445 F. Supp. 875 (S.D. Florida, 1978).
- . See also *Dr. Seuss Enterprises, L.P.V. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997) which suggests a book satirizing the O.J. Simpson trial in same style as a famous Dr. Seuss book was not likely to be fair use.
- . [Feist Publications v. Rural Tel. Service](#), 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); See also In re *Independent Serv. Organ. Antitrust*, 964 F.Supp. 1469 (D.Kan. 1997). 17 U.S.C.A. " 502-505. See also *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 104 S.Ct. 774 (1984), rehearing denied 465 U.S. 1112, 104 S.Ct. 1619. See also *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25 (2001).

- . \$250,000 and imprisonment for not more than 10 years, or both, for a second offense, or fined 250,000 and imprisonment for not more than 5 years, or both, for large offenses or fined \$25,000 and imprisonment for not more than 1 year, or both, for small offenses. [18 U.S.C.A. ' 2319](#).
- . 15 U.S.C. Section [1051](#) and [1127](#).
- . 15 U.S.C. ' 1127.
- . Note that the definition of person also includes a corporation, association or instrumentality of the state.
- . 15 U.S.C.A. [' 1053](#), ' 1127.
- . Trademark Manual of Examining Procedure, United States Department of Commerce-Patent and Trademark Office (1993).
- . K.S.A. 81-201 *et seq.*
- . 15 U.S.C. 459(n).
- . *Brunswick Corp. v. Spinit Real Co.*, 832 F.2d 513 (10th Cir. 1987).
- . National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, ' 3.2.4.5 (3rd ed. 1991).
- . Trademark Protection and Practice, ' 8 *et seq.*, (Matthew Bender 1997).
- . See K.S.A. 81-213 and Bruce Day and Mike Martinez, *The Roots of Intellectual Property: Trade Secrets, Patents, Trademarks and Copy Rights*, 62 J.K.B.A. No. 1, 30, 31 (1993).
- . See Restatement (2nd) of Torts ' 629-630.
- . Restatement (2d) of Torts ' 568).
- . See False Obituary, 85 ALR 4th 813.
- . [21 U.S.C.A. ' 301](#) *et seq.*
- . 21 U.S.C.A. ' 321.
- . [15 U.S.C.A. ' 55\(a\)](#).
- . See *Cliffdale Associates*, 103 F.T.C. 110 (1984).
- . See 103 F.T.C. 110 and 15 U.S.C. ' 55(a).
- . See *Moog Industires, Inc. v. F.T.C.*, 355 U.S. 411, 78 S.Ct. 377 (1958).
- . See *Simeon Management Corp. v. F.T.C.*, 579 F.2d 1137 (9th Cir. 1978).
- . Trade Reg. Rep. (CCH) & 7683.
- . National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, ' 4.2.2 (3rd ed. 1991). (See e.g. [K.S.A. 50-623](#), 50-628).
- . *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1989).
- . Trade Reg. Rep. (CCH) & 7533.
- . 42 U.S.C.A. ' 1971, 1915a-1975d, ' 2000.
- . 42 U.S.C.A. ' 2000e-3.
- . See *Pennsylvania Human Relations Comm'n v. Pittsburg Press Co.*, 376 A.2d 1187 (1979) cert. denied 442 U.S. 942 (1979).
- . See K.S.A. 44-1009.
- . See Kansas Administrative Regulations 21-32-8.
- . 42 U.S.C.A. ' 3604.
  
- . See *Regin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2nd Cir. 1993).
- . [413 U.S. 15](#), 93 Sup. Ct. 2607 (1973). See also *Reno v. ACLU*, 117 s.Ct. 2329, 2345 (1997).
- . K.S.A. 21-4301.
- . See *State v. Grant American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980).
- . Section 18 U.S.A. Section 1461 (mailing obscene or crime inciting matter). See also [Domestic Mail Material](#).
- . See *U.S. v. Goldstein*, 431 Fed. Supp. 974 (Dist. Ct. Kan. 1976). See *also Ashcroft v. ACLU*, 535 U.S. 564.
- . [2 U.S.C. Section 431](#) *et seq.*
- . CFR Section 110.11.
- . Subsection (b) of 2 U.S.C. Section 441b.
- . See also 11 CFR Section 110.11.
- . 11 CFR Section 114.2-114.10.
- . See 11 C.F.R. ' 114.2 (1997).

- . See 11 C.F.R. ' 114.10.
- . 11 C.F.R. Section 114.10(c).
- . [K.S.A. 25-2407](#).
- . K.S.A. 21-4502 and K.S.A. 21-4503.
- . K.S.A. 24-4156.
- . [K.S.A. 21-4503a](#) and 25-4156(a)(2).
- . K.S.A. 21-4502 and K.S.A. 21-4503.
- . K.S.A. 25-2505.
- . Opinion No. 85-4.
- . See Gambling 37 Am.Jur. 2d ' 5-9.
- . 18 U.S.C. ' [1302](#) & [1307](#). See also, [U.S. v. Edge Broadcasting Co.](#), 509 U.S. 418, 113 S.Ct. 2696 (1993). See also [Domestic Mail Manual](#).
- . See K.S.A. 79-4701 *et seq.*
- . See [K.A.R. 92-23-40](#).
- . [39 U.S.C. 3005](#)
- . See [28 U.S.C.A. ' 3701](#) & 18 U.S.C.A. ' 1084.
- . [18 U.S.C. 1301](#)
- . [25 U.S.C. 2720](#)
- . [Kan. Atty. Gen. Op. 2005-004](#). See also *State v. Schein*, 253 Kan. 205 (1993).
- . Kan. Ag. Op. 2005-4
- . [433 U.S. 350](#), (1977)
- . See also *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371 (1995).
- . K.A.R. 74-5-403. See also K.S.A. 1-202, and The ethical standards of the American Institute of Certified Public Accountants.
- . [See S.Ct. Rule 226, MRPC 7.2](#).
- . [See Supreme Court Rule 226](#).
- . See K.A.R. 71-3-1 and 71-3-2.
- . K.A.R. 67.
- . K.A.R. 102.
- . Kimberly A. Pace, The Legal Profession As A Standard for Improving Ethics: Should Engineers Behave Like Lawyers? High Technology Law Journal, 93 (1994).
- . Legal Aspects of Engineering, 2nd Ed. (1974), Richard C. Vaughn.
- . See [K.A.R. 65-11-1](#), Regulatory Advertising by optometrist.
- . See also, K.A.R. 65-11-2
- . K.A.R. 68-8-1.
- . See K.S.A. 74-1106 *et seq.* See also K.A.R. 60-1-102 *et seq.*
- . See [K.A.R. 100-18a-1](#). See also, K.S.A. 65-2865.
- . [K.S.A. 47-830](#).
- . [18 U.S.C. 504](#). See also [18 U.S.C.A. ' 474](#).
- . [468 U.S. 641](#).
- . [447 U.S. 557](#) (1980).
- . K.S.A. 41-714.
- . See [27 U.S.C. '201](#) *et seq.*
- . [27 C.F.R. ' 4.62](#).
- . [27 C.F.R. ' 5.63](#).
- . [27 C.F.R. ' 4.64, ' 5.65, ' 7.54](#).
- . See [27 C.F.R. ' 4.64\(d\)](#).
- . See [Rubin v. Coors Brewing Co.](#), 115 S.Ct. 1585 (1995).

- . See [Franklin National Bank v. New York](#), 347 U.S. 373 (1954).
- . See [Rubin v. Coors Brewing Co.](#), 115 S.Ct. 1585 (1995).
- . K.A.R. 38-3-1.
- . See 42 U.S.C. 3603(b), See Also January 9, 1995 HUD memorandum of Guidance Regarding Advertisements under §804(c) of the Fair Housing Act

- 24 C.F.R. §109
- Uniform Municipal Code §30-141 et seq.
- [www.atf.gov/firearms/faq\\_index](http://www.atf.gov/firearms/faq_index)
- . K.S.A. 59-2123.
- . K.S.A. 59-2123.
- . [4 U.S.C. 8\(i\)](#).
- . K.S.A. 44-1009 and 44-408.
- . [K.S.A. 65-1701](#).
- . [K.S.A. 28-137b](#).
- . [K.S.A. 28-137](#).
- . [K.S.A. 28-137\(a\)](#).
- . [K.S.A. 28-137\(d\)](#).
- . [K.S.A. 28-137\(b\)](#).
- K.S.A. 12-1,121
- . [K.S.A. 74-50,192](#).
- . K.S.A. 17-1260.
- . [16 C.F.R. 308.3](#)
- . [15 U.S.C. '1333](#)
- . [15 U.S.C. '4402](#)
- . [16 CFR '307.7](#)
- [New York Advertising Guidelines. Illinois Advertising Regulations.](#)
- [K.S.A. 50-626](#)
- K.S.A. 50-665
- . [K.S.A. 50-689](#).
- K.S.A. 50-689
- . [K.S.A. 2-1011](#).
- . [K.S.A. 2-1208](#).
- . [K.S.A. 2-1208](#).
- . [K.S.A. 2-2503](#).
- . [K.S.A. 8-2410](#).
- . [K.S.A. 40-235](#); K.S.A. 40-2404.
- . K.S.A. 47-668; K.S.A. 47-671.
- . [K.S.A. 65-655](#)
- . K.S.A. 65-1650.