KPA Advertising Law Handbook: 20 Questions and Answers

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This Handbook is intended to succinctly answer questions about some of the more common legal issues advertising clients have raised for publishers over Doug Anstaett's tenure as Executive Director. Each question is answered in a few sentences or less, but most also include a "Long Answer" if a reader has further inquiry.

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Legal issues related to selling ads, generally

1. Can a newspaper accept an advertisement from anyone it wants? Generally, yes, as long as the product or service advertised is legal.

Long answer: Whenever the paper, as a private actor, enters into a contract with a person, business or other legal entity desiring to purchase ad space, the paper's primary duty is to provide the space and disseminate the ad. However, the paper needs to conduct its due diligence before publishing any proposed ad. In general, red flags for the paper include advertisements that contain any of the following: antitrust violations; copyright violations or violations of trademarks or trade names; deceptive or misleading trade practices; defamation or invasion of privacy; fraudulent schemes; harmful medical advice; and obscene, indecent or profane language. Such content could create liability for the newspaper and should generally be refused.

2. Can a newspaper reject an advertisement from anyone it wants? Generally, yes, a newspaper can to accept or reject an ad for any reason, because for the government to require otherwise would infringe on the paper's First Amendment rights. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Ideally the policy for accepting and rejecting ads would be stated in the contract or rate card incorporated into the contract. The policy may also be published in the newspaper. The policy should be applied consistently.

Long answer: Newspapers are private enterprises and therefore may contract or refuse to contract with whomever they desire, and need not cite reasons for refusal. "[T]he great weight of authority in the common law supports the rule that the publisher of a newspaper is not required to accept and publish an advertisement in the absence of circumstances amounting to an illegal monopoly or conspiracy. It is

immaterial whether the refusal is based on reason or mere caprice, prejudice or malice." *Moola v. Tribune Publishing Company*, 14 Ariz. App. 82, 480 P.2d 999 (1971); see also *PMP Associates, Inc. v. Globe Newspaper Co*., 366 Mass. 593, (1975) and 18 A.L.R.3d 1286 ("Right of Publisher of Newspaper or Magazine in Absence of Contractual Obligation, To Refuse Publication of Advertisement").

Despite this well-established case law, advertisers who, for whatever reason, believe they have been treated unfairly could still bring a legal action against the paper, create bad press, or attack the paper on social media. A post on the Nebraska Press Association's website offers a suggestion about how a paper might reject an ad that violates the policy. "[I]f you are clear as to why an ad is being rejected, for example if the ad clearly violates fair housing or employment discrimination advertising laws, a reason can and probably should be given. If a political ad is submitted with an improper paid for disclaimer, you can relay this information to the advertiser as well. But if you simply don't like the person or entity placing the ad or if you disagree with the content of the ad and you give them specific reasons for rejecting the ad, you are skating on thin ice."

3. Can a paper charge different rates depending on the number of volume of advertising? Yes, except rates for political ads must be uniform (see next section, "Political ads").

Long answer: Newspapers, as private businesses, can set the terms of a contract if the other party to the contract agrees. However, keeping rates consistent between similarly situated customers will enhance the paper's credibility.

Political ads

4. Are political ads that do not advocate for the election of a specific candidate or outcome required to include disclaimers? Generally, no. Under both state and federal law, disclaimers are required only if an ad advocates the election or defeat of a particular candidate for "state or local office", or for the passage or rejection of a ballot issue. If so, the disclaimers set forth in K.S.A. 25-4156 and K.S.A. 25-2407 are required. K.A.R. 19-20-4 provides further guidance about how the disclaimers are to appear. Federal law, set forth in 52 U.S. Code § 30120 and applicable Code of Federal Regulations provisions, such as 11 C.F.R. 110.11 ("Communications; advertising; disclaimers"), establishes similar standards for advertisements related to candidates for federal offices.

Long Answer: If an ad does advocate for a specific candidate or outcome on a ballot issue, disclaimers must be included. Generally, that means that "the word 'advertisement' or the abbreviation 'adv.' in a separate line" as well as "the name of the chairperson or treasurer of the political or other organization sponsoring the same or the name of the individual" who paid for the ad needs to appear on the ad. See, e.g., K.S.A. 25-4156(b)(1)(a). "If a political committee is responsible for the advertisement or item, the chairperson's name and the name of the political committee shall be disclosed." K.A.R. 19-20-4(a)(2).

Kansas Administrative Regulations contained in K.A.R. 19-20-4(7)(A)-(E) provide specific guidance for how the disclaimers should read, depending on who paid for the ad:

(A) Paid for by the (name of candidate) campaign, (name of treasurer), treasurer;

(B) paid for by (name of candidate) for (title of office sought), (name of treasurer), treasurer;

(C) sponsored by the committee to elect (name of candidate), (name of chairperson), chairperson;

(D) paid for by (name of political action committee) political action committee, (name of treasurer), treasurer; and

(E) advertisement: paid for by committee to elect (name of candidate), (name of chairperson), chairperson.In 2018, the legislature passed HB 2642, which amends K.S.A. 25-4156, the key statute pertaining to political ads. However, the substance of the amendment is essentially limited to Twitter users, and is largely inapplicable to newspapers generally.

Federal law governs advertising disclaimers during elections for federal offices. As with state law, federal law applies to advertisements "expressly advocating the election or defeat of a clearly identified candidate" for federal office under 52 U.S. Code § 30120. The Federal Election Commission publication titled "Special Notices on Political Ads and Solicitations" is a particularly good reference for disclaimers during federal elections. If cites applicable Code of Federal Regulations to help flesh out disclaimer requirements.

Specific examples of public communications that would require a disclaimer under federal law include:

- Public communications coordinated with a federal candidate (i.e., in-kind contributions or coordinated party expenditures) that are paid for by a political committee or that contain express advocacy or a solicitation;
- Independent expenditures;
- Electioneering communications;
- A communication that solicits funds for a federal candidate or a federal political committee or that contains express advocacy; and
- Political committees' websites.

For any ad fitting either of those categories, the wording of the disclaimer depends on who paid for it, and how it was paid.

Examples:

- Paid for by John Smith, Candidate for Congress (as required by 52 U.S. Code § 30120(a)(1)("if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee")).
- Paid for by Al Jones and authorized by John Smith for Congress Committee (as required by 52 U.S. Code § 30120(a)(2)("if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee")).
- Paid for by Concerned Citizens Committees and not authorized by any candidate (as required by 52 U.S. Code § 30120(a)(3)("if not authorized by a candidate, an authorized

political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee")).

5. Do political ad rates have to be uniform? Yes. The "charge made for the use of such space shall not exceed the charges made for comparable use of such space for other purposes" under K.S.A. 25-4156(a)(1) and 52 U.S. Code § 30120 ("Publication and distribution of statements and solicitations"). "Intentionally charging an excessive amount for political advertising is a class A misdemeanor." 25-4156(a)(2).

Long answer: 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.

During federal elections, rates charged by newspapers and magazines for campaign advertising must be comparable to those charged for noncampaign advertisements. Further, if a paper offers one candidate a lower rate than another, it may face liability for making an improper in-kind campaign contribution.

6. Should a paper refuse accept a political ad if the publisher disagrees with the point of view of the candidate or issue presented? Generally, no. Rejecting political ads tends to invite needless controversy and negatively impacts the paper's bottom line.

Long Answer: As Doug Anstaett put it in 2016, "[t]he newspaper industry has always enjoyed the right to refuse any advertising for any reason, even without stating a reason. However, from a practical standpoint and because of the nature of politics and elections, newspapers need to be seen as accepting of viewpoints other than their own. This is a ticklish area because people are growing much more judgmental of what we do and how we do it. Since we rely so much on the First Amendment for our protections, we need to try to avoid being seen as stifling one view over another. I think if [a publisher has] an objection to the ad, [the publisher] should run it anyway and then use an editorial to say how you feel personally. [The publisher] could argue that while the other side has the freedom to run the ad, you're exercising your right to denounce its content and argue for the opposite."

7. Can a paper be liable under Kansas election law if it fails to include the required disclaimers in political ads that are placed programmatically? Technically, yes, although publishers can try to cure the violation by correcting the ad as soon as reasonably possible. As of 2018, the KPA is unaware of any publisher who has been prosecuted for violating this statue due to programmatic ads.

Long answer: K.S.A. 25-4156 imposes criminal liability on one who publishes such an ad without the disclosure. The liability is strict, meaning publishers may be prosecuted even if they were unaware that an ad would violate the law.

This isn't a problem for traditional print ads; the paper's ordinary vetting process is likely to be sufficient to detect whether the proper disclaimers have been included. Programmatic advertising on the internet to be displayed on a publisher's website, however, may be available for display only in a digital form over which the publisher has limited control. As a result, the publisher may not learn that the required

disclosure is missing from a political ad until after it has appeared on the paper's website. The publisher may then be exposed to criminal liability under K.S.A. 25-4156, even though there was no opportunity to prevent the ad from appearing without the required disclosure.

Ultimately, the law should be amended to account for the ephemeral nature of programmatic ads, and liability should be limited. For more, refer to the post on this topic at kautschlaw.com.

Use of trademarked logos, such as those for "Final Four", "Super Bowl", local sports teams, and political parties

8. Is it ever OK for a paper to use a trademarked logo? Yes, under certain circumstances, a paper can use trademarks on the basis of "nominative fair use," which is limited use of a mark to identify the subject of an article. But there is still may be risk for the publisher.

Long answer: Generally, use of a trademark by someone other than the trademark's owner is actionable by the owner as trademark infringement. A trademark is a word, phrase, or logo that identifies the source of goods or services. Trademark law protects a business' commercial identity or brand by discouraging other businesses from adopting a name or logo that is "confusingly similar" to an existing trademark.

However, owners of trademarks don't necessarily have truly exclusive rights to their marks. "Nominative fair use" means the use of another's trademark to refer to the genuine goods or services associated with the mark. The term "nominative" reflects that the mark generally is the most informative name for the specific goods or services intended to be referenced. Although Kansas courts have not taken a position on the matter, most other federal courts agree that nominative fair use is an affirmative defense against a claim of copyright infringement.

Nominative fair use generally is permissible as long as (1) the product or service in question is not readily identifiable without use of the trademark, (2) only so much of the mark is used as is reasonably necessary to identify the product or service and (3) use of the mark does not suggest sponsorship or endorsement by the trademark owner. So in other words, if a paper wanted to use the logo of a local community college to call a reader's attention to a story about a team representing the college, and used that mark in a way to highlight the story rather than to appropriate it for a commercial use or some other use beyond the minimum necessary to identify the subject of the story, the paper has a good argument to make that its use is legal under federal law.

However, just because nominative fair use is a good argument does not mean it is iron-clad. Certain trademark owners, such as the NCAA, are particularly (read: unreasonably) diligent in defending any use whatsoever. The NFL, while not as intent on the issue as the NCAA, still is willing to aggressively pursue commercial use of the word "Super Bowl."

Use of established political parties' logos is less of a risk than NCAA or NFL because political ads are core political speech protected by the First Amendment. But both parties, particularly RNC, have challenged merchandising that infringes on the donkey and elephant logos. Nominative fair use, by its nature, is descriptive, rather than commercial, so it is fair to say that political parties are less likely to challenge nominative fair use of their marks.

“Do not throw” ordinances

9. Can governmental entities enforce ordinances limiting or penalizing delivery of free weekly publications on residents’ driveways? No, although the issue remains unsettled in Kansas, while at the federal level, uncertainty remains. However, publishers have strong arguments to make.

Long answer: In the most recent such case, a Kentucky newspaper, the *Lexington Herald-Leader*, challenged such an ordinance in federal district court. There, The *Herald-Leader* “argued that the ordinance violates the First Amendment by restricting where its free weekly publication, the *Community News*, can be delivered. The ordinance says that any unsolicited materials must be placed on a porch, attached to the front door, or put into a mail slot or a distribution box. Violators could face a $200 fine for each violation.” The *Herald-Leader* argued that the ordinance was not content-neutral because its practical effect was to infringe on the paper’s First Amendment rights because of potential loss in advertising revenue. “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The *Herald-Leader*’s motion for preliminary injunction summarizes the arguments:

> “Although the language of the Ordinance does not specifically identify *The Community News*, the Supreme Court has recognized that laws that are facially content-neutral will be considered content-based regulations of speech if they “were adopted by the government ‘because of a disagreement with the message [the speech]’ conveys.” *Reed*, 135 S. Ct. at 2226 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). “[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.” *Reed*, 135 S. Ct. at 2228.”
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> Here, regardless of whether the Ordinance is content-neutral on its face, the record demonstrates that the County’s purpose was to prohibit the distribution of *The Community News*, which renders the Ordinance is a content-based regulation of speech subject to strict scrutiny under the foregoing authorities.
>
> In order for the Ordinance to survive strict scrutiny, the County must establish “that the [Ordinance] furthers a compelling interest and is narrowly tailored to achieve that interest.” Reed, 135 S. Ct. at 2231. The County has the burden to meet this standard. Id. The County has offered only three governmental interests to support the Ordinance: (1) reducing unwanted litter and visual blight; (2) prevention of damage to private property; and (3) prevention of interference with private property. See Ordinance No. 25-2017, Sec. 14-106. However, the County cannot meet its burden of establishing any of the three stated purposes of the Ordinance as a compelling governmental interest.”

The federal district court agreed with the newspaper, and issued an injunction preventing enforcement of the ordinance. However, a panel for the 6th Circuit Court of Appeals reversed, ruling that “the newspaper has not shown a likelihood of success on the merits of its challenge to the ordinance. ‘The

ordinance also preserves numerous alternative methods for expression that are inexpensive, efficient and effective.'" The paper is appealing the ruling.

Similar issues have been litigated occasionally, including in *City of Fresno v Press Communications, Inc.*, 31 Cal.App.4th 32 (1994) and *Statesboro Pub Co Inc v City of Sylvania*, 271 Ga. 92 (1999).

Ultimately, although the law is murky in light of the ruling in the recent *Herald-Leader* case, publishers should continue to push back against ordinances that have a dramatic effect on advertising revenue.

Advertising raffles

10. Can a newspaper advertise a raffle? Yes, although advertising for raffles in newspapers that will be sent to subscribers via United States Postal Service mail may technically violate federal regulations. Such regulations are unlikely to be enforced unless the federal government becomes aware of a fraudulent raffle.

Long answer: In 2014, the Kansas Constitution was amended "to permit the conduct of charitable raffles or other forms of charitable gaming by certain nonprofit organizations." Now, nonprofits with gross receipts less than $25,000 do not need a license to run a raffle, while nonprofits with higher gross receipts must get a license from the Kansas Department of Revenue.

While state law appears to allow for raffles and their advertisement, the USPS Domestic Mail Manual provides that "unlawful mail matter", defined to be "any letter, newspaper, periodical, parcel, stamped card or postcard, circular, or other matter permitting or facilitating participation in a lottery" is prohibited, but also provides that enforcement is unlikely unless the raffle was "fraudulently or inappropriately administered."

To date, there have been no instances where the USPS has alleged that a Kansas newspaper violated its regulations for advertising a raffle. The USPS would be likely to become involved only if someone has tried to scam people into buying tickets and never had any intention of giving the money to a non-profit.

11. Can a newspaper advertise a raffle if a firearm is a prize? Yes, under certain circumstances, but extra diligence is required.

Long answer: If the raffle includes a firearm as a prize, the Kansas Department of Revenue (KDOR) recommends "raffles containing firearms be finalized through a Federal Firearms Licensee (FFL). The check performed by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (not FFL) protects both the charity and the winner by checking the ability of the winner to possess the firearm." The FFL license check would also serve to protect the newspaper by ensuring that the advertisement was related to the distribution of legal goods. Thus, unless the charity provides proof that the ATF has conducted the FFL check on the charity's behalf, the risk may exceed the reward.

12. Can a newspaper advertise a raffle or other contest in which a gift certificate to a club or bar that sells liquor by the glass is a prize? No. The high likelihood that the winner of the gift certificate would have paid less in entry fee to the raffle than the gift card is worth would result in a drinking establishment to selling liquor "below cost", which is prohibited under Kansas law.

13. Can a newspaper advertise a raffle or other contest in which a gift certificate to a liquor store is a prize? If the paper is willing to run the risk that the winner of the raffle (i.e., the person who uses the gift card) is 21 or older, yes.

Long Answer: Whether to run that risk is policy decision for the paper, as a worst-case scenario involving something like an underage DUI fatality due to the liquor acquired with the gift certificate Is easy to imagine, but unlikely to occur. There are no statutes or regulations that prohibit below cost sales conducted by liquor stores (i.e., distributors).

Advertising tobacco products, cigarettes, vaporizers, CBD oil, and firearms marketed by individual sellers

14. Can a newspaper advertise the sale of cigarettes or "tobacco products". such as smokeless tobacco? Yes, but only if the advertisement complies with the myriad of federal laws related to properly placing warning labels on advertisements for such products. Failure to comply with federal law related to cigarette advertising also violates state law under K.S.A. 79-3321(v) and (w). Tobacco products, including smokeless tobacco, are also generally subject to federal warning label requirements.

Long Answer: Advertising for cigarettes is governed by 15 U.S. Code § 1333(b)(2)("Labeling; advertising requirements; typography, etc."). Cigarette advertisements must carry one of the forms of Surgeon General's warnings and conform to the format used by the federal Cigarette Liability Act. The label with warning must be conspicuous and legible, contrasting in typography, layout and color with all other material in the advertisement.

Federal law also provides that smokeless tobacco advertising must carry labels approved by the FTC. See 15 U.S. Code § 4402(b)("Smokeless tobacco warning; required labels").

As of August, 2018, cigars are also subject to federal warning requirements.

15. Can a newspaper advertise industrial hemp products, such as CBD oil? Yes, as of July 1, 2018.

Long Answer: In 2018, Kansas enacted SB 263, the Alternative Crop Research Act, which legalizes the sale of industrial hemp by excluding industrial hemp from definition of marijuana and cannabinoids. The sale of CBD oil is legal under the new law because the product is extracted from hemp, and therefore "contains less than 0.3 percent of THC." The statute overrules Attorney General Opinion 2018-5, which opined that in Kansas, it was "unlawful to possess or sell products or substances containing any amount of tetrahydrocannabinol."

16. Can a newspaper advertise the sale of electronic cigarettes, including vaporizers? Yes, but vaporizers are defined to be "electronic cigarettes" specifically regulated by K.S.A. 79-3321(l)-(n).

Long answer: State law prohibits the sale of electronic cigarettes (or tobacco products) to any person under 18 years of age. It also prohibits minors from purchasing or possessing electronic cigarettes. Otherwise, the use of vaporizers is not regulated statewide, but some jurisdictions, including Topeka and Overland Park, prevent vaping in bars and restaurants. Such advertising will probably be regulated at some in a manner similar to "real" cigarettes, but as for now, federal and state regulations do not appear to prevent newspapers from accepting ads from such companies.

17. Can a newspaper run a classified ad on behalf of an individual to sell a firearm? Yes, because of the so-called "gun show loophole."

Long Answer: Even though federal law ordinarily requires to background check requirements for gun sales, those requirements do not apply to "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." Thus, under such circumstances, a paper would not be in violation of federal law if it were to publish the ad without performing any background check. While former President Obama stated in 2016 that he would take executive action to close this loophole, such an executive order was never issued.

However there is a movement among publishers and others to refuse to publish such ads on the basis of gun safety, and there have been instances of backlash against publishers who advertised the sale of firearms due to the loophole.

Public notice rates

18. How should a newspaper set its rates for public notices? According to the statute governing public notices, K.S.A. 28-137, "[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.

Long answer: Under that same statute, legal rates may not be increased by more than 15 percent per year. 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.

For additional detail, refer to the KPA's publication, *Specific Types of Advertising*, section G.

Subscription taxation

19. Are print subscriptions taxable? How about online subscriptions? Print subscriptions are taxable, online subscriptions are not.

Long Answer: According to the Kansas Department of Revenue's Taxability Information Guide and applicable administrative regulations, traditional newspaper and magazine subscriptions are taxable. HB 2756, which would cause online subscriptions to be taxed, advanced in the 2018 legislature, but did not pass.

Ads that discriminate against protected classes

20. Can a newspaper publish an advertisement that favors one protected class over another, such as in a "help wanted ad" or in an ad for housing? No. Equal Employment Opportunity Commission regulations state "it is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information."

Long answer: Among the kinds of discrimination prohibited under the Civil Rights Act of 1964 is discriminatory job advertising related to "help wanted ads" listing employment using separate male and

female headings. The view is also supported in Kansas law. Under Kansas laws and regulations, including K.S.A. 44-1009, it is discriminatory for a publisher to place help wanted advertisements including discriminating criterion. Kansas Administrative Regulations contained at K.A.R. 21-32-8 specifically provide that "It is a violation of the Kansas act against discrimination for a help wanted advertisement to indicate a preference, limitation, specification or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such columns headed ''male'' or ''female,'' will be considered as an expression of preference, limitation, specification or discrimination based on sex."

If an ad violates federal regulations relating to gender equality, its publication could well result in liability for the newspaper under the precedent set by the US Supreme Court in Pittsburgh Press v. Pittsburgh Human Relations Commission, which held that gender-specific ads are not protected by the First Amendment.

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. 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. Under ***Regin v. Harry Macklowe Real Estate Co***., 6 F.3d 898 (2nd Cir. 1993), 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.

For example, publishers and advertisers are responsible under 42 U.S.C. 3604 of the Fair Housing 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. See also January 9, 1995 HUD memorandum of Guidance Regarding Advertisements under §804(c) of the Fair Housing Act.

For additional detail on housing discrimination issues, refer to the KPA's publication, *Specific Types of Advertising*, section G.