PUBLIC LAW Journal

Vol. 24, No. 3
Summer 2001

An Official Publication of the State Bar of California Public Law Section

MCLE SELF-STUDY

A Word From Our Sponsors

Profiting From Private Advertisements On Public Property

*By: Terence R. Boga, Esq.**

Introduction

Nationwide, cities and other government entities are generating revenue from private advertising on public property. Among other places, for example, municipalities have leased advertising space on buses,[1] bus shelters,[2] parking meters and trash cans.[3] School districts have made advertising space available on baseball field fences[4] and in student newspapers, yearbooks and athletic programs.[5] Transportation authorities have opened advertising space in subway and railroad stations.[6]

Unsurprisingly, proper implementation is crucial to ensure that a private advertising program serves as a productive fundraising venture rather than a drain on public coffers. Case law confirms that, in certain circumstances, government entities can incur civil rights liability by excluding a particular advertisement because of content. Moreover, public officials can lose their qualified immunity from damages liability by restricting advertisements on the basis of viewpoint.

This article explains the constitutional parameters that circumscribe municipal authority to use public property as a venue for private advertisements. Part I describes the cornerstone of this area of First Amendment law, Lehman v. City of Shaker Heights.[7] In Lehman, the United States Supreme Court established that private advertising programs may be conducted with content-based distinctions, a holding that effectively overruled a contrary prior decision by the California Supreme Court. Part II examines how lower courts have applied the Lehman principle in different contexts. As will be shown, the enforceability of content-based distinctions hinges on the public forum status of the property on which a private advertising program is conducted. Finally, Part III sets forth four strategies that cities should follow to profit from private advertisements on public property.

I. The Lehman Principle

The Lehman case arose when Harry J. Lehman, a 1970 candidate for the Ohio General Assembly, unsuccessfully attempted to purchase "car card" space in the rapid transit system operated by the City of Shaker Heights. Lehman's proposed ad copy contained his picture and professed his belief in honesty, integrity and good government. Metromedia, Inc., which managed advertising on the transit system pursuant to a contract with Shaker Heights, rejected Lehman's submission despite the availability of space. The exclusion rested entirely on the management agreement's

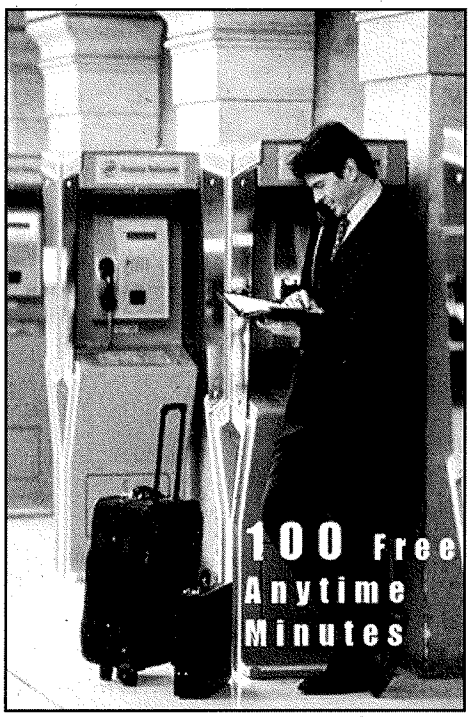
Inside this Issue

prohibition on political advertising, a ban that had been consistently enforced for twenty-six years.

In a 5-4 decision, the United States Supreme Court held that neither Shaker Height's policy against political advertising in car cards, nor the refusal to accept Lehman's campaign copy, violated the First Amendment. Lehman had argued that the car cards constituted a public forum such that nondiscriminatory access was required. The plurality opinion (representing Chief Justice Burger and Justices Blackmun, Rehnquist and White) categorically rejected this contention, however, deeming the car cards to be a part of the city's public transportation commercial venture. The plurality stressed that the political advertising restriction served to minimize chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience. These considerations, the plurality concluded, justified the "managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising."[8]

Justice Douglas provided the fifth vote for the Court's judgment. He agreed with the plurality that the sale of advertising space did not convert the car cards into a forum for communication. Unlike the plurality, though, he would have disposed of the case solely on the ground that commuters have a right "to be free from forced intrusions on their privacy."[9]

The Lehman case effectively overruled a contrary decision made seven years prior by the California Supreme Court in Wirta v. Alameda-Contra Costa Transit Dist.[10] The question raised in Wirta was whether a transit district constitutionally could limit the paid advertising on its motor coaches to commercial solicitations and to issues and candidates on the ballot at the time of an election. By a 4-3 vote, the Wirta court ruled that such a restriction amounted to a "most pervasive form of censorship" in violation of the First Amendment rights of persons seeking to display an anti-Vietnam War advertisement.[11] This determination apparently contributed to the grant of certiorari in Lehman.[12] Thus, although Lehman does not expressly disapprove of Wirta, it seems undeniable that the High Court intended to invalidate the California Supreme Court's inconsistent ruling.



II. Private Messages in Public Bottles

The contradictory outcomes of Lehman and Wirta stem from fundamentally distinct attitudes as to the nature of private advertising space on public property. For the Wirta court, such space comprised a "forum for the expression of ideas."[13] By contrast, in the opinion of the Lehman plurality, "[n]o First Amendment forum is here to be found."[14] Ironically, decades later, this conceptual dichotomy continues to be determinative as lower courts have applied the Lehman principle in different contexts.

First Amendment jurisprudence presently classifies public property according to three categories of public forum status. This taxonomy, as delineated in the landmark case of Perry Ed. Assn. v. Perry Local Ed. Assn.,[15] consists of: (1) traditional public forums - areas such as streets and parks that traditionally have been used for expressive activity; (2) designated public forums - areas dedicated by the government for expressive activity, either generally or for limited purposes; and (3) nonpublic forums.

Public forum status profoundly influences a government entity's authority to regulate private speech on public property. In both traditional and designated public fora, the government may only enforce a content-based speech restriction if it is necessary to serve a compelling state interest and also is narrowly drawn to achieve that interest.[16] By contrast, a content-neutral restriction on speech in a traditional or designated public forum is permissible provided it is narrowly drawn to serve a significant state interest and leaves open ample alternative channels of communication.[17] Nonpublic fora afford the government greatest regulatory latitude. A speech restriction in that context is valid as long as it is reasonable and viewpoint-neutral.[18]

For public property other than streets and parks, public forum status depends upon government intent. Stated differently, public property will be deemed a designated public forum if it has intentionally been opened for public discourse by the government; otherwise, the nonpublic forum classification will apply. The primary indicia of government intent are policy and practice, with the latter being the more significant of the two.[19] The selectivity with which the property has been made available to particular forms of expression, and the compatibility of expressive activity with the principal function of the property, also are relevant factors.[20]

Litigation over private advertising programs on public property tends to focus on the line between designated public forum and nonpublic forum, probably because streets and parks are rarely leased to advertisers. A recent state court example is DiLoreto v. Board of Education.[21] In this case, the California Court of Appeal sustained the Downey Unified School District's refusal to post, on a high school baseball field fence, a Ten Commandments advertisement submitted by local businessman Edward DiLoreto. The court largely justified its ruling on its conclusion that the fence constituted a nonpublic forum. This decision is particularly significant because the court utilized the First Amendment's public forum doctrine to resolve California Constitution-based free speech claims.

Perhaps surprisingly, of all the federal courts of appeals, the Ninth Circuit has deferred most to government entities by assigning the nonpublic forum classification to their private advertising spaces and acceding to their managerial decisions. This deference is reflected in the court's dismissal of Edward DiLoreto's First Amendment challenge to the Downey Unified School District's rejection of his Ten Commandments advertisement.[22] It is also demonstrated by decisions allowing the

City of Phoenix to exclude noncommercial advertisements from bus panels,[23] and permitting Nevada's Clark County School District to bar family planning service advertisements from student newspapers, yearbooks and athletic programs.[24]

Other federal jurisdictions have not compiled a comparable record. In 1995, for example, the Second Circuit characterized a Pennsylvania Station billboard as a nonpublic forum and sustained Amtrak's refusal to exhibit a political advertisement there.[25] Three years later, however, the court ruled that New York's Metropolitan Transportation Authority (MTA) had created a designated public forum in its bus panels such that it was obligated to display a political advertisement critical of New York City Mayor Rudolph Giuliani.[26] In an analogous case, the Sixth Circuit deemed Southwest Ohio Regional Transit Authority (SORTA) bus panels to be a designated public forum and reversed the exclusion of a labor union advertisement.[27] As a final example, the Third Circuit categorized Southeastern Pennsylvania Transportation Authority (SEPTA) subway and railroad station poster panels as a designated public forum and overturned the removal of an anti-abortion advertisement.[28]

What accounts for these disparate applications of the Lehman principle? The answer is the manner in which the government entity had conducted its private advertising program. Phoenix, the Downey Unified School District and Amtrak consistently limited their advertising spaces to commercial promotions. The Clark County School District continuously restricted its advertising spaces to subjects and entities considered to be in the best interests of its schools, and required advertisers to obtain approval from the principal having jurisdiction. By contrast, the MTA, SORTA and SEPTA all accepted a broad range of commercial and noncommercial messages in their advertising spaces. More than any other factor, this difference proved to be determinative of public forum status and, consequently, litigation outcome.

III. Program Implementation Strategies

Any government entity that leases advertising space on its public property should expect to be presented with an advertisement that it will not wish to display due to aesthetics, politics or some other reason. As explained above, however, excluding an undesirable advertisement may violate the First Amendment rights of the prospective advertiser and result in civil rights liability. This dilemma can be resolved by implementing a private advertising program in accordance with the following four strategies.

First, the advertising space should formally be declared to be a nonpublic forum. The advantage of such a declaration is that it undercuts an argument, sure to be raised by a litigious rejected applicant, that the advertising space was intentionally opened for public discourse. Although unlikely to be dispositive of public forum status,[29] the mere existence of the declaration probably will tilt the scales (at least initially) against a designated public forum classification.

"Unsurprisingly, proper implementation is crucial to ensure that a private advertising program serves as a productive fundraising venture rather than a drain on public coffers."

Second, an eligibility policy should be established to restrict the types of advertisements that may be exhibited through the program. The choice of eligibility criteria must be informed by the realization that the courts will rely heavily upon the standards when evaluating the public forum status of the advertising space. Allowing only commercial advertisements indicates that making money is the main goal. By contrast, allowing both noncommercial and commercial advertisements suggests a general intent to open the space for public discourse.[30]

Eligibility criteria are only meaningful if they are unambiguous and definite. This prerequisite is illustrated by the First Circuit's denunciation of the Massachusetts Bay Transportation Authority (MTBA) for drafting a "scarcely coherent" policy regarding acceptable advertising for its subway and trolley cars.[31] Among other edicts, that policy required compliance with the MTBA's determination of "good taste, decency and community standards." The policy also forbade messages or representations "pertaining to sexual conduct," an exclusion that the court criticized for being too vague and broad in scope.

Third, the eligibility policy for the program should be consistently enforced. The Ninth Circuit has stressed that "consistency in application is the hallmark of any policy designed to preserve the non-public forum status of a forum."[32] If an eligibility policy is not enforced, or if exceptions are haphazardly permitted, then the policy will not have the desired effect of persuading a court that the advertising space is intended to be a nonpublic forum.

Fourth, and most importantly, an advertisement should never be excluded from the program because of the viewpoint that it advocates. Although government entities enjoy considerable latitude as to the regulation of private speech in a nonpublic forum, even in that context a restriction must be viewpoint neutral. The requirement of viewpoint neutrality is so paramount that the Ninth Circuit denied a qualified immunity claim by City of Victorville officials who were sued for civil damages for allegedly demanding removal of pro-union advertisements from bus shelters.[33] In language applicable to all private advertising programs, the court declared: "No fair reading of Lehman, upholding content discrimination neutral as to viewpoint on buses, could have led any reasonable official to think that viewpoint discrimination would have been permissible in bus shelters."[34]

Conclusion

Whether or not to lease advertising space on public property is a policy question as to which cities of course enjoy absolute discretion. Should a jurisdiction choose to conduct a private advertising program, the legal question that most likely will arise first is how can the city retain maximum control over the advertisements that are displayed on public

property? The answer, corroborated by a large body of case law, is simple: promulgation and consistent enforcement of a policy that identifies the advertising space as a nonpublic forum and prescribes objective eligibility criteria for participation in the program. Through such action, a city can ensure the profitability of its private advertising program by minimizing the civil rights liability exposure presented by its managerial decisions.

Endnotes

1. Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), cert. denied 526 U.S. 1131 (1999).
2. Metro Display Advertising v. City of Victorville, 143 F.3d 1191 (9th Cir. 1998).
3. Rappa v. New Castle County, 813 F.Supp. 1074 (D.Del. 1992), aff'd in part and vacated in part 18 F.3d 1043 (3rd Cir. 1994).
4. DiLoreto v. Board of Education, 74 Cal.App.4th 267 (1999) ("DiLoreto I"), rev. denied, Cal. Supreme Court Minute 12-01-1999; DiLoreto v. Downey Unified School Dist. Bd. Educ., 196 F.3d 958 (9th Cir. 1999) ("DiLoreto II"), cert. denied 529 U.S. 1067 (2000).
5. Planned Parenthood v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991).
6. Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242 (3rd Cir. 1998), cert. denied 525 U.S. 1068 (1999).
7. 418 U.S. 298 (1974).
8. Id. at 304.
9. Id. at 307.
10. 68 C.2d 51 (1967).
11. Id. at 56.
12. Lehman, supra note 7 at 301 n.5.
13. Wirta, supra note 10 at 55.
14. Lehman, supra note 7 at 304.
15. 460 U.S. 37 (1983).
16. Id. at 45-6.
17. Id.
18. Id. at 46.
19. Hopper v. City of Pasco, 241 F.3d 1067, 1075 (9th Cir. 2001).
20. Id. at 1078.
21. DiLoreto I, supra note 4.
22. DiLoreto II, supra note 4.
23. Children of the Rosary, supra note 1.
24. Planned Parenthood, supra note 5.
25. Lebron v. National R.R. Passenger Corp. (AMTRAK), 69 F.3d 650 (2nd Cir. 1995), amended by 74 F.3d 371 (2nd Cir. 1995), cert. denied 517 U.S. 1188 (1996).
26. New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123 (2nd Cir. 1998), cert. denied 525 U.S. 824 (1998)
27. United Food v. Southwest Ohio Regional Transit, 163 F.3d 341 (6th Cir. 1998).
28. Christ's Bride, supra note 6.
29. Cf. Hopper, supra note 19 at 1075; United Food, supra note 27 at 352.
30. New York Magazine, supra note 26 at 130.
31. Aids Action Committee of Mass. v. MBTA, 42 F.3d 1, 12 (1st Cir. 1994)
32. Hopper, supra note 19 at 1076.
33. Metro Display, supra note 2.
34. Id. at 1195.

* Terence R. Boga is an associate in the Los Angeles office of Richards, Watson & Gershon. He serves as Assistant City Attorney for the cities of Seal Beach and Westlake Village, and specializes in municipal law and First Amendment law. *An abridged version of this article appears in the August 2001 issue of the California Bar Journal.*