



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 92- 14

Robert A. Engler, Director  
Alcoholic Beverage Control  
Department of Revenue  
512 S.W. 6th, 2nd Floor  
Topeka, Kansas

Re: Intoxicating Liquors and Beverages--Certain  
Prohibited Acts and Penalties--Advertising and  
Display of Liquor; Restrictions; Billboards

Synopsis: K.S.A. 1991 Supp. 41-714(a)(2) attempts to prohibit  
retailers from advertising alcoholic liquor by  
means of billboards. However, the statute does not  
sufficiently inform retailers what conduct will  
subject them to penalties, and prohibits  
advertising by "billboard" in terms so vague that  
persons of common intelligence must necessarily  
guess at its meaning. In our opinion that  
provision is therefore violative of due process and  
unenforceable. Cited herein: K.S.A. 1991 Supp.  
41-714, Kan. Const., Bill of Rights, § 10; U.S.  
Const., Amend. 14.

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Dear Director Engler:

You request our opinion regarding the 1991 amendments to  
K.S.A. 1991 Supp. 41-714 relating to advertising of alcoholic  
liquor by means of billboards.

K.S.A. 1991 Supp. 41-714 provides in part:

"(a) It shall be unlawful for:

. . . .

"(2) any retailer of alcoholic liquor to advertise any alcoholic liquor by means of billboards along public highways, roads and streets or to have on the retailer's licensed premises any billboard advertising alcoholic liquor;

. . . .

"(e) as used in this section, 'billboard' means any board or panel erected, constructed or maintained for the purpose of displaying outdoor advertising by means of painted letters, posters, pictures or pictorial or reading matter, either illuminated or nonilluminated, when such sign is supported by uprights or braces placed upon the ground or upon a structure affixed thereto. Billboard does not include a sign containing statements pertaining to a business conducted within or on the premises on which the sign is maintained."

You submit the following information and questions:

"Subsection (a) (2) of the statute makes it unlawful for a retailer to advertise any alcoholic liquor in the prohibited billboard format. We have concluded that, in order to qualify as an advertisement of alcoholic liquor, a brand name must be used. Thus, a billboard which contains only generic terms such as 'vodka,' 'wine' or 'beer' is not considered to be in violation.

"QUESTION: Must specific brand names be used in order to be considered an advertisement of alcoholic liquor as prohibited in the billboard format?

"Subsection (c) of the statute provides a physical description of a 'billboard' as

any board or panel erected, constructed or maintained. We have determined that a board or panel must be permanently affixed to a structure or the ground in order to qualify as a 'billboard' under this subsection. Therefore, we are not prosecuting the use of portable signs, banners or other temporary displays by retailers, even if brand names are used.

"QUESTION: Are signs which meet the physical criteria outlined in subsection (e) of K.S.A. 41-714 considered to be 'billboards' if they are not permanently affixed to the ground or a structure?

"Subsection (e) further provides that a sign containing statements pertaining to a business conducted within or on the premises on which the sign is maintained is not a 'billboard.' It appears to be legislative intent to allow retailers to use signs which meet the physical criteria of a 'billboard' to provide general information about their business, so long as the sign does not advertise any alcoholic liquor.

"QUESTION: Does the use of 'statements pertaining to a business conducted within or on the premises on which the sign is maintained' exclude a sign from the definition of 'billboard,' even if the sign contains specific brand name advertising of alcoholic liquor?"  
(Emphasis in original).

We have experienced great difficulty in our attempt to construe K.S.A. 1991 Supp. 41-714(a)(2), particularly in regard to your second and third questions. The definition of "billboard" contained in K.S.A. 1991 Supp. 41-714(e) does not specify whether it includes portable as well as permanent signs, nor does it clearly exclude portable signs. (Committee minutes and testimony attached thereto indicate that the definition was derived from the city of Topeka zoning regulations. Those regulations contain a separate definition for "portable signs." There is nothing in the record or the statute, however, to suggest an intent to adopt this

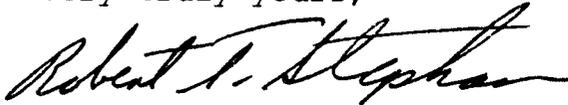
distinction. Minutes of the House Committee on Federal and State Affairs, April 9, 1991, attachment #5.) Thus it is impossible to tell, with any degree of certainty, whether advertising by means of portable signs is prohibited by the statute.

Similarly, it is unclear whether a retailer may advertise by billboard on the retailer's premises. In one breath K.S.A. 1991 Supp. 41-714(a)(2) states that it is unlawful for any retailer "to have on the retailer's licensed premises any billboard advertising alcoholic liquor," and in the next breath subsection (e) of the statute states that a "[b]illboard does not include a sign containing statements pertaining to a business conducted within or on the premises on which the sign is maintained." Is a retailer prohibited from advertising by billboard his business which is conducted within or on the premises on which the sign is maintained? Who knows.

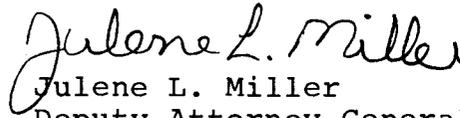
The tremendous difficulty we have had construing this statute leads us to conclude that its provisions regarding billboard advertising are unconstitutionally vague, notwithstanding the general rule that the constitutionality of a statute is presumed and that all doubts must be resolved in favor of its validity. State, ex rel., v. Fadely, 180 Kan. 652 (1957). As discussed in Attorney General Opinion No. 89-89, K.S.A. 1991 Supp. 41-714 is a penal statute. The Kansas Supreme Court has consistently held that under the fourteenth amendment of the United States constitution and section 10 of the Kansas bill of rights, a penal statute must sufficiently inform those who are subject to it what conduct will subject them to penalties. Lines v. City of Topeka, 223 Kan. 772 (1978); Hearn v. City of Overland Park, 244 Kan. 638, 640 (1989), cert. den. 493 U.S. 976, 107 L.Ed.2d 503, 110 S.Ct. 500 (1989). A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. State v. Hill, 189 Kan. 403, 411 (1962); State v. Garrett, 235 Kan. 768, 776 (1984); Hearn, 244 Kan. at 642. Due process requires that a law provide sufficient guides for police and other officials to minimize the possibility of arbitrary enforcement. Kansas Retail Trade Co-op v. Stephan, 522 F.Supp. 632, 639 (D.C. Kan. 1981), aff'd in part, rev. in part 695 F.2d 1343 (10th cir. 1982); City of Overland Park v. McLaughlin, 10 Kan.App.2d 537, 545 (1985), aff'd 238 Kan. 637 (1986). As illustrated above, K.S.A. 1991 Supp. 41-714(a)(2) does not sufficiently inform retailers

what conduct will subject them to penalties, and prohibits advertising by "billboard" in terms so vague that persons of common intelligence must necessarily guess at its meaning. In our opinion that provision is therefore violative of due process and unenforceable. It is also our opinion that the provisions of K.S.A. 1991 Supp. 41-714 which deal with billboard advertising are severable from its other provisions, and this conclusion does not extend to those other provisions.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm