



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 9, 1983

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 83- 131

The Honorable Ronald R. Hein
State Senator, Twentieth District
6031 West 24th Terrace
Topeka, Kansas 66614

Re: Crimes and Punishments -- Sex Offenses -- Promoting
Prostitution; Newspaper Advertisements

Synopsis: A newspaper may refuse to accept for publication any advertisement which is presented to it without a violation of the First or Fourteenth Amendments to the United States Constitution, except in those situations where a clear restraint of trade results or some other protected right is infringed. A newspaper may accordingly refuse to publish any individual advertisement or class of advertisements for businesses such as massage parlors. Should such advertisements be accepted for publication, a newspaper would not be engaging in any activity which is included in the criminal offense of promoting prostitution (K.S.A. 21-3513), which, as a penal statute, must be narrowly construed. Cited herein: K.S.A. 21-3513, U.S. Const., Amend. I, and Amend. XIV.

* * *

Dear Senator Hein:

On behalf of the Department of Administration of Justice of the Topeka Outreach Center of Wichita State University, you have requested the opinion of this office on three inter-related questions which concern the publication by newspapers

The Honorable Ronald R. Hein

Page Two

of advertisements for massage parlors. Specifically, you inquire: (1) are newspapers required to publish any advertisements which they are requested to print; (2) are such newspapers required to run advertisements for businesses where arrests or convictions for prostitution have been made; and (3) can a newspaper be prosecuted under Kansas statute (K.S.A. 21-3513) for advertising a business at which arrests or convictions for prostitution have been made, where such arrests or convictions arise out of the nature of the business?

Your first two inquiries may be addressed together, since both concern the obligation of newspapers to publish paid advertisements. Moreover, although your letter refers to both publically-owned and private newspapers, we know of no legal distinction between them which is relevant to your inquiry. Although Kansas Courts have not had the opportunity to rule on the question of an advertiser's right to access to the public through a newspaper, there are numerous cases from other state and federal jurisdictions on this point. Almost without exception, they have held that a newspaper is under no obligation to print any advertisement which is presented to it, and may decline to do so without having to provide any justification for its refusal. Wisconsin Assn. of Nursing Homes v. Journal Co., 92 Wis.2d 709, 285 N.W.2d 891 (1979), Modla v. Tribune Publishing Co., 14 Ariz. App. 82, 480 P.2d 999 (1971), Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970). The protections afforded by the First Amendment [Carpets by the Carload, Inc. v. Warren, 368 F.Supp. 1075 (E.D. Wis. 1973)] and the Fourteenth Amendment [Associates & Aldrich Company v. Times Mirror Company, 440 F.2d 133 (9th Cir. 1971)] simply do not apply in the area of a newspaper's discretion over what advertising to accept or reject, or the format in which it may be run.

Only in those cases where a newspaper uses its discretion under the First Amendment to attempt to destroy competition and establish a monopoly (i.e., an advertiser is prohibited from advertising with a competitor) have courts made an exception to this general rule. Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed.2d 162 (1951). Additionally, in the case of publications which serve as the official voice of a particular group, courts have on occasion found countervailing interests, such as the right to fair and open corporate elections, which modify the otherwise absolute discretion. Fitzgerald v. National Rifle Association, 383 F.Supp. 162 (D.N.J. 1974). Such cases are by far the exception rather than the rule, however.

The Honorable Ronald R. Hein
Page Three

Given the above, it is our opinion that a newspaper may establish as a general policy its refusal to accept for publication any advertisements for businesses where arrests or convictions for prostitution have been made. Indeed, given the broad sweep of the decisions cited above, a newspaper could decline to publish any advertisements for massage parlors, adult book stores, adult cinemas or other businesses of a similar nature. See, e.g., Bloss v. Federated Publications, Inc., 380 Mich. 485, 157 N.W.2d 241 (1968). Advertisers do not have any constitutional right of access to a newspaper. Newspaper Printing Corp. v. Galbreath, 580 S.W.2d 777 (Tenn. 1979) and cases cited therein at 779.

Your third inquiry goes to the potential criminal liability of a newspaper which runs ads for a business at which there have been arrests made or convictions obtained for prostitution. The statute you cite, K.S.A. 21-3513, concerns the offense of promoting prostitution, and defines the crime to include:

- "(a) Establishing, owning, maintaining or managing a house of prostitution, or participating in the establishment, ownership, maintenance, or management thereof; or
- "(b) Permitting any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; or
- "(c) Procuring a prostitute for a house of prostitution; or
- "(d) Inducing another to become a prostitute; or
- "(e) Soliciting a patron for a prostitute or for a house of prostitution; or
- "(f) Procuring a prostitute for a patron; or
- "(g) Procuring transportation for, paying for the transportation of, or transporting a person within this state with the intention of assisting or promoting that person's engaging in prostitution; or

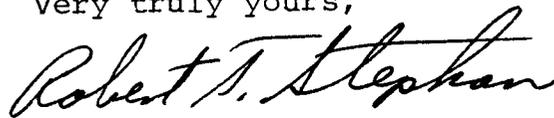
The Honorable Ronald A. Hein
Page Four

"(h) Being employed to perform any act which is prohibited by this section." (Emphasis added.)

We presume from your question that you assume a situation in which the newspaper, by virtue of the prior arrests, has knowledge of the activities of the owners or employees of the particular business. In the absence of such knowledge, a newspaper has been held not to be liable for the content of ads it prints, even though the ads are subsequently shown to be in violation of a state civil rights act. Commonwealth v. Pittsburg Press, 483 Pa. 314, 396 A.2d 1187 (1979). Although cases do exist in which publishers have been convicted for printing advertisements which they had reason to know were obscene [Dunlop v. United States, 165 U.S. 486, 41 L.Ed. 799 (1899)], such decisions hinge both on the particular facts of the case and statutes which specifically made the publication a criminal offense. In that K.S.A. 21-3513 is a penal statute, it must be narrowly construed [State v. Kearns, 229 Kan. 207 (1981)], and in our opinion fails to place a newspaper on notice that the mere printing of such an ad would incur criminal liability. See, e.g., State v. Stauffer Communications, Inc., 225 Kan. 540 (1979).

In conclusion, a newspaper may refuse to accept for publication any advertisement which is presented to it without a violation of the First or Fourteenth Amendments to the United States Constitution, except in those situations where a clear restraint of trade results or some other protected right is infringed. A newspaper may accordingly refuse to publish any individual advertisement or class of advertisements for businesses such as massage parlors. Should such advertisements be accepted for publication, a newspaper would not be engaging in an activity which is included in the criminal offense of promoting prostitution (K.S.A. 12-3513), which, as a penal statute, must be narrowly construed.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle