Developing and Implementing a Transit Advertising Policy

DETAILS

27 pages | | PAPERBACK
ISBN 978-0-309-43016-6 | DOI 10.17226/22932

AUTHORS

August 2010

TRANSIT COOPERATIVE RESEARCH PROGRAM
Sponsored by the Federal Transit Administration

Responsible Senior Program Officer: Gwen Chisholm Smith

Legal Research Digest 33

DEVELOPING AND IMPLEMENTING A TRANSIT ADVERTISING POLICY

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Lew R.C. Bricker, Esq., Ryan B. Jacobsen, Esq., and Colin P. Gainer, Esq., SmithAmundsen LLC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Applications

The primary goal of any transit system is to effectively and efficiently provide service to those in need of transportation. Advertising can help serve that goal. To augment revenue, public transit systems often lease advertising space or license others to sell advertising space. Buses, trains, and other transit facilities offer high-visibility locations for traditional advertising such as signs and billboards. Recent advances in technology are making electronic video and audio advertising possible as well.

While increased revenue from advertising can be attractive, transit systems have other, sometimes conflicting, priorities. There may be a concern that too much advertising will weaken the system's visual image. Transit systems reasonably want advertising to be tasteful, visually appealing, and not offensive to customers and stakeholders. As a result, transit systems often have policies limiting the locations where advertising will be permitted. Such policies are generally not controversial. However, controversy is likely to arise when transit systems do control content. Such control may result in challenges.

Although transit systems are increasingly expected to be more entrepreneurial, as governmental entities they have constitutional obligations to respect and protect freedom of speech and to provide equality of treatment. To the extent that a transit system's facility is viewed as a public forum, the system's ability to moderate expressive activity may be limited.

The goal of this digest is to provide information pertaining to transit systems' use of various strategies to implement advertising content policies that further the system's reasonable interests and protect free speech rights. This digest should be useful to transit administrators, policy staff, program developers, and attorneys.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

CONTENTS

DEVELOPING AND IMPLEMENTING A TRANSIT ADVERTISING POLICY

By Lew R.C. Bricker, Esq., Ryan B. Jacobsen, Esq., and Colin P. Gainer, Esq.
SmithAmundsen LLC

INTRODUCTION

Mass transit agencies, regardless of their size, have developed advertising programs to enhance their revenue stream. As a necessary precursor, their administrators routinely employ some formal protocol when evaluating the content of proposed advertising. These policies are often outdated and rarely evolve with the changing state of the law. As a result, many agencies find themselves the subject of burdensome and expensive litigation.

This research project was commissioned to provide a comprehensive review and analysis of the advertising issues regularly encountered by mass transit agencies across the country. The balance between transit advertising and free speech is complex, which is why transit agencies find it challenging to achieve the specific objectives set forth in their advertising programs. Certainly, free speech concerns weigh heavily against the agency's desire to restrict speech they deem offensive, garish, or inconsistent with the public image they hope to portray.

Advertising policies should be drafted in a manner that conforms to recognized legal standards. This digest addresses the unique and specific concerns transit agencies face as part of their regular operations, and it evaluates the same under the constraints set forth in federal court rulings governing what types of speech are or are not permissible. The case law analysis includes the factual background of each case, the key issues raised, and the reasoning employed by the judiciary in reaching its decision. The legal opinions referenced herein speak to a variety of relevant legal issues, namely, the distinction between advertising displayed in public versus nonpublic forums, viewpoint discrimination, and unconstitutionally vague or overly broad restrictions on speech.

In addition to a review of the relevant case law, this digest examines a sample of the advertising programs in force at transit agencies across the United States. This comparative analysis highlights the successful and unsuccessful practices implemented, including any preventative and corrective measures used to combat the typical advertising-related hurdles transit agencies have encountered.

Ideally, this research offers some practical guidance and uniformity in the way content is evaluated and transit policies are executed. This digest should afford administrators a stable framework to develop or enhance their existing advertising policy to ensure it comports with the current state of the law. The end goal is to achieve a proper balance between the free speech rights enjoyed by commercial and not-for-profit advertisers and the desire and ability to restrict unappealing or offensive content that may be inconsistent with the agency's public image.

CASE LAW ANALYSIS

First, whether an agency is drafting or modifying its policy, it is important to have a clear understanding of the authoritative legal decisions regarding advertising and free speech. Courts throughout the United States have grappled with the free speech concerns unique to advertising in a mass transit setting. For example, Justice Brandeis, speaking for a unanimous Court in *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), recognized that "there is a difference which justifies the classification between display advertising and that in periodicals or newspapers." The *Packer* Court pointed out that viewers of billboards and streetcar signs often have no choice but to observe such advertising. Viewers of display advertising are a captive audience, having the advertised message "thrust upon them by all the arts and devices that skill can produce."

Judges are more cognizant of this distinction today, as the effectiveness of traditional print media wanes while there is a proliferation of social and online media innovations that capture a much larger audience in an entirely different way. These changes add a dimension to a transit agency's analysis that goes far beyond the basic free speech arguments often presented. As the Supreme Court noted, "although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question."[1] As a result of this approach to First Amendment application, spaces held out by transit agencies for advertising are often the focus of litigation between interested parties with opposing views of how the space should be classified.

Forum analysis divides government property into three categories: public forums, designated public forums, and nonpublic forums.[2] "The Supreme Court 'has

[1] Lehman v. City of Shaker Heights, 418 U.S. 298, 302–03 (1974).

[2] Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976 (9th Cir. 1998).

adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.'"[3] An example of this is when a transit agency wishes to reserve its advertising spaces for commercial content, rather than allowing all types of content.

The most protected forum is the "traditional" public forum, where restrictions on speech are almost always invalidated.[4] Transit agencies rarely own or oversee a traditional public forum. Properties viewed by the courts as traditional public forums are locales customarily used for public expression (i.e., public streets, public parks, meeting halls, public sidewalks, and similar public thoroughfares).[5]

Nonpublic forums and designated public forums are the two forums most used by transit agencies for their advertising.

Nonpublic forums, the least protected, are places not traditionally used to display speech. The First Amendment does not guarantee access to property solely on the basis that it is owned or controlled by the government. In making this preliminary determination, courts will not classify a space as public where there is clear evidence of a contrary intent by the agency. Nor will courts infer that the government intended to create a public forum when the nature of the property is inconsistent with allowing free speech.[6] Places such as jails, public hospitals, and military bases, in addition to transit advertising spaces, have been held to constitute nonpublic forums.[7] It is this classification that is most beneficial to transit agencies, as courts generally uphold content restrictions in a nonpublic forum.

A designated public forum is a nontraditional forum that the government has opened for free speech by part or all of the public.[8] The Supreme Court has repeatedly held that the creation of a designated public forum requires the necessary intent to launch a nontraditional forum for public discourse.[9] Mere intent can transform a nonpublic forum into a designated public forum. Cases involving a mass transit agency deemed to have a designated public forum will more often than not result in a ruling against the agency for unfair content restrictions.

Vague and overly broad restrictions on speech are also considered by the courts when evaluating the constitutionality of a transit agency's decision to accept or reject an advertisement for display. These restrictions often contravene the principles of free speech because a speaker cannot grasp what content is acceptable, and may be, in effect, chilled from submitting an advertisement at the onset.[10]

In addition to vague and overly broad restrictions, an agency may not regulate speech based on "viewpoint discrimination." When evaluating a particular advertisement for display, it is unconstitutional to permit one speaker's point of view while prohibiting the opposite view on the same issue (i.e., pro-choice ads versus pro-life ads).

It is important to understand that courts will often incorporate a combination of the above factors into their analysis. Forum designation and viewpoint discrimination concerns must be reflected in an agency's policy to avoid exposure for unfairly restricting speech.

As was previously indicated, there is intense analysis involved in deciding whether an advertising policy or practice restricting certain types of ads or the content thereof will pass constitutional muster. This digest is based on a comprehensive review of the prevailing U.S. Appellate and Supreme Court decisions involving First Amendment challenges in the context of transit advertising. The transit cases reviewed in this report should help transit agencies avoid pitfalls that have resulted in advertising policies being invalidated.

Ridley v. Massachusetts Bay Transp. Authority[11]

Ridley stands as a model case for how an agency that intends to create a nonpublic forum should operate its advertising program. Express policy provisions that designate advertising spaces as nonpublic forums, viewpoint-neutral restrictions, and active review of advertisements for compliance with policy regulations will allow an agency to legally exercise discretion to restrict content.

Ridley discussed two consolidated cases where the parties in each case raised First Amendment challenges to Massachusetts Bay Transportation Authority's (MBTA) rejection of their proposed advertising.[12]

The first of the two consolidated cases, *Change the Climate, Inc. v. MBTA*, involved the rejection of three submitted advertisements that raised questions about marijuana laws.[13] The MBTA rejected these advertisements on the ground that such ads promoted illegal use of marijuana. The plaintiff argued that the advertising space constituted a public forum, making the rejection

[3] *Id.* (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985)).

[4] *See* Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 741–42 (1996).

[5] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974); Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976 (9th Cir. 1998).

[6] *See* Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 134 (1977).

[7] *See* Greer v. Spock, 424 U.S. 828, 828 (1976); Adderley v. Florida, 385 U.S. 39, 39 (1966).

[8] Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976 (9th Cir. 1998).

[9] *Id*., Cornelius v. NAACP, *supra*, note 2.

[10] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1988) and cases cited at ACLU v. Mineta, 319 F. Supp. 2d 69, 76 (D.C. Cir. 2004).

[11] 390 F.3d 65 (1st Cir. 2004).

[12] 390 F.3d at 69; *See also* App. C.

[13] *Id.*

of the advertisements unconstitutional on First Amendment grounds. The district court ultimately avoided the forum issue and found in favor of MBTA, holding that MBTA's guidelines, which prohibited content that promoted illegal activity, were reasonable.[14]

The second case, *Ridley v. MBTA*, dealt with MBTA's rejection of one advertisement from a religious group on the grounds that the ad violated guidelines prohibiting content that demeaned or disparaged individuals or groups. The ad at issue demeaned other religions by calling them false. The plaintiff alleged that MBTA's rejection was the product of viewpoint discrimination and vague guidelines that granted overly broad discretion to MBTA's administrators. The district court found in favor for MBTA, holding that the rejection was valid under the content restriction provision of MBTA's guidelines.[15]

Upon review of the district court's decisions, the First Circuit based its holding on three analyses: forum designation, viewpoint discrimination, and the level of discretion delegated to transit authority employees.[16] First, under the forum analysis, the court referred to the Supreme Court decision of *Cornelius v. NAACP*, which held that the government must have an affirmative intent to create a public forum for a designated public forum to arise.[17] To determine intent, the courts should consider: 1) the explicit expressions of intent, 2) the policy and practice of the government, and 3) the nature of the property and its compatibility with free speech.[18] In reaching the conclusion that MBTA did not express intent to create a public forum, the court focused on MBTA's explicit expressions and its policy and practice. First, the 2003 advertising guidelines, which were at issue, contained the express provision that MBTA intended to designate its facilities as nonpublic forums.[19] Second, the court reasoned, reviewing the prior practice of MBTA in relation to the changes made to their advertising guidelines, a consistent increase and strengthening in restrictions on advertisement from the inception of the program to the present evidenced an intent not to create a designated public forum.[20]

Turning to the issue of viewpoint discrimination, the court reached a different outcome on the two cases: holding that the rejection of the marijuana advertisements in *Change the Climate* constituted viewpoint discrimination, and holding that MBTA's application of the guidelines in *Ridley* was viewpoint neutral.

With regard to *Change the Climate*, the court found that MBTA's purported justification of protecting children by refusing to run the ads fell short. This finding was based on MBTA's previous statements, which showed that rejection of the ads was actually based on distaste for the ads.[21] The court noted that MBTA's guidelines were constitutional on their face. However, the court explained that viewpoint-neutral grounds may be a mere pretext and, therefore, turned to MBTA's reasons for rejection. First, previous statements made by representatives of MBTA showed direct evidence of viewpoint discrimination.[22] Second, the court found a lack of fit between the protective reasons given by MBTA and the rejection of the advertisements. The court pointed out that two of the three ads (the "Mother" and "Police" advertisements) were plainly not targeted at children.[23] Moreover, the "Teen" advertisement, which arguably could be viewed as directed to teenagers, was considered by the court to be ambiguous at best.[24] Therefore, the court found the argument that the advertisements would encourage illegal juvenile activity entirely unreasonable.

Under the facts of *Ridley*, the guidelines at issue prohibited advertisements that demeaned or disparaged an individual or group of individuals. Because the guidelines did not list any particular protected groups and the government was not attempting to give one group advantage over another, the court held that no viewpoint discrimination existed on the face of the guidelines. The court reasoned that "under the guidelines, all advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks."[25] The court distinguished two previously accepted ads from the rejected ad at issue, and found that MBTA could have reasonably concluded that the first two ads did not demean or disparage while the third ad did.[26] Lastly, the court analyzed whether the guidelines were consistent

[14] *Id.* at 71.

[15] *Id.*

[16] Contrast a prior District Court opinion in the Eleventh Circuit, Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F. Supp. 2d 1320 (N.D. Ga. 2000), in which MARTA refused to display ads, citing its policy banning advertising regarding matters of "public controversy." The court found that MARTA had accepted public interest ads in the past from other parties, and therefore had opened its "advertising forum" to such ads. Therefore, strict scrutiny applied to its denial of the Federation ads, and MARTA could not meet this test. The court also found that MARTA's actions were not consistent with its written policies, and further that "public controversy" was too subjective and put too much discretion into the hands of officials; therefore the policy was void for vagueness.

[17] Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985).

[18] *Id.* at 76.

[19] *Id*. at 77.

[20] *Id.* at 82.

[21] *Id.* at 83–85.

[22] For example, one reason for the refusal was that the ads were part of Change the Climate's effort to reform marijuana laws in an effort to legalize marijuana. Another example was the statement by the MBTA General Manager, who admitted that he would publish the ads if they had expressed the opposite viewpoint of compliance with existing laws. *Id.* at 88.

[23] See App. C.

[24] *Id.* at 88.

[25] *Id*. at 91.

[26] *Id*. at 92.

with MBTA's stated purposes in running an advertising program.[27] Summarizing that MBTA's purposes for the program included 1) maximizing revenue by generating money through ads while not reducing ridership through offensive advertisements, 2) maintaining a safe environment for its riders, and 3) avoiding unwanted identification with the displayed ads, the court concluded that guidelines preventing demeaning or disparaging advertisements adequately served such purposes.[28]

Finally, the court addressed the challenge by both parties on the vagueness of MBTA's regulatory scheme and the broad discretion vested in MBTA officials. The challenge incorporated two basic concerns: 1) concerns about fair notice and about the related danger of chilling expression, and 2) concerns about excessive discretion being invested in administering and enforcing officials.

The court diminished the concern in the first prong, holding no serious concern exists for either notice or chilling effects where there are no consequences (e.g., fines or sanctions) for submitting a nonconforming advertisement and having it rejected.[29] Turning to the second concern of overly broad discretion, the court held that in a nonpublic forum, a grant of discretion will be upheld so long as it is reasonable in light of the characteristic nature and function of the forum.[30] Given its chief purpose of raising revenue without losing ridership, MBTA's use of prevailing community standards to accept or reject advertisements was not unreasonably vague or overbroad. Moreover, due to the difficulty of determining if some advertisements are consistent with MBTA's purpose, some degree of interpretation and reliance on prevailing community standards is inevitable.[31]

[27] A more recent case from the Illinois District Court cites the *Ridley* decision in commenting that the "public forum" analysis is unsuitable for situations where the government is trying to "earn revenue through advertising." *See* Entertainment Software Ass'n v. Chicago Transit Auth., 38 Media Law Rep. 1257, 2010 U.S. Dist. Lexis 1156, at * 19, n.6 (2010). By ordinance the Authority prohibited advertising of video games with a designation for mature audiences on its trains, buses, and facilities. The court discusses the Authority's intent to restrict access, as evidenced by its statements and ordinances, but found that it had failed to create a nonpublic forum. It was significant to the court that Authority advertising property had been found to be a designated public forum in an earlier case.

[28] *Id*. at 93.

[29] *Id*. at 94.

[30] *Id.* at 95.

[31] *Id.*

Lehman v. Shaker Heights[32]

Lehman demonstrates how a court will uphold content-based restrictions where a transit agency can effectively articulate a revenue-generating purpose for its advertising program and restrict access in accordance with such a purpose.

Lehman is often cited by courts as precedent on the issue of forum analysis in the transit advertising context. At issue in the case was a space on a transit system, where a political candidate was denied access to advertise for his political office. Although the city's transit system accepted advertisements from commercial establishments and public interest groups, the policy did not permit any political advertisements on its buses.[33]

In his action, the political candidate argued that the car cards constituted a public forum protected by the First Amendment and, therefore, nondiscriminatory access to such publicly-owned and -controlled areas of communication existed for use by the candidate.[34] The Court, however, viewed differently the unique character of a public bus, and the conflicting interests involved with advertising in such a space.

The Court reasoned that, unlike a traditional public forum, here there were "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."[35] The transit system's car cards were, instead, part of the city's commercial operation. Moreover, the city purposefully limited access to the spaces to minimize chances of abuse, the appearance of favoritism, and the risk of imposing views upon a captive audience.[36] Therefore, the city transit system "ha[d] discretion to develop and make reasonable choices concerning the type of adver-

[32] 418 U.S. 298 (1974).

[33] *Id.* at 300.

[34] *Id*. at 301.

[35] *Id*. at 303.

[36] *Id.* A similar result was reached in James v. Wash. Metro. Area Transit Auth*.,* 649 F. Supp. 2d 424 (D. Md. 2009), where plaintiff had been denied the right to hang campaign posters in subway stations. The court divided the above-ground and below-ground areas, and found that the below-ground area was not a public forum. As to the above-ground areas, the court found that the regulations at issue were content neutral because they prohibited the affixing of any sign and also allowed for other kinds of communications of ideas.

As to whether bus stop benches may be public forums, there is a recent case that says yes: Bench Billboard Co. v. City of Toledo, 2010 U.S. Dist. Lexis 19916 (N.D. Ill. 2010). The city required permits to place "courtesy benches" with advertising on the backs at its bus stops on public city streets. The court found that because the benches were allowed on public sidewalks, they were in a public forum and any limitation on installation was subject to strict scrutiny. *Contrast:* Uptown Pawn and Jewelry, Inc. v. City of Hollywood*,* 337 F. 3d 1275 (11th Circuit 2003), where the court found that bus stop benches are *not* a public forum.

tising that may be displayed in its vehicles."[37] The Court ultimately found no public forum to exist and no First Amendment violation.

New York Magazine v. Metropolitan Transportation Authority[38]

In contrast to *Ridley* and *Lehman*, *New York Magazine* demonstrates how a designated public forum can be created when an agency attempts to generate revenue beyond commercial advertising by opening its doors to expressive and public content as well.

A magazine corporation leased bus advertising space from Metropolitan Transportation Authority (MTA). MTA subsequently removed the advertisement after receiving a complaint from the mayor's office because the ad referred to the New York City mayor by his first name and indirectly criticized him.[39] The issue presented to the court was whether MTA's conduct in removing the advertisement from the exterior advertising space of its buses deprived New York Magazine of its right under the First Amendment.[40] In analyzing this issue, the court addressed the argument of forum designation, ultimately holding that MTA's advertising space constituted a designated public forum.[41]

To reach this conclusion, the court first determined the type of government property. Under a designated public forum, content-based regulations are permissible only if narrowly drawn to achieve a compelling governmental interest; whereas in a nonpublic forum, regulations may limit speech if they are reasonable and not based on the speaker's viewpoint.[42]

Delving further into the analysis of the type of forum, the Ninth Circuit explained that where a government has opened the property for speech in its proprietary capacity—for the purpose of raising revenue or facilitating the conduct of its own internal business—the forum created is nonpublic and subject only to the test of reasonableness.[43] However, where the government acted for the purpose of benefitting the public, a designated public forum is created and subject to heightened scrutiny.[44]

MTA urged the court to find a nonpublic forum on the ground that MTA's standards restricted certain types of access, and MTA argued that such standards evidenced intent not to create a public forum. In rejecting the argument that the mere restriction of certain types of speech creates a nonpublic forum, the court explained:

> [I]t cannot be true that if the Government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the Government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content. We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to designated public forums.[45]

Thus, the court stated that the decision of the government to limit access to the forum is not dispositive in and of itself, but is relevant for what it suggests about the government's intent in creating the forum.[46] The restrictions in this case posed the question of whether the Government was acting primarily as proprietor or as regulator. The court elaborated by explaining that allowing commercial speech to be the only acceptable content indicates that making money is the main purpose. While, on the other hand, allowing political speech shows intent to open a space for discourse and an acceptance of controversial opinions, which are viewed as being inconsistent with sound commercial practice.[47]

Applying this analysis to the facts at hand, the court affirmed the district court's finding that the advertising space constituted a designated public forum because of MTA's acceptance of both political and commercial advertising.

Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority[48]

Similar to *New York Magazine*, *Christ's Bride Ministries* is another example of how a complex advertising program designed to generate revenue by accepting both commercial and free speech advertising can result in the unwanted classification of designated public forum status.

At issue in this case was whether Southeastern Pennsylvania Transportation Authority (SEPTA) and its licensee, Transportation Display's Inc. (TDI), violated the First Amendment rights of Christ's Bride Ministries, Inc. (CBM), when it removed CBM's advertisements from its ad spaces due to the content of the advertisements, which stated "Women Who Choose Abortion Suffer More and Deadlier Breast Cancer."[49] After the advertisements went up, SEPTA received various complaints, including a letter from the Assistant Secretary of Health of the U.S. Department of Health and Human Services, who commented on the

[37] *Id*.

[38] 136 F.3d 123 (2d Cir. 1998).

[39] *Id*. at 125–26.

[40] *Id.* at 128.

[41] *Id.* at 130.

[42] *Id.* at 128.

[43] *Id.* at 129.

[44] *Id.*

[45] *Id.* at 129–30.

[46] *Id.* at 130.

[47] *Id.* at 131.

[48] 148 F.3d 242 (3d Cir. 1998).

[49] *Id.* at 244.

ads' misleading information.[50] As a result, SEPTA decided to remove the ads. CBM subsequently filed suit in district court against SEPTA and TDI, and the court found in favor of the defendants, holding that SEPTA and TDI did not create a public forum, and the letter by the Assistant Secretary of Health was a reasonable basis on which to remove the advertisement.[51]

On appeal, the Third Circuit reversed. The court focused on the issue of whether SEPTA's advertising space constituted a public forum. Under this analysis, the court looked to whether SEPTA had created a designated public forum by expressly dedicating its advertising space to speech activity through its policies and practices. SEPTA's primary goal for the advertisement spaces was to generate revenue.[52] However, SEPTA and TDI also had a secondary goal of using the space to promote awareness of social issues—a goal that was supported by SEPTA's written policy that urged TDI to make advertising space available to other advertisers such as public health groups, instead of just alcohol and tobacco advertisers.[53] This secondary goal stood for SEPTA's intent to use the ad space for free speech advertising as well as commercial advertising. These different goals precluded the court from determining the designation of the forum based exclusively on intent found in the policy.[54] For that reason, the court turned to a review of SEPTA's past practices as well.

SEPTA's past acceptance of ads revealed that SEPTA requested modification of only three ads on specific occasions, none of which dealt with the issue of abortion. SEPTA argued that this practice demonstrated that the agency maintained tight control over the forum in support of the closed forum argument.[55] However, the court found the opposite by way of SEPTA's practice, where SEPTA accepted at least 99 percent of all ads without objection, including two previous ads on the topic of abortion.[56]

Therefore, based on SEPTA's 1) written policies, 2) goals for generating revenue through the sale of ad space for expressive and commercial content, and 3) practice of permitting virtually unlimited access to the forum, the Third Circuit concluded that SEPTA had created a designated public forum.[57] As a result of the finding, the court applied strict scrutiny to find that CBM's First Amendment rights were violated by SEPTA's removal of the advertisements.[58]

[50] *Id*. at 245.

[51] *Id*. at 246.

[52] *Id*. at 249.

[53] *Id.* at 249.

[54] *Id.* at 250.

[55] *Id*. at 251, 252.

[56] *Id.* at 251.

[57] *Id*. at 252.

[58] *Id.*

United Food and Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority[59]

United Food illustrates how a court will carefully review the relationship between the stated purpose of an advertising program and the reasons given by an agency for restricting access to its advertising spaces. If no relationship exists, an agency's advertising space will likely receive designated public forum classification regardless of the agency's initial intent to create a nonpublic forum.

The United Food and Commercial Workers Union, Local 1099 (UFCW) challenged Southwest Ohio Regional Transit Authority's (SORTA) decision to reject UFCW's wrap-around bus advertisement for being too controversial and not aesthetically pleasing.[60] The advertisement at issue contained pro-union messages. However, due to previous UFCW protests and the proposed design of the ad, which SORTA viewed as controversial,[61] SORTA ultimately rejected the advertisement, causing UFCW to file suit.

On appeal, the Sixth Circuit analyzed the issue of forum designation in relation to the First Amendment challenge. Analyzing the issue of intent, the court stated that it will infer intent to designate the property as a public forum where the agency makes the property generally available to a class of speakers.[62] In contrast, the court will infer intent to maintain the property as a nonpublic forum when the agency does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it.[63]

However, as previously mentioned, the agency's decision to limit access to the property is not dispositive in answering whether or not the agency created a designated public forum. Therefore, the court continued its analysis by looking at the relationship between the reasons for the rejection of the advertisement and the forum's purpose. The court explained that in cases where the main function of the property would be disrupted by free speech, courts are reluctant to find that the agency intended to create a designated public forum.[64] In con-

[59] 163 F.3d 341 (6th Cir. 1998).

[60] 163 F.3d at 346.

[61] SORTA described the ad as a "photograph of a mob of persons, many of whom are holding picket signs and certain of whose facial expressions, body positions and placement conveyed a solemn, if not angry, tone and an intimidating visual."; *United Food*, 163 F.3d at 347.

[62] *Id.* at 350.

[63] *Id.*

[64] *Id.* at 351. For a case that, although not strictly related to transit advertising, discusses limitation of access as a means of avoiding the determination of a public forum, see New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002). The owner of a fish pier refused to allow a union to leaflet on the pier. The court found that the pier was not a public

trast, where the agency's reason for the rejection of the advertisement is unrelated to the forum's purpose, courts will usually infer intent to create a designated public forum.[65] With this distinction in mind, the court stressed the need to carefully scrutinize whether the restriction on access to public property is truly part of the process of limiting a nonpublic forum to content that is compatible with the agency's stated advertising purpose.[66]

SORTA argued that the reason for rejecting controversial ads was based on three purposes: 1) enhancing the environment for its riders, 2) enhancing SORTA's standing in the community, and 3) enabling SORTA to attract and maintain its ridership.[67] However, the court took issue with SORTA's lack of definitive standards for rejecting controversial ads and the absence of an established causal link between its stated purpose and the broad-based exclusion of any advertisement considered to be too controversial or not aesthetically pleasing.[68] Moreover, the court noted that SORTA in the past had accepted a wide array of advertisements including political and public-issue advertisements. The court focused on the fact that acceptance of such advertisements—which by their very nature generate conflict—signals a willingness to open the property to controversial speech.[69] Applying this reasoning to the facts of the case, the court found that SORTA, through its policy and actions, had demonstrated intent to create a designated public forum and not a nonpublic forum.

Children of the Rosary v. City of Phoenix[70]

In contrast to *United Food*, *Children of the Rosary* demonstrates how agencies can successfully uphold content-based restrictions when the reason for restricting access is causally related to an advertising program's purpose. *Children of the Rosary* underscores the significance of viewpoint discrimination, as a court will strike down a regulation based on viewpoint even in a nonpublic forum.

The City of Phoenix had a practice of selling advertising space on the exterior of its buses for the purpose of raising revenue, and the policy governing this practice prohibited any advertisement that supported or opposed candidates, issues, causes, and religious beliefs.[71] Before the case, a religious group was able to get an injunction forcing the city to display its advertisement, which contained a pro-life message. This prompted the city to modify its policy to one which limited the subject matter of the bus advertising to speech that proposed a commercial transaction. Subsequent to the modification, the religious group submitted the same ad, with the exception that the advertisement now urged viewers to *purchase* the message in the form of a bumper sticker.[72] The city rejected the advertisement on the ground that the primary purpose of the advertisement was a noncommercial message, which prompted the lawsuit.

On appeal, the Ninth Circuit focused on the issue of forum classification to decide the case. The court looked to the interests which the city presented to justify the restrictions it had imposed on noncommercial speech.[73] The court found three interests to be reasonable to support the upholding of the city's advertising policy: 1) maintenance of a position of neutrality on political and religious issues, 2) a fear that buses and passengers could be subjected to violence if advertising were not restricted, and 3) prevention of a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded from using the same forum commonly used by those wishing to communicate primarily political or religious messages.[74] Applying this analysis, the court concluded that the forum at issue was a nonpublic forum and the city had not designated the advertising space on the bus exteriors as a place for general discourse.[75]

The court next turned to the issue of viewpoint discrimination. The court stated that in a nonpublic forum, "the First Amendment does not prohibit the Government from imposing content-based exclusions, so long as they are reasonable."[76] However, the court pointed out that although the government has the right to make distinctions in access to the forum on the basis of subject matter and speaker identity, it must not make distinctions based on the speaker's viewpoint.[77] In defining viewpoint discrimination, the court stated that "view-

forum, and the ban on leafleting was upheld on safety grounds. *See also* De Boer v. Village of Oak Park, 267 F.3d 558, 566 (7th Cir. 2001), where the court pointed out that the more a government restricts access to its property, the less likely it is to create a public forum.

[65] *Id.*

[66] *Id.* at 352.

[67] *Id.* at 354.

[68] *Id.* at 354–55.

[69] *Id.* at 355.

[70] 154 F.3d 972 (9th Cir. 1998).

[71] *Id.* at 975.

[72] The Arizona Civil Liberties Union was an additional party to the suit. Their advertisement, which contained the message "The ACLU Supports Free Speech for Everyone" and also urged viewers to purchase the message as a bumper sticker, was rejected by the city on the ground that it failed to comply with its new advertising standard.

[73] In Park Shuttle N Fly, Inc. v. Norfolk Airport Auth., 352 F. Supp. 2d 688 (E.D. Va. 2004), the court designates the two approaches that courts take in deciding First Amendment claims involving advertising in airport space as public forum analysis and "commercial speech" doctrine. The court found no First Amendment violation, based on an application of a combination of the two approaches.

[74] 154 F.3d at 979.

[75] 154 F.3d 978.

[76] *Id.* at 980.

[77] *Id.*

point discrimination is a form of content discrimination in which the Government targets not subject matter, but particular views taken by speakers on a subject."[78] Applying this reasoning to the facts of the case, previous versions of the city's policy were found to be in violation of the First Amendment on the basis of viewpoint discrimination because they prohibited the expression of religious perspectives on issues while permitting others to express their perspective.[79] However, the city subsequently modified its policy and implemented a neutral regulation on content to avoid jeopardizing revenue and the city's neutrality on controversial issues.[80] As a result of the modification, the court held that the restrictions were viewpoint-neutral because, to attract long-term commercial advertising, the city was consciously acting to prevent its advertising panels from becoming areas for political and religious debate.[81]

Planned Parenthood Assoc. v. Chicago Transit Authority[82]

Planned Parenthood is instructive in that it emphasizes the need for an agency to develop and maintain standards for reviewing content submitted for display. An agency that lacks definitive standards for reviewing content runs the risk of having its advertising spaces classified as designated public forums.

Before this suit was brought, Chicago Transit Authority (CTA) had accepted a wide variety of commercial, political, public-service, and nonprofit advertisements.[83] The agency had a policy that generally accepted commercial and political-candidate advertisements without secondary review, while seeking secondary review often for nonprofit organizations. Planned Parenthood Association, a nonprofit organization, sought advertising space in CTA buses. However, the agency denied multiple requests to display the ads, which contained messages about family planning services and abortions, on the basis that CTA had a long-standing and consistently-enforced policy of rejecting controversial public-issue advertisements.[84] As a result of refusing to display the advertisements, Planned Parenthood Association brought an action alleging First Amendment violations.

On appeal, the Seventh Circuit addressed the issue of forum analysis, holding that CTA's spaces constituted a designated public forum.[85] The CTA argued against this outcome, citing *Lehman* for the proposition that the interior of a bus is not a traditional public forum. The Seventh Circuit distinguished the *Lehman* case on the ground that the policy found in *Lehman* excluded entire classes of controversial speech, while the facts in the case at hand failed to show the same.[86] For example, during the time the advertisements were rejected, CTA maintained no system of control over the advertisements accepted for display other than review by a single coordinator of the agency.[87] The court also concluded that CTA essentially had no written policy in place. Therefore, because the agency had a consistent practice of accepting a variety of advertisements, CTA's advertising spaces had slipped into designated public forum status.[88]

American Civil Liberties Union v. Mineta[89]

While some of the cases above touch on the issue of viewpoint discrimination, in each of them, the court holds that viewpoint discrimination did not exist. *Mineta* provides an example of how a court can apply the concept of viewpoint discrimination to strike down an agency's rejection of a submitted advertisement.

Prior to the action, an act was signed into federal law that made funds available for federal mass transit systems so long as they were not involved directly or indirectly in any activity that promoted the legalization or medical use of a controlled substance.[90] The Washington Metropolitan Area Transit Authority (WMATA) was eligible to receive such funds. WMATA was sued by nonprofit organizations when WMATA rejected their advertisements because of its concern about jeopardizing its federal funding due to the conflicting nature between the nonprofit organization's interest in promoting discussion on marijuana laws and the newly passed funding act.[91]

On appeal, the court analyzed various issues raised by the parties. As a preliminary matter, the court determined that the forum at issue was a nonpublic forum.[92] However, the main focus of the analysis was viewpoint discrimination and the language found in the act.

[78] *Id.* (citations omitted).

[79] *Id. See also* Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County, 2009 U.S. Dist. Lexis 65885 (W.D. Pa. 2009). The Authority denied the right of the League to display ex-offender voting rights ads in the bus and rail mass transit system, citing an agency policy against accepting "noncommercial" ads. The court looked at the Authority's past practice, and found that it had accepted advertisements on "similar topics" in the past; therefore refusal of the League's ads was impermissible viewpoint discrimination.

[80] *Id.*

[81] *Id*. at 981.

[82] 767 F.2d 1225 (7th Cir. 1985).

[83] 767 F.2d at 1227.

[84] *Id.*

[85] *Id.* at 1231.

[86] *Id*. at 1233.

[87] *Id.* at 1232.

[88] *Id.* at 1233.

[89] 319 F. Supp. 2d 69 (D.C. Cir. 2004).

[90] *Id*. at 75.

[91] *Id.*

[92] *Id.* at 81.

The court reviewed the language of the restriction in the act to determine what was actually prohibited. The court concluded that the restriction did not attempt to stop a transit agency from expressing *all* views about controlled substances; instead, it prohibited only speech that *promoted* legalization or medical use of a controlled substance.[93] Furthermore, the court concluded that the government had failed to articulate a legitimate interest in restricting the type of speech at issue, other than the fact that it disapproved of the message presented by the nonprofit organizations.[94] Therefore, based on this reasoning, the court held that the restriction on speech found in the act amounted to unconstitutional viewpoint-discrimination.

ADVERTISEMENT POLICY SURVEY

Overview

In addition to the review of relevant case law, a survey was disseminated nationally to mass transit agencies of various sizes. Its purpose was to gather information about the challenges facing administrators when evaluating proposed advertising.[95] The following agencies were selected to participate in the survey:

- New York City Transit
- CTA
- Los Angeles Department of Transportation (LADOT)
- San Diego Metropolitan Transit System
- Dallas Area Rapid Transit
- Connecticut Transit
- Central Florida Regional Transportation Authority
- New Jersey Transit Authority
- St. Louis Regional Transit
- Central New York Regional Transportation Authority
- Central Ohio Transit Authority
- SEPTA
- Transit Services—City of Tempe
- Kansas City Transportation Authority
- Atlanta Rapid Transit System
- San Francisco Bay Area Transit Authority
- San Francisco Municipal Transportation Agency (SFMTA)
- WMATA
- Detroit Department of Transportation
- Memphis Area Transit Authority
- Miami Transit Authority
- Nashville Metropolitan Transit Authority
- Milwaukee County Transit System (MCTS)
- Transit Authority of Northern Kentucky

Of these agencies, detailed responses were provided by representatives of the Milwaukee County Transit System, SFMTA, New Jersey Transit, LADOT, SEPTA, and CTA. Each responding agency offered unique information concerning the operation of their respective advertising program.

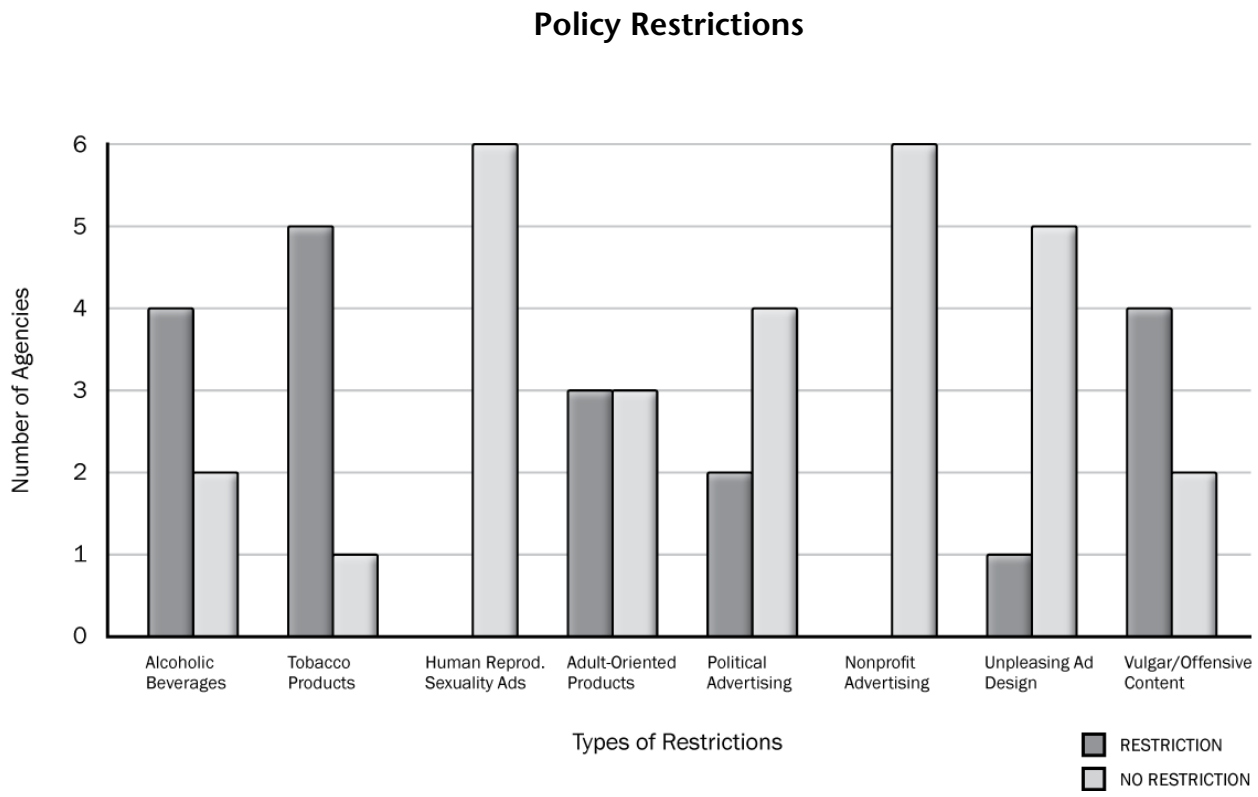
The written survey focused on each agency's formal, written, advertising policy (if one existed) to gauge what content-based restrictions were permitted. Information was sought regarding any legal consequences following an agency's decisions to restrict certain commercial speech and the disposition of any formal proceedings. In addition, each agency was requested to provide information about its day-to-day operations and practices. Lastly, each agency was invited to recommend best practices it had found useful in its assessment of proposed advertising pieces.

The information gleaned from the six survey responses demonstrates a variation in the types of advertisements the transit agencies restricted. Specifically, of the six, four had policy restrictions against advertisements promoting alcoholic beverages, five restricted tobacco products, three restricted adult-oriented products, two restricted political advertising, one restricted unappealing or garish ad designs, and four restricted generally vulgar or offensive content. Conversely, no agency enforced restrictions against reproductive advertisements or those dealing with sexuality, and nonprofit advertisements were widely accepted unless the speech at issue fell into one of the other restricted categories. The foregoing results are illustrated in the following graph:

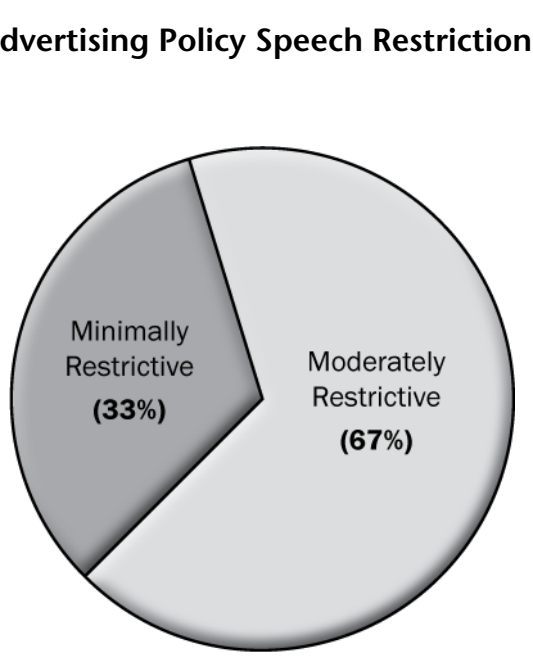
[93] *Id.* at 78.

[94] *Id.* at 86.

[95] *See* App. A.

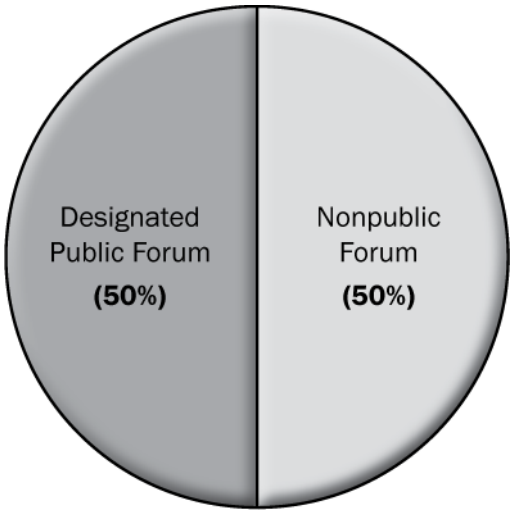


These agencies generally viewed their policies as only minimally (33 percent) or moderately (67 percent) restrictive when compared to other agencies with formal restrictions in place. Not one agency felt it was unnecessarily or unlawfully restrictive of the speech displayed in its advertising spaces, which included both nonpublic and public forums.



The responding agencies were equally divided in their forum classifications: half classified themselves as designated public forums and half as nonpublic forums.

Forum Classifications



It should be noted that the classification of each agency is based on the responses of those surveyed and not a legal classification determined by a court of competent jurisdiction. One interesting aspect of the survey is the equal split between forum classification among the agencies. As the case law above explains, the risk of increased litigation over policy restrictions often depends upon the type of forum classification (nonpublic forums being favorable to agencies and designated public forums being favorable to a party challenging the agency). These findings suggest that some agencies are not aware of the legal ramifications associated with forum classification. It also suggests that certain agencies, when deciding to display their advertising to the public, incorporate other concerns beyond litigation.

The agencies examined varied in size and location, and their operations differed greatly. A closer look at this sampling of mass transit agencies demonstrates the unique obstacles facing agencies with formal or ambiguous protocols in place.

Milwaukee County Transit System

The MCTS solicits various types of advertisements for its in-bus, on-bus, and bus shelter spaces. The agency has a policy in effect that permits commercial and not-for-profit advertising. MCTS accepts advertisements from tobacco companies, advertisements relating to human reproduction, and political campaign materials, as well as nonprofit postings. MCTS prohibits advertisements promoting the use or sale of alcoholic beverages and adult-oriented products. The agency also prohibits unappealing or garish ad designs and ads containing what it believes to be vulgar or offensive content.

MCTS states that the policy it employs is the determining factor in accepting or rejecting advertisements. The agency considers its policy to be moderately restrictive on speech contained in ads. The policy employed by the agency to accept or reject ads consists of the agency reviewing the ads when they are submitted. If anything considered questionable is submitted, the marketing director is alerted and the issue is discussed with various transit officials. The agency has rejected advertisements on various grounds; specific examples include an advertisement that was deemed too sexually explicit and another that did not portray the transit system favorably.

The agency responded that it has never been sued as a result of accepting or rejecting a controversial advertisement. Moreover, MCTS considers its advertising spaces to be nonpublic forums. The agency explained that the advertising spaces used follow the same restrictions as other spaces such as billboards.

When surveyed on the various legal issues that agencies encounter, MCTS responded that it has never dealt with any issues as a result of its policy being too vague or its transit officials having too much discretion

over the review process of an advertisement. The agency also stated that it does not accept viewpoint discrimination, nor has it ever amended its policy as a result of a lawsuit in this matter.

Finally, MCTS was asked about the most challenging issues the agency faces when reviewing and selecting advertisements. MCTS responded that the public sometimes holds MCTS to different standards than other advertising businesses since it is a government entity, and the different perception makes it difficult to run an effective advertising program.

San Francisco Municipal Transportation Agency

The SFMTA solicits advertisements for buses, trains, and bus shelter spaces. The agency has a policy in effect that does not restrict advertisements solely to commercial advertising. The policy restricts alcoholic and tobacco products, adult-oriented products, political advertising, defamatory advertisements, advertisements involving the use of firearms, and copyrighted material. The policy does not restrict advertisements related to human reproduction/sexuality, unappealing or garish ad designs, and vulgar or offensive content. The review process of the advertisements is controlled by a contractor hired by SFMTA. The contractor is required to make all determinations, referring to SFMTA's advertising policy when needed. The agency does not make any content-based determinations on its own.

New Jersey Transit Authority

New Jersey Transit solicits advertisements for buses, railways, light-rail, and various station and platform spaces. It has a policy in effect that does not restrict the advertising space to only commercial advertising. The policy prohibits advertisements for tobacco products, advertisements which contain false or misleading information, advertisements that promote illegal activity, advertisements that portray endorsement by the agency without permission, obscene material, advertisements that display weapons aimed at the viewer in a menacing manner, any controversial advertisements that would promote potential vandalism of advertising materials and agency property, and any advertisement that is not in the best interest of public transportation.[96] The policy does not prohibit advertisements for alcoholic beverages, products related to human reproduction/sexuality, and adult-oriented products, or political advertising, nonprofit advertising, unappealing or garish ad designs, and vulgar or offensive content.

New Jersey Transit cited only one advertisement that was rejected; the ad directly competed against several New Jersey Transit bus routes. The agency has never been sued over a controversial advertisement.

Los Angeles Department of Transportation

The LADOT solicits advertisements for bus spaces. It currently has a policy in effect that does not limit its advertising space to commercial advertising. The policy restricts advertisements for alcoholic beverages, tobacco products, and adult-oriented products, as well as political advertising, and vulgar or offensive content. The policy does not prohibit advertisements for products related to human reproduction/sexuality, nonprofit advertising, and unappealing or garish ad designs. The evaluation of the advertising content for display is conducted by a contractor. The contractor reviews the content of the submitted advertisements and accepts or rejects each advertisement based on LADOT's written policy.

The agency has never been sued over a controversial advertisement. However, LADOT stated that it occasionally deals with issues regarding free speech. The agency has never dealt with legal issues concerning vague policy terms in the context of evaluating content. Moreover, the agency has never dealt with the issue of transit officials having too much discretion in the selection process, nor has LADOT ever amended its advertisement policy as a result of any lawsuits filed against it. When asked about the type of forum classification it considers its advertising spaces to be, the agency responded that its spaces are classified as designated public forums. When asked how its policy compared to those of other transit agencies, LADOT responded that it considers its policy to be minimally restrictive on speech contained in advertisements.

LADOT stated that the most challenging issue it faces is interpreting the policy through a subjective manner in the context of approving advertising content for display. When asked about its best practices, the agency stated that hiring a contractor was important. In addition, LADOT considered performance standards and revenue expectations to be essential elements of its advertising policies.

Southeastern Pennsylvania Transportation Authority

SEPTA solicits advertisements for bus, train, trolley system, station, and billboard spaces. SEPTA has a written advertisement policy in effect, and the policy does not limit advertising to commercial advertising. SEPTA currently restricts advertisements for tobacco products, advertisements for firearms, and advertisements that contain vulgar or offensive content. The policy does not restrict ads for alcoholic beverages, products related to human reproduction/sexuality, and adult-oriented products, or political advertising, nonprofit advertising, and unappealing or garish ad designs.

During the process for evaluating the content of the advertisements, SEPTA's senior advertising specialist reviews and approves the submitted advertisements for display. In deciding whether to accept or reject an advertisement, SEPTA will consider whether the ad is offensive to the public or displays graphic violence. Applying this standard to a specific example, SEPTA previously rejected an advertisement for a malt liquor.

[96] See App. B for an example of New Jersey Transit's policy.

Unlike most of the responding agencies that were surveyed, SEPTA had been sued over a controversial advertisement in the past. Specifically, Christ's Bride Ministries created advertisements claiming dire health consequences for women who obtained abortions. SEPTA subsequently removed the advertisements in response to public outcry, but the Third Circuit ultimately ruled in favor of the advertiser.

When asked about legal hurdles regularly faced in the context of transit advertising, SEPTA stated that First Amendment concerns are consistently present, and the agency takes steps to make sure its policy complies. The agency considers its advertising spaces to be classified as designated public forums. Also, when asked to compare SEPTA's advertising policy with the policies of other transit agencies, SEPTA considered its policy to be minimally restrictive on the speech contained in the advertisements.

Of the issues which SEPTA faces in determining whether a proposed advertisement is content-appropriate, the most challenging issue that SEPTA identified deals with advertisements that are marked as questionable. These ads are subjected to additional review by a panel of upper management. In terms of advertising in general, SEPTA considers an extensive inventory for advertisers to choose from (e.g., bus poster wraps, station signs, schedules, passes, and billboard designs) as a best practice for transit agencies. Moreover, having a clear and reasonable policy that spells out exactly what is acceptable when shown on public transportation property is also recommended.

Chicago Transit Authority

CTA solicits advertisements for bus, train, rail station/platform, and billboard spaces. The CTA has a written policy in effect for transit advertising and does not limit its advertising spaces to commercial advertisers only. Currently, CTA's policy restricts advertisements for alcoholic beverages, tobacco products, and vulgar or offensive content. The policy does not restrict political advertising and unappealing or garish ad designs. In addition to the surveyed items, the CTA's additional guidelines require advertisements to be truthful and not directed at inciting imminent lawless action; they cannot be legally obscene or sexually explicit, depict nudity, or portray graphic violence. Moreover, advertisements that market or identify a video game with an Entertainment Software Rating Board rating of "Mature" or "Adults Only" are prohibited. Use of CTA graphics without permission is also prohibited in any advertisement.

The review process to determine whether advertisements are acceptable for display requires all advertisements considered questionable to be sent to CTA's Marketing and Law Departments. Compliance with CTA's written policy is the standard on which the advertisements are accepted or rejected. CTA has rejected advertisements in the past based on policy violations, but the agency did not list specific examples.

With regard to forum classification, the CTA classifies its advertising spaces as nonpublic forums. The CTA has never dealt with a legal issue concerning vague policy instructions for evaluating the content of its advertising, nor has it ever dealt with an issue concerning transit officials having too much discretion for determining what constitutes an acceptable advertisement. Unlike all the other agencies surveyed, the CTA does accept advertisements that contain discriminatory messages, but the CTA noted that it only accepts advertisements that do not violate the policy of the CTA. Finally, when asked to compare its advertising policy with the policies of other agencies, the transit agency considered its policy to be moderately restrictive on speech.

When asked about the most challenging issues that the CTA faces, the agency stated that its most challenging issue deals with an advertisement that offends certain members of the public but is still accepted by the CTA due to the fact that the advertisement, although offensive to some, does not violate any standard set by CTA's policy.

As can be seen from the responses of the mass transit agencies, the results show that the agencies are equally divided on the issue of being considered a designated public or nonpublic forum. The most commonly restricted advertisements were tobacco products, alcoholic beverages, and offensive content. Furthermore, most agencies considered themselves minimally restrictive in their policies. Review of the survey results also indicates that First Amendment rights are the most challenging when considering advertisements that fall into a gray area. For example, when controversial advertisements are typically subjected to additional review by a panel of upper management, the choice to accept or reject becomes an issue with serious legal consequences. In some instances these agencies employed a contractor to help make this determination, which then removed the burden of responsibility in developing the advertising policies, at least from an operational perspective.

CURRENT PRACTICES

The information above is meant to give the reader of this digest an understanding of the current state of transit advertising issues in the context of free speech. The case law provided serves the purpose of showing what issues a court will consider if an agency is ever sued over free speech restrictions. The agency survey is designed to give an idea of what mass transit agencies consider to be important issues in this area.

In addition, this digest is meant to provide direction through guidance and best practice techniques derived from the above information. The following is divided by the major issues that this report covers.

Framework of a Nonpublic and Designated Public Forum

As the case law has shown, a court will reach its own decision on the classification of a forum, despite how the agency initially classifies the advertising space in its policy. A court will focus on the intent of an agency to determine whether a designated forum has been created or not. Thus, it is important to understand intent, as defined by the courts.

Intent is determined by 1) any explicit policy provisions which aim to create or not create a certain type of forum, 2) past and current policies and practices of the agency, and 3) the advertising space in question and its relationship with free speech.

1. Explicit policy provisions:

Expressly stating in the advertising policy that an agency intends to classify its spaces as a nonpublic forum supports an argument for that type of classification. Although this is not an absolute method of ensuring that a space will receive such a classification by a court, it still serves as an objective way of showing intent.

2. Past and current policies and practices of the agency:

Past practices are a strong focus of the courts. Many of the agencies surveyed employ various methods of review for accepting or rejecting submitted advertisements. Procedures such as these are important for an agency to have because they demonstrate intent to preserve space as a nonpublic forum.[97]

It is important to note that a review process must have uniform standards and they must be consistently followed. If an agency is careless or inconsistent in applying its standards for review of the content displayed, the courts may find that a designated public forum has been created.

3. The advertising space at issue and its relation or compatibility with free speech:

A stated purpose for the advertising spaces operated by the agency is an essential policy consideration. In creating a purpose, the question to ask is whether the space would be disrupted if used for free speech.

Another way to understand this is to ask whether an agency could potentially lose advertising clients if it opened its space for public discourse. If so, the courts will usually find that the advertising space is a nonpublic forum and will consequently uphold an agency's rejection of an advertisement. Thus, it is harder for a court to strike down a rejection if an agency can effectively articulate a purpose for its ad spaces (e.g., a commercial operation).[98]

Finally, it is possible to transform the classification of a forum. Agencies in the past have successfully modified policies, resulting in a new classification of their advertising space. For example, a space once classified as a designated public forum can become a nonpublic forum if an agency limits its space to a certain purpose (e.g., generating revenue).

Benefit of Limiting a Space as a Nonpublic Forum

Another consideration when drafting the policy is to limit the types of advertisements to commercial or marketing advertisements. The more a government restricts access to its facilities, the less likely a court is to find a public forum.[99] Under this approach, generating revenue should be the agency's primary purpose, and this purpose should be written into the advertising policy. Based on the case law, a policy drafted in this style will maintain a nonpublic forum status. For example, the holding in *Lehman*—which classified the advertising spaces at issue as nonpublic forums—employed the reasoning that the advertising spaces were part of a purely commercial operation.

This type of policy is most successful in defending against attacks on an agency's rejection of an advertisement because courts have held that an agency need only employ reasonable discretion when accepting or rejecting submitted advertisements. For example, the following is a list of reasons that agencies have successfully used in arguing for their right to reject certain types of advertisement in a nonpublic forum:

- Increasing and strengthening revenue.
- Preventing the appearance of agency favoritism.
- Preventing the risk of imposing views upon a captive audience.
- Maintaining a position of neutrality on controversial issues.
- Preserving the marketing potential of the advertisement spaces.
- Maximizing ridership.
- Preventing any harm or abuse that may result from running offensive advertisements.

The conclusion drawn is that it is advantageous for an agency to classify advertising spaces as nonpublic forums if it plans to actively regulate the content that is submitted for display. This is because cases involving litigation on the issue of speech restriction are often decided in favor of the mass transit agency when a court determines that a nonpublic forum exists.

Benefit of Creating a Designated Public Forum

When an agency serves to benefit the public through its advertising program, a court will likely find that a designated public forum has been created. In other words, a designated public forum likely exists where a space is generally available for use by the public, versus a space where permission to use it must first be obtained. This classification makes it easier for a party to

[97] *See supra*, Planned Parenthood Assoc. v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985).

[98] *See supra,* Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998).

[99] *See, for example,* DeBoer v. Village of Oak Park, 267 F.3d 558, 566 (7th Cir. 2001).

challenge an agency's policy restriction, since the agency does not have the ability to restrict content to the same degree it has in a nonpublic forum.

However, litigation is not the only aspect that agencies consider when drafting their policy. If this were the case, it would be unusual that some agencies voluntarily classified their spaces as designated public forums. In this study, half of the responding agencies classified their advertising spaces as designated public forums.

A designated public forum is beneficial to an agency because it allows an agency to invite social commentary into its advertising spaces, and this is a significant interest considered by the agencies. Based on the research, policies that create designated public forums have a general purpose of promoting awareness of social issues, as well as generating revenue at the same time. Moreover, by encouraging discussion of public issues through use of advertising space, the agencies feel they will enhance their standing in the communities they serve. In other words, an agency that creates a designated public forum is focused on lending its advertising space to generate discussion, not solely revenue.

Points on Vagueness and Overly Broad Restrictions

As previously stated, reasonable discretion is a significant factor in the context of forum analysis, but it must also be considered in the context of the language found in the policy. Courts have found policies to be in violation of the First Amendment, even if the policy satisfied the forum analysis.

An agency will have a better chance of arguing its position on vague and overly broad restrictions in a nonpublic forum. For example, the *Ridley* Court held that a policy that used "prevailing community standards" as a guide for accepting or rejecting advertisements was not a vague or overly broad restriction on speech.

However, it should be noted that the forum in *Ridley*, and those in other cases with similar restrictions, are nonpublic forums. The use of "prevailing community standards" to reject or accept advertisements may be vague and overly broad in a designated public forum.[100]

Therefore, an agency must pay close attention to the balance between vague and overly broad restrictions and the forum classification of its advertising spaces.

Points on Viewpoint Discrimination

Restrictions on speech found in policy guidelines will be closely scrutinized by a court whenever an agency is sued over a First Amendment violation. If policy guidelines explicitly or implicitly disadvantage a certain group, a court will likely find the policy constitutes viewpoint discrimination.

The most important information gained from the case law on this issue is a potential misconception of neutral guidelines (i.e., a guideline that does not discriminate on its face) in a policy. It is possible for courts to dismiss viewpoint-neutral guidelines as mere pretext. Thus, it is important for agencies to understand that a court's analysis on viewpoint discrimination does not end with a simple review of the policy guidelines, as the court often considers factors outside of the guidelines, including the following:

- Previous statements on record by representatives of the agency.
- Agency's treatment of groups with similar viewpoints of those at issue.
- Agency's treatment of groups with opposite viewpoints of those at issue.
- The level of discretion given to a representative.
- Any inconsistent practices employed by the agency's selection process.
- The number of members involved in the decision-making process of rejecting or accepting advertisements.

As the information above suggests, it is important for an agency to employ uniform practices throughout its decision-making process for accepting or rejecting advertisements. This will show that the policy and the practices behind its application raise no question of viewpoint discrimination for the courts to consider.

Contractors

One question posed in the research was whether an agency could contract with an advertising broker to abrogate its responsibilities for regulation of advertising. Based on the survey of the agencies, it is clear that this practice is employed throughout the country. In fact, it was highly recommended by some of the responding agencies as a best practice for transit advertising programs.

However, the benefit derived from hiring a contractor seems to be limited to the area of managing an advertising program. As found throughout the case law, an agency cannot diminish its responsibility for regulating advertising spaces, even if a contractor handles the majority of the program.[101] Thus, courts generally view contractors as extensions of the mass transit agency for purposes of liability.

Furthermore, agencies should be aware that being named as an additional insured on a contractor's policy is not an effective way to insulate an agency from liability of free speech violations. Typically, general insurance policies will protect an entity against injuries outside the scope of free speech restriction; for example,

[100] *See, for example,* Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F. Supp. 2d 1320, 1328 (N.D. Ga. 2000), where the court found that MARTA had opened its forum by accepting other public interest ads.

[101] *See supra*, Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 242 (3d Cir. 1998) (where the court found the transit agency liable for the advertising restrictions implemented by its advertising contractor).

slander, libel, invasion of privacy, or trademark infringement.

FINAL CONSIDERATIONS

An agency operating an advertising program will inevitably have to consider the issue of having its advertising spaces classified as a designated public forum or a nonpublic forum. The results of this study suggest that a nonpublic forum is a simpler approach to avoid litigation. While avoiding litigation may be the goal for some transit agencies, this research shows that there are some instances where a designated public forum is preferred. In addition, an agency must be conscious of the implications created by the language in the policy and the practices it employs when screening proposed commercial or nonprofit advertising submissions. A favorable outcome in litigation can depend upon the basic language articulated in one's policy and consistent application of the policy in accepting or rejecting submitted ads.

Finally, it is important to be aware of agencies' practices throughout the country. Understanding the technical and legal background of different advertising programs, and staying current with changes in the areas of free speech and advertising, will allow an agency to successfully implement an effective advertising content policy for a program of any size or purpose.

APPENDIX A: Advertisement Policy Survey

TRB TRANSPORTATION RESEARCH BOARD OF THE NATIONAL ACADEMIES

The Transportation Research Board is in the process of conducting a comprehensive review and analysis of the advertising issues facing transportation agencies throughout the country. We ask that you respond to the attached questionnaire to enhance our understanding of the issues your agency encounters on a regular basis, as well as the policies you have in place to determine whether each proposed advertisement is content-appropriate for display.

Please enlist a director or representative of the department responsible for marketing and/or advertising to fill out the questionnaire below based upon agency-specific experiences they have encountered. Feel free to include or attach any information you believe might assist us in our research even if it is not addressed directly in the questionnaire. We also welcome any guidance or suggestions you have to assist us in compiling a list of practical advice to other agencies of how to best overcome advertising-related obstacles.

Thank you in advance for your input and prompt attention to this very important research project.

Agency Name: _____

Name of Employee: _____

Job Title: _____

Educational Background: _____

Legal Training: YES NO (explain)_____

How many years have you been with the agency? _____

1. What category of advertisements does your agency solicit? (e.g. bus, train, bench, shelters)

_____
_____
_____

2. Do you have a written advertisement policy in effect? YES NO

3. Does your agency only solicit commercial advertising? YES NO

4. Does your policy restrict:

   a. Alcoholic beverages: YES NO

   b. Tobacco products: YES NO

   c. Products or advertisements related to human reproduction/sexuality (e.g. contraceptive products, pregnancy counseling, STD's): YES NO

d. Adult-oriented products: YES NO

e. Political advertising: YES NO

f. Non-profit advertising: YES NO

g. Unappealing or garish ad designs: YES NO

h. Vulgar or offensive content: YES NO

5. Does your policy incorporate any other content-based restrictions?

6. What steps are taken to evaluate the content of the advertisements?

   a. What specific factors do you consider when deciding whether to accept or reject content?

7. Have you ever cancelled, refused, or rejected any proposed advertising or even a portion of its content? Please cite specific examples

   a. What reasoning (legal or otherwise) did you rely upon to reject the advertisement, if applicable?

8. Have you ever been sued over a controversial advertisement? YES NO

If you answered yes,

a. Facts surrounding lawsuit, venue, case name and caption:

_____
_____
_____
_____
_____
_____
_____

b. Legal issues involved:

_____
_____
_____

c. Disposition (i.e. settled, dismissed, verdict after trial, etc):

_____
_____
_____

9. What legal hurdles do you regularly face when evaluating the content of transit advertising?

_____
_____
_____

a. Any consistent or recurring legal issues?

_____
_____
_____
_____

b. Do you consider your agency to be classified as:

i. Designated public forum: YES NO

ii. Non-public forum: YES NO

iii. Please explain:

_____
_____
_____

c. Have you ever encountered issues concerning:

i. Vague policy instructions concerning how to evaluate advertisement or what constitutes permissible content?

_____
_____
_____

ii. Transit officials have too much discretion when determining what constitutes an acceptable advertisement?

_____
_____
_____

d. Do you accept viewpoint discrimination in any form (a regulation is considered to discriminate on the basis of viewpoint when it attacks a particular individual's or group's message, as opposed to the mode in which that message is conveyed)?

_____
_____
_____
_____
_____

e. Have you amended your advertisement policy in any way as the result of any lawsuits filed against you, court decisions, or influence from other agencies? YES NO

If yes, please explain

_____
_____
_____
_____
_____
_____

f. When compared to other advertising policies, do you consider your policy to be (circle one):

i. Very restrictive on speech contained in advertisements

ii. Moderately restrictive on speech contained in advertisements

iii. Minimally restrictive on speech contained in advertisements

10. What do you consider to be the most challenging issues your agency faces in determining whether a proposed advertisement is content-appropriate for display? How do you presently handle these issues?

_____
_____
_____
_____
_____
_____
_____
_____

11. What, if any, "best practices" do you recommend?

a. Transit advertising, in general

b. Formal transit advertising policies (e.g. essential elements, provisions, or omissions)

c. Past successful or failed practices that you feel other agencies could benefit from knowing or avoiding?

Additional Comments:

****

Please attach a copy of your advertising policy with this questionnaire

APPENDIX B: New Jersey Advertising Standards

CHAPTER 86

ADVERTISING STANDARDS

Authority

N.J.S.A. 27:25-5(e), (k), (l) and (s).

Source and Effective Date

R.2008 d.349, effective October 20, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).

Chapter Expiration Date

Chapter 86, Advertising Standards, expires on October 20, 2013.

Chapter Historical Note

Chapter 86, Advertising Standards, was adopted as new rules by R.1997 d.180, effective April 21, 1997. See: 28 N.J.R. 4384(a), 29 N.J.R. 1515(b). Chapter 86, Advertising Standards, expired on April 21, 2002.

Chapter 86, Advertising Standards, was adopted as new rules by R.2003 d.195, effective May 19, 2003. See: 34 N.J.R. 4050(a), 35 N.J.R. 2262(a).

Chapter 86, Advertising Standards, was readopted as R.2008 d.349, effective October 20, 2008. As a part of R.2008 d.349, Subchapter 2, Procedures, and Subchapter 3, Severability, were adopted as new rules, effective November 17, 2008. See: Source and Effective Date. See, also, section annotations.

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. GENERAL PROVISIONS

16:86-1.1 Purpose

(a) The purpose of these rules is to implement a ban on advertisements that contain tobacco and tobacco related products and obscene, false, controversial, deceptive, misleading or illegal goods, services or activities from being displayed on properties owned by NJ TRANSIT. The purpose of these rules is to announce that NJ TRANSIT is a responsible member of the community; to establish that NJ TRANSIT is not desirous of lending its name, directly or indirectly, to the promotion of the use of tobacco and tobacco related products, especially among minors; and, independently, to promote the general health and welfare of NJ TRANSIT passengers many of whom may be minors.

(b) The standards in this chapter shall apply to all contracts to set forth the standards for the installation, display and maintenance of advertising on properties and facilities owned or controlled by the New Jersey Transit Corporation and/or its subsidiaries (collectively "NJ TRANSIT").

(c) The display of advertising on property owned or controlled by NJ TRANSIT does not constitute an endorsement by NJ TRANSIT of any of the products, services or messages so advertised, unless authorized in writing by NJ TRANSIT and so stated within the advertisement.

Amended by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
In (b), inserted "or controlled" and deleted "executed after October 21, 1997" from the end; and added (c).

16:86-1.2 Limitation upon advertisements

(a) No advertisement located on property owned or controlled by NJ TRANSIT shall be displayed or maintained that falls within one or more of the following categories:

1. The advertisement proposes a commercial transaction and the advertisement or information contained in it is false, misleading or deceptive;

2. The advertisement or information contained in it promotes unlawful or illegal goods, services or activities;

3. The advertisement or information contained therein declares or implies an endorsement by NJ TRANSIT of any service, product or point of view without prior written authorization of NJ TRANSIT;

4. The advertisement contains obscene material as defined by N.J.S.A. 2C:34-3, as such definition may be amended, modified or supplemented from time to time;

5. The advertisement portrays graphic violence;

6. The advertisement displays weapons that appear to be aimed or pointed at the viewer or observer in a menacing manner;

7. The advertisement is controversial and, therefore, can promote vandalism of advertising materials and associated NJ TRANSIT property;

8. The advertisement proposes the use of or promotes tobacco or tobacco-related products; or

9. The advertisement is not in the best business interest of NJ TRANSIT or is not in the best interest of public transportation.

Amended by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Rewrote the introductory paragraph of (a); in (a)3, inserted "or implies"; in (a)4, inserted a comma following "2C:34-3" and deleted

"as" following "definition"; added new (a)5 and (a)6; recodified former (a)5 through (a)7 as (a)7 through (a)9; in (a)8, substituted "the use of or" for "and"; and in (a)9, substituted "public" for "mass".

16:86-1.3 (Reserved)

Recodified to N.J.A.C. 16:86-2.1 by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Section was "Advertising Standards Committee".

16:86-1.4 (Reserved)

Recodified to N.J.A.C. 16:86-2.2 by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Section was "Review of advertisements".

16:86-1.5 (Reserved)

Recodified to N.J.A.C. 16:86-2.3 by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Section was "Dispute resolution".

16:86-1.6 (Reserved)

Recodified to N.J.A.C. 16:86-3.1 by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Section was "Severability".

SUBCHAPTER 2. PROCEDURES

16:86-2.1 Advertising Standards Committee

The Executive Director shall establish a three member Advertising Standards Committee ("Committee"). Such Committee shall be independent and its determinations shall constitute NJ TRANSIT's final agency determinations.

Recodified from N.J.A.C. 16:86-1.3 and amended by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Substituted "shall" for "is hereby authorized by the Board of Directors of NJ TRANSIT to".

16:86-2.2 Review of advertisements

(a) NJ TRANSIT's advertising firm shall review each advertisement submitted for installation, display and maintenance on NJ TRANSIT properties and facilities to determine whether the advertisement falls within, or may fall within, one or more of the categories set forth in N.J.A.C. 16:86-1.2. NJ TRANSIT may also review such advertisement for compliance with N.J.A.C. 16:86-1.2. If NJ TRANSIT or its advertising firm determines that an advertisement falls within or may fall within one or more of the categories set forth in N.J.A.C. 16:86-1.2:

1. The NJ TRANSIT advertising firm shall promptly provide the advertiser with a copy of these standards and written notice of the determination, the reason(s) for the determination and the advertiser's right to request a prompt review before the Committee.

2. The NJ TRANSIT advertising firm shall provide the Committee with a copy of the written notice to the advertiser and the advertisement at issue.

3. Upon request of the advertiser, the Committee shall conduct a prompt review to determine whether the advertisement at issue falls within one or more of the categories set forth in N.J.A.C. 16:86-1.2.

4. The Committee shall promptly provide the advertiser and the advertising firm with a written notice of its determination. The Committee's determination shall be final as per N.J.A.C. 16:86-2.1.

Recodified from N.J.A.C. 16:86-1.4 and amended by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
In the introductory paragraph of (a) and in (a)4, substituted "firm" for "contractor"; in the introductory paragraph of (a), substituted "its" for "an NJ TRANSIT"; and in (a)4, updated the N.J.A.C. reference.

16:86-2.3 Dispute resolution

In the event of a dispute arising under these rules, an aggrieved party shall transmit its grievance in writing to the Committee. If no factual issues are presented, the decision by the Committee shall constitute the final agency action of NJ TRANSIT and shall be appealable to the Appellate Division of the Superior Court. In the event of a dispute of the facts the Committee shall within 45 days transmit the matter for the development of a record and an initial decision by the Office of Administrative Law in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. The Committee shall then render a final agency decision appealable to the Appellate Division of the Superior Court of New Jersey.

Recodified from N.J.A.C. 16:86-1.5 by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).

SUBCHAPTER 3. SEVERABILITY

16:86-3.1 Severability

If any category set forth in N.J.A.C. 16:86-1.2 is determined to be invalid as applied to any particular type of NJ TRANSIT property or facility, the category shall remain applicable to other types of NJ TRANSIT properties and facilities. If any category set forth in N.J.A.C. 16:82-1.2 is determined to be invalid as applied to all NJ TRANSIT property and facilities, the remaining categories shall remain valid.

Recodified from N.J.A.C. 16:86-1.6 and amended by R.2008 d.349, effective November 17, 2008.
See: 40 N.J.R. 3597(a), 40 N.J.R. 6650(a).
Inserted the last sentence.

APPENDIX C: Advertising Examples

©1999 www.arttoday.com

Tell us the truth . . .

Smoking pot is not cool, but we're not stupid, ya know.
Marijuana is NOT cocaine or heroin.

www.changetheclimate.org

I've got three great kids. I love them more than anything. I don't want them to smoke pot.

But I know jail is a lot more dangerous than smoking pot.

©1999 www.arttoday.com

www.changetheclimate.org

Police are too important . . . too valuable . . . too good . . .

To waste on arresting people for marijuana when *real* criminals are on the loose.

(actors used for illustrative purposes)

www.changetheclimate.org

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; **Ellen L. Partridge**, Chicago Transit Authority, Chicago, Illinois; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Gwen Chisholm Smith** represents the TCRP staff.

Transportation Research Board
500 Fifth Street, NW
Washington, DC 20001

ISBN 978-0-309-15486-4

Subscriber Categories: Administration and Management • Law • Public Transportation

These digests are issued in order to increase awareness of research results emanating from projects in the Cooperative Research Programs (CRP). Persons wanting to pursue the project subject matter in greater depth should contact the CRP Staff, Transportation Research Board of the National Academies, 500 Fifth Street, NW, Washington, DC 20001.