

SIGN LAW 101

Presented to the El Dorado County Planning Commission

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© 2014, 2015 Randal R Morrison, Sabine & Morrison, San Diego

Website: www.signlaw.com

Email: rrmsignlaw@gmail.com

Tel.: 619.710.2693

I What Is a Sign?

Basic Idea: a visually communicative image on public display

Specific: depends on definition of “sign” in your sign ordinance

Possible exclusions from definition of “sign”

- * fireworks, searchlights
- * grave markers
- * personal appearance (sign walkers and commercial mascots?)
- * aircraft, watercraft
- * flags
- * stained glass windows
- * signature architecture (Taco Bell and Arbys Restaurants)

II Historical Importance of Signs

- * 1517: Martin Luther’s “95 Theses” nailed to the church in Wittenburg
- * Rosetta Stone – key to translating ancient Egyptian
- * Royal heraldry
- * Flags: “Don’t Tread on Me” (Gadsden flag), “Liberty or Death”
- * Graffiti on walls of ancient Rome

III Key Distinctions and Definitions

On-site vs Off-site signs

Traditionally used to place billboards in a separate category

Commercial Speech vs. Non-commercial speech

Commercial: regular advertising, seeking customers and clients

Non-commercial: debate in marketplace of ideas

Mostly religion and politics

Also protest, commentary

Seeking adherents, supporters, voters

Content neutral: rules do not turn on message

III Why Regulate Signs?

- * Control spillover effects
- * Reduce visual clutter
- * Control advertising “shouting matches”
- * Community esthetics (overall appearance of the town or street)
- * Safety (driver distraction)
- * Property values
- * Enhance local economy

IV First Amendment to US Constitution

Congress shall make no law

[1] respecting an establishment of religion, or prohibiting the free exercise thereof;

[2] or abridging the freedom of speech, or of the press;

[3] or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (1868–full US and state citizenship for former slaves) makes the First applicable to all levels of government.

V Signs and the First Amendment

Every freedom of the First Amendment can be invoked by use of a sign. A communicative image on a sign is a kind of free speech.

The federal civil rights statute (42 USCA 1983) authorizes money damages and attorney’s fee awards.

VI California Constitution – Declaration of Rights

SEC. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

VII Oregon Constitution

Declaration of Rights mentions “on any subject” and “every person”
Interpreted by Oregon state courts to mean:

Governments cannot make the “onsite / offsite” distinction or the “commercial / noncommercial speech distinction

One California trial court recently followed the Oregon model– on appeal

Lamar v. LA – Case likely to end up at California Supreme Court
For now the *Lamar* ruling is binding only on the City of Los Angeles

VIII *Police Dept. Chicago v. Mosley* (408 U.S. 92, US Supreme, 1972)

Anti-segregation picketing in front of school

“The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

<https://supreme.justia.com/cases/federal/us/408/92/>

Important question: will the *Mosley* principle survive the sign case now at US Supreme (*Reed v Gilbert AZ*)?

IX Sign Regulator's Mantra: We regulate the medium, not the message

X TPM – Time, Place and Manner rules
size, height, setback, separation
illumination – neon, digital, backlit, direct
physical format: pole, monument, wall, window, back-to-back
TPM – applies only when the rule is “content neutral”

XI Free Speech Extreme: “God Hates Fags” (Westboro Baptist, Topeka KS)
See: http://en.wikipedia.org/wiki/Snyder_v._Phelps

XII Unprotected Speech
Defamation (libel / slander) – false statements of fact that injure reputation
Threats against the life of the President and / or VP
“True Threats” – threats of violence coupled with actions
Incitement to violence, destruction, mob action (“Shouting FIRE in a crowded theater”)
Speech that is part of a criminal conspiracy

Commercial speech that is false or deceptive

See: http://en.wikipedia.org/wiki/Kevin_Trudeau

Revealing state secrets

XIII Billboards as a Distinct Class

Onsite / Offsite / “General Advertising for Hire”

Fifth Ave Coach v NYC, 221 US 467 (1911)

US Supreme recognized “general advertising for hire” business model
REA v NYC, 336 US 106 (1949) – replay of 5th Ave Coach

http://en.wikipedia.org/wiki/Railway_Express_Agency,_Inc._v._New_York

IXX Where is the message “on-site”?

Fly Southwest Airlines to Albuquerque

Support Our Troops

Sell your used CDs on Ebay

Vote on November 4

Reject the system – Don’t Vote!

Visit this website: www.edcgov.us

XXI Is the “On-site/Off-site” Distinction Content Based?

Most courts say NO

Clear Channel Outdoor v. Los Angeles, 340 F.3d 810 (9th Cir., 2003)

“A sign's status as “off-site” or “on-site,” then, is primarily a function of the permittee's choice, not the government's classification.”

XXII Where is the location of an idea? (noncommercial speech):

Southlake Property Associates v. Morrow, 112 F.3d 1114 (11th Cir. 1997)

(ideas have no location; treat all noncommercial as if onsite)

National Advertising v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (any location with human activity related to the message)

XXIII A Better Way to Define Billboards

Focus on the economic model: general advertising for hire

“Permanent structure in fixed location that meets any one or more of the following criteria:

1) the sign is used for general advertising for hire

2) used for display of off-site commercial messages

3) the sign is a separate principal use of the property, not auxiliary or accessory

XXIV Sign Trucks and Mobile Billboards

Many cases uphold the right of local gov'ts to ban sign trucks and mobile billboards. Rationale: public roads are built for transportation purposes, not as advertising theaters. See *Fifth Ave Coach* and *REA v NYC*, above.

The SHARK Case: *Showing Animals Respect and Kindness v. West Hollywood*, 166 Cal.App.4th 816 (2008)

Complete ban on all mobile billboards (wheeled vehicles used for the primary purpose of advertising)

Ban applied equally to all message types

Exceptions: (1) Any vehicle which displays a . . . business identification of its owner, [and] is engaged in the usual business or regular work of the owner, and not used merely, mainly or primarily to display advertisements[;] [¶] (2) Buses; or [¶] (3) Taxicabs.”

Valid

XXV Metromedia – the law of billboards

Metromedia v San Diego, 453 US 490 (1981) (90+ pages)

Virtual “Tower of Babel”

Three basic “rules”

- 1) Cities can ban billboards
- 2) Gov't cannot favor commercial over noncommercial
- 3) Gov't can't show favoritism among noncommercial categories

XXVI Yard Signs

Linmark Realty v Willingboro, 431 US 85 (1977)

Onsite residential real estate for sale signs cannot be banned – location is crucial to the message

Cal Civil Code 713: local gov'ts cannot ban real estate signs

But REFS signs can be banned from right of way

No banning of REFS signs by HOA rules, other pvt contracts

Ladue v Gilleo, 512 US 43 (1994) – protest sign in yard

People have a right to express political views where they live

- XXVII Solving the Yard Sign Problem
Define total display area limit for all signs on the lot / parcel
State that sign area may be used for:
Real estate for sale, any noncommercial speech
(policy calls): garage sales, home based occupations
No “general advertising for hire”
Optional: expand the display area during pre-election period
GK Ltd v Lake Oswego OR, 436 F3d 1064 (expanded area available to all messages, not just political / election signs)
Permits for yard signs? Practical? Needed?
- XXVII Political (Election-oriented) Signs
Why have special rules for politicals?
Gov’t choosing the topic of debate? (*Mosley*)
Same practical result:
Temporary sign structures displaying noncommercial messages, including political / campaign / election
Allow at all times, but increase total area in pre-election period (GK, above)
A reasonable amount of display area must be available at all times
- XXVIII Content Neutrality
No reference at all to message, category or purpose?
Precise meaning: much confusion and debate between courts
“Just one look” rule
The “content neutrality” issue is currently pending at US Supreme Court:
Reed v. Gilbert AZ, 707 F.3d 1057 (2013)
“Evolution of content neutrality”
Serious break from precedent – does not follow *Mosley*
Separate rules for Temporary Directional Signs, Ideological Signs, and Political Signs—all approved by Ninth Circuit
- XXIX Rules vs Guidelines
Rules are enforceable law; should be definite and clear
Guidelines are statements of preferences and goals
Guideline alone cannot justify denial of a sign permit
Guidelines usually suggest discretion in permitting– legal risk
Dangerous for First Amendment land uses

- XXX Exemptions and Exceptions
Exempt from what? Sign ord? Permit req't? Size rule?
Exemptions based on content . . . often invalidated
Ballen v Redmond WA, 466 F.3d 736 (9th Cir 2006)
Ban on portable signs would have been valid but for exceptions for
politicals, real estate, construction
Atty fee award: \$165,000
- XXXI Private Signs on Public Property
Traditional Public Forum – surfaces of streets, sidewalks, parks, area around
city hall / legislature – objective characteristics, tradition
Test: Compelling interest, narrow tailoring
Designated (public) forum
Created by purposeful gov't action
Policy and practice determine the scope of invitation
Nonpublic fora – reasonable, no censorious purpose
Nonforum – *Taxpayers for Vincent* / utility poles – complete ban is valid
- XXXII Ten Commandments Monuments on Public Property

Sumnum v. Pleasant Grove UT, 555 US 460. US Supreme:
When city accepted private donation of Ten Commandments monument, for
permanent mounting in city park, it became gov't speech; no duty to allow another
religious group (Sumnum) to place their monument in the same park.

Van Orden v. Perry, 545 US 677 (2005): 10C monument was just one of
many in a panorama of displays on the grounds of the Texas State Capital; no
establishment clause violation.
- XXXIII The Digital Signs Debate
Modernizing or carnivalizing?
Are digitals within the traditional ban on “flashing, blinking, intermittent
light”?
Yes: *Scenic Arizona v Phoenix BOA*, 268 P3d 370 (AZ App 2011)
No: Federal Highway Admin guidance letter re Highway Beautification Act
Banning Digital Signs: *Carlson's Chrysler v. Concord NH*, 938 A.2d 69
(NH SC 2007): City's total ban on “electronic changeable copy sign” did not violate
First Amendment; related: *Naser Jewelers v Concord NH*, 513 F3d 27 (1st Cir 2008).