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STATE ATTORNEY GENERAL ISSUES OPINION ON COMMERCIAL SPEECH RIGHTS

by
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On April 5, 2005, Tennessee Attorney General Paul G. Summers issued an advisory opinion which determined that several state Alcoholic Beverage Commission (ABC) rules limiting alcohol advertising were "vulnerable to serious constitutional challenge as infringements of free speech." Opinion No. 05-040, "The Constitutionality of Alcoholic Beverage Commission, Rules 0100-1-.01(3)(a), 0100-3-.04(2) and 0100-3-.04(3)(b) at 1. Attorney General Summers' action provides positive reinforcement of advertisers' and consumers' First Amendment rights.

The opinion focused on three Tennessee ABC rules. Rule 0100-1.01(3)(a) generally proscribes TV and radio ads that mention the availability of alcoholic beverages, while allowing "liquor-by-the-drink licensees" (i.e. bars and restaurants) to advertise under very restricted circumstances. Rule 0100-3-.04(2) states "Distilled spirits may not be advertised in any manner on radio or television stations operating in Tennessee." Rule 0100-3-.04(3)(b), which is a section of a larger rule addressing wine advertising, states "Such advertisements must not give the name, address, or telephone number of a Tennessee licensed wholesaler or retailer." State Senator Joe Haynes, who is sponsoring a bill, SB0389, to prohibit ABC from enforcing alcohol advertising limits, reportedly requested the opinion. Rose French, *Attorney General: Limits on alcohol ads may violate First Amendment*, Tennessean.com, Apr. 12, 2005.

After a review of U.S. Supreme Court decisions striking down commercial speech restrictions (most of which were issued since the Tennessee ABC adopted the rules in question), Attorney General Summers concluded that "Rules 01003-.04(2) and .04(3)(b) would not withstand a First Amendment challenge." His brief analysis noted that the rules were "outright bans on truthful and non-misleading information," and stated that it was unlikely that ABC could show that such bans would directly and materially promote a state interest such as "temperance." The opinion also concluded, however, that because it was not an outright ban, Rule 0100-1.01(3)(a), "might withstand a First Amendment challenge."

The attorney general's legal conclusions on Rules 01003-.04(2) and .04(3)(b) are clearly supportable in light of the close scrutiny that the Supreme Court now applies to commercial speech prohibitions. His conclusion that Rule 0100-1.01(3)(a) might be constitutional, however, is very much open to question given the extreme limits it places on licensees' ability to mention basic information such as prices, which was the subject of one very relevant Court case, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Attorney General Summers' opinion and its reasoning are worthy of consideration by anyone debating or discussing limits on alcohol advertising. Also, the opinion provides affected parties in Tennessee, such as alcohol advertisers, distributors, or restaurants, with an impetus to challenge the rules. Finally, the attorney general's reasoning could easily apply to similar advertising restrictions in other states. Interested parties with knowledge of such state laws or rules are encouraged to contact Washington Legal Foundation with information on them.

Glenn G. Lammi is Chief Counsel of the Washington Legal Foundation's (WLF) Legal Studies Division. The Tennessee attorney general's opinion is available on WLF's website at http://www.wlf.org/upload/050305CASummers.pdf.

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