



Maneke law column

Getting into the weeds of marijuana advertising

For those of you MPA members at the convention last month, we had a fascinating presentation by Lyndell Fraker, Director of Medical Marijuana for the Department of Health and Social Services in our state. Based on his presentation, it is clear every county in the state is going to be touched by this program and a dispensary will begin serving those with a license to purchase the products.

I won't rehash his program here (yes, I chose that word on purpose!), but for those of you who weren't here, I will reiterate what I believe about the opportunity to advertise such products that we are seeing come to the state. Selling medical marijuana is going to be a highly-regulated industry, just like alcohol and tobacco. Those with a license to sell are going to be subject to rules regarding what they can and cannot say in their advertising. If they err in the content of an ad, their license to sell may be at risk. We cannot be used as their source to know what is legal or not legal in the content of their advertising, because a mistake on our part could create liability for us if their license is lifted due to what we recommend.

So, the same advice applies as the advice I give you for liquor advertising and cigarette advertising. You should not take that responsibility on. Run what they supply (subject to your own discretion, of course), but do not put yourself in the position of advising them what they can and cannot say in their ads.

Be sure you have disclaimer language in your rate cards. I've said this so often that I think most of you already have done this, but it is imperative you give a rate card to every advertiser, ideally

every time an ad is purchased so they absolutely have seen it. It needs language in it something like what's below (and I've written this so often that I am not saying you need this "exact" language but just something similar to cover these issues, including infringement of copyright, claims for unlawful use of photos, defamation and such matters):

The advertiser/agency, in placing this ad, affirms that the advertiser is the

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owner or is licensed to use the content of this advertisement, including all photos and names of persons, copyrighted or trademarked materials included in the advertisement, and any endorsements contained in the ad. In consideration of our company publishing this advertisement, you, the advertiser, agree to indemnify and hold harmless our company from any and all loss, liability, damage and expense of any nature, including reimbursement of

attorney's fees) arising out of the copying, printing, distributing, or publishing of this advertising. Further, you hereby license our company to use any copyrighted or trademarked material contained in this advertisement for purposes of our publishing it according to the terms of our agreement.

All advertisements created by the Publisher are not considered a "work made for hire" and the Publisher retains the copyright to all advertisements created by the Publisher for the Advertiser. The advertisement may not be reproduced without the written permission of the Publisher.

There are two other issues that are worth consideration in terms of

publication of marijuana advertising. The first is the postal permit issue. Marijuana is still a controlled substance according to federal law. While it will be legal in Missouri under the terms of this law, that does not necessarily mean it is legal to mail newspapers containing advertising for a product that is illegal under federal law. At this time, mailing advertising for a controlled substance is not permitted under federal postal regulations. This is an issue best left to your own judgment. I can tell you that under President Obama's administration, presidential mandates were issued ordering the Justice Department to ease enforcement of federal laws relating to marijuana in states that had passed easing of state laws on marijuana use. I can also tell you that President Trump announced he was rescinding that policy. The federal Justice Department has not issued any direct orders in regard to this conflict. Lawyers are giving mixed advice about this issue but I have not been made aware of any such prosecutions initiated under the Trump Administration.

Meanwhile, there are no such concerns over the advertising of CBD products.

How can you get paid? Well, while banks are not supposed to be taking funds from the sale of marijuana products, that should not impact newspapers. You are taking checks from advertisers who are selling all kinds of materials and you have no knowledge that the money you receive came from the sale of marijuana. You need not investigate to trace the source of the exact funds you receive. A check from the merchant says that their bank accepted the funds into their system. Who knows where the cash came from. I wouldn't be concerned about this issue.

Let me know if you want to discuss this issue further.

