April 27, 1998

No. 8256

This opinion responds to a question from Pamela S. Erickson, Administrator,

Oregon Liquor Control Commission (OLCC), concerning an OLCC rule that bans television and radio advertisement of distilled spirits. The OLCC is currently undertaking rulemaking and is considering repealing this rule.

QUESTION PRESENTED

> Does OAR 845-007-0015(1)(c), which bans television and radio advertisement of distilled spirits, violate the law?

ANSWER GIVEN

Yes. OAR 845-007-0015(1)(c) violates Article I, section 8, of the Oregon Constitution.

DISCUSSION

I. OLCC Statute and Rule

> The OLCC is authorized and empowered to:
>
> control, regulate and prohibit any advertising by manufacturers, wholesalers or retailers of alcoholic liquor by the medium of newspapers, letters, billboards, radio or otherwise.

ORS 471.730(7). Pursuant to this authority, the OLCC adopted a rule that provides, in relevant part:

> (1) The Commission prohibits advertising through:
>
> * * * *
>
> (c) Radio and television, if related to distilled spirits;

OAR 845-007-0015(1)(c).

The OLCC rule prohibiting radio and television advertising of distilled spirits has been in effect since the early 1950's. Since 1936 for radio, and 1948 for television, the distilled spirits industry, represented by the Distilled Spirits Council of the United States, Inc. (Council), has maintained a voluntary ban on radio and television advertising. The distilled spirits industry recently lifted this voluntary ban.

Because of a recent United States Supreme Court decision, ***44 Liquormart, Inc. v. Rhode Island***, 517 US 484, 116 S Ct 1495, 134 L Ed2d 711 (1996), the Council has questioned whether the OLCC rule is constitutional. As regards the purpose and effect of the rule, the Council asserts that:

> there is no scientific basis to conclude that advertising restrictions will directly and materially advance a government's interest in addressing alcohol abuse or illegal, underage drinking because advertising does not cause alcohol abuse or illegal, underage drinking.

Letter dated January 21, 1998, to Darleene Meyer, Rules and Policies Manager, OLCC, from Paul S. Cosgrove, Distilled Spirits Council of the United States, Inc., p. 6. Proponents of the rule simply assert that:

> [t]he Commission * * * should direct Staff to research the issue of whether the challenged OAR promotes temperance and statutory objectives.

Letter dated January 20, 1998, to Darleene Meyer, from Henry Kane, p. 4.

The OLCC initiated its rulemaking process proposing to amend OAR 845-007-0015 to delete the ban on radio and television advertising if it is unconstitutional. The notice of proposed rulemaking action was published in the Oregon Bulletin dated December 1, 1997.

II. Constitutionality under Oregon Constitution, Article I, Section 8

Oregon courts first consider and decide all questions of state law, including state constitutional law, before addressing federal claims, ***State v. Kennedy***, 295 Or 260, 262, 666 P2d 1316 (1983). We follow that same approach and first address constitutional claims in light of the Oregon Constitution. If the Oregon Constitution prohibits the state from enacting a regulation like OAR 845-007-0015's ban on distilled spirits advertising, then whether or not the First Amendment also prohibits the regulation is irrelevant. *See* ***State ex rel Sports Management News v. Nachtigal***, 324 Or 80, 87 n 6, 921 P2d 1304 (1996); ***Moser***, 315 Or at 379 n 4; ***Zackheim***, 134 Or App at 555.

> Article I, section 8, of the Oregon Constitution provides that:
>
> [n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever.

In ***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982), the Oregon Supreme Court established a framework for evaluating whether a law violates Article I, section 8. *See also* ***State v. Plowman***, 314 Or 157, 163-64, 838 P2d 558 (1992). That interpretation was restated in ***State v. Stoneman***, 323 Or 536, 920 P2d 535 (1996), and ***Moser v. Frohnmayer***, 315 Or 372, 845 P2d 1284 (1993).

The analysis begins with dividing the universe of state laws limiting speech into two categories: those that focus on the substance of any opinion or any subject of communication and those that focus on the effects of speech.[(1)] ***Stoneman***, 323 Or at 543-44. An example of the former would be a law making it a crime to utter the words, "You are about to die." An example of the latter would be a law making it a crime to utter words that are intended to cause, and do cause, a person to be in fear for his or her life.

A law in the first category is constitutional only if it imposes a restriction that was well established at the time freedom of expression provisions were adopted, and if those provisions were not intended to eliminate that restriction. *Id.* at 545; ***Moser***, at 376. Or, as the court in ***Robertson*** stated,

> [Article I, section 8] forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.

293 Or at 412. Examples of such "restraints" -- well-established restrictions on speech that the framers of the First Amendment or Article I, section 8 did not mean to eliminate -- include perjury, fraud and solicitation. *Id.*

A law in the second category, that is, one that focuses on an effect or harm actually caused by speech rather than on the substance of the communication itself, will expressly specify, or clearly imply, what serious and imminent effects it is designed to prevent. ***Moser***, 315 Or at 379. Such a law is presumptively constitutional unless it is overbroad, that is, unless its application in a particular situation infringes on protected speech. *See* ***Stoneman***, 323 Or at 543; ***City of Eugene v. Miller***, 318 Or 480, 488, 871 P2d 454 (1994); ***Robertson,*** 293 Or at 412.

As a caveat, the Oregon courts will not (as have their federal counterparts) engage in a balancing approach between the state's interest and the burden a law may impose on free expression. ***Stoneman***, at 542.

> [T]he balancing approach * * * is so contrary to the principles that have guided this court's jurisprudence respecting freedom of expression issues under Article I, section 8, that it cannot be countenanced.

Id.

Finally, for purposes of Article I, section 8, the Oregon courts make no distinction between commercial speech and non-commercial speech. Commercial speech is afforded the same constitutional protection as is non-commercial speech. ***Moser***, 315 Or at 377-78; ***Ackerley Communications, Inc. v. Multnomah Cty.***, 72 Or App 617, 696 P2d 1140 (1985), *rev dismissed* 303 Or 165, 734 P2d 885 (1987). *See also* ***City of Hillsboro v. Purcell***, 87 Or App 649, 653, 743 P2d 1119 (1987), *aff'd* 306 Or 547, 761 P2d 510 (1988); ***Northwest Advancement, Inc. v. Bureau of Labor, Wage and Hour Div.***, 96 Or App 133, 140, 772 P2d 934, *rev den* 308 Or 315, 779 P2d 618 (1989), *cert den* 495 US 932, 110 S Ct 2172, 109 L Ed2d 501 (1990).

We turn now to the rule at issue in light of the Oregon cases. Under the OLCC rule, distilled spirits may not be advertised

through television and radio. Radio and television advertisements are communications covered by Article I, section 8. The court in ***Moser*** found that recorded or simulated communication via an automatic dialing and announcing device was speech for purposes of Article I, section 8. 315 Or at 375. In its discussion, the court noted that signals conveyed through the air which are received and transformed by electronic means into the sounds of voices (e.g., television and radio) were also protected speech. *Id*.

A. Regulation Aimed at Speech, Not the Effects of Speech

The ***Moser*** court first considered whether ORS 759.290 was aimed at speech, or the effects of speech. Under the law, an automatic dialing and announcing device could be used to transmit any message, except messages that were a commercial attempt to sell realty, goods or services. Because the statute excluded some speech based on the content of the message, it restricted expression and was aimed at speech, not the effects of the speech. *Id.* at 375-76.

Similarly, the OLCC rule prohibits certain kinds of expression, i.e., television and radio advertising of distilled spirits. The restriction is aimed at the very content of the communication or speech that would constitute the advertisement; it does not mention or imply any non-speech effect. While the intention of the rule may be to promote temperance and prevent underage drinking, the rule applies against advertising regardless of its audience or its effect on them. It therefore focuses on speech per se and not on harm.

B. No Well-Established Historical Exception

In accord with the ***Stoneman*** and ***Moser*** analysis, we next consider whether there is a well-established historical exception for a restriction of the type imposed by OAR 845-007-0015(1)(c). In ***Moser***, the Attorney General argued that since commercial advertisements or solicitations were historically not protected by the First Amendment, there must have been an historical exception permitting states to limit such speech. *Id.* at 377. The court rejected this argument, stating that simply because the courts had not historically recognized commercial advertisements or solicitations as protected speech did not establish an historical exception. 315 Or at 378; *see also* ***Zackheim v. Forbes***, 134 Or App 548, 553-54, 895 P2d 793, *rev den* 322 Or 167, 903 P2d 886 (1995) (under the Supreme Court's holding in ***Moser***, there is no historical exception to the protection of Article I, section 8, for commercial advertisements or solicitations). Further, we are unaware of any indication that limitations on advertisements for distilled spirits were well established in the eighteenth or nineteenth centuries. We therefore conclude that the regulation of speech per se embodied in OAR 845-007-0015 is not a "contemporary variant" of a well-established limitation on expression, and does not escape constitutional infirmity on that basis.

CONCLUSION

Based on the above analysis, we conclude that the OLCC rule banning all television and radio advertising of distilled spirits violates Article I, section 8, of the Oregon Constitution.[(2)]

HARDY MYERS
Attorney General

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1. A third type of law implicating speech or expression is one that, while not including any reference to limitations of speech or expression, may in some instances be enforced in such a way as to impose such limitations. An example is a trespass law, which, while not mentioning speech, may in some instance (for example regulation of signature gatherers or political demonstrators) be enforced so as to effect censorship. Such a law is subject to challenge on vagueness grounds or on the ground that the law's reach, as applied, extends to privileged expression. *Moser*, 315 Or at 379. OAR 845-007-0015 is not a law of this type.

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2. This opinion does not address the question whether OLCC may prohibit particular instances of advertising that demonstrably cause, or are likely imminently to cause, some ill effect that the state has authority to regulate, or whether a

person demonstrably injured by such advertising may or may not recover damages from the advertiser.

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