

FINE PRINT*

**A Practical Legal Guide for Newspaper Advertising*



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GENERAL PRINCIPLES OF ADVERTISING LIABILITY

Protected by the First Amendment to the United States Constitution, newspapers have an almost unfettered right to make the decision to accept or reject advertising for publication. The flip side of that coin, however, is that in making decisions of what advertisements to publish, newspapers also bear potential liability for the content of those advertisements. While there are some exceptions to this general rule – such as the general exemption that holds newspapers immune from suit if an advertisement is false or misleading – advertising managers must be on guard for potential liability that might arise from the business side of the paper. Liability can come in several contexts: (1) contractual liability to an advertiser, (2) copyright or trademark liability, and (3) liability for libel.

ADVERTISING CONTRACTS

For many people, spending time with a lawyer is about as much fun and almost as expensive as spending time with a dentist, so they avoid it whenever possible. But with legal matters, as with cavities, an ounce of prevention is often worth a pound of cure. Moreover, if reviewing your standard advertising contract with an attorney is the functional equivalent of a dental exam, a lawsuit is just as painful as a root canal. Thus the wise publisher or ad manager will schedule both legal and dental "check-ups" regularly.

THE RIGHT TO REFUSE ADVERTISING

Generally speaking, private publishers have the absolute right to refuse to publish any advertisement, just as they have the right to refuse letters to the editor. The only limitations on the right to refuse are refusals based on illegalities – such as anti-competitive refusals or circumstances in which the newspaper's contract with an advertiser does not allow for refusal. Careful drafting of advertising contracts at the outset, therefore, may be the wisest investment of time and money you can make.

CONTRACT FOR PRICE, NOT SPACE

Although part of the editorial freedom that is guaranteed to newspapers by the First Amendment is the right to accept or reject advertisements, a newspaper can contract away that right. Thus if a publisher promises an advertiser, without qualification or reservation, the right to a quarter-page ad in every Friday paper for the next six months, the publisher must honor that promise or suffer the consequences. The First Amendment does not give newspapers the right to break a contract any more than it gives them the right to break into someone's home in the investigation of a story.

Advertising contracts, of course, vary widely. Many – such as the typical classified ad contract – cover only a single placement, whereas major advertisers may negotiate long-term agreements involving hundreds of ads to be submitted on a monthly, weekly or even daily basis. One way to protect a paper's rights to reject advertising or to cancel a contract if that should become necessary is to enter into a "price contract" -- a contract that establishes the rates for the advertiser's placements but does not guarantee the advertiser either a right to space in the newspaper or the right to publish any particular advertisement. A price contract based on frequency might provide that if the advertiser places a quarter-page advertisement at least once a week over a specified period, he will pay a specified rate; but if he places ads more frequently, the rate for each ad will be less. A price contract also might be based on volume, so that the advertiser agrees to pay a certain rate for advertising up to a specified number of inches or lines published during the contract term, after which discounts kick in. Regardless of form, the essence of a price contract is that the advertiser is not obligated to place, nor the newspaper to publish, any pre-set number or amount of ads. Rather, the advertiser effectively sets his own rate by choosing the amount and timing of his advertising placements.

Regardless of whether it is limited to price or commits the newspaper and the advertiser to a long-term advertising "program," every advertising contract should be drawn to preserve and protect the newspaper's right to cancel and its right to reject unsuitable ad copy. To accomplish this, the contract should include an "escape clause" that expressly reserves the publisher's right to reject ad copy.

THE ESCAPE CLAUSE

Every advertising contract should reserve the publisher's right to terminate. For example, the contract might provide:

[Newspaper name] reserves the right, in its sole discretion, to terminate this contract at any time and for any reason.

In an appropriate case, language like this might be supplemented by language requiring the newspaper to refund pre-paid advertising fees, language specifying the manner and timing of a termination notice, and the like.

Beware, however, that if the contract assures the publisher the absolute right to terminate the contract, there is a risk that a court would find the contract to be illusory, or a sham. This likely will not harm the newspaper that is seeking to get out of the contract. However, if the advertiser fails to fulfill his obligations under the contract, the newspaper might face difficulties in attempting to enforce the contract. This is the reason the "price contract" is preferable.

THE RIGHT OF REJECTION

Every advertising contract also should confirm unequivocally the newspaper's right to reject any particular ad copy. For example, the contract might say:

[Newspaper name] reserves the right, in its sole discretion, to reject or disapprove any advertising copy submitted by the advertiser in accordance with any standards the Publisher may now have or may adopt in the future.

Such a clause clarifies that final editorial review of ad copy rests with the publisher.

BEWARE THE HEADING

Placing the "escape clause" under the wrong heading can be as dangerous as putting the wrong caption under a picture. If a paper is relying on an escape clause, the contract must be clear that the paper reserves the right to terminate the contract altogether, not simply to accept or reject particular advertising copy. Unless a contract is ambiguous, courts are bound to enforce the intention of the parties, as evidenced by the "plain language of the contract." Only if the contract is ambiguous does the court explore what the parties really meant. That means a contract that unambiguously reserves an absolute right of

termination provides just that. However, if the absolute right is found under a heading "Nonpayment," for example, a court might find that the absolute right exists only when the advertiser has not paid what is owed under the contract. Contracts should include language that states, "The paragraph and sub-paragraph headings contained in this Agreement are for convenience only and shall in no manner be construed as part of this Agreement."

CONTRACT FOR CONTINGENCIES

Advertising contracts should be clear that, in the event the publisher fails to publish an advertisement, the advertiser's damages are limited to the cost of the ad. In no event should the publisher be liable for lost sales or any other alleged damage sustained by the advertiser. The contract might provide:

The Publisher shall not be responsible or liable for any loss or damage other than the cost of the advertisement by reason of non-publication, delay or interruption in publication. The Publisher shall not be liable to the Advertiser for incidental, consequential, punitive or lost-profit damages.

Additionally, the advertiser should indemnify the publisher for any legal action that might arise out of advertising copy that comes from advertiser. For example:

Advertiser warrants that it has obtained all copyright, trademark, or other licenses necessary for publication of all copy submitted by the Advertiser. The Advertiser shall be responsible for the defense of any copyright or trademark infringement claim or suit, including the payment of all legal defense costs through one or more levels of appeal, arising out of the advertising copy provided by Advertiser and shall be liable for the satisfaction of any judgment entered for a copyright or trademark violation.

Finally, the contract should preserve the home court advantage to the publisher. Many advertisers will be local, but the goal of a paper's advertising department is to obtain a broad base of advertisers, and that often means out-of-state clients. Therefore, advertising contracts should include a clause such as follows:

This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of North Carolina without regard to its conflicts or choice of law. In the event of any dispute arising hereunder, the parties agree to submit to the jurisdiction and

venue of the appropriate state or federal courts located in _____ County, North Carolina.

Using a canned contract is about as wise as using a canned photograph. It will never be the best option and may prove to be a costly one if the contract does not take into account the specifics and contingencies of the situation.

COPYRIGHT AND TRADEMARK

We see copyright and trademark symbols every day. They appear on almost every product we handle, and we rarely stop to think about what those marks symbolize. But for professionals in advertising, it is essential to know at least the basics of copyright and trademark law, both to protect a newspaper's rights and to avoid infringing someone else's intellectual property rights.

While there are some similarities between copyright and trademark, it is helpful to understand their differences. Copyright law protects the expression of an idea (although no one can corner the market on the idea itself), while trademark law identifies the source of a product or service. For example, John Lennon could not copyright the idea that Americans should give peace a chance, but he could and did have a copyright in his creative means of expressing that idea through song.

By contrast, the purpose of trademark is to identify the designer, maker or distributor of a product. For example, the words and slogans "Coca-Cola," "Coke" and "The Real Thing" all identify products produced by The Coca-Cola Company.

COPYRIGHTS

WHAT IS A COPYRIGHT AND WHAT DOES IT DO?

Copyright is the legal protection for the creator of a work that allows the creator to control how that work is used or exploited. The rights protected by copyright include the rights to reproduce the work, to make derivative works from the original, to distribute the work or reproductions, to perform or display the work.

A copyright vests in the creator of a work immediately when it is created, and the only way to transfer a copyright is by written agreement. Therefore, if the advertising department of a newspaper creates a display ad for a client, the newspaper owns the

copyright to that advertisement, even though the advertiser has paid for it. To protect against an advertiser re-using the ad design and layout in another publication, it is advisable for a newspaper to include language in its contract similar to the following:

All rights, including any copyright interest in advertisements produced for an Advertiser by Publisher, using artwork and/or typography furnished or arranged by the Publisher, shall be the sole property of the Publisher. No such advertisement or any part thereof may be reproduced without the prior consent of the Publisher. Nothing in this agreement, however, shall preclude the Advertiser from supplying to other publications similar or identical material or information for the production of advertisements by such other publications or from suggesting the content or form of any such advertisement, so long as the work of the Publisher and these newspapers shall not be directly reproduced by photographic offset process or other method of direct reproduction.

If, however, an advertiser comes to the newspaper with a camera-ready ad, the publisher knows that the copyright in the ad is owned either by the client/advertiser or by an advertising agency that created the ad. This raises two issues: First, the newspaper must verify that the advertiser has the right to use the ad being proposed; and second, the newspaper must not “re-use” that ad, even with some changes, for a different advertiser. To ensure that the advertiser has the legal right to use the advertisement being proposed, it is advisable for a newspaper to include in its contract language similar to the following:

Advertiser warrants that it has obtained all copyright, trademark, or other licenses necessary for publication of all copy submitted by the Advertiser. The Advertiser shall be responsible for the defense of any copyright or trademark infringement claim or suit, including the payment of all legal defense costs through one or more levels of appeal, arising out of the advertising copy provided by Advertiser and shall be liable for the satisfaction of any judgment entered for a copyright or trademark violation.

HOW DO YOU OBTAIN AND PROTECT A COPYRIGHT?

There is nothing magical about acquiring a copyright. All you have to do is create an original work that is fixed in some tangible way. At the instant a work is created, the originator has a copyright. Any actions beyond that point, such as printing the copyright notice on the work or registering the work with the copyright office, are merely steps to **strengthen** the copyright and increase the damages against anyone who infringes the copyright. Registration is required only if the owner of a copyright files a lawsuit to enforce the owner's rights under the copyright laws.

In a corporate setting like a newspaper, it is important to understand who "the creator" is. Employees do all of their work for the benefit of their employer, so an individual in an ad department does not own the copyright in works that are created. The employer does.

The area in which copyright infringement is most likely to occur is an ad department that "grabs" a photo from the internet. It cannot be emphasized enough that the placement of material on the internet does not put those materials in the public domain or make them fair game. The only valid way to use someone else's work in your advertisement is to get permission in writing.

TRADEMARKS

WHAT IS A TRADEMARK AND WHAT DOES IT DO?

A trademark is an indication of who or what company created a product. Trademarks allow companies to cultivate corporate goodwill. By way of example, if you know that you like Gatorade™ brand drinks, perhaps you also would like other Gatorade™ brand products, like power bars.

One area in which trademark law is of increasing importance to newspapers is the protection of the names of niche publications, as advertising departments of newspapers have begun to form joint ventures with community partners for the publication of specialty pull-out sections of the newspaper. Often the newspaper sells and retains the revenue from advertising space while the partner provides the editorial content. In such a scenario, it is important to clarify which entity owns the trademark rights to the name of the publication. Although the name may not mean much at the initial publication, it may become a valuable asset over time.

HOW DO YOU OBTAIN AND PROTECT A TRADEMARK?

As with copyrights, there is no magic to creating a trademark, but unlike copyrights, it is not automatic. Generally, a trademark is established through use in trade. A word, name or slogan that is used in association with a product or service can gain significance as a trademark. If the mark is for a product, it will be affixed to the product itself or to the packaging of the product.

Not every word can serve as a trademark, however. The word must be distinctive. The more utilitarian a word is, the more association must be established between the word and the product or service. For example, the word Cheeto™ is wholly capricious and therefore an ideal choice for “The cheese that goes crunch.” Frito could not have simply labeled the snack food "Cheesey Curls" and obtained a trademark for that name.

Protection of a trademark is similar to that of a copyright: Registration is not required but will allow a greater recovery if someone infringes your rights. However, trademarks may be registered on both a state and federal level, with federal registration allowing the originator to lay claim to rights throughout the United States.

LIBEL

Newspapers have potential liability for almost all the content that is published in the newspaper, including advertisements. This means that advertising representatives need at least a rudimentary understanding of libel law.

THE BASICS OF LIBEL LAW

In order to prevail in a libel action, the plaintiff must prove the publication to a third person of false and defamatory statements of fact about the plaintiff. He must prove that the defendant acted with some level of fault (either negligence or actual malice) and that he was injured by the publication. This does not mean that an advertising department must dispatch reporters to investigate and document all claims in proposed advertisements, but each ad should be reviewed for the following questions:

First, does the ad disparage someone or some organization? There are certain categories of statements that should send off whistles and raise red flags.

The “red flag” categories include stating that someone

- committed a crime
- is infected with a loathsome disease
- is guilty of malfeasance on the job
- is unfit for his job
- is guilty of fornication/adultery/unchastity (if a woman).

Second, is the disparagement factual? If the ad simply says that someone is a lousy candidate for mayor or that Sudso Dishwashing Detergent is better than Rinse-Away Detergent, there can be no liability. But if the ad says that County Commissioner Jones voted eight times to cut off all funding to public schools, that statement had better be correct.

Next, the person reviewing the advertisement must evaluate the ad’s accuracy.

Finally, if the analysis of all of the above leads to the conclusion that the ad might be risky, the advertising manager should evaluate the situation and handicap that risk. One factor that goes into the final decision should be the “status” of the person injured by the advertisement. If the person is a private individual, he will only have to prove that the newspaper was negligent in publishing the ad. If the person damaged is a public figure or a public official, though, he will have to prove actual malice. What that means is a public official or public figure (aka someone famous) must prove that the newspaper knew the ad was false or entertained serious doubts about its truth but published anyway.

PUTTING THE BASICS INTO PRACTICE

On occasion, advertisers seek to publish ads that imply defamatory facts about someone, such as the ad:

Did John Smith steal money from you, too? If so, call 252-555-1286.

Ads such as these generally should be rejected, unless the advertiser offers documentation such as a court order finding that John Smith stole money from the advertiser.

Political advertisements, like everything else in the newspaper, carry a risk of potential liability. After all, the most famous libel case in history – *New York Times v. Sullivan* – was based on errors in a paid advertisement that addressed civil rights violations in the South.

One high profile libel suit based on a political advertisement in North Carolina took years and years to resolve. In his campaign against Dan Boyce for attorney general, Roy Cooper ran an ad that said, “Dan Boyce – his law firm sued the state, charging \$28,000 an

hour in lawyer fees to the taxpayers. The Judge said it shocks the conscience. Dan Boyce's law firm wanted more than a police officer's salary for each hour's work. Dan Boyce, wrong for Attorney General."

Dan Boyce and others in his law firm filed suit, saying the ad was libelous, claiming that they didn't charge \$28,000 an hour because a judge reduced the attorney fee award in the case. As it happens, the media who broadcast the ad were not sued, but it took almost 15 years for the parties to reach a settlement.

In deciding whether to publish an advertisement, you should review it with the same scrutiny you would apply to a page one story. Consider whether the ad contains specific, factual statements that are damaging to an individual or small group of individuals. If it does, you should ask the advertiser to detail for you the basis of the facts stated or implied and evaluate how credible you believe the support to be. Hyperbole is to be expected in political advertising, but there is a difference between stating that a candidate has "robbed" the children of an area of a fair education and stating that he cannot be trusted because of his past ties to someone convicted of embezzling money. Both are statements of opinion, but the latter implies unstated, defamatory facts that could be libelous if false and stated directly.

Of course there is more leeway in the context of political debate. Because political candidates are public figures, the law requires them to prove that a libel defendant published the defamatory information in question with knowledge that it was false, or while entertaining serious doubts about its truthfulness. However, it is always wise to be on the lookout for the so-called unintended plaintiff -- the person who is not seeking office but gets caught in the crossfire between feuding candidates.

Newspapers that reject political ads often find themselves confronted by irate candidates and their representatives who assert that newspapers are legally obligated to publish any advertisement they are prepared to pay for. This tendency to view newspapers as a sort of public utility undoubtedly stems from the fact that political operatives are accustomed to dealing with radio and television stations, which are required by federal law and FCC rules to accept certain political advertisements. Although you certainly can choose to negotiate with political advertisers about changes in ad content, you have the right to stand your ground and say, "Sorry, but we have decided not to accept your ad."

From time-to-time, questions arise regarding comparative advertising: "Drink Coca-Cola! It's better than Pepsi," or more likely, "Detergent X gets out 10% more stains than Detergent Y." Once banned from advertisements, comparisons no longer are the black sheep of the advertising world. Again, if the advertisement makes specific, factual statements, it would be wise to obtain back-up from the advertiser. But if that back-up is supplied, newspapers need not reject an ad simply because it claims that the advertiser's products or services are superior to a competitor's.

NORTH CAROLINA STATUTES

ADOPTION

§ 48-10-101. Prohibited activities in placement.

(a) No one other than a person or entity specified in G.S. 48-3-201 may place a minor for adoption. No one other than a person or entity specified in G.S. 48-3-201, or an adoption facilitator, may solicit potential adoptive parents for children in need of adoption. No one other than an agency or an adoption facilitator, or an individual with a completed preplacement assessment that contains a finding that the individual is suitable to be an adoptive parent or that individual's immediate family, may solicit for adoption a potential adoptee.

(b) No one other than a county department of social services, an adoption facilitator, or an agency licensed by the Department in this State may advertise in any periodical or newspaper, or by radio, television, or other public medium, that any person or entity will place or accept a child for adoption. For purposes of this section, "other public medium" includes the use of any computerized system, including electronic mail, Internet site, Internet profile, or any similar medium of communication provided via the Internet.

(b1) Notwithstanding subsections (a) and (b) of this section, this Article shall not prohibit a person from advertising that the person desires to adopt. This subsection shall apply only to a person with a current completed preplacement assessment finding that person suitable to be an adoptive parent. The advertisement may be published only in a periodical or newspaper or on radio, television, cable television, or the Internet. The advertisement shall include a statement that (i) the person has a completed preplacement assessment finding that person suitable to be an adoptive parent, (ii) identifies the name of the agency that completed the preplacement assessment, and (iii) identifies the date the preplacement assessment was completed. Any advertisement under this subsection may state whether the person is willing to provide lawful expenses as permitted by G.S. 48-10-103.

(c) A person who violates subsection (a), (b), or (b1) of this section is guilty of a Class 1 misdemeanor.

(d) The district court may enjoin any person from violating this section.

ALCOHOL

Rulings of the United States Supreme Court call into question the constitutional validity of many of North Carolina's regulations relating to alcohol advertising. However, according to statute and code, whether or not the advertising originates in North Carolina, all advertising of alcoholic beverages in North Carolina must meet the regulations of the Alcoholic Beverage Control Commission. The ABC Commission has the authority to adopt a variety of rules, including those prohibiting or regulating the advertisement of alcoholic beverages in print media and mass media. Advertising, as defined by the ABC Commission, does not include editorials. Among the regulations are the following:

Among others, these kinds of statements are prohibited in alcohol advertising:

- False and misleading statements
- Disparagement of competitors' products
- Nudity, indecency or obscenity
- Statements or images relating to the armed forces or the American flag
- References to the intoxicating effect of the product

Advertisers may not use coupons or otherwise offer free alcoholic beverages.

Advertisers cannot run "2 for 1" or "BOGO" or any other similar statement that requires the purchase of more than one drink.

A retail malt beverage, wine or mixed beverage permittee may advertise price and brand through a circular, newspaper, magazine, radio, television and internet. (This is a fairly recent change in the law.)

DRUG PARAPHERNALIA

Guarding against ads for drug paraphernalia can be tricky, because they can be hard to spot. Often appearing in the classified ad section, these ads may contain “coded” language that may not be obvious to the person accepting advertisements over the phone. Local law enforcement may have a list of terms often used in paraphernalia advertising.

§ 90-113.24. Advertisement of drug paraphernalia.

(a) It is unlawful for any person to purchase or otherwise procure an advertisement in any newspaper, magazine, handbill, or other publication, or purchase or otherwise procure an advertisement on a billboard, sign, or other outdoor display, when he knows that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia described in this Article.

(b) Violation of this section is a Class 2 misdemeanor.

EMPLOYMENT ADVERTISING

There are three main sources of federal regulations on employment discrimination and ## North Carolina laws:

- The 1964 Civil Rights Act, Title VII
- The Age Discrimination in Employment Act
- The American with Disabilities Act
- NC Equal Employment Practices Act
- NC Persons with Disabilities Protection Act

The Civil Rights Act covers employers engaged in interstate commerce with 15 or more employees but excludes the United States government, Native American tribes and tax-exempt private clubs. Under the CRA, ads may not express any preference “based on race, color, religion, sex or national origin.” There is an exception to this if a religious organization chooses to hire someone of a specific faith to do work connected with the faith-based activities of the organization.

The Age Discrimination in Employment Act of 1967 applies to employers engaged in interstate commerce with 20 or more employees. The law prohibits advertisements that express a preference based on age. There is an exception to this if the advertisement expresses a preference for an older worker.

The Americans with Disabilities Act applies to employers engaged in interstate commerce with 15 or more employees and prohibits discrimination based on disability. The NC Persons with Disabilities Protection Act, likewise, prohibits discrimination based on disabilities by employers with 15 or more employees.

The NC Equal Employment Practices Act applies to employers with 15 or more employees and protects against discrimination based on race, religion, color, national origin, age, sex or handicap.

North Carolina law regulates private personnel services and job listing services. Both must be licensed. Private personnel services may not use symbols that could cause confusion with a government agency. Job listing services must advertise the business name of the service, as well as the term “job listing service,” and may only advertise notices of actual open jobs they have received and recorded. Job listing service ads may not directly or indirectly state that the job applicant will pay no fee.

North Carolina also regulations advertising for work-at-home schemes. Only advertisers who will pay “a wage, salary, set fee, or commission” may advertise and only if the “opportunity” does not require a deposit on or purchase of “instructional booklets, brochures, kits” or the like.

FAIR HOUSING

The Fair Housing Act applies to the sale or rental of housing, including single-family housing sold with or without a broker and owner-occupied buildings with no more than four units and regulations housing advertising.

Under the Fair Housing Act it is unlawful to publish advertisements indicating any preference, limitation, or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin.

An advertisement's discriminatory nature may be conveyed by words, phrases, photographs, illustrations, symbols, or forms.

The selection of particular media for placing advertisements may also illustrate discriminatory nature if the selection will prevent particular segments of the population from learning of the housing opportunity.

Religious organizations and private clubs are exempted from these rules and *may* limit or give preference to members of the same religion or club so long as membership is not restricted on the basis of race, color, or national origin.

Housing qualified as "housing for older persons" is exempted from familial status requirements.

Persons convicted of making or selling drugs may be discriminated against.

While not mandated, the Department of Housing and Urban Development encourages publishers to post copies of their non-discrimination policy in a conspicuous place so that it will be read by potential advertisers.

HUD also encourages publishers to include a notice regarding compliance with the Fair Housing Act at the beginning of the real estate section.

Advertisements for shared living arrangements -- such as for roommates -- legally may contain language such as "Female roommate wanted" or "Christian couple to be companion to elderly person."

In 1995, a memorandum from Roberta Achtenberg, then-Assistant Secretary for Fair Housing and Equal Opportunity, established some guidelines for how advertisements might comply with the Fair Housing Act.

"Publishers and advertisers are responsible under the Act for making, printing, or publishing an advertisements that violates the Act on its face."

"A publisher is not liable under the Act for advertisements which, in the context of the usage in a particular advertisement, might indicate a preference, limitation or discrimination, but where such a preference is not readily apparent to the ordinary reader. Therefore,

complaints will not be accepted against publishers concerning advertisements where the language might or might not be viewed as being used in a discriminatory context.”

“Publishers can rely on the representations of the individual placing the ad that shared living arrangements apply to the property in question.”

A publisher may also generally rely on an owner’s assurance that property meets the “housing for older persons” exemption from familial status requirements.

Certain phrases (e.g. “master bedroom,” “rare find,” “desirable neighborhood”, etc.) are facially neutral, and advertisements using them will not create liability.

Advertisements containing descriptions of properties, services, facilities, or neighborhoods do not violate the act. Advertisements describing conduct required of the residents do not violate the act. Advertisements containing descriptions of accessibility features are lawful.

FIREWORKS

The advertising of pyrotechnics is illegal in North Carolina. The following are excluded from the definition of pyrotechnics:

- caps for toy pistols, provided that the explosive mixture of the explosive caps shall not exceed twenty-five hundredths (.25) of a gram for each cap.
- snake and glow worms
- smoke devices consisting of a tube or sphere containing a pyrotechnic mixture that produces white or colored smoke.
- noisemakers, including party poppers, string poppers, snappers and drop pops,
- wire sparklers

§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; exceptions; license required; sale to persons under the age of 16 prohibited.

(a) Except as otherwise provided in this section, it shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use, handle, exhibit, or discharge any pyrotechnics of any description whatsoever within the State of North Carolina

GAMING: LOTTERIES, RAFFLES, BINGO & PRIZE GIVEAWAYS

LOTTERIES

Courts have interpreted private enterprise as constituting a lottery if it has three elements:

- the payment of money
- for the chance
- to win something of value.

Any scheme that has those three components is, arguably, a lottery and is illegal in North Carolina. (See below for special rules related to charity raffles and bingo.)

On its face, North Carolina's prohibition of advertising or other publication about lotteries prohibits the publication of ads for lotteries, even if they are legal, state-sponsored lotteries, such as the Virginia and South Carolina lotteries. On the other hand, neither state nor federal law prohibits the publication of advertisements for gaming activities conducted on Indian lands pursuant to the federal Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* North Carolina newspapers may accept advertisements for the Harrah's casino on the Cherokee Indian Reservation in western North Carolina. And the last sentence of the statute exempts new media from the prohibition "provided the publishing is in connection with a lawful activity of the news medium." That specific provision has not been interpreted by our courts.

RAFFLES, BINGO AND GIVEAWAYS

- Only tax-exempt organizations can lawfully conduct raffles.
- The maximum prizes that may be awarded, whether cash or value in merchandise, is \$125,000. Real property may be offered up to a value of \$500,000.
- Before accepting raffle or bingo advertising, publishers should obtain a statement from the advertiser that it is a tax-exempt organization and is conducting the raffle or bingo game in compliance with applicable law.
- Only tax-exempt organizations can conduct bingo games.
- The maximum prize for any one game of bingo is \$500. The maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session of bingo is \$1,500, unless the exempt organization holds only one session of bingo during a calendar week, in which case up to \$2,500 total may be awarded in aggregate.
- Beach bingo – a game with a maximum prize of \$10.00 – is legal and can be operated as a business by for-profit organizations.
- Any advertisement for a prize giveaway in connection with the sale or lease of property, goods or services shall contain disclosure of
 - on whose behalf the contest or promotion is conducted
 - all material conditions which a participant must meet

- the actual retail value of each item or prize
- the actual number of each item or prize to be awarded
- the odds of receiving each item or prize.

These requirements do not apply if

- participants do not make a purchase
- participants are only required to submit an entry form, and
- participants are not required to listen to a sales presentation.

§ 14-289. Advertising lotteries.

Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if anyone by writing or printing or by circular or letter or in any other way, advertises or publishes an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a Class 2 misdemeanor. News medium as defined in G.S. 8-53.11 shall be exempt from this section provided the publishing is in connection with a lawful activity of the news medium.

§ 14-290. Dealing in lotteries.

Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed two thousand dollars (\$2,000). Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. This section shall not apply to the possession of a lottery ticket or share for a lottery game being lawfully conducted in another state.

LEGAL NOTICES

- Newspapers may not charge in excess of their local commercial rates for publication of legal notices.
- Newspapers must file their legal notice rate with the clerk of superior court and may not charge a rate in excess of the filed rate. Therefore, publishers should update the filed rate any time advertising rates are increased and should check the filed rate at least once a year.
- To be eligible to publish legal notices, a newspaper must
 - be of general circulation
 - have paid subscribers
 - be admitted to the Periodicals Class of the U.S. mails in the county where the notice is required to run
 - have been published 25 of the last 26 weeks

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

Whenever a notice ... shall be authorized or required by any of the laws of the State of North Carolina ... to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails in the Periodicals class in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice;

§ 1-596. Charges for legal advertising.

The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

§ 1-598. Sworn statement prima facie evidence of qualifications; affidavit of publication.

Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice ... within the meaning of G.S. 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meeting all of the requirements and qualifications prescribed by G.S. 1-597, such sworn written statement shall be received in all courts in this State as prima facie evidence that such newspaper was at the time stated therein a newspaper meeting the requirements and qualifications of G.S. 1-597. ...

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of G.S. 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of G.S. 1-597.

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.

(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher, proprietor, editor, managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence.

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MOTOR VEHICLE ADVERTISEMENTS

- Motor vehicle dealers must list their dealer license number in advertisements.
- The Federal Truth in Lending Act contains strict rules regarding advertising credit terms. If an advertisement lists particular finance terms – down payment amount, dollar amount of payments, number of payments, period of repayment, and dollar amount of the finance charge -- then the advertisement must also list each of the following:
 - cash price (or amount of a loan),
 - the required down payment (if any),
 - number, amount and frequency of payments,
 - annual percentage rate of interest, and
 - the total payments required (the "deferred payment price").

§ 20-290. Licenses to specify places of business; display of license and list of salesmen; advertising.

(a) The license of a motor vehicle dealer shall list each of the dealer's established salesrooms in this State. A license of a manufacturer, factory branch, distributor, distributor branch, or wholesaler shall list each of the license holder's places of business in this State. A license shall be conspicuously displayed at each place of business. In the event the location of a business changes, the Division shall endorse the change of location on the license, without charge.

(b) Each dealer shall keep a current list of his licensed salesmen, showing the name of each licensed salesman, posted in a conspicuous place in each place of business.

(c) Whenever any licensee places an advertisement in any newspaper or publication, the licensee's name shall appear in the advertisement.

POLITICAL ADVERTISING

The primary provisions governing political advertising in print media are found in G.S. § 126-278.39.

- The ad must include the statement: "Paid for by _____ [Name of candidate, candidate campaign committee, political party organization, political action committee, referendum committee, individual, or other sponsor]."
- If the ad relates to a ballot measure, it must state the sponsor's position either for or against the ballot measure.
- If the ad relates to the election of a "clearly identified candidate," the ad must state whether it is authorized by the candidate.
- If the sponsor of an advertisement has coordinated or consulted about the advertisement or the expenditure with the candidate who is intended to benefit, the advertisement must disclose the name of the candidate who is intended to benefit from the advertisement.
- The height of all disclosure statements required by law must be at least five percent (5%) of the height of the printed space of the advertisement (up to a maximum of 28 point), but in no event less than 12 points in size.

There are two very limited circumstances in which the disclosure requirements of G.S. § 163-278.39 do not apply:

- an individual, "uncoordinated independent" expenditures totaling less than \$1000 or
- if an individual incurs expenses with respect to a referendum.

Newspapers receiving political advertising have an obligation to maintain records related to the advertisements placed and to make those records available to the public. A sample form follows the statutory provisions below.

§ 163-278.17. Statements of media outlets regarding political advertising.

(a) Repealed by Session Laws 1985, c. 183, s. 1.

(b) Each media outlet shall require written authority for each expenditure from each candidate, treasurer or individual making or authorizing an expenditure. A candidate may authorize advertisement paid for by a treasurer appointed by the candidate. All written authorizations of expenditures signed by a candidate, treasurer or individual shall be deemed public records and copies of those written authorizations shall be available for inspection during normal business hours at the office(s) of the media outlet making the publication or broadcast nearest to the place(s) of publication or broadcast.

(c) Repealed by Session Laws 1985, c. 183, s. 2.

(d) Each media outlet shall require written authority for each independent expenditure or electioneering communication from each individual, person, or entity making or authorizing an independent expenditure or electioneering communication. All written authorizations of independent expenditures or electioneering communications shall be deemed public records, and copies of those written authorizations shall be available for inspection during normal business hours at the office(s) of the media outlet making the publication or broadcast nearest to the place(s) of publication or broadcast. The written authorization shall include all of the following:

(1) The name and address of the individual, person, or entity making the independent expenditure or electioneering communication.

(2) The information required by G.S. 163-278.39(a), provided however that the provisions of G.S. 163-278.39(a)(7) and (a)(8) shall not apply to radio or television advertising.

§ 163-278.18. Normal commercial charges for political advertising.

(a) No media and no supplier of materials or services shall charge or require a candidate, treasurer, political party, affiliated party committee, or individual to pay a charge for advertising, materials, space, or services purchased for or in support of or in opposition to any candidate, political committee, or political party that is higher than the normal charge it requires other customers to pay for comparable advertising, materials, space, or services purchased for other purposes.

(b) A newspaper, magazine, or other advertising medium shall not charge any candidate, treasurer, political committee, political party, or individual for any advertising for or in support of or in opposition to any candidate, political committee or political party at a rate higher than the comparable rate charged to other persons for advertising of comparable frequency and volume; and every candidate, treasurer, political party or individual, with respect to political advertising, shall be entitled to the same discounts afforded by the advertising medium to other advertisers under comparable conditions and circumstances.

§ 163-278.35. Preservation of records.

All reports, records and accounts required by this Article to be made, kept, filed, or maintained by any individual, media, candidate or treasurer shall be preserved and retained by the individual, media, candidate or treasurer for at least two years counting from the date of the election to which such reports, records and accounts refer.

STATEMENTS OF MEDIA OUTLET REGARDING POLITICAL ADVERTISING

[sample form]

Required pursuant to § 163-278.17

STATEMENT OF MEDIA OUTLET RECEIVING POLITICAL ADVERTISING

Placement and payment of this advertisement is authorized by _____.

Address (if this is an independent expenditure¹):

All expenditures for media expenses shall be made by a verifiable form of payment. N.C. Gen. Stat. Ann. § 163-278.8(e).

By law, media expenditure statements must be maintained for two years from the date of the election referenced in the advertisement, G.S. § 163-278.35, and must be available for inspection during normal business hours. G.S. § 163-278.17(b).

1 “Independent expenditure” means an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is not a coordinated expenditure. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party. As applied to referenda, the term “independent expenditure” applies if consultation or coordination does not take place with a referendum committee that supports a ballot measure the expenditure supports, or a referendum committee that opposes the ballot measure the expenditure opposes. N.C.G.S. § 163-278.6(9)(a).

A POLITICAL ADVERTISING CHEAT SHEET

WHO IS COVERED?

Note first, the *sponsor* of an ad bears the responsibility of complying with the disclosure requirements of the statute, not the newspaper. Additionally, a newspaper representative should never give legal advice to an advertiser.

The disclosure requirements do not apply to an individual who makes uncoordinated expenditures in a candidate election totaling less than \$1,000. A coordinated expenditure is one that is made in concert or cooperation with, or at the request or suggestion of, a candidate, a candidate campaign committee, the agent of the candidate, or the agent of the candidate campaign committee. G.S. § 163-278.39C(1).

The disclosure requirements do not apply to an individual placing ads related to a referendum. G.S. § 163-278.39C(2).

WHAT'S IN THE AD?

The ad must state “Paid for by ...” and then name the candidate, candidate campaign committee, political party organization, political action committee, referendum committee, individual, or other sponsor. G.S. § 163-278.39.

If the sponsor is created pursuant to G.S. 163-278.19(b), the “name” must be the name of the corporation, insurance company, business entity, labor union or professional association whose officials, employees, or members established the committee. If not, the name must be or include the economic interest principally represented by the committee's organizers or intended to be advanced by use of the committee's receipts. G.S. § 163-278.7(b)(1).

If the sponsor is an individual, list all sponsors who are paying for the ad.

If the ad clearly supports or opposes a particular candidate, the ad must state whether it is authorized by the candidate: “Authorized by [name of candidate], candidate for [name of office]” or “Not authorized by a candidate.” This does not apply if the candidate or candidate’s campaign committee places the ad. G.S. § 163-278.39(a)(6).

If the ad was coordinated with a particular candidate and opposes another particular candidate, the ad must state which candidate is intended to benefit from the ad. G.S. § 163-278.39(a)(7).

HOW BIG DOES THE AD HAVE TO BE?

The disclosure must be 5% of the height of the ad, but the statute puts parameters on that. It must always be at least 12 point type, and even if the ad is so big that 5% yields a type size larger than 28 point, it only has to be 28 point. G.S. § 163-278.39(b).

WHAT CAN YOU CHARGE AND HOW CAN IT BE PAID?

You cannot charge more than your customary rate for comparable advertising. G.S. § 163-278.18(a). You also cannot favor one candidate over another with your rates. G.S. § 163-278.18(b). You can give volume or other discounts, so long as they are equally available to all political ad sponsors. G.S. § 163-278.18(b).

You cannot accept cash payments for political ads. “All expenditures for media expenses shall be made by a verifiable form of payment.” G.S. § 163-278.8(e). Checks and credit cards are fine.

WHAT RECORDS DO YOU HAVE TO KEEP?

You must get written authority for each expenditure from each candidate, treasurer or individual making or authorizing an expenditure, and those records are deemed “public records” by statute. G.S. § 163-278.17(a). Thus, anyone can come ask to review those records during regular business hours. Note that the statute does not require the specifics of the ad or the schedule. For that reason, you may consider keeping those details on a different document.

You must keep the authorizations for two years from the election to which they relate. G.S. § 163-278.35.

SALES TAXES

Retailers may not pay, waive or absorb sales tax and may not publish any advertisement offering to do so.

G.S. § 105-164.9. Advertisement to absorb tax unlawful.

Any retailer who shall by any character or public advertisement offer to absorb the tax levied in this Article or in any manner directly or indirectly advertise that the tax herein imposed is not considered an element in the price to the purchaser shall be guilty of a Class 1 misdemeanor. Any violations of the provisions of this section reported to the Secretary shall be reported by him to the Attorney General of the State to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated prosecute such violators in accordance with the law.

TOBACCO

In 1996, the FDA passed expansive regulations related to advertisements of tobacco products. The prime target of those regulations was to reduce children's exposure to tobacco advertising. However, in 2000, the U.S. Supreme Court struck down those regulations, holding that the FDA was not empowered to regulate tobacco and tobacco advertising. However, the pre-1996 regulations are still in place.

- All cigarette advertising (except outdoor billboards) must include labels featuring one of four Surgeon General's Warnings.
- Advertising of smokeless tobacco products (except through outdoor billboards) must include one of three warning labels.
- The FTC regulates the format of the labels appearing in smokeless tobacco advertisements, requiring a conspicuous and prominent location as well as a particular format for the warning.

UNFAIR TRADE PRACTICES

Newspapers are not liable for advertisements that constitute unfair and deceptive trade practices, so long as they did not have a direct financial interest in the product or service advertised.

N.C.G.S. § 75-1.1. Methods of competition, acts and practices regulated; legislative policy

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

WHOLESALE & LIQUIDATION ADVERTISEMENTS

- Before accepting an advertisement using the term “wholesale,” the publisher should obtain written confirmation that the advertiser complies with G.S. § 75-29.
- Newspapers do not bear liability for non-compliant advertising. However, publishers may be required to disclose the name and address of the person who placed the advertisement and may face criminal liability for refusal to provide that information.

N.C.G.S. § 75-29. Unfair and deceptive trade names; use of term "wholesale" in advertising, etc.

§ 75-29. Unfair and deceptive trade names; use of term "wholesale" in advertising, etc.

(a) No person, firm or corporation shall advertise the sale of its merchandise using the term "wholesale" with regard to its sale prices, except as such word may appear in the company or firm name, unless such advertised sale or sales is, or are, to a customer or customers having a certificate of resale issued pursuant to G.S. 105-164.28 and recorded as required by G.S. 105-164.25 or unless the wholesale price is established by an independent agency not engaged in the manufacture, distribution or sale of such merchandise.

No person, firm or corporation shall utilize in any commercial transaction a company or firm name which contains the word "wholesale" unless such person, firm or corporation is engaged principally in sales at wholesale as defined in G.S. 105-164.3. For the purposes of determining whether sales are made principally at wholesale or retail, all sales to employees of any such person, firm or corporation, all sales to organizations subject to refunds pursuant to G.S. 105-164.14 through G.S. 105-164.14B and all exempt sales pursuant to G.S. 105-164.13 shall be considered sales at wholesale. Sales of merchandise for delivery by the seller to the purchaser at a location other than the seller's place of business shall be considered sales at wholesale for the purposes of this section.

(b) The violation of any provision of this section shall be considered an unfair trade practice, as prohibited by G.S. 75-1.1.

(c) This section shall not apply to the sales of farm products, fertilizers, insecticides, pesticides or petroleum.

§ 66-76. Definitions.

For the purposes of this Article, "closing-out sale" shall mean and include all sales advertised, represented or held forth under the designation of "going out of business," "discontinuance of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out," "removal," or any other designation of like meaning; "distress sale" shall mean and include all sales in which it is represented or implied that going out of business is possible or anticipated, in which closing out is referred to in any way, or in which it is implied that business conditions are so difficult that the seller is forced to conduct the sale; and "person" shall mean and include individuals, partnerships, voluntary associations and corporations.

§ 66-81. Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a Class 1 misdemeanor.

§ 66-82. Sales excepted; liability for dissemination of false advertisement.

...[N]o newspaper publisher, radio-broadcast licensee, television-broadcast licensee, or other agency or medium for the dissemination of advertising shall be liable under this Article by reason of the dissemination of any false advertisement prohibited by this Article, unless he has refused, on the written request of any law-enforcement officer or agency of this State, to furnish to such officer or agency the name and address of the person who caused the dissemination of such advertisement

NORTH CAROLINA ADMINISTRATIVE CODE

Title 14b Department of Public Safety

CHAPTER 15 ALCOHOLIC BEVERAGE CONTROL COMMISSION

**Subchapter 15B Retail Beer: Wine: Mixed Beverages: Brownbagging:
Advertising: Special Permits**

SECTION .1000 ADVERTISING

[Selected Excerpts]

(a) General Restrictions. An advertisement or product label shall not contain:

(1) any statement, design, device or representation that is false or misleading in any material particular;

(2) any statement that is disparaging of a competitor's products;

(3) any statement, design, device or representation which depicts nudity or is obscene or indecent;

(4) any statement, design, device or representation of or relating to analysis, standards or tests, irrespective of falsity, which is likely to mislead the consumer;

(5) any statement, design, device or representation of or relating to any guaranty, irrespective of falsity, which is likely to mislead the consumer. Nothing in this Section shall prohibit the use of an enforceable guaranty in substantially the following form: "We will refund the purchase price to the purchaser if he is in any manner dissatisfied with the contents of this package";

(6) any statement that the product is produced, blended, made, bottled, packed or sold under or in accordance with any authorization, law or regulation of any municipality, county or state, federal or foreign government, unless such statement is required or specifically authorized by the laws or regulations of such government; and if a municipal, county, state or federal permit number is stated, such permit number shall not be accompanied by any additional statement relating thereto;

(7) any statement, picture or illustration implying that the consumption of alcoholic beverages enhances athletic prowess, or any statement, picture or illustration referring to any known athlete, if such statement, picture or illustration implies, or if the reader may reasonably infer, that the use of this product contributed to such athlete's athletic achievements;

(8) any picture or illustration depicting the use of alcoholic beverages in a scene which is undignified, immodest or in bad taste;

(9) any offer of a prize or award upon the completion of any contest in which there is a requirement to purchase the advertised product, provided that, no

advertisement shall promote a game of chance or a lottery;

(10) any subject matter or illustrations inducing persons under 21 years of age to drink;

(11) any statement, picture or illustration inconsistent with the spirit of safety or safe driving programs;

(12) any scene that would be contrary to state laws and rules governing sale, storage and consumption of alcoholic beverages;

(13) any statement concerning a brand that is inconsistent with any statement on the labeling thereof;

(14) any statement, design or device representing that the use of a brand has curative or therapeutic effects, if such statement is untrue in any particular, or tends to create a misleading impression;

(15) any statement or representation that the product was manufactured in or imported from a place or country other than that of the actual origin, or was produced or processed by one who was not in fact the actual producer or processor;

(16) any statement, design, device or pictorial representation of or relating to or capable of being construed as relating to the **armed forces of the United States or the American Flag, state flag, or any emblem**, seal, insignia or decoration associated with any such flag of armed forces of the United States; nor shall any advertisement contain any statement, device, design or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia, likely to mislead the consumer into believing that the product has been endorsed, made or used by, produced for or under the supervision of or in accordance with the specifications of the government, organizations, family or individual with whom the flag, seal, coat of arms, crest or insignia is associated; or

(17) words such as “high test,” “high proof,” “full strength,” “extra strong,” or similar descriptive terms, or direct or indirect **references to the intoxicating effect of the product.**

(b) Prohibited Statements in Regard to Wine. In addition to the applicable prohibited statements as set forth in Paragraph (a) of this Rule, an advertisement or label for wine shall not contain:

(1) any statement of bonded winecellar and bonded winery numbers unless

stated in direct conjunction with the name and address of the person operating such winery or storeroom. Statement of bonded winecellar and bonded winery numbers may be made in the following form:

“Bonded Winecellar No. ____,” “B.W.C. No. ____.”

“Bonded Winery No. ____,” “B.W. No. ____.”

No additional reference thereto shall be made, nor shall any use be made of such statement that may convey the impression that the wine has been made or matured under United States Government or any state government supervision or in accordance with United States Government or any state government specifications or standards;

(2) any statement, design or representation which relates to alcoholic content or which tends to create the impression that a wine is “unfortified” or has been “fortified” or has intoxicating qualities, or contains spirituous liquor (except for a reference to spirituous liquor in a statement of composition where such statement is required by these Rules to appear as part of the designation of the product); or

(3) statement of age or dates, or any statement of age or representation relative to age (including words or devices in any brand name or trademark), except that:

(A) In the case of vintage wine, the year of vintage may be stated if it appears on the label; or

(B) Truthful references of a general and informative nature relating to methods of production involving storage or aging, such as “This wine has been mellowed in oak casks,” “Stored in small barrels” or “Matured at regulated temperatures in our cellars” may be made.

The statement of any bottling date shall not be deemed to be representation relative to age, if such statement appears without undue emphasis in the following form: “Bottled in ____” (inserting the year in which the wine was bottled). No date, except as provided in this Section with respect to statement of vintage year and bottling date, shall be stated unless, in addition thereto and in direct conjunction therewith, in the same size and kind of printing there shall be stated an explanation of the significance of such date. Provided, that if any date refers to the date of establishment of any business, firm or corporation such date shall be stated without undue emphasis and in direct conjunction with the name of the person, firm or corporation to whom it refers.

(c) Prohibited Statements in Regard to Spirituous Liquor. In addition to the applicable prohibited statements in Paragraph (a) of this Rule, an advertisement for spirituous liquor shall not contain:

(1) words “bond,” “bonded,” etc; any statement containing the words “bond,” “bonded,” or “bottled in bond,” “aged in bond” or phrases containing these or synonymous terms, unless such words or phrases appear upon the labels of the spirituous liquor advertised, and are stated in the advertisement in the manner and form in which they appear upon the label;

(2) statements of age; any statement, design or device directly or by implication concerning age or maturity of any brand or lot of spirituous liquor unless a statement of age appears on the labels of the advertised product; When any such statement, design or device concerning age or maturity is contained in any advertisement, it shall include, in direct conjunction therewith and with substantially equal conspicuousness, all parts of the statement concerning age and percentages, if any, which appear on the label. However, an advertisement for any whiskey or brandy which does not bear a statement of age on the label, or an advertisement for rum which is four years or more old, may contain general inconspicuous age, maturity or other similar representation, e.g., “aged in wood,” “mellowed in fine oak casks”;

(3) the word “pure” except as part of the bona fide name of a permittee; or

(4) the terms “double distilled,” “triple distilled” or any other similar term.

14B NCAC 15B.1004
.1004 GENERAL PROHIBITIONS

(a) For the purposes of this Rule, the following definitions shall apply:

(1) “Coupon” means a part of a retail permittee’s advertisement that is redeemed by a purchaser to the retail permittee to obtain a discount at the time of sale;

(2) “Loyalty card, discount card, or membership card” means a card that is issued by a retail permittee to customers that, upon presentation to the retail permittee, provides for the purchaser to receive a loyalty card, discount card, membership card, or coupon discount on a portion of the amount paid by the purchaser for off-premises beer or wine consumption sales at the time of sale; and

(3) “Rebate” for a retail permittee, means a promise by the retail permittee to return a portion of the amount paid by the purchaser upon the condition the purchaser completes a rebate form and the purchaser meets the terms and conditions of the rebate form’s requirements.

(b) Advertising for an alcoholic beverage shall not include a coupon or an offer for a free alcoholic beverage. No person shall advertise by means of a coupon, a rebate or a permittee’s loyalty card, discount card or membership card offering a discount off the purchase of a malt beverage or wine, except as provided in this section. A combination of the use of a coupon, a rebate or a permittee’s loyalty card, discount card or membership card shall not exceed a total of 25 percent of the advertised retail price of the item. Permittees may advertise by means of a coupon, a rebate or a permittee’s loyalty card, discount card or membership card under the following conditions:

(1) A permittee who holds an on-premises or off-premises malt beverage or wine permit under G.S. 18B-1001(1) through (6) or a wine shop permit under G.S. 18B-1001(16) may advertise by means of a coupon or a rebate in the following circumstances:

(A) The permittee may provide a coupon or a rebate for use by a customer when purchasing a malt beverage or wine sold at the permittee’s retail location for off-premises consumption;

(B) The permittee may require a customer to use the permittee’s loyalty card, discount card or membership card with the use of a coupon or rebate when purchasing a malt beverage or wine sold at the permittee’s retail location for off-premises consumption;

(C) No coupons or rebates shall be honored for the purchase of alcohol for any individual below the legal age for purchase of alcohol;

(D) A coupon or rebate shall not provide a discount exceeding 25 percent of the advertised retail price of the item;

(E) A permittee shall not advertise or distribute coupons or rebates in a publication produced for or by a higher education institution; and

(F) In any advertisement displaying a discount coupon or rebate, the permittee shall include the following statement on or about the discount coupon or rebate in a similar font to the discount coupon or rebate, "Drink Responsibly-Be 21;" and

(2) A permittee who holds an on-premises or off-premises malt beverage or wine permit under G.S. 18B-1001(1) through (6) or a wine shop permit under G.S. 18B-1001(16) may advertise discounts, coupons and rebates with the requirement of the use of the permittee's loyalty card, discount card or membership card in the following circumstances;

(A) The permittee shall require customers to present a loyalty card, discount card or membership card to receive the advertised loyalty card, discount card or membership card discount when purchasing a malt beverage or wine sold at the permittee's retail location for off-premises consumption;

(B) No loyalty card, discount card or membership card shall be honored for the purchase of alcohol for any individual below the legal age for purchase of alcohol;

(C) A loyalty card, discount card or membership card shall not provide a discount exceeding 25 percent of the advertised retail price of the item;

(D) A permittee shall not advertise permittee loyalty card, discount card or membership card discounts in a publication produced for or by a higher education institution; and

(E) In any advertisement displaying a permittee loyalty card, discount card or membership card discount, the permittee shall include the following statement on or about the discount coupon or rebate in a similar font to the discount, "Drink Responsibly-Be 21."

Direct or indirect cooperation shall not occur between a retailer and an industry member in either marketing, redemption or funding of coupons, rebates or loyalty card, discount card or membership card discounts under this Rule. Participation of an industry member in the use of coupons, rebates or loyalty card, discount card or membership card discounts is a violation of G.S. 18B-1116(a)(3).

(c) No industry member or retailer shall advertise alcoholic beverages in any programs for events or activities in connection with any elementary or secondary schools; nor shall any alcoholic beverages advertising be connected with these events when broadcast over radio or television.

(d) No industry member or retailer is permitted to advertise alcoholic beverages by use of sound trucks.

(e) No industry member or retailer shall advertise spirituous liquor upon the picture screen of any theater.

(f) Except as otherwise provided in these Rules, no industry member or retailer shall promote an alcoholic beverage product by giving prizes, premiums or merchandise to individuals for which any purchase of alcoholic beverages is required or based on the return of empty containers unless all containers of like products are accepted and considered on an equal basis with the product sold by the promoter.

(g) No on-premise permittee or his agent shall advertise any drink promotion prohibited by 14B NCAC 15B .0223. This Paragraph includes a ban on all advertisements of “2 for 1,” “buy 1 get 1 free,” “buy 1 get another for a_____ (nickel, penny, etc.),” and any other similar statement indicating that a patron must buy more than one drink.

14B NCAC 15B.1005

.1005 COOPERATIVE ADVERTISING PROHIBITED

Except for point-of-sale advertising furnished to a retailer by an industry member, a retailer and an industry member shall not directly or indirectly cooperate in a joint effort to advertise alcoholic beverages, the retailer's business, or any promotion or other event unless prior written approval has been obtained from the Commission under 14B NCAC 15C .0715 of this Chapter. This Rule shall not be construed to prohibit the use by a retailer of items and services that may be lawfully sold or provided by an industry member as described in 14B NCAC 15C .0700 of this Chapter.

14B NCAC 15B.1006

.1006 ADVERTISING OF MALT BEVERAGES, WINE AND MIXED BEVERAGES BY RETAILERS

(d) Media Advertising. A retail malt beverage, wine or mixed beverage permittee may advertise price and brand of malt beverage, wine and mixed beverage products offered for sale by means of circular, newspaper, magazine, radio, television and internet.

14B NCAC 15B.1013
.1013 REFUND OFFERS

(a) General. Refund offers may be used to advertise spirituous liquor.

(b) Conditions. A refund offer is an offer to a consumer for a rebate of money or merchandise from a liquor industry member, obtained by mailing a form. A refund offer is allowed under the following conditions:

(1) A refund may be offered only by a manufacturer, importer, distiller, rectifier or bottler of spirituous liquor.

(2) A refund may be offered only to purchasers of the manufacturer's original unopened container of liquor that is purchased from a local ABC store.

(3) A refund may be offered only when the redemption form is a part of or attached to the package or container, or when the forms are available on tear-off pads displayed in the store. Any offer that is a part of or attached to the package or container shall be placed there by the industry member who offers the refund.

(4) A refund offer shall apply throughout the state.

(5) A refund offer shall include an expiration date.

(6) A refund offer shall include a statement explaining the redemption procedure including the expiration date and length of time before the refund is sent to the purchaser. Refund offers shall be redeemed by mailing the redemption form to the industry member who offers the refund or its designated redemption agent. Such an agent shall not be a retail or wholesale permittee in the state.

(7) An industry member shall notify the commission at least 10 days before it offers a refund on liquor. The notice shall state the proposed amount of the refund, its expiration date, to whom redemption forms must be mailed and the name, address and phone number of the redemption agent. The notice shall also include a sample of the redemption form.

(8) An ABC board member or employee shall not receive refunds on offers obtained from liquor packages or containers before sale at retail.

(c) Commercial Bribery; Cooperative Advertising. No local ABC board member, board employee, retailer or retailer employee shall accept and no industry member shall pay any fee for the display or use of refund offers. The name of a retail business or retail permittee shall not appear on any refund offer.

(d) Advertising Refund Offers. Refund offers may be advertised by newspapers, magazines or direct mail but no redemption form may appear in such advertisement. No refund offer for liquor may be advertised on the premises of any retail permittee.