PROVIDING QUALITY LEGAL SERVICES TO CITIES AND COUNTIES ACROSS IOWA

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Established 1926

Sign of the Times

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SIGNS OF THE TIMES

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Sign, sign, everywhere a sign
Blockin' out the scenery, breakin' my mind
Do this, don't do that, can't you read the sign?

- The Five Man Electrical Band -

1. Five Man Electrical Band's one hit wonder "Signs" was released in 1970. Although primarily an anti-establishment song, it highlighted how both ends of the political spectrum benefitted from the use of signage during one of the most politically charged eras in American history.
2. While today's political and social climate may not *quite* rival that of the 60s and 70s, signs have likely become a more common sight in your communities over the last decade.

THE FIRST AMENDMENT

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Signs, flags, and banners are a form of protected speech under the First Amendment long recognized by the United States Supreme Court.

CONSIDER YOUR LOCATION

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Government Forums

1. A "public forum" or an "open forum" must be treated as such, and cities are not permitted to limit most expression by the public in these areas. Example: City hall council chambers during public comment time.

2. A "limited public forum" is a space specifically designated by the government as open to certain people or groups of people, but for limited purposes.
   - Meeting rooms at the library
   - Meeting rooms at City Hall designated for public use
   - Reception areas, waiting areas by counters in department areas

3. A "non-public forum," however, is a space that is not open to the public for expression. Well-established examples of non-public forums are jails, airports, public schools, and places where at least an "important" governmental interest exists in preventing citizen access. Government has broad powers to limit expression in these places.

Private Property

1. While not limitless, individuals generally have broad freedom to exercise their free speech rights on their own private property. This is due in large part to the US Supreme Court's recognition of a private landowner's right to the free use of their property.

EXAMPLES OF A LIMITED PUBLIC FORUM

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1. Meeting rooms at the Library;

2. Meeting rooms at City Hall designated for public use;

3. Reception areas, waiting areas by counters in department areas;

4. Public parking lots or public sidewalks approaching public buildings.

EXAMPLES OF A NON-PUBLIC FORUM

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1. City Office Spaces: Any place where employees alone are permitted where work is performed and where confidential information is handled or stored;

2. Private Offices: Any office or cubicle assigned to an individual where confidential information is handled;

3. Storage Places: Any storage area where computers, files, disc drives, flash drives, servers, or other information is stored.

REGULATION IN NON-PUBLIC FORUMS

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The government is allowed to regulate non-public forums with…greater latitude. Non-public forums include…publicly owned property devoted almost exclusively to purposes ***other than individual expression***. *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).

VALID TIME, PLACE AND MANNER RESTRICTIONS ON EXPRESSION

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The United States Supreme Court has repeatedly held that to pass muster under the First Amendment for public forums, time, place and manner "TPM" restrictions must be content-neutral, be narrowly drawn, **serve an important government interest**, and leave open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

IT'S ALL ABOUT THE CONTENT: POLITICAL

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1. Content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

2. Municipalities are almost entirely prohibited from regulating the message that signs, flags and banners seek to convey. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015) (noting message-based restrictions are subject to the Supreme Court's rigorous "strict scrutiny" standard).
   - To pass "strict scrutiny", the governing body must have passed the law (ordinance) to further a compelling governmental interest, and the law (ordinance) must be narrowly tailored to achieve that interest.

3. This limitation is especially true when the message of the sign is political in nature.
   - "[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association"—a right which the Supreme Court has recognized as "integral to the operation of the system of government established by our Constitution." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203–04 (2014).

4. Preserving the aesthetic appeal of a city is generally not a government interest that justifies restricting its citizen's right to voice their political opinions through signage. *Reed*, 576 U.S. at 171.

IT'S ALL ABOUT THE CONTENT: POLITICAL

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1. Blanket prohibitions on all political signs on private property are invalid. *See Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985).

2. General limitations on the number of political signs on private property are also a problem. *See Arlington County Republican Committee v. Arlington County*, 790 F. Supp 618 (E.D. Va. 1992) (striking down ordinance that allowed residents to display only two political signs on their property).

IT'S ALL ABOUT THE CONTENT: COMMERCIAL

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1. Commercial speech is expression relating solely to the economic interests of the speaker and its audience. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

2. The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. If the commercial speech is protected, then a regulation on that speech is valid only if it (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) reaches no further than necessary to accomplish the given objective. *Id* at 563-66.

IT'S ALL ABOUT THE CONTENT: COMMERCIAL

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1. *Metromedia, Inc. v. City of San Diego*: San Diego adopted an ordinance that substantially limited the construction of outdoor advertising signs. Applying the *Central Hudson* test, the U.S. Supreme Court found that San Diego's twin goals of (1) traffic safety and (2) aesthetics constituted a substantial government interest and that the ordinance directly advanced those interests.
2. *City Council v. Taxpayers for Vincent*: The city had an ordinance that prohibited the posting of signs on public property. Vincent was a political candidate who attached signs supporting his election to city-owned utility poles which were removed by city employees acting pursuant to the ordinance. The U.S. Supreme Court began by reaffirming *Metromedia*'s decision that aesthetic interests do sufficiently justify a content-neutral prohibition of billboards. The Court then found that the ordinance was narrowly tailored to serve the city's interests in eliminating visual clutter. Finally, the Court concluded that there were sufficient alternative avenues for Vincent to convey his message.

THE CITY OF LADUE

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City of Ladue v. Gilleo: On December 8, 1990, Ms. Gilleo displayed a sign on the front lawn of her home in Ladue, Missouri that read: "Say No to War in the Persian Gulf, Call Congress Now." The sign was repeatedly knocked down and when Ms. Gilleo called the police for assistance, they informed her that signs like hers were prohibited in the City of Ladue. Ms. Gilleo brought suit against the City, the Mayor, and the members of the City Council alleging that the City's sign ordinance violated her First Amendment right to free speech. 512 U.S. 43 (1994).

- Ladue's ordinance prohibited all signs within the City limits unless they fell within one of ten possible exceptions

Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression. . . . Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else or conveying the same text or picture by other means.

TAKEAWAYS FROM *LADUE*

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1. A total ban on political signs in residential areas is unconstitutional and would likely be unconstitutional even if the ban extended to both public and private property.
2. A regulation of the use of temporary signs may be construed as a restriction on political signs and therefore could be held unconstitutional. *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).
3. A ban on offsite commercial speech may be constitutional provided that it furthers a legitimate governmental interest. *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981).
4. However, a prohibition of all commercial speech will be struck down unless there is a reasonable fit between the legislature's ends and the means chosen to accomplish those ends. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

BUT WHAT IF THE SIGN IS OFFENSIVE?

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1. There are limits to the First Amendment's protection. Free speech rights do not extend to obscenity, defamation, and fighting words. However, these categories of unprotected speech are very narrowly defined. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

2. Merely causing offense does NOT cause speech to lose protection. *See Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976) ("Words must do more than offend . . . the addressee to lose the protection of the First Amendment.").

3. For example, while we often refer to vulgar language such as "f**k, s**t, etc." as obscenity, speech that is constitutionally "obscene" must "appeal to the prurient interest in sex," depict or describe sexual conduct in a patently offensive way, and lack "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

HATE SPEECH

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1. As vile as the speech may be, you should start from the position that hate speech is protected under the First Amendment. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Nationalist Socialist Party of Am. V. Village of Skokie*, 432 U.S. 43 (1977).

2. Some communities and many colleges/universities have attempted to regulate hate speech as a form of "fighting words."

3. While *Chaplinsky* and its "fighting words" exception as never been overturned, every time the Supreme Court has reviewed a case involving fighting words over the last 60 years, it has reversed the conviction. The Court has relied on three techniques to overturn convictions without overruling *Chaplinsky*:
    1. Narrowed the exception as only applying to speech directed at another person that is likely to produce a violent response (face to face).
    2. Finding the laws prohibiting fighting words unconstitutionally vague or overbroad.
    3. Finding that laws that prohibit some fighting words – such as expression of hate based on race or gender – to be impermissible content-based restrictions on speech.

WHAT CAN YOU DO: CONTENT-NEUTRAL REGULATION

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1. If possible, call your legal counsel for advice. The First Amendment and free speech is a legal minefield with numerous considerations that we cannot cover in the time we have today.

2. An ordinance regulating speech is content-neutral, if it applies to all speech regardless of the message.
   - Intermediate scrutiny must still be met: (1) The ordinance must further an important government interest and (2) must do so by means that are substantially related to that interest.
   - Must also leave open ample alternative channels for communication.

3. In *Reed v. Town of Gilbert, Ariz*. (2015), the U.S. Supreme Court made clear that a city may lawfully regulate the physical characteristics of signs but not the sign's message. This is how the First Amendment balances the aesthetic and safety interests of the whole community without infringing on individuals' right to free speech.
   - Review your zoning and similar ordinances very carefully before attempting to regulate a sign on this basis. Expect a challenge.

TIPS FOR DEALING WITH SIGNS

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1. DOCUMENT EVERYTHING.
2. If law enforcement is the first to respond to a complaint, they should try to avoid immediately directing the sign be removed.
3. Pictures should be obtained of the sign.
4. Call your attorney.
5. Consult your code of ordinances.

EXAMPLES

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My Dad told M, when He was little, He Taught little girls about The birds and Bees In a Green Tree House was your Daughter Taught In a Green Tree House

My Mom told me when she was little, H Didn't Ask Man, I A greentree House HIV was eating the neighbood girls Cookie

QUESTIONS?

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