

## **LAW REVIEW**

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### **IS LEAFLETING OF UNOCCUPIED CARS ON PUBLIC STREETS LEGAL?**

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Does it bother you when you return to your car, perhaps after shopping, and someone has placed a leaflet under your windshield wiper? Do you respond by saying to yourself, "How neat is that, someone left a political flier (or advertisement) on my car. I'm so lucky to live in a country that allows the exercise of free speech." Or do you respond like I generally do, mumbling to yourself, "Who the heck stuck this paper on my car? Can they do that?"

#### **Klein v. San Clemente**

On June 2, 2007 Steve Klein and several others were distributing leaflets to passing pedestrians expressing their views on immigration policy. Then they started leaving leaflets under the windshield wipers of unoccupied vehicles parked along San Clemente streets. Deputies told Klein that "throwing" or "depositing" advertisements on any vehicles was a violation of San Clemente's anti-litter ordinance. When told he would be cited, Klein stopped distributing leaflets.

But he did not stop there, he filed suit in federal court arguing that San Clemente's vehicle leafleting ordinance violated his free speech rights under the First Amendment of the federal Constitution and the Liberty of Speech Clause in the California Constitution.

The district court threw out his case. Klein appealed to the Ninth Circuit Court of Appeals, considered the most liberal in the federal appellate system. Indeed, the judge that wrote the opinion is the most liberal on the Ninth Circuit bench.

#### Anti-litter Ordinance

San Clemente's anti-litter ordinance is straight forward: "No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a non-commercial advertisement to any occupant of a vehicle who is willing to accept it."

#### First Amendment

Not that it needs repeating, but the First Amendment, ratified on December 15, 1791, reads as follows: "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."

The California Liberty of Speech clause provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

San Clemente argued it had a significant interest in preventing litter and “promoting aesthetic values” and preventing unauthorized use of private property.

I agree, but I am one of those few that believe the First Amendment is overused and overrated.

### Free Speech Analysis

As to San Clemente’s litter argument, the Court of Appeals found that the City would have to find some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets: “Discarded paper, coffee cups and food wrappers can also add to litter, but we remain free to carry beverages and candy bars on public streets and cities do not eliminate all possibilities of litter.” The Court concluded that the City did not provide any evidence that placing leaflets on parked cars results in more-than-minimal amounts of additional litter.

### Private Property

The Court noted that the California Supreme Court allows leafleters to leave literature on homeowner’s doorsteps and porches and that the claim of “private property” is not sufficient to justify an across-the-board ban on door-to-door solicitation. Likewise San Clemente cannot justify an across-the-board ban on placing leaflets on windshields of empty vehicles parked on public streets. The minor burden on recipients of disposing of unwanted leaflets cannot justify hampering speech.

“The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury...particularly, as here, a plaintiff seeks to engage in political speech, as “timing is of the essence in politics” and “a delay of even a day or two may be intolerable.”

Remember this case involves leafleting of cars on public streets. It may not be applicable to narrowly-drawn leaflet restrictions in private malls.

#### Comment

I am often surprised at how far the courts will go to protect “free speech,” especially when it is unwanted and a case of one person pushing their political views (or advertisements) on another. I am not sure this case will be deemed significant enough to make it to the U.S. Supreme Court.

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