

ADM.24
PUBLIC INVITATIONS TO DISPLAY ART

Issued: 12/2002
Revised: 06/2009
Reviewed: 12/2014
Reviewed: 06/2017

POSSIBLE EXPOSURES:

When a Member creates a public forum and invites the public to display art, then censors or rejects certain artists or art work, the Member's actions may create liability exposure for violation of the artist's First Amendment rights. The use of an "Arts Commission" or any other volunteer oversight group or guild to enforce the Member's censorship standards may not protect the Member against liability for First Amendment rights violations.

In the United States, freedom of expression, artistic and otherwise, is ultimately governed by the First Amendment to the U.S. Constitution. The First Amendment says, "Congress shall make no law abridging the freedom of speech." The word "speech" in the First Amendment includes much more than verbal expression. The expression of artists, including the use of symbolism, is also protected. The Washington Constitution Article I, § 5, provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." This provision differs from its federal counterpart, but has been construed in a similar manner when defining what are considered "public forums."

Members may not enforce a content-based exclusion unless its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. A Member may enforce regulations of time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

"Content-neutral" generally means no restriction on the nature of the message which the artist tries to communicate through the artwork and prohibits restriction based on religious, ethnic, racial, political, or sexual preference and/or content.

RECOMMENDED CONTROLS:

1. Types of Public Forums

The Supreme Court identified four types of public property for First Amendment expression purposes:

- A. Traditional Public Forums include streets, sidewalks, and parks.
- B. Open or Designated Forums are other public owned property designated, by government action, ordinance or permissiveness, to be used by private groups.
- C. Non Public Forums such as government buildings, libraries, etc.

- D. Limited Public Forums, such as a City or Town hall, library, and community center that have been opened for use (invitation) by the Member as a place for expressive activity.

2. What do we mean by Works of Art

Works of art include, but are not limited to: sculpture, painting, drawing, print, photograph, film or videotape, and crafts in any material or combination of materials such as clay, fiber, textiles, wood, glass, metal or plastic.

3. Excluding Certain Categories of Public Speech from a Public Forum

- A. The Washington State Constitution is generally more protective of First Amendment rights to free speech and/or expression than the U.S. Constitution. Based on the standards set forth in Washington law, it appears that it would be very difficult for a Member to impose speech restrictions in the context of an invitation by the Member to the public at large to submit public art for display at a public forum.
- B. Washington law suggests that even categorical exclusions based upon non-obscene but troublesome subject matter (i.e., “no profanity”, “no nudity”, “no graphic or symbolic depiction of sexual intercourse”, “no portrayal of racial hatred”) would be subject to a strict scrutiny standard, and it is unlikely that such restrictions on expressive speech in a public forum would be upheld.
- C. Therefore, it is recommended that Members do not invite public art for display at public forums if the Member is concerned about the display of potentially controversial or offensive materials, which may not meet the test for obscenity.
- D. Privately financed and donated monuments for permanent display in a Member park or other public area are “government speech,” not subject to the Free Speech Clause and possibly not be regulated by the Establishment Clause. Members may accept or decline donated monuments as they see fit.

4. The “Three-Pronged Test” for Obscenity

There are limited categories of speech such as “obscene speech”, which are specifically defined and are not constitutionally protected. For these limited categories of speech, a Member may restrict or exclude such speech or expressive activity, whether in the form of pure speech or art.

In the most important case on freedom of expression, *Miller vs. California*, the Court established a “three-pronged test” for obscenity. The Court’s decision stated that obscene material is not protected by the First Amendment and that such speech may be regulated by the state under certain circumstances.

Obscenity is a narrow category describing materials that meet all three prongs of the definition below:

- A. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
- B. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law [RCW 7.48A.010 (2)].
- C. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Citizen complaints describing the artwork as “offensive” or “disgusting” is generally insufficient basis for rejecting the subject artwork.

5. Develop and Adopt a Written Policy

- A. A Member should develop a written policy addressing the display of art in public places that includes, but is not limited to:
 - 1. Purpose
 - 2. Definitions
 - 3. Artwork agreement
 - a) Written agreement with the artist that includes:
 - 1) Period of time artwork is to be exhibited.
 - 2) Responsibility for costs of permits (if required), site preparation, transportation, storage, installation, damage and liability insurance, removal of the artwork, and restoration of the site.
 - 3) Site location of the artwork.
 - 4) Conditions for sale of the artwork, if applicable.
 - 5) Conditions for termination of the agreement by the artist, donor or the Member.
 - 4. Types of Acquisitions (i.e., commissioned, purchased, acceptance of donated work, loaned, etc.)
 - 5. Selection criteria for artwork
 - a) Condition (i.e., good condition, free of safety hazards)
 - b) Availability of an appropriate site for display (size of art may be considered to determine if it fits available space)
 - c) Time Schedule
 - d) Maintenance and preservation
 - e) Restrictions
 - f) Appropriateness of artwork
 - 1) The artwork must not be lewd or obscene as defined in RCW 7.48A.010(2)
 - g) The safety of the artwork to the public (i.e., can it be placed so as to not create an unacceptable risk of physical injury to the public, traffic hazard, or be an attractive nuisance to children who could be injured playing on it)
 - 6. The Member should exercise final control and authority in the selection and/or (especially) the rejection of submitted artwork. Regardless of whether the Member utilizes an art commission or oversight committee, the

Member may be ultimately liable for any violations of an artist's First Amendment rights.

6. Open Invitations to Display Art (Indoors or Outdoors)

If a Member does not have the staff time, resources, desire, inclination, or capability to create, implement, and consistently administer a clearly articulated arts program that is considerate of the artist's First Amendment rights, WCIA recommends against creating any "limited public forums" by open invitation to the community.

7. Purchase of Art by Public Entities

Governmental entities may purchase art for display in public buildings and publicly owned outdoor locations. When acting as a purchaser of art in a proprietary capacity, governmental entities are not subject to the free speech restrictions cited above. (The same holds true for privately donated, permanent monuments. See above.) The only restrictions may be those which the entity has imposed upon itself by rule or which the entity has agreed to by contract with the artist.