

Countdown to November – Political Broadcasting Rules to Consider in the Last Days Before the Election



By David Oxenford, Davis Wright Tremaine LLP

We are now entering the height of the political broadcasting season. The window for lowest unit rates for the November elections opened on September 5, so stations should be now charging all candidates for political office – Federal, state and local – the lowest rate that any commercial advertiser gets for a spot of the same class run at the same time. With a hotly contested Presidential election, as well as Congressional and local elections seemingly being fought with ever increasing animosity and advertising budgets, broadcasters need to worry about much more than simply rates - and deal with the entire maze of compliance with the FCC's political advertising rules.

With candidates appearing on a greater and greater range of programs – from hard news to talk shows to late-night comedy - broadcasters have to be wary of the FCC's equal opportunities rules. These rules require equal time for candidates if their opponents get free time on a station and equal opportunities to buy time if their opponents buy an advertising schedule. To the benefit of broadcasters, in recent years, the FCC has interpreted the "news interview" exception to the equal time rules very broadly, concluding that virtually any interview program that is regularly scheduled is exempt unless the guests are selected for blatantly political reasons. But this latitude may have made some broadcasters careless, as they need to remain wary of a candidate appearance in non-interview settings that give rise to an equal time claim (e.g. on a scripted entertainment program or in a PSA). Stations also need to consider equal opportunities in connection with the sale of spot time, especially late in the campaign when demand is highest. Be careful not to contract with one candidate early in the campaign for a very heavy schedule to run late in the political window without leaving time for equal opportunities for the opponent who decides to buy a matching schedule shortly before election day.

One area that broadcasters are dealing with more frequently is the political use of a station's website. For the most part, unlike a broadcast station that is subject to the full panoply of the Commission's political rules, these rules largely don't apply to station websites. About the only informal pronouncement to come out of the FCC on the use of a station website is that, if the website is sold to one candidate as part of a package with broadcast spot time, then the same offer should be made to competitors of the candidate. This is not an application of FCC's the rules to the Internet, but instead just a restatement of a long-standing FCC policy that, if one advertiser gets extra benefits that come with the purchase of ad time, and those benefits would be of value to a candidate, they should also be offered to the candidate.

While the freedom from reasonable access, lowest unit rates, and equal time may seem like a boon to broadcasters, that freedom comes with a price. For instance, the "no censorship rule," which forbids a station from editing the content of a candidate's broadcast spot or rejecting that spot based on its content unless that spot violates a Federal felony statute, does not apply to Internet spots. Because candidate spots broadcast on a station cannot be censored, the station has no liability for the content of those spots. So the station is immune for libel and slander, or copyright violations, or other sources of potential civil liability for the content of a candidate's broadcast spots. But since these spots can be censored or rejected on the station's website, a station could have theoretical liability for the content of the Internet spot even though it could run the exact same spot on the air without fear of any liability. For instance, just recently, CBS asked YouTube to remove a McCain spot attacking Senator Obama as the spot used a copyrighted clip of a Katie Couric commentary without permission. Had that spot been run on a broadcast station, the station would have been forbidden from pulling the spot.

Similar liability concerns arise for broadcasters in connection with attack ads run by third-party groups – groups not "authorized" by the candidates. As broadcast stations are under no obligation to run ads by third party groups and have the full right to reject these ads based on their content, like an Internet spot, a station has potential liability for defamation or other civil liabilities that arise from the content of an ad that airs. Once a station is put on notice that the a third-party ad may be trigger civil liability (such notice usually coming from the candidate being attacked), the station needs to do its own fact checking to determine if there is a basis for the claims made. The determinations as to whether or not an ad can

give rise to liability are often difficult to make as the ad's creators usually have hundreds of pages of documentation that they say support their claims, while the person being attacked usually has equally weighty documentation to refute the claims. Thus, when such issues arise, each station needs to carefully review these spots and the backing documentation and consult with their lawyers.

Stations also need to assure that third party spots comply with FCC rules. The required sponsorship identification must set out the true sponsor of the ad, in writing for at least 4 seconds at 4% of screen height. Under FEC rules, there must also be a verbal identification of the sponsor. In addition, for any third-party ad requests dealing with Federal candidates, the station's public file should contain the following information:

- 1) The name of the group sponsoring the ad**
- 2) Its principal officers or its directors**
- 3) Whether the request to buy time was accepted or rejected**
- 4) If the schedule was accepted, the date and approximate time the spots will run**
- 5) The class of time purchased**
- 6) The rate charged**
- 7) The name of the candidate to which the ad refers**
- 8) After the spots have run, the exact time the spots ran**

There are many other issues that may arise in this political broadcasting season. For more information about some of these issues, you can consult our Political Broadcasting Guide,

[http://www.dwt.com/practc/broadcast/bulletins/12-07_PoliticalBroadcasting\(Guide\).pdf](http://www.dwt.com/practc/broadcast/bulletins/12-07_PoliticalBroadcasting(Guide).pdf)