

Political Ads and Libel Claims

It always happens around campaign season. A candidate runs an ad criticizing the opponent. The opponent's campaign lawyer issues a letter to the station claiming that the ad is blatantly false, or libelous, or violates some law. The letter demands that the station discontinue the ad or face a law suit. It's already happened with a couple of ads this year.

From *The Advocate* of Baton Rouge:

Vitters threatens to sue stations on ad

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Attorneys for U.S. Sen. David Vitter, R-La., threatened Thursday to sue radio stations if they continued airing a commercial critical of the senator's past conduct with women. Vitter's attorneys claimed in a letter to the radio stations that the 60-second advertisement is "false, misleading and defamatory." The spot talks about Vitter's alleged battery of a woman and of the arrest of the senator's former aide, Brent Furer, on charges stemming from an incident involving the aide's girlfriend. The ad, paid for by Senate candidate and former Supreme Court Justice Chet Traylor, is being run on radio stations around the state.

<http://www.2theadvocate.com/news/101134784.html>

What should the station do: pull the spot? Make the candidate prove the allegation or change the copy?

Most political broadcast rules are complex, subject to interpretation, exceptions and qualifications. But if there is a rule in political broadcasting which is nearly absolute it is this: a use cannot be censored in any way. In the presence of a "use," the broadcaster is prohibited from censoring the advertisement. Moreover, candidates for federal elective office are entitled to access the station even when the licensee may have decided not to cover the election.

For example, several elections ago, a claim was made that a spot depicting Senator Paul Wellstone in a positive light had to be pulled because it contained a segment of a CNN news report (depicting Senator Wellstone), would constitute an unlawful copyright infringement and subject the station to liability. The broadcast was intended to be an unflattering depiction of the Senator, but it aired in an advertisement intended to be supportive of him and therefore constituted a positive depiction which would be a "use" under Section 315 of the Communications Act. The station was powerless to censor the ad that it was nevertheless required to broadcast.

A "use" is any positive use of a candidate's voice or picture in a context not otherwise exempt under Section 315 of the Communications Act. Thus, any program or commercial which identifies the candidate by voice or picture in a positive way and is not a *bona fide* newscast, *bona fide* news interview, *bona fide* news documentary or on-the-spot coverage of a *bona fide* news event, cannot be censored by the broadcaster. As a result, the broadcaster is provided immunity from liability for its content. Broadcasters, who air political advertisements pursuant to Section 315, are immune from liability with respect to their content. Farmers Educational and Co-Op. Union v. WDAY, Inc., 360 US 525, 79 S.Ct. 1302 (1959).

Accordingly, a broadcast station running either of these ads would be *prohibited* from censoring or editing it in any way other than to assure that it has the proper sponsorship identification.

While most of the FCC cases dealing with immunity under Section 315 concern claims of libel and slander, the principle holds true across a variety of circumstances. The Wellstone case shows that it applies to claims of infringement. Another noteworthy example occurred in the 1992 campaign season. There was a proliferation of television advertisements by candidates for federal office depicting abortions and aborted fetuses in graphic terms. These candidates invoked the "reasonable access" provision of Section 312(a)(7) of the Communications Act to demand that the spots be aired. The licensees contended the advertisements were obscene or indecent, placing them in the awkward position of either violating the law against indecent and obscene broadcasts or the law requiring reasonable access for federal candidates. A federal district court judge in Atlanta ruled that stations could restrict a federal candidate's graphic abortion advertisement to the hours of midnight to 6 A.M., when children were less likely to be in the audience. The Commission allowed that a licensee who made reasonable, good faith judgment that a spot was indecent could restrict it to that "safe harbor" period. Subsequently, however, the Court of Appeals for District of Columbia Circuit struck down the Commission's "safe harbor" for indecent programming. In October 1992 the Commission issued a *Public Notice* seeking comments, but has never released any decision. Thus, the ability of licensees even to channel political advertising they believe to be indecent to dayparts when children are not likely to be in the audience remains unlikely. The Commission has even held that threats against the station do not warrant an exemption from the no-censorship provision.

Procedural censorship, such as requiring a tape or script in advance (to screen for content) or attempting to limit the topics to be discussed, is also forbidden. The broadcaster may request, but cannot compel, an advance tape or script, but only to check its qualification as a use, to verify that it contains proper sponsorship identification, and to measure its length. Similarly, if a candidate wishes to appear live, the licensee may not inquire as to the proposed content beyond what is necessary to provide required facilities.

A licensee can add content-neutral audio and/or visual disclaimer tags to political spots, provided it does not discriminate among candidates. An acceptable disclaimer might identify the spot as a paid political advertisement or state that the views expressed do not represent those of the station. To avoid the implication of discrimination, such a tag must be added to all advertising broadcast on behalf of every candidate for the same office. A licensee may not add a disclaimer that in any way might be construed as an editorial comment.

What's behind this policy? The policy was clearly explained by the Supreme Court in the *WDAY* case. The Court recognized that permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which 315 was passed - full and unrestricted discussion of political issues by legally qualified candidates. Here's how Justice Black explained it for the Court.

Section 315 dates back to the Radio Act of 1927, where "Congress first provided a comprehensive federal plan for regulating the new and expanding art of radio broadcasting. Recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by insuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss. Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication. It is in line with this same tradition that the individual licensee has consistently been denied "power of censorship" in the vital area of political broadcasts." *WDAY* at p. 529.

Moreover, a broadcasting station would be placed in a nearly impossible position if required to make decisions whether material in a political ad is libelous. "Whether such a statement is actionably libelous is an even more complex question, involving, as it does, consideration of various legal defenses such as "truth" and the privilege of fair comment. Such issues have always troubled courts. Yet, under petitioner's view of the statute, they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration of basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent political decision. We cannot believe, and we certainly are unwilling to assume, that Congress intended any such result." See *WDAY* at p. 530 <http://supreme.justia.com/us/360/525/case.html>.

Short answer: if a broadcaster receives a letter alleging defamation, or any other actionable or illegal matter and demanding that it pull a candidate spot that contains a "use," tell the sender to learn the law.

If you have any questions, please contact [Gregg Skall](#) or any member of the firm's [Telecommunications Law Group](#).

September 2010

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