

Broadcaster Liability After Citizens United

The 2010 mid-year election season has seen several privately placed electioneering advertisements for legally qualified candidates for public office, some of which are highly negative. These ads are placed by private corporations, unions or other groups that are not the candidate him- or herself, and therefore do not constitute a “use” under the Communications Act of 1934. Some ads of these are drawing threatening letters from the attacked candidate’s legal counsel.

By now, most broadcasters realize that the recent Supreme Court decision in *Citizens United* has indeed opened the door for significant new sources of advertising in the political process by corporations and unions, particularly in the sixty-day period prior to the general election. Reports indicate that political broadcast advertising this season is trending up significantly.

Political parties and outside groups have been more negative, going on the attack in nearly 80 percent of their ads while spending \$150 million, \$41 million ahead of the 2006 pace. *The Huffington Post*, August 27, 2010.

http://www.huffingtonpost.com/2010/08/27/2010-political-ad-spendin_n_696648.html

An interesting byproduct of that trend, however, is new emphasis upon the issues of liability for content of the political message.

It is well established that broadcasters are legally prohibited from censoring or editing the content of a broadcast message when it is presented in the context of a “use” by a legally-qualified candidate for public office. Consistent with that principle, the U.S. Supreme Court has held broadcasters immune from liability for the content of such a message. However, this is not the case with messages of other speakers. Electioneering messages of corporations, special interest groups, unions or any speaker other than a candidate making a “use” of the station can expose the licensee to liability. These messages have produced a new breeding ground for threats of legal action intended to intimidate a station into ceasing further broadcasting of the message. The threats can be claims of defamation, inaccuracies, violation of individual property rights such as copyright, and a general failure to exercise the broadcaster’s public interest duty, often implying a challenge against its license at renewal.

For example, the American Federation of State, County & Municipal Employees (AFSCME) recently began running an ad in Missouri claiming Congressman and U.S. Senate candidate Roy Blunt voted to raise his own pay five times while in Congress. A law firm representing the campaign sent a cease-and-desist letter to broadcasters demanding that they cease running the spot, that “In fact, Congressman Blunt has never voted, through H Res 517 or otherwise, to raise his own pay . . . [and] the advertisement is therefore not only maliciously false and misleading, but also potentially defamatory of the character of a United States Congressman . . . therefore, you are obligated to refrain from airing this advertisement.”

These situations are cause for thoughtful action and response by the broadcaster. A careful review of FCC policy on the topic is important. On several occasions dating back to at least the

1960 Program Policy Statement, the Commission has emphasized the licensee's obligation to avoid the presentation of deceptive advertising on radio and television. Initially the Commission stated that every broadcast licensee had the responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter.

Eleven years later the Commission declined to adopt specific rules to eliminate deceptive advertising, ruling on a petition of "TUBE" (Termination of Unfair Broadcasting Excesses) and a companion case against CBS and Washington radio station WTOPⁱ. The Commission stated its preference for deferring to the Federal Trade Commission on matters of advertising copy, while reserving the right to act in a clear, flagrant case. It did say that when an advertisement is the subject of an FTC complaint, the licensee should acquaint itself with the charges and the advertiser's response and then make a responsible determination as to whether to continue to carry the advertisements. From this one might infer a duty to make at least a modest investigation of charges against an advertisement. However, the Commission also said that it would not impose on broadcasters the duty to conduct their own tests. This seemed like a reasonable standard to live by: relying upon the licensee's obligation to use discretion and judgment in evaluating advertising offered for broadcast.

Soon after its TUBE decision, the Commission had occasion to set the standard for broadcaster responsibility for truth or falsity in the context of political matter. In *Complaint by Alan S. Burstein*ⁱⁱ, it said that in the absence of a candidate "use":

. . . each licensee may exercise its own judgment as how best to serve the public interest by presenting contrasting views, and what particular material is to be presented. Intervention by the Commission regarding specific material being broadcast for or against a proposition, even to the limited degree you urge, might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being broadcast on either side of a currently controversial issue – a position which would be inappropriate for a governmental licensing agency. . . . The Commission will not attempt to judge whether statements broadcast on political or other controversial public issues are true or false or whether a licensee was justified in either broadcasting or rejecting them. To do so would be to attempt to place the Commission itself, the government licensing agency, in the role of national arbiter of the "truth." Although we would be most concerned if substantial evidence were presented that a licensee had acted in bad faith or deliberately discriminated against a political candidate, we have no such evidence before us here.

In 1986, the Commission pounded in the final nail. In considering policies regarding broadcast licensee character qualifications, the Commission specifically took on the question of deceptive advertising and ruled that a broadcaster would jeopardize its qualification to remain a licensee only if it were to engage in a "knowing presentation" of falsity – an active participation in perpetrating a deception upon the audience, either by its actual involvement in the knowing creation of a deliberately fraudulent ad or by awareness of Federal Trade Commission ("FTC") or other final governmental action involving the advertisement in question.

Clearly, the Commission has no intention to intervene and second-guess a broadcaster's judgment – unless the licensee knows an ad to be false and broadcasts it nonetheless. Absent such circumstances, threats of taking the broadcaster to the FCC ring hollow. That leaves the

broadcaster to evaluate its liability for civil actions such as defamation. Generally, libel and slander occur when a person or entity communicates false information that damages the reputation of another person or entity. But how does that principle apply to public figures?

In the 1964 case of *The New York Times v. Sullivan* the United States Supreme Court set a new and important standard for defamation of a public figure (that is, one who places him- or herself in the public limelight). This includes a candidate for elective office. In recognition of the Founding Fathers' desire to foster the free flow of ideas to create an informed citizenry, the Court extended First Amendment protection to nearly all speech, even if defamatory, in connection with political issues. The Court held that the principle of open debate of political issues and government was too important to citizens in a democracy, where a free marketplace of ideas is critical to informed decisions. It also recognized that open debate frequently becomes caustic and emotional, with sharp attacks infused into the effort to persuade. That is certainly as valid a characterization of the political process in the 21st century as it was in 18th century America. In order to balance that goal against an individual's right to protection against blatantly false accusations, the Court imposed upon public figures claiming to have been defamed the burden of proving that a defendant acted with actual malice – that is, knowledge that a statement was false or was very likely to be false.

So here too, to be held liable for defamation, the broadcaster's active participation in perpetrating statements it knew or strongly suspected to be false would be required. While ultimately this involves a determination of fact by the trier of fact in a court of law – and that process can be very time-consuming and expensive – the simple act of making a preliminary inquiry to establish a reasonable basis for the statement (and reviewing the response to be sure that it seems plausible) should be sufficient to overcome a charge of actual malice.

In the Roy Blunt campaign case mentioned above, stations sent a letter to AFSCME's agency requesting a response to the law firm's letter. The agency responded with a line-by-line argument supporting the statements in the ad. That alone may have been sufficient for the broadcaster under the standards reported above in this article, but the Missouri Broadcasters asked Womble Carlyle Sandridge & Rice, PLLC to analyze the response. As might be anticipated, our analysis revealed the truth to be quite gray, allowing either side to claim it is right, thus proving the wisdom of the Court in *The New York Times v. Sullivan* and enabling the broadcasters to use their own judgment as to whether to continue running the ad in question. Serendipitously, a day later, an article appeared on the website www.Congress.org providing a description of the Congressional pay process strikingly similar to the Womble Carlyle analysis. http://www.congress.org/news/2010/08/23/how_congress_sets_its_own_pay

So, generally speaking, when faced with allegations of libel, slander, fraud or misrepresentation regarding a public figure in an ad that is not a "use," it is advisable to ask the sponsor of the ad for justification. If the response appears reasonable, the Commission and the courts do not require that the broadcaster be the guarantor of its truth, but only that the broadcaster not act with malice or knowingly participate in a deception. But, as always, factual situations differ and often present complicating factors, so be sure to consult your lawyer.

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

ⁱ *Adoption Of Standards Designed To Eliminate Deceptive Advertising From Television (Petition Of Tube (Termination Of Unfair Broadcasting Excesses))* 32 FCC 2d 360 (1971)

ⁱⁱ 43 FCC 2d 590 (October 19, 1973)

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