

Political Advertising Issues for 2008

Legal Alert
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Garvey Schubert Barer Legal Update, September 23, 2008.

Some new twists in the time-tested political advertising rules are cropping up this Fall. Here are a few to consider as the November 4th election approaches.

1. *If you stream your terrestrial broadcast signal, does the no-censorship rule protect you from defamation claims for the ads streamed on the Internet?* **No.** The protection broadcasters have from liability during a use by a legally qualified candidate does not apply to the Internet. You should strip those ads from your streams if the ad is potentially defamatory.
2. *Do you have to accept a political spot that contains indecent content?* **Yes,** if the ad is by a **federal** candidate **or** if a **non-federal** candidate is entitled to **equal opportunities**. It is possible that if you cannot persuade the candidate to channel the spot to the safe harbor (between 10 p.m. and 6 a.m.), you could be liable for airing indecent content under the no-censorship rule. Given the extraordinary fines the FCC can now impose for the broadcast of indecent content, you may need to choose which law to violate.
3. *Does the no-censorship provision apply to third party spots that contain a candidate use?* **No.** The FCC staff informally states the "no-censorship protection" should NOT apply to third party spots because 1) it would give a producer of the spot protection to lie at will by just inserting a picture of the candidate in the spot, and it is unlikely Congress intended the no-censorship protection to apply to third party sponsors; and 2) if the opponent contested the station's failure to take it down, the station could be sued and the court could decide that the no-censorship provision is inapplicable. But, if a national political party sponsors the ad, the political party requested lowest unit charge because it is buying the time with hard money, and you have a letter from the candidate authorizing the spot, then you should assume that the political party spot is a use that cannot be censored.
4. *If you charge a candidate for one federal office the lowest unit charge but the candidate did not comply with the Bipartisan Campaign Reform Act's disclosure requirement (i.e., stating that the candidate approved the broadcast and that the candidate or his/her authorized committee paid the candidate approved the broadcast and that the candidate or his/her authorized committee paid for the broadcast; and, if an opposing candidate is mentioned, identifying the office sought), do you have to provide other candidates for other races the same break?* **Yes.** The FCC staff's position is that if you give a non-compliant candidate lowest unit charge, all federal candidates in that election cycle are entitled to equal treatment, even if they are running for other offices, regardless of the degree of non-compliance with the BCRA.

5. *If you receive two checks, e.g., one from the candidate's campaign committee and the other from the candidate's party, do you have to provide a dual sponsorship ID? **Yes.*** This has occurred with advertising spots purchased for Senator McCain's presidential campaign, and happened previously with the Bush campaign. The FCC staff informally states that broadcasters can accept the party's assertion that its financing comes from hard contributions as opposed to soft money. Note, however, that the FEC could find that to violate the campaign finance laws if soft money is used to purchase advertising advocating the direct election of a candidate within 30 days of the election.

Remember to keep your Political Disclosure Statements current and to provide them to anyone requesting political time.