



# The **Broadcasters' Desktop Resource**

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... edited by Barry Mishkind – the Eclectic Engineer

## **Ask the Lawyer**

### **Political Broadcasting Q&A**

**By Cary S. Tepper**

*[August 2016] Every election cycle, politicians scramble to get their message out. Stations must adhere to the FCC Rules related to such political advertising, although some can be downright confusing at times. Cary Tepper addresses the issue.*

Over the past twenty five years political broadcasting has morphed into a complex legal web of laws and regulations of which many broadcasters remain unaware or do not fully comprehend. Let us take a look at some of the things broadcasters need to know.

#### **UPDATING FCC POLITICAL RULES**

When speaking of politics on radio and television, people often first mention the *Fairness Doctrine*. However, for the most part the *Fairness Doctrine* was declared unconstitutional in 1987. However, the "personal attack" rule and the "political editorial" rule remained in practice until 2000.

The 2002 *Bipartisan Campaign Reform Act* (BCRA), prohibits the purchase of broadcast commercials by labor unions and corporations using their general funds during the 30 days before a Federal primary and the 60 days prior to a Federal general election. The Act prohibited these 'electioneering communications,' essentially defining an electioneering communication as any mention of a Federal candidate.

Then, in 2007, the U.S. Supreme court decided to revisit this provision. The Court, in an opinion released on Tuesday, June 26 2007, upheld a U.S. District court opinion finding that prohibit-

tion unconstitutional as applied to a Wisconsin Right to Life group's effort to promote the opposition of a Senate filibuster.

This opinion undoubtedly resulted in increased issue advertising – as did the Citizens United case in 2009. Those opinions, combined with the excessive purses of candidates running for the 2016 Presidential election, will create more political advertising airing on broadcast stations than ever before.

In addition, issues have arisen about on-line sales ads by *Google* and other Internet marketplaces concerning the potential impact on political broadcasting rules.

#### **ANSWERING THE CALL**

To help navigate the political season, we have put together a special memo of 56 political broadcasting questions & answers to help our clients navigate through this confusing aspect of broadcasting.

Here is a small sample of our special memo, presented as a Q&A, so you can see if your personal understanding is correct and current.

True or False? Lowest unit charge requirements apply only to candidates for federal office, and stations can charge candidates for state and local offices their full commercial rates.

**False.** Stations are required to provide their lowest unit charge to all candidates for any public office that buys time during the political windows. The Bipartisan Campaign

Reform Act of 2002 (“BCRA”) establishes new conditions on the availability of the lowest unit charge to federal candidates.

True or False; My station’s signal can be viewed in an adjacent state. A candidate for Congress calls wanting to buy time; my station can be seen in one county in his district, but only because it is carried on the cable system. I must sell him time.

**False.** Candidates for federal office are entitled to reasonable access to stations whose over-the-air signal (TV – Grade B; FM – 1mVm; AM – 0.5mVm) covers at least an identifiable political unit (city, country, etc.) within their district. Cable carriage outside of a station’s over-the-air coverage area does not result in reasonable access obligations to candidates running in those locations.

## SPECIAL RATE CARDS

True or False; Broadcasters are required to publish political rate cards.

**False.** If a political rate card is published, however, it should contain all classes of time offered to commercial advertisers, including every level of preemptibility.

The chances of preemption for the various levels of preemptibility should be disclosed. It should also contain information about the various discount package options and rotations offered to commercial advertisers, including the broadcaster’s willingness to negotiate combinations of time suitable to the needs of particular candidates if negotiation is available to commercial advertisers.

A description of the broadcasters “make good” policy should be set out. Candidates should be made aware of whether their preempted advertising will be made good prior to the election.

True or False; Candidate A publicly announces his intention to run in the near future. Can-

didate B ran a spot on your station in the past week. Candidate A wants to be granted equal time to respond to Candidate B. You have to grant Candidate A the time requested.

**False.** To meet the public announcement requirement, all a candidate must do is either declare publicly that he is a candidate for nomination or election, or take the steps necessary to be placed on the ballot for the general or primary election. Candidates for nomination need only make a substantial showing of being a bona fide candidate.

However, an announcement that one “expects to run” or announcements that one will announce in the future do not meet the public announcement requirement.

True or False; Outside of the 45 and 60 day political windows, I can charge candidates any rate I want.

**False.** Outside of the political windows, stations are required to offer candidates “comparable” rates, *i.e.* the same rates a commercial advertiser buying the same amount and class of time would get.

Stations during those times may require candidates to buy packages in order to get package rates. During the window, if a federal candidate forfeits the right to the lowest unit charge, stations are not limited to their comparable rates in selling time to such candidates.

## CREATING SPECIAL CLASSES

True or False; I have a very good, long-term advertiser who buys time at a low preemptible rate, but I informally guarantee him that all of his spots will clear. That guarantee will affect the rates I have to offer candidates.

**True.** By promising a favored advertiser that its spots will clear even if they are nominally preemptible, the station creates a

fixed time class. Candidates buying at that rate would have to be given the same clearance guarantee and the station would have to disclose the availability of that rate to clients.

True or False; A candidate's campaign manager calls my station and demands to be told over the phone what spots opposing candidates have bought. I do not have to give him information over the telephone.

**True.** Stations are not required to give out information about candidate buys over the telephone.

Although in 1998 the FCC changed the Public Information File rule to require stations to provide information about documents in the File over the telephone, on reconsideration it excluded the political file from the new rule (as well as limiting the telephone rule generally to stations with main studios outside of their city of license).

## CLEAR SPONSORSHIP ID

True or False; I am running some issue ads for a group called "Citizens for Good Government."

I now find out that all or almost all of the funds for this group come from the National Rifle Association, and the only officials of the group are the NRA's paid lobbyists in my state. Despite these facts, I do not have to change the ID on the spots.

**False.** The FCC held in 1996 that if stations are presented with evidence that a sponsor ID on an issue ad is misleading, they should require the advertiser to change the ID.

Stations are not required, however, to initiate investigations into issue advertisers. Also, stations are required to put a list of the officers, directors, committee members, etc. of issue advertisers in the Public File.

True or False; For a television or cable originated political advertisement I must make sure that the sponsor must be visually identified.

**True.** The letters of the advertisement must be equal to or greater than four percent (4%) of the vertical picture height that air for no less than four (4) seconds.

True or False; An agent comes to me asking to purchase political time for his candidate. I must identify the name of the agent in the announcement.

**False.** The announcement must identify the person or persons *on whose behalf* the agent is dealing, rather than the name of the agent.

If the sponsor is a committee, association or other group, the announcement must identify the group.

Additionally, a list of the chief executive(s) or members of the association, committee or group must be made available for public inspection at the station in a "Political File."



## **MORE HELP AVAILABLE**

We hope that this sampling of political questions and answers has been helpful.

If you have any further questions – or would like to purchase the complete 17 page discussion on political advertising – please do not hesitate to call or email us.

*Founder and managing member of Tepper Law Firm, LLC, Cary Tepper has had, since 1985, an extensive telecommunications law practice representing several hundred radio and TV stations with regard to broadcast regulation, business negotiations, acquisitions and mergers, facility modifications, radio spectrum allocations, and administrative hearing litigation.*

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