

## QUESTIONS AND ANSWERS ON POLITICAL ADVERTISING

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This is a random sampling of questions from MAB members on political advertising topics that have arisen over the years, along with answers from our FCC counsel, Dave Oxenford of Wilkinson Barker Knauer LLP, as well as other authoritative sources.

This Q&A is intended to be advisory in nature only, and should not be relied on as legal opinion. Stations should consult their own legal counsel concerning the application of law and regulation based on the particular facts and circumstances of a given situation.

### **Political Public File**

#### **Q. Do we need to put a copy of a contract for third-party advertising in the public file?**

*Answer from Dave Oxenford:* Under FCC rules, there is never any obligation to put the contract into the file - for candidate or non-candidates. Many stations do put it in for candidates (state and Federal), as it contains the rate information and the schedule to be run, and that information is required to be in the file. So rather than copying it onto another piece of paper, stations will often just put the contract into the file.

BCRA (the Bipartisan Campaign Reform Act) extended the rate and schedule requirement to third party ads dealing with Federal candidates or issues. So third parties running ads on Federal races, or asking that you write your Congressman or Senator in Washington about a particular Federal issue, do need all the rate and schedule information for the public file.

But BCRA does not apply to state candidate or issues. So, unless there is some peculiar Maine law requirement [there is no such requirement in Maine law. –SG], for third party ads dealing with state races or state issues (such as a state referendum), all you need is a list of the principal officers, directors or member of the governing board of the third party group that is sponsoring the ad (see, Section 73.1212e of the FCC rules). For completeness, though not specifically called for in the rules, I'd also provide the address and a contact person for that group in the file. Rate and specific schedule information is not required (so there would be no reason that the contract would have to go in the file).

#### **Q. What needs to go in our political public file for issue ads?**

*Answer from Dave Oxenford:* Under the sponsorship identification rules, on any ad involving political matters or other issues of public importance, you have always had to have a list of the executive officers or the executive committee or the board of directors of the organization sponsoring the ad in your public file. See, Section 73.1212(e) [Code of Federal Regulations, Chapter 47]. This is true whether the ad deals with Federal or state or local issues.

Under provisions of the Bipartisan Campaign Reform Act passed in 2004, for ads dealing with Federal issues or elections, you also need to include basically all the information that you would for a candidate ad - how much time was purchased, when it will run, the class of time purchased, and the price that was paid - as well as the list of the officer or directors of the purchasing organization.

In both cases, I suggest putting in the address and contact phone number of the organization, too, as it may not be particularly meaningful just to give a name of an organization with no other details.

While you need to use your good faith discretion to decide if the ad deals with a controversial issue of public importance, I think that you can count on any ad dealing with an election or a legislative issue or a ballot proposition as being a controversial issue of public importance.

Obviously, any ad saying "call your representative in [congress or the state legislature or on the city council or on the school board]" would also be dealing with an issue of public importance.

### **Disclaimers**

#### **Q. Does the "20 scan lines/4 seconds" requirement for TV sponsor IDs apply to ads concerning ballot questions?**

A. No. *This answer is based on a phone conversation with Bobby Baker, Chief of the Political Programming Branch at the FCC, on 10/5/06. My questions, and his answers, are shown below.*

*The FCC's regulations read as follows:*

*Section 73.1212 [47 CFR §73.1212] Sponsorship identification; list retention; related requirements.*

*(2)(ii) In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.*

Does this regulation apply to federal candidate ads: YES

Does this regulation apply to ads for state and local candidates: YES

Does this regulation apply to 3rd-party ads concerning candidates: NO

Does this regulation apply to issue ads: NO -- "Prudence says that 20 scan lines/4 seconds is a reasonable standard, but if a station accepts an issue ad with a sponsor ID that's only 15 scan lines, technically it is not in violation of the law." (Baker)

The FCC's 1991 "Political Programming Policies" Report & Order states, "...sponsorship identification for television must be sufficiently large, and of sufficient length on radio and television, to allow members of the audience to reasonably comprehend the identity of the sponsor. ... we have generally advised that the sponsorship announcement must be displayed in letters of sufficient size to be legible to the average viewer; set against a background that does not reduce the announcement's legibility; and exhibited on the screen for a sufficient amount of time to be read in full by the average viewer."

Maine law concerning disclaimers on PAC ads states only that the disclaimer be "clearly and conspicuously" displayed.

### **Candidate's committee and state/county party committees**

Q. A county party committee claims that it is entitled to lowest unit rate because it is placing ads "on behalf of" one or more candidates. Is the county committee entitled to LUR?

*The response below is from Jonathan Wayne, executive director of the Maine Commission on Governmental Ethics and Elections Practices, in response to a question as to whether a county party must register with the Ethics Commission if it claims to be a candidate's "authorized" committee for purposes of obtaining LUR. The Ethics Commission's candidate registration form states, "No later than 10 days after appointing a political committee, the candidate must register the name of the committee, and the name and address of the candidate, the treasurer and each officer of the committee."*

For reporting purposes, the Commission definitely views the party committee as a different animal than the candidate's committee. If you look at the first section of paragraph B in the provision you quote, it says: "a candidate may authorize one political committee to promote the candidate's election." Usually, the candidates name the committee: "Friends of ..." or "Committee to Elect ...." A county party committee is not the candidate's committee - it exists to promote that party and its candidates for the entire county. The party committee may make the claim to get the lowest rates, but we view them as an entity that is independent of the candidate. If the party makes the claim to a broadcaster that it is acting as the candidate's committee to get lower rates, would it have to register? I would tend to say no, because just saying it doesn't make it so. To be required to register, the committee has to be the one committee authorized by the candidate to promote the candidate's election.

### **Production Services and Payment Policies**

#### **Q. May a station charge a candidate for production services?**

*Response from Dave Oxenford:* There is a case from 1992 that addresses the issue. Basically, stations must make available their production facilities on a basis similar to the basis provided to commercial advertisers. If commercial advertisers pay for production, candidates pay. If commercial advertisers get production free as part of a schedule, political broadcasters would get it free. If the commercial advertiser has to buy a certain dollar amount of advertising to get the production free, then the political advertiser has to buy the same amount of time to get the free production.

While dubbing is not addressed separately by the FCC, I think that the same logic would apply.

One caveat - the station talent does not need to be made available for the spots, as that could be seen as implying a preference for a candidate.

#### **Q. May a station require payment in advance for candidate or issue advertising?**

*Response from Dave Oxenford:* It is permissible to require cash in advance from candidates or issue committees if your normal credit policy is to not give credit to transient organizations that are here today and gone tomorrow - as that is the situation with most campaign committees - they are in existence for one election only, and the credit history of the last campaign committee doesn't carry through to the next one. However, if your normal credit policy is to give credit to anyone who walks through the door - then you have to give credit to candidates too, though I can't imagine too many stations are in that position. In most cases, I don't think that the candidates themselves will personally guarantee the buy as there are campaign finance issues that could come up. But, if they do, they are subject to your normal credit policies which, if they include a credit check for new advertisers, could be applied in this situation.

As for candidates buying through agencies, the same policies apply. If the agency stands behind the ad and guarantees payment, and you usually accept the agency's credit, then you should accept it when they agree to back the political ads. I doubt that they will do that much for candidates because of campaign finance issues, but they may for issue advertising.

### **Claims made in issue ads**

**Q. Must a station require that claims made in issue ads be substantiated, or that the ad must include the source of any claim made?**

*Answer from Dave Oxenford:* Stations don't have any obligations to accept issue ads, so they can reject them entirely – or require sourcing if they want to, as a condition of accepting the ad. But they don't have to - either on air or in their file. All they need to do is have a list of the sponsoring organization, its address, and the executive officers and directors in their public file. The only time that this becomes an issue is in a libel or slander case, or theoretically in some sort of FTC-type false advertising claim - which is not usually brought against the medium, but instead against the advertiser.

**Q. Opponents of a ballot question have accused the proponents of running an ad that contains false and/or misleading information. What liability does a station face if it continues to run such an ad in the face of allegations of inaccuracy?**

*Answer from Dave Oxenford:* The biggest liability issue is for libel or slander if the alleged inaccuracies relate to identifiable people or groups. If stations continue to run a third party ad that is not truthful, and that libels or slanders an identifiable person or group, they could be liable. Normally, someone suing a media outlet for libel about an election-related issue has to prove that the outlet had "malice" in running it - which means that they either knew it was false, or broadcast it with reckless disregard of the truth.

If someone tells you that it is false, and provides something to back up that claim, and you continue to run it - that could be construed as reckless disregard.

If it doesn't attack an identifiable person or group, the liability becomes harder to find. Truth in advertising rules usually are applied to the advertiser and not the medium. Perhaps a challenge to their license renewal - for not serving the public interest because they continued to run ads they knew were false just so that they could collect the fees. In today's climate, there might be some receptivity to that at the FCC.

### **Use of "trade" spots**

**Q. A station has a client who is owed some "trade," in other words, free advertising. The client wants to use the trade spots to promote the candidacy of a particular Presidential candidate.**

1. Does the station have to accept such advertising, whether trade or paid?
2. Is it okay for the station to adopt a blanket policy saying that trade spots cannot be used for political purposes?
3. If the station accepts such third-party political advertising, what is the station's liability for the content of such ads (accuracy, e.g.)?

*Answer from Dave Oxenford:* I see no reason why a station cannot put restrictions on its trade - forbidding its use for political purposes. I have advised stations to include such limitations on any spots given away to charity auctions and such (as the question about the candidate who buys at the auction comes up all the time) - so I don't see that the analysis for trade is any different.

Must stations air ads by supporters of a candidate? No. Reasonable access applies only to the candidates themselves. (The recipient of the trade may have some sort of contractual issue with the station for not honoring it - but there is no FCC requirement that you air ads by supporters of a candidate.)

If the station accepts third-party ads, it is responsible for the content of those ads. The no censorship provisions of the rules (which gives rise to the insulation of the station from liability - if you can't censor it, you can't be held responsible) applies only to candidate uses. For third parties, since you can choose whether or not to accept the ad - you are responsible for the content of the ad.

### **Lowest Unit Rate**

#### **Q. Must a no-charge spot given on one station as part of a cluster buy be factored into Lowest Unit Rate calculations?**

*Answer from Dave Oxenford:* A no charge spot on Station A, given to an advertiser in connection with a purchase of time on Station B, makes for a "combination rate" that creates its own LUR. Thus, a candidate can buy that combination at the lowest unit rate that combination was sold to a commercial advertiser.

This is an exception to the normal rule that applies to buys on a single station. On a single station buy, the rules require you to allocate a package rate to all of the spots in a package. For example, if you gave a No Charge overnight spot to an advertiser who bought a morning drive spot, you in effect have a package rate for a morning drive/overnight package. You would take the price of that "package", and allocate part of it to the morning drive spot and allocate part of it to the overnight spot, and then take that allocation into account in determining if the "package" has any impact on your LUR in either of those time periods. You can make that allocation in internal station records, regardless of the rate shown on the commercial invoice. You are supposed to make that allocation at the time that the package is written.

The "combo" rate, involving multiple stations, is the only place where a package price need not be broken out through such an allocation.