Broadcast LAW BLOG

PUBLISHED BY
Davis Wright Tremaine LLP

Graphic Abortion Ads in Iowa by Presidential Candidate - And a Seminar on FCC Political Broadcasting Rules

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December 14, 2011

With the Iowa primary approaching, political ads are increasing on the local Iowa TV stations. While the national press may have been focused on some of the recent Rick Perry ads about the end of "don't ask, don't tell" and its connection to the celebration of Christmas in the public schools, there has been an even more controversial ad running on Iowa TV stations - anti-abortion spots being run by Randall Terry, the head of Operation Rescue, who has announced that he is running for the Democratic nomination for President - challenging President Obama for the privilege of running in next year's election. Some of the planned ads have graphic depictions of the results of abortions. These ads are disturbing to some, and many viewers (and many stations) are concerned and upset about their being broadcast - so why are stations running them? For the most part, it is based on the requirement of **Section 315 of the Communications Act** that **prohibits a station from censoring an ad from a candidate for public office**. Not only that, but court rulings concerning the **reasonable access provisions** of the Communcations Act prohibit stations from channeling potentially disturbing ads to later night hours - limiting stations to a pre-ad disclaimer warning viewers of the content to come and advising them that the ad is being aired by a candidate and is not subject to station censorship (stations should work with counsel to use language on such a disclaimer that has been approved by the FCC).

But there are issues that stations need to explore to prevent everyone with the money to cover an ad from claiming to be a candidate for office and being able to air disturbing images on broadcast stations. Under the law, a person has no censorship rights for their ads (and reasonable access rights for Federal candidates) only if they can show that they are a **"legally qualified candidate."** In most cases, the question as to whether someone is legally qualified is relatively easy. The station looks at whether the person has the requisite qualifications for the office that they are seeking (age, residency, citizenship, not a felon, etc.), and then looks to see whether they have qualified for a place on the ballot for the upcoming election or primary. In most cases, qualifying for a place on the ballot is a function of filing certain papers with a state or local election authority, in some places after having received a certain number of signatures on a petition supporting that person. But once the local election authority receives the papers (and does whatever evaluation may be required), a person is legally qualified and entitled to all the FCC political broadcasting rights of a candidate: equal opportunities, no censorship, reasonable access if they are Federal candidates, and lowest unit rates during the limited LUC windows (45 days before a primary and 60 days before a general election). But, for Presidential candidates, especially in caucus states, and for write-in candidates, there are slightly different rules that are applied, as there is no election authority to certify that the requisite papers have been filed for a place on the ballot. Instead, in these situations, a person claiming to be a candidate must make a **"substantial showing"** that he or she is a bona fide candidate - that he has been doing all the things that a candidate for election in the caucus would do. What does that mean?

Section 73.1940(f) of the Commission's rules sets out what a substantial showing needs to include. The rule states:

> The term substantial showing of a bona fide candidacy as used in paragraphs (b) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his or her campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

Stations are entitled to ask a purported candidate to make that substantial showing before they accord the candidate all the rights that he or she might be entitled to under the rules. Stations will looks at factors including whether the candidate has had campaign rallies. Is he making speeches and campaign appearances throughout the area where the election is being held? Is there campaign literature that is being distributed on his behalf? Does he have any campaign offices or campaign workers? Is his campaign more than a website? A station is entitled to ask for this evidence, and then needs to review it, probably with the aid of counsel and possibly with the informal advice of the FCC (whose Political Broadcasting Office is usually quite helpful in working through issues like this) to determine whether it meets the substantially test.

For Presidential candidates, there is yet another wrinkle - as once a candidate has established his qualifications in 10 states, then he or she is presumed to be qualified throughout the country. So, candidates like Mr. Terry, who work hard to qualify in early primary and caucus states, will have the FCC rights of a candidate accorded to them in later states by virtue of their actions in these early states. This may become important as Mr. Terry has claimed that he is looking to buy spots in the Super Bowl from stations across the country.

Is this system fair? Does it allow fringe candidates valuable airtime access that stations would otherwise likely deny? The intent of this law to is forbid stations from being censors of political messages – leaving candidates free to deliver their message in a manner that they believe to be the most effective. With stations not being able to second guess the decisions of candidates, some controversial material may be aired in candidate advertising, but that will be the candidate's choice. It is then up to the voters (not the stations) to make the decision as to whether the candidate made wise decisions in delivering his or her message in their advertising in the way that they choose. But substantial questions remain about whether stations should be allowed to channel ads to periods when a more appropriate audience may exist. But given court decisions in this area, it would take an act of Congress to allow the FCC to allow such channeling.

This question, and other questions about the political rules were discussed last week in a webinar that I conducted for the **Texas Association of Broadcasters**. The slides from that presentation are available here. Other questions about the political broadcasting process are available in the ***Davis Wright Tremaine*** Political Broadcasting Guide, and we'll continue to highlight on this blog some of the interesting issues that arise throughout this election season.