

## **Political Ad Content---When Do You Need to Worry?**

February 27, 2012 by [David Silverman](#)

Political speech has been called the "life-breath of democracy" by the US Supreme Court and receives very strong First Amendment protection. For that reason, the FCC has said that it will "not attempt to judge the truth or falsity of material broadcast regarding candidates or ballot issues." That principle is sure to be tested in the wave of negative campaign ads we are likely to see between now and November, many of which will generate "cease and desist" letters from the subjects of those negative ads. Of course, broadcasters and cable operators alike are immune from liability for anything said in the context of a candidate "use" featuring a sponsoring candidate's recognizable voice or image...the so-called "no censorship" rule.

There is, however, one type of political ad that could create potential liability for the media if allowed to run unchecked: A third party or PAC attack ad that is defamatory. A defamatory ad is one that exposes the candidate to public hatred, shame, disgrace or ridicule. Generally, these are ads that allege crime, fraud, dishonest or immoral conduct on the part of the candidate. Truth is the only absolute defense to a defamatory claim. Therefore, when defamation is alleged, substantiation should be requested. Read on for details of a recent case study....

An [opinion](#) released several weeks ago by the US Court of Appeals for the First Circuit sheds some light on whether statements made in the context of a third party political ad are defamatory. The ad at issue there was a negative campaign ad against a candidate for the Maine State Senate. The ad stated that the candidate, as a town selectman (equivalent to city council) "voted to cancel the \$10,000 fireworks celebration for the Fourth of July," while also "[giving] 10,000 taxpayer dollars to a political organization." The ad then stated that "It's wrong for [the candidate] to give your money to a political organization, and it was wrong for [him] to cancel your 4th of July celebration."

The candidate claimed that the word "wrong" implied that he had committed a crime and that the words "political organization" implied that it was the candidate's own organization, therefore implying that he had stolen town funds for his own organization. The court disagreed and granted the defendant's motion to dismiss. Why?

First, the court held that a political candidate is "public" figure. In order for a statement to be defamatory against a public figure, the statement must be made with "actual malice," which means that it must be made with knowledge of falsity or with "reckless

disregard for the truth." The court held that this standard could not be met here because the word "wrong" does not necessarily mean that the candidate broke the law. Although the court did not elaborate on this, the word "wrong" is often used to convey the speaker's opinion rather than as a statement of fact. In other words, in a political ad, one party often believes that what the other party does is "wrong," even though it is neither criminal nor immoral. A statement presented as an opinion generally is not defamatory.

The court also refused to draw the inference that the "political organization" referred to in the ad was the candidate's own organization. In essence, the entire ad was an opinion that the candidate's use of \$10,000 would have been better spent on fireworks rather than on a political organization of any kind, and there is nothing defamatory about that allegation/opinion.

In this particular case, the court also found that the allegations were true, which is an absolute defense to defamation, as noted above. However, for purposes of ruling on the motion to dismiss, the court viewed the allegations in the most favorable light to the plaintiff (the non-dismissing party) and still found that the statements were not defamatory, even if untrue.

The lesson to be learned is that political speech is subject to strong First Amendment protection. Most of the negative ads do not need to be taken down, even if you get a cease and desist letter. You may need to be concerned if the statements made are potentially defamatory, charging that a candidate has committed a crime or an immoral or unethical act. And you should request substantiation of any potentially defamatory claims made in the ad. But merely stating that a candidate did something "wrong" does not necessarily imply criminality or unethical behavior. It may simply be "wrong" in the eyes of the advertiser, and that is a mere opinion.

Of course, if there is any question about the content of a political ad, you should consult with legal counsel. This is one area where it is better to be safe than sorry.

Tags: [Political Broadcasting](#), [defamation](#), [defamation in political advertising](#), [equal opportunities](#), [false advertising](#), [political ad liability](#), [political](#), [political ads](#), [political advertising](#), [political broadcasting law](#), [political broadcasting obligations](#), [political broadcasting obligations for cable](#), [political party advertising](#), [third party ads](#)

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