



2019 Political Advertising Webinar



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**Brooks, Pierce, McLendon,
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Overview

- ▶ Candidate Ads
- ▶ Third-Party and Issue Ads
- ▶ Sponsorship Identification
- ▶ Recordkeeping/Political File
- ▶ Digital Political Advertising

3 “Buckets” of Political Ads

- ▶ Candidate Ads
- ▶ Third-Party Election Ads
 - ▶ Look like candidate ads (“look-alikes”)
 - ▶ Support or oppose a candidate
- ▶ True Issue Ads
 - ▶ Focus on issues rather than elections

Candidate Ads



Candidate Ads - Obligations

- ▶ **Equal Opportunities** - All candidates entitled to equal opportunities to buy similar spots
- ▶ **Lowest Unit Charge** - All candidates entitled to lowest commercial rate
- ▶ **Reasonable Access** - Federal candidate ads generally may not be refused
- ▶ **No Censorship** of candidate ads
- ▶ **Sponsorship Identification** - Public must know who paid for the political spot

Candidate “Uses”

- ▶ A “use” by a legally qualified candidate triggers:
 - ▶ Equal Opportunities
 - ▶ Lowest Unit Charge
 - ▶ No Censorship

What is a “Use”?

- ▶ Positive appearance on the air by a legally qualified candidate
- ▶ Candidate’s voice or picture is identified or “readily identifiable”
- ▶ Not disparaging or negative
- ▶ Does not have to promote candidacy (careful with on-air talent!)

Candidate Ads - Equal Opportunities

- ▶ A “use” by a candidate triggers equal opportunities
- ▶ Opposing candidates are entitled to purchase the same amount and class of time
 - ▶ Applies to opposing candidates in each relevant election (primary and general)
 - ▶ Covers time, use of production facilities, extension of credit, etc.
 - ▶ Request must be made within 7 days
 - ▶ No obligation to notify opponent of the “use”

Candidate Ads - Equal Opportunities

- ▶ Exempt appearances - bona fide newscasts, news interview programs, documentaries, on-the-spot coverage of news events
- ▶ Candidate debates may be exempt



Important LUC Dates

- ▶ General Election
November 3, 2020
- ▶ LUC Window Opens
September 4, 2020



Candidate Ads - Lowest Unit Charge

- ▶ The lowest commercial rate for the same class, time period, and amount of time (multiple LUCs)
- ▶ In a nutshell, the most favorable “quantity” discount
- ▶ Applies during defined windows
 - ▶ 45 days before a primary election
 - ▶ 60 days before a general election



Candidate Ads - Lowest Unit Charge

- ▶ LUC applies to each class, amount, and time period, such as:
 - ▶ Preemptible vs. Fixed
 - ▶ Primetime vs. Overnight
 - ▶ :60 vs. :30
- ▶ Check your rate cards and update weekly



Candidate Ads - Lowest Unit Charge

- ▶ Applies only to “uses” that also:
 - ▶ Are purchased by the candidate
 - ▶ Promote the candidate’s election, or defeat of the candidate’s opponent

Candidate Ads - Lowest Unit Charge

- ▶ LUC does not apply to third-party spots
 - ▶ SuperPAC spots - No!
 - ▶ Not even if the third-party spot is deemed a “use” for equal opportunities purposes
 - ▶ Beware: many ads “look like” candidate spots, but they aren’t! Check sponsorship ID!

Candidate Ads - Lowest Unit Charge

- ▶ Tricky situation: LUC and Political Party Ads
 - ▶ Is the party an authorized agent of the candidate for purposes of the advertisement?
 - ▶ Is it otherwise a “use”?
- ▶ Get documentation from agent/candidate authorizing ad buy on behalf of candidate

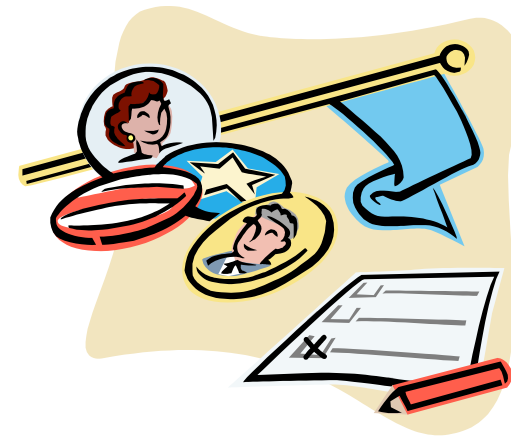
Candidate Ads - Lowest Unit Charge

- ▶ How to calculate Lowest Unit Charge
 - ▶ Best quantity discount and privileges
 - ▶ Must assign value to all package spots
 - ▶ Prepare written memorandum of value
 - ▶ Beware of free spots (especially via contests/promotions)
 - ▶ Detailed accountings and disclosures



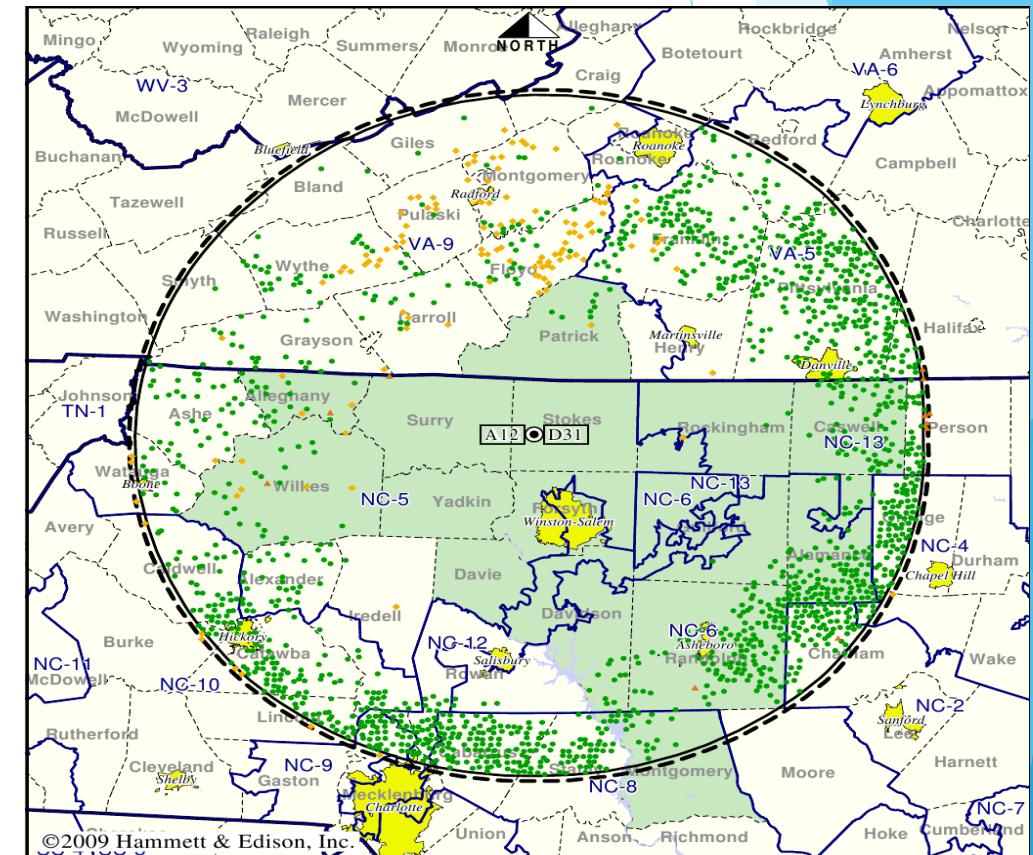
Candidate Ads - Reasonable Access

- ▶ Federal candidates have a legal right to your inventory if they are “legally qualified”
 - ▶ Publicly announced
 - ▶ Qualified to be on the ballot
 - ▶ Qualified to hold office if elected



Noise Limited Service Contour

- ▶ “Reasonable access” applies to a candidate if part of his or her district falls within the station’s service area



Candidate Ads - Reasonable Access

- ▶ Reasonable access only applies to federal candidates
- ▶ Must still treat state and local candidates fairly
- ▶ Sell to one state race, must sell to all candidates in that race

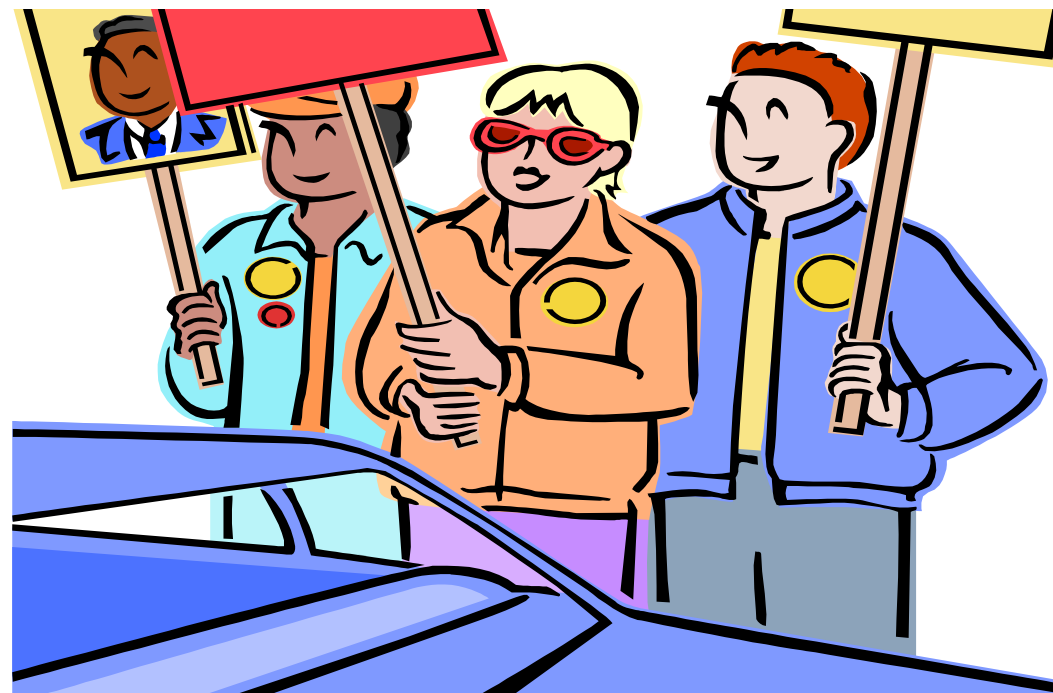
Candidate Ads - Reasonable Access

- ▶ Federal candidates may demand spot lengths not offered by station (e.g., 30-minute, prime time spots)
- ▶ Denials must be well-reasoned:
 - ▶ Needs of candidate
 - ▶ Potential for program disruption
 - ▶ Amount of time previously provided
 - ▶ Impact on “equal opportunities” obligations
 - ▶ Amount of notice given by candidate

Candidate Ads - No Censorship

- ▶ Stations may not censor candidate ads unless legally “obscene” or “indecent”
- ▶ Immunity - station is not liable for content of the spot, except for FCC sponsorship tags

Third-Party Election Ads & Issue Ads



Third-Party Election Ads & True Issue Ads

- ▶ **Third-party election ads**
 - ▶ SuperPACs
 - ▶ 501(c)(4) organizations
 - ▶ 527 organizations
 - ▶ Ad generally supports or opposes a candidate
- ▶ **True Issue Ads**
 - ▶ “Controversial Issues of Public Importance”
 - ▶ May or may not reference candidates

Third-Party Election Ads & True Issue Ads

- ▶ Not entitled to LUC
- ▶ Stations may be liable for content
- ▶ Stations must maintain list in public file of executive officers or board members of the sponsoring entity

Sponsorship Identification



Sponsorship Identification

- ▶ Station's responsibility: **ALL POLITICAL ADS MUST HAVE SPONSORSHIP ID**
- ▶ Applies to all spots, including issue and third-party election ads
- ▶ “Paid for” - spot must identify that it was sponsored, paid for, or furnished, and who paid for it
- ▶ TV: 4% and 4 seconds

Sponsorship Identification

- ▶ Sponsor must be clearly identified as person or organization (not “People Who Care About America”)
- ▶ Must disclose the “true identity” of the sponsor

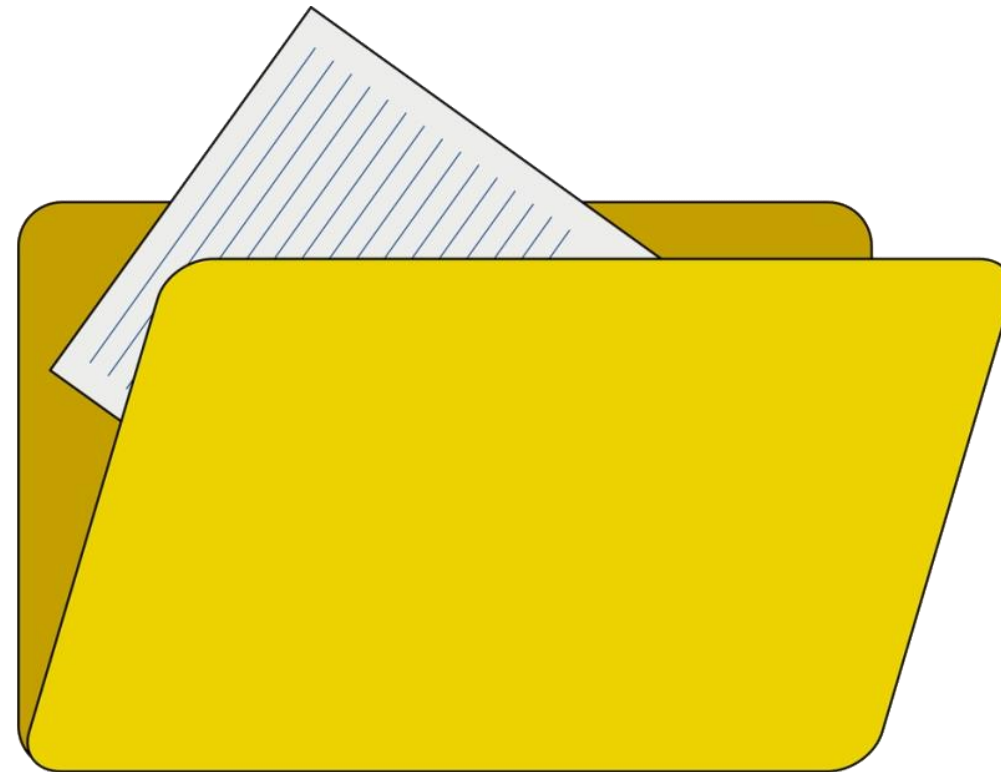
“Stand By Your Ad”

- ▶ Applies to federal candidates
- ▶ Candidates must give station written certification that they will comply with special sponsorship rules if ad refers to opponents
- ▶ No “entitlement” to LUC if doesn’t comply - consult counsel

“Stand By Your Ad”

- ▶ For radio: must include a statement by the candidate that identifies the candidate, office sought, and indicates that the candidate approved the ad
- ▶ For TV: must include a statement for 4 seconds at the end of the ad that includes: (1) image of the candidate; and (2) printed statement identifying the candidate and stating that the candidate approved the ad

Political Recordkeeping



Political Disclosure Statement

Explain and/or describe:

- ▶ Each class of time
- ▶ LUC for each class
- ▶ Method of selling preemptible time
- ▶ Approximation of the likelihood of preemption
- ▶ Make good policy
- ▶ Sales practices which affect rates
- ▶ Rotations
- ▶ Discount and value-added packages



Political File Records

- ▶ Documentation of all requests for time (candidate and federal issue ads)
- ▶ Whether request is accepted or rejected
- ▶ The rate charged
- ▶ The date and time on which the ad aired
- ▶ The class of time that is purchased

Political File Records

- ▶ Online public inspection files
- ▶ All stations must retain political file records in online public file for 2 years
- ▶ Use current forms (e.g., NAB PB-18 form)
- ▶ Ensure records are complete and accurate

Political File Records

- ▶ If candidate ad, name of candidate and committee and treasurer
- ▶ If issue ad, name of person making request and list of executive officers or board members of purchaser
- ▶ List election (if applicable)
- ▶ Describe issues discussed in ad (if applicable)

Digital Political Advertising

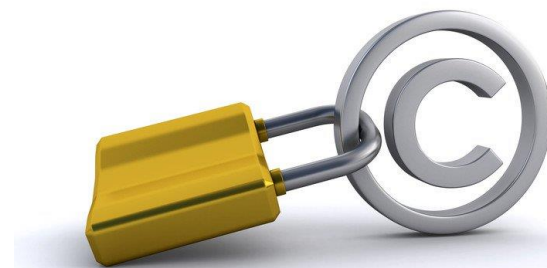
- ▶ What platforms are you selling? Where will the ad run?
- ▶ In the digital space, FCC rules do not apply
- ▶ But - no blanket immunity for candidate ads
- ▶ And - election laws and other rules do apply

Digital Political Ads - Protection from Defamation Claims

- ▶ Immunity for ads “created or developed” by a third party
- ▶ Immunity applies if advertiser intends for ad to air online - keep the documentation
- ▶ No immunity for ads produced by station
 - ▶ Risk: may lose immunity if station is producing, editing, or otherwise involved in creative for an online ad

Digital Political Ads - Protection from Copyright Claims

- ▶ Registered DMCA agent for all URLs; include in website terms and conditions
- ▶ Must not allow any content the station knows or has reason to know is infringing
- ▶ Must respond to “take down” notice from copyright owner
- ▶ Repeat infringer policy
- ▶ Consult counsel



No Protection from Trademark and Right of Publicity Claims

- ▶ False endorsement claims
- ▶ Right of publicity claims
- ▶ Trademark infringement claims
- ▶ Complaints increasing
- ▶ Report problems to counsel immediately
- ▶ Use common sense - Morgan Freeman narrating for GOP Congressional challenger?

Election Laws Online

- ▶ Charge candidate the “normal and usual” commercial rate - no LUC
- ▶ Charge opposing candidates equal rates for similar buys
- ▶ Laws prohibit corporate “contributions” to candidates or parties - avoid discounted spots and unequal treatment

Sponsorship ID Online

- ▶ No FCC sponsorship requirement
- ▶ **BUT**, FEC sponsorship requirement imposed on advertisers
 - ▶ Applies to candidate and third-party ads that support/oppose a candidate
 - ▶ Ads that refer to a candidate within 30/60 days from primary/general election

Digital Ads - What To Do?

- ▶ Treat opposing candidates equally
- ▶ Be vigilant for possible infringements and violations
- ▶ Report complaints quickly
- ▶ Be sure ad is intended for Internet
- ▶ Consider policies and procedures for digital sales and package buys
- ▶ Consult counsel

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