

Beware as Charges of "Corruption" Fly in Political

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With two weeks left in a hotly contested election season, the airwaves and newspapers are jammed full of political ads supporting (or attacking) one candidate or another. These ads make for great political fodder, but they can also present knotty issues for broadcasters and newspapers to consider in deciding what to run and what not to run, especially as the ads become more negative in the late days of the campaign.

With negativity comes the possibility of defamation liability, especially when the target of the negative ad ends up losing the election. While broadcasters enjoy immunity from liability for ads sponsored by candidates for state or federal office, there is no such protection for so-called "issue" ads sponsored by persons other than candidates, by political parties or by third-party interest groups. Newspapers have no such immunity at all. This means for political ads other than candidate ads broadcast over the air, broadcasters and newspapers are potentially on the hook for defamatory statements contained in the ads they run.

Generally speaking, as the California Supreme Court has said, "short of accusations of crime or personal dishonesty, the First Amendment protects even sharp attacks on the character, motives, or moral qualifications" of a public official, which includes candidates for elective office. But political ads don't always stop short of those kinds of accusations. In fact, ads linking a candidate, either directly or implicitly, to illegal activity or to political corruption are not uncommon.

The first thing to remember is that if an accusation contained in an ad is true, you cannot be liable for defamation. So when you are asked to place such an ad, ask for backup that supports the statements accusing the candidate of illegal activity or corruption. Also be mindful that any person or company mentioned in the ad other than the candidates themselves may be a potential defamation plaintiff. Ask for backup as to any potentially defamatory statements made about them as well. (Public officials will also have to show that you acted with a high degree of fault in airing the advertisement--the famous "actual malice" standard--but that is the subject for another post).

It may well be the case that statements made in an aggressive ad are neither clearly true nor demonstrably false, such as "Senator X is the most corrupt politician in the legislature." Is the proper response, "Corruption is an opinion, and since I (or someone) truly hold (or holds) that opinion, it cannot be a false statement." Unfortunately, the U.S. Supreme Court foreclosed that argument in the case of *Milkovich v. Lorain Journal*. The Court held: "If a speaker says, 'In my

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opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." That implication is enough to support liability for defamation.

As for the underlying charge of corruption or illegality, the rule in almost every jurisdiction in the country is that a false statement that accuses someone of committing a crime or that "tends to injure the plaintiff in his or her trade, business or profession" is libel *per se*. So, for example, when one candidate for mayor of a town in New Jersey distributed flyers that said that his opponent's "corruption will bring increase in 1990 taxes," the New Jersey Supreme Court held that the statement was defamatory. In that case, however, there was clear evidence that the deal in question was not illegal or corrupt because a state investigative commission had cleared the mayor of any wrongdoing. Similarly, the Texas Supreme Court upheld a libel verdict against a talk show host who had repeatedly accused a judge of being corrupt because the evidence at trial showed those statements to be verifiably false.

The rub is that an implicit accusation of "corruption" may be hard to prove true or false. The question you have to answer, then, is how close to the line you want to walk as a news operation. The simplest rule to follow is the more directly an ad accuses someone of corruption or illegal activity, the more concrete evidence supporting that accusation you should require before running the ad. The stakes are too high to be less careful—the judge in the Texas case above was initially awarded compensatory and punitive damages totaling \$8 million.