

Federal Candidate Ad Entitled to Air Time

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National news outlets are reporting that the NBC Network has asked presidential candidate Mitt Romney to stop using a television ad attacking Newt Gingrich that features former NBC News anchor Tom Brokaw. The ad is available on the Mitt Romney campaign website and features Brokaw's reporting on ethics violations.

Some say the spot gives the impression that NBC is biased against Gingrich or in favor of Romney. As reported in the Wall Street Journal, Brokaw has said he is "extremely uncomfortable with the extended use of my personal image in this political ad. I do not want my role as a journalist compromised for political gain by any campaign."

So why can't NBC owned and operated stations, or NBC-affiliated stations, simply say no to the ad and take it off the air?

The reason is two-fold—first, Romney is entitled to "reasonable access" to station air time, and second, the "no censorship" rule applies to the Romney spot.

Federal law requires radio and TV stations to provide "legally qualified candidates" for federal office—including candidates for the offices of President and Vice President, the U.S. Senate, and the U.S. House of Representatives—with "reasonable access" to their broadcast facilities. "Reasonable access" does not require stations to give free time to federal candidates, but it means that a station may not have a policy of refusing to sell or give a "reasonable" amount of time to federal candidates.

Additionally, the "no censorship" rule applies to a "use" by a "legally qualified candidate." A "use" means any positive appearance of a candidate whose voice or likeness is either identified or readily identifiable. In this case, consistent with FCC staff decisions on the issue, Romney's appearance and voice in the sponsorship identification at the end of the spot is sufficient to render this ad a "use" to which the "no censorship" rule applies.

Under the "no censorship" rule, unless the material broadcast is legally obscene or indecent, a station may not censor the content of a candidate's broadcast even if it is libelous, a copyright violation, inflammatory, or otherwise offensive. A station can insist on a compliant sponsorship identification to be included if it has not been (for example, "paid for by" and the name of the sponsor), but otherwise it may not censor or alter the spot (unless it is legally obscene or indecent).

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The “no censorship” rule would seem to put stations in the difficult position of being required to air political advertisements that expose them to legal liability—for example, for defamation or invasion of privacy. On the contrary, under federal law, TV and radio stations cannot be held liable for the content of a “use” by a “legally qualified candidate.”

Accordingly, stations are obligated to grant the Romney campaign committee “reasonable access” to their air time until the Romney campaign chooses to pull the spot.