

The politics (and legal expectations) of political advertising

A Missouri Press Association member commented to me the other day, in discussing legal issues about political ads, “While having all the political advertisements in the paper is indeed great, trying to determine what is okay and what isn’t has become a big pain.”

That made me laugh because I understood the issue. Some of the local political banter gets just as hostile, if not more so, than the national political mud-slinging. While it may seem to be worse at the national level, local races can be every bit as controversial. And, as you know, you, the publisher, are just as responsible for libel contained in the ad as is the person who placed the ad. So you need to have at least one staff person checking content on each ad that comes in for publication.

In last month’s column, we discussed the subject of libel in stories that the paper publishes. Most of the same rules apply to advertising that the paper carries. Does the ad carry a statement that harms another person’s reputation? But the benefit the paper gets is that, in a political season, almost all the ads are about persons either already public officials or hoping to be public officials shortly.

So clearly the “actual malice” standard applies. Unless you know the statement is false, or unless you have reason to believe an accusation in the ad may be false but take no action to verify it, then the paper should be protected by the standard set out in *New York Times v Sullivan*.

(Of course, I can never tell you that you won’t get sued. Lawsuits are filed all the time in the midst of ugly campaigns, primarily as tools to either scare the opponent into toning down the rhetoric or as a bluff to protect a candidate’s image among voters. The problem is that defending them in court gets very expensive.)

The second important point is that every political advertiser, in fact EVERY advertiser, should be presented

a rate card when an ad is purchased, and, ideally, signs a contractual agreement with the paper including a provision that the advertiser assumes responsibility for the content of the ad. That way, if you get sued, you can countersue the advertiser and, it is hoped, have someone else responsible to pay for the defense of the ad, if you choose to go that route.

And, it also is a reminder to your advertiser that there are ads that generate lawsuits and perhaps the advertiser should think twice before placing an ad that might create liability for the advertiser.

And it’s not just the words that should be considered. Photos in political ads deserve a little attention, too. Where did the photo come from and who is in it? Does the advertiser have permission to use any photo included in the ad?

I’m less concerned about use of a photo of a competing candidate than I am the use of an unknown individual in a photo, especially the use of a photo of a child. Context in such situations means a lot. A “street scene” photo might be fine to be used but it is important to consider the context of any cutline used with a photo, in case it raises an inference that is totally unrelated to the photo.

As an aside, the present news cycle has raised an interesting question regarding the use of a photo for political advertising purposes, you might note. Politico, the news entity, owns the photo of Senator Josh Hawley with his fist raised, taken in January 2021.

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When Sen. Hawley started promoting that by selling coffee mugs, and apparently now a whole host of merchandise containing that photo, Politico objected to its use, but the candidate’s campaign responded that the use was its First Amendment right under the “fair use” theory of defenses to copyright claim.

They’ve repeated that defense in a lot of news stories, but so far it’s not been tested by

his campaign in court. The issue that may need to be addressed, if it goes to court, is that the Senator’s campaign committee appears to be selling this merchandise in its online “store.” The products are not a “gift” sent with a campaign contribution. When does a sale from a “store” of copyrighted content become a campaign contribution that is a First Amendment right? That’s an interesting topic for another day.

And, last but not most important, be sure every ad has a “Paid for by” tag on it. The chart outlining that law is available on the Mo. Ethics Commission website (www.mec.mo.gov). Or email me and I’ll send you one. Not having this in the ad can generate a significant fine against the paper!



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