THE REMEDIES AVAILABLE TO CANDIDATES WHO ARE DEFAMED BY TELEVISION OR RADIO COMMERCIALS OF OPPONENTS

James A. Albert*

INTRODUCTION

It was virtually impossible for anyone to watch even a minimum of television programming during the fall of 1984 without being exposed to campaign advertising on behalf of candidates for various major public offices. Radio and television advertising is increasingly being relied upon by political candidates to effectively and persuasively reach large numbers of voters. Today, a sea of campaign commercials punctuates radio and television programming every two years and a tidal wave of presidential campaign ads blankets the airwaves every four years. Yet, some of those campaign commercials lie, distort, misrepresent and defame. Some slander and others libel. The reputations of their victims, most typically the opposing candidates, are at times shattered and often their political careers destroyed.

This article will begin by discussing the importance of campaign commercials to political candidates and to society as a whole, focusing specifically on the amount of money spent on such commercials. Illuminating examples of political commercials which have defamed, misrepresented, or lied are considered as the context for the legal analysis which follows. Such examples will be taken from both the 1984 and 1980 campaigns.

After presenting the foregoing basic information, this article answers the crucial question: what legal remedies are available to candidates, or others, who have been defamed by the campaign commercials of opponents? Three remedies are obtainable. First, the person defamed can sue for libel. Second, the opponent can be sued for false advertising and the victim may seek injunctive relief. Third, the injured party can file a complaint under one of several state fair campaign codes.

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* Professor of Law, Drake University Law School; Of Counsel, James & Galligan, P.C., Des Moines, Iowa. B.F.A., 1971, Drake University; J.D., 1976, Notre Dame Law School. Formerly Attorney-Advisor, Federal Communications Commission, Washington, D.C. The author wishes to thank Joseph Seidlin, Eric Borseth and David Gault, who, as exemplary law students at the Drake University Law School, contributed valuable research to this article.

Other remedies are typically not available to one defamed. Specifically, this article explains why victims of defamation are precluded from filing a libel suit against the broadcast station which carried the ad, or from filing complaints with the Federal Communications Commission or Federal Trade Commission.

After considering the legal remedies which are unavailable to defamed persons, and after analyzing the strengths and weaknesses of the legal remedies which are available, this article concludes that an aggrieved candidate has the best chance of success filing a state fair campaign complaint.

I. The Importance of Campaign Commercials

Television and radio advertising has literally revolutionized campaigning for major public office in America. Commercials are increasingly relied upon to reach and persuade the millions of voters who, on a given morning, are listening to their car radios while driving to work, or who, on a given evening, are relaxing in their living rooms in front of their television sets. Indeed, Congress has enacted laws which recognize the importance of political commercials to not only an informed electorate but to most candidates who harbor any hope for an election day victory. Specifically, a federal statute now empowers the Federal Communications Commission to revoke the license of any television or radio station which refuses to sell reasonable amounts of advertising time to candidates for federal office.[1]

The importance of such advertising is illustrated by one of Ronald Reagan's 1984 television ads which showed him speaking at the Normandy ceremonies marking the 40th anniversary of the Allied invasion of the Continent during World War II. That commercial was described by a broadcast industry magazine as so potent that it was "effective enough to wring a tear or two from even committed Democrats."[2] A memorable Walter Mondale commercial, on the other hand, featured a roller coaster which depicted the economy moving slowly to the top "on a mountain of debt and record Reagan deficits"[3] and then showed the coaster suddenly hurtling downward to economic catastrophe.

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1. 47 U.S.C. § 312(a)(7) (1982).
2. *Presidential Hopefuls Take to the Airwaves*, Broadcasting, Sept. 17, 1984, at 32.
3. *Id.* at 33.

The economy certainly has not been depressed, however, for the broadcasters who sell their air time to candidates or for the advertising agencies or consultants who produce the campaign ads. Perhaps the truest indication of the extent to which candidates regard their television and radio advertising as essential is the money they spend on it. Overall, it was estimated that candidates for local, state, and national office in 1984 would spend an enormous $225 million on political advertising.[4]

The 1984 presidential campaign provides a good illustration of the amount of money spent on advertising. Ronald Reagan assembled a veteran team of writers and producers who had earlier created hit commercials for Pepsi Cola, Pan American Airways and Ralston-Purina to develop the Reagan-Bush ads; and then bought more than $15 million of time on network television during the two months before the election to air their finished products.[5] Walter Mondale's campaign spent nearly $10 million on network television time during the 1984 general election campaign.[6] Neither figure includes the millions each candidate paid for commercial time on local television stations around the country.

Candidates in the 1984 Congressional races also inundated voters with radio and television ads. In North Carolina, Senator Jesse Helms spent $8 million on radio and television commercials.[7] According to a Washington Post account of this extraordinary advertising barrage, Helms and opponent Governor Jim Hunt "have virtually camped out in the living rooms of every owner of a television set and . . . have inflicted their strident, jarring arguments on everyone within earshot."[8] Record spending for other Senate seats was also fueled by massive media buys, as the candidates spent $6.5 million on their campaigns in Illinois, $5 million in Minnesota, $4 million in Iowa, nearly $4 million in Michigan and $1 million in Nebraska.[9]

The 1984 levels of spending for campaign commercials represent a continuation and escalation of the campaign trend in the recent years of this age of television toward emphasis on radio and

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4. *NAB Offers Political Advice,* BROADCASTING, Feb. 27, 1984, at 36.
5. Sharbutt, *Presidential Hopefuls Ads: $26.6 Million,* Los Angeles Times, Nov. 2, 1984, § IV, at 1, col. 4.
6. *Id.* at 8, col. 1.
7. Wicker, *The Other Jesse,* N.Y. Times, Apr. 17, 1984, at 23, col. 6.
8. Washington Post, Oct. 28, 1984, at 9, col. 1.
9. Chicago Tribune, Oct. 28, 1984, at 16, col. 1.

television commercials to reach voters. In the 1980 Presidential contest, President Jimmy Carter paid more than $18 million for radio and television time and Ronald Reagan purchased nearly $12 million worth.[10] In 1976, President Gerald Ford's radio and television advertising tab was $9.5 million and Jimmy Carter's was $9.8 million.[11] President Richard Nixon's 1972 budget for re-election campaign commercials was $6.2 million compared to $5.7 million for rival Senator George McGovern.[12] In the 1968 Presidential race, Vice President Hubert Humphrey's radio and television ad buy was $5 million and Mr. Nixon's was $10.1 million.[13]

Similarly, past Congressional campaigns have been noteworthy for their extensive use of political commercials. The total spent on television ads by all Congressional candidates in the 1982 elections was $100 million, with many candidates spending up to seventy percent of their war chests for commercials.[14] Indiana Senator Richard Lugar paid $1.3 million for television ads in his successful 1982 campaign.[15] In that year's California Senate race, mayor Pete Wilson spent $3.5 million on television ads while his opponent, Governor Jerry Brown, paid $3.8 million for television.[16]

To bring all of this spending into perspective, it is noted that in 1860, Abraham Lincoln's entire successful national campaign for President cost $100,000.[17] On March 29, 1984, Senator Gary Hart had to spend $123,720 for just one-half hour of network television time at 11:30 p.m. that night in his quest for the 1984 Democratic Presidential nomination.[18]

The massive, often frantic media buys on behalf of candidates for office during the past few years have flooded the airwaves with a torrent of campaign commercials. Unfortunately, some of those ads have defamed and libeled opponents, distorted and misrepre-

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10. P. DAVID & D. EVERSON, THE PRESIDENTIAL ELECTION AND TRANSITION 1980-1981, 123, (1983).

11. H. ALEXANDER, FINANCING POLITICS—MONEY, ELECTIONS AND POLITICAL REFORM 105 (2nd ed. 1984).

12. H. ALEXANDER, FINANCING THE 1972 ELECTION 316 (1976).

13. H. ALEXANDER, FINANCING THE 1968 ELECTION 92 (1971).

14. *Now A Word From Your Local Candidate*, U.S. NEWS & WORLD REP., Oct. 18, 1982, at 18.

15. Cohen, *Costly Campaigns: Candidates Learn That Reaching the Voters is Expensive*, NAT'L. J., Apr. 16, 1983, at 782.

16. *Id.* at 784.

17. H. ALEXANDER, *supra* note 11, at 11.

18. N.Y. Times, May 30, 1984, at 18, col. 2.

sented the truth, and lied to the viewing and listening public.

II. Examples of Political Commercials Which Have Defamed Distorted or Lied

A. The 1984 Elections

Independent Presidential candidate Lyndon H. LaRouche claimed Walter Mondale was a Soviet agent in a half-hour paid political program broadcast nationally on CBS a week before the November election. LaRouche, a Virginia economist who was on the ballot in eighteen states, blasted Mondale as "an agent of influence of the Soviet secret intelligence services."[19] LaRouche's reasoning was that since Mr. Mondale had criticized President Reagan's defense build-up, he revealed himself as a Soviet agent.

During the New Hampshire primary campaign, Senator John Glenn was forced to take one of his radio ads off the air after acknowledging that it was misleading. The ad aired after the much publicized debate among all the Democratic candidates in that pivotal presidential primary. It began with an announcer asking, "Did you watch the Democratic presidential debate . . . [w]ell, here's what some people are commenting."[20] What followed for sixty seconds were man-on-the-street interview excerpts from several people who praised Glenn but criticized Walter Mondale's debate performance. One woman said: "Senator Glenn is honest. He comes across as very believable."[21] Contrasting that to Mondale, one man lamented: "In going back to Mr. Mondale, I'm afraid it's the same old rhetoric that we've heard in the past."[22] Within days, though, the *Boston Globe* reported that, in truth, these man-on-the-street interviews had been recorded before the debate ever took place and the people were just commenting generally on John Glenn and the other candidates. The Mondale campaign characterized the ads as "obviously misleading" and a storm of controversy was ignited.[23] In the final analysis, Glenn himself ordered that the ad be pulled.

National Republican Congressional Committee television ads

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19. Des Moines Register, Oct. 25, 1984, § C, at 1, col. 2; *see also* N.Y. Times, Oct. 25, 1984, at 14, col. 5.

20. Washington Post, Jan. 19, 1984, § A, at 4, col. 1.

21. *Id.*

22. *Id.*

23. *Id.*

depicting House Speaker "Tip" O'Neill as a tyrant who would make George Washington cry prompted Democratic Congressman Tony Coelho to angrily retort that "[t]his latest lie-and-buy campaign will not work."[24] At issue were commercials which flashed photos of Speaker O'Neill on the screen and then typed over them such charges as "Democrats falsify Congressional records, Democrats ram through special interest laws and Democrats bottle up important crime law."[25] In response to the announcer's question whether this was the way our founding fathers meant it to be in the Congress, a picture of George Washington appeared and a tear welled in the corner of his eye.

In a nationally televised debate prior to the April New York primary, Walter Mondale glowered at Gary Hart and railed: "[w]hy do you run those ads that suggest I'm out to kill kids when you know better?"[26] The former Vice President was seething over a Hart television commercial which featured a burning fuse symbolizing the possibility of war in Central America. The announcer in the ad told voters that Mondale risked another Viet Nam War by his willingness to use American troops in Central America. Hart retorted by saying that Mondale's own ads had consistently misrepresented Hart's civil rights and nuclear arms voting records. Mondale closed the debate by demanding that Hart remove his ads from the air.

Another clash arose between Hart and Mondale during the Illinois primary campaign. An embarrassed Hart formally apologized to Mondale after wrongly accusing the former Vice President of airing certain defamatory commercials. An hour after charging that Mondale had broadcast derogatory ads belittling Hart for having changed his name, the Colorado Senator admitted to the press that no such ads had ever aired. He then offered Mondale a public apology.[27]

In the Congressional trenches, the United States Senate campaign in Illinois between Charles Percy and Paul Simon was punctuated by emotional charges of false advertising. In response to a Percy commercial reporting that Simon would raise taxes by $200

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24. Des Moines Register, May 31, 1984, at 2-A, col. 2.

25. *Id.*

26. *When TV Spots Stir the Political Pot*, U.S. NEWS & WORLD REP., Apr. 9, 1984, at 15; *see also* Des Moines Register, Mar. 29, 1984, at 1-A, col. 2.

27. Chicago Tribune, Mar. 18, 1984, § 1, at 19, col. 5.

billion, Simon countered that he actually proposed cutting the taxes of the average family and only closing the tax loopholes of the corporations and the rich. Enraged, Simon rushed into a television studio and taped his own response to the Percy ad in which he branded the Percy commercial as a lie. Said Simon: "I'd rather lose by telling the truth than win through distortion."[28] Later, during a televised debate, Simon called Percy a liar to his face for running the "sleazy" ads that he claimed distorted his plan to reduce the federal deficit by $200 billion.[29]

In that same rancorous campaign, Percy took offense at a Simon ad which he claimed misrepresented and distorted his voting record on race issues. The radio commercial which drew Percy's fire aired on black-oriented Chicago area stations and featured a black woman saying "[w]e need a senator who will stick with us, not take our votes and stick it to us."[30] Percy labeled it a misleading and racist appeal.

Of the record millions spent on campaign commercials by Jesse Helms and Jim Hunt in their 1984 North Carolina Senate shoot-out, some went for deceptive ads. One Hunt commercial argued that a Helms anti-abortion bill could actually outlaw such birth control devices as the pill used by millions of women. Helms, characterizing that charge as "disgusting and dishonest,"[31] quickly produced a responsive ad in which his wife, Dorothy Helms, referred to the Hunt commercial as "an outright falsehood."[32] "I'd have never believed that Jim Hunt would stoop this low,"[33] said Mrs. Helms.

In one commercial in an Oklahoma House of Representatives race, Republican candidate Frank Keating appeared in a boxing ring. He looked into the television camera and said: "As a Tulsa prosecutor I won every case I tried."[34] As it turned out, his record was not quite that stellar—he in fact lost two major kickback trials. That revelation prompted his opponent, Congressman Jim Jones, to produce a commercial of his own in which he criticized the Keating ad as deceptive and false. Said Jones, "[i]n Oklahoma,

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28. Chicago Tribune, Oct. 12, 1984, § 2, at 1, col. 1.
29. *Id. See also* Chicago Tribune, Oct. 19, 1984, § 1, at 1, col. 2.
30. Chicago Tribune, Oct. 13, 1984, § 1, at 6, col. 1.
31. Washington Post, Nov. 18, 1984, § C, at 1, col. 1.
32. *Id.*
33. *Id.*
34. Washington Post, Nov. 5, 1984, § A, at 3, col. 1.

we believe a man is only as good as his word."[35]

B. The 1980 Elections

The National Conservative Political Action Committee (NCPAC) targeted six liberal United States Senators for defeat in 1980 and pumped more than a million dollars into negative advertising to get the job done. After election night, four had fallen—Frank Church of Idaho, George McGovern of South Dakota, Birch Bayh of Indiana and John Culver of Iowa. But many screamed foul, characterizing some of the NCPAC ads as distorted, inaccurate and false. NCPAC Chairman John T. Dolan acknowledged at one point during the 1980 campaign that an independent campaign advertising group like his "could lie through its teeth"[36] and still engender no voter backlash against the candidate it was trying to help.

One NCPAC television spot which ran on stations in Idaho pictured an empty Titan missile silo. The announcer warned that because such silos were empty they would not be much help in defending our country. He continued, "you see, Senator Church has almost always opposed a strong national defense."[37] The implication, of course, was that Church's anti-defense votes had emptied that silo. The truth was that the Titan, by 1980, was obsolete, its silos had been abandoned, and the Titan system replaced by Minuteman missiles.

One ad which NCPAC ran against George McGovern in South Dakota accused him of supporting "a gas tax that could reach 50 cents a gallon."[38] McGovern's legislative aides quickly and vehemently denied that he ever proposed such a tax or supported anyone else's gas tax proposal. They argued that the NCPAC ad blatantly and callously misstated the clear public record on the gas tax proposal.

A Missouri NCPAC ad attacking Thomas Eagleton's voting record flayed him for voting in favor of a $75 million aid package for the Communist revolutionary government in Nicaragua. In fact, the *Congressional Record* revealed that he had voted against

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35. *Id.*

36. McPherson, *The New Right Brigade*, Washington Post, Aug. 10, 1980, § F, at 1, col. 1.

37. *Id.* at 2, col. 6.

38. *Id.* at 4, col. 1.

that measure. Eagleton then launched his own counterattack, excoriating NCPAC for lying and distorting the truth in its political ads.[39]

As the foregoing discussion illustrates, there are innumerable methods which candidates use to defame, libel, or misrepresent the intentions of their opponents. While some attacks may be more malicious than others, invariably they all cause the victim of the attack some degree of injury. But the question remains: What legal remedies are available to a candidate aggrieved by an opponent's campaign commercial?

III. The Remedies Available to One Defamed

A. Sue for Libel

A candidate for public office who is defamed by an opponent's campaign commercial may indeed successfully sue for libel. The appropriate party defendant would be the opponent if that person made the attack or appeared on the advertisement, or whoever otherwise defamed the plaintiff in the commercial. The organization or person who paid for the ad should also be named. However, it should be quickly noted that given the first amendment freedom of speech latitude enjoyed by those who criticize candidates for office, the circumstances in which such a suit can lie are strictly limited.

In its landmark *New York Times v. Sullivan*[40] decision, the Supreme Court recognized that this country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[41] Lower courts espoused similar views, as the following observation by a California appellate court illustrates:

> Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson . . . insane . . ., Henry Clay a pimp, Andrew Jackson . . . an adulterer, and Andrew Johnson and Ulysses Grant drunkards.

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39. *Id.*
40. 376 U.S. 254 (1964).
41. *Id.* at 270.

> Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul . . . . [A]nd Franklin Delano Roosevelt [was castigated] as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy.[42]

That court concluded that criticizing politicians is "an unpleasant fact of our political background—a history of rough, crude, brawling, mud-slinging, muck-raking, name-calling attacks upon those in or seeking political office."[43]

The paramount public interest which the courts have attempted to protect by severly limiting candidates' opportunities to sue for defamation was succinctly acknowledged by the Supreme Court in another case as the "free flow of information to the people concerning public officials, their servants."[44] On the other hand, albeit in a non-political context, Supreme Court Justice Potter Stewart, in one oft-quoted 1966 concurrence, crisply articulated the interest which an individual enjoys in his own reputation: "The right of a man to the protection of his own reputation from . . . wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[45]

Indeed, time-honored causes of action for libel or slander[46] afford redress to victims of false statements which injure them. The types of injuries for which defamation victims can sue include being brought into public hatred, contempt or ridicule; being shunned or avoided; or injured in their trade or business.[47] The legal issue here is, of course, reconciling the right of an individual candidate to his good name with the public interest in unfettered, uncensored, wide-open political debate. Striking the balance in favor of the latter, the Supreme Court has established standards for judging allegedly defamatory political statements.

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42. Desert Sun Pub. Co. v. Superior Court, 97 Cal. App. 3d 99, ___, 158 Cal. Rptr. 519, 521 (1979).

43. *Id.*

44. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

45. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

46. It should be noted that although the typical distinction between the two is that libel involves written defamation and slander oral defamation, in the political advertisements context, libel is the tort if the offending radio or television commercial is read on the air from a written script.

47. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

In *Sullivan,* the Court ruled that a public official may not recover damages for a defamatory attack relating to his official conduct unless he proves with convincing clarity that the statement was made with actual malice.[48] That "public official" category was later expanded to include "public figures" in *Gertz v. Robert Welch, Inc.*[49] Actual malice has been defined as the defendant publishing the complained-of statement knowing it was false or with reckless disregard of the truth.[50] Criticisms relating to official conduct have been defined as those touching on fitness for office.[51] Clearly, all candidates for office are at least public figures and thus these general rules of law govern suits by candidates for political advertising libel.

The *Sullivan* rule and its progeny can properly be placed in context as the primary defense available to one sued for defamation by a political candidate. Sometimes referred to as the constitutional defense, reflecting the first amendment interests it protects, it allows defendants who falsely defame candidate plaintiffs to escape liability unless the plaintiff can establish known falsehood or reckless disregard—an admittedly difficult burden.

The second viable defense available here is that of fair comment and opinion.[52] This defense is underpinned by the distinction that while false statements of fact can be actionable, there is no such thing as a false statement of opinion. Opinions which defame and which are uttered in the context of political campaigns are not actionable.

The distinction between fact and opinion is a peculiarly fine one and courts have been hard-pressed to frame a ready standard or test; the situs of the defamation seems to be key, and material, such as venomous letters to the editor, that appear on the Op-Ed pages of newspapers have typically been classified as protected or privileged opinion.[53] The so-called privilege to express one's opinion, however, can be quickly lost if the attack imputes crime or

48. *Sullivan,* 376 U.S. at 279-80.

49. 418 U.S. 323, 342 (1974).

50. *Id.*

51. *Garrison,* 379 U.S. at 77.

52. RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

53. *See generally,* Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62, 426 A.2d 463 (1981); Caron v. Bangor Pub. Co., 470 A.2d 782 (Me.), *cert. denied,* 104 S.Ct. 3512 (1984); Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983), *aff'd on rehearing,* 750 F.2d 970 (1984), *cert. denied,* 105 S.Ct. 2662 (1985); Belli v. Berryhill, 11 MEDIA L. REP. (BNA) 1221 (Cal. Ct. App. Nov. 19, 1984).

dishonesty to the plaintiff; and statements charging a candidate with having committed a crime or other accusations involving moral turpitude are generally regarded as actionable.[54]

The third defense recognized is that of truth. By definition, a defamatory statement must be false, so it is axiomatic that if the defendant can prove the truth of the statement being sued on, no liability will be found.

The bottom line then is that the opportunity for candidates to recover damages for defamation along the campaign trail is available only in limited circumstances, and the courts have been blunt in acknowledging that fact. The Supreme Court has posited that "[government officials] are to be treated as 'men of fortitude, able to thrive in a hardy climate.' "[55] President Harry Truman put it another way: "If you don't like the heat, get out of the kitchen."[56] The Supreme Court of Pennsylvania said it all, with clarity, and spoke directly to the issues this article examines when it said:

> It is deplorable but true that during a political campaign, candidates and their supporters often indulge in gross exaggeration, invectives, distorted statements, charges of being unfit for the office sought, gross incompetence, disregard of the public interest or the welfare of our Country, prophecies of war or doom if the opponent is elected, mudslinging, half truths and outright lies which are so defamatory that they not only deeply wound the feelings of the person attacked, but undoubtedly damage his political aspirations and often (for a time) his reputation. Nevertheless, the Supreme Court has apparently taken the position that the free expression of thoughts and opinions, charges, accusations, criminations and recriminations regarding men in public life and political matters are so valuable and so essential to the preservation or improvement of our Government that they must be permitted and constitutionally protected unless they are made with actual malice.[57]

It should not be lost, however, that within these general rules and standards which govern political defamation cases, candidates can successfully sue for campaign libel if they meet the standards

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54. 50 AM. JUR. 2d *Libel and Slander* § 135 (1970).
55. *Sullivan*, 376 U.S. at 273 (quoting Craig v. Harney, 331 U.S. 307 (1947)).
56. BARTLETT'S FAMILIAR QUOTATIONS 788 (15th ed. 1980).
57. Clark v. Allen, 415 Pa. 484, ___, 204 A.2d 42, 44 (1964).

as discussed above.

B. Cases in which Candidates have Sued Opponents For Libel

The following cases are representative of those in which candidates have sued their opponents for libel.[58]

Martha Beamer and Wayne Nishiki were opposing candidates in the 1978 Democratic primary election for Lieutenant Governor of Hawaii. Nishiki ran television and newspaper ads which stated that Beamer was controlled by one Larry E. Mehau. Although no specific allegation was made in the ads, Mehau was known as a rumored underworld figure. Beamer lost the election, attributed her defeat to the Nishiki commercials, and sued him for libel. The trial court granted Beamer's motion for summary judgment, acknowledged liability and sent the case to the jury on the issue of damages only. A $35,000 jury verdict for Beamer was overturned by the Hawaii Supreme Court, which ruled that whether the ads were defamatory and whether the defendants had acted with malice were jury questions and elements of libel which the plaintiff needed to prove.[59]

In the 1974 general election, plaintiff Ralph Loveless ran against defendant Charles Graddick for Mobile County, Alabama, District Attorney and was defeated. Loveless subsequently sued Graddick for libel, claiming that a Graddick newspaper ad had falsely implied that Loveless was facing criminal charges for fraud. Loveless charged that his campaign was particularly damaged by the ad's headline, "Loveless Faces Fraud Charges," which he argued was categorically untrue. The Alabama Supreme Court reversed the trial court's entry of summary judgment for the defendants, reasoning that it was for the jury to determine whether the ad charged criminal fraud and whether the defendants had acted with actual malice. The court ruled that if an ordinary reader or listener of average intelligence would regard the ad as imputing criminal conduct, Loveless could prevail. Further, they wrote that because the determination of actual malice involves motive, intent and subjective feelings, the same was peculiarly inappropriate for

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58. It should be noted that in most cases involving claims of libelous campaign advertisements run on behalf of the opponent, the newspapers in which these ads appeared were also named as defendants.

59. Beamer v. Nishiki, 66 Hawaii 572, 670 P.2d 1264 (1983).

disposition by summary judgment.[60]

Thomas Noonan challenged Congressman John Rousselot in the 1962 California Republican primary. Later, Noonan claimed he lost the election because of a campaign tabloid Rousselot published which charged Noonan was disloyal to his country and was not a true Republican, but was running on behalf of left-wingers to divide the GOP and blow the election. The court denied Noonan relief because he had failed to even allege that the defendants had acted with actual malice, one of the cardinal elements necessary for any public figure plaintiff to plead and prove.[61] In the plaintiffs-who-live-in-glass-houses department, it is interesting to note as an aside that in this same campaign, Noonan referred to Rousselot as a "lunatic, fanatical fringe" candidate in his own right.[62]

In the wake of his defeat in the 1962 primary election for the office of Constable of New Orleans, John Matassa sued his opponent, incumbent Clyde F. Bel, Sr., for libel. The Bel campaign had published a newspaper ad the day before the election reporting that Matassa had been charged with irregularities in his management of the New Orleans airport. Matassa claimed libel because the Bel ad failed to mention that after a full investigation, the grand jury returned a "no bill" exonerating him. The trial court entered a judgment for the defendants, reasoning that the combative nature of political campaigns gave candidates the privilege of fairly criticizing the records of their opponents. The Louisiana Supreme Court reversed, holding that the defense of fair comment could be defeated by a jury finding of malice. The court also acknowledged that charges of corruption or dereliction of duty, as here, went to the heart of the protection from serious damage to reputation that the law of libel provides even candidates for office, noting that "the right to a good name" is among the inalienable rights enjoyed by all.[63]

The above should not be read as encouraging the overly sensitive candidate to sue over campaign barbs, as the following case illustrates. James Corman, a candidate for Congress from the 22nd District of California in the 1960 election, sued his opponent, C. Lemoine Blanchard, for libel for publishing a pamphlet implying

60. Loveless v. Graddick, 325 So.2d 137 (Ala. 1975).
61. Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966).
62. *Id.* at ___, 48 Cal. Rptr. at 819.
63. Matassa v. Bel, 246 La. 294, 164 So.2d 332 (1964).

that Corman was a Communist sympathizer. The courts denied relief, ruling that the question posed to voters in the pamphlet, ("[Do you favor] abolition of the Un-American Activities Committee?") was simply not susceptible of defamatory meaning and did not in fact charge Corman with being a Communist sympathizer.[64]

Glen Thompson, the incumbent Democratic County Assessor of Tulsa County, Oklahoma, sued his 1956 Republican opponent, James Arnold, and two newspapers for libel resulting from an Arnold ad which contained a caricature of Thompson with the caption "[d]o you ever get the feeling your pocket's being picked?" This apparently was a reference to an increase in taxes during Thompson's term of office. The court ruled that the statements were protected privileged criticisms of the official acts of the assessor and held that only when such criticism extended to the false imputation of criminal conduct that liability for defamation could attach. Satisfied that the instant ad did not contain words accusing Thompson of a crime, the courts found for the defendants.[65]

One case in which a candidate did recover against his opponent for libel involved the 1951 election for Executive Member of the New York County Democratic organization between Frank Stella and incumbent party boss James Farley. Farley published a campaign tabloid which charged Stella with being affiliated with Communists. The jury returned a $17,500 verdict for Stella which was reduced to $10,000 but affirmed on appeal. The court ruled that the privilege of vigorously criticizing a candidate for office does not extend to dishonest, unfair attacks on the private character of the candidate or to improper attacks. Consequently, the court rejected the defense that the statements were simply fair comment, made in the campaign context.[66]

The following are representative of those cases in which candidates have brought suits for libel against opposition party leaders, supporters of their opponents, writers of critical letters to the editor, and newspapers in which those letters were published.

Attorney Arthur Silsdorf served as part-time mayor of the small village of Ocean Beach, New York, from 1956 to 1978. Silsdorf sued several opposition party leaders who wrote an open letter

64. Corman v. Blanchard, 211 Cal. App.2d 126, 27 Cal. Rptr. 327 (1963).
65. Thompson v. Newspaper Printing Corp., 325 P.2d 945 (Okla. 1958).
66. Toomey v. Farley, 2 N.Y.2d 71, 138 N.E.2d 221, 156 N.Y.S.2d 840 (1956).

to the townspeople during the 1978 election campaign which he claimed was libelous. The letter had charged that Silsdorf's administration was corrupt and that his private law practice was profiting at the village's expense. An intermediate appellate court ruled that the statements were constitutionally protected opinions. The New York Court of Appeals reversed, however, and held that accusations of illegal or criminal activity—even if in the form of an opinion—are actionable if false statements of fact are the basis of that opinion.[67]

A classic example of the operation of truth as a defense to libel was presented in the suit brought by Kansas State Senator Ronald Hein against the state chairman of the opposing American Party after the 1978 election. The defendant had distributed 22,000 copies of a brochure attacking Hein's votes in the Kansas Senate in favor of marijuana and homosexuality. Hein sued for libel. The defendant produced Hein's voting record which established he had in fact voted to reduce the penalty for possession of marijuana and to remove the criminal prohibition against sodomy. After examining the evidence, the court concluded the statements were substantially true and granted a summary judgment for the defendant. The Kansas Supreme Court subsequently affirmed.[68]

The defense of fair comment and opinion can be illustrated by a case based upon an allegation made in a 1979 letter to the editor that the plaintiff candidate was a "Desert Dirty Trickster." The California Court of Appeal quickly directed a summary judgment for the defendant, holding that the statement was clearly protected opinion.[69]

The vitality of the *Sullivan* constitutional defense to political libel was again demonstrated in the suit brought by Jose Menendez, a member of the Key West, Florida, City Commission who was defeated for re-election in 1971. Menendez complained that a negative ad purchased by opponents and carried in the defendant local newspaper libeled him and cost him the election. The ad charged Menendez was un-American and displayed a pro-Castro

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67. Silsdorf v. Levine, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822 (1983).

68. Hein v. Lacy, 228 Kan. 249, 616 P.2d 277 (1980).

69. *Desert Sun Pub. Co.*, 97 Cal. App.3d 49, 158 Cal. Rptr. 519. *See also* Sparks v. Boone, 560 S.W.2d 236 (Ky. Ct. App. 1977) where the jury and appellate court found a statement in a letter to the editor that plaintiff candidate, a former college president, had left the institution in financial disarray, was not libelous as it was true to the best of defendant writer's knowledge and no malice on his part was proven.

Communist allegiance. The trial court, affirmed on appeal, held that since the plaintiff public official had not clearly and convincingly demonstrated that the newspaper defendant published the ad with doubts about its truthfulness or otherwise maliciously, the *Sullivan* defense would bar any recovery.[70]

At least two candidates' libel suits have been disposed of with judges ruling that the allegedly libelous statements made by opponents or their supporters were not, as a matter of law, capable of defamatory meaning. In a 1959 Texas decision, the charge that plaintiff candidate for the Texas Legislature was a left-wing radical was so characterized by the judge;[71] and in a 1966 Wisconsin case, the statement that plaintiff candidate for governor in the Democratic primary was only pretending to be a Democrat was similarly classified and that suit dismissed.[72]

C. File a False Advertising Complaint and Seek Declaratory and Injunctive Relief

At least one federal district court judge has enjoined certain allegedly false and misleading political advertising, justifying his decision in part on the accepted regulation of false commercial advertising by the Federal Trade Commission.[73] This option must therefore be considered against the backdrop of regulation by the government of deceptive commercial speech or product advertising which appears on radio or television.

1. The Regulation of Commercial Product Advertising

a. The Federal Trade Commission

The Federal Trade Commission Act makes unlawful "unfair or deceptive acts or practices in or affecting commerce;"[74] and false advertising is clearly a deceptive or unfair practice. Armed with that statutory mandate, the FTC closely monitors all product commercials appearing on television or radio.

In meeting its responsibility to protect the average consumer from false advertising, the FTC has moved with noticeable vigor

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70. Menendez v. Key West Newspaper Corp., 293 So.2d 751 (Fla. Dist. Ct. App. 1974).
71. Rawlins v. McKee, 327 S.W.2d 633 (Tex. Civ. App. 1959).
72. Frinzi v. Hanson, 30 Wis. 2d 271, 140 N.W.2d 259 (1966).
73. Tomei v. Finley, 512 F.Supp. 695 (N.D. Ill. 1981).
74. 15 U.S.C. § 45(a)(1) (1982).

against several ads for a variety of products: the Commission charged that the advertising of pharmaceutical manufacturer Pfizer was deceptive when ads for its sunburn product Un-Burn claimed it actually anesthetized nerves because it contained the same anesthetic doctors use;[75] it found that ads for non-dairy oleomargarine which contained references to the margarine being "churned to delicate, sweet creamy goodness" and "country fresh" were false in that they incorrectly intimated the oleo was butter-like or a dairy product;[76] and it ordered a deceptive television ad for Rapid Shave off the air because viewers were told they were watching Rapid Shave's moisturizing power softening a piece of tough, dry sandpaper when in truth they were watching Rapid Shave moisturize a piece of plexiglass.[77]

The FTC also found the manufacturer of Swim-Ezy, an inflatable rubber waistband worn as a swimming aid, to have falsely advertised the product by asserting it would render its wearer unsinkable and would enable a poor swimmer to perform like a champion;[78] it ordered the maker of the Water Pik to cease falsely representing that it prevented gum disease;[79] and terminated what it decided was false and medically preposterous advertising for Charles of the Ritz Rejuvanescence Cream that it could restore the petal-like quality of youthful skin regardless of the age of the user.[80]

In addition, the Commission filed a false advertising complaint against an egg industry trade association for its ad which represented that there was no scientific evidence that eating eggs increased the risk of heart disease.[81] It also prosecuted the Cinderella Career and Finishing School for deceptively advertising that it offered a college education in five weeks.[82]

The FTC has preferred charges against these and thousands of other advertisers who made false statements in their advertising. The general rule of law is that false, deceptive or misleading advertising enjoys no first amendment protection and is indeed subject

75. In re Pfizer, Inc., 81 F.T.C. 23, 26 (1972).
76. E.F. Drew & Co. v. FTC, 235 F.2d 735, 736 (2nd Cir. 1956).
77. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).
78. In re Universe Co., 63 F.T.C. 1282, 1283 (1963).
79. In re Teledyne, Inc., 97 F.T.C. 320, 322 (1981).
80. Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2nd Cir. 1944).
81. Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977).
82. FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

to restraint.[83]

b. The Federal Communications Commission

Pursuant to its legislative authority, discussed above, the Federal Trade Commission exercises primary jurisdiction regulating unfair or deceptive advertising in all media, including the broadcast media. The Federal Communications Commission has been directed by Congress to specifically regulate radio and television broadcasting to insure that the overall operations of those stations serve the public's interests. These two agencies have adopted a liaison agreement whereby the FTC will remain primarily responsible in this area and the FCC will itself take action against a broadcast station in only the most egregious false advertising case. The FCC does, however, reserve the right to consider any FTC false advertising findings in the licensing context of whether a particular broadcast station is operating in the public interest.[84]

In a 1971 decision, the FCC clarified the federal false advertising turf. A consumer's group had filed a complaint with the FCC that CBS and its local Washington, D.C. affiliate, WTOP-TV, had failed to protect the public from false, misleading and deceptive advertising.[85] The ads which particularly riled the complainants included one for Dancerina Doll, which appeared to dance by itself in the ad but which in truth had to be manipulated manually, and a Sugar Frosted Flakes ad representing that cereal was an excellent source of energy and demonstrating it by pictorializing scenes of Tony the Tiger accompanying members of a family in all their activities throughout the day.[86]

The FCC highlighted two general rules which govern in the area of false advertising. First, it acknowledged that the FTC was specifically created by Congress to deal with the problem and that it would defer to the FTC in all false advertising cases except those which were flagrant.[87] Secondly, the FCC reminded its own broad-

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83. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 and n.24 (1976).

84. Liaison Agreement Between Federal Communications Commission and the Federal Trade Commission, 3 TRADE REG. REP. (CCH) ¶9852 (Apr. 27, 1972).

85. Television Advertising, 32 F.C.C.2d 400 (1971) (citing Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising, *reprinted in* 74 F.C.C.2d 623 (1979)).

86. *Id.*

87. *Id.* at 404.

cast station licensees of their "duty to protect the public from false, misleading or deceptive advertising [as] . . . an important ingredient in his operation in the public interest."[88] While recognizing that most licensees do not possess the expertise or resources to test every advertising claim for truth, the FCC imposed on them a duty to use reasonable diligence to be alert to suspicious ad claims and to demand substantiation of factual claims if wary.

The FCC warned:

> In short, every station must have a program to protect the public in this area . . . . For, commercial broadcasting, by definition, is based on carriage of commercials, and its own integrity thus depends on the integrity of the commercial message. The false and misleading advertisements disserves [sic] the broadcasting industry as well as the public.[89]

Applying the facts presented in this complaint to those rules of law, the Commission concluded that the requisite level of conduct had not been demonstrated and denied the complaint.[90]

On other occasions, the FCC has imposed even more specific advertising obligations on its licensees. In its 1961 Public Notice, the Commission imposed the following additional obligation on broadcast stations: "[T]o take reasonable steps to satisfy himself as to the reliability and reputation of every prospective advertiser and as to his ability to fulfill promises made to the public over the licensed facilities."[91] Similarly, in its omnibus 1960 program policy statement, the FCC emphasized: "With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading or deceptive matter."[92]

In an effort to entice the FCC to exercise its shared jurisdiction over false advertising, a group of George Washington University law students filed a petition in 1970 urging the Commission to adopt new rules regulating certain product commercials the students found misleading. One of the commercials singled out by the

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88. *Id.* at 405.

89. *Id.* at 407, 409.

90. *Id.* at 409.

91. Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising, *reprinted in* 74 F.C.C.2d 623, 624 (1979) [hereinafter cited as Licensee Responsibility].

92. En Banc Programming Inquiry, 44 F.C.C. 2303, 2313 (1960).

petitioners was for a vegetable slicer known as the Veg-O-Matic. In that commercial, an announcer enthusiastically described the $7.77 wonder shredder in these terms while the camera recorded each slice:

> It slices a whole potato in one stroke; turns whole onions into zesty thin slices for hamburgers; now turn the dial and slices are automatically dices; . . . . [D]ice carrots the same way; prepare celery for use this easily . . . . Veg-O-Matics can slice a whole firm tomato like this in a stroke or make everybody's favorite, golden french fries—hundreds—in one minute. Veg-O-Matic; just $7.77. The perfect Christmas gift.[93]

The students charged that this ad was false and misleading because in truth the Veg-O-Matic did not cut smoothly at all, was very difficult to operate, food usually got caught in its blades, the blades sometimes broke, they rarely made a complete cut through any vegetable, and the whole thing was extremely difficult to clean. The FCC denied the students' petition, ruling that additional rules to control false advertising were not needed.

2. *But The Government Shall Not Touch Political Commercials*

Because federal law prohibits stations from censoring political advertising, neither the FTC nor the FCC will take action against a false or misleading ad that is political in nature.[94] It could be the most outrageous ad, one which libels or slanders, one which is blatantly misleading and patently false, and the government will not touch it. The FTC will not file a complaint or prosecute and the FCC will not sanction a station for carrying it. The commercial could be so bad that one could accurately compare it to United States Senator John Randolph's own slanderous remark spoken of an opponent, "[l]ike rotten mackerel by moonlight, he shines and stinks."[95] Indeed, such a political campaign ad could shine and stink—and the government's agencies charged with regulating advertising stench would not touch it. They would leave it on the beach, to shine on another day's television or radio programming.

The restraint exercised is due, of course, to deference paid the

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93. Television Advertising, 32 F.C.C.2d 360, 392 (1971).
94. 47 U.S.C. § 315(a) (1982).
95. L. HARRIS, THE FINE ART OF POLITICAL WIT 53 (1964).

first amendment by these two agencies. Further, with respect to the FCC, it would seem incongruous to sanction one of its licensees for broadcasting a false or libelous campaign commercial when federal law prevents a licensee from censoring or editing in any way a political campaign use ad.[96] But the FTC, which typically targets the advertisers themselves who buy the ad time rather than the medium of publication, has also adopted a "hands-off" approach to campaign advertising.

The question must be asked, though, whether the distinction the government has drawn between commercials for products and commercials for political candidates, denominating the latter as the expression of political ideas, has rusted through time. Specifically, since 1952, candidates for President of the United States have openly been marketed and sold to the voters by advertising agencies. Commented Republican National Chairman Leonard Hall after the ad agency of Batton, Barton, Durstein and Osborn added the 1956 Eisenhower campaign as a regular account: "You sell your candidates and your programs the way a business sells its products."[97]

Since 1956, the reliance by major office politicians on television and radio to reach the masses of voters has exploded to the point that today the television studio where a candidate tapes an ad has replaced the whistle-stop speech. In addition, it is uncontroverted that campaign commercials provide most voters their window on the campaign and their often primary exposure to the candidate. It is readily acknowledged today that advertising agencies and public relations firms develop their political commercials just like they develop product commercials for their business clients—quarter pounders, drain uncloggers and breath sprays. The argument is this: if we have indeed reached the point where campaign commercials are prepared and packaged to achieve the same effects as product commercials—visual (or aural) imagery, color, style and perception rather than the substance of political debate, then the politicians themselves have erased the political speech/product distinction and the new political product commercial should be regulated in the same way as any other product commercial—i.e., if it is false or misleading, accountability and liability will be imposed.

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96. 47 U.S.C. § 315(a) (1982); *see infra* text accompanying notes 157-170.

97. J. McGinniss, The Selling of the President 1968, 27 (1969).

It could be argued that the FTC and FCC are no longer justified in doing cartwheels over Water Piks, oleomargarine, shaving cream, rejuvanescence cream, charm schools, Dancerina Dolls and Veg-O-Matics and yet sit idly by while big-stakes Presidential and Congressional campaign ads flood the airwaves with false and misleading claims. The referees should at least take the field, some would insist. This is particularly compelling given the acknowledgement by the courts that the thrust of the Federal Trade Commission Act's false advertising provisions was to abolish *caveat emptor* and replace it with a rule which allows the consumer the right to rely on advertising representations made as the truth.[98]

The foregoing logic of the regulation of false advertising has already been relied upon in part by one federal district court judge. In a well reasoned and articulate 1981 decision, Judge Milton Shadur of the United States District Court for the Northern District of Illinois enjoined certain false and misleading political advertising.[99] This opinion, in itself, could easily serve as a form book for anyone seeking similar relief—all the issues are addressed and tightly researched.

The plaintiffs were the Republican officials and candidates for office in the April 7, 1981, township elections in the rock-ribbed Republican stronghold of Lyons Township.[100] The defendants were their Democratic counterparts.[101] Plaintiffs brought this action when the defendants started calling themselves the "Representation for Every Person Party" and plastered the advertising for their Democratic candidates with the prominent slogan: "Vote REP April 7."[102] That slogan dominated the defendants' buttons, signs and literature; 60,000 pamphlets adorned with the slogan were prepared for mailing at the time the matter came up for hearing.[103] The Republicans argued that the advertising of their opponents was false, misleading and would confuse and trick traditionally Republican voters into voting for Democratic candidates. The Democrats responded that the first amendment protected their political advertising from judicial scrutiny and sanction.[104]

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98. Goodman v. FTC, 244 F.2d 584, 603 (9th Cir. 1957); FTC v. Standard Education Society, 302 U.S. 112, 116 (1937).

99. Tomei v. Finley, 512 F. Supp. 695 (N.D. Ill. 1981).

100. *Id.* at 696.

101. *Id.*

102. *Id.* at 697.

103. *Id.*

104. *Id.*

Judge Shadur first analyzed the pertinent Supreme Court precedent. From *Garrison v. Louisiana,* he noted the reasoning that "[f]or the use of the known lie as a tool is at once at odds with the premises of democratic government . . . . Hence, the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection."[105] He also found significant the proposition that "[p]reserving the integrity of the electoral process, preventing corruption . . . are interests of highest importance."[106]

So armed with authority, the judge rejected the first amendment arguments of the defendants. He found the use of the acronym "REP" by the Democrats to be "deliberately false expression to the voters of the idea that the defendants are Republicans" and as such to be outside the protection of the first amendment.[107] The judge also reasoned that the Democrats' advertising here was "little different from the commercial (rather than political) false advertising held unprotected."[108] Of course, this reliance on the false commercial product advertising decisions is particularly noteworthy and incorporates all of the general rules of law and theories of recovery from this article's analysis of false product advertising.

The judge concluded that the plaintiffs had satisfied all prerequisites and tests necessary for preliminary injunctive relief, and then entered same, restraining the defendants from using the acronym "REP" in conjunction with the upcoming township election.[109] This case supports filing a false advertising complaint in federal court as a viable option to those aggrieved by false or misleading campaign advertising by an opponent.[110]

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105. *Id.* at 697-98 (quoting *Garrison,* 379 U.S. at 75).

106. *Id.* at 698 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1977)).

107. *Id.*

108. *Id.* (citing Bates v. State Bar of Ariz., 433 U.S. 350 (1977) and *Nat'l Comm. on Egg Nutrition,* 570 F.2d 157 (7th Cir. 1978)).

109. *Id.* at 699.

110. *Compare Tomei with* Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893 (D.C. Cir. 1984), where the court found a subway system's refusal to rent display space for a poster to an artist because it considered the poster to be deceptive, distorted and untruthful, to be a violation of the artist's first amendment rights. It is noted, however, that in its analysis the court conceded that similar prior restraint of false political messages in situations comparable to those in *Tomei* indeed "may be appropriate." *Lebron,* 749 F.2d at 898. In *Lebron,* Judge Bork was of the opinion that no reasonable man would believe that the political poster at issue, a depiction of President Reagan pointing to and laughing at a group of minority persons, was a depiction of an actual event. *Id.* at 897-98. Thus, he ruled that the poster could not be restrained on the basis of falsity.

D. File A State Fair Campaign Complaint

Twenty-five states have enacted statutes which, in varying degrees, proscribe certain campaign conduct and set out penalties for violations. Most of these fair campaign codes make it unlawful for a candidate to libel his or her opponent or to otherwise employ false and misleading advertising in the campaign. The sanctions vary from nominal fines to removal from office.

In California, if any winning candidate for office libels or slanders an opponent and in a successful suit for defamation against that candidate it is determined that such attack was a major contributing cause of the opponent's defeat, the winner must forfeit the office.[111] Assemblyman Art Angos, who introduced the bill in the California Legislature, explained that it was drafted to clean up increasingly prevalent mudslinging campaigns in the state. The type of activity Angos hoped to prevent included one 1982 Senate race in which a candidate falsely accused his opponent of not being actually married to his wife and a Newport mayoral race in which the mayor was falsely described by an opponent as a Marxist sympathizer.[112]

There is a comparable tell-a-lie-lose-your-job campaign statute in Oregon.[113] The Oregon prohibition of false statements in campaign advertising cost a former state senator who had been out of office for two years the nomination she won in a 1968 primary for her false and misleading use of the word "re-elect" on campaign advertising when she in fact was not the incumbent.[114] There are also statutes similar to Oregon's in Montana,[115] Utah,[116] Alaska,[117] and Minnesota.[118] Minnesota's political advertising law exacted the expulsion from the state house of representatives of a newly elected legislator who had falsely accused his incumbent opponent of having voted only four times out of more than 300 votes during

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111. CAL. CONST. art. VII, § 10.

112. Letter from California Assemblyman Art Angos to California Editors (May, 1984).

113. OR. REV. STAT. § 260.532 (1983).

114. Cook v. Corbett, 251 Or. 263, 446 P.2d 179 (1968). *See also* Comm. of 1,000 v. Eivers, 296 Or. 195, 674 P.2d 1159 (1983); Koch v. Makinson, 52 Or. App. 155, 628 P.2d 397 (1981); Mosee v. Clark, 253 Or. 83, 453 P.2d 176 (1969).

115. MONT. CODE ANN. § 13-35-234 (1983).

116. UTAH CODE ANN. §§ 20-14-28, 20-14-47 (1976).

117. ALASKA STAT. §§ 15.56.010, 15.56.110, 15.20.540 (1982).

118. MINN. STAT. ANN. §§ 210A.04, 210A.40 (West Supp. 1984).

two years in office.[119]

It is unlawful in Ohio for any candidate to make false statements about an opponent,[120] and a newly elected county prosecutor was found to have done just that by falsely misrepresenting his opponent's prosecution record in their 1976 campaign.[121] Statutes similarly prohibiting false statements in campaign advertising can be found in North Dakota,[122] Colorado,[123] Indiana,[124] Massachusetts,[125] Tennessee,[126] Washington,[127] West Virginia[128] and Wisconsin.[129]

The Michigan fair campaign code is somewhat more narrowly drawn and prohibits those false statements in campaign advertising which reflect on an opponent's character, morality, or integrity.[130] Comparably, Mississippi has made unlawful those false campaign statements that go to the opponent's honesty, integrity, or morality "so far as his private life is concerned."[131] The North Carolina fair campaign statute proscribes "derogatory reports" about a candidate by an opponent.[132]

The states of Texas,[133] Pennsylvania,[134] Hawaii,[135] New York,[136] Kansas,[137] Louisiana[138] and New Hampshire[139] have en-

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119. *See* Scheibel v. Pavlak, 282 N.W.2d 843 (Minn. 1979). *See also* Pavlak v. Growe, 284 N.W.2d 174 (Minn. 1979); In re Ryan, 303 N.W.2d 462 (Minn. 1981); Kennedy v. Voss, 304 N.W.2d 299 (Minn. 1981); Bundlie v. Christensen, 276 N.W.2d 69 (Minn. 1979); Schmitt v. McLaughlin, 275 N.W.2d 587 (Minn. 1979); Moulton v. Newton, 144 N.W.2d 706 (Minn. 1966).

120. OHIO REV. CODE ANN. § 3599.091 (Baldwin 1982).

121. Dewine v. Ohio Elections Comm., 61 Ohio App.2d 25, 399 N.E.2d 99 (1979).

122. N.D. CENT. CODE § 16.1-10-04 (1981). *See* Snortland v. Crawford, 306 N.W.2d 614 (N.D. 1981); Saefke v. VandeWalle, 279 N.W.2d 415 (N.D. 1979).

123. COLO REV. STAT. § 1-13-109 (1980).

124. IND. CODE ANN. § 3-4-7-5 (Burns 1982).

125. MASS. ANN. LAWS ch. 56, § 42 (Michie/Law Co-op. 1975).

126. TENN. CODE ANN. 2-19-142 (1985).

127. WASH. CODE ANN. § 29.85.070 (1965).

128. W. VA. CODE § 3-8-11 (1979).

129. WIS. STAT. ANN. § 12.17 (West 1967).

130. MICH. STAT. ANN. § 6.1931(3) (Callaghan 1983).

131. MISS. CODE ANN. § 23-3-33 (1972).

132. N.C. GEN. STAT. § 163-274(8) (1982).

133. TEX. STAT. ANN. art. 14.10 (Vernon 1967).

134. PA. STAT. ANN. tit. 25, § 3258 (Purdon Supp. 1984).

135. HAWAII REV. STAT. § 19-3 (1976).

136. N.Y. ELEC. LAW § 3-106 (McKinney 1978) and N.Y. ADMIN. CODE tit. 9, § 6201 (1985).

137. KAN. STAT. ANN. § 25-2407 (1981).

138. LA. REV. STAT. ANN. § 18:1463 (West 1979).

139. N.H. REV. STAT. ANN. § 666:6 (Supp. 1983).

acted fair campaign laws which prohibit such conduct as bribery, false allegations of political affiliation, political espionage, campaign dirty tricks, the failure to identify the committee or person who has paid for the political ad, and the purchase of last-minute advertising without allowing opponents a sufficient time in which to reply. There are no provisions in the statutes of these seven states which sanction libel or false statements about a candidate.

IV. The Remedies Not Available to One Defamed

A. Sue the Broadcast Station for Libel

Save your filing fees. The Supreme Court has held that broadcast stations are immune from liability for any defamation caused by a candidate's campaign use of the airwaves.[140]

The factual context of the Court's decision involved a speech delivered on WDAY radio and television in Fargo by A.C. Townley, a candidate for United States Senator from North Dakota in the 1956 elections. WDAY understood that the Federal Communications Act precluded it from censoring candidates' speeches and Townley was permitted free reign on the air.[141] In his speech, he accused his opponents and a farmers' cooperative union of conspiring to "establish a Communist Farmers Union Soviet right here in North Dakota."[142] The plaintiff farmers union sued both candidate Townley and the station for libel. The state trial court dismissed the suit and the United States Supreme Court affirmed.[143]

The significance of this decision lies in the Court's interpretation of the legal effect of the statutory prohibition against licensee censorship contained in section 315 of the Communications Act. Section 315 provides today, as it did in 1959, that:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions*

140. Farmer's Union v. WDAY, 360 U.S. 525 (1959).
141. *Id.* at 526.
142. *Id.* at 527.
143. *Id.* at 535.

of this section.[144]

This provision is known as the no-censorship clause; the question before the Court in *WDAY* was whether a station which obeyed the express prohibition of the clause and refrained from censoring or editing out libelous remarks could nonetheless be sued for libel by a defamed party.[145] The Court held that there could be no civil tort liability imposed on a station for conduct (refusing to censor or edit out libelous remarks) which the statute demanded of the station.[146] The Court reasoned that:

> Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter.[147]

In the years since *WDAY* was decided, the FCC has provided further definition to the immunity and to the reach of the no-censorship clause. The Commission has underscored the proposition that the immunity covers only commercials or broadcasts in which a legally qualified candidate appears or is heard, i.e. in the Act's language, a "use" by that candidate.[148] A station is indeed subject to liability for any defamation caused by a commercial in which a candidate does not appear or is not heard, for example a commercial in which a supporter speaks on behalf of the candidate.[149] The FCC has also provided broadcasters examples of the type of conduct which would constitute unlawful censorship, including refusing to broadcast a candidate's commercial or program because it contained libelous material or rejecting a candidate's ad because it was vulgar or in bad taste.[150]

A station may, however, reject political ads in which the candidate's voice or picture do not appear if the station in good faith believes they are inaccurate, unfair or libelous.[151] A station may

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144. 47 U.S.C. § 315(a) (1982) (emphasis added).

145. *WDAY*, 360 U.S. at 526.

146. *Id.* at 531.

147. *Id.* at 530.

148. New Primer on Political Broadcasting & Cablecasting, 69 F.C.C.2d 2209, 2273 (1978) [hereinafter cited as New Primer].

149. *Id.*

150. *Id.* at 2270.

151. *Id.* at 2271.

also require an advance tape of the political ad for several reasons: to satisfy itself the candidate is a part of it (i.e. it is a "use"); to assure itself that the appropriate required sponsorship identification appears; or to insure that the commercial is the length the purchaser represented it to be when the time was purchased.[152]

In a case testing the reach of the *WDAY* immunity, the FCC held that a station is immune from liability for statements by other persons who appear on a broadcast *with* a candidate because section 315 prohibits the censorship of any part of a commercial on which a candidate appears.[153] Subsequently, in an interesting 1972 decision, the Commission ruled that KNXT-TV and KNX Radio in Los Angeles were wrong to require the Humphrey For President campaign to sign a contract providing that if the stations were sued as a result of any Humphrey commercial, Humphrey would then indemnify them.[154] The FCC found that not only did such imposition on a candidate improperly inhibit that candidate's use of the station, but that given the *WDAY* immunity, such indemnification agreements were unnecessary.[155]

The reasoning underpinning these FCC decisions and the *WDAY* case is that it would be unfair to leave stations exposed to liability for defamation and at the same time statutorily deprive them of the power to avoid such liability by editing out libelous portions of the political broadcasts. That logic has not been lost at the state level. The legislatures of fully forty-one states have enacted statutes providing varying degrees of defenses and immunities to broadcast stations from suits for defamation arising out of broadcast statements of political candidates.[156]

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152. *Id.* at 2271-72.

153. Section 315 Ruling, 14 F.C.C.2d 766 (1968), *recon. denied,* Gray Communications Systems, Inc., 19 F.C.C.2d 532 (1969).

154. Section 315 Ruling, 37 F.C.C.2d 576 (1972).

155. *Id.*

156. ARIZ. REV. STAT. ANN. § 12-652 (1982); ARK. STAT. ANN. § 3-1108 (1976); CAL. CIV. CODE § 48.5 (West 1982); COLO. REV. STAT. § 13-21-106 (1973); CONN. GEN. STAT. ANN. § 52-239 (West Supp. 1985); FLA. STAT. ANN. § 770.04 (West 1964); GA. CODE ANN. § 51-5-10 (1982); IDAHO CODE § 6-701 (1979); IND. CODE ANN. § 34-4-14-1 (Burns Supp. 1984); IOWA CODE ANN. § 659.5 (West 1950); KY. REV. STAT. ANN. § 411.062 (Bobbs-Merrill 1971); LA. REV. STAT. ANN. §§ 45:1351, 45:1352 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 3-503 (1984); MASS. ANN. LAWS ch. 231, § 91-A (Michie/Law. Co-op. 1974); MICH. STAT. ANN. § 27.1406 (Callaghan 1980); MINN. STAT. ANN. § 544.043 (West Supp. 1985); MISS. CODE ANN. § 95-1-3 (1972); MO. ANN. STAT. § 537.105 (Vernon 1953); MONT. CODE ANN. § 27-1-811 (1985); NEB. REV. STAT. §§ 86-601, 86-602 (1981); NEV. REV. STAT §§ 41-340, 41-360 (1985); N.H. REV. STAT. ANN. §§ 507-A:1-507-A:3 (1983); N.J. STAT. ANN. § 2A:43-3 (West Supp. 1985); N.M. STAT. ANN. § 41-7-6 (1982); N.Y. CIV. RIGHTS LAW § 75 (McKinney 1976); N.C. GEN. STAT. §§

B. File A Complaint With The FCC

Over the years, several candidates for public office have filed complaints with the Federal Communications Commission in Washington, D.C. Some charged that radio and television stations in their home states acted unlawfully in refusing to air campaign commercials the stations considered libelous, false, misleading or distasteful. Others complained that they had been victimized by the deceptive and unfair advertising of their opponents. Such complaints have typically urged the FCC to impose sanctions against the broadcast stations involved.

Many viewers, as well, have lodged formal complaints with the FCC alleging that certain campaign commercials were vulgar, defamatory or offensive. Those petitions also sought government penalties against the wrongdoers.

The result is always the same. No viewer or candidate has ever been successful in persuading the FCC to order a broadcast station to pull or censor a political campaign use commercial on grounds the ad was false, libelous or misleading. Nor has the FCC ever penalized a station for carrying, without editing and cleaning them up, even obviously libelous and offensive political candidate commercials.

1. Statutory Limitations

The Federal Communications Commission, the agency which licenses and regulates all radio and television stations in the country, possesses jurisdiction to enforce those obligations Congress imposes on broadcast stations.[157] The agency is also empowered to enact rules and issue public notices of its own which impose additional obligations on its licensees as quid pro quo for the privilege of holding such federal licenses to broadcast.[158] There are several of these obligations which are relevant to the present discussion:

99-1, 99-2, 99-5 (1985); N.D. CENT. CODE § 14-02-09 (1981); OHIO REV. CODE ANN. § 2739.03 (Baldwin 1982); OKLA. STAT. ANN. tit. 12 §§ 1447.1, 1447.2 (West 1980); OR. REV. STAT. § 30.150 (1983); 42 PA. CONS. STAT. ANN. § 8345 (Purdon 1982); S.C. CODE ANN. § 7-1-80 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 20-11-6 (1979); TENN. CODE ANN. § 29-24-104 (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 73.004 (Vernon Supp. 1986); UTAH CODE ANN. § 45-2-5 (1981); VA. CODE § 8.01-49 (1984); WASH. REV. CODE ANN. § 19.64.010 (1978); W. VA. CODE § 55-7-14 (1981); WIS. STAT. ANN. § 895.052 (West 1983); WYO. STAT. § 1-29-102 (1977).

157. 47 U.S.C. § 303 (1982).

158. 47 U.S.C. § 303(r) (1982).

1. Section 312(a)(7) of the Communications Act of 1934, as amended, requires broadcast stations to sell commercial time to candidates for federal elective office.[159]

2. Section 315(a) of the Communications Act prohibits any broadcast station from in any way censoring the campaign commercials of any candidate for office.[160]

3. The FCC has ruled that stations may not refuse to broadcast a political ad on which a candidate appears merely because it contains libelous material, is vulgar or in bad taste or might incite to violence.[161]

4. The FCC has emphasized, however, that if in the commercial in question, the candidate does not appear, a station is free to refuse to air it if a good faith determination is made that the ad is libelous, inaccurate, false, unfair or misleading.[162]

It should be noted that the above constitute an exception to the general rule of law that broadcast stations must "take all reasonable measures to eliminate any false, misleading or deceptive matter" from ever reaching the public[163]—an obligation the FCC has ferociously enforced over the years. As early as 1957, the Commission warned licensees that it expected them to exercise care and prudence in accepting ads so that "no material is broadcast which will deceive or mislead the public."[164] The FCC has minced no words in threatening broadcasters with revocation of license if they aired ads adjudged to be false and deceptive by the Federal Trade Commission, the federal agency with jurisdiction and special expertise in the area of deceptive advertising.[165] The FCC even entered into a formal liaison agreement with the FTC so that broadcast stations across the country would be immediately alerted to decisions of the FTC which involved false or misleading ads.[166] To be sure, only in carving out this exception for political campaign

159. 47 U.S.C. § 312(a)(7) (1982).

160. 47 U.S.C. § 315(a) (1982).

161. New Primer, *supra* note 142, at 2270.

162. *Id.* at 2271-72.

163. Program Policy Statement (Network Programming Inquiry), 25 Fed. Reg. 7291 (1960).

164. Liaison Between FCC and FTC Relating to False and Misleading Radio and TV Advertising, 22 F.C.C. 1572 (1957) [hereinafter cited as Liaison Agreement].

165. Licensee Responsibility, *supra* note 116, at 624.

166. Liaison Agreement, *supra* note 158.

advertising has the FCC wavered in holding its broadcast licensees to a first rank "obligation to sift out fraudulent and deceptive advertising"[167] before it even reaches the public.

The public policy justification for the exception lies in the paramount importance placed by Congress and the FCC on unfettered, robust, and free debate and discussion by candidates for political office as essential to the very working of our democratic system of government which is at the core of the first amendment freedom of speech guarantee. It prohibits broadcast stations from interfering, censoring, reviewing, approving, or meddling with the commercial messages of candidates who seek to speak directly to the viewing and listening public even though those messages may be libelous, false, misleading or otherwise objectionable.

2. *FCC Decisions*

Against this statutory and regulatory backdrop, the FCC has adjudicated the following cases involving political advertising complaints which were filed with the agency.

a. Determining uses

Initially, the FCC was called upon to interpret the provision enumerated in section 315(a) of the Communications Act that when a licensee permitted any legally qualified candidate for public office to "use" its facilities, the licensee would be prohibited from censoring that use.[168] The Commission has ruled that a campaign commercial on behalf of a candidate is clearly such a use "if a candidate makes any appearance on . . . [it] in which he is identified or identifiable by voice or picture."[169] Thus, even the briefest flash of a picture of the candidate at the end of a television ad or even the candidate speaking only the required sponsorship identification tag on a radio spot (e.g. "Paid for by Citizens for Smith, John Doe, Treasurer") would render the whole advertisement a use.[170] Once classified as a use, no broadcast station could censor the ad and the FCC would refuse to penalize the broadcaster for any violation of its rules prohibiting false or misleading

167. Licensee Responsibility, *supra* note 116, at 623.
168. 47 U.S.C. § 315(a) (1982).
169. Section 315 Ruling (Letter to Charles F. Dykas), 35 F.C.C.2d 300, 304 (1972).
170. Radio Station WITL, 54 F.C.C.2d 650, 651 (1975).

advertising.

b. Complaints filed by candidates

The Committee to Elect McGovern-Shriver filed a 1972 complaint charging that a Democrats for Nixon television ad grossly distorted Senator McGovern's views on welfare reform. The commercial featured a construction laborer at work on a steel girder of a building. The announcer was reporting that under McGovern's welfare plan, forty-seven percent of the people in the country would be eligible for welfare. The spot concluded: "And who's going to pay for this? Well, if you're not one of the one out of two people on welfare, you do." The McGovern complaint alleged that the ad maliciously maligned and deliberately distorted McGovern's true stand on welfare reform and demanded that the FCC order the national television networks to provide McGovern free commercial time to rebut the false Nixon claims. The Commission denied the McGovern complaint, reasoning that the agency would violate the first amendment were it forced into the position of judging the truth or falsity of campaign ads and be sucked into campaign frays as some sort of referee every time one side called foul.[171]

In its seminal 1948 *Port Huron Broadcasting* decision, the FCC considered whether, upon complaints received from local candidates for city commissioner alleging illegal censorship on the part of station WHLS, the license of that station should be revoked. Several candidates were running for the office of city commissioner of Port Huron, Michigan, in the 1945 election. Radio station WHLS reviewed in advance the script for one political broadcast by candidate Muir. The station noted that the script contained a vigorous attack on one Mactaggart, who was a member of the city commission. The station showed the script to Mactaggart and was told it contained actionable falsehoods. Subsequently, WHLS cancelled all of Mr. Muir's advertising time, and that of all the other candidates as well in what had become a campaign too hot to air. As a result, Muir and another candidate filed complaints with the FCC seeking revocation of WHLS's license for its patent violation

171. Fairness Doctrine Ruling (Letter to Thomas R. Asher), 38 F.C.C.2d 300, 304 (1972). Note that this ad was a "use" because a picture of President Nixon appeared at the end of the spot.

of the no-censorship provision of section 315(a).[172]

The Commission framed the issue as whether section 315(a) prohibited a broadcaster from deleting material from candidates' uses of airtime which the station reasonably believes are libelous and might subject the station to a state court libel judgment for damages. In its analysis, the FCC examined the legislative history of section 315(a) and determined that Congress intended no exceptions to the plain language of the ban on censorship. The FCC noted that granting stations the right to censor for libel would give them a weapon with which to discriminate against candidates, and with which to support or oppose candidates the broadcaster chose. To allow a broadcaster the power of gatekeeper standing between candidates for office and the listening and viewing public was anethema to Congress, the Commission concluded. While ruling WHLS had indeed violated section 315(a), the FCC characterized the contravention as neither deliberate nor willful and decided license revocation would be too harsh a penalty for such a transgression.[173]

A campaign committee supporting the re-election of the Democratic Mayor of Syracuse, New York, in the 1973 campaign broadcast television ads featuring His Honor's picture and denominating him "one of the six best mayors in the United States." That inflamed the mayor's Republican opponent, who promptly charged that the ad was false and misleading because no national organization had ever given the mayor such a ranking. Rather, it was the local campaign committee which apparently bestowed the honor on its own candidate. The Republican railed that the ad was deceptive and that the local Syracuse stations should be ordered by the FCC to pull it from the air. As the incumbent mayor's picture appeared on the spots, they were uses. The FCC ruled that the plain language of section 315(a) prevented either it or local stations from refusing to air ads which the opponent considered false and misleading.[174]

Alvin A. Cobb, a candidate for mayor in the 1950 New Orleans elections, complained to the FCC that local radio station WDSU required him to submit an advance script of one of his campaign

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172. Port Huron Broadcasting Co. (WHLS), 12 F.C.C. 1069 (1948).

173. *Id.*

174. Political Broadcast Ruling (Letter to Mr. Alan S. Burnstein), 43 F.C.C.2d 590 (1973).

speeches for which he had purchased radio time. Determining that certain portions of the prepared text were libelous, the station demanded Cobb revise it. He refused and the speech was never aired. The FCC ruled that WDSU had violated section 315(a) by blatantly censoring the Cobb use; because there was doubt and uncertainty in 1950 as to whether a station could censor political broadcasts to spare themselves being sued for libel, no sanction was imposed. In so doing, the FCC made it abundantly clear to all licensees that there was plainly no justification for ever censoring a political broadcast and contravening the clear mandate of section 315(a). The Commission reiterated its opinion, announced in the *Port Huron Broadcasting* decision, that stations were not subject to state libel liability for defamation arising from political ads because federal law prohibited them from screening or censoring those ads in any way. The FCC continued, however, that even if stations were not thus immune from suits for libel in state courts, they still must abide by the clear command of section 315(a) and never censor a political candidate's air time.[175]

Lane Denton, a candidate for Texas Railroad Commissioner in the 1976 elections, filed a complaint with the FCC after Austin radio station KLBJ refused to air one of his sixty second ads. The station considered the commercial libelous and slanderous because of its statement that Denton's opponents were being "bankrolled by the oil and gas fat cats who want a yes man." Additionally, it considered the commercial deceptive and misleading for its use of teletype clatter and the words "Election Special . . . Consumer Report" which, the station decided, misrepresented the ad to the public as a newscast. KLBJ explained that it did not consider the ad a use because Denton only appeared in the last few seconds. Therefore, the station believed it could in fact censor the spot and force Denton to revise it. However, the FCC advised the station that the ad was unquestionably a use because of Denton's appearance. The station then offered to broadcast the spot; the FCC ruled that KLBJ had violated the no-censorship provision of section 315(a), and sent the station a letter of admonition which was made a permanent part of the station's records on file with the agency.[176]

In 1980, Barry Commoner and LaDonna Harris, the Citizens

175. WDSU Broadcasting Corp., 16 F.C.C. 345 (1951).
176. Lane Denton v. The LBJ Co., 61 F.C.C.2d 1163 (1976).

Party candidates for President and Vice President of the Untied States, filed a complaint with the FCC against NBC radio for its refusal to broadcast one of their campaign commercials. The ad featured the following dialogue:

> Man: Bullshit.
>
> Woman: What?
>
> Man: Carter, Reagan and Anderson. It's all bullshit.
>
> Barry Commoner: Too bad people have to use such strong language. But isn't that what you think, too? That's why we started an entirely new political party. The Citizens Party.

NBC at first rejected the spot because of the word bullshit, but after conferring with counsel, the Citizens Party was advised that the ad would be run in its entirety. The network did so, feeding it to its hundred of affiliates on closed circuit as a Hotline Code 5 Advisory which alerted affiliates to the potentially offensive language. The network explained to its affiliates that it was required by section 315(a) to air the ad, bullshit and all.[177]

Commoner and Harris charged that the network alert was an open invitation to the affiliates to delete the opening lines of the spot and that many simply refused to clear the spot at all. The candidates demanded that the FCC order NBC to re-feed the spot at an equivalent time at no cost to them. The Commission decided that NBC's initial rejection of the spot was in error and violated section 315(a). However, because the network corrected itself and aired the ad later that same day, the agency considered any sanction inappropriate. Still troubled by the allegation that several local NBC affiliates refused to carry the commercial, the FCC committed itself to querying those local stations and taking appropriate action against any of them which had censored, clipped or refused to clear the Commoner spot.[178]

Stamford, Connecticut radio stations WSTC-AM and FM were fined $10,000 by the FCC in 1973 for violations of the no-censorship provision of section 315(a). The stations had required all Democratic candidates for Mayor of Stamford in the 1969 pri-

177. Barry Commoner & LaDonna Harris, 87 F.C.C.2d 1 (1980).
178. *Id.*

mary and general elections to submit their campaign commercials for approval in advance of broadcast. The Republican candidate was not required, however, to clear his commercials with station management. His ran just as they were. Yet the station forced deletions from the Democrats' ads on six different occasions when it determined the spots were in bad taste, attacked another's reputation, called opponents "names," or exaggerated the facts. When candidates vigorously objected to such deletions, the station simply responded that if no revisions were made, no spots would be aired. The candidates, of course, buckled under at the time. The FCC found the above conduct to be serious enough to warrant the imposition of a heavy $10,000 fine, reasoning that WSTC-AM and FM—the only radio stations in Stamford—had egregiously violated section 315(a) by interfering with the free flow of political information to the electorate.[179]

c. Complaints filed by viewers

Ms. Ellen McCormack ran as an anti-abortion candidate for President in several 1976 Democratic primary elections, including the one held in New York State. Several weeks after the election, but before the 1976 Democratic National Convention, McCormack ran a five minute campaign commercial focusing on her anti-abortion views. That ad, which aired on Syracuse, New York, station WHEN-TV on June 3, 1976, featured lurid photographs of aborted fetuses. Gloria W. Sage, a Syracuse area viewer of WHEN-TV filed a complaint against the station with the FCC charging that the broadcast station had been negligent in not editing out the portions of that ad which Sage considered "vulgar" and offensive.

The Commission denied the complaint, reasoning that on June 3 McCormack was, by definition, still a legally qualified candidate for President. Even though she had lost the New York primary, she continued her Presidential campaign in other states; therefore, as a candidate, her commercials were protected from station editing by the no-censorship provision of section 315(a). The FCC found that WHEN-TV had followed section 315(a) to the letter and correctly refused to edit the McCormack commercial.[180]

Mr. J. B. Stoner was one of seventeen candidates running in

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179. Western Connecticut Broadcasting Co., 43 F.C.C.2d 730 (1973).

180. Sage, Gloria W., 63 F.C.C.2d 148 (1977). *See also* Sage, Gloria W. v. WHEN-TV, 62 F.C.C.2d 135 (1976) (initial ruling of the FCC's Broadcast Bureau).

the 1972 Georgia Democratic primary for United States Senator. Stoner, an admitted neo-Nazi and white supremist, aired commercials on local radio and television stations which asked Georgians to vote for "white racist J. B. Stoner" because he would repeal civil rights laws which had allowed blacks to take jobs from white people. He also railed on his ads that the only reason blacks sought integration was that they wanted "our white women." Throughout the ad, blacks were referred to by a colloquial term which most blacks consider highly offensive.[181]

Members of the Atlanta NAACP lodged a complaint with the FCC explaining that the racial slurs in the Stoner ads posed an immediate threat to the public safety of the community and of the stations which had aired it. Bomb threats had already been served on television stations in Augusta and Savannah, Georgia, which had aired the explosive commercial. The complainants urged the Commission to recognize an exception to section 315(a)'s no-censorship clause and rule that if a candidate's ad poses a threat of inciting racial hatred and violence, the broadcast station could refuse to air it. Specifically, the NAACP requested the FCC to issue a directive to Georgia stations advising them that they could refuse to air the Stoner commercials.[182]

While emphasizing the unconstitutionality of any Commission remedy involving prior restraint or censorship of speech which even the Commission found abhorrent, the FCC did acknowledge that speech which in fact advocated or was likely to incite imminent lawless action "might warrant overriding the no-censorship command of Section 315." However, it refused to resolve the constitutional issue in that case because, after a staff investigation which revealed that the television stations in Augusta and Savannah had in truth not received bomb threats, the agency concluded there was no factual basis for the relief the NAACP sought. The Commission also reasoned that were it to grant the relief sought by complainants in this case, anyone who wished to knock a candidate's ads off the air in the future would be able to do so "by threatening a violent reaction."[183]

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181. Section 315 Ruling (Letter to Mr. Lonnie King), 36 F.C.C. 2d 635 (1972).

182. *Id.*

183. *Id.*

d. Complaints filed involving non-uses

Non-uses, those political campaign commercials in which no candidate appears, have also been the subject of viewer complaints to the FCC.[184] With respect to those non-uses, broadcast stations are not restrained by the no-censorship provision of section 315(a) and can readily edit, censor or refuse to carry the commercials for any reason, including their determination that the ads are false, misleading or libelous. Thus, non-use complaints typically fault a station for having pulled a misleading ad from the air or, conversely, for not pulling a misleading ad.

When Washington, D.C. radio station WMAL, after twice airing a commercial on behalf of the Republican candidate for Attorney General of Virginia in the 1973 general election, refused to broadcast it again, the candidate went straight to the FCC. In his complaint, Patton Echols sought an FCC order immediately reinstating the commercial and admonishing the station. The station argued that it had pulled the ad because it was inaccurate and unfairly represented the position of the Democratic gubernatorial candidate on the school busing issue. Specifically, the Echols ad criticized Henry Howell for advocating forced busing of children from Virginia schools to District of Columbia schools to achieve a racial balance there. At best, there was confusion as to the true Howell position. At worst, the Echols ad misrepresented that position. Either way, WMAL was having no part of it and refused to carry the ad. Echols supplied the FCC with documentation supporting the position that his interpretation of the Howell busing position was accurate. The Commission, however, refused to second-guess WMAL. It flatly spurned any action which would require it to judge either the truth or falsity of a non-use political ad or whether a local station was justified in rejecting or airing it. That, grumbled the agency, would place it in the role of "national arbiter of the truth" of non-use political ads—a position it found unconstitutional. For those reasons the Commission rejected the Echols complaint.[185]

In a 1972 complaint, Governor Ronald Reagan of California charged that the California State Employees' Association was air-

184. Fairness Doctrine Ruling (Letter to Hon. Ronald Reagan), 38 F.C.C.2d 314 (1972); Section 315 Ruling (Letter to Mr. Patton Echols), 43 F.C.C.2d 479 (1973).

185. Section 315 Ruling (Letter to Mr. Patton Echols), 43 F.C.C.2d 479 (1973).

ing false and deceptive advertising in its support of Proposition Fifteen on that year's California general election ballot. Governor Reagan asked the FCC to alert all California radio and television stations that they had "a legal obligation to screen out all broadcast materials which are false and fraudulent." The FCC reasoned that to do so would at least create the impression that it was attempting to judge the truth or falsity of non-use political ads—a position it felt was inappropriate for the federal government and a decision which the law properly left to local radio and television stations in California. Thus, the FCC refused to take any action which might even be construed as second guessing or overseeing a local station's prerogatives as to whether it should accept or reject a non-use political ad which some considered false.[186]

CONCLUSION

Candidates, or others, who have been defamed, libeled or misrepresented by the campaign commercials of opponents have the following legal remedies available to them: (1) sue the opponent for libel; (2) sue for false advertising and seek injunctive relief; or (3) file under a state fair campaign act. While all three are viable options, they are not all of equal availability or effectiveness.

The state statutes insulating broadcast stations from liability for defamation are rock solid and there to stay. It is, as well, highly unlikely that the Communications Act of 1934 will ever be amended to confer upon the FCC jurisdiction in this area given the serious first amendment challenges which would be mounted to such an arguable inhibition of robust political debate. In addition, section 315 of the Act, the unshakable anti-censorship provision, already precludes such activity on the part of the agency. During the past five years, the Commission has been downsizing its regulations and withdrawing from exercising a wide variety of powers over broadcasting. It is absolutely inconceivable the agency would now turn around and thrust itself into the regulation of political campaign commercials.

Nor is there even a hint of interest on the part of Congress to confer jurisdiction on the Federal Trade Commission to police campaign commercials as it does ads for shaving creme and butter. Not only do members regard such an extension as unconstitu-

186. Fairness Doctrine Ruling (Letter to Hon. Ronald Reagan), 38 F.C.C.2d 314 (1972).

tional, but the political reality of the matter is that gone are the days when people accept the wisdom of solving problems of this type by referring them to federal government agencies. Hence, those doors remain closed.

Of the three still ajar, suing for libel or slander is the most problematic because of the wide latitude candidates enjoy in attacking their opponents. The tolerance in this country of wide-open political debate and excesses in campaign rhetoric is borne of the constitutional commitment to free speech and an acceptance by the public of such rhetoric as a part of our democratic system of government.

As for the option of suing the opponent for libel, given the Supreme Court's landmark decisions which have greatly restricted the circumstances in which public figures or officials can successfully sue for defamation, it is clear that only in the most egregious of situations would this remedy prove viable to one defamed.

Filing a false advertising complaint and seeking declaratory and injunctive relief is a course largely unknown and unused today. Its limitations are obvious considering the only judicial recognition of it is one federal district court opinion. But its potential is enormous. If it withstands the tests of further litigation and appellate review, this could indeed be the remedy of choice for the future.

An aggrieved candidate has the best chance of success filing a state fair campaign complaint. In those twenty-five states which have adopted fair campaign codes, candidates who defame their opponents do so at significant risk. The track record is clear—these work. Justice is swift and sure, and in some states includes the removal of the guilty party from office. State courts have been receptive, as well, to enforcing such clearly drawn statutes.

If twenty-five more states were to enact such statutes, and a parallel federal statute covering federal office seekers was also enacted, there would certainly be a clearing of this particular form of air pollution.