



Virginia Association of Broadcasters Legal Review



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May 24, 2017

Legal Memorandum

“Equal Opportunities” for Political Candidates in Virginia During 2017 Election Season

With the 2017 political election cycle underway in Virginia, stations may wish to refresh their staff on various aspects of how the “equal opportunities” rule works. This “refresher” provides general information regarding the equal opportunities rule. Of course, stations should contact their legal counsel to determine whether and how the equal opportunities law applies in a particular situation.

Equal Opportunities, Generally. The equal opportunities rule states that when a station permits a “legally qualified” candidate for public office to “use” its facilities, the station must afford “equal opportunities” to all other candidates for that office.

What Constitutes a “Use” for Purposes of the Equal Opportunities Law? For purposes of “equal opportunities,” a “use” is generally defined by the FCC as a non-exempt *positive appearance* on the air by a legally qualified candidate where either the candidate’s voice or picture is identified or is “readily identifiable” by the listening or viewing audience.

- In **radio ads**, if a candidate simply reads a sponsorship tag and is identified as the person reading the tag, or if the candidate is not expressly identified but the candidate’s voice is identifiable to a substantial segment of the community, the ad constitutes a “use.”
- In the case of **television ads**, a photo of the candidate in an ad is sufficient to qualify the ad as a “use.” This is one of the reasons candidates will often tag their commercials with a brief appearance or voice-over.

It is not necessary for the candidate to discuss or promote his or her candidacy for his or her appearance to constitute a “use.” For example, the broadcast of a television show, movie, PSA, or commercial advertisement featuring a candidate would be considered a “use.”

All Public Offices and Elections. The “equal opportunities” requirement applies in elections for all public offices, including federal, state, regional, county, and municipal offices. Similarly, the law covers all public elections including primary, general, run-off, and special elections.

Opposing Candidates. A candidate acquires a right to equal time only when an appearance is made by an “opposing” candidate for the same office in the same primary or general election. For example:

- Thus, an appearance by a Republican candidate for sheriff would not give rise to equal time by a Democratic candidate for Congress—because the candidates are running for different offices, they are not “opposing” candidates.
- Candidates seeking nominations by different political parties in different primary elections also are not “opposing candidates”—an appearance by a Republican candidate for sheriff in a Republican primary would not give rights to equal time by a Democratic candidate for sheriff in a Democratic primary.

Equal Opportunities. Once a station adopts a policy of selling or giving time, it may not discriminate in any way among opposing candidates. A station, upon timely demand, must afford “equal opportunities” to all opposing candidates for the same office. This requirement applies to the availability of broadcast time and the desirability of the specific time period, the use of production facilities, the extension of credit, and the application of technical requirements.

Timely Requests and Public Inspection File Requirement.

- *7-Day Requirement.* A right to “equal opportunities” arises only when a timely request is made. Such requests must be made within 7 days of an appearance by an opposing candidate (or in advance of an appearance if directed to a specific future use known at the time of the request).
- *Public Inspection File.* Except for the limited exceptions discussed below regarding public inspection file requirements, stations have no obligation to notify candidates directly when time is sold to other candidates, nor is a station required to notify a candidate of time given without charge to opposing candidates. Stations must ensure that records of free time and notations of all requests for time are immediately placed in the station’s political folder in the public inspection file. Failure to promptly place notification of a use in the political file may extend the 7-day period due to lack of proper notice.
- *Notification to Candidates.* If a station chooses to tell a candidate that it has sold time to one or more of his or her opponents, it must provide the same information to all the opponents. Also, if a station initially told candidates that it would not sell time on election day, but then does sell or give time on that day to a candidate, the station must notify opposing candidates to give them a reasonable opportunity to request equal time. A station may not discriminate in any way in its dealings with candidates.

- “*Equal opportunities*” rights cannot be “*daisy chained*.” Assume, for example, that X, Y, and Z are all legally qualified candidates for governor. X broadcasts an announcement (a “use”) to which Y makes a timely “equal opportunities” request, but Z fails to do so. Z is barred from responding within seven days of Y’s responsive use. Z is required to respond to the first prior use triggering the right of response which, in this example, was X’s use.
- *Late Requests on the Eve of an Election.* The FCC has held that stations may be justified in rejecting a candidate’s “eleventh hour” request for equal time. The Commission has said that if a candidate, during the closing days of an election, “sits” on his or her rights and does not make a request for equal time until a day or two before the election, a station may limit the amount of time sold if (1) grant of the request would seriously interfere with the station’s duty to program in the public interest or (2) grant of the request would give the last-minute purchaser an unfair advantage over opposing candidates by allowing him or her to saturate broadcast time during the last few days before an election. This FCC policy applies to both federal and non-federal candidates. But the rule may be slightly different for *federal* candidates. If a *federal* candidate “sits” on his or her rights, the Commission has said he or she may still be entitled to purchase some amount of time.

Some Appearances Are Exempt from the “Equal Opportunities” Requirement. The “equal opportunities” requirement does not apply to an appearance by a candidate on any of the following types of programs:

- **Bona fide newscasts**, including specialized news shows such as “Entertainment Tonight” and “Inside Edition.”
- **Bona fide news interview programs** that are regularly scheduled in which newsworthy guests are occasionally featured and the host controls the interview process (e.g., “Meet the Press,” “Face the Nation,” “Good Morning America,” “Politically Incorrect with Bill Maher,” “Donahue,” “The Howard Stern Show,” the “interview” portion of “The Tonight Show,” and similar shows). Stations must be careful to ensure that all elements of this exemption are present. For example, radio shows on which the Mayor, Sheriff, or other local official provides a weekly update of local affairs may or may not qualify for the exemption—if a local official who is running for office has control over the content presented on the show and is not being interviewed by the show’s host, or if the local official is the host of the show, then the appearance by the local official is not exempt and the appearance would trigger the equal opportunities rule. Stations should carefully evaluate appearances made by local officials who are running for office.
- **Bona fide news documentaries**, if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary.
- **On-the-spot coverage of bona fide news** events including, but not limited to, political conventions and activities incidental thereto. With respect to the exemption for candidate appearances during “on-the-spot coverage of bona fide news events,” a couple of points warrant further discussion.

- ✓ *Debates.* The FCC has ruled that the broadcast of a debate between candidates qualifies as “on-the-spot coverage of a bona fide news event” so long as (1) a decision to broadcast a debate is a bona fide journalistic decision and the format of the debate is determined by the station or an independent third party; (2) there are structural safeguards to ensure that no candidate will be favored or disfavored in the broadcast; and (3) all station decisions are based on bona fide news judgments—there must be reasonable, objective standards for deciding which candidates to include and which to exclude. The FCC also has made clear that political candidate debates that meet the three factors and are sponsored by broadcast stations are exempt from the “equal opportunities” requirement.
- ✓ *Recorded Special Programming.* The FCC has ruled that special programs featuring candidate interviews and candidate discussions qualify as “on-the-spot-coverage of a bona fide news event” provided that the decision to broadcast the special programs is a bona fide journalistic decision based on bona fide news judgments and that there are structural safeguards designed to avoid favoritism towards one candidate or the other. The “on-the-spot” element of the news event exemption is not lost when programming is taped and shown at some later date so long as the broadcast is of a “reasonably recent event.” Many stations have used this ruling to provide “free time” to candidates for the discussion of public issues in increments of 5, 15, or even 30 minutes.

Network Programming Is Not Exempt. Appearances by candidates on network programs will trigger “equal opportunities” for local stations. In such cases, the “equal opportunities” requirement is ultimately the local station’s obligation if the network does not provide “equal opportunities” upon a proper request. Thus, network programming is not automatically exempt, although it may be exempt under one of the four categories discussed further below. (And, appearances by candidates that constitute “uses” by candidates must be reflected in the local station’s political file.)

Programming Containing Station Talent Is Not Exempt. Sometimes, stations have on-air talent who run for political office. When the on-air talent has one or more opposing candidates in his/her political race, stations may have to make a difficult decision about whether to leave the talent on the air and subject the station to potential equal opportunities demands for free time or to temporarily take the talent off the air. Stations should make such decisions carefully and, preferably, after consultation with the station’s regular employment lawyers.

Consult with Communications Counsel. Stations that receive an equal opportunities request or have specific questions about how the rules apply to a particular situation should consult with their communications counsel.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

Stephen Hartzell, Editor

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