

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION

MINNEAPOLIS OFFICE:
377N GRAIN EXCHANGE BUILDING
301 FOURTH AVENUE SOUTH
MINNEAPOLIS, MN 55415
(612) 339-2026; 1 (877) 501-1389
(612) 339-4789 (FACSIMILE)

WASHINGTON, D.C. OFFICE:
2014 P STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 833-5300
(202) 833-1180 (FACSIMILE)

MEMORANDUM

TO: Greg Moore
FROM: Adrian Herbst and Casey Lide
DATE: October 30, 2007
RE: Public Access – Political Candidates

=====

I. INTRODUCTION

This memorandum addresses questions regarding public access, political candidates on a public access channels and programs, and the application of the Equal Time Law. This memorandum also addresses similar questions with regard to programming on Channel 12.

As described below, while cable television is in fact subject to the same Equal Time Law as broadcast television, it is our interpretation that no legal duty exists to require equal access to other candidates on an access producer's public access program. However, subject to exceptions, the Equal Time Law is applicable to programming on Channel 12.

II. CAN A CANDIDATE FOR PUBLIC OFFICE USE THE PUBLIC ACCESS CHANNEL TO PROMOTE HIS/HER CANDIDACY AND CAN A POLITICAL CANDIDATE APPEAR ON A PUBLIC ACCESS PROGRAM OF ANOTHER?

Answer: Yes. Public access channels are available to the general public. Political candidates cannot be prohibited. However, certain time, place, and manner restrictions are included in the rules of the NWCT and applicable to all political candidates.

Discussion: The public access channels are permitted by the federal Cable Act,¹ which provides in applicable part "subject to 544(D) of this Title, a cable operator shall not exercise any editorial

¹ 47 U.S.C. § 531.

October 30, 2007

Page 2

control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.” Inasmuch as the NWCT is responsible for public access programming and not the cable operator, it is our opinion that the application of this requirement also applies to the NWCT. Further, Minnesota Statutes include certain requirements regarding public access, applicable to all franchises granted in Minnesota including in applicable part,² “the provision must require that a Franchisee shall, to the extent of the systems available channel capacity, provide to each of its subscribers who receive some or all of the services offered on the system reception on at least one specially designated non-commercial public access channel available for use by the general public on a first-come, first-served, non-discriminatory basis . . .” (underline added.)

Further, Minnesota law³ provides, “no cable communications system may prohibit or limit a program or class or type of program presented over a . . . channel made available for public access . . .”

The Northwest Suburbs Cable Communications Commission Franchise includes provisions in compliance with the Minnesota Statutes and the federal Cable Act. The language in or of itself makes it clear that the channel must be made available to the general public and, as outlined above, based on provisions in Minnesota law and the Cable Act, there cannot be any editorial control of the content of programming or prohibition as to the type or class of programming on a public access channel.

The above Cable Act and Minnesota law provisions are consistent with the First Amendment of the U.S. Constitution, commonly referred to as the “right to free speech.” Without describing all of the cases, the case law concerning the application of the First Amendment makes clear that a public place or forum are places where the First Amendment protections are applicable. “A public place is a place, with traditional or government designation, that has been devoted to public expression and free exchange of ideas⁴ A public access channel is a public place and the above statutes have made it a public place by government designation. However, as in the case of the rules of the NWCT, reasonable time, place, and manner restrictions are permissible. This is commonly known as the “O’Brien test.”⁵ The NWCT rule provides:

² Minnesota Statute § 238.084, subd. 3(a)(1).

³ Minnesota Statutes § 238.11.

⁴ *Burson v. Freeman*, 112 S.Ct. 1846 (1992) (citing *Perry Education Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983)).

⁵ *United States v. O’Brien*, 391 U.S. 367 (1968).

October 30, 2007

Page 3

3. Programs promoting political candidates. For the purpose of these rules, a political candidate is a person who has filed for public office and that person remains a political candidate until after the election for that office.

That person must comply with all the rules contained herein and, in addition:

- a. Are limited to a total of one-half (1/2) hour per week of channel time.
- b. Program content must be in compliance with the Minnesota Fair Campaign Practices Act. NWCT is not responsible for any violations.

In summary, the federal law permits the requirement of a public access channel and Minnesota law establishes that all franchises include the requirement of a public access channel. Both Minnesota law and the federal Cable Act prohibit the editing of content on public access channels and application of the First Amendment makes clear that as a public place or forum, a public access channel is open to free public expression and no type or class of person is prohibited from using a public access channel. However, the reasonable time, place, and manner restrictions are appropriate restrictions and applicable to all political candidates are included within the rules of the corporation to ensure reasonable time and availability.

III. DOES THE FAIRNESS DOCTRINE APPLY TO POLITICAL PROGRAMMING ON PUBLIC ACCESS CHANNELS?

Answer: No. This doctrine has been abolished.

Discussion: The Fairness Doctrine, often confused with the Equal Time Law, was an FCC-based concept that imposed obligations on broadcast licensees with regard to coverage of substantive public issues. The Fairness Doctrine was not a statute and there is no portion of the U.S. Code that sets out legal obligations.

The Fairness Doctrine was abolished by the FCC in 1987, while the Equal Time Law is alive and well, and does apply to cable TV programming.

While the Fairness Doctrine generally was eliminated in 1987, two examples of the doctrine – the “personal attack” rule and the “political editorial” rule – persisted until 2000. Both imposed obligations on broadcasters to notify persons who were the subject of a personal attack during a

October 30, 2007

Page 4

broadcast, and offer a reasonable opportunity to respond. The FCC ordered the repeal of these rules in 2000.

IV. DOES THE EQUAL TIME LAW APPLY TO A PUBLIC ACCESS PROGRAM PRODUCED BY A PERSON FOR PLAYBACK ON A PUBLIC ACCESS CHANNEL?

Answer: No. Public Access Producers are not licensees. Further, as described above, Public Access Channels are available to anyone and, thus, there is an equal opportunity to all political candidates to appear on programs on the channel.

Discussion: The Equal Time statute, dating from 1959 and codified at 47 U.S.C. § 315, imposes a duty on “broadcasting stations” and “licensees” (defined to include cable systems, for purposes of the rule)⁶ that permit candidates for public office to use a station, to “afford equal opportunities” to all other candidates in the use of the station.

V. DOES THE EQUAL TIME LAW APPLY TO CHANNEL 12?

Answer: Yes, subject to exceptions.

Discussion: If any licensee (including the NWCT and Channel 12) shall permit any person who is a legally qualified candidate for any public office to appear on the Channel, it shall afford equal opportunities to all other such candidates for that office in the use of the Channel.

It is our interpretation that although the Equal Time provisions are not applicable to individual producers of an access program to be played back on a public access channel, in the event that either the NWCT, the Northwest Commission or Comcast produced a local origination program, such as a candidate forum, the Equal Opportunities law would apply and all candidates would be afforded an equal opportunity and equal time in such programming.

Four exceptions to the general obligation include appearance by a legally qualified candidate on any —

- (1) bona fide newscast,

⁶ (c) Definitions

For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

47 U.S.C. § 315.

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION

October 30, 2007

Page 5

- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),