

POLITICAL ATTACK ADS: Lessons Learned

by Bill Grimes

There is a decidedly less strident, more civil tone coming from our TVs and radios since November 2nd when the centerpiece of our democracy, Election Day, came and went. It was another banner political season for the champions of free speech. The United States of America set an excellent example for the rest of the world on how to combine the desperation of political candidacy with the sleaze of Madison Avenue. Candidates of all persuasions – Democrats, Republicans, Tea Partiers, Libertarians, liberals, conservatives, incumbents, challengers – use attack ads these days.

Is there anything attorneys can learn from these tactics?

To rise above the noise, ad makers had to get more and more inflammatory as the election approached. In Illinois, Democratic Governor Pat Quinn had viewers cringing with a [TV attack ad](#) accusing Republican challenger Bill Brady of supporting mass euthanasia of pets.

In Nevada, Tea Party candidate [Sharron Angle claimed in an ad](#) that Senator Harry Reid, a Democrat, supports using taxpayer dollars for convicted sex offenders to get Viagra.

In Florida, incumbent Democratic Congressman Alan Grayson attacked conservative Republican opponent Daniel Webster in an [attack ad](#) for wanting to “impose his radical fundamentalism on us,” and for being a draft dodger.

In Kentucky, Democratic Senate candidate Jack Conway asked [in an ad](#) a rhetorical question about his Tea Party opponent, “Why was Rand Paul a member of a secret society?” And the negative ads went on and on, for weeks and weeks.



The conventional wisdom is that attack ads have become commonplace in election campaigns because they work. The question is, according to whom, and under what criteria? Obviously, not every candidate who used attack ads won, nor did every candidate who used attack ads lose. Pat Quinn beat Bill Brady in the Illinois Governor’s race by the slimmest of margins. Harry Reid easily beat Sharron Angle for the U.S. Senate from Nevada. Daniel Webster trounced Alan Grayson for U.S. Representative from Florida. And Rand Paul easily beat Jack Conway for Jim Bunning’s old Senate seat from Kentucky.

Certainly there are those in the electorate who will be persuaded by attack ads and vote accordingly, but would the attack ad approach work in court? The instant analysis is that the ads attacking Daniel Webster in Florida and Rand Paul in Kentucky backfired on the candidates that commissioned them. There is probably a greater risk of the “attack” approach backfiring in court, because unlike in the unencumbered world of politics and advertising – especially in 2010 where it wasn’t so clear where the

attacks were coming from – an attorney can't fire off a volley in court and then duck behind the podium. The triers-of-fact know exactly who is firing the shots.

In addition, the decision-making process of an election and a jury trial are fundamentally different. In court you must get all the decision makers to agree after an open discussion (in some cases a 3/4 majority will suffice). In a political election, the winner only needs one more vote than his or her opponent, and the decision makers vote in secret. There is no deliberation in the voting booth.

CAUTION ADVISED

In my opinion, attorneys using any techniques approaching those of attack ads do so at their client's peril. Attack ads are full of invective, stereotypes and insults. Typically the only evidence presented is a quote from a newspaper article or editorial. The content of even the best newspapers is, aside from the Op-Ed page, hearsay, and we all know what judges think of hearsay. Besides violating the rules of civil procedure, attack ads are an insult to all but the most reactionary, and turn many off to the process. An attorney does not want to turn off any jurors. Political "attack" ads are how not to do it.

It's difficult to prove the effect of negative advertising on voter turnout, but I'll go out on a limb and say all the rancor has to be turning some voters away. Individual elections will have a spike in turnout from time to time, but the trend over the long term is down. The 1876 Presidential Election between Rutherford Hayes and Samuel Tilden attracted 82% of the voting age population. Voter turnouts of 75% and higher were common in the late 1800s. By 1996 the presidential election turnout had dropped to 49%. No presidential election turnout has cracked the 60% mark since 1968. Many state and local election turnouts are considerably less. Some scholars point to the diminishing influence of political parties and labor unions, as well as urban and suburban sprawl weakening a sense of community. If voter turnout continues to drop, and negative attack ads are a reason, can we really say they work?

Maybe the lesson learned from all this is from Colorado gubernatorial candidate John Hickenlooper, former mayor of Denver, who used [humor in his ad](#). He said every time he sees a negative ad he "wants to take a shower." The ad shows him taking several. Hickenlooper was elected Governor of Colorado on November 2nd in a landslide.

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Sources:

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Our Favorite Thing for November 2010

Our favorite thing this month will (if not already) be a favorite thing of travelers everywhere. It's provided by Bruce Beal--and without further ado: It's [SeatGuru!](#)

Bruce says: “[One example](#): It shows the seat maps (with ratings) for all of the major air carriers. I know it is kind of a travel geeky thing to get all hopped up about - but it has already helped me pick better seats and better flights - so I thought I would pass it along. Also, it is free.”

Bruce Alan Beal lives in Chicago, goes wherever you need him to do dial groups, and flies often enough to think it odd he would like a site like SeatGuru so much. Learn more about Bruce at: [BealResearch.com](#)

Editor's Note

You know how 'they' say as you get older, time seems to fly by faster? 2010 has absolutely flown by for me. This is our last issue for 2010 and we wanted to offer a full plate (so to speak) as you go into the holidays. To that end, we have articles on self-presentation in the courtroom; thoughts on what we can learn (if anything) from negative political attack ads; a review of the research on police deception in interrogation and how that influences jurors as they consider confessions; using hyperlinked briefs to power up both your argument and your persuasiveness; a look at the role and impact of juror IQ; a psychological approach to *voir dire*; and a review of the research on the role of the juror foreperson. As you peruse these (with holiday fudge and hot cider) all of us at the American Society of Trial Consultants wish you and yours the best of holiday times and success, health and happiness in the New Year.

In 2011, we hope to continue to bring you thought-provoking pieces that make you think as well as improve your litigation advocacy skills. We are in a time in this country where we have to continually assess and re-assess whether strategies in persuasion are still effective or if we have to re-group and re-vamp and re-approach the venire. As you practice and run up against new concerns, perspectives and attitudes-it helps us a lot to hear from you about topics you'd like to learn more about in *The Jury Expert*. Send me an email and tell me what topics you want to have in our 2011 issues. We'll see what we can do to make that happen. Think of it as our gift to you. Happy Holidays.

[Rita R. Handrich, Ph.D., Editor](#)

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