

Drawing the Line: A Guide to Avoiding Illegal Content for the On-Air Performer

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Introduction

As competitive pressures continue to intensify in broadcasting, programming goals may require provocative or "attention-getting" on-air elements designed to increase station awareness among input-saturated listeners and viewers. This competitive pressure comes at a time when Congress has substantially increased the fines that the FCC can impose for violations of Commission rules. In extreme cases, illegal on-air content can now garner forfeitures as high as \$250,000. In addition to the increased FCC fines, certain types of illegal on-air content

can subject a broadcaster to civil and criminal liability.

Familiarity with Commission rules regarding on-air content should be part of an effective "bottom-line" strategy. In most cases, editorial judgments made in advance, especially in the case of syndicated or pre-recorded programming, can prevent illegal content from reaching the air. Therefore, it is important for those involved with the implementation of on-air programming to be up-to-date with the boundary lines that the FCC and the courts have drawn to distinguish legal from illegal on-air content.

This guide is not meant to constitute legal advice or to represent an exhaustive survey of permissible and impermissible on-air activity. Rather, it is intended to provide general information to the on-air performer regarding FCC rules and policies in 15 areas that directly affect on-air speech. Often, a violation in one of these areas can result in fines, broadcast license renewal difficulties, or challenges under civil and criminal laws. If a planned on-air activity raises questions of potential liability for the station, do not hesitate to contact us, since legal advice should always be obtained for specific facts and circumstances as the need arises.

Obscenity

The First Amendment grants broad freedom to a licensee and its on-air performers to choose the content of speech without threat of government censure. However, this freedom is not absolute. Obscene speech is not protected by the First Amendment and its broadcast is strictly prohibited. A federal statute gives the FCC the authority to prohibit the broadcast of speech that is obscene or indecent. The FCC will consider broadcast speech obscene if (a) it

appeals to the prurient interest, (b) it describes or depicts sexual conduct in a patently offensive manner, and (c) taken as a whole, it lacks serious literary, artistic, political, or scientific value. Under this definition, speech appeals to the "prurient" interest if it appeals to lustful ideas or desires.

Broadcasting obscenity can result in severe fines and the very real possibility that the FCC will not renew a station's broadcast license. Furthermore, the FCC has stated that any complaints involving obscene broadcast material will be turned over to the Department of Justice for possible prosecution. If convicted under federal law, a violator may receive up to two years imprisonment in addition to very substantial fines.

Indecency

Indecent speech, unlike obscenity, is legally entitled to First Amendment protection. However, the Supreme Court has held that government may nonetheless "channel" indecent speech to times when children are not expected to be in the viewing or listening audience. The official definition of "indecent" is "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

The history of indecency regulation has been an eventful one. Because the Supreme Court held in the 1970s that indecent speech may not be prohibited, but may be channeled to times when children are not likely to be in the audience, the FCC created the concept of a "safe harbor" -- a period of nighttime hours when indecent speech may be broadcast without liability on the assumption that unsupervised children will not normally be viewing or listening. Originally, the "safe harbor" period was from 10:00 p.m. to 6:00 a.m.

In 1987, however, without advance notice, the FCC cited several stations for indecent broadcasts that occurred between 10 p.m. and midnight. As a result of these cases, the Commission announced that the "safe harbor" would be from midnight until 6 a.m. While various parties appealed this decision in the

courts, in a separate action taken in 1988, Congress created legislation directing the FCC to enforce a 24-hour ban on indecent speech. A year later, a federal court of appeals ordered the FCC to solicit information from the public which might justify the 24-hour ban. In 1990, the FCC completed its inquiry and concluded that a 24-hour ban on indecency was necessary. In 1991, however, the court of appeals overturned the 24-hour ban and ordered the FCC to once again create an indecency "safe harbor." In 1992, Congress once again passed legislation on the matter, this time establishing a dual "safe harbor"-- midnight to 6:00 a.m. for commercial broadcast stations, and 10 p.m. - 6:00 a.m. for public broadcasting stations which went off the air at or before midnight. The FCC adopted rules creating this dual "safe harbor" in 1993 -- only to see those rules stayed by the court of appeals. For the ensuing two years, the FCC enforced its indecency regulations only against broadcasts airing between 6:00 a.m. and 8:00 p.m. Finally, in June 1995, the court of appeals issued a decision finding that a midnight-to-6:00 a.m. "safe harbor" was supportable, but at the same time finding no justification for creating a midnight-to-6 a.m. "safe harbor" for commercial stations while simultaneously allowing certain public stations to air indecency between 10:00 p.m. and midnight. The court ordered the FCC to establish a "safe harbor" of **10:00 p.m. - 6:00 a.m.** for *all* stations, and that remains the "safe harbor" today.

Just as the safe harbor for airing indecent material has fluctuated over the years, the task of identifying precisely what constitutes indecency has also been a moving target. In the early days of indecency regulation, enforceable indecency was generally regarded as the broadcast of one or more of the "seven dirty words" memorialized in George Carlin's famous comedy routine -- the broadcast of which led to the 1978 Supreme Court decision allowing government to regulate indecency. Beginning in the 1980s, however, the FCC substantially broadened its definition to include innuendo, coded sexual references, and other references to sexual and excretory matters that do not include the seven dirty words. This resulted in case-by-case FCC determinations as to the offensiveness of references and the context in which they were made. Many cited stations, as well as other interested

parties, have complained that the FCC's case-by-case indecency approach does not provide sufficient notice of what actually constitutes an indecent broadcast. Admittedly, radio broadcasters who wish to keep pace with the proliferation of daring sexual content in television and movies have good reason to be frustrated with the Commission's inability to provide more exacting guidelines. Nonetheless, this FCC policy remains intact today. Indeed, on April 6, 2001, the Commission released a *Policy Statement, In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*. The *Policy Statement* is quite simply that: a restatement of existing FCC caselaw, with interspersed examples of material found to be indecent, as well as material found not to be indecent.

While it is virtually impossible to define with any precision what constitutes actionable indecency, some general conclusions can be drawn from past indecency cases to give on-air performers some guidelines regarding the types of material that have been found to cross the indecency line.

First, recognize that the Commission evaluates the overall programming context of a broadcast when making indecency determinations: the FCC has said that "an indecency determination must include review not only of the express language or depiction involved and its topic, but also a careful consideration of the various factors that comprise the context in which the material was presented." The Commission also considers whether the words or depictions are "vulgar" or "shocking," and whether or not the reference is isolated and fleeting. Therefore, even seemingly "non-graphic" sexually-oriented terms can be grouped in such a way as to create a patently offensive context sufficient for an indecency finding. In a number of its indecency decisions in radio cases, the Commission has found that the cited verbal references, when taken in context, were made in a "pandering and titillating fashion." Implicit in language such as this is the notion that the amount of on-air time devoted to "dwelling on sexual matters" will be viewed as a factor contributing to an indecency finding. This also has been the case in several indecency decisions where fines were levied against popular morning shows that present a daily diet of thinly-disguised sexual humor. Not even asserted

newsworthiness will necessarily serve as a defense against an indecency violation. For instance, when two St. Louis disk jockeys read an entire *Playboy* magazine account of the Jessica Hahn seduction of televangelist Jim Bakker replete with graphic sexual language, the Commission found a sufficient context for an indecency finding. On the other hand, the FCC has found a profanity-laden National Public Radio interview with convicted mobster John Gotti *not* to be actionable indecency. The FCC thus appears to be more tolerant of potentially indecent material when it is presented in a serious journalistic context rather than in a comedic "morning zoo" framework.

Second, the FCC has rejected the defense that broadcasts containing potentially indecent content garner large, exclusively adult audiences. In the past, stations have contended that the ratings for the programs in question indicate that children are not in the audience, thus allowing for greater programming freedom without running afoul of the Commission's indecency rationale. The FCC appears unwilling to accept this argument. The fact that a show may be extremely popular with an adult audience, says the FCC, does not lessen the likelihood that children could happen across the program on a regular basis. To the FCC, daytime means a high probability that unsupervised children could be present. As a result, statistics of audience composition will probably be irrelevant in the Commission's indecency determinations.

Third, the FCC has also rejected the argument that popularity of the cited broadcasts indicates community acceptance of sexually explicit material. The problem with this argument is that the FCC has made quite clear that indecency, unlike obscenity, will be measured by a national standard (*i.e.*, the views of the FCC Commissioners in Washington), not a local standard. Therefore, local popularity will not influence the Commission's evaluation of broadcast content. The FCC has made it clear that it will employ its own expertise in broadcast matters to determine what is indecent to the average listener. Judging by the FCC's indecency decisions in recent years, lengthy or daily sexual content will be subject to FCC indecency scrutiny

whether broadcast from a major metropolitan city or a small rural town.

The FCC has not hesitated to act upon complaints of indecent programming. It has imposed fines ranging from \$20,000 to upwards of half a million dollars for indecency violations. Perhaps the FCC's crowning jewel in its indecency enforcement came in September 1995, when, after delaying its approval of a major station acquisition by a large radio group owner, it persuaded the company to contribute \$1,715,000 to the federal treasury to settle an aggregate \$1.7 million in indecency fines imposed on it by the FCC for broadcasts by national morning personality Howard Stern. The various Stern decisions, as well as other stiff fines handed down in the indecency area, require on-air performers seeking to avoid forfeitures for indecency to formulate programming that maintains a safe distance from the indecency line. In light of more recent FCC indecency decisions and the corresponding fines, any questions regarding the potential liability of current or proposed on-air programming should be addressed by counsel.

The Fairness Doctrine

In 1987, the FCC repealed its 38-year-old policy known as the Fairness Doctrine. The Fairness Doctrine required broadcasters to provide coverage of controversial issues of public importance and to afford a reasonable opportunity for the presentation of contrasting viewpoints on such issues. Declaring the Fairness Doctrine unconstitutional, the FCC held that the requirement of airing opposing viewpoints chilled the willingness of broadcasters to cover issues in the first instance. Subsequently, the FCC and the courts eliminated an offshoot of the Fairness Doctrine that required balanced presentations of opposing points of view with respect to ballot issues. Until October 2000, two vestiges of the Fairness Doctrine remained: the personal attack rule and the political editorializing rule. However, pursuant to a decision by the United States Court of Appeals for the District of Columbia Circuit, these two rules have been repealed. Thus, broadcasters are more or less free from official requirements to present opposing viewpoints on controversial issues of public importance (except in the case of "uses" by legally qualified candidates for public office, which still trigger an obligation to

provide "equal opportunities" for the purchase of time by a candidate's opponents). However, it is never advisable to provide just one viewpoint on a controversial issue to the exclusion of all others, as such a practice can cause headaches at license renewal time.

Because the court decision ordering the FCC to repeal the personal attack and political editorializing rules was not decided on the merits, it is still possible that the Commission may create new rules in this area. Thus, we provide below brief summaries of the requirements of the repealed rules.

Personal Attacks

Under the personal attack rule, if a station broadcast an attack on the honesty, character, integrity or similar personal qualities of an identified person or group during the presentation of views on a controversial issue of public importance, it was required to take the following actions within one week of the attack:

- (1) notify the person or group attacked of the date, time and identity of the broadcast;
- (2) send a tape, transcript, or if neither is available, as accurate a summary as possible to the attacked party; and
- (3) offer a reasonable opportunity for response.

Statements that imputed political motivation, alleged incompetence, attacked an individual's ability or knowledge, or critiqued an individual's reasoning or conclusions were not attacks on honesty, character, or integrity, and thus did not constitute a violation of the personal attack rule. Note also that the person or group attacked had to be identifiable and the attack had to occur during a presentation of views on a controversial issue of public importance.

Excluded from the rule were personal attacks on foreign individuals and groups, attacks occurring during broadcasts by legally qualified candidates for public office, and attacks occurring during bona fide newscasts, bona fide news interviews, bona fide news documentaries, and on-the-spot coverage of bona fide

news events. The personal attack rule did, however, apply to station editorials. Also, statements not considered personal attacks by the FCC could nevertheless be potential targets for libel suits.

Political Editorializing

If a station endorsed or opposed a legally qualified candidate in an editorial, it was required, within 24 hours of the editorial, to provide the endorsed candidate's legally qualified opponents (or the candidate being opposed) with: (1) notification of the editorial's date and time; (2) a script or tape of the editorial; and (3) a reasonable opportunity for the candidate(s) to respond over the station. The station could impose reasonable limitations on the reply. For example, a station could require that the affected candidate's spokesperson, rather than the candidate him/herself, give the reply.

Libel and Invasion of Privacy

The laws of libel and invasion of privacy are governed by individual state law and are not enforced by the FCC. However, on-air performers and editors or producers should be cognizant of some general principles in this area and should seek to develop a broadcast climate aimed at avoiding on-air remarks that are potentially libelous or invade another's privacy.

Libel

Libel is a complex area of the law where distinct guidelines can be difficult to draw, as libel law encompasses both state law and constitutional protections of the First Amendment. This section intends to provide only a very general outline of the law. When in doubt as to whether a specific statement intended for broadcast is actually libelous, the advice of legal counsel should be obtained prior to the statement's broadcast. In this difficult area of the law, it is best either to err on the side of caution by omitting potentially libelous material or, in the alternative, to establish or confirm the facts through careful reporting.

In the broadcast context, libel is a false statement of fact concerning a person that is broadcast to an audience, and which tends to injure that person's reputation. In addition, the false statement must be made with some element of fault on the part of the broadcaster. The key element is the presence of a false statement of fact. Opinion that does not contain or strongly imply false facts is not libelous – but the line between opinion and a false statement of fact is not always easy to draw. The courts will continue to protect "pure opinion" as long as false facts are not mixed in with the statement of opinion.

Also receiving constitutional protection are statements amounting to mere name-calling or "rhetorical hyperbole." The rationale is that these statements are the byproducts of free and open debate and are entitled to First Amendment protection. However, insults can create problems, as some insults are "rhetorical hyperbole," while other insults may contain factual statements that are sufficiently false and defamatory to give rise to a libel action. Generally, insults should be made only with extreme caution. Remember that many aspects of libel law are governed by state law and, therefore, liability for insults could vary from state to state. For instance, Virginia has an Insulting Words Statute that creates liability for any insults that could lead to violence and a breach of the peace.

Next, a false statement of fact must be "of and concerning" a person in order for that person to recover damages. It is not necessary that the false statement of fact actually "name" an individual. For instance, members of a group can show that they were "identified" in a false statement made about the group. Again, use extreme caution in statements such as insults that may be thought of as being made "anonymously." A libeled party need only show that the audience was capable of understanding the unstated identity of the person being referred to in the broadcast statement.

If a libel suit is brought against a station, the station's standard of "fault" will vary depending on whether the person complaining is a public official, a public figure, or a private person, and whether the statement in dispute involves a matter of public concern. For a statement concerning a public official

or public figure to be libelous, the on-air performer must make the statement with actual malice – that is, broadcast the statement knowing it was false or broadcasting it with reckless disregard of whether it was true or false. Statements concerning a private person in a matter of public concern will be judged by a negligence standard in most jurisdictions – whether the statements would have been made by a reasonable person. Clearly, the types of statements most likely to bring about a libel action are statements about private individuals and private concerns. In some states, the mere fact that this last type of statement was broadcast is sufficient to show fault on the part of the broadcaster.

Limiting a station's libel liability before a statement is broadcast is an important goal. After-the-fact measures can also serve to limit libel liability. A University of Iowa study indicates that an in-house system for the courteous resolution of complaints appears to be one of the best ways of reducing libel suits. The research shows that half of all libel complainants only go to an attorney after they have first contacted the media outlet and received poor treatment. Selecting one person with good human relations skills to deal with complaints can help to prevent a complaint from escalating into a lawsuit.

Another precaution to limit the effects of libel actions can be found in an errors and omissions insurance policy. Upon the receipt of a libel complaint, it is important to review the station's insurance policy to determine when the insurer should be contacted.

Commercial Disparagement

Closely related to libel is the tort of commercial disparagement. Also known as trade libel, broadcast commercial disparagement occurs when: (1) a broadcast statement falsely disparages a party's property or product; (2) the statement is made with the intent to cause economic harm to the disparaged party; and (3) the broadcaster knew that the statement was false or acted in reckless disregard of its truth or falsity. Not only can individuals sue for commercial disparagement, but companies can sue for the broadcast of false statements that disparage the

company or its product. This form of libel could impact an on-air performer when the performer attacks a competing radio station with statements that are false and made with the intention of causing economic loss to that station. Therefore, if "attacking the competition" is an important programming strategy, carefully examine the substance of the statements being utilized. Avoid any false or malicious statements that could render economic harm to a competitor. Use statements that position your station in a creative, humorous manner rather than relying upon malicious statements that attack the opposition or its product.

Invasion of Privacy

There are four types of invasion of privacy: (1) intrusion upon the seclusion or solitude of another; (2) public disclosure of embarrassing private facts; (3) publicity which shows a person in a false light; and (4) appropriation of a person's name or likeness for commercial advantage. As with libel, the specific elements of each privacy branch are largely governed by individual state law. In fact, invasion of privacy is so closely related to libel that actions for insults or other libelous statements broadcast about "private persons" could implicate both libel and privacy laws.

Common to all state laws is the notion of consent as a complete defense to an invasion of privacy claim. Consent is absolutely necessary when using a person's likeness or voice for the station's commercial benefit. Maintaining a "master" tape of all telephone contest winners can assist in this regard. For example, if the station wishes to replay a contestant's on-air participation for a station image promo, permission can be sought and recorded on the telephone "master" tape to preserve the contestant's consent to the subsequent use of the contestant's voice in a station "commercial."

Rebroadcasting Telephone Conversations

Section 73.1206 of the FCC's Rules governs the pre-recorded and "live" broadcast of telephone conversations. The rule states that prior to recording a telephone conversation for broadcast and prior to

broadcasting a "live" conversation, the party must be given notification of the station's intention to tape or broadcast that conversation. For purposes of the rule, a "conversation" begins with the party's first spoken words on the telephone. Therefore, the station generally may not record or broadcast any portion of the party's conversation until it first provides notification. The FCC has not hesitated to fine stations for violations of the "phone call rule."

The rule, however, provides for two exceptions to the general prior notice requirement: (1) if the other party is associated with the station; and (2) if the other party places the call to the station and "it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations." The first exception applies to situations such as where station personnel (*e.g.*, street reporters, traffic reporters) provide reports via telephone for on-air broadcasts. The second exception applies to such situations as programs that feature listener call-in conversations.

Before recording or airing telephone conversations without providing prior notification to the caller, a station must first determine whether the use of telephone conversations is "customary" during the airshift in question (the Commission will view each disc jockey airshift as a "program"). Making this determination more problematic is the fact that the Commission has never declared the number of broadcast conversations necessary to establish "customary" usage in an airshift.

One way to analyze a station's compliance with the rule is on a sliding scale of risk. The daily use of telephone conversations during the airshift in question is much more likely to represent "customary" usage. Arguably, a station's use of telephone conversations in an airshift that is not daily, but is otherwise regular and predictable (*i.e.*, frequent on-air contests or a weekly "all request" program), could also be viewed as "customary." However, when an airshift only occasionally airs telephone conversations, a station's risk of violating the rule increases significantly, as the callers may have no expectation that their conversations would be recorded or broadcast.

Several measures can serve to reduce a station's risk of violating the telephone rule if an airshift's "customary" use of telephone conversations is in doubt. The most foolproof method is to regularly provide prior notification to all callers. For instance, an intern or producer could alert callers to the possibility of their conversation being used on the air prior to passing the caller along to the air studio. Similarly, if the station employs a "voice-mail" system to record listener requests for later playback, a taped message could alert callers that the station might use their conversations on the air. Also, even though an airshift may "customarily" feature telephone conversations, an air personality can further reduce the risk of a complaint by not taping or broadcasting a caller who obviously does not expect to be on the air (*i.e.*, callers asking to speak with the station manager rather than the air personality or where the caller indicates on a request line message tape that the conversation should not air). Note that the Commission has also held that when an individual is informed during a broadcast conversation that he or she is being put on hold, the prior notification effectively ceases. Therefore, if a station wishes to broadcast any conversations that occur while the caller is on hold, the station must provide explicit notification of this to the caller.

Rebroadcasting Emergency Communications

Until recently, the news departments of radio and television stations nationwide have been satisfied with simply listening to police and fire scanners so that they can quickly be at the scene. With the competitive trend toward news presented in as dramatic a way as possible, these departments now want to record and rebroadcast over the air the communications of police, fire and other emergency services intercepted on their scanners. Can they do it? Stations need to know the important limitations.

The interception, recording and rebroadcast of emergency services traffic received over a scanner is a violation of the Communications Act, unless the emergency services authorities have authorized such rebroadcast. Routine interception and divulgence of police communications would violate section 705 of the Communications Act of 1934.

Section 705 (formerly Section 605) of the Communications Act states that: "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto."

Generally, officials responsible for public safety desire to cooperate with news media, and will authorize the monitoring of public safety radio transmissions for the more efficient gathering of news, and will indicate the conditions under which such transmissions may be divulged to the general public. Therefore, licensees should contact officials of the public safety agencies whose radio transmissions are monitored in order to obtain the necessary authorizations and to ascertain the conditions under which use and divulgence are permitted.

Airing "*Bartnicki*" Material

On May 21, 2001, the United States Supreme Court ruled that broadcast reporters are protected by the First Amendment if they air recordings of telephone conversations that were illegally intercepted as long as the recordings are legally obtained by the broadcaster. The case, *Bartnicki v. Vopper*, supports the position that reporters cannot be punished for airing material that is true, no matter how the material was obtained, as long as the reporters broke no laws themselves in obtaining the material.

The *Bartnicki* case involved an intercepted cellular telephone conversation which was recorded and anonymously given to a third party, who in turn gave it to the radio reporter, who broadcast the recording on his radio show. *Bartnicki* keeps alive the principles stated in the famous "Pentagon Papers"

case, *New York Times Co. v. United States*, where the Supreme Court held that the press has the right "to publish information of great public concern obtained from documents stolen by a third party," and extends that right to electronic information aired by broadcasters.

TV News Crew "Ride-Alongs"

TV news crew ride along stories can provide dramatic news clips, but they often occur in situations that raise challenging legal issues. News directors and station managers should be closely and carefully advising their reporters, producers and ENG crews about the station's policies regarding ride along stories and practices. Here are some basic guidelines:

Most importantly, riding with the police, fire department or EMTs does not permit any station employee to trespass on private property, and there is no inherent privilege for newsgathering under the First Amendment or otherwise that permits such trespassing. The field producer or reporter should be asking a person with apparent authority over private premises for permission to enter those premises – this could be a homeowner, a business owner, a landlord or a tenant, but not the police or a passer by at the scene. However, filming can occur from outside the premises looking in for most purposes.

There are, however, situations or events which will be found to be either defamatory or private in the sense of disclosing private and embarrassing facts about private persons without attendant newsworthiness, or inflicting emotional distress by invasive outrageous behavior, even if some consent has been obtained to be on the premises or the event takes place in a quasi-public place. Many of these can occur in ride-along stories, such as:

- filming of arrests of persons who are later not charged with a crime for reasons of mistaken identity, lack of evidence or erroneous information including persons who were just there at the scene and rounded up;
- persons found in an embarrassing state, such as being undressed when a night arrest occurs, or being injured

and distraught as an accident victim, or in the hospital emergency room; or

- involving persons in a story by implication, such as bystanders or those involved but not charged in arrests for drugs, prostitution or domestic violence.

The best protection against liability under these circumstances is at the editing stage. A standard technique is to mosaic or otherwise blur faces of people portrayed in stories that might carry liability for the reasons described above, and this provides protection for the station.

On some rare occasions where the police and TV reporters and/or producers have worked very closely together in developing a story, if the police are subsequently sued for misconduct, false arrest, etc., the news media may also be sued, essentially as agents of the police, although most of these suits ultimately fail.

Finally, station management should consider that some ride-along assignments are inherently very dangerous and may expose reporters or ENG crew to serious injury. Although it is rare that these injuries occur, station management that knows of the dangers and still makes the assignment, without appropriate guidelines for exposure to the danger (*i.e.* stay in the truck if there is shooting), can be liable for those injuries.

Payola/Plugola

The payola prohibition and plugola policy both stem from a provision of the Communications Act, incorporated into the FCC's Rules, known as the sponsorship identification rule. The rule states that if a broadcast station or a station employee receives any money, product, or service directly or indirectly in exchange for causing anything to be broadcast, that fact, as well as the identification of the sponsor, must be broadcast. The underlying premise is that members of the public have a right to know when a broadcaster has a financial interest in influencing what the public hears or sees in the broadcast media. Thus,

it is improper for a station or station employee to cause matter to be broadcast in exchange for consideration unless a full, over-the-air disclosure of the sponsorship is made.

"Payola" is a variant of the sponsorship identification requirement. It is defined by the FCC as an undisclosed agreement to accept anything of value in return for on-air promotion of a product or service. Payola is always illegal. It is not the payment of money to influence a broadcast, but the lack of disclosure and sponsorship identification that makes the transaction illegal. Payola usually occurs when someone makes a gift or payment to a person involved in station programming in exchange for favorable exposure. Both the person making the gift or payment and the recipient are required to disclose the arrangement to the licensee, and both can face criminal sanctions for a failure to disclose. When told of such an arrangement, the licensee must exercise its judgment as to whether to allow the program to be aired under such circumstances. If the program is aired, the station must give complete sponsorship identification on the air. Thus, there are two levels of disclosure. The employee and the person giving the consideration must disclose the existence of a "payment" to station management, which must then disclose the "sponsorship" on the air if the material is aired.

"Plugola" is the on-air promotion or "plugging" of goods or services in which someone responsible for including the promotional material in the broadcast has a financial interest. Plugola is similar to payola, except that it need not involve an outside party or payment of any kind. It can be accomplished by a single station employee. For instance, if a local nightclub pays a radio announcer to spin records, and the announcer mentions these appearances on the air to bolster club attendance without disclosing that he or she is paid by the club, plugola has occurred. Although it is less likely, even people who are not on-air performers can engage in plugola. For example, the person who prepares program logs could schedule extra announcements for a company in which he or she has a financial interest. Conversely, in an age witnessing the growth of some radio companies into giant multimedia conglomerates, plugola issues can arise at the highest corporate levels

when a station promotes the goods or services of another enterprise that its parent company owns or in which it has a financial interest. For example, a radio station owned by a company which also owns a concert promotion business could run into plugola problems by promoting concerts without disclosing to listeners the fact that the station's corporate owner also has an ownership interest in the concert promoter. Plugola is legal only when (1) station management is made aware of the nature and extent of the financial interest that is being promoted and (2) required over-the-air disclosure is made.

Like payola, plugola can take many forms and should be guarded against carefully. Penalties for payola/plugola violations can be as high as \$250,000 and can threaten a station's license. Stations that do not have payola/plugola guidelines in place could be vulnerable to these sanctions. Therefore, it is important that stations adopt strict payola and plugola policies. At a minimum, we recommend that: (1) employees with outside business interests be insulated from the process of program selection; (2) all station employees be required to review payola/plugola guidelines; (3) employees be required to execute affidavits disclaiming involvement in payola or plugola; (4) logs be maintained to record visits by record promoters to the station; and (5) any other necessary procedures be adopted to prevent illegal payola/plugola practices at the station. The firm can provide detailed guidelines, forms and necessary procedures to assist in creating a payola/plugola prevention program. The firm publishes a separate **Advisory** on this subject, and we strongly recommend that broadcasters utilize that **Advisory** to ensure compliance in this complex area of the law.

Illegal Lotteries and Contests

Illegal Lotteries

A station may face fines or renewal problems for the broadcast of certain lottery information. The traditional elements of a lottery are (1) prize, (2) chance, and (3) consideration. All three elements must be present to constitute a lottery. These three elements can appear in infinite permutations; however, if any element is missing, there is no lottery.

A prize is anything of value offered to a contestant. The element of chance can exist either when a winner is selected by chance or when the value of the prize is not predetermined. Under FCC guidelines, the element of consideration is present in any contest or promotion which requires a contestant to (1) "furnish any money or other thing of value," (2) "have in [his or her] possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast" by a station, or (3) meet any other requirement which involves a substantial expenditure of time and effort by the contestant. If consideration does not flow to the promoter or co-promoter (participating sponsors are considered "co-promoters"), then there is no prohibition against broadcasting the material.

The following examples generally constitute consideration:

- payment of an entry fee
- requirement to purchase a sponsor's product
- requirement that an entrant submit a box top, label or wrapper
- admission ticket serving as an entry blank
- cash register receipt serving as an entry blank
- requirement of a test drive to enter
- award of a prize, discount, or refund after purchase
- award of a prize to every tenth purchaser.

The following examples generally do not constitute consideration:

- requirement that an entrant be present to win (provided that drawing time is announced)
- need for an entrant to listen for his/her name to be called over the air
- need to visit sponsor's store to obtain a free entry blank
- need to expend the cost of a postage stamp or postcard to mail an entry blank
- eligibility requirements: driver's license, Social Security card, particular age to enter
- prize or discount with no purchase obligation
- radio auctions to raise money for charity.

Consideration requirements can vary from state to state. Therefore, we recommend that legal counsel be

consulted to ascertain a state's specific consideration requirements.

Under legislation enacted in 1990, the broadcast of information concerning station-conducted or sponsor-conducted contests with lottery elements rarely presents a problem under federal law, even if the contest *is* a lottery. Under federal law, broadcasts of information concerning lotteries authorized or not otherwise prohibited by the state in which they are conducted are now permitted if the lottery is conducted: (1) by a not-for-profit organization; (2) by a governmental organization; or (3) for promotional purposes by a commercial entity, provided the lottery is clearly "occasional" and "ancillary" to the commercial entity's primary business. Effectively, this means that it is legal under federal law for a station to advertise or promote raffles and similar contests which contain all the elements of a lottery, whether the contest is conducted by the station itself, conducted by a commercial sponsor such as a car dealership and referred to in a spot, or conducted by a non-profit concern and promoted by way of a public service announcement. **Importantly, however, the federal law does not preempt state prohibitions on lotteries. Broadcast of lottery information is protected by the federal exemptions only if the lottery is legal in the state where it is conducted, and broadcasting information about the lottery is legal in the state where the information is broadcast.** As a result, many lottery-type questions that arose under FCC law ten or twenty years ago have now become purely questions of state law. Many states not only have their own lottery laws, but also have trade regulation laws, which may restrict or prohibit "contests" that technically may not be lotteries. We therefore recommend that stations have access to competent local counsel familiar with state regulations on lotteries and contests, and consult such counsel before undertaking to conduct or promote contests with one or more elements of a lottery.

Federal legislation in recent years has also relaxed restrictions on the broadcast of information concerning state-run lotteries, as well as restrictions on information concerning lotteries on Indian land. Information concerning lotteries conducted by one state can now be broadcast in any other state so long as the station broadcasting the lottery is located in a state which has its own lottery. Therefore, California

may advertise its lottery in Florida without violating the lottery rules. Also, cross-border broadcast advertisements of non-casino-type Indian gaming (e.g., advertisements of Indian games conducted in another state) is permitted unless prohibited under state law. Casino-type Indian gaming may be subject to tribal and state law. In addition, the Secretary of the Interior must approve any tribe-state compact for the lawful broadcast of Indian casino-type gaming.

However, federal law may still prohibit the broadcast of information concerning non-Indian casino gambling activities -- although the legal status of this prohibition and the extent to which the FCC will enforce it are presently highly uncertain. This prohibition has taken on more prominence in recent years, with the emergence of riverboat casinos in numerous locations throughout the country and the lure of significant advertising revenues from spots purchased on local stations by those casinos. As the casino advertising prohibition is interpreted by the FCC, a commercial spot or other announcement providing information about a casino may use the word "casino" *only* in stating the name of the establishment, if the word is included in the name (e.g., "New Orleans Riverboat Hotel and Casino"). The spot may not in any way, shape or form depict or describe the establishment's gambling activities. Promotion of the establishment's non-gambling features (e.g., food, luxurious hotel rooms, non-gambling entertainment such as music/dance shows) may be promoted -- if such features exist. Thus, a spot's reference to "Vegas-style entertainment" might be permissible if the establishment featured Las Vegas-style shows, but would not be permissible if the only entertainment at the establishment was casino gambling. Determinations of the legality of casino advertisements almost always come down to close analysis of individual spots, so counsel should be consulted to review any spot before it is broadcast.

One final postscript on casino gambling: the FCC's ban on casino gambling advertisements has been declared unconstitutional in certain states and is thus currently enforced in only some parts of the country. In 1997, the United States Court of Appeals for the Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana

Islands) held the casino advertising ban unconstitutional, and in February 1998 the U.S. Supreme Court let that decision stand. In that same year, the United States District Court for New Jersey issued a similar ruling. Finally, in 1999, the U.S. Supreme Court held that the ban on casino gambling advertising is unconstitutional when applied to states where gambling is legal (*e.g.*, Louisiana). As a result, the ban cannot currently be enforced by the FCC against stations licensed to communities in the Ninth Circuit's jurisdiction, in the State of New Jersey, or in states where gambling is legal under state law.

Illegal Contests and Promotions

The FCC shows a strong interest in the manner in which contests and promotions are conducted. A broadcaster's failure to conform to the FCC contest rule can lead to stiff fines. Generally, the Commission requires broadcasters to fully and accurately disclose the material terms of the contest and to conduct the contest as announced. It is very important that the contest description not be false, misleading or deceptive with respect to any material term.

Under the FCC contest rule, "material terms" are the significant factors in the contest's operation. Material terms in a contest description should include the following:

- how to enter or participate;
- eligibility restrictions;
- entry deadline dates;
- nature and value of prizes;
- when prizes are awarded;
- means of selecting winners; and
- tie-breaking procedures.

These material terms should be stated whenever a live or recorded promo purports to set out the complete terms of the contest. However, short promos merely "teasing" the contest do not require a complete listing of all material contest terms. Spots disclosing the full terms of the contest should be scheduled with reasonable frequency -- at least once a day.

Three problem-contests draw significant FCC attention: misleading contests, rigged contests and

public nuisance contests. A misleading contest is one in which the broadcaster misrepresents the contest terms or overstates the prizes that can be won. In the past, the FCC has imposed fines for failing to accurately state the full extent of the prize. For example, merely promoting as a prize a four-day vacation to a resort without mentioning that the prize does not include round-trip transportation is considered misleading since the average listener would expect such transportation to be an integral part of the prize. Moreover, in cases where a station contest is being co-promoted (*e.g.*, by a local retailer), the station should carefully monitor to make sure that the co-promoter is carrying out its duties as the station has represented, as the FCC generally has not accepted the failings of a co-promoter as an excuse for the station's failure to conduct the contest as advertised. In constructing and executing your contests, avoid the following:

- falsely stating the amount or nature of prizes;
- failing to control the contest to assure a fair opportunity for contestants to win the prize;
- urging persons to stay tuned to the station in order to win at times when it is not possible to win prizes;
- changing the contest rules without promptly advising the listening public;
- using arbitrary standards in judging entries;
- providing secret assistance to contestants or predetermining winners;
- claiming that winning is by chance when in fact chance plays little or no part; and
- broadcasting false clues.

Rigged contests are those contests where the outcome has been predetermined. It is unlawful to: (1) supply assistance to a contestant; (2) induce any contestant to refrain from using his or her knowledge in a contest involving skill or knowledge; or (3) engage in any scheme to predetermine or prearrange all or part of the outcome of a contest. To ensure trouble-free contests, include the following facts in the appropriate recorded and live contest promos:

- a location where the public may obtain copies of contest rules;
- the beginning and ending dates of the contest;
- how to enter;

- an express statement of the amount or nature of the prize;
- a statement that if the original prize becomes unavailable, the station will substitute an equivalent prize or one of comparable value;
- if a contest involves the elements of prize and chance, a statement that no purchase is necessary.

The third type of contest that draws FCC attention is a contest or promotion that adversely affects public safety. In 1985, the FCC eliminated a 1966 policy statement that warned stations about various kinds of contests that could adversely affect the public -- for example:

- (1) a contest that results in hazardous accumulations of scrap metal in a certain location;
- (2) a contest which leads listeners to call randomly chosen names from the telephone book at all hours of the day and night;
- (3) a contest which requires the participants to travel to a specified place in a very short time, resulting in unsafe traffic conditions;
- (4) the broadcast of "scare" announcements which could frighten or mislead the public.

Despite FCC deregulation, the Commission will continue to consider contests that threaten public safety if they are raised at license renewal time. As a result, broadcasters must still exercise care so that contests do not threaten public safety.

With contests or promotions that involve the public, certain precautions should be taken in the planning and execution stages. First, if the proposed event involves a significant public gathering, it is advisable to consult with local police authorities. The police can be helpful in providing advice as to methods of crowd movement and crowd control. Next, consult with local civil authorities regarding necessary permits for outdoor locations. Early consultation could even provide municipality

co-sponsorship of an event, further increasing the potential effectiveness of a promotion. Also, if it is likely that a contest will create an unusually heavy demand upon the studio lines, it is advisable to contact your local telephone company prior to the contest. Advance preparations made in conjunction with the telephone company can prevent serious regional telephone tie-ups from overloaded telephone lines.

Finally, if during the execution of a contest, problems begin to appear that could threaten public safety or welfare, stop the contest and immediately contact local police authorities. Carefully executed and well-planned coordination with civil authorities, police officials, and telephone company representatives should maximize safe, trouble-free public promotions and contests.

On-Air Hoaxes

The FCC has adopted a hoax rule that expressly prohibits the broadcast of hoaxes considered "harmful to the public." The rule prohibits a station from knowingly broadcasting false information concerning a crime or catastrophe if it is foreseeable that broadcast of the information will in fact directly cause substantial public harm. A "crime" is defined as any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" means a disaster or imminent disaster involving a violent or sudden change affecting the public. FCC decisions under this rule will employ a two-step analysis: (1) whether the programming's harm was foreseeable; and (2) whether the programming in fact directly caused substantial public harm.

For purposes of the hoax rule, public harm will be foreseeable if the licensee could expect with reasonable certainty that substantial harm would occur. Broadcasters will be permitted to presume that the public will behave in a rational manner; unreasonable or unpredictable public conduct will not be held against a licensee. The greatest determinant of foreseeability will be the nature of the broadcast. In this respect, the more inherently unbelievable the broadcast, the more certain broadcasters can be that substantial public harm is unforeseeable. The FCC has stated that the timing of the broadcast will not necessarily determine foreseeability, although it will

be one factor that may be considered. Thus, if substantial harm results from a very realistic hoax, the FCC will not conclude that the harm was unforeseeable simply because the broadcast aired on April Fool's Day. Foreseeability will also be determined from other factors, such as the number of public complaints received about the broadcast.

To avoid this rule's potential to chill broadcast speech, the FCC has incorporated into the rule a disclaimer presumption whereby fictional programming otherwise subject to this rule will pose no foreseeable harm if the programming is accompanied by a disclaimer. To qualify for this presumption, disclaimers must clearly label the broadcast as a fiction at the beginning and end of the program. For programs over 15 minutes in length, a disclaimer must also occur within each 15-minute interval.

Once the FCC concludes that harm from fictional programming is foreseeable, it must be shown that the programming in fact directly caused substantial public harm. "Public harm" will include damage to the health or safety of the general public, diversion of law enforcement or other public health or safety authorities from their duties, and damage to property. In all cases, the harm must be substantial. The public harm must also begin immediately after the broadcast and result in actual damage. Rather than adopt a particular definition of what constitutes "substantial" public harm, the FCC will make this determination on a case-by-case basis. In general, the FCC will find substantial public harm where a broadcast depicts imaginary danger that diverts local police and emergency resources from their duties, causes widespread public disorder, or harms the health or safety of the general public. By contrast, a broadcast hoax that results in no more than a few questions to police or complaints to the station would probably not be considered as causing substantial public harm. Nevertheless, in light of the new hoax rule, licensees should exercise caution when creating fictional events depicting imagined crimes or public dangers.

One hoax that drew FCC attention was the broadcast of faked Emergency Broadcast Alerts. Federal law prohibits the transmission of any false or fraudulent signals of distress. In 1991, a major St.

Louis station received a \$25,000 fine when the morning announcer broadcast a prerecorded skit designed to simulate an Emergency Broadcast System warning, complete with warning tone. In announcing the fine, the Commission noted that despite the substitution of a common "bleep" tone, most listeners mistook the tone for the authentic EBS signal. Judging by the FCC's swift and severe reaction, this type of parody is not recommended. Avoid using any "warning tone"-type sound effect in a skit or parody, even if the effect is dissimilar to the actual EAS tone.

A commonly expressed maxim states that "ignorance of the law is no excuse." This statement is relevant for on-air performers whose daily broadcasts are subject to specific FCC rules and policies. A general awareness of these rules allows a performer to create exciting, contemporary programming while minimizing the risks of potentially substantial FCC fines or, at the extreme, threatening a broadcast license.

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