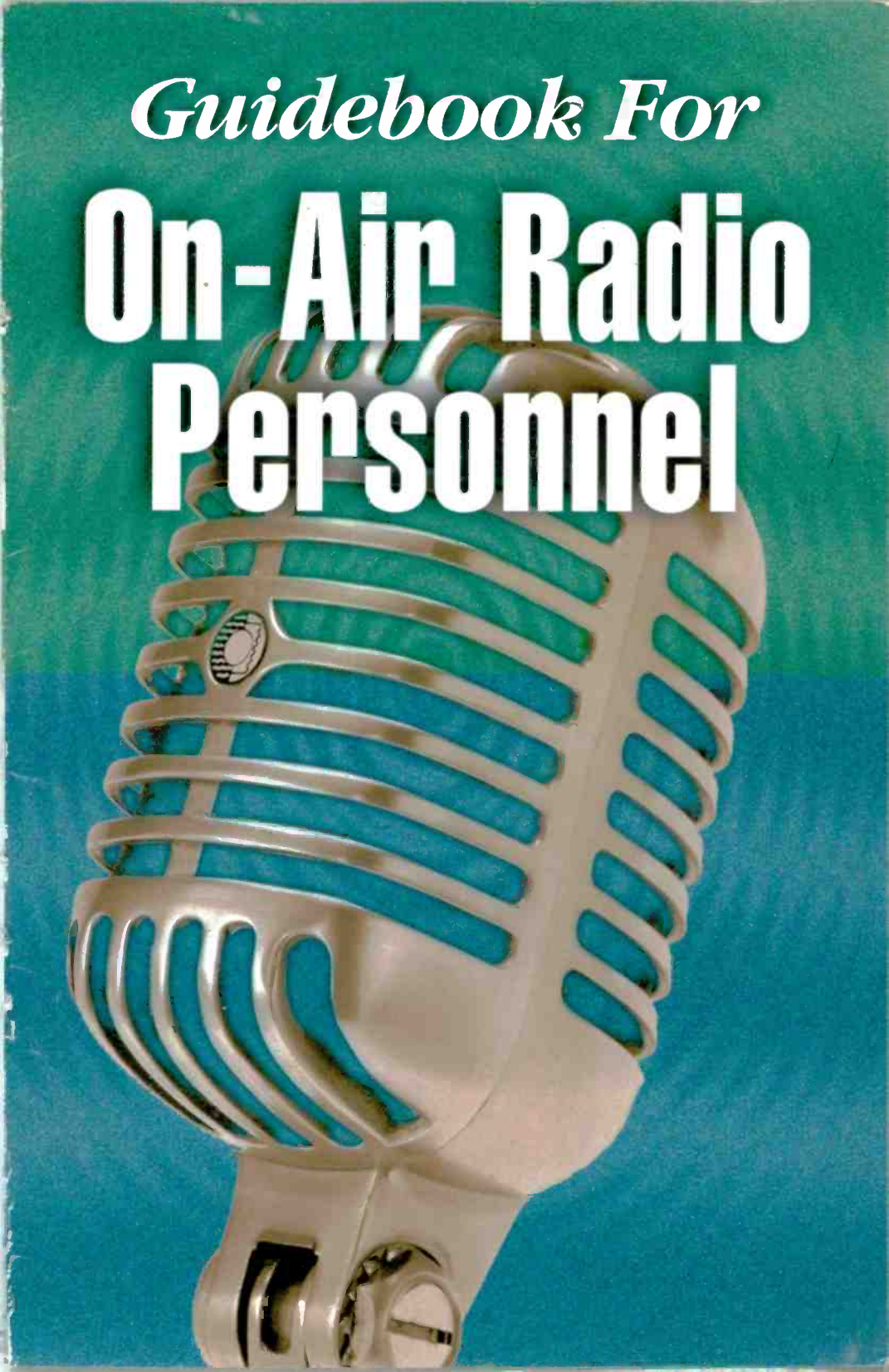
Guidebook For

On-Air Radio Personnel



Guidebook for

On-Air Radio Personnel

National Association of NAB BROADCASTERS

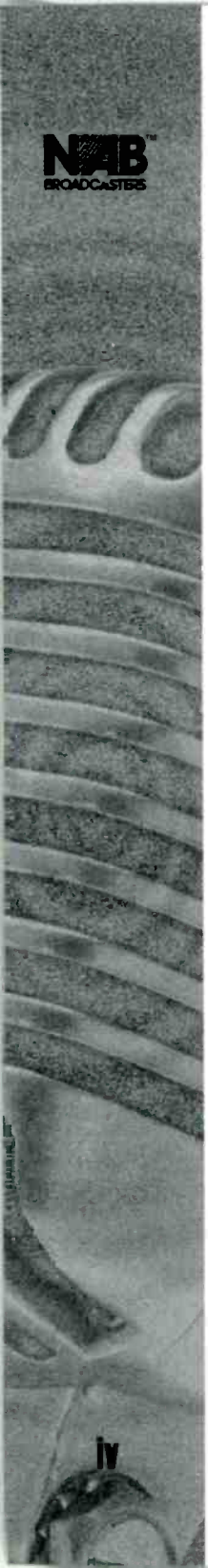
The following guidebook is intended to inform on-air personnel of the Federal Communications Commission (FCC) rules and policies regarding a variety of topics related to programming and station operation. Each topic contains appropriate citations to the FCC's rules (47 C.F.R.), FCC decisions published in the FCC Record (FCC Rcd), the United States Code (U.S.C.) and/or various NAB publications.

All NAB publications are available through NAB Services (1-800-368-5644) unless otherwise noted. NAB Counsel Memos are available to member stations either through the NAB HelpFax, the members only portion of the NAB Website (www.nab.org) or by contacting the NAB Legal and Regulatory Affairs Department (202-429-5430).

Violation of the rules listed in the guidelines may result in the administration of fines or other disciplinary measures by the Commission, including loss of license. Therefore, station licensees are reminded that they are responsible for the actions of their employees. A licensee's failure to know the rules for on-air personnel does not exempt them from liability if a violation occurs.

For further explanations of the issues covered in the guidebook, please consult the *NAB Legal Guide to Broadcast Law and Regulation*, Fifth Edition and *1998 Legal Guide Update* available from NAB.

The reader is reminded
that this document serves only as a guide
and is not a substitute for legal advice
pertaining to a particular topic.
Legal advice should be sought from the station's attorney.



This *Guidebook* was revised and updated by Chris Noland, a former NAB Legal Intern. Barry Umansky, NAB Deputy General Counsel, Lori Holy, NAB Staff Attorney and Dave Wilson, NAB Technical Regulatory Affairs Manager, provided editorial assistance for the new edition. Sharon Donahue, a former NAB Legal Intern, prepared the original edition of this *Guidebook*.

Editorial assistance and review of this NAB publication was provided by the attorneys at

Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036-3101
(202) 728-0400

Contents

ALCOHOL ADVERTISING

(27 U.S.C. § 205 (e) and (f), *NAB Legal Guide*, 4th Edition, 1996, pp. 136-137)

✧ ✧ ✧

Many broadcasters question to what extent alcohol may be advertised on the air. Currently, there are no federal restrictions against advertising beer, wine or hard liquor. Advertising liquor stores and the prices of alcoholic beverages are also legal. The issue of whether the FCC will conduct a formal inquiry into liquor advertising is a current topic within the FCC.

Despite the lack of federal laws prohibiting or governing alcohol advertising, broadcasters should always check state law through their state's alcohol and beverage control board or state attorney general office. States are permitted to regulate in-state alcohol advertising and, as a result, each state has different restrictions on advertisements for alcohol. For example, some states prohibit the advertising of "Happy Hours." In addition, to promote the public policy of discouraging irresponsible drinking, no alcohol advertisement should glorify or promote abusive drinking, or drinking and driving.

CONTESTS AND PROMOTIONS

(47 C.F.R. § 73.1216; *Legal Guide*, pp. 90-96; *Contests, Lotteries & Casino Gambling*, NAB, 1995, NAB Counsel Memo, "Contest/Lottery/Casino Gambling Checklist," L-9703)

✧ ✧ ✧

The FCC rules define a contest as any arrangement in which a prize (or anything of value) is offered to the public. The means of selecting winners usually involves ability, skill, knowledge, chance or similar factors. Contests are distinguished from lotteries in that they generally have only two of the three elements (prize, chance and consideration) that constitute a lottery. The licensee-conducted contest rule applies to all contests conducted by the station and broadcast to the public.

A broadcast or advertisement promoting a contest conducted by the licensee must not be misleading, false or otherwise deceptive. The licensee must fully and accurately disclose all material terms of the contest. Material terms generally include, but are not limited to: how to enter or participate; eligibility requirements; entry deadlines; whether prizes can be won; when prizes can be won; the extent, value and nature of the prizes; time and means

of selecting winners; and tie breaking procedures. In addition, the contest should be conducted with no variation in material terms. However, if a change in the contest terms is necessary after the contest begins, the broadcaster should announce the change in the contest as soon as possible.

Broadcasters should be aware of three danger zones related to contest violations: misleading contests, rigged contests and contests affecting the public interest. A misleading contest is one in which the station misrepresents the terms of the contest or overstates the amount that can be won. The FCC lists a number of misleading practices that licensees should avoid when developing a contest. Such practices include:

(1) Disseminating false or misleading information regarding the amount or nature of the prize;

(2) Urging participation in a contest, or urging persons to stay tuned to the station in order to win, at times when it is not possible to win prizes;

(3) Failing to award prizes within a reasonable time;

(4) Failing to set forth accurately the rules and conditions for the contest on a continuing basis; and

(5) Conducting contests without proper supervision.

The rigging of contests is also strictly prohibited. A rigged contest is one that is intentionally deceptive to the listening public in that the outcome has been predetermined. Broadcasting false clues for the contest, predetermining the winner(s) of the contest or failing to set out the rules of the game accurately are characteristics of a rigged contest.

The FCC looks upon contests that adversely affect the public interest with disfavor. Because the licensee is held liable for the conduct of station employees, licensees should exercise caution when conducting these types of contests. One example of such a contest is a treasure hunt which causes a member of the audience, in attempting to find the treasure, to trespass on private property, commit traffic violations by racing to a particular destination under time constraints or otherwise endanger people or property.

The FCC consistently imposes heavy fines on stations that conduct misleading or rigged contests. In addition, contests that adversely affect the public interest may lead to civil or criminal liability of the licensee, which in turn could reflect on the licensee's character at license renewal time. Thus, proper supervision of all contests by the licensee is always required to avoid Commission penalties.

Stations must also remember that whenever a contest participant wins an aggregate of $600 or more in station-conducted contests during any year, the station must file a 1099 MISC federal tax form for each such person and a 1096 MISC form itemizing all 1099 MISC forms that were filed. This requirement only applies to *station-sponsored* contests (including those where the station may be a co-sponsor with other businesses), and not to promotions in which the licensee simply airs an advertisement for a nonstation-affiliated contest promoter.

DEFAMATION: LIBEL AND SLANDER

(*Legal Guide*, pp. 115-116; Bruce Sanford, *Libel and Privacy*, 2nd Edition (1991))

✧ ✧ ✧

Defamation is an umbrella term for the acts of slander and libel. Defamation results when a false statement, presented as fact, impugns a person's character and/or reputation, damaging him or her in the eyes of the community. Specifically, the act of slander damages a person's character or reputation via the falsely spoken word. In contrast, a libelous act damages a person's character or reputation via a written statement.

In either form, a defamation claim must contain the following four components:

(1) The damage done is the result of defendant's *fault*;

(2) The language in question caused *harm* to the complainant;

(3) The communication (be it spoken or written) sufficiently identifies the complainant (even if not by name, it must be shown that the language is of and concerning the complainant); and

(4) The defamatory words must be communicated to someone other than the person defamed (which is usually not an issue if the words are broadcast).

It is not enough that the words are spoken to the defamed person, even in the *presence* of others, if no one else overhears them. Similarly, if the words are communicated to the defamed person and are "heard" by a concealed listener, no defamation claim will arise. However, if the words are "spoken" so loudly that another person who heard them could have been expected to hear them, such a claim may exist.

In order to be actionable, a defamatory statement(s) made about a public figure must be made *with malice,* while one made about a

private party need only be made *intentionally or by a negligent act*. The communication is not defamatory if it is protected by a legal privilege, such as a state's law regarding a fair reporting privilege. It is important for stations to recognize as well that rebroadcasting a defamatory statement made by someone else (such as a quote) can subject the broadcaster to a defamation lawsuit.

Broadcast licensees should be aware that laws governing defamation vary from state to state and defamatory words and meanings can present themselves in a variety of ways. Common defamatory statements are made in regard to a complainant's morality, alleged criminality or professional reputation. Examples of statements made in a broadcast that could be considered slanderous, and therefore defamatory, are as follows:

- Accusing a person of professional incompetence or unethical business dealings;
- Accusing a person of a crime or past criminal record without verification;
- Attacking the honesty, virtue, temperance or truthfulness of a person; or
- Calling someone, without verification, a liar or saying they have a drinking problem, a disease or a history of psychological problems.

On-air personnel must exercise caution when broadcasting potentially damaging information about persons or groups in the community. However, mere insults and epithets, though uncomplimentary, are not actionable if they do not convey a degrading charge or imputation that would be defamatory as defined above.

In addition, broadcasters should be aware that even false and defamatory statements made about a group of people, naming no particular individuals, could result in a libel/slander claim. When a slanderous statement is broadcast about a group of people, each of the group's members may maintain a suit by showing that they are identifiable members of the group that has been slandered or that the slanderous statement concerns them as individuals. For example, one case in Minnesota involved a statement accusing the board of city commissioners with favoritism, nepotism and malfeasance. The court held that a defamation claim existed because the statement made was "of and concerning" each member of the board, therefore supporting a suit by one of the board members.

While the defamation laws differ from state to state, certain criteria may be useful to broadcasters in determining whether a defamatory comment about a group could subject them to a suit. In order for a group defamation claim to prevail, the following criteria must be considered: (1) the size of the group (if group consists of more than 25 individuals, claims usually do not prevail); (2) the definiteness of the group; and (3) the prominence of the group. Once again, broadcasters should familiarize themselves with the group defamation laws of their state. Licensees who have a problem involving a defamation claim should contact their own counsel for assistance.

DRUG LYRICS

(47 C.F.R. §§ 73.4095 and 73.4170; 4 FCC Rcd 7533 (1989))

✧ ✧ ✧

The broadcasting of songs containing drug lyrics is within the discretion of the licensee. The Commission has stated that "[w]hether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee." The Commission requires that a licensee, or other responsible person, be familiar with each song's lyrics and current slang pertaining to drugs, and adhere to responsible programming when airing material containing questionable drug lyrics. A pattern of failure by a licensee to act responsibly in exercising adequate control over broadcast material aired may raise serious questions as to whether continued operation of the station is in the public interest. In addition, the FCC has vowed to enforce stringent rules against licensees found guilty of drug trafficking. Broadcast licensees with drug convictions are in danger of having their licenses revoked. Hence, the FCC's choice to defer to licensees in all matters pertaining to drug lyrics is not indicative of a generally lax attitude towards drugs in the industry. In consideration of public policy, licensees are advised to use caution in this area at all times.

EMERGENCY ALERT SYSTEM (EAS)

(47 C.F.R. §§ 11.1 to 11.62; *Legal Guide*, pp. 201-204)

✧ ✧ ✧

In 1994, the Commission replaced the Emergency Broadcast System (EBS) with the Emergency Alert System (EAS). EAS relies

upon "multiple source monitoring," which is less prone to breakdowns than the "daisy chain" EBS system.

Stations were required to install EAS equipment by January 1, 1997. All broadcast stations are required to own and maintain EAS *decoding* equipment. All broadcast station licensees, except for LPTV facilities and 10-watt noncommercial (Class D) FM stations, are required to have equipment capable of *encoding* the EAS codes.

Under the new system, stations must perform complete tests once a month and abbreviated tests weekly, pursuant to FCC rule § 11.61. As part of the station's routine maintenance schedule, the licensee's Chief Operator should check the EAS receiver to ensure:

(1) The EAS stations being monitored is supplying sufficient signal at all times;

(2) The EAS tone decoder properly decodes the EAS attention signal; and

(3) The tone encoder is generating the EAS attention signal (proper tone frequencies, levels, distortion content, and timing) in accordance with FCC rule § 11.51.

The station must maintain, as part of the station log, a log of EAS tests received and transmitted for two years. A notation must also be made of any missed EAS tests. The Chief Operator, or other designated station personnel, must check this log weekly to insure that the required entries are being made correctly.

NAB members can call the NAB Legal Department (202-429-5430) for information on the FCC's EAS rules. State broadcasting associations may be contacted for information on state emergency plans.

HOAX BROADCASTS

(47 C.F.R. § 73.1217; *Legal Guide*, pp. 90-91)

✧ ✧ ✧

The FCC rule pertaining to hoaxes specifically states that no licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if:

(1) The licensee knows this information is false;

(2) It is foreseeable that broadcast of the information will cause substantial public harm; and

(3) Broadcast of the information does in fact directly cause substantial public harm.

Public harm must be immediate and cause direct and actual damage to property or to the health and safety of the general public, or divert law enforcement officials or other safety authorities from their normal duties. Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm *if* the disclaimer clearly characterizes the program as fiction and is presented in a reasonable way under the circumstances.

Broadcasters are encouraged to develop written guidelines specifically prohibiting the deliberate broadcast of false, misleading or deceptive material. Stations should periodically circulate the memoranda to remind employees that serious sanctions will result from violation of the FCC rules on the broadcasting of such material. Licensees will not be insulated from FCC sanctions if employee misconduct results in violation of the FCC hoax rules. Licensees may also be liable for property damages or expenses incurred by local government agencies in responding to the hoax.

INVASION OF PRIVACY

(*Legal Guide*, pp. 117-120; Bruce Sanford, *Libel and Privacy*, 2nd Edition (1991))

✧ ✧ ✧

The defamation laws of libel and slander protect the integrity of one's reputation as it relates to the public's perception. In contrast, the law of privacy protects one's interest "in being let alone" and kept out of the public eye. The law of privacy is divided into four separate categories:

- Intrusion into a person's affairs or upon a person's solitude;
- Public disclosure of private facts;
- Publicity which places a person in a false light; or
- Commercial appropriation of a person's name or likeness.

Examples of intrusion into one's solitude or personal affairs include invasion into a private home or other premises where a person expects to be protected from the public eye. The legal term *Intrusion* usually refers to *physical* invasion like **trespass** or

secret surveillance but also includes **misrepresentation** (invalid or exceeded consent). Broadcasters should be aware of the special impact of this tort on newsgathering methods. An intrusion claim can arise from the actual act of acquiring information for a broadcast. Subsequent broadcasting of the information gathered from the intrusion is not required in order for there to be a legal cause of action against the station.

Broadcasters should consider the following factors before risking an intrusion claim: (1) whether or not there is direct or implied consent to enter the property; (2) whether the information sought is newsworthy; and (3) where a reporter will have to go to acquire the information. Note that intrusion as a cause of action depends on state law. Thus, broadcasters should familiarize themselves with the law in their state.

Examples of public disclosure of private facts refer to those facts previously unknown and not of public concern, excluding matters of public record (i.e., marriages, births, deaths), but including intimate personal habits, details or history that a person ordinarily does not reveal. Disclosing this information need not be defamatory to be actionable. Thus, truth is *not* a defense to this type of claim. In order to sustain a disclosure claim, a plaintiff must prove three elements: (1) the disclosure must be to the public; (2) the facts must have been private before the disclosure; and (3) release of information regarding the matter must be highly offensive and objectionable (not merely annoying or mildly embarrassing) to a person of reasonable sensibilities.

False light claims arise from publicity (in the form of words or pictures) that portrays a person as someone or something that she or he is not. The depiction must be false and the person publishing or airing it must have either: (1) known it was false; or (2) had serious reservations about its truth but did not confirm its accuracy and published or aired it anyway. The primary distinction between defamation and false light invasion of privacy is that in a false light claim, the publication need not be defamatory. In other words, even statements that speak well of a person can give rise to a false light claim. The most common false light cases that have arisen in the courts have involved false or glorified reports of the victimization of a person or family.

Commercial appropriation of a person's name or likeness is best illustrated by the use of a sound-alike voice that gives the impression that the person being imitated is endorsing a product. This privacy right is also included under the burgeoning "right of publicity" laws which currently vary from state to state. Broadcasters are cautioned to obtain prior written consent from a

person whose voice, likeness or name may be used, particularly when a commercial benefit accrues from the appropriation. In addition, in many states the right of publicity of a person may extend beyond his or her death and be considered property of the estate. Therefore, broadcasters should be cautious regarding the depiction of deceased celebrities as well.

LOTTERIES AND CASINOS

(47 C.F.R. § 73.1211; *Legal Guide*, pp. 96-105; *Contests, Lotteries & Casino Gambling*, NAB, 4th Edition (1996), NAB Counsel Memo, "Contest/Lottery/Casino Gambling Checklist," L-9703)

✧ ✧ ✧

Effective May 7, 1990, the FCC amended its lottery rules to conform to the revisions of the Charity Games Advertising and Clarifications Act of 1988. Under the federal rules, broadcasters are generally allowed to advertise, promote, and provide information about lotteries conducted by non-profit groups or governmental entities. The federal rules also allow the promotional lotteries by commercial organizations (including the station itself), provided that the lottery is clearly "occasional" and "ancillary" to the primary business of the commercial organization. *However, state law must allow (or otherwise not prohibit) the broadcast of the above lotteries before such ads may be aired.*

Most states allow charitable lottery advertising. To qualify for this exemption, the organization or civic group must meet the definition provided in Section 501 of the United States Tax Code.

Most states now have a state-operated lottery. A station may advertise its own state's lottery. Generally, a station also may advertise state-operated lotteries conducted in other states so long as the station is licensed to a city in a state that already runs its own official lottery.

The federal law permits lottery promotions by commercial businesses when these promotions are conducted as a sideline and the state does not prohibit the advertisements. The promotion must be occasional and ancillary to the primary business, meaning that the frequency of a lottery by the same sponsor is critical. The FCC has held that an event is not "occasional" if it is held on a daily basis or at regular intervals (weekly or monthly) - so close together that the event appears to be part of one ongoing promotion or a series of promotions. Only a few states have amended their state lottery laws to follow the federal exemption for ancillary, occasional lotteries by commercial organizations.

The traditional elements of a lottery are prize, chance and consideration. A prize is anything of value offered to the contestant. The element of chance is present when the winner or the value of the prize is determined wholly or partly by chance. Consideration is an item of value, such as money or the expenditure of substantial time and energy by a participant in a promotional plan. A promotion that has all three elements and that is not exempt under federal and state law should not be conducted or promoted.

The advertising of gambling casinos continues to be unlawful regardless of whether it is sponsored or allowed by the state, with three exceptions:

- As a result of *Valley Broadcasting v. FCC*, stations licensed to cities in states located in the Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon and Washington) may legally advertise casino gambling as long as their state law allows. Stations in the Ninth Circuit should check with their state broadcast associations or state attorneys general for any state restrictions on advertising casinos.
- As a result of *Players International, Inc. v. U.S.*, the FCC has also suspended enforcement of the casino advertising ban in New Jersey after a District Court judge found the statute to be unconstitutional. Stations need to check state law for any state restrictions on the advertisement of casinos.
- Another exception to the law against advertising casino gambling exists for games conducted by Indian tribes on Indian tribal lands. If the Indian tribe and the state in which the gaming is conducted have reached a compact approved by the National Indian Gaming Commission (1441 L Street, NW, 9th Floor, Washington, DC 20005, (202) 632-7003), then broadcasters are permitted to air advertisements for that form of casino gambling.

Stations outside the Ninth Circuit and New Jersey may carry advertising for "multi-dimensional" establishments that have casinos along with hotels and restaurants. However, there may not be any reference, visually or aurally, to any gambling activities. Advertisements may only promote the non-gambling activities within the establishment.

The current status of the federal lottery statute as applied to

casino advertising is in a state of flux. The Government has petitioned the U.S. Supreme Court to remand the *Valley Broadcasting* case back to the Ninth Circuit. Additionally, the U.S. Court of Appeals in the Fifth Circuit previously found the casino advertising ban constitutional. The Fifth Circuit decision has been vacated and remanded by the U.S. Supreme Court. The Fifth Circuit has yet to re-issue a decision. Stations should consult their station attorney concerning the current status of the law before accepting advertising for casinos.

MECHANICAL REPRODUCTION ANNOUNCEMENTS

(47 C.F.R. § 73.1208; Legal Guide, p. 79)

✧ ✧ ✧

The Commission requires that any taped, filmed or recorded program material in which time is of special significance must be broadcast with an appropriate announcement at the beginning of the program stating that the program is recorded. An announcement that the program is recorded must also be present if an attempt is made to create an impression that it is occurring live or simultaneously with the broadcast. The language must be clear and in terms commonly understood by the public.

Events likely to require mechanical reproduction announcements include recordings of "live" events such as concerts, speeches and news events, unless the element of time is not of special significance. This rule does not apply to commercial, promotional or public service programming.

NETWORK CLIPPING

(2 FCC Rcd 3474 (1987))

✧ ✧ ✧

Network clipping is the failure of the licensee to fulfill its contractual obligation to a network with which it is affiliated by certifying that specified material was broadcast in full when there were, in reality, cancellations or deletions. The Commission has deleted its rule and policies prohibiting network clipping. However, licensees guilty of network clipping may be open to non-FCC remedies through civil litigation or enforcement of local laws relating to fraud, racketeering, fair trade or antitrust. Moreover, an adverse ruling can reflect negatively on the licensee's character at license renewal time.

OBSCENE OR INDECENT MATERIAL

(47 C.F.R. §§ 73.4165 and 73.4170; 18 U.S.C. § 1464; *Legal Guide*, pp. 89-90)

✧ ✧ ✧

Obscene material does not enjoy constitutional protection and may not be carried at any time. Material is considered obscene if:

(1) The average person, applying contemporary community standards, would find that the material appeals to the prurient interest;

(2) The material describes or depicts sexual conduct in a patently offensive manner; and

(3) Taken as a whole, the material lacks serious literary, artistic, political or scientific value.

Indecent material describes sexual or excretory activities that are patently offensive as measured by contemporary community standards for the broadcast medium at times of the day when there is a reasonable risk that children may be in the audience. No longer is this standard limited to the "seven dirty words" of George Carlin. It now is aimed at *any* material that is patently offensive when exposure to children is reasonably likely. However, as the standard implies, there are times when indecent material can be aired without violating the indecency policy. Currently, broadcasters must abide by the "safe harbor" of 10:00 p.m. to 6:00 a.m. for the broadcast of indecent material. In other words, the broadcast of indecent material must be limited to that time period.

If there is a chance that the FCC might consider any part of the broadcast indecent or obscene, the material must be checked with the appropriate station officials before airing. The sizable forfeitures imposed for violation of this rule indicate the seriousness of the Commission's concern with indecent programming. It is important to educate on-air personalities regarding the law in this area in order to avoid penalties assessed by the FCC for spontaneous comments that could be construed as indecent or obscene.

OPERATOR LICENSES

(47 C.F.R. § 73. 1870; *Legal Guide*, pp. 182-183)

✧ ✧ ✧

Operators are no longer required to hold individual licenses in order to operate a broadcast station. Each station must designate

a person to serve as the station's Chief Operator. If the Chief Operator is engaged on a contract basis, there must be a written contract to this effect, available for inspection by FCC personnel. Written designation of the station's Chief Operator and "Alternate Chief Operator" must be posted with the station license. The Chief Operator must perform, or oversee the performance of, the following duties:

(1) Inspect and calibrate the transmission system, required monitors, metering, and control systems and supervise any necessary repairs or adjustments;

(2) Review the station log at least once each week to verify that required entries are being made correctly and that the station has been operated in accordance with FCC rules or the station's authorization; and

(3) After reviewing the station log, the Chief Operator or his or her designee must date and sign the log, initiate any corrective action that is necessary and advise the station licensee of any problems that are repetitive.

PAYOLA AND PLUGOLA

(47 C.F.R. § 73.4180; 47 U.S.C. §§ 317 and 507; *Legal Guide*, pp. 77-78, NAB Counsel Memo, "A Station Payola/Plugola Policy," L-9709)

✧ ✧ ✧

Payola is the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to obtain airplay for any programming. The Communications Act requires that those persons who have paid, accepted or agreed to pay or accept payments for the broadcast of any material report that fact to the station licensee before the matter at issue is broadcast. The licensee is then required to announce that the matter contained in the program is paid for and to disclose the identity of the person furnishing the money or other valuable consideration. (See **Sponsorship Identification** section, below)

Plugola is the practice of promoting a licensee's or on-air personality's non-broadcast activities on the air. It involves an indirect benefit flowing to *persons responsible for program selection*. If the employee gives on-air plugs for that business interest, the employee's interest in this business must be disclosed during the plugs. The Commission looks upon the practice as a

form of conflict of interest and violation of the sponsorship identification rule. For example, if an on-air personality or other employee has an interest in a business outside of the station, the station must insulate him or her from the program selection process, at least to the extent that a choice of program materials (e.g., which records to play) might relate to the outside business interests (e.g., concert promotions or record distributorship).

POINT-TO-POINT COMMUNICATIONS

(47 C.F.R. §73.1250; *Legal Guide*, p. 127)

✧ ✧ ✧

Except during emergency operation, a station may not broadcast a message intended primarily for a specific individual or group. Messages in coded form also constitute point-to-point communications and should not be broadcast. The Commission's policy is that radio stations are licensed to broadcast program material intended only for reception by the general public, and point-to-point transmissions run counter to this policy. However, licensees may address a message to a particular individual (e.g., a person in public life) if the message is an integral part of the program format and its meaning is clear to the audience.

Certain emergency situations will justify broadcasting material in the nature of point-to-point communications. For example, at the request of responsible public officials a station may air messages to request or dispatch aid in rescue operations. However, immediately following the end of the emergency situation, the licensee must notify the FCC, disclosing the nature of the emergency, the dates and hours of the broadcasts and a brief description of the material transmitted.

POLITICAL EDITORIAL RULE AND PERSONAL ATTACK RULE

(47 C.F.R. §§ 73.1920 and 73.1930; *Legal Guide*, p. 81)

✧ ✧ ✧

The FCC has abolished the Fairness Doctrine requirements for broadcasters. Yet, the Political Editorial Rule still remains, and applies to situations in which the station editorially endorses or attacks a legally qualified candidate. If that occurs, broadcasters are required to provide:

(1) Notification of the date, time and identification of the broadcast;

(2) A script or tape (or an accurate summary thereof) of the attack; and

(3) An offer of a reasonable opportunity to respond using the licensee's facilities.

If the first airing of the editorial is scheduled to occur within 72 hours of the election, notification and a copy of the editorial must be given to the candidate sufficiently in advance of the broadcast to give the candidate a fair opportunity to respond.

A corollary to the Political Editorial Rule is the Personal Attack Rule, which also remains in the FCC regulations. If the character of a person (or group) is attacked during a discussion of a controversial issue, a broadcast station must meet the above requirements within a week of the attack's occurrence. A personal attack is an attack on the honesty, character, integrity or like personal qualities of an identified person or group.

- The rule does not apply to attacks on foreign groups or public figures, attacks made during an appearance by a legally qualified candidate or attacks made by candidates or their representatives about opposing candidates or their representatives. The rule also does not apply to bona fide newscasts, bona fide news interviews, on the spot coverage of bona fide news events or to commentary and analysis contained in such programs.
- The rule does apply to station editorials.

Since 1983, the FCC has had an open rule making proceeding proposing the repeal of the Personal Attack and Political Editorial rules. Thus far, the Commission has failed to take action in the proceeding. The Radio and Television News Directors Association and NAB filed suit against the FCC in response to the inaction of the Commission. The Court of Appeals for the D.C. Circuit is scheduled to hear oral argument in the case in May 1998.

PUBLIC INSPECTION FILE

(47 C.F.R. §§ 73.3526 and 73.3527; *Legal Guide*, pp. 54-55; NAB Counsel Memo, "Your Public File: What to Keep, What to Toss and Where to Keep It," L-9706)

✧ ✧ ✧

Licensees must maintain certain records in a file for public inspection in the community where the station is licensed. The

public has a right to inspect this public file during regular business hours and no appointment is necessary. Licensees may ask for the name and address of the person wishing to inspect the file; but no other information, such as reason for inspection or name of the person's organization, may be requested. Copies of a particular document must be made available, provided the individual agrees to pay reasonable costs of reproduction. A station must honor any requests for inspection made in person. However, the station is free to determine whether it wishes to comply with the request if made by phone or mail.

The following must be kept in a radio station's public file for eight years or until grant of the next renewal application, whichever is later:

- Materials pertaining to certain applications filed with the FCC requiring public notice;
- Statement certifying compliance with pre- and post-filing license renewal announcements, including the text of the announcements and the dates and times the announcements were broadcast;
- Ownership materials;
- Annual employment records;
- Citizens agreements; and
- Issues-programs lists.

Other items, which must be kept in the public file for different periods of time, include:

- Political and "Controversial Programming" information (two years);
- Letters from the public (three years);
- Time brokerage agreements (kept at both stations for term of the agreement);
- The 1974 FCC Procedural Manual entitled The Public and Broadcasting (indefinitely) (Note, however, that because some of the information in the manual is outdated, the FCC will not issue a forfeiture against a licensee that fails to maintain the manual in its public inspection file); and
- Materials relating to an FCC investigation or complaint (must be retained until the FCC notifies the licensee in writing that the material may be discarded).

There is a pending rulemaking proceeding at the FCC that will likely delete the rule requiring the retention of the 1974 FCC Procedural Manual and may change some of the retention periods for some documents. Until the FCC takes action on that proceeding, stations must comply with the current rules and retention periods.

QUARTERLY ISSUES-PROGRAMS LISTS

(47 C.F.R. §§ 73.3526(a)(9) and 73.3527(a)(7); *Legal Guide*, p. 53)

✧ ✧ ✧

The FCC has eliminated daily, detailed program logging requirements for broadcast operations. As a result, stations may exercise discretion in including certain materials in the program logs. However, in specific instances, the retention of broadcast materials (such as news copy or videotape) may protect the station if problems should arise regarding libel, defamation or personal attacks. Such record retention also may be required under state law. As a rule of thumb for broadcasters, most stations should keep program logs for one year to facilitate commercial verification.

The FCC requires a station to prepare lists on a quarterly basis which enumerate some of the community issues addressed by the station during the preceding three months and which set forth the programming which gave significant treatment to those issues. Each list must identify the issue, provide a narrative description of the programming that addressed the issue and list each program's title, duration, time and date of airing.

Quarterly lists must be placed in the station's public inspection file by the tenth day following the end of each quarter and must be kept for the term of the station's license. The FCC has stated that a licensee whose lists include at least five issues each quarter would likely be able to demonstrate compliance with the issue-responsive programming obligation. The lists should be prepared with care and placed in the station's public file on a timely basis because they constitute contemporaneous, tangible evidence of the station's programming. Such evidence could prove critical in defending a licensee's "renewal expectancy," although they are not intended or expected to describe all of a station's programming for the preceding quarter. Further, the completeness or absence of the lists may be used as a basis for petitions to deny the renewal of the station's license.

RF RADIATION REGULATION COMPLIANCE

(47 C.F.R. §1.1307(b); *A Broadcasters Guide to FCC Radiation Regulation Compliance*, NAB, 4th Ed. (1997); *Legal Guide*, pp. 174-175)

✧ ✧ ✧

On-air personnel often have questions regarding RF radiation exposure. A summary of the latest findings on RF radiation and a

review of current FCC policy are included below.

RF "radiofrequency" radiation here refers to the emission of energy from communications antennas. Human exposure to RF radiation is an environmental issue addressed in the FCC's license renewal and station authorization processes; but it is one where the FCC requires compliance at all times. While there is no conclusive connection between exposure to low levels of RF radiation and health effects in human beings, high levels of RF radiation can cause body heating and be injurious to humans. Thus, revised FCC rules, effective October 15, 1997, define levels of RF radiation acceptable for human exposure, based on a hybrid of the 1992 standard of the American National Standards Institute and the 1986 standards of the National Council on Radiation Protection and Measurement. These rules act as PREVENTIVE AND PRECAUTIONARY MEASURES to ensure the public's health and welfare in areas around broadcast facilities. However, neither the FCC nor any other arm of the federal government has determined that broadcast antenna emissions, at levels normally encountered by the public or station employees who do not actually climb or come in physical contact with towers, currently pose a health hazard.

The FCC's RF radiation regulations were tightened in 1997, with more stringent limits applicable to areas accessible to the general public than apply to areas accessible only to station employees. The rules apply to full service radio and TV broadcast stations, low power TV stations, TV translators and FM translator and booster stations operating with 100 watts or higher effective radiated power.

All covered stations must certify compliance at the time of license renewal and in any application for new or modified facilities. Stations shown by FCC calculation methods to generate less than 5% of the FCC's radiation limit at any location accessible by humans are exempt from any analysis beyond that threshold determination. NAB advises broadcasters at these stations to check RF radiation levels at their transmission facilities periodically, regardless of any current need to file a renewal or modification application. A periodic environmental assessment by the licensee is necessary to make sure that station workers and the general public are being kept away from areas where exposure would exceed the FCC's standard. After performing such checks, it is suggested that the broadcaster prepare a memorandum that records:

(1) That a review of the facility's RF radiation levels has been undertaken;

(2) Whether or not the facility was found to be in compliance with FCC guidelines; and

(3) If the facility was not found to comply, what corrective measures and/or procedures have been or will be designed and implemented.

This memo should be kept readily available but should not be placed in the station's public inspection file. Fences or other barriers should be installed and warning signs should be posted to keep humans away from any area where RF levels are expected to exceed FCC standards.

The FCC has issued worksheets that may be used to check compliance by both sole tower occupants and stations that share a tower or are near another radio or TV tower. If the worksheets do not indicate compliance with FCC standards for both workers and the general public, more sophisticated methods are available that may indicate whether a station is in compliance. These include calculations specified in *FCC OET Bulletin 65* and *Bulletin Supplement* A and a computer model for FM radio stations available from the FCC.

A station certifying compliance with the FCC's acceptable RF radiation standards pledges that, for the license term, no member of the public or station employee will be exposed above the level specified by the FCC for its RF radiation regulatory purposes. The vast majority of radio stations are already in compliance with the rules regarding the general public's exposure to RF radiation. Nevertheless, station on-air personnel and other station workers should help ensure that the station's certification remains valid.

SPONSORSHIP IDENTIFICATION

(47 C.F.R. § 73.1212; *Legal Guide*, pp. 74-77)

✧ ✧ ✧

Whenever a station broadcasts any material for which it has received, or will receive, any money, service or other valuable consideration, the licensee, at the time of the broadcast, must fully and fairly identify the entity which paid, or promised to pay, for carriage of that material. The Commission emphasizes that stations should maintain strict control over the airing of sponsorship identification announcements, not only to ensure that they are made, but also to make sure that they adequately describe the sponsoring entity. The sponsorship identification requirements do not apply to feature motion picture films produced initially and primarily for theatre exhibition.

If a station broadcasts material involving a controversial issue of public importance, the station must place a list of the chief executive officers or directors of the sponsoring entity in the station's public file. Stations must also make sure the issue advertisement complies with all the sponsorship identification rules.

Problems can arise if a station co-produces a concert or other event, or promotes an event on the air, and fails to indicate on the air that the station is a co-sponsor. Similarly, if a station receives free tickets in exchange for promoting a local event, this fact must be revealed in the broadcast promotional announcements. On the other hand, if the station has no financial or management interest in an event, it is misleading for the station to say that it is "presenting" or "sponsoring" the concert. In addition, if a station indicates that it is co-sponsoring an event, it may be held liable under state law for damages resulting from the event.

In the case of an advertisement for commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship, is sufficient.

No special announcement is required for want ads sponsored by individuals, but the station must:

(1) Maintain a list of the name, address and (where available) phone number of advertisers;

(2) Make the list available to members of the public who have a legitimate interest in obtaining the information; and

(3) Retain the list for two years after broadcast.

STATION IDENTIFICATION ANNOUNCEMENTS

(47 C.F.R. § 73.1201; *Legal Guide*, pp. 60-61)

✧ ✧ ✧

The FCC requires that each station air a station identification announcement at the beginning and end of each day of operation, and hourly, as close to the hour as feasible, at a natural break in programming.

The required station ID announcements must contain the station's call letters followed by the name of the city of license as specified in that station's license. Also, the name of the licensee and the

station's frequency or channel number may be included between the call letters and the city of license. No other insertion is permissible. For example, the announcement, "This is station WBPE, Austin Broadcasting Incorporated, 750 on your AM dial, Central City," is permissible, whereas the announcement "WBPE, Austin Broadcasting Incorporated, 750 on your hot AM dial, your number one rocker in Central City," would not be permissible.

Additionally, a station may include the name of any other community or communities with its official station identification, provided that the community of license is named first. In the rare case where a station is licensed in two communities, both communities must be mentioned in the order in which they appear on the station license. In the case of station simulcasting, station identifications may be made jointly for the stations under common ownership. When a station's programming is being rebroadcast simultaneously by a satellite station or one operating under a local marketing agreement (LMA), the originating station may make station identification announcements for the satellite or LMA station as well.

Identification-type announcements that are broadcast at times other than on the hour and at the beginning and end of each time of operation are not limited by this rule, provided they are not misleading.

STATION LICENSES

(47 C.F.R. § 73.1230)

✧ ✧ ✧

The station license and any other instrument of station authorization must be posted in a conspicuous place so that all terms are visible at the principal control point of the transmitter. Posting of station licenses shall be done by affixing the license to the wall at the proper posting location or by retaining it in a binder at the posting location. A photocopy of the station license and other authorizations shall be posted at all other control or Automatic Transmission System monitoring and alarm points.

STATION LOGS

(47 C.F.R. §§ 73.61, 73.1800, 73.1820 and 73.1840; *Legal Guide,* Appendix C)

✧ ✧ ✧

A station log is required of each licensee and must include the following information:

(1) Any adjustments to the technical operating parameters, if any parameter deviation extends beyond permissible limits, by a notation describing the type of action taken to rectify the deviation;

(2) Records of any malfunction of antenna tower lights, including:
- The nature of the malfunction;
- The date and time the problem was discovered or otherwise noted; and
- The date, time and nature of repairs or adjustments made.

(3) The receipt or transmission of each EAS test and each EAS activation; and

(4) Any other records required by the individual station's license.

Directional AM stations without an FCC-approved antenna sampling system must make the necessary measurements (as prescribed by FCC rules) once each calendar quarter at intervals not exceeding 120 days. Stations without an approved sampling system must record the following additional information in the station log at the beginning of daily operations in each mode of operation, and thereafter in intervals not exceeding three hours:

(a) Common point current;

(b) When the operating power is determined by the indirect method, the efficiency factor F and either the product of the final amplifier input voltage and current or the calculated antenna input power;

(c) Antenna monitor phase or phase deviation indications; and

(d) Antenna monitor sample currents, current ratios or ratio deviation indications.

When making a manual entry in the station log, knowledgeable station employees must sign the log, attesting to the fact that the entry that is made is an accurate representation of what transpired. Log errors must be corrected by striking out the erroneous portion and explaining the correction being made. The corrections must also be signed and dated by the person keeping the log or by the station's chief operator, station manager or an officer of the licensee. Each sheet of the log must be numbered and dated. In addition, time entries must be made in local time and indicated as advanced (e.g., EDT) or non-advanced (e.g., EST) time.

Alternatively, automatic devices that are accurately calibrated and have appropriate time, date and circuit functions may be used to record log entries, provided that the equipment is monitored as necessary to ensure its accuracy. No automatically kept log may be altered in any way after entries have been recorded. When automatic logging processes fail or malfunction, the log must be kept manually until automatic logging is restored.

Station logs must be retained for two years, unless the log concerns a disaster or FCC investigation about which the licensee has been notified. In such cases, the FCC must specifically authorize destruction of the logs.

TELEPHONE CONVERSATION BROADCASTS

(47 C.F.R. § 73.1206; *Legal Guide*, pp. 121-123)

FCC rules require that licensees notify parties of the intention to broadcast telephone conversations prior to recording or broadcasting any conversation. The notification requirement applies whether or not the conversation is being broadcast live or being recorded for later broadcast. However, prior express notification that a party's voice is being broadcast is not required when the party is "aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast" (e.g., an "open mike" call-in show). FCC Rules provide that "such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations."

The Commission has determined that a "conversation" begins whenever a person answers the telephone. Therefore, the prior notification requirement is violated if the station airs the called party's answering of the phone, even though the announcer may immediately inform the party called of his or her intention to broadcast the conversation live or record the conversation for later broadcast. In other words, stations may not air that portion of a live or taped telephone conversation which precedes the announcer's notification to the called party that the conversation will be aired live or taped for future broadcast.

In addition to FCC requirements, state privacy laws may impose other obligations. Licensees should check state law. Please note

that the NAB and many broadcasters find the current broadcast telephone conversation rule to be excessively restrictive and unrealistic. Consequently, a proposal has been filed with the FCC suggesting that there are alternative measures to insure legitimate privacy rights without such stringent regulatory measures.

TOBACCO ADVERTISING

(15 U.S.C. §§ 1335 and 4402(f); *Legal Guide,* p.137; NAB Counsel Memo, "Tobacco Products in Broadcast Advertisements," L-9712)

✧ ✧ ✧

Congress has banned all advertising of cigarettes, little cigars and smokeless tobacco via any medium of communication under the FCC's jurisdiction. Failure to obey this law is a violation of a criminal statute and is considered a misdemeanor punishable by fine. Cigarettes, for purposes of the law, refer to:

(1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(2) Any roll of tobacco wrapped in a substance containing tobacco which will be offered to, or purchased by, customers as a cigarette defined in (1) because of similar characteristics to that tobacco product.

For purposes of the law, little cigars are defined as "any roll of tobacco wrapped in leaf tobacco or any other substance containing tobacco (except cigarettes) of which one thousand units weigh a maximum of three pounds."

Broadcasters may advertise regular cigars, pipe tobacco and smoking accessories. In addition, it is legal for a smokeshop or a tobacco store to advertise with their legal name even if the word "tobacco" is part of the title, so long as they sell tobacco products that may be advertised legally. However, the Department of Justice has stated in a written opinion that advertisements for establishments whose legal name includes the word "cigarette" would violate the statute.

Cigarette-named events such as "The Virginia Slims Tennis Tournament" are legal to advertise as long as the event does exist, it is the legally registered name of the event and the product is mentioned no more than necessary. However, broadcasters are advised to avoid advertisements that are a sham for blatant cigarette promotion. For example, advertising shops that sell predominantly cigarettes but have a display of lighters (a smoking

accessory) would be a sham because advertising of the basic product sold (cigarettes) is illegal under the criminal statute.

Other common examples include broadcast promotion of public displays or events featuring cigarette-sponsored racing cars and cigarette-sponsored vans that appear at retailers to distribute free cigarettes and clothing bearing the cigarette's logo. Advertisements of this type are considered blatant promotions for cigarettes and, therefore, violate the statute.

TOWER LIGHTING, PAINTING & MARKING

(47 C.F.R. §§ 17.21 to 17.58, 73.1213; *Legal Guide*, p. 169; *Antenna and Tower Regulation Handbook*, NAB (1997))

✧ ✧ ✧

For many years, the FCC placed almost all responsibility for tower maintenance and lighting on station licensees. New rules shift the *primary* responsibility from licensees to tower *owners*. However, the FCC will continue to hold non-owner licensees responsible if the tower owner has clearly abdicated its responsibility for the tower (e.g. if rent checks are being returned as undeliverable).

Tower owners are responsible for ensuring that all tower lights function properly. Section 17.47 of the FCC rules requires a daily observation of tower lights. An automatic device may be employed to indicate an outage in lieu of an on-site inspection. However, any automatic system must be inspected visually by a human being at least once every three months to ensure that white strobe tower lights flash continuously or red tower lights are illuminated each night. In the case of a failure of any top steady-burning light or any flashing obstruction light, regardless of its position on the tower, the tower owners must promptly report the outage to the nearest FAA Flight Service Station unless it can correct the problem within 30 minutes. The FAA must be notified again once the outage has been repaired. When any steady-burning intermediate light goes out, the owner must correct the problem as soon as possible; however, it is not required to notify the FAA. In addition, an entry concerning lighting failure must be entered into the station log pursuant to § 73.1820(1)(i) of the FCC rules.

A tower owner is also responsible for proper tower painting maintenance as described in §§ 17.23 and 17.53 of the FCC rules in those cases where the FAA and/or FCC requires painting. Painting requirements normally accompany requirements for red tower lights but not daytime/nighttime strobe lighting. Familiar

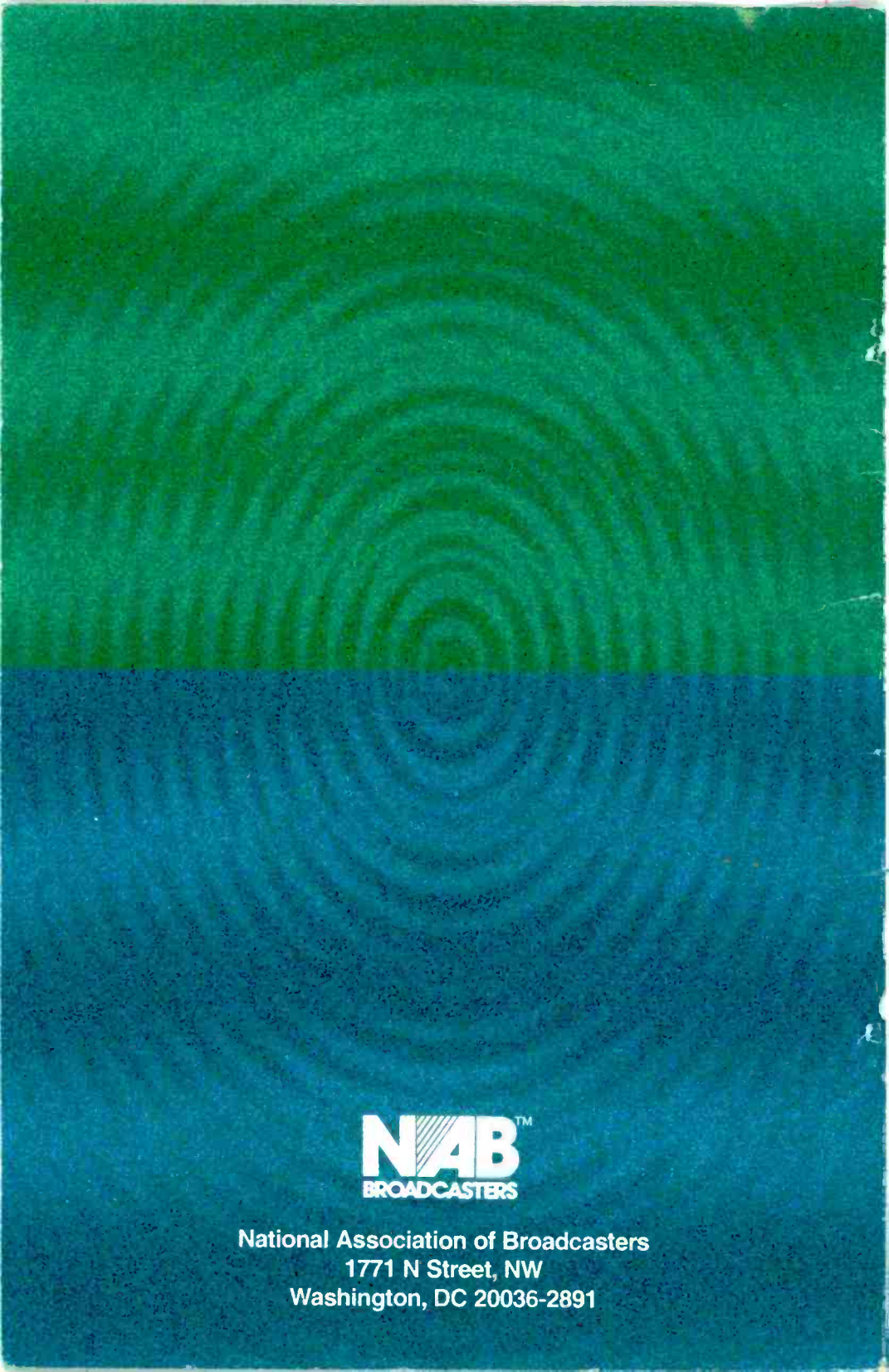
alternating bands of orange and white must be seen on the broadcasting tower to ensure good tower visibility. If the color of the tower fades beyond the required intensity of aviation surface orange, the tower must be repainted. While it may be difficult to determine exactly when a tower is so faded as to fail to meet FAA/FCC specifications, the *FAA In-Service Orange Color Tolerance Chart* is an appropriate guideline for deciding when a tower should be repainted. Although paint deterioration rates vary according to climate, the average length of time between tower paintings is four years. Tower owners should remember that the FCC's regulations on limiting human exposure to radio frequency (RF) energy apply to tower painters and maintenance personnel. For further information on RF radiation, refer to the RF Radiation section of this *Guidebook*.

UNAUTHORIZED COMMUNICATIONS AND REBROADCASTS

(47 C.F.R. § 73.1207; *Legal Guide*, pp. 125-127)

The broadcast material of a broadcast station may not be rebroadcast by another station without receiving the written consent of the originating station. Ideally, this consent first should be obtained in writing. If not possible, oral consent later should be confirmed in writing and a copy of the written consent or confirmation by the licensee originating the program must be kept in the records of the station re-transmitting the program. If requested, the station must provide a copy of the rebroadcast authorization to the FCC. Amateur and Citizens Band (CB) messages may be rebroadcast at the discretion of broadcast station licensees. Stations cannot grant rebroadcast consent for network programming or syndicated programming carried on the station.

Stations originating emergency communications under a detailed state EAS operational plan are deemed to have conferred rebroadcast consent. The unauthorized rebroadcast of material involves copyright and other possible liability in addition to violation of FCC rule § 73.1207.



National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036-2891