

*Celebrating 25 years of dedicated service to clients in the communications industries.*

To: All Broadcast Clients

February 6, 2008

## FCC PROPOSES FORFEITURES FOR INDECENCY VIOLATIONS

For the first time in over a year, the FCC has proposed forfeitures for the broadcast of indecent material. The FCC has issued a Notice of Apparent Liability proposing fines in the amount of \$27,500 per station against fifty-two ABC Television Network affiliated stations and ABC owned-and-operated stations ("ABC") in connection with the February 25, 2003 broadcast of "NYPD Blue," which aired at 9:00 PM in the Central and Mountain Standard Time Zones.

The FCC received thousands of letters from members of various citizen advocacy groups, complaining that the program included a sequence in which a young boy walks in on a woman preparing to take a shower. In one scene, the side of the naked woman's breast and buttocks are visible, and in another, the camera "lingers" on her bare buttocks from behind. The sequence ends with a frontal view of the woman covering her pubic area and breasts with her hands and arms.

The FCC defines "indecent speech" as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium. The FCC concluded that although the broadcast of nudity is not indecent per se, the material depicted in the episode of "NYPD Blue" was (1) explicit; (2) dwelled upon; and (3) shocking, pandering and titillating, and that it aired between the hours of 6 a.m. and 10 p.m., which is outside the "safe harbor" time period. The Commission found that the scene contained

explicit and graphic depictions of sexual organs, i.e. "an adult woman's naked buttocks," that it dwelled on and repeated the sexual material, i.e. by including "several shots of her naked buttocks," and that the scene was titillating and shocking, i.e. the scene "included repeated and lingering images of a woman naked from the back, with close-up views of her naked buttocks...". ABC included a program warning that "this police drama contains adult language and partial nudity," but the FCC relied on a Supreme Court ruling that such warnings are not necessarily effective because the audience constantly changes stations.

The FCC proposed the statutory maximum forfeiture of \$27,500 per station, based on the FCC's rules in effect in 2003 when the subject episode of "NYPD Blue" was broadcast.

For broadcasts on and after July 20, 2007, the Commission may issue forfeitures for the broadcast of indecent programming of up to \$325,000 for each violation or each day of a continuing violation, with a maximum forfeiture that can be assessed for any continuing violation of \$3,000,000 for any single act or failure to act.

Broadcasters should therefore exercise extreme care when airing any material that is arguably indecent or profane. If you have any questions concerning questionable programming material, please contact our office before such material is broadcast.

*Leventhal Senter & Lerman PLLC*

This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact any attorney in our office.