

SWEEPS MAY BRING LITIGATION PERIL TO BROADCASTERS

The up-coming television ratings period provides hours of interesting and shameless television – including the stuff of which lawsuits are made – as the local and national networks compete for viewer attention. Program and news producers are vulnerable during these periods as they often resort to some downright low, but entertaining programming in hopes of scoring points from Nielsen viewers. As media junkies, it's time for us to set the DVR, brush the Jiffy Pop off our “seen on TV” Snuggies and start thinking about liability issues and insurance.

On an annual basis, two million paper diaries are collected from Nielsen “viewing families” across the country during the months of November, February, May, and July— also known as the “sweeps” rating periods. Before computers kept track of the data, the diaries were collected from the East Coast to the West in an orderly “sweep” so that the data could be efficiently tabulated. The viewing results determine what programs viewers like to watch and those they tune out. These quarterly, four-week time periods are important because local advertising rates - think gimmicky ads for car dealers that include all manner of kith and kin - are based upon the number of viewers that tune in. In addition to driving ad rates, sweeps ratings also determine what programs – and personnel – should be celebrated or chopped. Although Nielsen now monitors viewer habits throughout the year with electronic “people meters” that attach to TV sets to establish national rates, the impact of sweeps remains.

During sweeps, network execs and local news directors produce plot-twists, contests, cameo appearances and other “gotcha” television moments in hopes of luring viewers and keeping them glued to their sectionals. The annals of sweeps history are replete with unforgettable moments: Ellen DeGeneres coming out as a lesbian on *Ellen*, *ER* broadcasting live, Fonzie jumping over a shark pen on skis (an event that coined the term, “jumping the shark,” which captures the whiff of desperation associated with over-the-top programming), and the use of hidden cameras to catch all manner of scammers, including locksmiths, auto mechanics and home repair personnel, attempting to rip off the public. Cringe-worthy programming, such as “To Catch a Predator” and local knock-offs are also popular sweeps fodder.

Sweeps has played a prominent role in media litigation as news organizations often roll out highly promoted and complex investigative stories to coincide with the ratings periods. Investigative reporting can expose a newsroom to liability for defamation, invasion of privacy, trespass and other related perils. One of the most famous and instructive sweeps suits is *Food Lion, Inc. v. Capital Cities/ABC, Inc.* In 1992, Primetime Live, an ABC news program, aired a hidden camera report on unsanitary

meat handling practices of grocery store chain, Food Lion. Acting on a tip, two reporters falsified their resumes and landed jobs with the grocery chain. With miniature cameras hidden in their wigs, they photographed meat handlers repackaging spoiled meat, mixing old ground meat with new and sprucing up turkey long past its prime with barbecue sauce and spinning it as “gourmet.”

A federal jury awarded Food Lion \$5.5 million dollars in damages, and one of the aggravating facts was that ABC had held the broadcast for nine months to coincide with the November sweeps period, which is the most important ratings period because of the high volume holiday advertising revenue. Although ABC was essentially exonerated on appeal (\$2 in damages remained after appeal- \$1 for trespass and \$1 for a breach of loyalty claim), defense costs were significant, and the defendant’s ethics were questioned for icing an important story for nine months so that it could be released during the most important ratings period.

So, what’s a news or program producer to do to minimize exposure while maximizing ratings? We recommend the following:

- Use of in-house or outside media counsel is the most effective way to reduce exposure. However, it’s too late when the footage is already in the can because an invasion of privacy, trespass or other newsgathering tort may have already taken place. Counsel should be consulted before commencing any investigative news reporting to review planned newsgathering methods, including the use of confidential or anonymous sources. Are hidden cameras or microphones going to be used? Does the state where the newsgathering will take place require “one-party” or “two-party” consent with respect to recording devices? Are reporters riding shotgun with law enforcement officers? Do reporters plan to mine social media sites for information? You get the drift. Counsel should also be involved in the vetting process to make sure that the overall piece is objective and balanced to minimize exposure to defamation;
- Watch out for the “Oh No! Promo.” Story promos should match media content. Promotional graphics and teasers should not overhype or skew the story. The same care that is given to the hard-hitting news report should also be given to all promotional materials, as well as any web content;
- If stunts, contests or sweepstakes (“prize promotions”) are part of sweeps, make sure that they comply with state and federal laws as to font size, use of expiration dates and other legal requirements. Additionally, there may be a bodily injury exposure arising from a contest. (Who remembers the tragic consequence of “Hold Your Wee for a Wii?") Bodily injury is often excluded from

media insurance policies, so broadcasters should check for broadening endorsements. Also, analyze relevant insurance policies before engaging in a promotion where many will play, but few will win. As most media insurance policies exclude coverage for contests and prize over-redemptions, it may be necessary to buy a stand-alone insurance policy for the contest. Broadcasters should consult their brokers well before the contest is to take place because it may take some time to analyze coverage or to place separate coverage.

- Maintain a fastidious paper-trail with respect to all investigative reporting. Reporters should use care to avoid making damaging, snide and problematic comments in e-mail communications, which could be construed by a jury as proof of actual malice. Out of an abundance of caution, outside or in-house counsel should be copied on email correspondence relating to complex investigative pieces to allow for attorney-client confidentiality.
- Reporters' use of social media or blogs to hype or supplement investigative reporting should also be reviewed by counsel in advance. If this practice is not acceptable, strict guidelines should be in place with respect to what can and cannot be posted by the reporter without editorial oversight. A reporter's unfettered tweets or Facebook posts can quickly undermine the efforts of counsel and editorial staff to minimize the risk attendant to investigative reporting.
- If an investigative reporting piece impacting public health, safety or welfare is going to be aired during sweeps, its newsgathering should be fresh.
- If you get it wrong in an over-hyped piece, apologize promptly, frequently and prominently. Make sure that the correction is as conspicuous as the original broadcast.

It's ok to get a little swept away during the sweeps ratings period. In fact, viewers expect it. To avoid increased exposure from investigative reporting, prize promotions and other sensational programming, producers need to consult with their risk management team to ensure that they successfully "jump the shark" instead of having to retain one to defend a lawsuit.

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