

Broadcasting and the Law: 2017

**Alcohol and Tobacco
Over the Airways**

A Basic Sourcebook

2017 The New York State Broadcasters Association

The New York State Broadcasters Association is engaged in providing legal or other professional advice, and this sourcebook should not be read as providing legal or other professional advice. Statutes, regulations and court decisions can and do change regularly and without notice from time to time and their application to any specific factual situation may vary widely. The information provided in this sourcebook is not intended to be, nor should it be considered, a substitute for legal or professional advice rendered by a competent licensed attorney. If you have any questions regarding the applicability of any of the information provided in this sourcebook, consult a qualified attorney, or seek the advice of the regulatory agency that oversees the subject area of concern.

FOREWORD

The distribution of alcohol and tobacco products is extensively regulated to prevent their abuse and to protect minors who are not of legal purchase age. Broadcasters need to be aware of these restrictions before airing advertisements for alcohol and tobacco products. The purpose of this book is to provide answers to the questions that any broadcaster needs to consider before agreeing to air such advertisements.

If you still have questions about advertising alcohol and tobacco products, you may call the New York State Broadcasters Association in Albany at (518) 456-8888.

Alcohol and Tobacco Over the Airways

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PART I: Alcohol Over the Airway

What is the definition of "alcoholic beverage?"

Alcoholic beverages include beer, wine and distilled spirits or hard liquor (e.g., vodka, rum, whiskey).

What are the types of businesses engaged in the sale of alcoholic beverages?

The State Liquor Authority licenses both wholesalers and retailers. Wholesalers include businesses that manufacture and store alcoholic beverages, as well as distributors who sell to retailers. Retailers include businesses that sell alcoholic beverages for consumption off-premises (such as liquor stores, grocery stores, convenience stores) or on-premises (such as bars, restaurants, clubs).

May radio and television stations advertise hard liquor?

Yes, there is no legal prohibition on the advertisement of hard liquor on radio or television.

Are there restrictions on advertising alcoholic beverages on programs where some members of the audience are not of legal drinking age?

While there is no legal restriction on advertising alcoholic beverages on programs that may be seen or heard by persons not of legal drinking age, the Code of Responsible Practices for Beverage Alcohol Advertising and Marketing of the Distilled Spirits Council of the United States contains some useful guidelines. The Code provides that such advertising should not be aimed at persons below the legal purchase age, and that it should be placed only where at least 71.6 percent of the audience can be reasonably expected to be above the legal purchase age.

May advertisements on radio or television mention brand names of alcoholic beverages?

Yes, there are no legal prohibitions on the advertisement of brand names of hard liquor, beer or wine. Rules of the State Liquor Authority require that if an advertisement for hard liquor sets forth a brand name, it must afford the consumer adequate information as to the quality and identity of such product. An advertisement for a brand name of wine must, in addition to giving adequate information as to the quality and identity of such product, also identify the country of origin if such wine is imported.

May advertisements list the price of specific brands? May they indicate that a product is on sale?

Advertisements for liquor stores that list a price for a particular brand may not indicate the former price of the product or the amount by which the former price has been reduced from a former suggested retail price or list price. Advertisements for liquor stores may not represent a product as being "on sale" or "special" unless the price is lower than the lowest price charged by such liquor store at any time during the two preceding calendar months.

How specifically must advertisers identify the name of their business?

Licensees of the State Liquor Authority may only use the name on their licensed certificate.

May a wholesaler or manufacturer pay for radio or television advertising by bars or retail outlets?

Manufacturers and wholesalers in New York are generally prohibited from making gifts to retailers, and are specifically prohibited from paying for the advertising of retailers, whether they are bars, packaged goods stores, or grocery stores.

Regulations of the Bureau of Alcohol, Tobacco and Firearms prohibit manufacturers and wholesalers from paying for or crediting a retailer for advertising. Cooperative advertising by retailers and wholesalers/manufacturers is specifically prohibited. There is a prohibition on wholesaler/manufacturer advertising in retailer publications. This prohibition might be applicable as well to a program produced for or in cooperation with a retailer. For example, if a local wine bottler appears on a weekly wine tasting program, it is likely that wholesalers and manufacturers would be prohibited from purchasing advertising on that program. These gift or loan restrictions in federal and state law become particularly important when a retailer is advertising a particular brand of alcohol; such advertisements may make authorities question (and thus investigate) whether the manufacturer or wholesaler has paid for the advertisement, either directly or indirectly.

In an advertisement placed by a manufacturer or wholesaler, the advertisement may list the names of local retailers who sell the manufacturers' or wholesalers' products, if the advertisement does not contain the retail price of the product, and the listing is the only reference to the retailer in the advertisement and relatively inconspicuous in relation to the advertisement as a whole. Pictures of the retail establishment or "laudatory references" to a retailer are not allowed.

Wholesalers and manufacturers are prohibited from entering into "interlocking relationships" with retailers. This prohibition forbids not only manufacturer or wholesaler ownership of retail establishments, but also forbids relationships such as those that would result from cooperative advertising between retailers and wholesalers or manufacturers.

Who is considered a wholesaler or manufacturer?

New York State regulates the distribution of alcohol through a three-tier system of control. Manufacturers are at the top of the system, and are the entities that actually produce the alcoholic beverages (i.e., Coors, Seagram's, Gallo). Wholesalers are essentially the "middle men" in the three-tier system. Because of the way in which the system of regulation was developed, there are essentially two distinct types of wholesalers: those with a retail privilege (beverage retail centers), which sell directly to the public; and, "generic" wholesalers, with no retail privilege, who can sell only to the third level of the regulatory scheme, retailers (bars, restaurants, grocery stores, etc.)

Wholesalers who operate beverage retail centers (and thus sell to the general public) are the only wholesalers who may have any interest in advertising at all. Other wholesalers are generally the only suppliers of a particular product to a region, and thus, advertising does not make sense for them. While encouraging people to drink their products at particular establishments might increase their business, the prohibitions on interlocking relationships and gifts to retailers noted above would certainly prohibit such advertisements paid for by the wholesaler.

May advertisements on radio or television indicate the price of "mixed drinks?"

Yes. There is no State or federal regulation prohibiting an establishment that sells drinks for on-premises consumption from advertising the price of such drinks.

May a bar's advertisement indicate that drinks will be given away free?

No. Section 117-a of the Alcohol Beverage Control Law prohibits unlimited drink offerings. No licensee of the State Liquor Authority may "offer, sell, serve, or deliver to any person or persons an unlimited number of drinks during a set period of time."

Likewise, such person may not "advertise, promote or charge a price for drinks that in the judgment of the [State Liquor] Authority created an offering of alcoholic beverages in violation of the purposes of this section, or which in the judgment of the Authority is an attempt to circumvent the intent and purposes of this section, such as offerings of free drinks, or multiple drinks for free." The State Liquor Authority has determined that "2 for 1," half-price and happy hour specials where the price of a drink is not lower than one-half of the premise's normal retail price for the same drink does not constitute an attempt to circumvent the intent and purposes of Section 117-a.

May a bar run advertisements for "ladies nights" where women are given benefits (such as free drinks) not provided to men?

Such promotions are improper for two reasons. Firstly, offering unlimited free drinks to any person is a violation of Section 117-a of the Alcoholic Beverage Control Law, as explained in the preceding paragraph. Secondly, offering a benefit to only women would likely be found to be a discriminatory practice in violation of New York's Human Rights Law. A broadcaster who runs an advertisement for "ladies nights" may be guilty of aiding and abetting discrimination.

May a bar run a promotion that provides a benefit to certain patrons?

An example of such a promotion would be "Yankees Night" where patrons who wear a Yankees cap are entitled to a 2 for 1 special. As long as the opportunity to participate was available to all patrons, the promotion would not constitute discrimination in violation of the State Human Rights Law, and a broadcaster may advertise such an event. Of course, the promotion must comply with the prohibition on unlimited free drinks in Section 117-a of the Alcoholic Beverage Control Law.

What other requirements pertain to advertising alcoholic beverages?

The Federal Communications Commission, the Federal Trade Commission, and the Bureau of Alcohol, Tobacco and Firearms all have regulations that, while not necessarily targeted to alcohol ads, apply to advertising in general. State limitations on who may solicit sales of alcohol may also apply. In general, these regulations prohibit advertising for alcoholic beverages that is deceptive or misleading to the consumer. Federal regulations also prohibit any statement that is disparaging of a competitor's product.

The following are the advertising requirements of the various governmental agencies:

Federal Trade Commission

Advertising must be truthful (not false or misleading)

Federal Communications Commission

The person or organization that sponsors (or pays for) an advertisement must be stated, and the broadcaster must exercise reasonable diligence to determine who paid for an advertisement

Bureau of Alcohol, Tobacco and Firearms

Wine Advertisements must include:

- name & address of responsible advertiser*
- conspicuous statement of class or type of wine (as required on label)
- ads that refer only to wine products of one company or to wine in general need only have name & address of person responsible for broadcast

Beer Advertisements must include:

- name & address of responsible advertiser*
- class to which product belongs (as on label)
- an ad refers to general malt beverages or products of one company need only have name & address of person responsible for broadcast

Distilled Spirits Advertisements must include

- name & address of responsible advertiser*
- class to which product belongs (as on label)
- alcohol content (can also state as "proof")
- percentage of neutral spirits and name of commodity used
- if ad refers to general spirits or products of one company, need only have name & address of responsible advertiser

**City and State will suffice for the address*

New York State

Only persons licensed to sell alcohol may place advertisements of its availability for purchase.

May a broadcaster sell alcoholic beverages at a "remote" broadcast?

No. It is illegal to sell alcoholic beverages in New York without a license from the State Liquor Authority. Thus, a broadcaster that sells alcohol at a "remote" broadcast would be in violation of the law and subject to penalties.

May a broadcaster "give away" alcohol beverages at a remote broadcast?

As mentioned above, Section 117-a of the Alcohol Beverage Control Law provides that a licensee of the State liquor Authority may not "offer, sell, serve, or deliver to any person of persons an unlimited number of drinks during a set period of time." This restriction applies to a licensee's "agent, party organizer, or promoter." Whether or not the State Liquor Authority would consider a broadcaster a licensee's "agent, party organizer, or promoter," it is strongly recommended that a station avoid becoming involved in the "free" distribution of alcohol. If it appears to be essential to include alcohol in a station remote, working with a licensed retailer, and allowing the retailer to handle and control all alcohol related elements of the event, is the most prudent course of action for a licensed broadcaster to take.

What can happen to a broadcaster that accepts an alcohol advertisement when a patron who heard the advertisement subsequently injures another person in an alcohol related accident?

This question involves the part that the Dram Shop Law plays in reference to a broadcaster. New York's Dram Shop Law allows anyone who is injured by an intoxicated person a right of action against any person who unlawfully sold to or unlawfully assisted in the procurement of liquor for the intoxicated person. This right extends to any person who loses a means of support as a result of such injury. A lower court case in New York declined to extend liability under the Dram Shop Law to a radio station that co-sponsored an event involving alcohol where an accident involving an alcohol impaired driver occurred following the event. Because Dram Shop liability only exists where sales occur, and the radio station did not sell the alcohol at this event, the radio station was not found liable under the Dram Shop Law. The court noted specifically that the alcoholic beverages were dispensed only by tavern employees, and that the station had no say in whom should be served or how often.

This single decision should not be interpreted as suggesting that broadcasters will not be sued for their part in encouraging or promoting alcohol related activities. New and innovative theories of liability are constantly tested in court, and it is always possible that a radio or television station might have to defend itself in a lawsuit due to its part in advertising alcohol. One of the legal theories outside the Dram Shop laws that may be asserted against a broadcaster that promotes alcohol consumption is that of negligence, and other theories may be asserted in lawsuits as well.

Is it legal to have alcoholic beverages on the premises of a radio station? Does it matter whether the alcohol is in the office or the studio?

There do not appear to be any restrictions in FCC regulations regarding the possession of alcoholic beverages on stations premises. Keep in mind, however, that operators must be qualified and able to control the broadcast, and that having alcohol in the on-air studio may well give an appearance of lack of ability. Station parties held on the premises may involve alcohol absent prohibitions to the contrary from the FCC or state officials. The location of the alcohol does not appear to be addressed in regulations or statute, but common sense must be used when bringing alcohol onto the licensed premises and especially when consuming it on site. It is also important to note that the operators perform a vital function in the broadcast operation, as do engineers working on-site at the transmitter. If a problem with the broadcast, such as going off-air with FCC authorization, results from an employee having consumed alcohol on the premises, and there is evidence the station condones or allows such activity, the FCC could fine the station. License loss is also a possibility in such a situation.

Is a broadcast station liable if an employee injures someone following a remote station broadcast from a bar or retail alcohol establishment or following a station party?

There are two legal theories at play in this question an employer might be held liable for an employee caused accident following a station party. The first is whether there is any liability under the Dram Shop Laws. The second concerns whether the broadcaster as employer might be held liable for injuries caused by its employee.

First, the Dram Shop Laws are applicable only to sales of alcohol. So long as the station was not the liquor licensee who sold alcohol, liability should not attach even if the person causing the accident is a company employee. New York's courts have declined to impose liability on an employer under the Dram Shop Laws for injuries caused by an employee following an employer's party.

As to employer responsibility for the negligence of its employees, courts have held that traveling to and from work, and therefore to and from company parties, is not considered to be within the scope of the employee's duties. Accordingly, an employer will generally not be held liable for injuries caused by an employee while traveling to and from work.

What concerns are involved in running an alcohol related promotion on a college campus?

Many colleges and universities have specific regulations and limitations on the use, service and provision of alcohol on college campuses. These regulations may make it difficult or impossible to plan and implement an alcohol related promotion on a college campus. There may be practical difficulties in such a promotion, because a substantial portion of the student body on a college campus is generally not of legal drinking age. Some states restrict alcohol advertisements, while others restrict advertising and promotions on college campuses. New York does not have such restrictions in place on a statewide basis, but the individual campuses may have regulations in force which close the gap and preclude alcohol related promotions on campus.

May a broadcaster "sell" high school or college sporting events to alcohol advertisers?

Depending on the target audience, it may be acceptable to sell high school or college sporting events to alcohol advertisers. If the target audience is high school students, or even college students (who are generally under age 21), sales of alcohol ads during such events is not likely to be appropriate and will likely be scrutinized by the state and possibly the Federal Communications Commission, other governmental agencies and authorities. If the programs are targeted to draw from a general adult audience, which might have an interest in the sporting event, alcohol ads may be appropriate. Broadcasters should consider the 71.6% rule in the Code of the Distilled Spirits Council discussed above.

Is it illegal (or inappropriate) to run alcoholic beverage advertisements in children's or teenagers' programming?

It is clearly inappropriate, both from an advertising dollars standpoint and a moral perspective, to advertise alcohol during programming geared to children. As children cannot, by law, purchase alcohol, placing alcohol advertisements in children's programming is simply the wrong thing to do, and would certainly generate negative publicity in terms of the public and governmental regulators. Also, from the advertisers' standpoint it makes little sense to attempt to advertise a product to a group, which cannot by law even possess it.

While there does not appear to be a specific statutory prohibition on placing such ads in children's programming, alcohol advertising has been the subject of much recent debate between the FCC and FTC. Since the liquor industry lifted its self-imposed broadcasting ban in 1996, federal and state regulatory agencies are concerned with the impact of alcohol advertising on underage audiences. In response, media outlets have imposed various restrictions on radio and television advertisement content and access.

Who has jurisdiction over alcoholic beverage advertising?

Various regulatory agencies have jurisdiction over alcohol-related situations. At the federal level, the Bureau of Alcohol, Tobacco and Firearms, the Federal Trade Commission, and the Federal Communications Commission all have some authority to address alcohol-advertising issues. New

York, which derives its authority to become involved with alcohol from the 21st Amendment to the U.S. Constitution, regulates alcohol through the State Liquor Authority and through state statutes (found mostly in the Alcohol Beverage Control Law). Local Alcoholic Beverage Control Boards also exist in various areas throughout the state and may have different or stricter standards than state law or regulation for certain alcohol-related items (such as hours of legal operation of alcohol retail stores and bars).

What else should a broadcaster consider if it chooses to accept advertising for alcoholic beverages?

A broadcaster should avoid giving the impression that it supports irresponsible or illegal use of alcoholic beverages. It is essential that advertising for alcohol be targeted to persons of legal age to purchase such products (21 in New York). Advertising should in no way encourage drinking and driving, and a broadcaster that carries advertising for alcoholic beverages may want to consider running public service announcements about the consequences of driving while intoxicated or impaired.

Broadcasters should always exercise caution in accepting alcohol advertising. Advertisements that promote irresponsible drinking are subject to legal sanctions, and are likely to draw criticism and possible legal actions. Even if an advertisement was entirely legal, being drawn into a legal battle to prove its legality is something a broadcaster wants to avoid. One way a station can help discourage drinking and driving is to encourage the use of a designated driver, someone who abstains from the use of alcohol so as to be able to provide a safe and dependable ride home for his or her companion.

PART II: Tobacco Over the Airways

Which tobacco products may be advertised on radio and television?

Federal law prohibits broadcast advertising of cigarettes, little cigars and smokeless tobacco, such as chewing tobacco and snuff. The law absolutely bans the use of the terms cigarettes, little cigars and chewing tobacco in any broadcast ad. A station faces federal prosecution if it airs ads that use terms that indirectly refer to banned products, e.g., cartons, smokes, brands, pack, etc. It is permissible to advertise cigars, pipe tobacco and smoking accessories, such as lighters and rolling papers.

What about electronic cigarettes?

In 2016, the FDA finalized a rule extending their regulatory authority to cover all tobacco products including, “[v]aporizers, vape pens, hookah pens, electronic cigarettes, and e-pipes and all other types of Electronic Nicotine Delivery Systems (ENDS).” While the new advertising requirements apply primarily to manufacturers, there are several broadcasting implications.

So what do these new ENDS advertising regulations require?

While the new FDA regulations permit ENDS to be advertised on TV, radio, billboards, and other forums where traditional cigarette ads have been banned, the rules now require health warnings on the tobacco-related products and in the advertising for those products. For example, e-cigarette advertisement must include the phrase: “WARNING: This product contains nicotine. Nicotine is an addictive chemical.” The FDA requires that the advertising disclosures need to be included in all ads, no matter the medium. Specially included in the requirements were ads on TV, internet, and any other audio promotion.

May a broadcast station advertise smoke shops?

While there is no prohibition against advertising smoke shops, each individual commercial must be scrutinized for content that may be prohibited. The ad may not mention prohibited items: cigarettes, little cigars and smokeless tobacco products. Furthermore, an ad may not make an indirect reference to prohibited products. The following are examples of language that could provoke an investigation:

"Also available are hundreds of other brands, including domestic, foreign and cloves." A reasonable person could only imply the language refers to cigarettes.

"We have plenty of humidors, boxed cigars and cartons of other fine products." The term "cartons of other fine products" can only mean cigarettes.

"We carry cigars, lighters, pipe tobacco and other tobacco products." The term "other tobacco products" is inclusive of all tobacco items, including cigarettes. Such language would be deemed a violation, particularly if the major portion of the retailer's revenues was from cigarettes.

What if the name of a smoke shop includes a forbidden item?

The expressly prohibited terms cigarette, little cigar, chewing tobacco, etc., may not appear anywhere in the ad, whether in the text or the tag line. Thus, an ad may not include the name of a business such as "The Little Cigar Shop" or "Joe's Cigarette Salon." Names such as "Chuck's Tobacco Emporium" or "Edna's Smoke Shop" will probably pass muster. However, a name like

"Ricky's Home of Fine Tobacco Products" is probably not acceptable because of the all-inclusive reference to all tobacco products.

Is there a problem if the advertiser is a business with an acceptable name that actually sells only cigarettes, little cigars and smokeless tobacco?

That might cause a problem for a station that accepts advertising for such a business. The station should check to see if the advertiser sells a variety of products that may be advertised, such as cigars, pipe tobacco, lighters and smoking accessories. Otherwise, it could be concluded that the ad is meant to attract viewers or listeners into a shop whose business is mainly in cigarettes, little cigars and smokeless tobacco.

Who enforces these restrictions?

This area is policed by the United States Department of Justice rather than the FCC. Enforcement is undertaken on a case by case basis, and the Department of Justice does not publish formal rules or guideline to follow.

May a broadcaster offer tobacco products or coupons for free over-the-air or at events or remote broadcasts?

State laws that prevent tobacco products from coming into the hands of minors greatly restrict their distribution without charge. While the law allows tobacco companies to engage in certain giveaways at "adult facilities" (such as bars and private clubs), any broadcast station that gave away such products would likely be considered to be engaging in the prohibited promotion of a brand name tobacco product. In addition, coupons for tobacco products may not be distributed except as allowed by New York law. While the law allows for distribution of such coupons in smoke shops and by newspaper and magazine, it does not allow for personal distribution by radio or television stations.

May a radio or television station include tobacco coupons in a newsletter it distributes?

No. The requirements for legal coupon distribution include that the magazine or newspaper be sold, and not distributed free-of-charge.

What happens if a station broadcasts from an event at which a promotion for a tobacco product is also occurring?

A broadcaster cannot always predict what other advertisers may appear at a remote location or event. As noted above, tobacco companies may distribute brand-name tobacco products to adults under certain circumstances. If a name brand tobacco product is conducting a promotion at the same time and location as a station remote is taking place, the broadcaster must exercise extreme caution to avoid appearing connected to the tobacco promotion. The broadcaster must not mention the tobacco promotion or include any information in its broadcast about the ongoing event. Station personnel should, wherever possible, locate themselves physically apart from the tobacco promotion and not be seen handling the product.

Are station personnel prohibited from smoking during in-studio or remote broadcasts?

Yes, New York law prohibits smoking in indoor places of employment, and most indoor public areas, such as bars, restaurants indoor arenas and commercial establishments. Otherwise, it could be concluded that the ad is meant to attract viewers or listeners into a shop whose business is mainly in cigarettes, little cigars and smokeless tobacco.

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Are station personnel prohibited from smoking during in-studio or remote broadcasts?

Yes, New York law prohibits smoking in indoor places of employment, and most indoor public areas, such as bars, restaurants indoor arenas and commercial establishments. Smoking during a broadcast at an outdoor venue would not violate this law. While the restrictions on tobacco promotion do not apply to individual use of tobacco products, their use should not be generally announced or discussed in such a way as to appear to encourage smoking on the

part of listeners. This precaution is extremely important when minors may be listening or watching.

Do anti-smoking commercials and campaigns fall under the prohibition?

No. Actually, this type of practice is encouraged under Federal Communications Commission regulations. Restrictions on the use of tobacco terminology do not apply if the advertisement or promotion is designed to prevent or discourage smoking. Otherwise, it could be concluded that the ad is meant to attract viewers or listeners into a shop whose business is mainly in cigarettes, little cigars and smokeless tobacco.