

10-1-1987

Negotiating and Drafting Employment Contracts for Radio Programming Personnel

"Doc" Elliot Pollock

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

"Doc" Elliot Pollock, *Negotiating and Drafting Employment Contracts for Radio Programming Personnel*, 4 U. Miami Ent. & Sports L. Rev. 211 (1987)

Available at: <http://repository.law.miami.edu/umeslr/vol4/iss2/2>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

ENTERTAINMENT & SPORTS LAW JOURNAL

ARTICLE

NEGOTIATING AND DRAFTING EMPLOYMENT CONTRACTS FOR RADIO PROGRAMMING PERSONNEL

"DOC" ELLIOT POLLOCK*

| | |
|------------------------------------------------|-----|
| I. INTRODUCTION | 211 |
| II. PURPOSE OF THE CONTRACT | 215 |
| III. HOW TO DRAFT THE CONTRACT | 216 |
| A. <i>The Introduction</i> | 216 |
| B. <i>The Recitals</i> | 217 |
| C. <i>The Statement of Consideration</i> | 217 |
| D. <i>The Body</i> | 217 |
| E. <i>The Signatures</i> | 254 |
| F. <i>The Acknowledgement</i> | 254 |
| IV. CONCLUSION | 255 |

I. INTRODUCTION

There are nearly nine thousand commercial radio stations cur-

* J.D., The John Marshall Law School, 1987; A.B. Grinnell College, 1981. Member of the State Bar of Illinois and the Federal General Bar of the United States District Court for the Northern District of Illinois. Mr. Pollock specializes in radio law. He is the founder of Doc Elliot & Associates, a radio programming, production, and promotions consultancy and has served as Director of Legal Affairs of RadioPhiles, a radio trade association for which he is a contributing editor of the association's newsletter as well as President emeritus of The Entertainment Law Society of The John Marshall Law School. Mr. Pollock's fourteen years of broadcasting experience encompasses all aspects of radio. The author gratefully thanks Professor Constance F. Fisher of The John Marshall Law School for her support and guidance in the preparation of this article.

rently operating within the United States and its possessions.¹ This figure reflects a significant increase in the number of facilities from five years ago.² Ninety-nine percent of all United States households have at least one radio.³ The radio industry is expected to expand further during the next ten years. Although this expansion is sure to provide an increased job market for today's radio station announcer, the so-called "air personality"⁴ (AP), the number of commercial stations operating under a particular format⁵ in a desirable location to live, and in major radio markets, is limited.

Radio stations must operate as businesses. Intense competition among stations is the rule because commercial radio stations depend on successful ratings for advertising revenue.⁶ A station must cut its losses by rapidly terminating unproductive air personalities and other programming personnel.⁷ The management-by-numbers approach will intensify as more corporations enter the radio broadcasting field. Diversification demands increased profits to support unprofitable operations. Existing shareholders have to be

1. There are 4,718 commercial AM stations and 3,875 commercial FM stations licensed by the Federal Communications Commission operating in the United States and its possessions as of February 1986. RADIO ADVERTISING BUREAU, INC., RADIO FACTS 34 (1986).

2. There were 4,559 commercial AM stations and 3,155 commercial FM stations licensed by the Federal Communications Commission operating in the United States and its possessions as of January 2, 1981. Broadcasting Magazine, *Broadcasting Yearbook*, at A-7 (1981).

3. See RADIO FACTS, *supra* note 1, at 3.

4. An air personality is more than an announcer or disc jockey. The term air personality denotes a person who informs, educates, or entertains the listening public through his personality over the air. An air personality may perform some of the same functions that a disc jockey formerly performed, including the playing of recorded music over the air. See L. DUDEK, PROFESSIONAL BROADCAST ANNOUNCING 147 (1982).

5. A radio format defines the type of music or other programming presented on a particular station. For example, formats include News, Contemporary Hits, Black/Rhythm & Blues, Country, Adult Contemporary (appealing to older demographics than does Contemporary Hits), Album Oriented Rock, Nostalgia/Big Band, Rock Oldies. See R. HILLIARD, RADIO BROADCASTING 181-207 (1985); F. SMITH, PERSPECTIVES ON RADIO AND TELEVISION 174 (1985).

6. Radio "ratings" are audience estimates compiled primarily by the Arbitron and Birch companies through sophisticated sampling and survey techniques. These audience estimates allow potential advertisers to determine the size and composition of a particular station's listening audience for the survey period. From this information, potential advertisers decide on which stations to place their advertising. The higher the "ratings" are, the higher the listening audience. Hence, the higher the "ratings", the higher the rate which the station may charge for commercials. See generally F. SMITH, *supra* note 5, at 396-414; BILLBOARD PUBLICATIONS, THIS BUSINESS OF RADIO PROGRAMMING.

7. Other programming personnel include anyone whose primary job responsibilities affect the way the station sounds over the air. On a station where the programming is largely recorded music, these positions include Program Director, Music Director, Promotions Director, Assistant Program Director, and Research Director. See R. HILLIARD, *supra* note 5, at 143-47.

satisfied and growth must be stimulated by attracting new shareholders.

The job market is overcrowded with qualified air personalities and programming personnel due to an unrealistic perception of the nature of the business. Many people expect a high paying, high-visibility, glamorous career. Realistically, however, advertising revenues will support high salaries only in the larger markets. There is little glamour, status, or visibility on smaller market radio stations. Consequently, there is intense competition among air personalities and other programming personnel for positions on the higher rated profitable stations located in the larger markets. As a result, job security among air personalities and radio programming people is low. The likelihood that an air personality or other programming person will work under an employment contract varies as a function of market size and sophistication of the station ownership entity⁸ (OE). The larger the market and the more sophisticated the OE, the more likely the air personality or programming person will work under contract.

APs in smaller markets are often leery about hiring an attorney to draft or negotiate a contract for them for fear that it will be perceived as distrust of OE management. Another reason broadcasters fail to have an attorney draft or negotiate an employment contract is the misconception that the cost would be too high. The AP's fear of high legal fees in proportion to the salaries paid are usually justified because many general practice attorneys do not have specialized knowledge about the radio business. The general practice attorney must bill the radio employee for research, interviews, and other incidental costs. These costs tend to be more than the average AP can afford. An AP might also consult an entertainment attorney who specializes in drafting and negotiating employment contracts for broadcasters. Since most of these practitioners are only located in major markets, it is often financially impossible or generally impractical for the AP to retain these attorneys. Furthermore, an entertainment attorney who drafts and negotiates a radio employee's contract may be compensated by taking a fixed percentage of the contract. Consequently, the entertainment attor-

8. Radio stations are usually owned and operated by one of five types of business entities: sole proprietorships, general partnerships, limited partnerships, closely held corporations, and publicly held corporations. In most cases the entity will not seriously affect the process of drafting the employment contract. However, final approval, as evidenced by signatures in a partnership situation, which is necessary for the contract to be binding, must be from an authorized agent of the partnership or, in the corporate situation, must be from an authorized agent of the corporation.

ney is often reluctant to provide services for smaller market radio employees because the expenses could exceed the percentage paid for the services.

Most employment contract litigation concerns the enforceability of restrictive anti-competitive covenants following termination of the AP's employment.⁹ Generally, these covenants are enforceable if they are reasonable and supported by consideration.¹⁰ Whether a contract's terms are reasonable is determined on a case by case basis.¹¹ Most disputes concerning anti-competitive covenants are resolved in trial courts.¹² Consequently, there are very few reported appellate decisions which makes it difficult to predict whether a particular jurisdiction will enforce an anti-competitive covenant.¹³ The reported decisions are almost evenly split on the issues of enforcement,¹⁴ or the refusal to enforce¹⁵ the anti-compet-

9. See generally Annotation, *Enforceability of Covenant Not to Compete Involving Radio or Television Personality*, 36 A.L.R. 4th 1139 (1985).

10. *Id.* at 1140.

11. Promises not to compete are not necessarily invalid, but may be unreasonable when the restraint is greater than necessary to protect the legitimate interests of the promisee, or the promisee's need for protection is outweighed by the hardship to the promisor and the likely injury to the public. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1979).

12. See Annotation, *supra* note 9.

13. *Id.*

14. *T.M. Communications Inc. v. Herman & McBean*, 505 So. 2d 484 (Fla. 4th Dist. Ct. App. 1987) (temporary injunction granted to radio station where air personalities were formerly employed, enforcing anti-competitive clause in the air personalities' employment contract prohibiting the air personalities from becoming connected with any radio station within a sixty mile radius of the transmitter of the employer during the anti-competitive period); *Cullman Broadcasting Co., Inc. v. Bosley*, 373 So. 2d 830 (Ala. 1979) (radio announcer could not, as per contract, compete for one year within the county of the broadcasting company); *Murray v. Lowndes County Broadcasting Co.*, 248 Ga. 587, 284 S.E.2d 10 (1981) (employee agreed upon termination of employment not to engage in the business of announcer, disc jockey, advertisement seller, station manager, or direct any other radio station in the same county for two years); *Beckman v. Cox Broadcasting Corp.*, 250 Ga. 127, 296 S.E.2d 566 (1982) (television broadcaster would not cause his voice or image to be broadcast on the air after terminating employment for a period of 180 days within 35 miles of the broadcasting company's offices); *Clooney v. WCPO Television Div. of Scripps-Howard Broadcasting Co.*, 35 Ohio App.2d 124, 300 N.E.2d 256 (1973) (contract held reasonable where broadcaster could not perform competitive services for one year within 100 miles of employer's television station); *Skyland Broadcasting Corp. v. Hamby*, 2 Ohio Op. 2d 426, 141 N.E.2d 783 (1957) (contract restrictions held reasonable where radio announcer was not allowed to act as an announcer-disc jockey for any radio or television station operating a transmitter within 35 miles of the two broadcasting stations owned by employer within a period of eight months after termination of employment); *KWEL Inc. v. Prassel*, 527 S.W.2d 821, Tex. Civ. App. 1975) (no injunction granted in absence of damage suffered by radio station where broadcaster breached contract by engaging in announcing or sales activities in connection with any advertising media within a 75 mile radius of the company for 12 months following termination of employment).

15. *Storz Broadcasting Co. v. Courtney*, 178 So. 2d 40 (Fla. Dist. Ct. App. 1965), *cert. denied*, 88 So. 2d 315 (Fla. 1966) (employee could not compete for eighteen months in the

itive covenants contained in the employment contracts. The fact that several of these cases involve television performers¹⁶ and people who have concurrently appeared on radio and television¹⁷ further complicates the ability to predict the possible results of the courts in interpreting the anti-competitive covenants.

These difficulties along with a lack of scholarly information on drafting employment contracts for APs underscores the need for a practitioner's guide. This article will provide a brief overview of the purposes of a radio employee's employment contract. It will also present a sample contract and provide comments and illustrations regarding general organization and the drafting of specific sections and clauses. The main objective is to familiarize readers with topics that will enable them to act as effective advocates when drafting and negotiating an air personality or programming person's contract.

II. PURPOSE OF THE CONTRACT

Any radio employment contract that will be effective over one year must be in writing.¹⁸ The most important purpose of such a

event his employment with the company was terminated for any reason other than for discharge without cause); *Wake Broadcasters, Inc. v. Crawford*, 215 Ga. 862, 114 S.E.2d 26 (1960) (employee prohibited from engaging in radio or television work within 50 miles of any city in which the employer broadcasting corporation operated, or began to operate during the term of the contract, for a period of 18 months after the termination of the broadcaster's employment); *Orion Broadcasting, Inc. v. Forsythe*, 477 F. Supp. 198 (W.D. Ky. 1979) (employee could not appear or speak on competing broadcasting stations for a period of twelve months after the broadcaster was terminated or his contract expired—broadcasting company could terminate contract with 60 days notice, but broadcaster had no right to terminate with notice); *Richmond Brothers, Inc. v. Westinghouse Broadcasting Co., Inc.*, 357 Mass. 106, 256 N.E.2d 304 (1970) (broadcaster could not engage in radio, television, or advertising business anywhere in New England without the broadcasting company's written permission for a period of five years after the termination of employment); *Knowles Broadcasting Co. v. Oreto*, 3 Mass. App. Div. 707, 322 N.E.2d 791 (1975) (court did not specifically state the terms of the covenant, but stated that the various factors usually considered grounds for enforcing such a covenant were not present); *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965) (broadcaster could not be employed at any radio or television station and could not enter into an agreement to purchase or operate a station in any city in which the broadcasting company owned or operated a station for eighteen months after the termination of employment); *American Broadcasting Co. v. Wolf*, 52 N.Y.2d 394, 420 N.E.2d 363 (1981) (injunction issued preventing sportscaster from being employed at a competing station after he breached renewal negotiation clause, but did not violate express anti-competitive covenant contained in his contract).

16. *Beckman*, 250 Ga. at 127, 296 S.E.2d at 566; *Clooney*, 35 Ohio App.2d at 124, 300 N.E.2d at 256; *Courtney*, 178 So. 2d at 40; *Forsythe*, 477 F. Supp. at 198.

17. *Wolf*, 52 N.Y.2d at 394, 420 N.E.2d at 363; *Crawford*, 215 Ga. at 862, 114 S.E.2d at 26.

18. RESTATEMENT (SECOND) OF CONTRACTS §§ 112-23 (1979); ILL. REV. STAT. ch. 59 para. 1 (1983).

contract is to remind the AP and OE of the terms of their agreement. Since the contract is likely to be lengthy and referred to frequently, it should contain succinct headings to guide the reader to relevant provisions. Another purpose of the contract is to resolve minor disputes. A clearly drafted employment contract will enable either party to find a solution to a perceived problem. A third purpose of a clearly drafted document is to provide a written record of the relationship for the benefit of future parties who may later become interested in the agreement. Interested third parties might include subsequent managers, agents, attorneys, or station owners. The final purpose of the contract is to serve as evidence in any possible litigation.

III. HOW TO DRAFT THE CONTRACT

The typical employment contract for air personalities and programming people is divided into six major sections: the introduction; the recitals; the statement of consideration; the body; the signatures; and the acknowledgement.¹⁹ A sample of each section of the contract is set forth below along with commentary and an explanation of the importance and significance of each clause.

A. *The Introduction*

This contract is made on (Date) between (Air Personality/ Programming Person Name and abbreviation) and (Ownership entity name and abbreviation).

OE (include complete address) owns and operates (station call letters), an AM/FM radio station that broadcasts (format) music and is licensed by the Federal Communications Commission to serve (community of license) and which serves (characterization of market if appropriate).

The best way to identify the parties is by name. The air personality/programming person's name is abbreviated throughout the sample contract as "AP" and the ownership entity name is abbreviated as "OE." When drafting the contract it is important to indicate how the party will be identified throughout the document. Any abbreviations must be used consistently throughout the contract to avoid confusion. The first sentence also contains the contract's date of execution. This date may be different than the day the contract term begins to run.

19. See S. BRODY, J. RUTHERFORD, L. VIETZEN, & J. DERNBACH, *THE LEGAL DRAFTING HANDBOOK* 119 (1985) (under contract to Little, Brown & Co.).

B. *The Recitals*

OE wishes to employ AP as an Air Personality/Programming Person for a (duration) period (as described in section 2 below).

AP is a/an Air Personality/Programming Person who wishes to be employed by OE in this capacity for (duration).

The recitals are the preliminary statements which are frequently preceded by "whereas" in older documents. The recitals briefly state the purpose of the contract, the intent of the parties, and set forth facts that both parties assume to be true.²⁰ Legally the recitals are not part of the contract; therefore, terms mentioned in the recitals should be restated in the body of the contract.²¹ Frequently, however, a court will examine contract recitals to determine the intent of the parties.²² The recitals must be completely consistent with the contract's provisions. If they are inconsistent, the body of the contract controls,²³ even when the recitals are broader in scope.²⁴

C. *The Statement of Consideration*

Accordingly, OE and AP mutually agree:

Contracts must be supported by consideration to be enforceable.²⁵ In most states, mutual promises are sufficient²⁶ and it is misleading to represent that a fictional transaction occurred. However, it is important to check local law. A few states still require more formal statements of financial consideration if the contract is not under seal.²⁷

D. *The Body*

The body sets forth the legally enforceable terms of the contract. The terms should be organized in a meaningful sequence so

20. *Id.* at 120.

21. *Id.*

22. *Coca-Cola Bottling Co. of Minn. v. Coca-Cola Co.*, 164 F. Supp. 293 (Minn. 1957).

23. *Great Western Oil Co. v. Lewiston Oil & Refining Co.*, 91 Mont. 146, 6 P.2d 863 (1932).

24. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979).

25. *Powers Restaurants, Inc. v. Garrison*, 465 P.2d 761 (Okla. 1970); *Stonestreet v. Southern Oil Co.*, 226 N.C. 261, 37 S.E.2d 676 (1946).

26. RESTATEMENT (SECOND) OF CONTRACTS § 131 (1979).

27. *See, e.g., DEL. CODE ANN.*, tit. 10, § 8106 (1974); *ME. REV. STAT. ANN.* tit. 14, § 751 (1964).

readers can easily find applicable sections and clauses.²⁸

Section 1. *Place of Employment:* AP will work for OE according to the terms and conditions of this contract on (station(s)) only, except as noted in Sections 6.03, 6.04, and 8 below.

The place of employment clause ensures that the AP will work exclusively for the station or stations owned by the OE.²⁹ It is reinforced by an expansive in-term restrictive covenant (section 10.01) and modified to permit the AP to work for an outside employer in specified situations contained in Sections 6.03, 6.04, and 8.

Section 2. *Term of Employment:* AP will be an OE employee from (effective date) to (end date) subject to the provisions specified in Sections 3 through 5. AP will negotiate with OE for renewal of this contract within at least eight (8) weeks of (end date).

The term of employment clause fixes the duration of employment. Although most air personalities, programming people, and station owners would prefer that their contracts run for a year or longer, the termination procedures provided in Section 3, and the resulting facilities use and outplacement provisions in Sections 4 and 5 allow maximum flexibility should either party become dissatisfied and wish to end the employment relationship prior to the contract end date. The last sentence provides at least an eight week period to negotiate for renewal prior to the contract end date. However, section 16 permits both parties to modify the contract in writing at any time. This effectively allows re-negotiation at any time during the contract term.

Section 3. *Termination Prior To (end date):* This contract may be terminated prior to (end date) by OE with cause and by OE

28. S. BRODY, J. RUTHERFORD, L. VIETZEN, & J. DERNBACH, *supra* note 19, at 121.

29. The protection afforded an AP by the place of employment clause can be seen in the following example. A hypothetical AP is approached, interviewed, and hired by a group owner to do an airshift in a particular city (market one). The AP gathers all of his worldly goods, loads them into a trailer, and sets out for his new career in market one. Upon arriving a few days before the start of his new job, he is informed by OE that the vacancy he was supposed to fill never occurred because the prior AP did not leave. The OE offers another position within the group for an airshift in a smaller and far less prestigious market (market two) at the same salary. The AP is between a rock and a hard place. He cannot go back to the job he left for the position in market one. He may also have incurred expenses in market one in connection with the move such as apartment or utility deposit costs. The AP will have to bear the burden of these expenses without a contract clause to protect him. Finally, the AP may not want to take the position in market two because it would constitute a downward or lateral career move which will make it much more difficult to find a better position in the future.

or AP without cause. Cause is defined as including, but not limited to, the following grounds:

- (a) criminal activity on the part of AP directed toward OE or its employees;
- (b) AP's repeated insubordination;
- (c) AP's repeated intoxication affecting on-the-job performance;
- (d) AP's repeated incompetence;
- (e) incidents involving moral turpitude on the part of AP;
- (f) AP's failure to perform any of his/her major obligations under this contract.

The first sentence gives the station owner the ability to terminate the AP with or without cause if the procedural requirements are followed. It also permits the AP to terminate the employment relationship for any reason or no reason,³⁰ as long as the procedural requirements are followed. The second sentence defines "cause." The definition is based on the general idea that an employee may be terminated for acts or omissions that are counterproductive to the smooth functioning of the business enterprise. The various subparts of the definition are not meant to be exhaustive, but to reflect reasonably anticipated circumstances that require termination. Thus, APs are on notice that they could be terminated if they commit criminal acts toward the OE or its employees.³¹ Additionally, repeated insubordination,³² intoxication affecting on-the-job performance,³³ incidents reflecting repeated

30. The most common reason for terminating the contract is for a more lucrative position in another market. See generally C. HALL, *THE BUSINESS OF RADIO BROADCASTING* 52-62 (1977).

31. Typical examples of criminal activity directed against the ownership entity include theft of phonograph records, audio tapes and office supplies. Examples of criminal activity toward other employees include theft and assault and battery.

Non-typical examples of criminal activity include violations of provisions of the Communications Act of 1934 which relate to payola and plugola as well as violations of the Commission's Sponsorship Identification Rule (73.1212). The form contract deals with these violations in Section 10.09, *infra*.

32. "Repeated" is defined as something done, made, or said again and again. *AMERICAN COLLEGE DICTIONARY* (1969). Insubordination in this context may happen on or off the air. On-air insubordination occurs when a superior (such as the program director) specifically tells the employee not to engage in a particular course of conduct over the air yet he does so anyway. Typical examples are variances from the prescribed format or the employee's insistence on the use of off color innuendo or double entendre.

33. Sometimes an AP may broadcast while intoxicated without being noticed. However, an AP's on-the-job intoxication may be inappropriate, even if barely noticed because it may set a poor example for other employees and encourage a poor community image for station and OE alike.

incompetence,³⁴ and incidents involving moral turpitude,³⁵ or an inability to perform major obligations under the contract,³⁶ could all result in termination.

Section 3.01. *With Cause*: If OE wishes to terminate this contract with cause, it must notify AP in person of its intention to do so through one of its agents or by certified United States mail within five (5) working days after discovery of cause. Such notice must include the specific grounds upon which cause is based. Further, at AP's option, OE must provide AP with a hearing to refute the charges against him/her within five (5) working days after his/her receipt of notification of OE's intention to terminate this contract with cause. AP must notify OE, through one of its agents, in person or by certified United States mail of his/her request for a hearing within two (2) working days of his/her receipt of notification of OE's intention to terminate this contract with cause. This hearing is to take place at the station. Persons that must be present at this hearing include, but are not limited to, AP, AP's immediate supervisor, the head of the programming department (if different from AP's immediate supervisor), and the person in charge of the overall operations of (station). AP shall have the right to have legal counsel and/or other advocates present at this hearing. Any appeal made on behalf of AP will be governed by Section 15 of this contract.

The with-cause procedure clause protects the AP from arbitrary and unexpected attempts to be terminated with cause. The first two sentences set forth the specific notice requirements that the OE must follow to initiate the termination with cause procedure. Forcing the OE to deliver notice, in person or by certified mail, ensures that the AP actually knows that the OE wishes to terminate the contract with cause and informs the person of the

34. Examples include technical mistakes in the playing of audio tapes or records over the air, inability to effectively mix programming elements degrading the station's airsound, and/or inability to do the job for which the air personality/programming person was hired.

35. "Moral turpitude" is defined as the act of baseness, vileness, or the depravity in private or social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory *mala prohibita*. BLACK'S LAW DICTIONARY 522 (5th ed. 1983).

36. An example of an employee who is unable to perform major obligations of the contract includes an air personality who is incapacitated (is involuntarily unable to broadcast or perform other major duties making it reasonably impossible or impractical for the employment relationship to continue).

termination grounds. The five day notice requirement prevents the OE from terminating for a present violation when the OE chose to ignore a past violation. The provision also promotes efficient OE management because it forces prompt resolution of personnel problems.

The next five sentences list the hearing procedures where the AP can refute the cause allegations giving rise to the attempted termination with cause. The third sentence provides the right to a hearing within five working days of receipt of the notice which ensures that the hearing will be conducted in a timely manner. The fourth sentence states the form of notice that the AP must give the OE to receive the hearing. The fifth sentence states that the hearing will take place at the station. This provision precludes the OE from conducting the hearing at an impossible or impractical location for the employee.³⁷ The sixth sentence mandates that the AP, his immediate supervisor, the programming department director, and the chief operating officer be present at the hearing.³⁸ Requiring different management levels to attend the hearing discourages conspiracies among groups who might attempt unjust termination of the contract for unfounded or insufficient grounds. Furthermore, the people at the hearing can be potential witnesses should litigation arise. The seventh sentence gives the employee the right to retain legal counsel at the hearing. The last sentence refers the reader to section 15 which outlines the appeal process.

Section 3.02. *Without cause*: Either OE or AP may terminate this contract prior to (end date) without cause with notice to the other party, in person or by certified United States mail, equal to two (2) weeks for each month, or portion thereof, that OE has employed AP up to a maximum of eight (8) weeks total notice. However, OE may elect to pay AP an amount equal to his/her salary for the entire notice period in lieu of notice. If OE makes this election, it must pay the entire amount to AP immediately. If OE intends to change or seriously modify the format of (station), OE must give AP reasonable notice, in person through one of its agents or by certified United States mail, before the format change or modification. Upon this notice, AP may elect to terminate this contract by giving OE notice, in person or by certified United States mail, of his/her intention to do so and dis-

37. It may be impossible or impractical for the AP to attend the hearing if it were to occur at the ownership entity's corporate headquarters in a distant city.

38. The chief operating officer of a radio station is usually the General Manager, but he could hold a variety of corporate titles. F. SMITH, *supra* note 5, at 430; R. HILLIARD, *supra* note 5, at 62-64.

continuing employment after the last day (station) operates under the existing format. If AP makes this election, OE will pay his/her as severance pay an amount equal to two (2) weeks' salary for each month, or portion thereof, that OE has employed AP up to a maximum of eight (8) weeks' salary.

The without cause procedure clause allows the OE and AP to end the employment relationship prior to the end date of the contract so long as proper notice is given by the party wishing to terminate.

The first three sentences state the necessary procedures for termination without cause by either party when the station continues to operate under the same format after the termination takes effect. Two weeks notice for each month that the air personality has worked, up to a maximum of eight weeks' total notice, is reasonable, although a different interval could be negotiated. This time interval permits the OE to find a replacement and the AP to find another job. The payment in lieu of notice provisions in the third and fourth sentences enables the OE to replace personnel quickly. Quick replacement is necessary when the OE believes that the AP will alienate listeners. The employee has little incentive to excel because the impact on subsequent ratings has been diminished. Fully compensating the employee during the notice period and allowing him to leave without working during the period is also in the employee's best interest because steady income is received that can be used to pursue similar positions in distant markets during what would have been the notice period.

The remainder of the clause provides a solution for when the OE decides to change or seriously modify the station's existing format³⁹ to one at which the employee is unskilled. Training the AP to effectively perform within the new format could be expensive and impractical; therefore, the OE may elect to use the notice procedure or payment in lieu of notice procedure in the first part of the clause. The employee may dislike the new format and would be more comfortable working for a station that programs the prior format. Hence, an employee in this situation could terminate the contract after the last day of broadcasting under the existing format. The reasonable notice provision in the fourth sentence en-

39. Examples of serious modification of an existing format include demanding that the AP use a higher energy delivery, play more music and talk very little, play softer or harder music within the same general format to appeal to a larger demographic segment, read cards with station slogans without interjecting personality and increase or decrease the number of air personalities doing a particular airshift.

tures that format changes or major modifications do not surprise the employee. The employee has the alternative of quickly finding a job on a station programming the prior format or performing in a format under which he is unskilled and/or unmotivated. The last sentence ensures that the AP employee is given a reasonable amount of severance pay when he elects to terminate after station format changes.

Section 4. Use of Facilities After Termination Prior To End Date: If this contract is terminated prior to (end date) OE must reasonably make (station's) audio production facilities available to AP so that he/she may reasonably produce demonstration materials to facilitate his/her finding subsequent employment. OE may elect to have one of its agents supervise AP during his/her use of these facilities.

The use of facilities clause enables the departing AP to use the station's audio production facilities⁴⁰ to produce demonstration materials⁴¹ to help in finding a new position. The reasonableness standard protects both the OE and the AP. Reasonable use prevents the OE from making the facilities available during times when it is impractical or impossible for the AP to use them. The term also prevents the AP from overusing the facilities or demanding to use them during important station activities. The last sentence enables the OE to elect to have another employee supervise the AP whose contract has been terminated to prevent possible theft of station property or misuse of the facilities.⁴²

40. Production facilities generally include a separate studio from the current programming studio. The production studio usually contains microphones, a mixing console, turntables, tape recording machines, and audio processing equipment such as compressors and equalizers. *See generally* R. HILLIARD, *supra* note 5, at 127, 288-90; F. SMITH, *supra* note 5, at 139-45.

41. Demonstration materials generally include a short compilation of the air personality's best work, called an aircheck, as well as production samples. *See generally* L. DUDEK, *supra* note 4, at 369-73; R. HILLIARD, *supra* note 5, at 322; C. HALL, *supra* note 30, at 52-62.

42. A "use of the facilities clause" will typically benefit the OE. Take the example of a terminated AP who wishes to create a demo tape for use in his job search. He demands access to the production studio on Wednesday at 1:00 p.m. That is also the time by which the station requires its commercials for the upcoming weekend to be finished. Producing commercials to generate revenue for the station and OE is far more important than letting the AP produce his demo tape. In this situation, the clause protects the OE.

If the terminated AP requests the use of the facilities at 4:45 a.m. on the same day, the "more important use" issue does not exist, but a different set of problems arise. The OE will have to pay an employee to supervise the terminated AP's use of the facilities. Even in amicable situations, careless or negligent damage may take place. In hostile departures, the OE will be concerned about intentional damage or theft to the production equipment or station property. In the extreme case, the departing AP may act to damage the station's image by damaging or manipulating tape cartridges to broadcast offensive material. This

Section 5. *Outplacement*: If OE terminates this contract without cause prior to (end date), it will pay for AP's reasonable and appropriate outplacement services.

The outplacement⁴³ clause requires the OE to pay for reasonable and appropriate outplacement services. This payment will aid the departing AP in finding a new position if the OE terminates the contract without cause. Often this service is only included in contracts for programming and management personnel. However, from an advocacy and negotiation standpoint, it is sensible to extend this service to air personality employees as well.

Section 6. *Duties of Employee*: OE will employ AP as an Air Personality.

Section 6.01 Normal Airshift: AP will work a total of six (number) -hour airshifts on (station) per week. OE may not require AP to work more than (1) airshift per twenty-four (24) hour period. AP will work from approximately (start time) to (end time) Monday through Friday. The time and day for AP's sixth airshift will be determined under sec 6.02. During AP's airshift, he/she will perform all normal airshift activities. Normal airshift activities include:

1. broadcasting (vocal performance) under the prescribed format;
2. necessary technical activities to play recorded music, commercials, and other pre-recorded station announcements over the air under the prescribed format;
3. legal maintenance of the technical and program logs;
4. necessary interaction with other OE employees and non-OE personnel;
5. maintenance and/or operation of co-owned OE station, if necessary;
6. any other reasonable or customary activities deemed necessary by (station) or OE management personnel.

AP will have the exclusive right to define and control any audio equalization of his/her voice while he/she is engaging in normal airshift activities.

The first part of the duties section is the usual airshift clause which defines the number and duration of airshifts⁴⁴ that the AP will work on the station per week. The taxing nature of on-air work

clause allows both parties to arrange for the efficient and proper use of the facilities.

43. Outplacement services are those services necessary to assist the departing employee in obtaining future employment elsewhere.

44. An airshift refers to the hours the AP actually spends broadcasting each day.

is reflected in the provision that the OE cannot require the AP to work more than one airshift per twenty-four hour period. The clause also states the approximate start and end time of the AP weekday airshift. The inclusion of specific times prevents the OE from changing the airshift to a less desirable time or reassigning the AP to a lower rated airshift.⁴⁵ The clause refers the reader to section 6.02 to determine when the AP's sixth weekly airshift will take place. The clause states that the AP is responsible for all the normal enumerated and defined airshift activities.

The first activity is to broadcast under the prescribed format. Broadcasting encompasses the act of speaking into the microphone. The voice is carried to the audio console.⁴⁶ The console is connected to the audio processing and equalization equipment.⁴⁷ These are in turn hooked up to the radio transmitter.⁴⁸ The antenna system⁴⁹ sends the signal into the air as radio waves. The second activity is to perform necessary technical activities, to play recorded music,⁵⁰ commercials, and other pre-recorded station

45. A lower rated airshift is one that has fewer listeners and, thus, lower ratings. The lower the ratings for a particular airshift, the less prestige afforded the AP who must work it. The 1:00 a.m. to 5:00 a.m. airshift is not rated.

The normal airshift clause would prevent situations such as the following from arising: A newly hired afternoon drive AP arrives at the station ready to begin his broadcast. The program director informs him at this time that the AP's enormous talent convinced the OE that the AP should do the morning shift instead. Unfortunately, the AP is not a "morning person" and has trouble functioning in a coherent fashion when forced to get up at 4:45 a.m. As a consequence, he does not perform well in the morning slot and is eventually demoted or fired.

This scenario often has the OE insisting that the newly hired AP do a less prestigious or lower rated airshift for the same pay. This creates a very angry new employee. In other cases, the AP may have just finished a five hour shift and is home asleep. Three hours later, the program director calls and informs him that another AP is ill, no substitutes can be located, and that he must come in and do the other AP's show. The single shift per day clause would prevent this problem.

46. The audio console is a mixer which enables the AP to mix various inputs (such as tape players, turntables, and microphones) to be broadcast over the air. See generally R. HILLIARD, *supra* note 5, at 127-32.

47. Audio processing is the technical process of making a station's signal sound a particular way in hopes of attracting a greater number of listeners. This often involves installing and adjusting equipment that maximizes the signal's loudness by compressing the signal to one loud level by pulling soft passages up and loud passages down. Through the process of equalization, a station's signal can be made to sound more treble or bass. See generally R. HILLIARD, *supra* note 5, at 114-17.

48. See R. HILLIARD, *supra* note 5, at 113.

49. See F. SMITH, *supra* note 5, at 280.

50. Technical activities necessary to play recorded music over the air generally involve using the turntable to cue records to the point where the music starts so that when a button is pushed the music plays instantaneously. See R. HILLIARD, *supra* note 5, at 135-36. Another method of playing recorded music is when it has been pre-recorded onto standard broadcast cartridge. The AP using this method must insert the cartridge into a player and

announcements⁵¹ over the air under the prescribed format. These technical activities include pulling and cueing up records and/or compact discs;⁵² pulling, inserting, and firing standard broadcast cartridges;⁵³ adjusting the volume and mix of various audio elements;⁵⁴ and joining the network for items of other programming.⁵⁵ The third activity entails maintaining programming or technical logs required by the Federal Communications Commission and/or the OE.⁵⁶ Other activities include interacting with other OE employees⁵⁷ and non-OE personnel⁵⁸ such as account executives or consultants, maintaining a co-owned station⁵⁹ if one exists, as well as performing any other reasonable or customary activities deemed necessary by station or OE management personnel.

The last sentence of the clause gives the AP the right to define and control any audio equalization⁶⁰ of their voice while engaging in normal airshift activities. Equalization is often not individually controlled by the employee, but is pre-controlled by the engineer-

punch a button to initiate play. See R. HILLIARD, *supra* note 5, at 145-49. The increasing use of compact discs for on-air play means the AP may have to insert the disc into its player, cue it to the start of the selected track, and punch the necessary button to provide an instantaneous start.

51. Pre-recorded station announcements are usually promotional announcements recorded on standard broadcast cartridge as is music at some stations. See generally R. HILLIARD, *supra* note 5, at 145-49.

52. See *supra* note 48 and accompanying text.

53. *Id.*

54. See *supra* note 46 and accompanying text.

55. See R. HILLIARD, *supra* note 5, at 120.

56. *Id.* at 121-26.

57. Other employees of the ownership entity include managers (general manager, sales manager, program director, operations director, news director, public service-community affairs director, chief engineer, traffic and continuity director, and office manager) as well as other programming department employees (music director, research director, promotions director, production director, and assistant program director) and support personnel for each department of the station (account executives, secretaries, bookkeepers, interns, engineers and maintenance workers). See generally R. HILLIARD, *supra* note 5, at 60-68; F. SMITH, *supra* note 6, at 429-33.

58. Record company promotion personnel promote their product to the stations at a local level and often visit the station once a week for this purpose. See C. HALL, *supra* note 29, at 122-26. Radio programming consultants listen to the station and the competition and recommend changes in the format so ratings success will be maximized through increased listenership. See F. SMITH, *supra* note 6, at 127.

59. Maintenance of a co-owned station may involve any or all of the same duties that the AP is responsible for doing on the primary station. A co-owned station will often be automated and the AP's responsibility is to keep the automation system running smoothly. See generally R. HILLIARD, *supra* note 5, at 169-74.

60. Some newer audio consoles allow the air personality to insert a specially encoded card that gives the microphone the proper equalization to give his/her voice a specific tonal quality.

ing department⁶¹ under the direction of the programming department. Therefore, this sentence may be rendered inapplicable.

Section 6.02. *Sixth Airshift*: AP will inform OE of his/her preference of time and day for his/her sixth airshift, in person or by phone, by no later than Thursday at 12:00 P.M. each week. AP will have priority over other air personalities in choice of the time and day of his/her sixth airshift. AP will be allowed to choose only standard dayparts (as are defined in the ratings) or those dayparts currently used for weekend programming on (station). AP may elect to delegate the responsibility of his/her sixth airshift to another Air Personality and may make private arrangements with this Air Personality for his/her compensation. If AP makes this election, he/she must notify OE, in person or by phone, at least twenty-four (24) hours prior to the scheduled sixth airshift. OE will have the reasonable right of approval for any such substitutions for AP's sixth airshift.

The sixth airshift clause states the procedure that the air personality/programming person must follow to select his sixth airshift per week. The sixth airshift will be a weekend airshift.

The first sentence is a notice provision to facilitate scheduling of weekend air personalities. If programming management knows by noon on Thursday which weekend airshift the AP radio employee wishes to work, then a definitive schedule of full-time and part-time air personalities can be set up in time to inform all interested parties in advance. The second sentence allows the AP to have first choice of weekend airshifts among fellow air personalities and programming people. The third sentence restricts the AP's choice to standard dayparts⁶² or to those currently in use on the

61. Equalization is often a part of the station's complete audio processing chain and must be controlled by a qualified engineer under the direction of the programming department. Many stations have their equalization and audio processing equipment locked in the engineering department space of the station or at the transmitter site which is often at a different location than the station studios. See generally R. HILLIARD, *supra* note 5, at 115-17.

The equalization clause is designed to prevent a program director from hiring an AP and then equalizing his voice. The AP may feel that this process distorts his voice so that it no longer represents what he actually sounds like. Such actions could hamper future career moves for the AP. In some cases, the AP will not know that the OE plans to use equalization until his first day on the job.

62. "Daypart" means part of the day. RADIO & RECORDS RATINGS REPORT AND DIRECTORY 188 (Fall 1987). "Standard dayparts" refers to those dayparts that conform to rated dayparts. Standard dayparts are 6-10 a.m. (morning drive), 10 a.m. to 3 p.m. (midday), 3 p.m. to 7 p.m. (afternoon drive), 7 p.m. to 12 midnight (night) and 12 midnight to 6 a.m. (overnight). Usually a station will give each air personality an airshift that encompasses one of the standard dayparts so ratings success can be easily determined. *Id.*

station during weekends. The last three sentences of the clause permit the AP to individually sub-contract with APs from other stations to do the sixth airshift. The AP pays the surrogate out of his/her own pocket for the time the replacement works. The clause provides moderately liberal mandatory notice provisions to prevent any possible schedule conflicts and to allow management an opportunity to revise the schedule. The last sentence gives the OE reasonable right of approval of the substitute AP who will do the sixth airshift. This provision exists to provide for the possibility of management's disapproval. A replacement may include an air personality accustomed to doing non-rated⁶³ or less important airshifts than the sub-contractor is prepared to do. This is especially true if the sub-contractor works in a highly rated airshift. In this case, programming management might flatly refuse the sub-contract proposal or revise the schedule by putting a more qualified air personality in the sub-contractor's chosen airshift and placing the less qualified sub-contractee in a less important or lower rated airshift.

Section 6.03. *Production*: Production is defined as:

1. conceiving, writing, and/or modifying commercial promotional or public service oriented copy; and/or
2. voicing copy regardless of its source; and/or
3. using audio processes, music, and effects to maximize copy potential; and/or
4. recording and editing work product to form a finished product suitable for airplay; and/or
5. recording finished product and preparing it for airplay.

In addition to his/her six weekly airshifts, AP will be required to spend no more than fifteen (15) hours per week doing inside production (production for (station)). Should additional production become necessary, AP may elect to exceed this maximum. If AP makes this election, OE will compensate him/her at an hourly rate of 1/15 of weekly salary for each additional hour beyond the maximum spent doing production. AP may use (station) audio production facilities for outside production (production unconnected with (station)) as long as such use is reasonable and does not conflict with any production being done by any employee for (station). If OE assigns AP outside production (production that will be used on any station(s) other than (station)), OE will pay AP a talent fee in addition to AP's salary. This talent fee must equal at least 1/15 of AP's weekly sal-

63. None of the major ratings companies issue specific ratings/audience estimates for 12 midnight to 6 a.m. An airshift during this time period is known as a non-rated airshift.

ary per hour that he/she works doing the outside production.

The clause begins by defining production.⁶⁴ This definition encompasses both common and uncommon situations. The first subpart includes various forms of copywriting⁶⁵ as production. Next, copy reading that the AP might do, regardless of whether he has written the copy, is addressed.⁶⁶ The third subpart includes embellishments that the AP can add to the copy in the studio to make the copy more appealing to the listener and more effective from an advertising standpoint.⁶⁷ The fourth subpart includes editing,⁶⁸ dubbing,⁶⁹ and recording⁷⁰ any previously produced material to form a finished piece that can be played over the air. The last subpart includes any re-recording⁷¹ necessary to make the finished production piece suitable for airplay and any other preparation that is necessary before it is played over the air.⁷²

The second part states the number of required weekly hours of inside production.⁷³ The clause gives the AP the option to do extra production work and outlines the compensation package. This compensation package is based on a sliding scale rather than a fixed amount. Therefore, maximum flexibility is achieved if the AP's salary increases during the contract term. The third part of the clause permits the AP to use the station's audio production facilities to do outside production.⁷⁴ However, the AP's use must

64. See generally R. HILLIARD, *supra* note 5, at 217-96, 317-18; F. SMITH, *supra* note 5, at 222-40; C. HALL, *supra* note 30, at 218-316.

65. See R. HILLIARD, *supra* note 5, at 217-47.

66. *Id.* at 247-96, 317-18; C. HALL, *supra* note 30, at 218-316.

67. Common embellishments include sound effects and music. See R. HILLIARD, *supra* note 5, at 294.

68. Editing audio tape is an integral part of production. See R. HILLIARD, *supra* note 5, at 166-68; F. SMITH, *supra* note 5, at 140.

69. "Dubbing" refers to duplicating any material already recorded on tape onto another tape or the act of transferring recorded music from disc to tape. See F. SMITH, *supra* note 5, at 140.

70. "Recording" is transferring audio material to tape for later use. See R. HILLIARD, *supra* note 5, at 139-50; F. SMITH, *supra* note 5, at 140-45.

71. Re-recording is most likely to occur when a production piece is first recorded on reel tape or cassette and then dubbed onto standard broadcast cartridge for airplay. Other common re-recording applications are the use of material on cartridges in compiling a complex production piece on reel or cassette for later broadcast and the dubbing of a client's commercials from whatever source to tapes for personal use or for use on other stations. See F. SMITH, *supra* note 5, at 140.

72. Other preparation might include writing or typing a label for the tape or cartridge and placing it in the rack, or impressing sub-audible tones on the tape or cartridge necessary to trigger automation equipment. See R. HILLIARD, *supra* note 5, at 149.

73. Inside production is production the station assigns to the AP that will be used exclusively on that station or a co-owned station in the same market.

74. Outside production is production that will eventually be used on other radio sta-

be reasonable and cannot be abused by prohibiting other APs from doing their required inside production. This is consistent with the outside employment provisions found in Section 8, *infra*. The last part of the clause permits the OE to assign outside production to the AP as long as he/she is paid a talent fee in addition to his regular salary. The last sentence sets the amount of the talent fee using the sliding scale approach noted above.

Section 6.04. *Promotional Activities*: Promotional activities of (station) that involve AP include, but are not limited to:

1. broadcasts from a remote location
 - a. for (station) to promote itself
 - b. for charity or civic organizations
 - c. for sponsors and/or advertisers;
2. personal appearances
 - a. for (station) to promote itself
 - b. for charitable or civic organizations
 - c. for sponsors and/or advertisers.

AP will have the first right of refusal (over other air personalities) with respect to appearing or broadcasting in connection with (station) promotional activities. OE will compensate AP for appearing and/or broadcasting in connection with promotional activities by paying AP a promotions fee in addition to AP's weekly salary. This promotions fee must equal at least 1/10 of AP's weekly salary per hour spent in connection with (station) promotional activities. Travel time to and from (station) promotional activities will be excluded from the calculation of the promotions fee.

The first portion of the clause defines promotional activities that involve the AP. The first class of these activities is broadcasts from a remote location.⁷⁵ Next are personal appearances that are made by the AP.⁷⁶ Remote broadcasts and personal appearances allow the station: 1) to promote itself to gain additional listeners

tions. One type of outside production is done on a free-lance basis for advertisers and other radio stations. The AP is compensated for the services directly by the advertiser or other station. Another type is assigned by the employer station. This outside production may be for a co-owned station in another market or for an advertiser as in the first type of outside production. However, when the station assigns outside production to the AP the station must compensate him for the time and effort.

75. Any broadcast that originates outside the studios is termed a "remote." R. HILLIARD, *supra* note 5, at 168-69; cf. F. SMITH, *supra* note 5, at 195-96.

76. A "personal appearance" is when the AP travels to some location in the market to promote the station. Often the location of the personal appearance by a particular air personality is continually broadcast by other employees to get large audience participation. Where the personal appearance is done in conjunction with an advertiser, the personal appearance is usually noted in that advertiser's commercials.

and higher ratings; 2) to benefit charitable or civic organizations through increased listener involvement; and 3) to generate new business for sponsors and advertisers.

The second part of the promotional activities clause gives the AP the right of first refusal over co-workers with respect to appearing or broadcasting in connection with promotional activities. The clause gives the employee a chance to refuse promotional activities that are scheduled at inconvenient times.⁷⁷ This sentence also allows the air personality to appear or broadcast in as many promotional activities as are available. This provides the employee with additional income as mandated in the last part of the clause.

The last three sentences of the clause contain the required method of calculation of the AP's compensation for participation in promotional activities. The first sentence states that the AP must be paid a promotions fee in addition to the weekly salary for participation in promotional activities. The second sentence states the formula used to calculate the promotions fee. A sliding scale approach is again used to take salary increases during the contract term into consideration. Travel time to and from the site of the promotional activity is excluded from the calculation of the promotions fee.

Section 6.05. Dress Code: AP may dress in any manner he/she wishes during or incident to his/her airshift and during or incident to the time he/she is doing audio production on (station) premises so long as the clothing worn does not contain obscene or derogatory language. AP will wear clothing that is reasonable and appropriate for dealing with the general public during any promotional activity.

The dress code clause is drafted to ensure the AP's comfort during the airshift or production. "Incident" includes the time immediately before or after the airshift or actual production work. The prohibition against obscene or derogatory language on clothing is to promote professionalism. It also prevents other OE employees from being offended and preserves a positive public image among visitors to the station. The requirement that the employee wear appropriate and reasonable clothing at promotional activities presents the AP and the station in the most favorable light to the

77. "Inconvenient times" may be during the radio employee's day off or during a weekend that he wishes to take completely off. Depending upon the amount of time needed to prepare for the airshift, it may be inconvenient to make a personal appearance immediately preceding the airshift. Because on-air work is mentally draining, it is sometimes inconvenient for the air personality to make personal appearances at the end of the shift.

public.

Section 6.06. *Programming Duties*: AP will serve as Program Director of (station) and will be responsible to the chief operating officer of (station). AP may temporarily assign any or all of his programming duties, as defined under this section, to subordinate programming department personnel.

(A) AP will play an integral part in the hiring and recruitment of programming personnel for (station) including, but not limited to:

1. soliciting resumes, demonstration tapes, and related materials from candidates for employment;
2. listening to, reading, and evaluating these materials;
3. submitting hiring recommendations to OE.

AP will have the exclusive right to approve all air personalities and/or other programming department personnel prior to their employment by (station). AP will have the exclusive right to recommend discharge for air personalities and/or other programming department personnel as provided in section 3. AP will have the exclusive right to appoint and/or remove from such appointment subordinate programming department personnel including, but not limited to:

1. Production Director (assigns production to other air personalities and (station) personnel, instructs these assignees on production technique and/or use of production equipment);
2. Music Director (arranges for record service from and maintains liaison with recording company promotions personnel and/or distributors, conducts appropriate research to determine weekly playlist and/or music survey, catalogs and inventories incoming records, evaluates incoming records and makes recommendations to the program director regarding possible addition of these records to the weekly playlist and/or survey, maintains record and/or music tape library, reports weekly playlist activity to trade publications, dubs records added to weekly playlist and/or other records to tape for airplay if necessary);
3. Promotions Director (conceives promotions and promotional activities and submits ideas for program director's approval; once approved, plans, and implements all promotions and promotional activities);
4. Assistant Program Director (assists program director with special projects, acts as program director if program director is unable to do so);
5. Research Director (conducts necessary audience research in all areas except for music research, maintains

liaison with ratings companies, interprets ratings and reports findings to program director and/or other department heads).

(B) AP will supervise day to day operations of the programming department. AP will have the right to critique all air personalities and other programming department personnel performance, at periodic intervals, at his/her discretion to maintain and control the airsound of (station).

(C) AP will have the final right to approve the content of all music and the manner in which it is presented prior to airplay on (station). AP will have the exclusive right to conceive and implement music rotations (the specific order in which records or categories of records are played to be played) on (station).

(D) AP will have the right to determine and set a maximum number of commercial minutes and/or units per hour on (station) within financial guidelines developed by the sales department of (station) and/or OE.

(E) AP will have the exclusive right to approve all commercial matter, promotions, or special air personality segments/features (those features/segments done by an air personality during his/her airshift that are exclusive to that personality or airshift).

(F) AP will conduct regular periodic meetings and conferences with programming department personnel, air personalities, other (station) department heads, the (station) chief operating officer, and/or (station)'s radio programming consultant to maintain quality and/or continuity of airsound and to improve interdepartmental relations.

(G) AP will have the exclusive right to define and control the type and extent of audio processing on (station)'s signal using existing audio processing equipment. Decisions regarding purchase and installation of new audio processing equipment will be made jointly among the program director, engineering department, and OE management. (Station)'s engineering personnel will implement AP's audio processing decisions.

(H) Promotions conceived and documented by AP during the term of this contract, regardless of whether implemented, will not be deemed works for hire and AP will be free to obtain a personal copyright for them.

(I) AP will compile, write, and submit a programming department budget to the chief operating officer of (station) within one (1) month after (effective date) and once each year on or before January 15 of the year in which the budget is to be followed, for the duration of the term of this contract. The chief operating officer of (station) will have the exclusive reasonable right of approval of any initial programming budget and any modifications that become necessary during the budget term. If any initial

budget is not approved, AP will work with the chief operating officer to arrive at an acceptable budget within a reasonable time. Once the programming budget is approved, it will be implemented as soon as is reasonably possible. AP will operate reasonably within the approved budget.

The programming duties clause is applicable where the AP will also be the program director.⁷⁸ The introduction states the terms of the employment relationship and that the program director is directly responsible to the chief operating officer of the station.⁷⁹ The introduction also allows the program director to temporarily assign any or all of his programming duties to subordinate programming department personnel.⁸⁰ Subsection A addresses the program director's involvement in personnel concerns. It contains three major subparts. The first subpart sets forth the program director's hiring and recruitment duties, including solicitation and evaluation of resumes, demonstration tapes,⁸¹ and related materials⁸² from candidates for employment. It further provides that once the evaluation process is completed, the program director must submit his hiring recommendations to the OE which may then begin the formal employment negotiation process.

The second subpart gives the program director the exclusive right to approve all APs prior to their employment at the station and the exclusive right to recommend their discharge. The program director must maintain strict quality control over the air personality and programming people because their performance may ultimately determine whether the station enjoys success in the ratings. Furthermore, the program director's immediate bonuses, contract renewal, and subsequent salary will all depend on her results

78. A program director will often be required to or decide to function in an air personality capacity by doing an airshift along with his other programming management duties. If the employee is first hired as an air personality or programming person and is promoted to program director during the term of the contract, this status must be added to the internal advancement clause of the document. This section can also be used as a "later negotiated modification" treated under section 15 if the AP is promoted to program director after the original contract has been executed.

79. A program director is usually responsible to the general manager or operations director of the station. See R. HILLIARD, *supra* note 5, at 430-32.

80. Assigning programming responsibilities to subordinate programming employees is helpful when the program director is pressed for time because he must attend to a special time-consuming project, when he/she must attend conventions and/or symposia in distant markets, and/or when he/she is taking vacation or sick/personal days under the contract.

81. See *supra* note 41.

82. Related materials include resumes, cover letters, copywriting samples, ratings summaries and anything else to aid the program director in the recruitment process that is not on the demonstration tape. See generally L. DUDEK, *supra* note 4, at 365-73.

as reflected in the ratings.

The third subpart gives the program director the right to appoint and remove subordinate programming personnel from various positions within the programming department. The subpart defines common positions that delineate the general responsibilities of each position. These positions include production director,⁸³ music director,⁸⁴ promotions director,⁸⁵ assistant program director,⁸⁶ and research director.⁸⁷

Subsection B addresses the program director's involvement with the day-to-day operations of the station. The first sentence gives the program director the right to supervise the day-to-day operations of the programming department.⁸⁸ The second sentence permits the program director to randomly critique⁸⁹ the air personalities and programming people working under him. The critique allows him to control, maintain, and improve the station performance. This process ensures continued success for the air personalities and programming people, the program director, and the station itself.

Subsection C involves the program director's relationship to station music decisions. The first sentence gives the program direc-

83. See generally R. HILLIARD, *supra* note 5, at 114-46.

84. F. SMITH, *supra* note 5, at 431.

85. R. HILLIARD, *supra* note 5, at 65; cf. F. SMITH, *supra* note 5, at 195-96.

86. The assistant program director is usually responsible for any or all of the subordinate programming management functions and is second in command to the program director.

87. The research director usually does audience research through interpretation of the ratings. The music director is generally responsible for music research. See generally C. HALL, *supra* note 30, at 91-110.

88. Day-to-day operations often involve making routine programming decisions regarding the content of the specific programs broadcast within a given format. See *Jurado v. Eleven Fifth Corp.*, 630 F. Supp. 569 (C.D. Cal. 1985), where a terminated disc-jockey sued a radio station for alleged violations of his civil rights based on race and national origin discrimination. The court held that the acts complained of were constitutionally protected programming decisions and that the disc-jockey failed to show any improper motivation on the part of the station. See also R. HILLIARD, *supra* note 5, at 64-66; F. SMITH, *supra* note 5, at 431; C. HALL, *supra* note 30, at 91-110.

89. Critiquing the air personality's on-air performance is often accomplished by use of a "skimmer" tape. A skimmer tape is produced by a cassette recorder that records the station's broadcast and is activated every time the microphone is turned on and deactivated when the microphone is turned off. This allows the air personality's entire airshift to be recorded on one side of a cassette. The air personality's cassette is later critiqued by the program director. Some program directors collect skimmer tapes from every airshift. Others choose one airshift skimmer tape to critique at random. Another critiquing technique is for the program director to listen to an air personality while on the air. The director then jots down suggestions and comments for a later critique. A program director will sometimes telephone the air personality to offer comments and suggestions during the airshift. This, however, may be distracting to the AP and negatively affect the on-air performance.

tor the right to approve the content of all music⁹⁰ and the manner in which it is presented.⁹¹ This is another mechanism designed to allow the program director better control over the station's sound. The second sentence defines the program director's responsibility for conceiving, implementing or revising the music rotation⁹² used on the station. Having a music rotation that attracts and maintains listeners is important to the success of any station that has a specific music format.

Subsection D mandates that the program director will have the right to determine the maximum number of commercial minutes played during any given hour that the station is on the air. This right is given to the program director to ensure that the station attracts and maintains the most listeners possible during any given hour of operation. However, since the primary goal of any radio station is to profit the OE, the program director's power in this respect cannot go unchecked. Because station revenue and profit depends on the number of commercial minutes sold to advertisers per hour, this subpart makes clear that the station's sales department, operating under the authority of OE management, has the final say in determining how many minutes per hour will be devoted to commercials.⁹³

Subsection E gives the program director the exclusive right to approve all commercial matter, promotions, or special air personality segments/features prior to being aired.⁹⁴ Commercials, promo-

90. The music director usually does the weekly music research and submits titles of records to the program director that should be added to the station's playlist. Since the program director is responsible for the airsound, the right to veto the music director's suggestions must be maintained.

91. Several versions of a particular song are often available for radio station airplay. Some of these include the seven-inch single, the album version, the disco or twelve-inch version, and special live versions. Even though the music director may suggest that any combination be played in various dayparts, the program director has the final decision which versions are played in which dayparts.

92. A music rotation is a formula that determines the order in which records are played within a given hour. The hourly rotation is often expressed as a clock of the particular hour showing the various records and other elements corresponding to the sections of a clock. F. SMITH, *supra* note 5, at 174-175; C. HALL, *supra* note 30, at 126-130.

93. Since the success any radio station is determined by revenue and profits, the sales department must determine how many commercial minutes of each hour are necessary for the station to remain profitable and communicate these goals and needs to the program director who must structure the format around these financial constraints. See R. HILLIARD, *supra* note 5, at 79; cf. F. SMITH, *supra* note 5, at 244.

94. Special air personality segments or features, generally known as "bits," are deviations from the regular format of the station designed to attract and maintain the listening audience. Examples of bits include on-the-air phone calls to individuals such as music performers, on-the-air phone conversations with listeners (where telephone talk is not the format), fake, and hopefully funny, commercials and extended comedic sketches commonly

tions, and air personality segments/features conceived or produced by other programming or sales department employees may be inappropriate, distasteful, or offensive to the target listener.⁹⁵ The program director's responsibility for the drop in ratings that might occur if programs with these characteristics are broadcast renders it appropriate to give him final approval.

Subsection F provides that the program director conduct periodic meetings with programming department personnel, other station department heads,⁹⁶ the station's chief operating officer, and the station's radio programming consultant.⁹⁷ This maintains the quality and the continuity of the airsound, and promotes interdepartmental cooperation. These goals and objectives facilitate a better and more productive interaction between the programming department, the rest of the station, and the OE.

Subsection G gives the program director the exclusive right to define and control the type and extent of audio processing⁹⁸ on the station's signal using the station's audio processing equipment. Audio processing is directly linked to maintaining and attracting listeners. Therefore, it is appropriate to allow the program director to make audio processing decisions. To ensure that the program director will not demand that the station purchase new audio processing equipment that is too expensive, unnecessary, poorly designed, or obsolete, the decision to purchase new audio processing equipment must be made jointly with the station's engineering department and OE management. The last sentence provides that station engineering personnel will implement the program director's audio processing decisions. This is important because modification of audio processing is often a technical process. Hence, it is often impossible or impractical to expect the program director to do it.

Subsection H is an unconventional provision that takes promotions conceived by the program director throughout the contract term, whether or not they are ever used by the station, out of

heard in the morning drive daypart.

95. Examples of tasteless or inappropriate material depend on the market and format of the station, and may include commercials for funeral homes on a station appealing to teens and young adults, promotions involving wet T-shirt contests and bits involving explicit sexual language that is not per se profane or indecent. The program director needs to screen material prior to airplay to avoid negative impact on listenership and ratings as well as to prevent any defamatory matter from being broadcast.

96. Department heads commonly include sales manager, chief engineer, office manager/administrative manager, and news director. F. SMITH, *supra* note 5, at 430.

97. See F. SMITH, *supra* note 5, at 177.

98. See *supra* note 47.

the realm of works for hire under the Copyright Act.⁹⁹ This enables the program director to obtain a personal copyright on promotions that he creates. This may become important if the program director wants to use the promotion on a different station, sell the copyrighted promotion to another station or OE, or prevent further use of the promotion by the OE.

Subsection I contains general budget provisions. The program director must submit an initial budget to the chief operating officer of the station within one month after the effective date of the contract and then once per year during his term. The chief operating officer has the exclusive right of approval of any initial budget submitted. However, if any initial budget is not approved, this term provides that the program director and chief operating officer work together to arrive at an acceptable budget within a reasonable time. Once the budget has been approved, the contract states that it must be implemented within a reasonable time. The contract further states that should modifications become necessary after the initial budget has been approved, the chief operating officer will have the exclusive right to approve of these modifications. The last sentence provides that the program director will attempt to stay within the programming budget. Both the chief operating officer and the program director are held to a reasonableness standard in these actions. This provision assists the station and OE in better financial planning.

Section 7. *Vacation, Sick/Personal, and Holiday Time*

Section 7.01. *Vacation Time*: AP will be entitled to one (1) week paid vacation per six-month interval that he/she has been employed by OE up to a maximum period of three (3) weeks per year. Vacation must be taken in one (1) week increments. AP will have priority over other air personalities in choosing which weeks he/she will take vacation. AP may not take vacation during any ratings sweep. AP will not receive additional compensation if he/she works during his/her entitled vacation.

Section 7.02. *Sick/Personal Time*: AP will be entitled to two (2) paid sick/personal days per month. Sick/personal days are days on which he/she would ordinarily work, but chooses not to work because of personal reasons, sickness, or injury. These sick/personal days may be taken at AP's discretion without losing compensation from OE if AP gives OE notice of his/her intention to

99. Works made for hire remain the intellectual property of the employer unless both parties sign a written agreement to the contrary. 17 U.S.C. § 201(b) (1977). See also 17 U.S.C. § 101 (1977) (defines works made for hire).

take the sick/personal day(s) within a reasonable time prior to his/her airshift. Sick/personal days may not be accumulated from month to month and will be forfeited if not taken during each month. AP will not receive additional compensation if he/she works during sick/personal time not taken.

Section 7.03. *Holiday Time*: AP will be entitled to two (2) of the following holidays off without losing compensation from OE: New Year's Day, Easter Sunday, Memorial Day, Independence Day, Labor Day, Christmas Day. All other holidays will be governed by section 7.02. AP will have priority over other air personalities in the selection of which holidays he/she will take.

The vacation time clause permits the AP to take one week of paid vacation for each six-month interval he has worked for the OE under the contract, up to a maximum of three weeks paid vacation per year. Vacation time must be taken in one week increments. This alleviates the burden of finding qualified personnel to do the vacationing AP's airshift and production duties while he is gone.¹⁰⁰ The next part gives the AP priority over his co-workers in choosing which weeks he will take vacation time. The next sentence of the clause limits the time when the employee may be on vacation to any time that a ratings sweep¹⁰¹ is not in progress. The station needs its best full-time employees to work during ratings sweeps to maximize ratings success. The last sentence of the clause prevents the employee from receiving additional compensation if he chooses to work during his vacation.

The sick/personal time clause allows the AP to take two sick/personal days per month. Sick/personal days are defined as days on which the AP would ordinarily work, but chooses not to because of personal reasons, sickness, or injury. The third sentence is a notice provision that mandates that the AP notify the OE that he intends to take the sick/personal day(s) within a reasonable time before his airshift. Reasonable notice avoids the unfairness and disorganization that occurs when an AP decides to notify the station that he is taking a day off too close to the airshift start time to find a qualified replacement. Although it is often impossible or impractical to force an AP to work if he gives defective notice, the employee will lose compensation for that day if defective notice is

100. Qualified weekend air personalities may be effective substitutes for vacationing full-time APs, but often these part-time employees have other full-time jobs during the week. Therefore, if a full-time air personality takes a vacation in one week increments, it is more likely that the part-time employee can pre-arrange vacation from his full-time job.

101. A "sweep" is the period in which the ratings firms survey the listening audience of the market. F. SMITH, *supra* note 5, at 399.

given. The fourth sentence prohibits the saving of sick/personal days from month to month. Otherwise, the AP could effectively save over three weeks per year of compensated off time. When coupled with a possible three weeks of paid vacation time, the AP's effective compensated off time might well become over six weeks per year. If left unchecked, large blocks of off time might severely decrease station continuity leading to lower ratings, revenue, and profit. The last sentence parallels the last sentence of Section 7.01 preventing the AP from receiving additional compensation for working on sick/personal days.

The holiday time clause allows the AP maximum flexibility in choosing which two paid holidays will be taken during the year from a list of six commonly celebrated holidays.¹⁰² All other holidays will be governed by the sick/personal days clause. Should the AP wish to take off a holiday not on the list, then a personal day would have to be taken. The last sentence grants the air personality priority over other co-workers in selecting which paid holidays to take.

Section 8. *Outside Employment*: AP may engage in outside employment which is defined as including, but not limited to:

1. production for a sponsor or agency of commercials and/or public service announcements that are to be used on other radio or television stations;
2. hosting, appearing in, and/or announcing on any television station;
3. use of his/her voice and/or production skills for the creation and/or marketing of a radio show for syndication;
4. exploitation of his/her public image through print media writing and/or interviews.

Materials generated in connection with outside employment will not be works made for hire by OE and AP may obtain personal copyrights for such works subject to his/her agreements with outside employers.

The outside employment section provides a definition of permissible outside employment under the contract. Such outside employment will not violate the prohibitions in the place of employment section, or the in-term restrictive covenant. Permissible outside employment includes the AP doing outside production for advertisers that are not advertising with the station; hosting, ap-

102. These holidays include New Year's Day, Easter Sunday, Memorial Day, Independence Day, Labor Day and Christmas Day.

pearing in, or announcing for any television station;¹⁰³ using his voice in the creation or marketing of any radio program for syndication;¹⁰⁴ and using his public image through print media, writing, and interviews.¹⁰⁵ The last part of this section contains a provision similar to Section 6.06 (H), which takes works created under outside employment out of the realm of works for hire which would ordinarily be owned by OE for copyright purposes. Instead, the AP is free to individually copyright appropriate works arising out of outside employment as long as they are not deemed works for hire of the AP's outside employers.

Section 9. *Airname*: AP's airname, the name which he/she uses on the air at (station) and by which he/she is generally known by listeners as well as the radio community, will be (Name). The AP's airname will be the sole property of AP. As such, AP may use his/her airname within outside employment and may continue to use his/her airname after leaving OE employment.

The airname section defines the term as the name which the AP uses on the air and by which he is generally known by listeners. The first sentence states the airname the AP will use during his tenure at the station.¹⁰⁶ The second sentence grants the AP an exclusive property right in the airname. This clause thwarts claims from the OE that it has copyrighted the airname. The second sen-

103. See *supra* note 74.

104. See R. HILLIARD, *supra* note 5, at 47, 264-65; cf. C. HALL, *supra* note 30, at 26, 59.

105. Many air personalities write columns or give interviews to promote themselves for general circulation.

106. Our hypothetical AP's airname is Chuck Roast. His real name is Stanley Tushid-sky. He arrives at his new job without an airname provision in his contract and is told he must use his real name on the air. Sometimes this means the AP must drop his existing airname for a new one. This may occur because the station already has another AP named "Chuck" on the air. Another case arises where the AP arrives at the new station and is told by the program director that he must use another airname picked for him. In either of these cases, the AP has no real choice but to accept the new airname due to the lack of a negotiated airname clause.

This section also guards against a station or OE copyrighting the name of a program. If the AP is part of the "Mike and Michelle Morning Show" and the OE has copyrighted the program name, "Mike" could be prevented from using that identity if and when he leaves the OE's station.

Finally, this section permits the AP to use his name in the preparation of programs for outside employers. For example, the AP may develop, produce, and syndicate a program called "The Chuck Roast Weekly Top Thirty." This may become problematic when another station in the same market runs the program. Mr. Roast would then be heard on two competing stations; the one he is under contract to, and the one running his syndicated program. In such a case, the station which Mr. Roast is under contract to may attempt to enjoin him from selling or distributing the syndicated program to the competitor. This clause prevents such an action. See also §§ 8 and 11.01.

tence declares that the air personality may continue to use the airname after the employment relationship with the OE has ended and within outside employment during the term of the contract.

Section 10. Compensation

Section 10.01. Salary: OE will pay AP at least (base salary) per week. (Note: include table if varying scale through duration of contract.) This salary is subject to withholding for applicable federal, state, and local taxes. OE will pay AP salary twice each month on the first and fifteenth day of each month.

Section 10.02. Salary Escalation: AP's salary may never decrease, but may increase from the amount specified in section 10.01 for the following reasons including, but not limited to:

1. increase in the cost of living;
2. merit (performance);
3. ratings success.

Section 10.03. Other Cash Compensation: OE will pay AP the following types of compensation on the same dates that salary is paid and with applicable federal, state, and local taxes withheld as under section 10.01:

- (A) production and promotion compensation as defined in clauses 6.03, 6.04;
- (B) severance compensation as defined in clause 3.02;
- (C) vacation compensation as defined in clause 7.01;
- (D) barter/trade unavailability payments as defined in clause 10.05; and
- (E) restrictive covenant compensation as defined in clause 11.02.

Section 10.04. Ratings Bonus Compensation: OE will pay AP a ratings bonus of (dollar amount) for each (amount of increase) in (demographic or age/sex cell) in (type and specific date(s)) of ratings sweep(s). (Note: may include descriptive information on what ratings are here so no dispute will arise later. The ratings bonus will be paid in full on the first day of the month after the applicable ratings reports for (station) are received by OE. OE will withhold applicable federal, state, and local taxes from the amount of the ratings bonus.

Section 10.05. Barter/Trade Compensation: OE will enter into barter/trade agreements with merchants for (goods and/or services) for AP's use. (Goods and/or services) are valued at (dollar amount) per week. If OE is at any time unable to provide AP with (goods and/or services) valued at (dollar amount) through the negotiated barter agreement, OE must compensate AP for the fair market value of (goods and/or services) in cash. If and when OE is able to re-enter a barter/trade agreement for similar

(goods and/or services), AP must elect to have OE continue the cash payments or to accept the new (goods and services) and have OE discontinue the cash payments.

Section 10.06. *Relocation Expenses Compensation*: OE will compensate AP for his/her relocation expenses incurred to establish residence in connection with employment at (station). Relocation expenses include, but are not limited to:

1. costs of moving the personal effects of AP and his/her spouse and children (if applicable) to (area) whether done professionally or otherwise;
2. costs of transportation of AP and his/her spouse and children (if applicable) to (area) by (negotiated medium);
3. reasonable lodging costs that AP incurs searching for housing in (area).

AP may elect to pay for these expenses out of pocket and be reimbursed by OE as soon as it is practicable to do so, or to have OE pre-pay for these expenses directly to the providers of these services. If AP elects to have OE reimburse him/her, he/she must provide OE with receipts and other supporting documentation to verify relocation expenses. AP will reimburse OE for all relocation expenses paid by OE if he/she voluntarily terminates OE employment (as provided in sec. 3.02) within three (3) months of the effective date of this contract.

Section 10.07. *Insurance*: OE will make available to AP a health and life insurance plan as provided in appendix 1.

Section 10.08. *Internal Advancement*: AP will have the right of first refusal of programming positions with higher total compensation and/or higher rated airshifts which become available during the term of this contract.

Section 10.09. *Violation of Federal Law*: AP has read and will comply with the provisions of Section 317 and 508 of the Communications Act of 1934, as amended, copies of which are attached in Appendix two; the Federal Communications Commission's Sponsorship Identification Rule (73.1212), a copy of which is attached in Appendix two; and the notice setting forth interpretations of prohibited conduct constituting payola, also attached in Appendix two.

The compensation section concerns the amount and type of compensation OE will provide the AP and the dates of compensation. The section is divided into eight clauses: 1) salary; 2) salary escalation; 3) other cash compensation; 4) ratings bonus compensation; 5) barter/trade compensation; 6) relocation expenses compen-

sation; 7) insurance; and 8) internal advancement.

The salary clause includes the OE's promise to pay the AP a base salary per week for the term of the contract. A table may be included within this clause if there will be a varying scale of increases throughout the contract term. The salary is subject to withholding for applicable federal, state, and local taxes. The last sentence provides that the OE will pay the AP's salary on the first and fifteenth days of the month.

The salary escalation clause ensures that the AP's base salary may increase, but never decrease. It also includes common reasons for a salary increase, such as a cost of living increase, rewards for meritorious performance, and rewards for ratings success.

The other cash compensation clause explains that the OE will pay the AP various forms of cash compensation on the same dates and in the same manner as his base salary. These forms of cash compensation are for production and promotion as provided in clauses 6.03 and 6.04; severance as defined in clause 3.02; paid vacation time as defined in clause 7.01; barter/trade unavailability as defined in clause 10.05; and as part of the restrictive covenant contained in clause 11.02.

The ratings bonus compensation clause permits the OE to give the AP a bonus for ratings success. This clause is only applicable to AP's who work in rated markets.¹⁰⁷ There is considerable latitude in the dollar amount that may be given for an increased rating¹⁰⁸ in a particular age/sex cell¹⁰⁹ or daypart¹¹⁰ in a particular

107. Approximately 260 markets in the country undergo Arbitron ratings sweeps at various times throughout the year. Telephone interview with Ruth Kaufman, Account Executive for The Arbitron Ratings Company, (April 10, 1987).

108. The principal types of "ratings" are "average quarter hour estimates", "cume" estimates and "exclusive cume estimates." Average quarter hour estimates are expressed as Average Persons, Average Ratings, and Average Metro Shares. Average Persons estimates indicate the estimated number of persons listening to a station during any quarter hour during a particular daypart. Average Ratings expresses the number of listeners (Average Persons) as a percentage of the metro population (population of the metropolitan area). Average Metro Share is the percent of the total metro listening audience that listened to each station during any quarter hour of a particular daypart. "Cume" estimates are expressed in terms of Cume Persons and Cume Ratings. Cume Persons indicate the number of different persons who listened at least once during a particular daypart. The length of the listening does not matter. Cume Ratings express the number of Cume Persons as a percentage of the metro population. Exclusive cume estimates are expressed in Exclusive Cume Persons. Exclusive Cume Persons indicates the number of different persons that listened at least once to a given station and to no other station during a particular daypart. Many people confuse a "rating" with a "share" estimate since both are expressed in terms of percentages. Audience estimates are known generally as "ratings." However, a "rating" always refers to total population (e.g., census data) whereas audience "share" always is expressed in terms of the total listening activity taking place during a particular daypart. ARBITRON RAT-

type of ratings¹¹¹ for a particular ratings sweep. The first sentence of the clause provides a convenient form to specify this data. Since ratings bonuses are often given to APs for increases in existing ratings, it may be helpful to include a description of the station's current ratings to minimize future disputes over whether the AP should receive a ratings bonus. The last two sentences of the clause state that the ratings bonus, if any, will be paid on the first day of the month after the OE receives the applicable ratings reports for the station and that applicable taxes will be withheld from any ratings bonus given.

The barter/trade compensation clause only applies when a portion of the AP's compensation is done on a barter or trade basis with local merchants. In such an arrangement, the OE gives the air personality scrip¹¹² at various intervals throughout the month, redeemable for goods or services of a certain dollar amount. The scrip is provided in exchange for commercial time on the OE's station(s). This clause provides a form for such an arrangement. Should the barter/trade arrangement between the OE and a particular provider of goods or services end during the term of the contract, this clause provides that the OE must compensate the AP for the loss by paying the fair market value of these goods or services in cash. The last sentence permits the AP to take advantage of a new barter/trade arrangement for similar goods or services or to have the OE continue the cash payments in lieu of any barter/trade arrangement.

Compensating an AP for relocation expenses provides a further incentive to take a position with the OE. The relocation expenses compensation clause first mandates that the OE will compensate the AP for relocation expenses incurred as a result of station employment. The clause defines relocation expenses as including, but not limited to, three major expenses. The first expense is the cost of moving the personal effects of the AP, including the

INGS COMPANY, UNDERSTANDING AND USING RADIO AUDIENCE ESTIMATES 8-11 (1976). *See generally* F. SMITH, *supra* note 5, at 392-415.

109. An age/sex cell means a combination of the age and sex of a group of listeners who form a demographic category. Demographic categories include total persons 12 and over, Men 18-24, 25-34, 35-44, 45-54, and 55-64; Women 18-24, 25-34, 35-44, 45-54, 55-64; and teens 12-17. Combinations such as Men 18 and over, Women 18 and over, and Adults 18 and over, may also be included. RADIO & RECORDS RATINGS REPORT AND DICTIONARY 188 (Fall 1987).

110. *See supra* note 62.

111. A particular type of ratings refer to average quarter hour, cume, or exclusive cume estimates. *See supra* note 108.

112. *See* F. SMITH, *supra* note 5, at 229, 386.

spouse and family, to the station area, regardless of whether this moving is done professionally or otherwise. The second expense is the cost of transportation for the AP, spouse, and family on a negotiated medium.¹¹³ The third expense is for reasonable lodging for the air personality while searching for housing in the station area.¹¹⁴ The remainder of the clause provides the mechanics of the compensation scheme. The air personality is given the opportunity to elect to pay for the relocation expenses out of his pocket and to be reimbursed later, or to have the OE pre-pay the providers of relocation services. If the AP elects to have the OE reimburse him for out-of-pocket relocation expenses, the clause states that the AP must provide the OE with receipts and supporting documents. The OE is protected from an inflated claim for relocation expenses through the documentation process. The last sentence protects the OE from investing in an AP who quits shortly after being hired. The AP will reimburse the OE for all relocation expenses if she voluntarily terminates the contract without cause within three months of the effective date of the contract.

The insurance clause is standard and mandates that the OE must make appropriate group insurance available to the AP employee. The specific terms of the available insurance will be included in an appendix to the contract and are beyond the scope of this article.

The internal advancement clause grants a right of first refusal to the AP for better positions which become available during the contract term. Better positions consist of those involving higher rated airshifts or where total compensation is higher. Negotiating this clause may be difficult or impossible because the OE often gives its program director considerable control to hire, fire, and promote programming department personnel. This clause is the appropriate place to include ownership entity promises of promoting the air personality to programming department supervisory positions if they become available during the contract term.

The Violation of Federal Law clause is included to inform the

113. The negotiated medium depends on whether the AP owns an automobile and the barter opportunities available with airlines, train, bus lines and travel agencies. The medium of transportation is also dependent upon the amount of personal belongings the radio employee has as well as whether the spouse or family is involved.

114. Expenses for housing may be dependent on the barter opportunities with local hotels and motels and chains. In this context, "reasonable" means that the radio employees must make a serious effort to find their own place to live. The term protects the station from an employee who does not seriously seek housing and who continues to live at a hotel or motel for as long as possible to avoid paying the cost of housing.

AP that the OE expects him to obey applicable provisions of the Communications Act of 1934 and the FCC Rules and Regulations pertaining to payola, plugola, and sponsorship identification.

Section 11. *Restrictive Covenant*

Section 11.01. *In-Term:* AP will not broadcast (cause his/her voice to be heard over the air live or through sound recording) for compensation on any other radio station that may be regularly heard in (market/area) for the duration of this contract except as provided in sections 6.03, 6.04, 8, and 9.

Section 11.02. *Post-Term:* In exchange for (amount of consideration) which OE will pay AP in equal installments (on the same dates provided in clause 10.3) throughout the duration of the contract, AP will not broadcast for compensation on any other radio station that may be regularly heard in (market/area) for one (1) year after the end date of this contract.

Section 11.03. *Voluntary Termination:* In exchange for (amount of consideration) to be paid as provided in clause 10.03, if AP voluntarily terminates his/her employment under section 3.02 of this contract and (station) continues to play (format) music after the date of termination, he/she will not broadcast for compensation on any other radio station that may be regularly heard in (market/area) for a period of one (1) year from the date of his/her last airshift on (station) or last regular work day (if AP is not an on-air employee).

Section 11.04. *Nondisclosure of Confidential Information:* During the term of this contract and for a period of one (1) year after the end date or date of termination whether voluntary or involuntary, AP will not disclose any information or data concerning the programming of (station), disclosed to or acquired by him/her in confidence at any time during the term of this contract.

Section 11.05. *Effect of Breach:* If OE repudiates this contract or fails to perform any of its major obligations under this contract, a breach will have occurred and AP may elect to terminate this contract. If he/she does so, no restrictive covenant will apply. If AP repudiates this contract, a breach will have occurred and OE may elect to terminate this contract. If it does so, AP will not broadcast for compensation on any other radio station regularly heard within (market/area) for a period of one (1) year from the date of breach. The restrictive covenant contained in this clause will not apply if AP breaches the contract due to incapacity (involuntary inability to broadcast or perform other major duties making it reasonably impossible or impractical for

the employment relationship to continue).

The restrictive covenant section is drafted in accordance with the principles set forth in the case law surrounding AP employment contracts section.¹¹⁵

The OE has two main interests protected through the restrictive covenant. First, the OE is interested in preserving its station's listening audience, which is reflected in its ratings. Successful ratings, in turn, generate higher commercial rates and, thus, additional revenue and profit. If a popular AP leaves to join a competing station immediately after his contract has been terminated (whether on the end date or through voluntary means prior to the end date), it is likely that listeners would follow the AP to the new station, triggering a chain of events eventually depriving the OE of profit.

Second, the OE has a legitimate interest in the nondisclosure of confidential information¹¹⁶ that has been given to, or acquired by, the AP during the contract term. Placing such confidential information in the hands of a competitor immediately after contract termination provides the competitor with a significant advantage, enabling it to counter-program its station more effectively, resulting in a loss of listeners to the OE's station, and, ultimately, a loss of profit.

The in-term restrictive covenant clause is included to protect the OE from a loss of listeners because of AP "moonlighting." To breach the clause, the AP must cause his or her voice to be heard live or through recording for compensation on a station regularly heard in the same market as the OE's station during the term of the contract. The breach is defined in this manner to prevent a disagreement regarding whether a station operating under a different format broadcasting in the same market is really a competing station. In this way, all stations that regularly may be heard in the market are deemed competitors. The clause is limited by allowing the AP to appear on competing stations either in connection with his/her production or promotional duties under clauses 6.03 and 6.04, or as an outside employee as defined in sections 8 and 9.

The post-term restrictive covenant clause parallels the in-term restrictive covenant clause in its prohibitions and operates for a one-year period after the end date of the contract. Since the AP is

115. See *supra* notes 14-16 and accompanying text.

116. Confidential information that has been given to or acquired by the radio employee during the course of employment includes information concerning station's format, music rotation, hour clocks, sales policies, personnel concerns and news sources.

no longer governed by the contract, the limitations of clauses 6.03 and 6.04 and section 8 do not apply. The post-term restrictive covenant is supported by additional consideration and is separate from the rest of the contract. This disarms any argument that it was not bargained for, that it is unreasonable, and that there was inadequate consideration to support it.

The prohibitions of the voluntary termination clause parallel the post-term restrictive covenant clause, with a few differences. First, the former clause begins to operate when the AP voluntarily terminates his employment under clause 3.2 of the contract. Second, in order for the clause to be applicable, the station must retain the same format after the date of termination. Thus, the clause excludes situations where the station changes format, effectively forcing the AP to abandon the agreement, even though he theoretically terminates the contract voluntarily. When the OE station's format changes, the AP is free to pursue other employment opportunities within the same market as if the contract had been terminated by the OE. A final difference between this clause and the post-term restrictive covenant clause is the date on which the voluntary termination restrictive covenant becomes operative. Necessary flexibility is provided by fixing the date upon which the restrictive covenant will begin to operate as the day of the last airshift for air personalities. Of course, there is no way to predict when this clause will become effective. Therefore, the date on which the restrictive covenant will begin is fixed as the day of the last airshift, for air personalities, and as the last regular workday, for off-air programming people.

The effect-of-breach clause protects the AP from being bound by the restrictive covenant if the OE fails to perform any of its major obligations under the contract,¹¹⁷ effectively *forcing* him to terminate the contract "voluntarily." The second part of this clause provides that if the AP repudiates¹¹⁸ the contract, the OE may terminate it; if it does so, a one-year restrictive covenant that

117. The OE could fail to perform any major obligation under the contract, but the best example is where an ownership entity pays the radio employee with a payroll check that bounces because of insufficient funds in the bank.

118. Three actions constitute repudiation. These are: (1) a positive statement to the promisee or other person having a right under the contract indicating that the promisor will not or cannot substantially perform his contractual duties; (2) transferring or contracting to transfer to a third person an interest in specific land, goods, or any other thing essential for the substantial performance of his contractual duties; (3) any voluntary affirmative act which renders substantial performance of his contractual duties impossible or apparently impossible. RESTATEMENT (SECOND) OF CONTRACTS § 250 (1979). See generally J. CALAMARI & J. PERILLO, CONTRACTS 524-26 (3d ed. 1987).

parallels the post-term restrictive covenant will operate starting on the date of the repudiation. The last part of the clause reinforces the idea that although incapacity may result in a technical repudiation or breach, the incapacitated AP should not suffer the consequences of the restrictive covenant. This treatment of incapacity is consistent with section 3 which treats incapacity as a ground for terminating the contract with cause, where no restrictions apply except for the nondisclosure of confidential information.

Section 12. *Assignment/Delegation of Duties:* AP will not delegate his/her duties and obligations under this contract to any person, partnership, or corporation, except as provided in section 6.02. However, AP may assign his/her rights to compensation under this contract. OE may delegate its duties and obligations and assign its rights under this contract to any person, partnership, or corporation.

The assignment section prohibits the delegation of the AP's duties and obligations under the contract. Since the OE is employing the AP because of his individual talent, permitting delegation to another would be inappropriate.¹¹⁹ An exception to this is the AP's ability to delegate his sixth airshift with reasonable approval by the OE as provided in section 6.02. The second part of the clause enables the OE to sell the station and assign its duties and obligations under the contract to the new OE.

Section 13. *Damages for Breach:* If OE repudiates this contract or fails to perform any of its major obligations under this contract, a breach will have occurred and AP may elect to have OE pay him/her liquidated damages of (dollar amount = to 2 months salary) plus the entire amount that AP would normally be due (as described in section 3.02 above) to compensate him/her for the loss of prospective economic advantage caused if OE deprives AP of the opportunity to fully exploit his/her potential as an air personality and/or programming person. This payment, if necessary, will be made within thirty (30) days of OE's breach. If AP repudiates this contract or fails to perform any of his/her major obligations under this contract, OE may elect to terminate the contract. If OE does so, AP will pay OE the reasonable cost of recruitment and training of a new air personality/pro-

119. A duty is not delegable where performance by the delegatee would vary materially from the performance by the obligor. See J. CALAMARI & J. PERILLO, *supra* note 118, at 760; RESTATEMENT (SECOND) OF CONTRACTS §§ 318(2) and 319(2) (1979). If the obligor's performance is to produce a particular entertainment, there is no objective standard by which the performance of the delegatee can be determined to be equivalent to the obligor's performance. *Standard Chautaugua System v. Gift*, 120 Kan. 101, 242 P. 145 (1926).

gramming person to fill his/her former position at (station) plus the reasonable cost of part-time personnel necessary to fill his/her former position during the recruitment and training process. However, if AP becomes incapacitated during the term of this contract, AP need not pay this amount even though a technical breach has occurred. If litigation becomes necessary to resolve a breach of this contract, the breaching party will pay all reasonable legal fees.

The first part of the damages-for-breach section states that a breach has occurred when the OE fails to perform any of its major obligations under the contract. It further specifies the liquidated damages that the OE must pay to the AP in the event of such a breach. The liquidated damages amount is negotiable, but the form includes a suggestion that it equal the amount the AP normally would be due in a without-cause termination initiated by the OE, plus an amount equal to two months salary. To make it clear that the actual damages are difficult to ascertain and that the liquidated damages are reasonable,¹²⁰ this section explains that the liquidated damages amount is to compensate the AP for the loss of prospective economic advantage caused by the OE's deprivation of the opportunity to fully exploit his or her potential. There must be, of course, a reasonable calculation of the amount of liquidated damages. The last sentence of the first part provides that the liquidated damages must be paid within thirty days of the OE's breach. This ensures that the OE pays the liquidated damages amount in a timely fashion.

The second part of the damages-for-breach section provides the OE with a remedy for the AP's breach. This breach occurs when the AP repudiates or fails to perform his major obligations under the contract. Once breach occurs, the OE may terminate the contract. If it does so, the AP must pay the reasonable cost of recruiting and training a replacement plus the reasonable cost of part-time personnel to fill the position during the recruitment and training process. Requiring the AP to pay these costs prevents the station from incurring a loss if the personality does not use the proper mechanisms in section 3 for termination prior to the end date. There is an exception to this penalty to the AP, however, if the AP becomes incapacitated during the contract term. It would

120. Courts usually list three criteria in determining the validation of a liquidated damages clause. First, the parties must intend to provide for damages rather than for a penalty; second, injury caused by the breach must be uncertain or difficult to quantify; third, the sum stipulated must be a reasonable pre-estimate of the probable loss. J. CALAMARI & J. PERILLO, *supra* note 118, at 640.

be unfair to require an AP who is the victim of a sudden involuntary incapacitating illness or injury to pay for recruiting and training his/her replacement.

The last part of the damages-for-breach section provides that the breaching party will pay all reasonable legal fees if litigation becomes necessary to resolve a dispute surrounding a breach of the contract.

Section 14. *Disputes*

Section 14.01. *Internal Resolution*: AP and OE will attempt to resolve all disputes arising under this contract internally through (1) conference between AP and his/her immediate supervisor; and if unsuccessful by (2) conferences among AP, his/her immediate supervisor and the head of the programming department (if different from his/her immediate supervisor); and if unsuccessful by (3) conferences among AP, his immediate supervisor, the head of the (station) programming department (if different from his/her immediate supervisor), and the chief operating officer of (Station). Unsuccessful resolution through this process will result in arbitration under 14.02.

Section 14.02. *External Resolution*: Any differences, claims, or matters in dispute arising between OE and AP out of this contract that cannot be settled under clause 14.01 of this contract shall be submitted to arbitration by the American Arbitration Association or its successor as an express condition precedent to any legal or equitable action or proceeding based on a dispute arising under this contract. The arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association or its successor and the pertinent provisions of the laws of the State of (state name) relating to arbitration.

The disputes section states the procedures that the OE and AP will follow to resolve disputes arising out of the contract. They will first attempt to settle these disputes through the internal resolution procedure contained in clause 14.01. If internal resolution is impossible, external resolution through arbitration is available under clause 14.02. Should arbitration be unsuccessful, the parties may resort to the courts to resolve their dispute.

The internal resolution clause develops a chain of dispute resolution so the station hierarchy need not be involved in resolving minor disputes under the contract. In this scheme, the AP first must attempt to resolve the dispute through a conference with the immediate superior. If this conference is unsuccessful, a conference between the AP, the immediate supervisor, and the head of the

programming department (if different from the immediate supervisor) should occur. Should this dispute resolution conference be unsuccessful, the last level of internal resolution is a conference with the AP, the immediate supervisor, the head of the programming department, and the chief operating officer of the station. Finally, if internal resolution is impossible, the dispute is submitted to arbitration.

The external resolution clause sends disputes that could not be resolved internally to arbitration by the American Arbitration Association as a condition precedent to any legal or equitable action surrounding the dispute arising out of the contract. In this way, a dispute may be resolved with less expense and more speed than a lawsuit. This clause provides for court involvement only as a last resort.

Section 15. *Governing Law*: This contract will be governed by the laws of the State of (state).

This is a standard section included so that no ambiguities arise regarding which state's law will govern should there be court intervention in any disputes arising under the contract.

Section 16. *Complete Agreement*: The complete agreement between AP and OE is contained in this contract and may be modified only by a written memorandum executed by OE and AP.

The complete agreement section states that the document signed by the agent of the OE and the AP is complete and that any subsequent revisions, additions, and/or deletions must be made in writing. This section also protects both parties from claiming that changes were made at the time of execution.

Section 17. *Severability*: If any provision of this contract is illegal, the remainder of the contract will not be affected by the illegal provision.

The severability section permits the contract to be severed into a legal and enforceable portion and an illegal and unenforceable portion. If the contract is found to contain "an illegal provision that is not central to the agreement and the illegal provision does not involve serious moral turpitude, the illegal portion of the contract is disregarded and the balance of the contract is enforceable."¹²¹ The main criterion in determining whether the primary

121. "If an agreement contains an illegal provision that is not central to the agreement and the illegal provision does not involve serious moral turpitude, the illegal portion of the agreement is disregarded and the balance of the agreement is enforceable." J. CALAMARI & J.

purpose of the contract will be defeated by the severance of an illegal provision is whether the parties would have entered into the contract regardless of that provision.¹²²

E. *The Signatures*

APPROVED AND EXECUTED ON THIS ____ DAY OF
____ 19__.

OE (Inc.)

AP

By: (Officer and/or Director)

The signatures come immediately after the body of the contract. They should not be placed on a separate page of the contract as it may appear that the parties never read the contract.¹²³ Further, to guard against accusations of later amendments, both the AP and the officer or director of the OE should initial the bottom of every page at the time they sign the contract.¹²⁴ If any changes are made at the time the contract is executed, these changes should be initialed by both the AP and the officer or director of the OE.¹²⁵ The AP should sign the contract in exactly the same manner as the name appears in the identification section. Full legal names, and not air names, should be used. If the OE is a corporation, it is important to check local law to determine whether the corporate signature requires an attestation by the secretary of the corporation or whether the corporate seal must be affixed.¹²⁶

F. *The Acknowledgement*

An acknowledgement is a statement that the signatories have read the contract and have voluntarily signed it. The signature is usually notarized.¹²⁷ In some jurisdictions, acknowledged contracts are self-proving.¹²⁸

PERILLO, *supra* note 118, at 784-85. See also RESTATEMENT (SECOND) OF CONTRACTS § 184 (1979).

122. See J. CALAMARI & J. PERILLO, *supra* note 118, at 893-94.

123. S. BRODY, J. RUTHERFORD, L. VIETZEN, & J. DERNBACH, *supra* note 19, at 122.

124. *Id.*

125. *Id.* at 123.

126. *Id.* at 124.

127. *Id.*

128. RESTATEMENT (SECOND) OF CONTRACTS § 131 (1979).

IV. CONCLUSION

A well-drafted employment contract serves a variety of functions for the AP and OE. First, it reminds the parties of the terms of their agreement. Second, it is a vehicle for the resolution of minor disputes that may occur within the employment relationship. Third, the document may be used as evidence in judicial proceedings should litigation become necessary. Finally, the document satisfies the statute of frauds which states that contracts that cannot be performed within one year must be in writing. The contract form and commentary permit the practitioner to better counsel the AP client so that his interests are maximized through the drafting of a complete and easy to understand document, whether created "from scratch" or through addition, deletion, and modification to sections of clauses in a previously drafted document. Additionally, the form and commentary allow the attorney to save valuable time in drafting and negotiating the AP's employment contract because they raise and answer questions the attorney may not know to ask or would have to struggle to answer. This savings of time for the attorney and, hence, money for the radio employee, has the effect of promoting an increased number of better defined and protected employment relationships between employees and OEs as well as generating additional clients and billable time for the attorney, as the benefits of having an attorney negotiate and draft an employment contract outweigh the costs to the radio employee.