Fletcher, Heald & Hildreth®

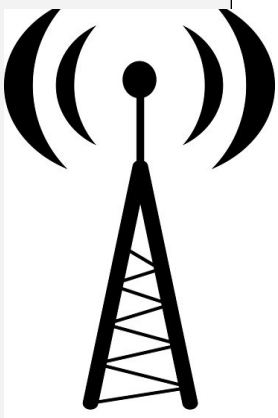
Memorandum to Clients

May 2018

No. 18–05

The FCC Looks Toward the Further Commercialization of the Educational Broadband Service

by Tom Dougherty
dougherty@fhhlaw.com
(703) 812-0409



On the books for the FCC's May Open Meeting will be a Notice of Proposed Rulemaking (NPRM) regarding rule changes to establish commercial eligibility for Educational Broadband Service (EBS) licenses and to "rationalize" the EBS service areas. EBS is not a well-known radio service, so to appreciate the significance of these changes, a little history is in order.

If there is one radio service epitomized by change, it is the EBS. EBS was first conceived in the 1960s as a means for schools to transmit video educational programming to off-campus locations. It was first called the Instructional Television Fixed Service (ITFS), and could be licensed only to accredited schools and nonprofit companies who used the channels to offer formal educational programming to accredited schools. At that time, the ITFS allocation was 168 MHz within the 2.5 GHz, which was a huge allocation, but no one at that time saw any other value in such a "high" frequency.

In the 1980s, Microband Corporation conceived of the concept of "wireless cable" and was able to convince the FCC to allow ITFS licensees to lease their "excess capacity" to wireless cable companies. With 168 MHz, there was considerable excess capacity. In addition, the FCC sawed off 48 MHz of that spectrum and created the MMDS which could be licensed to commercial entities.

In this Issue...

As more and more companies went into the wireless cable business and leased ITFS "excess capacity," the FCC was convinced that these ITFS stations needed protected service areas, not for their core educational transmissions, but to protect wireless cable receivers. So, the FCC gave them 710-mile protected service areas which would correspond to the directionality of the antenna system, but provide 15-mile radius service area for an omnidirectional antenna system. Eventually, the wireless cable industry convinced the FCC to enlarge the protected service area to 35-mile radius, again to protect wireless cable reception at more remote points.

(Continued on page 2)

(Continued from page 1)

Then the wireless cable industry convinced the FCC to allow digital transmissions over ITFS channels, again for the benefit of the wireless cable industry.

Following that change, the wireless cable industry (which was failing) convinced the FCC to allow ITFS channels to be used for two-way broadband communications, to increase the maximum ITFS channel capacity that could be leased from 60 to 80 percent, to 95 percent, and to allow ITFS channels to be used "flexibly" while retaining the primary educational use requirement. Once again, yielding to the commercial lessees of the ITFS channel capacity, the FCC revised its rules so that ITFS would be regulated like almost all other commercial wireless services regulated by Part 27 of FCC Rules, and it changed the name "ITFS" to "EBS." Sensing a pattern here? Still, with all those rule changes intended to assist an ancillary use of these educational frequencies, the FCC did not change its requirement that these frequencies be licensed only to educational entities, a requirement which (while already very much diluted) was retained.

Well, the near inevitable is now on the horizon. The NPRM up for adoption this May will propose the elimination of the educational licensing requirement and ask for comment on the elimination of the requirement to use some part of the channels for education, but there is a catch. An EBS licensee will be able to assign its license to a commercial (non-educator) entity but the FCC will not accept applications for licenses from non-educators. Thus, the licensing of commercial entities within the EBS will be at the discretion of the educators that hold these licenses. As explained below, the FCC proposes filing "windows" for new EBS licenses that would be limited to non-commercial entities.

The NPRM also proposes to clean the untidy patchwork of licensing that resulted from various incremental changes in the licensing rules that have occurred over the years. Other commercial wireless services authorize service areas based upon geopolitical boundaries such as MSAs, GSAs, RSAs, etc. The smallest unit in these allocation schemes is the county (or parish or district). As a result, all parts of the United States are within a service area of these other commercial wireless services. EBS has been licensed in a manner that created vast and irregularly shaped unserved areas ("white areas") that do not correspond to any geopolitical boundaries. ITFS was first licensed without a pro-

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
(703) 812-0400
On Twitter *@CommLawBlog*
***E-Mail*:** Office@fhhlaw.com
Website: fhhlaw.com
Blog: www.commlawblog.com

Editor
Helena Okolicsanyi

Contributing Writers
Tom Dougherty
Donald Evans

Memorandum to Clients is published on a regular basis by Fletcher, Heald & Hildreth, P.L.C. This publication contains general legal information which is not intended to be deemed legal advice or solicitation of clients. Readers should not act upon information presented herein without professional legal counseling addressing the facts and circumstances specific to them.

Distribution of this publication does not create or extend an attorney-client relationship.

(Continued on page 3)

(Continued from page 2)

tected service area. Unlike other wireless services, EBS applicants chose a transmitter site and would be licensed at that site if their proposed facilities protected all previously authorized or proposed cochannel and adjacent channel facilities. As a result, cochannel EBS stations often were crowded into small geographic areas. (There are actually instances in which two cochannel stations were licensed to operate from the same tower.) This station location, versus area-based, licensing scheme resulted in many unserved areas.

The NPRM proposes a license change for existing licenses and filing windows to attract applications to serve these white areas. While you would think that commercial entities would be allowed in these filing windows, the FCC's proposal is to exclude them and limit qualified applicants to educators and tribal nations. To serve these white areas the FCC would, first, expand the service areas (called GSAs) of existing EBS licenses to cover the entirety of census tracts that are partly within these service areas. As a result, the remaining "white space" would have boundaries that are coterminous with census tracts. After that expansion of the GSAs, the FCC proposes three filing windows. The first would be open to existing EBS licensees who could file to extend their GSAs to the borders of counties that are already partially covered by their GSAs. The second filing window would be open to tribal nations in rural areas, who could apply for licenses where they have tribal lands. The third filing window would be limited to educational entities that do not currently have EBS licenses, who would be able to file for licenses where they have educational facilities.

The proposed NPRM contains several other proposals, including reexamining the amount of spectrum within the FCC's spectrum aggregation screen, eliminating the 30 year limit on EBS leases, eliminating the prohibition on leasing and assigning attached to licenses granted by waiver, and requiring EBS licensees to make a demonstration that they are using the channels (or face loss of the license or the unused channels).

The NPRM discusses possible alternatives to many of its proposals, suggesting a willingness to tailor the eventual rules to industry consensus. It is thus difficult to predict what the FCC will ultimately do. But, I would lay dollars to donuts that the educational eligibility restriction will be tossed in the final rules, while the educational use requirement (diluted as it is) will probably be eliminated or preserved in some other form that is favorable to commercial entities. Will that mean the end to the educational use of EBS? I think not. There are EBS licensees who are dedicated to promoting education through EBS, with Mobile Beacon and Mobile Citizen being exemplary of those who have proven the value of EBS for education.

Comments will be due 30 days after a summary of the NPRM is published in the Federal Register with reply comments due 60 days after that publication. We anticipate that those two dates will fall in August.

FCC Grants Puerto Rico Broadcasters Recovery Relief Request for FM Translator Applicants Impacted by Hurricanes Maria and Irma

By FHH Law

On May 1, the FCC's Media and Wireless Bureaus granted a request filed by Fletcher, Heald & Hildreth attorneys Frank Montero and Keenan Adamchak on behalf of the Puerto Rico Broadcasters Association (PRBA) to waive the FCC's rules limiting the scope of settlements involving mutually exclusive (MX) FM translator applications filed in the Auction 100 MX filing window. The Bureaus had opened a settlement window running through June 14, 2018, during which Auction 100 MX applicants (that is applications that conflict with each other and cannot both be granted without some modification to remove the technical conflict) can file technical amendments to resolve their mutual exclusivities.

The FCC rules place limits on the settlements that can be negotiated by MX applicants for FM translator frequencies. Specifically, Section 74.1233(a) of the FCC's rules limit the resolution of such conflicts to "minor" amendments which are changes to first, second, or third adjacent channels, or to an intermediate frequency channel.

In its filed request on behalf of the Puerto Rico Broadcasters, Montero and Adamchak argued that the damage caused by Hurricanes Maria and Irma resulted in broadcasters expending considerable resources in restoring broadcast services. Accordingly, the broadcasters in Puerto Rico lacked the resources to settle these conflicted applications within the current "minor" amendment confines of the rule. As such, they requested that the FCC permit Puerto Rico applicants to be allowed to settle conflicts with amendments to ***any*** available channel even if not "minor," provided such amendments did not cause interference to existing or proposed FM stations and complied with the FCC's coverage requirements for FM translators.

The FCC's Public Notice states that such waiver requests serve the public interest "by assisting the broadcasting industry to rebuild following the hurricanes and by ensuring that robust radio coverage is provided in areas prone to severe hurricanes."

Applicants granted waivers of Section 74.1233(a), however, must still comply with all other requirements for technical amendments, and must file their technical amendments by the end of the MX settlement window on June 14.

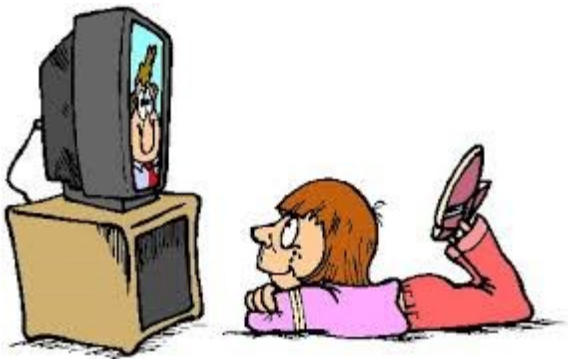
Comments on FCC Proposed EEO Form 397 Elimination Reply Comments Due May 15

by FHH Law

In March 2018, the FCC proposed eliminating the Equal Employment Opportunity Mid-Term Report (also known as Form 397) and those wishing to voice their opinions could do so, through submitted comments, until April 30. As we've discussed before, this is part of the FCC's ongoing Modernization of Media Regulation Initiative (spearheaded by Chairman Pai). Currently, Form 397 is intended to provide the FCC with information about a broadcast station's employment practices at the midpoint of the station's eight-year license term. The form consists of a very brief cover portion and attachment of the station's last two EEO Public File Reports. Form 397 currently must be filed by TV stations with five or more-full-time employees and radio stations with 11 or more full-time employees (smaller station employment units may file the Form to confirm their smaller size but are not required to do so).

The FCC, and those advocating for the elimination of Form 397, argue that it is redundant and is becoming, "unnecessary and unduly burdensome, and most of the information it contains is otherwise available to the Commission." Organizations such as the National Association of Broadcasters voiced their support for the elimination of Form 397 with the advent of the Online Public Inspection File. Due to a statutory mandate, the Commission will still be required to conduct a mid-term review of all station employment units that would have been required to file the Form 397. Without the Form 397, however, the Commission recognized that there would no longer be a single place where it could determine which stations were subject to such reviews. Thus, by seeking comment on the proposal, the FCC was also looking to the public on suggested ways they could track this information, such as adding a requirement that this information appear in a station's annual EEO Public File Report or be entered elsewhere in the online public file.

The proposal was published in the Federal Register. Comments could be filed until April 30, but reply comments are due by May 15. If you wish to submit a reply comment and need assistance, contact us at 703-812-0400.



LPTV Displacement Filing Window Extended to June 1

by FHH Law

On April 18, the Commission's Incentive Auction Task Force and Media Bureau announced that it was extending the special filing window for displaced Low Power Television and TV Translator Stations for a few extra weeks. The window for filing such applications will now close on June 1 at 11:59 p.m. EDT. The original due date was May 15.

The extension was to "allow applicants further time to analyze data and other information and to prepare or make changes to their applications accordingly."

This action applies only to LPTV stations and TV translators being displaced from their current channel as a result of the TV spectrum repack. As we've previously written about, an LPTV is considered "operating" for purposes of eligibility for this window if it was constructed and licensed (or had a license application pending) as of April 13, 2017.

If you need advice on navigating this filing window, we will have attorneys ready to help with strategy and application preparation. Reach out to us at www.fhhlaw.com or call us at (703) 812-0400.

FCC Issues Big Fines to Sprint and Mobilitie for Siting Violations (But Doesn't Offer Much Explanation as to Details or Guidance for Future Acceptable Action)

by Don Evans
evans@fhhlaw.com
(703) 812-0430

On April 10, the FCC released Orders and associated Consent Decrees resolving investigations into alleged violations of the site registration and/or pre-construction environmental review procedures by Sprint and Mobilitie. In the past, the Commission has made it clear that it means business when it comes to enforcing compliance with the often rigorous, expensive, and time-consuming procedures necessary to meet the environmental rules, which include the rules requiring evaluation and avoidance of adverse effects on historical and tribal sites.

(Continued on page 7)

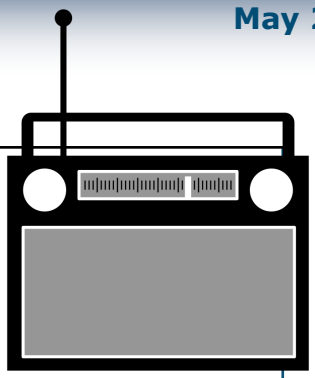
(Continued from page 6)

The sheer size of the amounts required to settle the investigations, however, was enough to catch our attention: **$10 million** for Sprint and **$1.6 million** for Mobilitie. While the Consent Decrees referenced multiple violations of the rules, the number of sites and violations involved was not stated. In the past the FCC has used $7,000 as a base forfeiture amount for violations of this sort; therefore, one might conclude from the size of the settlement amount that there were either 1,400 sites implicated in the Sprint investigation (and over 200 in the Mobilitie one) or that there were egregious circumstances justifying multiplication of the base fine.

The Consent Decree is frustratingly silent on this point, which unfortunately leaves the industry – those who might be expected to be warned and alarmed by this action – without a clear sense of how bad the alleged offenses were. We say "alleged offenses" because, while the Commission appeared to find non-compliance, termination of the investigation by settlement does not result in a finding of a violation of the law.

Apart from the size of the settlement amounts, we note two interesting features of these orders. First, the FCC has made it clear that amounts paid pursuant to consent decrees are not tax deductible. This is made explicit on page four in both consent decrees. In years past, parties could argue that these payments were "voluntary payments" (deductible) rather than fines (non-deductible). That ambiguity has been resolved. Second, in the case of Sprint, the decree indicates that compliance with the rules was the responsibility of a third party provider who undertook to build the sites and handle the environmental compliance. Yet, Sprint, one of multiple carriers who were to use the subject sites, was charged with the violation. Mobilitie, on the other hand, was itself the third party provider who constructed the sites and should have handled the environmental reviews; yet Mobilitie, rather than the ultimate carriers, was socked with the violation.

Why the FCC treated the carrier as the responsible party in one case and the site constructor in the other is not made clear by the FCC's orders or the consent decrees. So, while the FCC certainly intends to signal its seriousness about compliance with the rules, it does not clearly explain which parties are responsible for that compliance.



CBRS: The Path Ahead

by Don Evans
evans@fhhlaw.com
(703) 812-0430

The Citizens Broadband Radio Service (CBRS) was originally envisioned as a true people's broadband radio service – one that would be either free or highly affordable for small, locally-based operations of limited breadth and duration. The paradigm was a conscious break from the Metropolitan Statistical Area – or – larger sized service areas with 10-year renewable terms that have dominated regulatory thinking for the last few decades, effectively limiting the licensees of most new spectrum to billion-dollar companies with plenty of cash to acquire licenses. Those companies have pushed strongly to rearrange at least some portion of the CBRS band into the standard Big Company-favoring model.

There appears to be the strong sentiment on the FCC's eighth floor for a movement in that direction, so the service has been treading water while the FCC considers whether to increase the size, term, and length of licensed Priority Access Licensees (PAL) operations in the 3550-3700 MHz band. I expect FCC action in the relatively near future since the pace of ex parte contacts has accelerated in the last month. While much remains up in the air as I type, current and potential General Authorized Access (GAA) Citizens Band Radio Service users can nevertheless be thinking ahead about how and whether they can sustain uninterrupted operations under the new CBRS licensing and usage program already adopted by the FCC.

Current system. Under the rules that have governed the use of the 3650-3700 MHz band for the last ten years or so, all users were nationally licensed on a non-exclusive basis. While users were required to cooperate with other licensed users with registered sites and make every effort to avoid interfering with other users, no one is guaranteed interference-free operation. Since usage of this band has not been heavy, it has usually been possible for multiple non-exclusive users to avoid interfering with each other in the same geographic areas. The new regulatory paradigm makes things more complicated.

CBRS. Under the CBRS plan, there will be:

- **Incumbent Users**: generally federal government users near the coasts and around certain government facilities, but also **Grandfathered Users** for a period of time;
- **Priority Access Licensees** (PAL): people who acquire priority usage rights through an FCC auction;
- **GAA** users: those users who are the equivalent of unlicensed users since they have few rights vis a vis other categories of users or each other.

Federal incumbents will always have the highest priority to use the spectrum and may bump all other users if they need access. Grandfathered incumbents – existing licensees who registered their transmitter sites as of April 16, 2016 and who have kept those stations opera-

(Continued on page 9)

(Continued from page 8)

tional since then – have priority over other PAL and GAA licensees for the duration of their grandfathered term, which will not exceed five years from 2015.*

PAL users have a higher priority than GAA users, have first access to available spectrum, and can bump GAA users if they need spectrum to accommodate what they bought in the auction and no other spectrum is available.

Finally, **GAA** users register in the system and are assigned spectrum on an "as available" basis. The SAS entity which assigns spectrum to competing users according to the prioritization scheme established by the FCC will try to accommodate all users so they can operate without interference, but no GAA user is entitled by right to interference protection from other users.

Here is the FCC rule:

> *96.35 – General Authorized Access Use*
> *(a) General Authorized Access Users shall be permitted to use frequencies assigned to PALs when such frequencies are not in use, as determined by the SAS.*
>
> *(b) Frequencies that are available for General Authorized Access Use shall be made available on a shared basis.*
>
> *(c) General Authorized Access Users shall have no expectation of interference protection from other General Authorized Access Users operating in accordance with this part.*
>
> *(d) General Authorized Access Users must not cause harmful interference to and must accept interference from Priority Access Licensees and Incumbent Users in accordance with this part.*
>
> *(e) General Authorized Access Users operating Category B CBSDs [higher powered stations] must make every effort to cooperate in the selection and use of available frequencies provided by an SAS (the System Administrator) to minimize the potential for interference and make the most effective use of the authorized facilities. Such users shall coordinate with an SAS before seeking station authorization, and make every effort to ensure that their CBSDs operate at a location, and with technical parameters, that will minimize the potential to cause and receive interference among CBSDs. Operators of CBSDs suffering from or causing harmful interference are expected to cooperate and resolve interference problems through technological solutions or by other mutually satisfactory arrangements.*

As with the current system, there is an obligation on the part of all licensees to cooperate to resolve interference problems and there is no right to "hog" a particular spectrum band or even any particular amount of spectrum.

(Continued on page 10)

(Continued from page 9)

The FCC has expanded the original 3650 – 3700 band by an extra 100 MHz. It has at the same time reserved the 50 MHz from 3650 to 3700 for GAA operations. This means the GAA operators in this band can be bumped by Federal or Grandfathered incumbents, but will not have to worry about PALs demanding access to this band. PALs will be licensed in up to seven 10 MHz channels in the 3550 – 3650 MHz part of the CBRS band. GAA licensees can also operate in that part of the band, but they will be subject to bumping by PALs there. So GAA operators will have 50 MHz to themselves plus an additional 30 MHz that should be available in the band shared with PALs.

The FCC's rules are intended to "ensure" that PAL users have access to the amount of spectrum they bought in the auction (as many as four 10MHz channels), so while the FCC's rules do not expressly indicate that lower priority users can be bumped, this seems inherent in the assurance granted by license ownership. The situation of a non-grandfathered user in the exclusive GAA part of the band is not clear in the FCC's rules and orders. The user has no right to protection from interference, but the SAS is supposed to accommodate as many users as possible in assigning frequencies. It has the power to bump users or limit their time on the air or the amount of spectrum they are assigned.

Ordinarily, the SAS would not bump a GAA user offline unless there was a competing request for spectrum and no other way to accommodate both users, but if demand was high and there was an insufficient supply of spectrum to satisfy everyone, a user who was providing service could theoretically be interfered with by another user. The SAS will try to coordinate usage so that all parties seeking spectrum can use it effectively, but if there is more demand than supply in a particular area, there would be the possibility of reduced spectrum, reduced access, or interference. While excessive demand is unlikely to be a problem in the most rural areas, the lack of a "right" to maintain service in the face of a competing demand may make it problematic to depend solely on GAA usage when service to customers is mission-critical and a service interruption is not acceptable.

All of this suggests that small-scale "citizen"-based broadband services may still have a place in the new CBRS, but users will have to be nimble and expect at least occasional service disruptions.

**3650 MHz Band incumbent users will receive protection for five years after the 3.5 GHz Order adoption date of April 17, 2015, or for the remainder of the license term, whichever is longer, with the exception that Part 90 incumbents licensed after January 8, 2013, will be limited to a protection period of five years after the 3.5 GHz Order adoption date. See 3.5 GHz Order 30 FCC Rcd at 4075-76, para. 400.*

Upcoming FCC Deadlines —

Do you know what FCC filing deadlines are in the coming months? We do.

Note our list is not comprehensive, and other proceedings may apply to you.

May 15, 2018 – *Elimination of the Requirement to File EEO Mid-Term Reports* – Reply Comments are due regarding the FCC's requesting comments on a proposal to eliminate the requirement in Section 73.2080 that TV stations with five or more full-time employees and radio stations with 11 or more full-time employees file mid-term reports on FCC Form 397 with the two most recent public file reports attached.

June 1, 2018 –

EEO Public File Reports – All radio and television station employment units with five or more full-time employees located in Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia, and Wyoming must place EEO Public File Reports in their public inspection files. For all stations this placement now means uploading the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports – All television stations with five or more full-time employees and located in Arizona, Idaho, Nevada, New Mexico, Utah, or Wyoming must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

FHH - On the Job, On the Go

On May 4-5, **Peter Tannenwald** and **Kathleen Victory** will be speaking on panels at the National Translator Association's annual meeting in Salt Lake City, U.T.

On May 9, **Frank Montero** will be attending the George Washington University Law School Barristers Luncheon in Washington, D.C.

On May 10, **Kevin Goldberg** will be part of the "Ask a Lawyer" panel at the American Society of Business Publication Editors (ASBPE) 2018 B2B Media Success Conference at the National Press Club in Washington, D.C. There, he will be focusing on copyright, right to be forgotten, and new EU data privacy laws.

On May 15-16, **Mitchell Lazarus** will be speaking on the Annual National Spectrum Management Association Conference in Arlington, Va.

On May 15, **Frank Jazzo** will participate in the Board Meeting of the Rockefeller College Advisory Board in Albany, N.Y.

On May 21-May 23, **Kevin Goldberg, Dan Kirkpatrick**, and **Frank Montero** will be attending the Media Finance Focus Conference in Crystal City, Va. There, Goldberg and Kirkpatrick will be speaking on panels. On Monday, May 21 Goldberg will be speaking on Fair Use and copyright issues in video games. Also on Monday, Kirkpatrick will be speaking on a panel focused on the evolution of tracking payment and accountability for consumed media. Lastly, on Tuesday, May 22 Goldberg will be joining Travis Ploeger of SoundExchange to discuss music royalties. Fletcher, Heald & Hildreth is also a proud sponsor of this event.

On May 31, **Frank Jazzo** will be speaking at the Louisiana Association of Broadcasters/ Mississippi Association of Broadcasters convention on the legal session panel in New Orleans, La.

On June 1, **Kevin Goldberg** will also be presenting at the Public Media Business Association's Annual Conference in Long Beach, Calif. His presentation will focus on avoiding copyright infringement liability in productions, websites, and via social media.

On June 4, **Frank Montero** will be attending the FCC's Supplier Diversity Conference in Washington, D.C.

On June 8, **Kevin Goldberg** and **Frank Jazzo** will be attending the New Mexico Broadcasters association's annual summer convention in Albuquerque, N.M. Goldberg will be presenting a session on copyright use on social media and Jazzo will be speaking at the Engineering and Ask a Lawyer sessions.