

New Jersey Appeals Court Expands Scope of Liquor Liability

by Joseph Deal, Esquire
Cooper Levenson

In a decision that could have a broad impact on establishments that sell alcoholic beverages, a New Jersey Appeals Court recently held that licensed alcohol beverage servers can face legal liability even in the absence of evidence they served drinks to an already intoxicated customer.

In what appears to be a case of first impression, in the case of *Bauer v Nesbitt, et al*, a New Jersey Appellate Court reversed the trial court's grant of summary judgment in favor of a defendant bar, based in part upon the finding the bar was under a common law duty to protect its customers who were visibly intoxicated, even with respect to a customer who arrived at the bar already intoxicated and who was never served any additional drinks by the bar.

The case involved an underage defendant-driver and his plaintiff-passenger, both of whom were intoxicated and were involved in a motor vehicle accident which occurred after they left the bar. The accident caused fatal injuries to the plaintiff-passenger.

The evidence indicated the defendant-driver had become intoxicated prior to his arrival at the bar and likely exhibited signs of intoxication while he was at the bar. However, there was no evidence to suggest he was served drinks by the bar. The evidence further indicated the plaintiff-passenger, who was of legal age, was served by the bar after he had become visibly intoxicated.

Up to now New Jersey courts had ruled that actions against licensed alcoholic beverage servers were subject to, and limited by, NJSa 2A:22A-1, et seq., commonly referred to as the "New Jersey Dram Shop Act". The statute limits server liability to instances where injury results from the negligent service of alcoholic beverages, with the concept of "negligent service" being defined as service to a visibly intoxicated person (or to a minor). Under this definition, a bar would face no legal liability unless there was some evidence to show it served drinks to someone who was already visibly intoxicated.

In the *Bauer* case, the court addressed the issues of: 1) whether

a bar could face liability where there were facts to indicate it served a visibly intoxicated customer who was the passenger, rather than the driver, in a fatal accident; and 2) whether the bar had a legal duty with respect to the driver who appeared to be intoxicated, but who was never served any alcoholic drinks by the bar.

As to the question of service to a visibly intoxicated customer who was a passenger, the court ruled that NJSa 2A:22A- could impose liability on a bar for serving a visibly intoxicated customer, since the bar had a statutory duty to protect its customers from foreseeable harm, including in relation to a motor vehicle accident, "by insuring he did not drive and that he did not ride as a passenger with a patron who was similarly impaired". This part of the court's ruling was based upon a direct application of NJSa 2A:22A and did not come as any great surprise in terms of its rationale.

However, the troubling part of the *Bauer* decision was its further declaration that, as to the defendant-driver who had not been served by the bar, but who was evidently visibly intoxicated by way of drinking that had occurred prior to his arrival to the bar, the bar was under a common law duty of care with regard to the supervision of that driver.

In rejecting the idea that liability against a bar can only exist under the statutory scheme of NJSa 2A:22A, and that the statute therefore preempted any common law grounds for imposing liability on an alcoholic beverage server, the court held that an action grounded in common law could be maintained against a bar, even if there was no service of drinks by the bar to the visibly intoxicated customer in question.

The court's rationale was that other New Jersey cases involving different factual scenarios (i.e. rape and assault) have recognized the existence of a common law duty of care against certain defendants under a claim of negligent supervision. By analogy to these other cases, the Appellate Division rejected the bar's preemption

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SIX WEEK PAID LEAVE LAW SIGNED BY GOVERNOR

Over the objections of the business community, on May 2, 2008, Governor Corzine signed into law, legislation that provides employees with up to six weeks of partial wage replacement to care for newborn, adopted or seriously ill family members on an annual basis. The paid leave benefit provides two-thirds (2/3) of the employee's wages capped at a maximum of \$524 per week for calendar year 2008. Eligible employees will be able to take the leave on an intermittent basis.

The program is funded by a new payroll tax on employees. On January 1, 2009, employers will be responsible for remitting to the state the new employee tax authorized by the program. The tax rate is specified as .09% for 2009 and .12 % for 2010 and beyond. On July 1, 2009, employees will be eligible to take family leave benefits. Please note that there is no direct contribution by the employers to the paid family leave fund at this time.

The law specifies that an employer may not require an employee to utilize more than two weeks of sick, vacation or other paid time off in connection with a period of paid family leave. An employer can require an employee to use up to two weeks of sick, vacation or other paid time off, as part of the six weeks of paid leave.

All employers are required to post a notice, which is currently unavailable, alerting employees of their rights to paid family

leave. Additionally, employers are required to provide employees with copies of the notice (1) upon request of the employee; (2) within 30 days of its availability; (3) at the time of the employee's hiring; and (4) whenever the employee is requesting time off for a qualifying reason.

The Department of Labor & Workforce is charged with administering the program and will promulgate regulations over the next few months.

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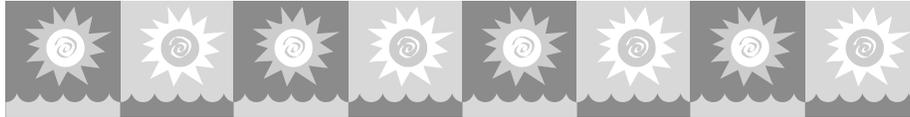
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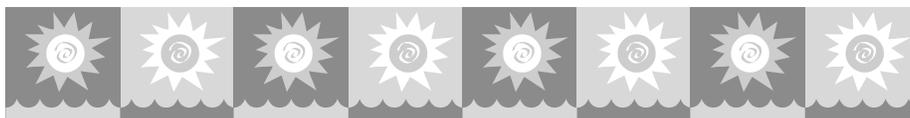
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WELLHOFER/WILINSKI SCHOLARSHIPS AWARDED

It was observed by a nineteenth century teacher that “a good education is another word for happiness.”

The Wellhofer/Wilinski Scholarship Foundation has been providing that “happiness” to deserving college bound students for over 63 years. The Foundation has received numerous expressions of appreciation and thanks for the scholarship grant and for the happiness it has brought to the recipient’s adult life.

“The Scholarship Foundation is pleased to announce that the 2008 scholarships have been awarded to Taylor Kurilew and Sean O’Conner” reported Scholarship Chairman Nick Balka. “We wish them every success during their college years.”



Taylor is the daughter of Walter Kurilew who owns KC Korner in South Plainfield. She graduated from South Plainfield High School with a perfect attendance record throughout all fourteen years of school. She was constantly on the scholastic honor roll and is a member of the National Honor Society.

Her stage credits include appearing as Julia Jordan in *Carousel*, Emma Carew in *Dr. Jekyll and Mr. Hyde*, Ms. Krumholtz in *How to Succeed in Business* and this past spring as Marian Paroo in *the Music Man*.

Taylor’s interest in music began, in her own words, “when at three years old, I was dressing up and singing to Aladdin with my older cousins.” She participated in orchestra and chorus all during high school and was selected for the New Jersey Women’s Region Choir and nominated to Governor’s School for vocal in 2006. She danced at Cultural Heritage Day for her high school. She was selected to sing with the Emeralds at Disney World in Orlando, Florida.

Taylor will attend Montclair State University where it is her dream to keep pursuing and studying music and theatre.



Sean O’Conner lived in Manalapan until seventh grade when his family moved to Monroe. From age thirteen on, Sean worked for his father Patrick at the family restaurant, the Cambridge Inn located in Spotswood.

Sean graduated from Monroe Township High School. Among his many accomplishments are a second place finish in the state level American Legion

Oratorical contest, Delegate to the YMCA Conference on National Affairs, Delegate to American Legion Boys State, recipient of bronze medal from Columbia University Scholastic Press Association, Delegate to Columbia University Journalism Exposition, business manager and editor of *The Falcon*, the school newspaper, obtaining the rank of Eagle scout and being selected for the National Honor Society. He completed honor courses in World Studies, American Studies and chemistry and advanced placement courses in government and politics, art history and literature II. During his high school career, he completed over 260 hours of voluntary community service. With this busy schedule, Sean still found time to compete on the varsity golf team.

Under the guidance of a teacher and in conjunction with the History Club, Sean was founder of the Living History project. The focus of this project is to record the memories of people who lived through historically significant events. To date, the project has recorded memories from Holocaust survivors, World War II veterans and people who lived through the Great Depression.

Sean will be attending Fordham University in the fall.

NJ Appeals Court Expands Scope of Liquor Liability

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argument, and ruled that liability can be imposed upon a bar under a negligent supervision principle. The court defined the applicable duty of care as: “the duty to protect (the driver) from the foreseeable risk of injury to himself and others from an automobile accident by insuring that (the driver) did not drive while in an intoxicated state”.

Thus, the Appellate Division reserved the grant of summary judgment to the bar, and in so doing recognized the existence of a legal duty on the part of liquor-serving establishments if they fail to take action with regard to customers who appear to be intoxicated, even if the establishment did not serve any drinks to such customers.

Unless this decision is reversed at the State Supreme Court level it will explode the scope of liability that can be imposed upon licensed alcohol beverage servers, in essence making them more akin to nannies than business purveyors of adult beverages. The ruling will also have a pocketbook impact on both the industry and its insurers, since juries will often target those they believe to be the “deep pocket” defendants in liquor liability cases.

TAM® TRAINING, PART OF THE SOLUTION

by Len Patrizi, Statewide Instructor, New Jersey

So you think you're certified because you took the TAM® course years ago? Well, think again. TAM® has gone through some changes-the program has been revamped and updated. Your employees' education, as it related to the public and the dispensing of beverage alcohol needs to be updated as well as their certification from TAM®.

Since 1984, I have been instructing TAM® seminars in New Jersey and have seen all types of licensed establishments make many changes in their business practices. These changes have helped them to project a better image to the public, town or city official and law enforcement. They also help produce more knowledgeable, alert employees. I am still amazed at the lack of knowledge many employers and employees exhibit about the liquor industry, its state and local laws and ABC laws. Many seem to think "If I know how to mix a drink, what else do I need to know?" This type of employee can be very costly to an owner. With training, this problem may be eliminated. Time after time, I hear remarks such as "I didn't know that" or "nobody ever told me that was wrong".

Since training is relatively inexpensive and since the training comes to you at your convenience (including flexible hours of the day and days of the week including weekends), what is keeping you from encouraging your employees to gain knowledge that may save them and the establishment time and money in the long run? Some insurance carriers offer discounts for TAM® trained employees and TAM® certified establishment. Check with your insurance carrier. Any employee involved in the functioning of your business, owners, managers, security, bar staff, wait staff,

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NOMINATIONS OPEN

Any eligible NJLBA member who wishes to run for an officer's position on the Executive Committee has until July 13, 2008, to submit his or her name to the State Headquarters. The election of officers will take place during the annual Convention scheduled for October 13-15, 2008.

All terms of office on the Executive Committee are for the period of one year and no officer may serve more than two successive terms in the same office.

Every county is entitled to elect a County Director to sit on the Board of Directors of the Association. The Constitution requires that the Board of Directors meet five times per year but Board Members are encouraged to attend the monthly meetings of the Executive Committee. The Board is the eyes and ears of the Association.

If you need additional information on eligibility or responsibilities of a particular office, please contact the office. Volunteers are needed to serve as Regional Directors and to serve on Association committees.

Members are encouraged to attend the monthly meetings of the Association which meetings are scheduled the second Wednesday of each month. The challenges facing the industry are addressed and solved by the collective input from members.

IN MEMORIAM

It is with great sadness that we report the recent passing of former officer and Atlantic County Director Joe Johnson, former owner of the Rod & Reel Tavern in Brigantine.

NJLBA offers condolences to his family.

Tips for bucking the ‘slump’

by Joy Gendusa

It’s known that the economy has taken a hit, so I won’t belabor that point. I’ve been saying that it is time to quit buying into the doom and gloom and get on the ball with promotion. The reason is simple. Those that continue to promote during slow economic times are the ones that will win out in the end because those businesses that continue to promote will pick up all customers and prospects from their competition that has cut their marketing.

If you want to buck this slump, you will have to buckle down, work harder, get smarter and continue to promote.

I’ve got 6 tips for you. Be wise. Use them.

- **Market smart** – there are too many of your competitors that are cutting back their marketing budgets now (not smart). Make sure you are targeting correctly and going after an audience that is likely to buy;
- **Look** for a company that offers terms. It’s less painful to shell out the money after you start seeing a return;
- **Up-sell** to every patron that comes in the door. Get your staff on board to beat the slump by up-selling and delivering the highest level of customer service. Be attentive to your customers needs and wants and cater to them — service them well and they will come back for more.
- **Cut out waste** — there’s an old saying from John Wanamaker that “I waste half my marketing budget; I just don’t know which half.” If you improve your tracking methods you can get more out of your marketing dollars. Figure out which

form of advertising is making you more money — the more precise you get, the higher the return on investment you will get. Then channel your marketing budget to the avenue that is getting you the most ROI.

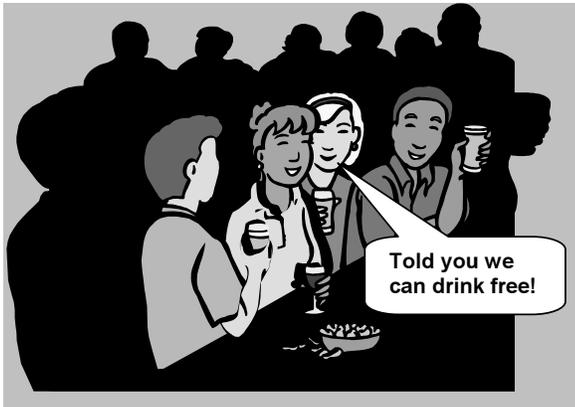
- **Get creative** — figure out a service or a product you can add, that you normally don’t offer, to help your customers out and create more business for yourself.
- **Don’t “agree”** — don’t ever buy into the fact that you can’t control your business’s outcome or its income. Lots of businesses lived through many a recession. Find out how – do your research. Emulate the winners – not the whiners.

Remember. You can make a difference in your business. And by doing that your business can make a difference in the perception of a “slump”. And if enough companies do this we can make a difference in the economy.

About Joy Gendusa:

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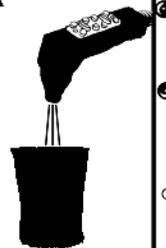
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RESTAURANTS AND SONGWRITERS: PLAYING THE SAME SONG

If you don't understand why you must pay to use music in your restaurant, you're not alone. The need for music licensing often comes as a surprise to new entrepreneurs, and sometimes is misunderstood by even veteran restaurateurs. Because we can buy a CD and play music as much as we want in our homes or cars, we sometimes like to think we can do the same in our businesses.

Songs – like computer software, books, poems, patented recipes, magazine articles, and other forms of intellectual property – belong to creators of the work until their copyright is transferred or expires. Although it is harder to touch with your finger, intellectual property is treated much like physical property under the law. If you own physical property, such as the building in which your restaurant is housed, you control the usage, rental and sale of that real estate. You also help determine the price of that property when it is sold.

The concept behind music licensing is as old as the U.S. Constitution, which gives Congress the power to grant patents and copyrights. Just as the McDonald's restaurant chain protects its brand names and "golden arches" trademark, songwriters defend their property from unauthorized use. Under U.S. Copyright Law, no other business can perform or play a copyrighted song publicly without the songwriter's permission. In essence, each songwriter is a vendor to restaurants, providing a specialized product – a unique musical work.

In many ways, a songwriter is a typical small business owner. As with restaurants and other businesses, a few songwriters are especially successful and highly celebrated in our news media – while the majority barely makes ends meet. The average songwriter earns less than \$5,000 per year from performance royalties as he struggles to become established in his chosen profession. Most songwriters are unknown to the people who use their music.

A songwriter, like other intellectual property owners, has the right to authorize the duplication of his work (such as CDs and tapes), distribution (in record stores, retail establishments, etc.)

and sale of his product. In reality, the performer (singer and/or musicians) rather than the composer of the musical work makes the bulk of the income from those uses. Most of the composer's income is derived from the public performance (live or recorded) of the music in business (radio stations, restaurants, bars, etc.) which use his product to create ambiance through the performance of that music.

It would be very difficult for the writer of a popular song to negotiate a price and collect royalties from every restaurant or bar wanting to use his work. Because it is so difficult for songwriters to authorize the use of their property for each and every business desiring their music, and conversely for the business owner to contact each and every songwriter whose music is used. Performing Rights Organizations (PROs) were established to handle that seemingly unmanageable process. With a single annual payment, businesses receive a blanket music license from BMI, which provides lawful access to an enormous catalog of music (more than 6.5 million songs from more than 300,000 copyright owners).

Because songwriters and restaurants have better things to do than negotiate thousands of contracts with each other. Performing Rights Organizations usually are the easiest, least expensive way of bringing those business people together for mutual benefit. BMI is a non-profit-making organization. All of the money it collects, after expenses, is paid out to songwriters and copyright owners. Currently, the payout amounts to about 86 cents of every dollar.

While some restaurant operators may avoid paying music fees for a while, it can be an expensive game. Restaurants and bars open to the public and highly visible. The cost of using music without permission can be high. Under the U.S. Copyright Law, each musical composition which has been performed without authorization entitles copyright owners to damages of between \$450 and \$30,000, plus legal fees.

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Legislative Affairs Report

NEW JERSEY LICENSED BEVERAGE ASSOCIATION
TRENTON, NEW JERSEY
by Barbara McConnell

Budget Deadline Looming

With only weeks away from the June 30 deadline, the Legislature is still working on a budget bill that will put a freeze on state spending, while at the same time pay for essential services and help to pay down New Jersey's state debt. This won't be an easy task.

With state spending increasing by more than 50 percent in the last five years, the Governor in his Budget Message believes that it is time to put the brakes on spending and restore order to the state's fiscal house. State Treasurer, David Rousseau, recently appeared before the Senate Budget and Appropriations Committee and presented several revised revenue estimates for fiscal years 2008 and 2009. Here are some highlights:

- 2008 revenue estimates will be \$533 million above the Governor's original estimates;
- Declining sales tax revenues and the weakening economy for fiscal 2009 have resulted in an estimated \$159 million decline, resulting in a \$375 million fund balance for fiscal years 2008 and 2009;
- To maintain its goal of a \$600 million fund balance, the Administration would need to find an additional \$225 million in savings. The Administration proposes to reach this goal through \$130 million in debt service savings; \$70 million in cuts; and \$25 million in lottery enhancements.

In areas where the funding has been restored as a result of budget negotiations is:

- Restored funding to municipalities with under 10,000 residents where there was a proposal to cut funding;
- The Department of Agriculture will remain a state agency and will not be eliminated;
- State parks will remain open; and
- Hospitals will receive more in Charity Care than was anticipated.

Taxing Bottles

The Assembly Environment and Solid Waste Committee received testimony in May on a "Bottle Bill" proposal that would require a 10 cent deposit on all plastic and glass bottles and aluminum cans less than 24 ounces; and a 20-cent deposit on beverage containers from 24 ounces to 3 liters. The proposal would include juice, sports drinks, and bottled waters, as well as soda, wine and beer containers.

Industry leaders, as well as municipal recycling programs opposed this measure because New Jersey already has a mandatory recycling program that impacts all the recyclables addressed in this legislation. In addition, New Jersey has a Clean Communities program that places a small tax on 15 litter generating products which also includes all the beverage containers addressed in the sponsor's "bottle bill". The testimony against this legislation was compelling, whereby the Chairman announced that the bill would not be voted on. It is pretty certain that New Jersey will continue to work hard to enhance recycling and litter clean-up through the state's existing program, and will not entertain a "bottle bill".

Off Track Wagering Bill

On Thursday, June 6, the Assembly Tourism and Gaming Committee heard legislation that revises various provisions within the current "Off-Track and Account Wagering Act."

The language pertaining to alcoholic beverage license is the same language that NJLBA helped to establish in a global bill pertaining to "special licenses".

The bill was released from Committee and is expected to move through both houses. New Jersey Sports and Exposition Authority opposed the provision that removes sole authority from them in establishing these facilities. The bill allows for the establishment of 15 such facilities. Under current law, only two facilities have been licensed. Proponents of this legislation believe it will help to facilitate the establishment of the 13 other facilities.

Supermarkets Win Round One on Plenary Licenses for Wine and Beer

On June 9, 2008, the Senate Economic Growth Committee heard legislation sponsored by the Chairman of the Committee, Senator Raymond Lesniak, which would increase the two-license limitation for a broad "C" license, allowing grocery stores, big chains and box stores to sell wine and beer.

A very controversial bill that evokes strong feelings on both sides - those for and against - were poised to do battle before the committee on this legislation. On one side, those strongly opposed to the legislation which included bars, taverns, package stores and the organizations and lobbyists representing them; and on the other, the supermarkets, convenience stores, store workers, and consumers wearing tee shirts that read, "One Stop Shopping", were signing up to

testify.

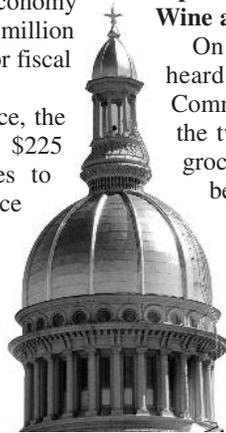
However, in a surprise move, Chairman Lesniak opened the committee meeting by calling up S-1608 and stated that New Jersey's current alcoholic beverage laws were archaic and should be changed to allow grocery stores and chains to have more than two plenary licenses. With that statement, he immediately asked for a motion to "release the bill without reference", leaving the opponents and their lobbyists stunned. Within minutes the bill was moved and seconded and released from committee by a vote of 3 - 2.

The bill will now go to the full Senate for a vote where it appears to be gaining support and momentum. NJLBA strongly opposes this measure and needs your support in calling your Senators, asking that they vote "no" on S-1608.

Other Legislative Issues Relating to Alcoholic Beverages

On Monday, June 5, the Assembly Law and Public Safety Committee heard and released A-2440 - legislation that would permit a qualified trustee to hold interest in alcoholic beverage license for a qualified beneficiary under age 18. NJLBA was "neutral" on this bill.

Also, A-2896 - Cryan - was released from committee. This bill would prohibit a municipality from imposing minimum bid for issuance of hotel liquor license in certain cases.



Behind the Bar

by David T. Kratt

AND THE SURVEY SAYS...!



My question was, "What kind of service does it take for you to leave a bigger tip than you would normally?"

Not a single person wanted to see a bartender put on a show behind the bar. When asked why not, responses ranged from thinking these bartenders don't know when someone wants to be left alone to seeing these bartenders as the overly-enthusiastic game show contestant who jumps up and down and screams a lot.

It's just too much.

So, the number one answer for cash and prizes is attentiveness, timely service and friendliness; and not "the big show."

Here are a few responses:

"Sometimes it's like there's a non-person working behind the bar. I tip better when I don't think that way."

When it's slow, prop your leg up within talking distance from your customers; not at the other end of the bar. When it's busy, look for times when you can exchange a few words. Chat while a customer is pulling money out of his wallet. During a break in

the action, ask the customer sitting by your service station, "How are you doing tonight?"

"I tip better when I don't have to get a bartender's attention every time I want something."

Instead of waiting for a customer to ask you for something, you ask, "How are we doing at this corner of the bar?" or "Can I refill your pop?"

"One time I tipped \$3.75 tip on a \$6.25 bill. If the bartender didn't say, '\$6.25, please,' and just took my ten-dollar bill, I probably would have tipped only seventy-five cents, maybe \$1.75, at best. But, since it was going to be my last drink and he was on top of it every time I came up to the bar for drinks, I shouted, 'Keep it!' before he got more than five steps away."

Always say the amount owed for the cocktail order along with *please* and then say the denomination they paid with. This triggers a customer into thinking about the tip and gives them time to think while you're getting their change.

"Her tip got bigger when she handed us our bill and said, 'Good seeing you guys again!'"

Silence is not the best parting gift. At least say, "Thank you. You have a good night."

"I tip really well when the bartenders at my bar make my drinks strong or buy my drinks."

Go ahead and spin that tip wheel of fortune and see where it stops!

Cutting deals and giving drinks away to make better tips? That's not playing the game right. It's not yours to give away like that. And it's not being honest. But if that's the way you choose to play the game then don't be too surprised when your wheel of fortune one day stops on the "You're fired!" slot and your consolation prize is that no bar will hire you after that.

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- June 25, 2008** Wellhofer/Wilinski
 Scholarship Picnic
 Oak Tree Lodge,
 Wall Township

- October 13-15, 2008** 76th Alcohol Beverage
 Retailers' Convention,
 Atlantic City

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