TYL In Focus: Holiday Law

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At the Firm for the Holidays: These Helpful Hints Will Help You Celebrate While You Work

By The Rodent

If you’re a new lawyer, you should know that this Christmas will be different from the ones you enjoyed before you started walking around with a bar card in your wallet. While partners at the firm are running off to vacation at some winter wonderland even though there is work to do, it’s not hard to figure out who will be left behind trying to meet those year-end deadlines. That will be you.

This scenario has created some of the most memorable tales of associate Christmases past. One commonly shared memory is the experience of having to work late, missing a flight and ending up spending Christmas Eve on a cold airport floor.

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Another memorable seasonal story is the one of the associate who tried to deliver documents to a partner’s vacation home during a blizzard. His car skidded off the road, and he spent at least a couple of the 12 days of Christmas trapped in a snow bank. Adding insult to injury, lawyers in these situations can usually only bill clients for the time they spend in the snow bank, as clients tend to balk at paying for time spent in a hospital being treated for frostbite.

Such experiences teach attorneys the true meaning of a law firm Christmas. They also make lawyers appreciate the relative comfort and safety of spending the holidays at the office. It’s better simply to make plans to be at the firm rather than make plans you will never be able to keep.

But don’t despair! Instead, do what you can to make the best of the situation. Here are some helpful holiday hints and thoughts to cheer you up:

• If you drive to work, traffic on Christmas morning is certain to be far lighter than usual. Give yourself a special holiday treat by sleeping an extra 10 minutes before going to the office.
• The firm computer is likely to have a faster Internet connection than your home computer. This will reduce the time it takes to send electronic Christmas cards to all the people who are so important to you.
• Buy yourself a present on the way to the office (7-Eleven is open 24 hours, even on Christmas) and unwrap it at your desk while waiting for documents to be proofread.
• Bring a cassette tape of Christmas carols and play them on your dictaphone.
• In lieu of going to church with loved ones, gather with other associates for services in the senior partner’s office.
• Come to the office dressed as your favorite biblical character.
• Use a fire extinguisher to make your office part of a white Christmas.
• Call home while the family is gathered around the fire opening presents, and listen to them on your speakerphone while you do your work.
• Don’t forget to think of the less fortunate on this special day. Specifically, remember that while you may not yet be a partner, there are those who rank even lower than you on the law firm totem pole. Take advantage of your senior position and keep from getting lonely by making a first-year associate and a paralegal or two come to the office and share in the firm festivities.

If these steps fail to make your holiday a joyous occasion, it’s probably because being at the firm has caused your post-Christmas depression to kick in early this year. The good news is that you might also get over it earlier than usual and actually feel like celebrating on New Year’s Eve.

That is, of course, assuming you don’t have to work that night.

Merry Christmas and Happy New Fiscal Year!

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New Approaches to Holiday Marketing

By David A. Barrett and Mike O'Horo

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About this time each year, law industry publications are rife with all kinds of advice about “holiday marketing,” and the advice is both well worn and easy to summarize: Give gifts that show you appreciate the person receiving the gift. Give gifts that are thoughtful. Make a good impression with your gift. Leave the law firm logo off the gift. Personalize the gift. Be classy about your gift giving. Good advice all.

However, today’s legal environment requires more substantial analysis and strategy, a “Holiday Marketing 2.0,” if you will, for three important reasons:

1. Legal marketing and legal business development are getting more ethical scrutiny than ever before. State bar overseers are paying new attention to nonlawyer lead generation services and the entire lawyer client referral process.

2. The market for legal services is more competitive than ever. In the past, simply showing up and sending a holiday gift was adequate “holiday marketing.” Sadly, the sellers’ market for legal services—with 100 lawyers for every 150 cases—is over. Lawyers today need to shift from a product-centric focus to a client-centric focus, and do it well, in order to win business.

3. Today’s technology and the rise of online networking change the nature of “holiday marketing,” which is inherently social. Lawyers not only need to own a Twitter account, but they need a clear understanding of how online and social media marketing work together with their overall business development plan before being able to effectively leverage these technologies around holiday relationship-building opportunities.

Holiday Gifts and the Rules of Professional Conduct

As bar overseers increasingly take a closer look at marketing activities such as pay-per-click and the nonlawyer lead generation business, the rules of professional conduct in a growing number of jurisdictions are expanding to specifically address gifts from lawyers not only to clients but to potential referral sources as well.
Greater Philadelphia ethics attorney Micah Buchdahl notes that “for ‘referral sources’ you need to make sure not to be providing something of value that can be misconstrued” (as prohibited legal fee sharing or compensation for legal referrals—past, present or future).

The Louisiana Bar Association echoes this sentiment in an ethics opinion that notes “prospective recipients of proposed gifts from lawyers should not be encouraged or allowed to conclude easily but mistakenly that, in exchange for or as a result of the gift(s), the recipients are expected to try and solicit prospective new clients for the lawyer.” Even if the recipient of a gift is not a “referral source” but rather a former client, the gift should not encourage the former client to solicit new business for a lawyer as a type of compensation.

Gifts given by lawyers to clients during the holidays are not prohibited; however, lawyers need to be cautious about the advice they choose to follow and the cost of the gifts they provide. Blog posts found online by private ethics counsel in Florida seem to focus on the cost of the gift in relationship to good taste and whether the recipient “put thousands of dollars in your pocket,” but in contrast the Louisiana Bar Association suggest that “it would be best to keep the size/value of the gift at a very reasonable—perhaps even nominal or de minimis—level” so that it appears clearly to everyone that the gift is not some form of payment.

A gift should be a token expression of the lawyer’s appreciation, gratitude, or friendship only—with the emphasis on “token” (adj.: done as a symbolic gesture). A “modest” gift in relation to the comfortable lifestyle of a successful lawyer may be pushing the ethical boundaries. Lawyer bloggers in Florida may love to give and get fancy packages full of fresh lobsters from Maine, but a lawyer in Louisiana was disciplined for maintaining a “ham list”—a list of clients to whom the lawyer sent a ham at Christmas time; many of these clients were only on the list because of the suggestion that those who referred new business would get the gift. Ham-handed holiday marketing indeed.

Holiday Marketing vs. Strategic December Business Development

Unfortunately, too many of the traditional “holiday marketing” articles on giving gifts also proffer suggestions about how to get business during the social season. Here’s our simple guideline: Don’t do it. Don’t attempt to get new business during the holiday season at all.

Why? Think about yourself and your personal appetite for someone marketing or selling to you during the hectic holiday season. Think about the chaotic composition of most successful lawyers’ final three weeks of the year. Activities such as completing work in progress before an end-of-year deadline, taking care of any end-of-year issues with your own practice, social obligations to clients, social obligations to family and friends, and travel for all the above.

How different do you think are the comparable lists for those with whom you do business, or wish to? How receptive are they likely to be to your marketing or sales overtures? Setting aside concrete business obligations, market contact during the period from Thanksgiving to New Year’s Eve is predominantly social. And most people prefer it that way.
This doesn’t mean that you ignore business development then, only that you apply a different perspective and align your expectations to reality, and reality is that, barring someone you know well dealing with a sudden emergency, you’re extremely unlikely to get actual new business in December. December is for teeing up calls and meetings for January.

Here’s how to make December a reliable new business accelerator for January without creating discomfort for anyone:

1. Begin converting social relationships into business relationships without jeopardizing the friendship. Your instincts tell you that anything resembling a pitch will put a friendship at risk, and it should. The root word in “relationship” is “relate.” Your social relationship is based on relating to each other’s lives. Similarly, a business relationship is based on relating to someone’s business life. As you learned when you were very young, to be interesting, be interested.

2. Associate yourself with business issues—and terminology—that your potential referral sources actually care about. Your sources want to help you, but you make it hard by using language that disconnects you from their contacts’ conversations. Relevance is key to any conversation and relationship. Whether the context is social or business, if what you discuss isn’t relevant to people, they will tune you out. Commit now to raising your awareness of what’s happening in the business world generally and in your prospects’ industries particularly. Your referral sources will rarely hear their contacts using your practice group terminology (M&A, employment, litigation, etc.), and when they do, it is usually too late in the decision cycle to introduce a stranger. What they will hear is their contacts discussing business situations, problems, challenges, and opportunities. If they associate you with these topics, when they hear them you will come to mind and trigger their intent to introduce you.

3. Begin conversations that can’t (or shouldn’t) be completed in a social setting. This makes it natural to suggest continuing the discussion in a January lunch, meeting, or phone call. No matter how fascinating your topic, nobody wants to hear everything you know in a social setting. As the public-speaking axiom goes, “it is better to leave them begging for more than begging for mercy.” Tee up an interesting topic, stay with it just long enough for the other person to demonstrate real interest, then graciously suggest that you don’t want to monopolize their attention and ask if it makes sense to pick up the phone later.

At this juncture you are forgiven if you feel frustrated at reading so much about what you should do and so little about how. “The devil is in the detail,” and the detail is the “how.” To learn how to do what we urge, you have to invest a little time and money on business development training, and the holiday season is a great time to do that. New approaches leverage technology to deliver on-demand, just-in-time training to give lawyers the discrete business development skills they need for holiday events to effectively and confidently address immediate challenges in turning the holiday season into a reliable client accelerator for the New Year.

**Leveraging Online and Social Media**

Obviously, online technologies are not limited to business development training, and the huge growth in both lawyer and potential client use of online and social media should not be ignored when planning and participating in holiday marketing or holiday business development.

Lawyers may integrate online networking into holiday marketing and business development in two ways:
1. Use online networking as a research tool. Not only are business contacts connecting on LinkedIn after an event, savvy networkers use information online to learn more about their networking targets before the event in order to be more effective networkers and relationship builders.

2. Use online networking to understand what online and social media marketing should be doing in the first place, so that holiday marketing, networking, and business development activity can work seamlessly with this process rather than as another disconnected or, worse, another random marketing activity.

**Pre-event research.** Generally speaking, it isn’t hard to find event attendees, and many businesses and professionals of all types are publishing their own content on blogs, on Twitter, and to their LinkedIn and professional profiles. Learning about what your networking targets care about enough to publish will better enable you to build relationships with them. Some content is only available to connections, online networking group members, or second- and third-degree connections, and this is yet another instance where having a large social network provides benefits to better enable you to find people you don’t know yet, but who may be a marketing or networking target for you.

Attention to various social media platforms when doing this kind of pre-event work is critical. Finding someone on Twitter and following them is generally acceptable. LinkedIn helps you find professionals of all types, and if you are interested in building new referral relationships with other lawyers, the robust mix of content in a lawyers-only social network such as wireLawyer is the place you want to be. Stalking people’s personal profiles on Facebook should be avoided.

**Understanding social media marketing.** In addition to pre-event research, having a clear understanding of how social media marketing is supposed to work is critical to using holiday events and holiday marketing in an integrated and seamless way. We meet countless lawyers of all ages and in every practice area who say things like, “I’m on LinkedIn and I never got a client out of it.” Unfortunately, in today’s competitive legal services market, simply having a social media profile isn’t enough to win new business.

Generally speaking, legal social marketing needs to break down each practice area like an individual business, and the marketing targets (for a consumer-based practice) and networking targets (for a referral-based practice) should be identified and profiled for each practice area. Once identified and profiled, the creation of social networks or groups of these marketing and networking targets is the work of social marketing. These groups may be Twitter followers, Facebook fans, wireLawyer contacts, LinkedIn connections, blog subscribers, or groups within social networks such as Employment Law Professionals on LinkedIn, or a Twitter Twibe of personal injury lawyers. Holiday events and communications may be an opportunity to grow these social networks, and once grown to a healthy population, these groups can in turn support real-life events, holiday and otherwise.

Sharing high-quality, high-demand content that demonstrates your expertise to these social networks is much of the remainder of the work of social marketing, along with developing a law firm “client-funnel” for each individual practice area that steers online connections into your traditional real-world networking and business-development activities. As you increase the size of the social networks of your marketing and networking targets, and as you provide them high-quality and high-interest con-
tent that solves actual problems of theirs, your Twitter followers, LinkedIn connections, or wireLawyer contacts should be turned into networking phone calls, which turn into networking coffee meetings, which turn into lunch meetings, which turn into professional relationships.

Unfortunately, many lawyers fail to understand “what it means” to make social or online media connections, and many keep these contacts “limited” to “only people (they) would personally recommend.” I have yet to see the benefit of that kind of online media strategy. By adopting an open network-style connection strategy with online media, new connections and contacts initiated during the holidays can be blended into a process that is understood before the holiday season begins.

**Holiday Marketing 2.0**

Holiday marketing should not be done as it has been done year after year in the past. Lawyers and law firms need to develop business in an entirely new legal services environment, and this requires a “Holiday Marketing 2.0” or “smart marketing” approach. This new style involves skills that help make rain even with heavy competition, leverage new social and online technologies, and work carefully within trends in the rules of professional conduct.

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**Holiday Party Liability: Cases on Social Host Liability, Office Party Suits, and More**

By Ursula Furi-Perry

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Most companies love to throw a good party for their employees—whether it’s to increase camaraderie, convey a sense of appreciation, take stock in the employer’s progress through the year, or just get together to celebrate something good.
As one author writes:

[W]hile there are many good reasons to throw a holiday party for your customers and employees, surprising antics can occur as the office team relaxes at the event. Take, for instance, the corporate executive who mooned his staff, much to their dismay. No buts about it—that just wasn’t a good act. We caution you to make sure your happy events don’t become a breeding ground for two specific legal liabilities: sexual harassment and DUI-related accidents.


The author goes on to note that many sexual harassment suits are the result of advances at office parties between coworkers, and cites to a Lawyers.com survey sponsored by LexisNexis, according to which “29 percent of adults have observed or experienced sexual advances at office parties between people who work together.” Id.

To help avoid sexual harassment lawsuits, the author provides the following tips:

Beware of employees engaged in inappropriate touching. A single incident can be an actionable event under Title VII of the Civil Rights Act of 1964 if it’s serious enough.

Watch the behavior between your employees and any clients or customers. If a client makes an inappropriate advance toward an employee, your company may be liable, particularly if the employee feels pressured to make the client "comfortable" or "happy" and acquiesces to his demands.

You need to watch both men and women. In [one] case, a male employee filed a sexual harassment claim in federal court after his female supervisor harassed him at two holiday parties. At the first party, the supervisor attempted to kiss the employee under the mistletoe and force him to dance with her. She commented, “[I]f it was this difficult to get you on the dance floor, how difficult would it be for me to take you home?” At the second party, she followed him around, making suggestive faces, the entire evening.

How spouses and guests of your employees are treated is also your concern, albeit not necessarily from a legal standpoint. Even though an employee’s spouse can’t sue the company for harassment, the fact that the incident occurred at an office party can cause problems in the workplace from friction between the employees involved. Id.

Then there is the issue of liability for the acts of employees. Even though a party host may not be liable for the behavior of a guest, as an employer, you may be liable for the behavior of an employee who is acting within the scope of his employment, the author warns.
Whether attending a company holiday party is “within the scope of employment” varies on a case-by-case basis. If attendance is mandatory, a court will probably find employees to be acting within the scope of their employment. If attendance isn’t technically mandatory but there’s a strong expectation that all employees will or should attend, a court may infer that attendance was expected and thus find employees to be acting within the scope of their employment. *Id.*

In addition, the courts might consider whether the party was held at the employer’s workplace premises, and whether it was during work hours. If the injuries result from the actions of an inebriated employee, the court will also consider whether drinking was a part of the employee’s work duties. “If a court determines that attendance at the holiday party was within the scope of an employee’s employment, then it will most likely hold the employer vicariously liable for the actions of an inebriated employee.” *Id.*

The courts might also consider whether the party was sponsored by the employer, and whether the employer had influence over the employee’s actions. The courts might consider whether the employer encouraged employees to attend, or whether the employer had any responsibility for the injuries that occurred at the party. In some cases, the courts will find that the employer was liable for the actions of an inebriated employee, even if the employee’s actions were not within the scope of their employment. *Id.*, citing to *Sayles v. Ford Motor Co.*

Some courts have declined to hold employers responsible in these situations. In one Wisconsin case, a manager and coworker attended a company-sponsored holiday party. The coworker became intoxicated, and the bartender asked him if he had a ride home. Overhearing the conversation, the manager agreed to drive him home, but he left the party without the coworker. The coworker attempted to drive home, crossed into oncoming traffic, and was killed along with the driver of another vehicle. That driver’s estate sued the manager and the company.

The lower courts found that the manager had volunteered to take the intoxicated coworker home, and that a jury could reasonably infer that the manager was negligent in leaving the coworker at the party. In a separate decision, the appeals court held that the employer could be held responsible if the manager acted within the scope of his duties when he agreed to drive the coworker home.

The Wisconsin Supreme Court disagreed, however, refusing to hold the manager liable based on public policy factors. “The court found that the injuries sustained in the case were completely out of proportion to any wrongdoing by [the manager]” explains an article detailing the case. “It also concluded that to allow him to be potentially liable for damages under the circumstances of the case would allow the law to enter a field that has no sensible or just stopping point.” Michael J. Modi, *Broken Promises: Wisconsin Supreme Court Decides Holiday Party Case*, in 11 WISCONSIN EMPLOYMENT LAW LETTER 1 (2002).
There is a special problem with alcohol at company parties: the problem of underage employees or guests. "They're called 'adult' beverages for a good reason," notes one author. "Is your company planning to have a holiday party for employees and their guests? If so, you’d better know the age of all in attendance and take precautions to ensure that no one underage drinks alcoholic beverages." Gayla McSwain, The Holiday Party—Beware, in 16 SOUTH CAROLINA EMPLOYMENT LAW LETTER 1 (2007).

Some states will hold the employer liable for injuries suffered as a result of underage drinking. As an example, the aforementioned author cites to two South Carolina cases: the first one involved a holiday cookout for business acquaintances at the home of an employee, at which a 19-year-old was allowed to drink alcohol, then was later killed in a single-car accident while driving home; the second involved another 19-year-old guest at a work-related holiday party who was served alcohol by the bartender and was killed in a two-car accident while driving home.

The article offers some helpful suggestions to control the serving of alcoholic beverages during company-sponsored parties:

- Limit the number of drinks served by requiring tickets or some other means to limit access.
- Before the function, encourage the use of designated drivers. Serve plenty of food.
- Think about limiting the length of the function because the longer people are at a party, the greater the chance for them to drink more.
- Always consider having alternative transportation available so that each person who attends has a safe way home at the end of the function. Id.

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Alcoholic Beverage Law and Hospitality Law: Merry Times and Safe Travels

By Reshard J. Alexander

Reshard J. Alexander, Esq., MBA, LL.M., is the managing member of RJ Alexander Law PLLC (rjalexanderlaw.com), in Houston, Texas. He has represented various clients in the alcoholic beverage industry as both general counsel and in litigation.
“Welcome to the Texas’ Spurs bar, home of the all-you-can-eat crawfish tails and the 24-ounce margarita, where the women and men are hot and the drinks are cold. Tonight’s specials are two-for-one boneless buffalo wings, half-price pitchers of the local Armadillo craft beer, $8.95 for a bucket of beer, $5 for Jameson drinks, $8 for doubles, and white wines available by the glass!”

Whether you are an owner of a nightclub, bar, or restaurant or are simply throwing a party for a few friends at your home (or your law office) during the holiday season, this time of the year is a very exciting period for entertaining patrons and house guests. Of course, a great deal of responsibility comes with the service of alcohol to persons in your business establishment and sometimes even in your home. Irresponsible serving of alcohol can lead to loss of community reputation, hikes in insurance coverage, lawsuits, catastrophic multiple injuries, and in some cases even death.

**Dram Shop Liability**

A dram shop generally refers to any bar, nightclub, tavern, brewpub, or business where alcoholic beverages are sold. The word “dram” in dram shop refers to a small amount of liquid and is a word with roots in Greco-Roman days. In today’s society, “dram shop acts” create a cause of action that allows an injured party to successfully sue a provider of alcoholic beverages if, at the time the injury occurred, it was apparent to the alcohol provider that the person receiving the alcoholic beverage was already intoxicated to the point that he/she presented a clear danger to him/herself and others. The intoxicated person must also have a proximate cause (legally recognizable injury) of the suffered damages.

In some states the dram shop act contains a safe-harbor provision that allows alcoholic beverage providers an escape clause from liability. In Texas, for example, the safe-harbor provision requires the provider to attend (and make employees attend) an alcoholic beverage seller/server training course licensed by the Texas Alcoholic Beverage Commission (TABC). This attendance of the TABC seller/server course grants the provider a shield from the employee’s actions as long as the employer has not directly or indirectly encouraged the employee to violate the law regarding serving alcohol to patrons. Criminal and civil liabilities lie at the footsteps of the establishment that does not respect the law. These liabilities can range from liquor license revocation, medical expenses for the injured, harsh fines from the state alcoholic beverage commission, and even jail time.

**Serving Alcohol at Home**

For the most part, social hosts (those serving alcohol in the privacy of their own home) are not burdened with the common law duty of curtailing alcoholic beverage service to guests in their homes. Courts generally recognize that such hosts do not have the requisite skill and knowledge to determine when their guests have drunk too much alcohol. However, courts have recognized that social hosts are responsible for not allowing minors (persons under the age of 21) to consume alcohol and have held social hosts liable for damages inflicted by minors who obtained alcohol this way.
Serving Alcohol at a Place of Business
There are several problems that may arise when serving alcohol in your place of business:

Alcohol content. You may not be fully aware of the varying degrees of alcohol content in the beverages you are serving: the standard alcohol content for a 12-ounce serving of craft beer, five-ounce glass of wine, and 1.5-ounce shot of distilled spirits are all the same, meaning drinking any of the above produces the same results as the others. Whether you are a newly minted bar owner or a seasoned veteran, it is important to understand that you are expected to operate within the parameters of your state’s alcoholic beverage code at all times. Your state’s alcoholic beverage commission will not show you sympathy if you over-serve a patron.

Alcohol flavors and ingredients. Alcoholic beverages have become more complex in taste owing to multiple ingredients—ingredients to which your guests may have undisclosed allergies. And accidents can occur when bartenders try to experiment with cocktails outside their acumen. Did you hear about the young lady who had her stomach removed after drinking an ingredient that is supposed to make cocktails smoke? Depending on the jurisdiction, you may be held liable for any injuries suffered by the guests.

Security. People become clumsier and their motor skills fall off a cliff as they drink more. Their hand-eye coordination—along with their inhibitions—plummet after they have tossed back a few shots of the local distilled spirits. So . . . that door that is barely hanging on by the top hinge, that loose floorboard that you have been meaning to fix, and those rickety stairs that your foot might put a hole through any day now need to be fixed as soon as possible to prevent a possible injury to a guest.

Avoiding Potential Lawsuits and Injuries
So what can you do to avoid the potential problems caused when serving alcohol to your guests—whether at home or at a place of business? Below are seven tips to consider:

1. Get a professional involved. Hire a food and beverage company to cater the event. Oftentimes, the catering company is required by city and/or county laws to obtain permits to serve alcohol. These permits generally ensure that the caterers operate within the realm of reasonable service to guests and deny alcohol service to guests who have requested too many drinks in too short a time period or are exhibiting signs of intoxication. Additionally, because the catering service is a business, the owners or servers of the business are likely to feel less pressure in turning away an intoxicated guest from the bar.

2. Create a designated-driver program. If you are inviting family members or co-workers to your event, make sure that everyone has come to the party with someone who has abstained from drinking.

3. Keep track of the alcohol. Maintain a record of alcohol sold at each daily event and what vendor you bought your alcoholic beverages from. Nothing is worse than having agents from the state alcoholic beverage commission raid your bar in the middle of an event and shut it down owing to outstanding state taxes or poor record keeping.

4. Set up a coat check/key check. Have all guests deposit their keys with you at the door of the event. You can place them in a safe deposit box or a secure area that only you can enter. Give them a ticket to redeem their keys or a password that only they would know. This will prevent people from leaving the party intoxicated without your knowledge—and may prevent a potential lawsuit.
5. **Maintain level headedness.** You are the conductor of the party, not the life of it. Don’t drink at your party. Bartenders do not drink on the job; if you are hosting a party, neither should you. The point of throwing an event is to entertain your guests and ensure that they have as much fun as possible. Not to get wasted.

6. **Put water out in plain sight.** Have a ton of water available for people to moderate their alcohol consumption. People in nightclubs are often concerned with their image. They may feel that they are not being cool in front of their friends if they drink water. Offer it to people who look like they may be experiencing signs of severe inebriation. You will be amazed at how often someone will gladly drink some water to help mellow out the alcohol in their system if you simply ask them, “would you like some water?”

7. **Remember: Kids and alcohol do not mix.** Make sure the kids are nowhere near the booze. Generally speaking, courts have zero tolerance for those under the age of 21 consuming alcohol and then driving a motor vehicle. If Little Timmy decides to take a spin in Dad’s truck and rear-ends someone after stealing away a few bottles of Mom’s wine coolers, he may not be the only one in trouble. The police will want to know where the alcohol involved in the accident was purchased and consumed.

**Last Call**

“This is the last call for alcohol! At two o’clock the bar closes; you have ten minutes to get to the bar and buy a drink. I repeat, this is the last call for alcohol!”

This scene is a teachable moment for business owners as well as partygoers. If you have hired a professional vendor to serve drinks, you should always ensure that your bar staff is not simply attempting to sell as much alcohol as the crowd will purchase when they rush to the bar for that last drink because there are likely a number of intoxicated people hoping to buy a few more drinks before the event/bar/club closes. When police arrest someone who is suspected of driving while intoxicated, the person often claims that they had only one or two beers. If they drink a ton of alcohol right before leaving the event and get into an accident that injures someone, it is highly likely that the club owners will find themselves involved in the lawsuit as well.

I hate to sound like a worry wart during one of the most festive times of the year. I’m sure we all are looking for reasons to celebrate with family and friends. Just make sure that you think about the safety of your guests and make sure everyone gets home in one piece from your holiday events so that you can party hard next year as well.

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**Getting Bailed Out During the Holidays**

*By Eddie Cortés*
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This article originally appeared in GPSolo magazine, one of the many benefits of membership in the ABA Solo, Small Firm and General Practice Division. Learn how the Division can help you advance in your career here.

Editor’s Note: While this hypothetical situation pertains to a child (son), we can imagine a similar scenario involving a friend.

It’s 3:00 AM on New Year’s Day. You’re fast asleep all snug and warm in your bed. Suddenly, your phone rings. On the other end of the line, sounding like he’s inside of a tin can, is your loving son: the one you used to read to at night; the one under whose pillow you placed a dollar when he lost his first tooth; the one you taught to ride a bike. And what does this fine young man have to say to you after he’s woken you from your peaceful slumber? The last three words a parent ever wants to hear: “I’m in jail.” Although your first instinct is to tell him, “You got yourself into this, now get yourself out . . .” and then hang up the phone, at least your second instinct would be to ask yourself, “Now what?”

What to Say When You Get That Call

Our criminal justice system is one of the strongest connections to our Founding Fathers and the history of this nation, but very few people truly understand how it can affect them or, much less, how to maneuver through it once they have been caught up by the slow-spinning wheels of justice. Far too often people find themselves lamenting the fact that they are up a creek without a paddle instead of focusing on how to get out of that canoe. They want to tell their story to anyone who will listen, as if by some miracle a guard at the jail is going to say, “Oh, well, now that you’ve explained it that way, I see clearly that you did not commit this offense. Of course, you may leave! Here, let me get the door for you.” Which leads me to Rule Number One for those who find themselves behind bars: Keep your mouth shut! Do not discuss the facts of the case over the phone with your incarcerated loved one. Most conversations in a jail facility are recorded. Make sure your loved one understands this: No talk about apologies, regret, or recriminations—nothing that makes him sound guilty.

The next thing you need to worry about is your loved one’s stress level. Obviously, jail is not a nice place to be. But no one really understands the value of a day until they have spent 24 hours behind bars. Irrespective of the constant noise, lights, and of course that indelible smell, you must also consider that this individual has been separated from all forms of communication and identity. Most people nowadays can’t go more than 15 minutes without looking at their cell phone; imagine an entire weekend. This lack of communication leads to stress. What compounds the stress is the expectation of release.

Most jurisdictions take a significant amount of time to process inmates into their detention facility and an equal amount of time to process them out. A common misconception among lay people is the amount of time it takes to get their loved one out of custody. It could take hours or even days depend-
ing on the workload the guards have at the jail and whether or not it is a weekend—or worse, a holiday. So every time your loved one calls and gets news about his release, his expectations rise, only to be dashed by another passing hour or by an explanation that he has not had his medical screening yet and so cannot be moved to a different tank. This only serves to compound the stress, and it begins to build on itself. Therefore, one of the most important things you can do when loved ones are arrested is to have them take a deep breath and calm down. Assure them that you will be doing everything in your power to get them out as soon as possible. All they need to do is relax and get as much rest as possible.

**Arranging Bond**

Now the question is how do you bond your loved one out? The short answer is: Find a bail bondsman and pay the 10 percent fee; the bondsman will get your loved one out of jail. But this is a lawyer's magazine, so there are never any "short" answers. Article 14.06 of the Texas Code of Criminal Procedure says that a police officer must take a suspect before a magistrate within 48 hours of arrest. The Federal Code says "without necessary delay." Fed. R. Crim. P. 5 (a)(1)(A). Therefore, from the time of arrest, you can count on your loved one being in front of a judge within 24 to 48 hours. That judge, or magistrate, will inform the suspect of what he is being charged with, what his rights are, and what the bond amount will be. There are a number of factors that go into determining whether or not a suspect gets a bond and, if so, how much that bond will be.

The specific purpose of bond is to assure the defendant’s appearance at court. *Stack v. Boyle*, 342 U.S. 1 (1951). In essence, the accused is saying, “Judge, if you let me out of jail today, I promise to come back and answer for these charges. As a token of my sincerity, here is X amount of dollars that you can keep if I don’t show up to court.” However, there are many things a judge can look at when deciding how much that “X” should be. A judge may consider "the nature and circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender and the danger to the community." *U.S. v. Salerno*, 481 U.S. 739 (1987). The history and characteristics of an offender have a great deal more to do with a bond than what this excerpt may suggest.

**Factors Affecting Bond**

The history of an offender is going to involve virtually anything and everything he has ever been arrested for above a traffic ticket. It doesn’t matter if he was a juvenile or if it happened in another state. The judge can look at anything that may help in determining if this person is a danger to the community. A prior felony conviction will obviously have a serious impact on that decision. When examining the characteristics of a defendant, the judge will want to know if the accused has a job. If so, how long has he been at that job? Does he own a home or does he rent? Is he married? Does he have any children? What are his family ties? Where did he go to high school? What are his ties to the community? In other words, how much skin does this person have in the game and how much will he lose if he decides to run? The judge will weigh all these factors along with those previously mentioned to determine just how high the bond will be. Many jurisdictions have averages—amounts that are listed on “schedules” for specific crimes. These are guidelines for the judges to follow on certain types of offenses. Obviously, the more serious the crime, the higher the bond.
Some defendants, however, are not entitled to a bond. If the accused is already on probation or parole for another offense, he may not be entitled to a bond. Probation is community supervision in lieu of incarceration; if you follow the conditions of probation, you stay out of jail. Parole is early release from prison for good behavior; if you follow the conditions of parole, you don’t have to go back to prison. In both cases, committing a new offense is considered a “new law violation.” Anyone under these conditions may be given a bond on the new offense but may be held with “no bond” on the old offense. So even if the family goes to pay a bail bondsman on the new case, the person will not be released because of the probation “hold” or parole “blue warrant.” The family would just be wasting money. A lawyer could, however, approach the judge and ask for a bond on the old case for which the accused is on probation or parole. But then there is the dilemma of whether to spend the money on the lawyer or on the bond—a quandary I will address below in more detail.

If the person is already on bond for another case, that, too, could cause the same sort of chain reaction leading to a delay in release. When a judge sets a bond and allows a defendant to be released from jail, he has the authority to lay down certain conditions that must be followed if that person is to remain free while fighting his case. These are known as “conditions of release.” Defendants refer to them as being “on probation” even before they’ve been found guilty. Some common conditions of release include random drug testing, electronic monitoring, house arrest, and random visits from pretrial services officers. 18 U.S.C. §3142 (b)(c)(1)(A) (2006). If the charge is driving while intoxicated, an ignition interlock or in-home alcohol monitoring device should be expected. If it is a family violence or assault case, a magistrate’s order for emergency protection (also known as a protective order) frequently is put in place, which will temporarily restrict the accused’s ability to go within a certain distance of the complaining witness’s home or place of employment. Obviously, if the accused and the complaining witness are married and have children together, this can pose significant and unexpected difficulties.

Should any of these conditions be violated, the judge has the authority to revoke the bond and issue a new warrant for the defendant’s arrest, and in all likelihood will double the original bail amount. Bitter v. U.S., 389 U.S. 15 (1967). This means that the accused will lose the original bond and will have to go back to the bondsman to pay double what he paid in the first place.

Immigration status is another factor that may affect a person’s ability to get a bond. If a suspect is not a U.S. citizen, Immigration and Customs Enforcement (ICE) may very well place a “hold” on him until the case is adjudicated. In other words, even if the person is given a bond in the criminal case and the bond is paid, he still may not be released because of an “ICE hold.” This detainer may be placed on him at any stage prior to release. So just before someone is “ATW” (all the way out of jail), an ICE agent may interview him and decide to detain him. This includes legal permanent residents, persons in the United States with a valid visa, and persons with no status whatsoever.

**Contacting a Bail Bondsman or a Lawyer**

Assuming none of these issues apply to your beloved son, your very next step should be to call a bail bondsman. They shouldn’t be hard to find. They are as ubiquitous as pawn shops or gas stations. Check the Internet. Ask a trusted friend. As with any other purchase, do not be afraid to shop around. Whether it’s the holiday season or not, most bail bond offices are open 24 hours a day. On average they
charge about 10 percent of the total bond amount. In other words, if the bond is set at $5,000, then it’s going to cost you $500 to get Junior out of jail. That $500 is gone. You will never see it again. It is the fee the bondsman charges to put up the whole $5,000. In essence, he is vouching for your boy. The bondsman is saying to the court that he will guarantee the defendant’s presence at trial and if he does not show up, then the court can keep his money. Obviously, the more money that the bondsmen can get from the accused, the better. So depending on the factors listed above, they may require a co-signer or some other form of collateral to insure their investment. They are not just going to put their money at risk based solely on someone’s signature. If the court date comes and goes and the defendant is nowhere to be found, then the bondsman will turn to a second form of insurance: bounty hunters. In many ways they have much more freedom in tracking down fugitives than do law enforcement officials. Suffice to say you do not want to wind up cross-ways with a bounty hunter.

But herein lies a rub: Do you spend your money on a bondsman or a lawyer? Well, as with most things in the legal field, it depends. It depends on the charges and the nature of the offense. It depends on whose court you’re in or in what county. It depends on what resources you have at your disposal. Times are tough, but almost everyone has something of value if they look hard enough: cars, jewelry, land, maybe a 401K. Everyone always says they’ll do “anything” for their kids, but you don’t know the truth of it until it comes time to pay a lawyer or bail. The truth of the matter is a lawyer probably cannot get your son out of jail. His work won’t truly begin until the case goes to court. So my inclination is to say spend your money on a bondsman first. But what if Junior has a bunch of prior convictions? Maybe a felony on his record? What if there’s no chance he’ll be offered probation or deferred adjudication? If the only offer coming from the assistant district attorney is jail time, would he not be better off earning his credit now? What if it’s a drug case and you know he’s only going to get out and use again? These are all questions that have to be answered on a case-by-case basis. If any of these issues apply to your loved one, then perhaps you’re better off saving your money for a good lawyer.

On the other hand, if the bond is exorbitantly high, you may need to go ahead and acquire the services of a good lawyer who could possibly convince the judge to lower the bail. You’re not just paying a lawyer for his experience, his training, and his expertise. You’re also paying for his access. Someone with all these attributes will be much better at packaging all the factors mentioned above in such a way that will allow the judge to lower the bond without fear of reprisals or recriminations. Look, no one wants to be the judge who lowered the bond on someone who then went out, got drunk, and killed a family of four in an automobile accident. For judges who are elected, as they are here in Texas, that’s political suicide.

**Personal Recognizance Bond**

That is not to say that you cannot get released from jail based solely on your signature. In this case, a bondsman—or a lawyer—will have nothing to do with it. If the magistrate reviews all the factors above and finds that your son has no criminal record and fits all the necessary criteria that show he is neither a flight risk nor a danger to the community, the judge may very well release him on a personal recognizance bond. This is basically a signature bond where the accused signs a piece of paper promising to return to answer the charges against him. This usually happens after an interview with a pretrial services officer. However, if the county you’re in is not large enough to have such an office, the accused may review these factors in front of the magistrate himself and ask for a "PR" bond.
Getting Your Loved One Home
It may actually take a few hours to enter the judge’s order setting the bond or releasing the accused into the county’s computer system. Once the bond is paid, it may take several more hours to enter that information into the system as well. And once the guards can confirm the information in the system, it may take several more hours to get the inmate processed out. If all this is taking place during the holidays, you can add more time to this process given the fact that many jails may be working with skeleton crews. So actually getting Junior out of jail may take quite some time. But once he gets his property back and walks out that door, the best thing you can do for him is get him a good meal and a hot shower to wash that jail smell off of him.

Preparing for Court
So now you've got Junior home and his first court setting is in two weeks. How do you find a good lawyer? Wait a couple days. Chances are you will get bombarded with direct mail solicitations. You can be sure all of Junior’s information is going on a database somewhere, and you can be sure that some enterprising company has agreed to do mass mailings for lawyers based on the information on these lists. You may choose not to go that route, in which case you can look to the usual sources: the Yellow Pages (anyone still use those?), the Internet, Martindale-Hubbell, Lawyers.com, etc. However, local bar associations as well as the state bar may have marketplaces where you can look and ask questions.

If language or cultural issues exist, there are particular bar associations that can deal with these types of client characteristics. For example, a majority of the Mexican American Bar Association of Houston’s membership is composed of Spanish-speaking attorneys in virtually every area of the law, including many judges and justices of the higher courts. Maneuvering the maze of the judicial system is difficult enough for a fairly educated English speaker. Imagine how much more difficult it can be if English is your second language. Effective communication between lawyer and client is essential to a proper defense.

However, the most traditional method of finding an attorney is simply to ask a trusted friend or associate. Perhaps you know a divorce lawyer or the lawyer who probated your grandfather’s will. Although they specialize in a different area of the law, these lawyers are bound to know someone who can help with a criminal case. Perhaps a friend at work had an uncle or a cousin who ran into a little problem a couple of years ago. Whatever path you choose, there are two questions you should ask any lawyer you consult with: (1) About how much is it going to cost if the case goes to trial? and (2) When was the last time you tried a case in front of a jury?

The first question is going to help you avoid the type of lawyer who is going to take your case for $250. Maybe he advertises “felonies as low as $500.” Remember the old adage, “You get what you pay for.” Sometimes in these cases, the lawyer continually resets the case, eventually asking for more money or charging per setting. Meanwhile, the case is getting older and older on the judge’s docket. Judges don’t like old cases. Eventually the judge will ask if the lawyer intends to “fish, or cut bait?” Suddenly the client is facing the prospect of going to trial with a lawyer who is demanding an unexpected trial fee—or pleading “guilty” and accepting the state’s plea bargain. Often clients choose the latter because
they cannot afford the former. Any decent lawyer with a significant amount of experience should be able to give you a ballpark figure of what you can expect to pay if the case goes to trial. If he can’t, look very closely at the contract and remember: No one can force a defendant to plead guilty. No one.

The second question will weed out those lawyers who may have no intention of taking the case in front of a jury. You may find one who will cite his 30 years of experience, or another who may claim to be board certified. You might even hear one boast that he’s never lost a case. However, if you keep digging you may find that the guy who’s been doing this for 30 years hasn’t tried a case in 20, or maybe the guy who’s board certified hasn’t tried a case since he left the district attorney’s office (he’s put a lot of people in prison, but he hasn’t actually defended that many folks). Or my favorite, the guy who’s never lost a case. If you keep digging, you may find that he’s only tried five cases in his entire career.

The bottom line is don’t be afraid to ask questions. Be informed. Make sure your lawyer is a good match for you. There is a reason they call this a “practice.” There is nothing that says that a brilliant, young, aggressive lawyer can’t achieve the same or better results than a longtime practitioner who’s resting on his laurels. On the other hand, a more seasoned attorney might be able to get done in a phone call or an e-mail what it takes a freshman lawyer six court settings and two trips to the law library to accomplish. Trial is expensive. Every day the lawyer sits in court with you is a day he is not in his office. He is away from his other clients. He cannot deal with other cases. If he is not in his office, he is not making money. Therefore, one could argue, going to trial or accepting a plea bargain is a business decision. But real trial lawyers are not businessmen. They live to do battle against the state. They yearn for the opportunity to be in front of a jury. And most of the time, they don’t come cheap.

Finally, keep in mind that the professional services of a skillful attorney do not fit the normal standards of a consumer society. When most people pay money for something, they are used to receiving a product, something tangible that they can hold in their hands. A lawyer, however, can change someone’s life with a simple conversation. With an e-mail he could shave years off someone’s sentence. With a phone call, he could save someone’s home. With a text message, he could get someone’s kid back. How does one value this? How do you put a price on it? I like to give this example: Assume that you’ve gone to trial on your case, you lost, and the court sentenced you to five years in prison. You’re sitting there doing your time, two years pass, and lo and behold, you get a visitor. I come to see you after two years and say, “Junior, I can get you out of prison today. Right now.” What would you do? What would you say? How much would you pay to get out of prison three years early? How much is three years of your life worth to you? You see, every time a defense attorney conferences with an assistant district attorney, the plea bargain should get better and better. Perhaps the state will start at ten years. Then five. Then two. Maybe they’ll come down to probation. Or maybe they’ll even agree to reduce the charges to a misdemeanor. What is that worth? $50,000? $100,000? $250,000? This is where the lawyer earns his keep. Before the case even gets in front of a jury, this is where the lawyer is earning his fees.

As you can see, even before the case gets to trial, there are a number of things to consider, a number of factors that could affect your loved one’s case. For someone who has never been in or around the system, it can seem daunting. But the right lawyer can make the process go much smoother.
The Establishment Clause and Holiday Law, Part I: Public Displays of Religious Holiday Items

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As early as middle school, American children learn about the doctrine of separation of church and state, recognized and embedded in our legal system. The courts, however, have long concluded that total separation is impossible. Instead, the courts have employed various tests to determine whether various situations, from city holiday displays to holiday celebrations in schools, violate First Amendment freedoms.

This article discusses a question that becomes visible around the holiday season each year: May local or state governments erect holiday displays on public property? The answer is a resounding yes. But may those displays include religious holiday items, such as a crèche (nativity scene) or a menorah? Yes, with qualification, the courts have ruled; overall, they may be displayed so long as they are in the company of secular symbols, like a Christmas tree, a holiday banner, or a figure of Santa Claus. As explained by the authors of a relevant article,

Furthermore, in areas deemed to be a public forum for free expression, local governments must allow private religious expression, but may prohibit persons from placing unattended displays there or adopt other policies governing how such displays will be handled (i.e., size, length of display, safety of proposed location and installation, etc.).

Two different clauses of the First Amendment are implicated by local and state government holiday displays. First, there is the Establishment Clause, which works to forbid government speech that would endorse religion.

To be held constitutional under the Lemon test, a challenged governmental action must 1) have a secular purpose; 2) have as its primary effect neither the advancement nor the inhibition of religion; and 3) not create excessive government entanglement with religion. Challenged conduct that does not meet all three criteria will be deemed to be unconstitutional under the Establishment Clause. A challenge to a government-sponsored holiday display would be analyzed under these criteria.

_Id._ at 22.

Second, there is the Free Exercise Clause, which serves to protect private speech, including speech that endorses religion.

The local government’s ability to control or limit private speech or expression is determined according to the location and context of the expression. The conditions that the local government may place on expression in a public place depend on whether that place is deemed to be a “public forum” for free expression. Free speech rights are most extensive in a public forum, where governmental regulations of the content of expression are subject to “strict scrutiny” analysis, meaning that they must be narrowly drawn to serve a compelling governmental interest.

_Id._ at 19.

The authors explain the various classifications of fora in First Amendment contexts:

- There is the traditional public forum, which is public property that “by its very nature is the type of property that has historically been held in trust for the use of the public and has traditionally been used for purposes of assembly, communication of thoughts, and discussion of public questions.” _Id._ Some examples include city streets and sidewalks, along with public parks. _Id._
- There is the designated public forum, which offers the same level of protection and includes “public property that the government has opened for public use as a place for expressive activity, although not traditionally used for such purposes.” _Id._ at 20. Some examples include school board meeting rooms and state college classrooms. _Id._
- There is the limited public forum, which is public property that the government has designated for only certain types of activities. When the state establishes a limited public forum, it is not required to allow persons to engage in every type of speech and may be justified in reserving the forum for certain groups. However, any restrictions must not discriminate against speech based on its viewpoint and must be reasonable in light of the purpose served by the forum. _Id._
- Finally, there is the nonpublic forum, which includes “any other public property that has not been traditionally used for or designated for use as a forum for expressive activity,” such as an elevated sidewalk extending from a U.S. Postal Service office to the public sidewalk. _Id._

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To understand the jurisprudence behind holiday displays and the Free Exercise and Establishment clauses, three key decisions must be examined.

The first, *Lynch v. Donnelly*, involved an annual holiday display in the city of Pawtucket, Rhode Island, in a park owned by a nonprofit organization and located in the city's shopping district. The display included a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers and other characters, colored lights, a banner, and a crèche with traditional religious figures. Residents and members of the American Civil Liberties Union (ACLU) brought suit against the city, claiming that the inclusion of the crèche violated the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668 (1984). The federal district court held for the plaintiffs, and the appellate court affirmed.

On appeal, the U.S. Supreme Court first recognized that total separation of church and state is impossible, and that this line of jurisprudence requires fact-by-fact application. “In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.” *Id.* at 672.

The High Court then gave several examples that made it “clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.” *Id.* at 676. Among those examples were:

- the phrase “In God We Trust” printed on money;
- the phrase “One Nation Under God” as part of the Pledge of Allegiance;
- masterpieces with religious messages housed in the National Gallery;
- Congress’s provisions for chapels in the Capitol for religious worship and meditation;
- proclamations of a National Day of Prayer, along with recognition of various religious “heritage weeks.” *Id.* at 676–77.

The history, the High Court stated, helped explain why the Court has declined to take an absolutist view of the Establishment Clause, and why each case and each inquiry called for line drawing. *Id.* at 678–79.

As for the Pawtucket holiday display, the High Court held that the city did not violate the Establishment Clause and it reversed the lower courts’ holdings. The Court noted:

> When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The City, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

*Id.* at 680.
Just five years later, the case of *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, found its way to
the Supreme Court. That case involved two instances that the plaintiffs alleged violated the Establish-
ment Clause. In the first, a crèche was situated in the Allegheny County Courthouse, along with a ban-
ner exclaiming "In Excelsius Deo!" or "Glory to God in the Highest!" In the second, situated outside the
City-County Building located in Pittsburgh, Pennsylvania, were a Hanukah menorah, a decorated
Christmas tree, and a sign stating, "During this holiday season, the city of Pittsburgh salutes liberty.
Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom."

The High Court struck down the first display, noting that the crèche stood alone and no other (secular)
decorations served to detract from its religious purposes. "There is no doubt, of course, that the crèche
itself is capable of communicating a religious message," it noted. *Id* at 598. "Indeed, the crèche in this
lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmis-
takably clear." *Id.*

The Court rejected the county's argument that it was allowed to display the crèche simply because
Christmas was a national holiday.

This argument obviously proves too much. It would allow the celebration of the Eucharist inside a
courthouse on Christmas Eve . . . The government may acknowledge Christmas as a cultural phe-
nomenon, but under the First Amendment it may not observe it as a Christian holy day by suggest-
ing that people praise God for the birth of Jesus. *Id.* at 601.

While the government may celebrate Christmas, the County of Allegheny decided to do so in such a
manner as to endorse Christian doctrine, the Court held. *Id.*

The Court reached a different opinion regarding the second display, which was provided in three sepa-
rate opinions by a rather splintered majority. The opinions emphasized that the second display did not
have the effect of endorsing religion, but rather showed a more secular message. *See Id.* at 616–19 and
632.

In her opinion, however, Justice O'Connor noted her view that the Court's upholding of the display
didn't hinge upon whether it included symbols from both Hanukah and Christmas. "If the City cele-
brates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause," (id. at 614–22) she cautioned. She elaborated as follows:

The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than
the endorsement of Christianity alone. . . . Conversely, if the city celebrates both Christmas and
Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause.
Because government may celebrate Christmas as a secular holiday, it follows that government may
also acknowledge Chanukah as a secular holiday.

*Id.* at 615.
Thus, the question under the Establishment Clause, Justice O'Connor noted, is whether the combined display had the effect of endorsing several religions—or merely acknowledging that those religions are all part of the same winter-holiday season. *Id.* at 616. “In these circumstances, then, the combination of the tree and menorah communicates not a simultaneous endorsement of both the Christian and Jewish faiths, but instead a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition,” (*Id.* at 617–18) she concluded.

Following these two landmark Supreme Court cases, the Third Circuit Court of Appeals issued its own decision in a similar case in 1999. The case, *ACLU of New Jersey v. Schundler*, involved plaintiffs who sought declaratory and injunctive relief over Jersey City’s maintenance of a holiday display on city hall plaza, the original version of which included a crèche and a menorah, both owned by the city. Through the proceedings, the federal district court granted the plaintiffs’ request for an injunction, and also enjoined the city from erecting any substantially similar display on property it owned.

In the meantime, the city erected a new display. That display included a crèche, a menorah, Kwanzaa symbols, and a Christmas tree, along with a sign that stated, “Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its people.” The plaintiffs moved for an injunction, claiming the modified display was constitutionally objectionable. The district court once again agreed.

The federal appeals court, however, disagreed and reversed. The court noted that the modified display was indistinguishable from the display in the *Lynch* case. “Reasonably viewed, none of these displays conveyed a message of government endorsement of Christianity, Judaism, or of religion in general,” the court held, but rather sent a message of pluralism and endorsed the freedom to choose one’s own beliefs. *Id.* at 107.

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