

## WHO'S THE JUDGE?

### Or, How Those Backroom Decisions Are Made

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with **Stephen Warren Solomon and Stephen Jamieson**

Avid **Beverage News** fans who read *Legal Ease* every month already know that Administrative Law Judges who regularly hear cases brought by the ABC against licensees are employees of the ABC. But that's only the beginning of the story. It does get worse; read on.

The decisions reached by those Administrative Law Judges are only proposed decisions. Guess who decides to accept, reject or modify those decisions. The Director or Chief Counsel of the Department makes those calls. When a proposed decision is rejected by the Department, a new decision is drafted and signed and adopted by the Department itself. Where an Administrative Law Judge dismisses an accusation against a licensee, the Department can reject that decision and write and adopt a new decision sustaining the accusation and imposing a suspension or even a revocation of the license. When, the judge rules in your favor and you win, the ABC can decide not to accept the judge's ruling, will hear no testimony, see no witnesses and just stick it to you by taking away your license forever. There may be even more mischief involved where the individual in the Department who issues that new decision is from the same office as the ABC attorney who prosecuted the case to begin with.

Government Code Section 11517, of the Administrative Procedure Act, allows the ABC and other state agencies to reject proposed decisions and to review the record including the transcript of the hearing and to then decide the case anew. This law allows the Department to consider new evidence but also states: "A copy of the record shall be made available to the parties." Some of this record is obvious. Some, less obvious. Certainly the evidence admitted during the hearing is part of the record. The transcript is also part of the record. In an 11517 situation, all that material should be provided upon request, including the transcript when prepared. What about ABC attorney notes that include observations, opinions about witnesses and evidence, recommendations directly related to whether to accept or reject a

proposed decision, and evaluations of admitted evidence and testimony? The APA in Section 11430.10 et seq. specifically disallows ex parte (as in secret and one sided) communication by one party. Are those notes set down on an ABC Form 104 a secret document made during and after the hearing by the ABC attorney trying the case part of the record to be provided to the parties? Are those notes and memos available to the Director or Chief Counsel who ultimately writes the decision? Those notes could be based on personal opinions, biases and prejudices not developed or accounted for by the record. Quite possibly that secret document could be crucial. The Department never discloses the contents of that potentially critical form. Why so important? Observing the blank Report of Hearing might give some insight:

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

<b>REPORT OF HEARING</b>			File	Reg.
Date	Place	In Re:		
Administrative Law Judge		DBA		
Reporter		Address		
<b>PARTIES</b>	<b>ABC</b>	<b>PROTESTANT</b>	<b>LICENSEE/APPLICANT</b>	
Representatives				
Witnesses #1				
Witnesses #2				
Witnesses #3				
Witnesses #4				
Exhibits #1				
Exhibits #2				
Exhibits #3				
<b>STIPULATIONS</b>				
<b>ISSUES</b>				

DISPOSITION	___ Hearing Completed	___ Partial	Completion Time: _____
HEARING TIME	Start _____ .M.	Close _____ .M.	Total _____
Comment:			
	PETITION	PROTEST	ACCUSATION
RECOMMENDATION	Grant	Deny	Sustain
			Overrule
			Standard
			Aggravated
			Mitigated
			Dismissed

DISCUSSION (Summarize evidence for and against with reasons for the recommended decision.  
If necessary to use reverse, please invert.)

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ABC-104 (11/78)

Other than the obvious, that is, those notes of impressions and evaluations and recommendations could be relied on heavily by the Decision Maker, recent Courts of Appeal decisions make disclosure of those notes a highest priority. In April 2003 and more recently in December 2003, two different Appellate Courts issued decisions that make disclosure of Form 104 critical. The Court of Appeal in *Quintero v. Santa Ana* (December 23, 2003) reversed an order terminating the employment of a non-sworn Police Department Detention Officer finding an appearance of bias and unfairness by the Personnel Board. The Court noted: "For the Board to allow its legal adviser to also act as an advocate before it creates a substantial risk that the Board's judgment in the case before it will be skewed in favor of the prosecution. The chance that the Board will show a preference toward... [the prosecutor/adviser], even "perhaps unconsciously" is present and unacceptable."

The Court in *Quintero* relied on the Court of Appeal in *Nightlife Partners v. Beverly Hills* (April 24, 2003) where that court decided that a City Attorney advocate in a permit renewal hearing couldn't also be an advisor to the Hearing Officer: The Court held: "Here, this same objectionable overlapping of the role of advocate and decision-maker occurred....It requires no citation of authority exactly on all fours with this fact pattern in order to justify the conclusion that...[the City Attorney's] role as advisor to the decision-maker violated petitioners' right to due process. There was a clear *appearance* of unfairness and bias. This was sufficient to support the trial court's ruling."

What do these cases mean in the context of decisions rendered by the Department under Government Code Section 11517? Clearly notes of impressions and evaluations and recommendations contained in the Form 104 Report of Hearing constitute a form of advice available to the Trier of Fact making the Department's decisions under the Administrative Procedure Act. Since the notes are ex parte communication, they shouldn't be considered but when included should be disclosed. And doesn't it appear that the Trier of Fact in the Department just might give greater credence to that advice than any argument you the licensee may submit? Does this scenario become even more ominous when the Trier of Fact is an attorney from the same office as the ABC attorney who tried the case and made those notes? There is a long held tradition in the Department where those 11517 decisions have been signed by Chief Counsel for the ABC.

Here are some assumptions: First, the Report of Hearing is included in the file transmitted in an 11517 review; second, the Report of Hearing is available for review by the Trier of Fact; third, the Trier of Fact reviews and relies on the Report of Hearing as part of the decision making process. These are only assumptions since the ABC would rather give up its secret handshake than disclose the contents of one of these secret documents.

In the Department's 11517 decision making process, it may be assumed the Trier of Fact has access to prosecutorial insight and wisdom in the form of friendly advice in the Report of Hearing crafted by the Department's advocate in the administrative hearing. Then the blurring of roles between advocate and Decision-Maker is at least as profound as occurred in *Nightlife Partners* and *Quintero*. The Due Process violation condemned by those courts is as blatant.

**Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."**