

## **Minor Decoys: Multiple Liabilities**

In representing ABC licensees in as many as from 1250 to 1500 sales to minor cases with most of those cases involving minor decoys, this firm has an inside perspective on the issues presented in defending licensees against ABC accusations where sales to a minor decoy is alleged. From time to time we are asked the following question: “Since my clerk’s case was dismissed by the City Attorney in the criminal court (or was found not guilty) why is the ABC still after my license?”

There is an answer to the question and it is not: “Because the ABC doesn’t care.” Rather the answer resides in the fact of multiple jurisdictions for this offense. The ABC has constitutional and statutory jurisdiction to issue, suspend and revoke licenses for sale of alcoholic beverages and a sale to a minor case is actionable as a criminal misdemeanor. The City Attorney can prosecute a defendant attempting to send the violator to jail, while the ABC can impose discipline on the ABC license, because the ABC has jurisdiction to suspend or revoke a license where that violation of law occurs in that licensed premises. Simply stated, the Department’s determination to file or not file an accusation does not depend on the proceedings over in the criminal court building. If the prosecutor dismisses the criminal complaint, that act doesn’t factor seriously

in the ABC's decision. If your clerk is convicted or pleads guilty to the criminal complaint, that conviction or plea stands as an admission to the fact that there was a sale to the minor decoy but does not impact whether the ABC pursues its case against the licensee or not. Interestingly, a plea of "nolo contendere" (no contest) does not constitute an admission that the Department can use in an administrative proceeding although the two pleas are the same in the eyes of the criminal court judge. If the licensee is the seller and pleads guilty, this plea also constitutes an admission of the underlying violation but not should alter the outcome of the administrative case.

There are several reasons why the criminal proceeding is not determinative for the administrative proceeding. In the criminal case, the prosecution must prove its case beyond a reasonable doubt to a jury (or to the trial judge, with jury waived). In the ABC administrative hearing, the ABC attorney must simply demonstrate the violation by a preponderance of the evidence. With these different burdens of proof, the probable outcomes for the two separate proceedings immediately may look very different. Moreover, the Department has a specific rule governing the conduct of minor decoy operations and prosecutions that does not apply at all in the

criminal justice system. ABC Rule 141 spells out the criteria and procedural requirements for minor decoy investigations.

The Rule provides, in full:

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

(2) The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense;

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy that purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

*In Acapulco Restaurants, Inc. v. ABC Appeals Board, 67*

Cal.App.4<sup>th</sup> 575 (Oct. 1998) litigated by the author, the Court of Appeal in Los Angeles mandated the Department to strictly adhere to its own rule (Title 4, Cal. Code of Regulations, Sec. 141). The Court held: “We reject the Department’s contention that its refusal to apply rules 141(b)(5) and 141(c) is not more than an exercise of its right to ‘interpret’ a rule governing its enforcement obligations. To ignore a rule and the defense that arises from law enforcement’s failure to comply with that rule is not a matter of ‘interpretation.’ What the Department has done is to unilaterally decide that rule 141(b)(5) applies in some situations but not others, a decision that exceeds the Department’s power.” (Footnote omitted).

However, shortly thereafter, the Court of Appeal in San Diego specifically exempted criminal proceedings from observance of that same rule. The Court in *People v. Figueroa*, 68 Cal.App.4<sup>th</sup> 1409 (Jan. 1999), stated: “...[A]llowing the administrative guidelines to be used as a defense in a criminal prosecution would in effect permit Department to define the elements of what does and does not constitute criminal conduct in the use of underage decoys. Absent an indication the Legislature delegated such power to Department, this would constitute an improper usurpation of the Legislature’s function to define what criminal conduct is.”

The Court in *Figueroa* held that the Rule has no application in the criminal court. That being said, there are still a myriad of defenses available exclusively in the ABC administrative process to lawyers conversant in the Rule, its nuances and the ABC Appeals Board's library of interpretations of the Rule. The practical result is that your clerk, waitress or bartender could face an insurmountable task in defending against the misdemeanor complaint whereas you, as licensee, stand a good probability of successful defense in the ABC case where the police department conducting the decoy investigation simply did not follow Rule 141.

Any failure by the Department or the local law enforcement agency to follow this rule constitutes a defense to the administrative proceeding.

As you know, when an accusation is sustained by the Department and a suspension, revocation or fine is then to be imposed, the case can be appealed to the ABC Appeals Board. That Board has the power and authority to review ABC decisions and reverse those decisions where necessary. The Board publishes its decisions and has amassed a body of law applicable to ABC prosecutions in minor decoy proceedings. Intimate familiarity with the Rule and the Board's interpretation of the Rule are crucial in defending against a Department accusation alleging sales to a

minor decoy. Police or Department actions which may look like compliance with the rule to the uninitiated, may actually constitute a violation previously defined by the Board.

A final thought for you as you helplessly watch your clerk, waitress or bartender plead guilty in the criminal court to the offense so he can pay a small fine and leave the building: The Department still has to try its case against you, and you can win.

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