LEAGUE OF CALIFORNIA CITIES

CITY ATTORNEYS DEPARTMENT

2009 Ad Hoc Due Process Committee Report On the Separation of the Advocacy/Prosecutorial Function From the Decision Making Function in Administrative Hearings

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ANNUAL CONFERENCE
September 2009

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INTRODUCTION AND ORGANIZATION

This report updates the October 2005 ad hoc Due Process Committee report in light of new case law on the separation of the advocacy/prosecutorial function from the decision making function in administrative hearings. The 2005 report presented a thorough critique of the then-recent decisions in *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81 and *Quintero v. City of Santa Ana* (2004) 114 Cal. App. 4th 810. The 2005 report also provided a series of recommendations that were designed to minimize the risk of successful legal challenges in specific situations.

This report begins with a summary of the important post-*Nightlife/Quintero* California Supreme Court case law, then reexamines and recasts the 2005 recommendations in light of those cases: *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731 and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2006) 40 Cal.4th 1. We also examine two post-*Nightlife/Quintero* court of appeal cases: *Stardust Mobile Estates v. City of San Buenaventura* (2007) 147 Cal.App.4th 1170, and *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543. Finally, this report includes an appendix that offers sample forms for due process wall arrangements, a sample Reciprocal Professional Services Agreement for solo or small city attorney offices that may not be equipped to separate advisory and prosecutorial functions without special considerations, as well as a sample resolution that attempts to disavow the adversarial hearing model.

In sum, since the 2005 Due Process committee report the legal terrain has become more favorable for local governments both with respect to the applicable legal test and the types of proceedings that have found to meet fairness standards. The 2009 Committee has revised the 2005 recommendations in light of these new cases. Like the 2005 report, the 2009 report contains an analytically sequenced series of recommendations.

A NOTE ABOUT RESOURCES

This report is best understood by reading through the entire report using Manuela Albuquerque's May 2009 *Morongo* update presented at the Spring 2009 City Attorneys Department Conference as a legal reference because that paper contains an in-depth discussion of the entire development of the case law on the separation of functions doctrine in California.[1] That paper and the accompanying PowerPoint presentation are

[1] Albuquerque, *Due Process In Local Administrative Hearings After The California Supreme Court's Opinion in Morongo Band of Mission Indians v. California State Water Resources Control Bd., 45 Cal.4th 731 (2009)*

available from the League website at http://www.cacities.org/attypapers. The 2009 ad hoc Due Process committee, and indeed the League as a whole, owe much to Manuela for her scholarly leadership and advocacy on behalf of cities. This report is intended to supplement Manuela's work in order to avoid repetition.

CASE LAW SUMMARY

Relying primarily upon federal due process cases, the California courts have held that administrative hearings must be fair and that administrative decision makers must be impartial, i.e., free from unacceptable bias. California constitutional due process and the fair hearing requirement of Code of Civil Procedure section 1094.5 (administrative mandamus) dictate essentially the same result, as discussed in the May 2009 *Morongo* update.[2] Thus, these fairness and impartiality standards apply to all administrative hearings, irrespective of whether the loss or modification of some other property or liberty interest is threatened.[3]

The Good News: Morongo Restores the Presumption of Impartiality

In *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731 ("*Morongo*"), the California Supreme Court restored the longstanding legal test for analyzing claims of bias: Decision makers who are not challenged for pecuniary bias must be afforded a presumption of impartiality. Under *Morongo*, only a very specific factual showing can rebut the presumption of impartiality:

> "In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting *ex parte* communications are observed, the presumption of impartiality can be overcome *only by specific evidence demonstrating actual bias or a*

[2] For purposes of this report, an "administrative hearing" occurs when: a) a hearing is held to apply a rule or standard; b) to an individual person, project or circumstance; c) involves the taking of evidence; d) results in the rendering of a written decision issued by the hearing officer or tribunal (including the adoption of findings by the city council or commission; and e) the written decision is based on the facts and arguments submitted at the hearing. "Administrative hearing" for these purposes, includes all adjudicatory hearings and all hearings subject to review under CCP § 1094.5. It does not refer to legislative hearings such as those required before enactment of a zoning ordinance or other across the board policies.

[3] As the May 2009 *Morongo* update explains, under the California Constitution, the right to a fair adjudicative procedure is itself considered a protected liberty interest.

particular combination of circumstances creating an unacceptable risk of bias." (*Id.* at 740, emphasis added.) [4]

Nonetheless, the Court observed that "'[p]rocedural fairness "'requires internal separation between advocates and decision makers to preserve neutrality." (*Morongo*, *supra*, 45 Cal.4th at 737 citing *Department of Alcohol Beverage Control v. Alcohol Beverages Appeals Bd.* (2006) 40 Cal.4th 1, 10.) [5] This report analyzes the scope and application of this prohibition and also discusses related claims that a tribunal is biased based on roles played by staff in two unrelated different matters.

Witt Home Ranch, Inc.: Separation of Functions Limited to Adversarial Decision Making?

All the cases requiring a separation between "advocates" and decision makers have been decided in the context of an "adversarial" hearing model.[6] In an adversarial hearing model, the matter to be decided is structured as having two "sides," each of which is represented by an advocate presenting evidence and argument supporting their side. In this model, the decision maker is dependent on each advocate to develop the facts and the law, and has no professional staff whose role is to provide technical

[4] The *ex parte* communication referred to in *Morongo* is communication between the prosecutor/advocate and the decision maker or its advisers, i.e., not *ex parte* communications with the public.

[5] As the May 2009 *Morongo* update points out, *Department of Alcohol Beverage Control v. Alcohol Beverages Appeals Board* (2006) 40 Cal.4th 1, 10 cited by *Morongo*, involved application of the California Administrative Procedure Act and did not resolve the constitutional question, notwithstanding the fact that this *Morongo* language suggested that it had. The *Morongo* court did not cite *Nightlife Partners, Ltd., supra,* 108 Cal. App.4th 81 but *Nightlife* was cited in the *ABC* case quoting from *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575. The failure of the Supreme Court to cite to *Nightlife Partners, Ltd.* may indicate some queasiness about its sweeping language, its erroneous suggestion that a subjective "appearance of bias" test governed analysis of these cases. As we have explained, *Morongo* made clear that decision makers whose impartiality is challenged for reasons other than pecuniary bias are entitled to a presumption of impartiality.

[6] Tribunal/adjudicator must be advised by lawyer who is different from lawyer acting as advocate/prosecutor in adversary hearing. (*Midstate Theaters, Inc. v. County of Stanislaus* (1976) 55 Cal.App.3d 864, 870-871.) Lawyer advising adjudicator must be ethically walled off from lawyer acting as advocate in hearing when county adopted adversarial model. (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575.) Lawyer advising staff whose decision is being appealed may not advise decision maker on appeal. (*Nightlife Partners, Ltd. ,supra,*108 Cal.App.4th 81.)

advice and assistance to all levels of the government agency. Given an adversarial model, it makes sense to require that the partisan of any "side" be prevented from *ex parte* contacts with the decision makers in order to preserve the decision maker's impartiality.

In contrast, the only post-*Nightlife Partners*, *Ltd.* case to consider the separation of functions issue in the context of a non-adversarial hearing concluded that the county counsel in that case had not acted as an advocate merely by providing legal advice to all staff and decision making boards about a legal issues implicated in the matter at issue in the administrative hearings.

In *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, a property owner sought a writ of mandate to compel issuance of certificates of compliance for an antiquated subdivision. The property owner asserted that it had been denied due process because of, among other reasons, bias created when a deputy county counsel "'performed the incompatible dual roles of an advocate *and* advisor to the decision maker.'" (*Id.* at 568.) The deputy county counsel was alleged to have advised both the original decision maker and appellate review body on general legal issues related to the dispute, and to have assisted in formulating the disputed County policy. (*Id*.)[7]

The *Witt Home Ranch, Inc.* court of appeal readily distinguished both *Howitt, supra,* 3 Cal.App.4th 1575 and *Nightlife Partners, Ltd.* by noting that:

> "Neither case is applicable here because there is no evidence that Gallagher ever acted as an advocate in connection with the Ranch's proceeding. While Gallagher's exact role is unclear, we assume for the sake of argument that *she was the attorney from the County Counsel's office who was charged with advising both PRMD and the Board with respect to the interpretation of section 66499.30, in connection with the earlier appeals, and therefore was instrumental in devising the policy followed by the Board.* Such a role did not place Gallagher in the role of advocate adverse to the Ranch. There is no evidence Gallagher represented the County in related preexisting litigation against the Ranch or communicated with the Ranch while acting as the County's attorney, as counsel in *Nightlife Partners* did, nor that she represented PRMD before the Board, as counsel in *Howitt* did. At the Board hearing over the Ranch's certificates, PRMD was represented by a staff member. Gallagher's role was limited to providing, at the request of a Board member, a public 'primer on Gardner and how it applies to this particular

[7] Because of its support for the conclusions we reach in Recommendation C, distinguishing adversarial hearings from evaluative ones, we quote extensively from *Witt Home Ranch, Inc*.

> situation.' All of Gallagher's activities vis-à-vis the Ranch are therefore consistent with those of a legal adviser to the Board. *The mere fact that she reached her conclusions and provided advice to PRMD and the Board prior to the hearing* of the Ranch's appeal *did not convert her from an adviser to an advocate, nor did it demonstrate bias*, either on her part or the part of the Board." (*Witt Home Ranch, Inc., supra,* 165 Cal.App.4th at 569, emphasis added.)[8]

In cities and counties, most administrative hearings follow a structure that is "evaluative." In this structure, successive decision makers are assisted by the same technical and professional staff to ensure that decisions are well informed and that the decisions are consistent with one another, legislative intent and administrative interpretation. The adversary model is not only irrelevant, but also actually harmful to this evaluative model. We believe that *Witt Home Ranch, Inc.* confirms our conclusion that separation of functions has no application in evaluative proceedings because no "advocate" is pushing for some outcome to which the "advocate" is committed. *Witt Home Ranch, Inc.* was decided before *Morongo* confirmed that decision makers challenged for non-pecuniary bias are entitled to a presumption of impartiality. Nonetheless, even in the absence of this beneficial legal presumption of impartiality, *Witt Home Ranch, Inc.* is very significant because it rejected *Nightlife Partners, Ltd.-based* claims that the lawyer/advisers in the cases before them were biased and had rendered the tribunal in those cases biased.

Moreover, *Morongo* itself found no bias resulting from lawyers switching roles as advisers and prosecutors from one case to the next as long as the agency's separation of function rules were followed and an internal separation was maintained between the advocate and adviser to the decision maker in any given case, overruling *Quintero* on this point.[9]

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[8] In another post-*Nightlife* case, the court held that an attorney who advised a mobile home rent board and defended the board in subsequent litigation did not improperly combine functions because the attorney was representing the rent board at all times. (*Stardust Mobile Estates v. City of San Buenaventura* (2008) 147 Cal.App.4th 1170, 1190, distinguishing *Nightlife Partners, Ltd.*)

[9] It did not however overrule *Quintero* entirely distinguishing it on its facts, as discussed in greater detail in Section F and in the May 2009 paper.

RECOMMENDATIONS

A. Avoid creating "adversary" administrative proceedings with the city as a "party" represented by counsel.

As the May 2009 *Morongo* update explains, the *Nightlife Partners, Ltd.* case built upon the holding of *Howitt v. Superior Court, supra,* 3 Cal.App.4th 1575. *Howitt* held that it was improper for an adjudicatory tribunal that was considering an employee's appeal to be advised by the county counsel, unless the county could show that a due process wall existed between the county counsel and the deputy in the county counsel's office who was prosecuting the termination before the tribunal. The *Howitt* and thus the *Nightlife Partners, Ltd.* courts' conclusions turned on the facts that the agency had *chosen* to use "the adversary model" by (1) creating "an independent and disinterested administrative board to adjudicate" the matter, with no appeal, and (2) having a lawyer present the county's termination case to the independent adjudicatory tribunal. In *Howitt*, for example, the "adversarial models" involved independent personnel boards, whose decisions were final and not appealable; in *Nightlife Partners, Ltd.* the independent decision maker was a hearing officer whose decision likewise was final and not appealable.

As in *Howitt*, *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 (discussed in detail in Recommendation F) also involved an independent personnel board. Similarly, although neither case was called upon to comment expressly on the issue, both *Quintanar* and *Rondon*[10] involve adversary models under *Howitt.* Thus, under *Howitt*, if a city has established such an adversary model, and a lawyer is going to appear to represent one arm of the city whose decision is being appealed, the prohibition on commingling prosecutorial and adjudicatory functions precludes the tribunal from being represented by another lawyer from the same office, unless the office can show that it has established and implemented appropriate procedures (a "due process wall")[11] ensuring that the two lawyers do not consult with one another on the issue. Under *Nightlife Partners, Ltd*., if a city has established such an adversary model, a lawyer who has played an "active and significant" role in a decision that is appealed may not then advise the tribunal deciding that appeal.

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[10] *Department of Alcoholic Beverage Control v. Alcohol Beverage Control Board* (2006) 40 Cal.4th 1 ("Quintanar'); *Rondon v. Alcohol Beverages Appeals Board* (2007) 151 Cal.App.4th 1274.

[11] We use the term due process wall throughout this report to distinguish procedures for the separation of functions from an ethical wall that may be needed in conflict of interest situations. Due process walls are discussed in detail in Recommendation E.

A city should be deliberate about choosing when and when not to utilize such an adversary model for adjudication, with the city effectively acting as a "party" represented by counsel, since in such cases the commingling prohibition will always be applicable. In addition, although no case has addressed the efficacy of doing so, Berkeley has adopted a resolution disclaiming any intention to establish or follow an adversary model in land use proceedings, discussed in Recommendation B.

B. Adopt procedures that disavow any intention to create an adversarial administrative structure in general or in selected proceedings.

All reported cases requiring separation of functions have arisen in the context of adversarial proceedings. We believe separation of functions should not be applicable to the evaluative model of decision making, which is prevalent at the local government level, as we discuss in greater detail in Recommendation C. A city may wish to adopt a resolution or other procedures that disavow any intention to create an adversary administrative hearing structure. The major elements to emphasize in any such resolution or procedure would include:

- State that the purpose of internal appeals is to ensure adherence to the Council's legislative intent in enacting the regulatory system and to create administrative consistency.

- Expressly disclaim any intention to adopt an adversary criminal or civil justice system or to create an independent body completely disconnected from staff

- State that adversary systems are unsuitable for the purpose at hand

- State that no city agency or staff is a partisan on any side of a dispute, but rather are charged with providing technical analysis and advice to successive decision makers who make their decisions after weighing all the information.

- Expressly disclaim an advocacy role for city staff or city attorneys, instead likening their function to providing expert technical advice to all participants.

A sample resolution from the City of Berkeley is included as an appendix to this report.

C. Internal separation of functions is required only in those proceedings for which a lawyer or staff member in the City can be said to be acting as an advocate, or when the proceeding is adversarial rather than evaluative in nature.

As we have explained in Recommendation A, all of the separation of functions cases have been decided in the context of adversarial proceedings. As we have also explained, *Morongo* held that an impartial tribunal requires that "advocates" must be separated from decision makers. Thus, as a threshold matter it is necessary to evaluate when a member of the staff or a lawyer is acting as an advocate with a "will to win," rather than a technical adviser to the decision maker.

In *Nightlife Partners, Ltd., supra,* 108 Cal.App.4th 81, 94 the appellate court condemned the city's practice of allowing the assistant city attorney to advise the hearing officer on appeal when that same assistant city attorney had previously "been the City's advocate during the *review* of the City's decision to deny the application."

Witt Home Ranch, Inc.* Moves Away from *Nightlife Partners, Ltd.

In stark contrast to *Nightlife Partners, Ltd.,* however, the *Witt Home Ranch, Inc.*, *supra,* 165 Cal.App.4th 543 court of appeal distinguished the role played by a deputy county counsel (Gallagher) who had been advising the county staff and then advised the board of supervisors regarding interpretation of archaic provisions of the Map Act. The court found that she never left her role as an advisor:

> "Neither case is applicable here because there is no evidence that Gallagher ever acted as an advocate in connection with the Ranch's proceeding. While Gallagher's exact role is unclear, we assume for the sake of argument that she was the attorney from the County Counsel's office who was charged with advising both PRMD and the Board with respect to the interpretation of section 66499.30, in connection with the earlier appeals, and therefore was instrumental in devising the policy followed by the Board (footnote removed). Such a role did not place Gallagher in the role of advocate adverse to the Ranch. There is no evidence Gallagher represented the County in related preexisting litigation against the Ranch or communicated with the Ranch while acting as the County's attorney, as counsel in *Nightlife Partners* did, nor that she represented PRMD before the Board, as counsel in *Howitt* did. At the Board hearing over the Ranch's certificates, PRMD was represented by a staff member. Gallagher's role was limited to providing, at the request of a Board member, a public "primer on *Gardner* and how it applies to this particular situation." All of

> Gallagher's activities vis-à-vis the Ranch are therefore consistent with those of a legal adviser to the Board (footnote omitted). The mere fact that she reached her conclusions and provided advice to PRMD and the Board prior to the hearing of the Ranch's appeal did not convert her from an adviser to an advocate, nor did it demonstrate bias, either on her part or the part of the Board. (See, e.g., *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1241, 97 Cal.Rptr.2d 467.)" (*Id*. at 143-144.)

We believe that the fairness principles pertaining to commingling of functions apply only to prosecutorial or adversarial proceedings in which the local agency lawyer or staff is representing an arm of the city that is advocating a particular result. In short, whether under the rubric of the federal due process clause, the freedom from arbitrary adjudication protected by the California Constitution, or Code of Civil Procedure section 1094.5's guarantee of an unbiased decision maker, the doctrine that prosecutorial and advisory functions should not be combined in the same lawyer should only be applicable to an administrative proceeding in which one arm of the city is playing a prosecutorial role and a different administrative tribunal or individual is the quasi-judicial decision maker reviewing the decision of that body.

The prohibition on commingling functions is likely to be applied to any quasi-judicial proceeding in which the government has initiated and is affirmatively prosecuting a party to achieve a particular outcome. These necessarily include, among other things, permit revocations, nuisance abatement hearings, and employee discipline hearings.[12] Hence, we do not include proceedings where the government is playing more of an evaluative role – such as the processing of a permit, employment application or a license – where the staff is *reacting* to an application (even if the agency staff is offering a recommendation). Our analysis is intended to draw a sharp distinction between administrative proceedings in which the city staff act as "advocates" and those that are evaluative in which the staff functions as advisers. If there are no advocates in a proceeding there is no need to segregate then from advisers to the decision makers.

In general, the prohibition against commingling functions will be triggered when the city is taking away an existing entitlement – such as a license or permit -- or imposing a sanction, because, for example, the subject of the proceeding has violated some ordinance or other standard and a lower official has *already* taken the position that the subject has committed that violation.[13] By contrast, the City engages in a *purely*

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[12] For purposes of determining whether the staff is acting as "advocate" the question of whether property rights are at stake is irrelevant.

[13] Examples include employee disciplinary and grievance hearings/appeals, administrative citation hearings, revocation of discretionary permits, revocation of

evaluative role when it is deciding whether to grant or deny a permit *in the first instance.* In such proceedings no arm of the City is acting in a prosecutorial role to argue for denial of a permit. Successive decision makers such as the Planning Commission and the Council exercise a review role on the application in question and the staff merely plays an advisory role.

While this report provides some basic principles to assist cities in evaluating whether multiple lawyers may need to be assigned to play independent roles in providing advice and assistance in any given quasi-judicial proceeding, it is essential that the lawyer research the case law applicable to the particular proceedings to ascertain what procedural safeguards may have been held applicable in that particular type of proceeding. For example, some proceedings that are traditionally regarded as legislative may nonetheless possess a prosecutorial aspect triggering application of these rules.[14] These may well be cases of first impression for the courts, and there will be conflicting arguments as to whether the proceeding is an evaluative or prosecutorial one.

D. A lawyer who has had active and significant involvement in advising staff who act as advocates at the administrative hearing may not advise the decision maker. Similarly, a lawyer who has had such active and

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business license, dangerous animal hearings, tax delinquency hearings, storm water violation hearings, revocation of "carry" permits for retired police officers, and declarations of public nuisance and determinations of nuisance abatement costs.

[14] For example, award of public contracts is generally regarded as legislative where principles of due process do not apply. *See Ghilotti Const. Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 904; *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal. App. 4th 1294, 1303. Also the United States Supreme Court has held that even if a property right is triggered when the contracting entity withholds money from the contract for failing to comply with prevailing wage laws, no hearing is required at all since the contractor's right to file a breach of contract action later is sufficient under due process. *Lujan v. G. & G. Fire Sprinklers* (2001) 532 U.S. 189, 195. "We hold that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process." Obviously, if no hearing under federal due process is required, any hearing provided should become a matter of the entity's sole discretion and the prohibition on combining adjudicative functions would be irrelevant. However, this does not answer whether a hearing might be required where a contractor is being debarred from future contracting or whether a determination of lack of responsibility might be deemed stigmatizing and, thus, trigger due process as it does in the personnel context. In such cases, the hearing may be deemed one in which the City is playing a prosecutorial role and it is wise to observe the prohibition on commingling prosecutorial and adjudicative functions.