

# Department of Alcoholic Beverage Control

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The Department of Alcoholic Beverage Control (ABC) is a constitutionally-authorized agency established in 1955 (section 22 of Article XX, California Constitution). A division of the Business, Transportation and Housing Agency, ABC is responsible for the enforcement of the Alcoholic Beverage Control Act (ABC Act), Business and Professions Code section 23000 *et seq.*, and its regulations, which are codified in Divisions 1 and 1.1, Title 4 of the California Code of Regulations (CCR). The Act delegates to ABC the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages in California. In addition, the ABC Act vests the Department with authority, subject to certain federal laws, to regulate the importation and exportation of alcoholic beverages across state lines.

ABC is authorized to investigate violations of the Business and Professions Code and other statutes which occur on premises where alcohol is sold, and may deny, suspend, or revoke alcoholic beverage licenses. Approximately 71,200 retail licenses operate under this authority. ABC's disciplinary decisions are appealable to the Alcoholic Beverage Control Appeals Board. Many disciplinary actions taken by ABC, as well as other information concerning the Department, are printed in liquor industry trade publications such as *California Beverage News* and *Beverage Industry News*.

The Director of ABC is appointed by, and serves at the pleasure of, the Governor. ABC divides the state into two divisions (northern and southern), with assistant directors in charge of each division. The Department is further divided into 24 field offices, which are headed by district administrators or supervisors and staffed by investigators, licensing representatives, and support personnel. ABC's investigators, who have full peace officer powers to enforce the ABC Act, the California Penal Code, and the Department's regulations, are responsible for investigating applicants for licenses and complaints filed against licensees and, when necessary, making arrests for statutory violations. In addition to the district offices' investigations, the Department operates a Special Operations Unit consisting of 22 special investigators who primarily assist district offices and other law enforcement agencies in undercover operations involving vice and criminal activities, as well as high-profile operations at large events.

ABC dispenses various types of licenses to qualified persons and legitimate businesses to sell, manufacture, or otherwise deal in alcoholic beverages. "On-sale" refers to a license to sell alcoholic beverages which will be bought and con-

sumed on the same premises. "Off-sale" refers to a license to sell alcoholic beverages which will not be consumed on the premises. Population-based quotas determine the number of general liquor licenses issued each year per county; in 1997, the legislature applied similar quotas to beer and wine licenses.

## Major Projects

### **Advertising and Merchandising of Alcoholic Beverages**

In July 1998, ABC held a public hearing on its proposal to amend section 106, Title 4 of the CCR, which sets forth the Department's standards and restrictions on the advertising and merchandising of alcoholic beverages. Section 106 implements Business and Professions Code sections 25500, 25502, and 25600, the state's so-called "tied-house laws" which strictly control the advertising, marketing, and promotions programs of alcoholic beverage suppliers and their relationships with retailers and consumers. These statutes prohibit alcoholic beverage suppliers from providing, directly or indirectly, inducements or items of value to retailers; and prohibit ABC licensees generally from giving, directly or indirectly, premiums, gifts, or free goods to any person, licensed or not, unless specifically authorized by ABC regulations.

Many of the Department's proposed changes to section 106 are technical and nonsubstantive. However, ABC proposed substantive changes to subsections (b)(3), (b)(9), (c), (c)(4), (d), (e)(1), (e)(2), (e)(3), and (j) of section 106.

Subsection (b)(3) defines the term "sign" for purposes of section 106, and requires ABC to preapprove manufacturers' signs which are furnished to retailers for advertising purposes. Due to limited resources, ABC can no longer preapprove signs, and thus proposed to delete the term "after approval by the Department" from section 106(b)(3). The Department also added subsection (b)(9), which would define the term "furnish" to mean "to supply or make available for use as well as the giving or actual transfer of title of an item."

ABC's proposed amendments to subsection (c) integrate the subject of "promotional materials" with the subjects of "signs" and "displays" as the logical area to address all three subjects, and add subsection (c)(4) to provide guidance to licensees relative to promotional materials, which are referred to in Business and Professions Code section 25503.1(a)(2). Subsection (c)(4) would allow suppliers to furnish, give, lend,

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rent, or sell promotional materials for alcoholic beverages to a retailer for use within off-sale premises, so long as the promotional materials have no intrinsic value other than as advertising.

Subsection (d) currently allows suppliers who are authorized to sell wine to retailers to furnish retailers with lists of wine sold and/or produced. At the public hearing, industry representatives requested that the authority to provide product lists be extended to include lists of distilled spirits. ABC's amendment to subsection (d) would make the requested change, extending the existing authority to furnish wine lists to the furnishing of distilled spirits lists in the same manner.

Section 106(e) regulates ABC licensees' furnishing of "advertising specialties" to both retailers and consumers. Retailer advertising specialties include coasters, napkins, towels, jiggers, stirring spoons, sponges, menu cards, calendars, and other similar items; consumer advertising specialties include ash trays, bottle or can openers, litter or shopping bags, matches, recipe cards, pencils, hats, bottle or can stoppers, and other items. Under section 106(e), all advertising specialties must be approved by ABC; their value is strictly limited; and suppliers must maintain specified records of all such items furnished to retailers.

Prior to this rulemaking, section 106(e)(1) authorized any licensed supplier to provide advertising specialties to retailers, provided all the requirements of section 106 are met. However, in *California Beer and Wine Wholesalers Association, Inc., et al. v. Department of Alcoholic Beverage Control*, 201 Cal. App. 3d 100 (1988), an appellate court held that section 106(e)(1) is invalid to the extent that it authorizes the gift of supplies by a wholesaler of beer to a retailer in violation of Business and Professions Code section 25501(a), which prohibits the gift of "supplies" by a beer supplier; the court enjoined ABC from enforcing subsection (e)(1). Because the court addressed only beer suppliers, ABC proposed to amend subsection (e)(1) to leave intact the advertising specialties privileges accorded in Business and Professions Code section 25600 to wine and distilled spirits suppliers.

Section 106(e)(2) regulates the provision of advertising specialties to consumers by suppliers of wine, beer, and distilled spirits. ABC's proposed amendments to subsection (e)(2)(A) would implement a 1997 legislative change by limiting the value of consumer advertising specialties provided by a distilled spirits supplier to a retailer or to the general public to \$5 per unit original cost to the supplier who purchased it (the limit was previously \$1 per unit original cost). Under subsection (e)(2)(B), consumer advertising specialties furnished by wine suppliers to retailers or to the general public are limited to \$1 per unit original cost; and subsection (e)(2)(C) limits advertising specialties furnished by beer suppliers to retailers or to the general public to 25 cents per unit original cost (or \$15 in the aggregate for all such items given by a single beer supplier to a single retail premises per calendar year).

Subsection (e)(3) currently requires licensed suppliers to keep and maintain records at the licensed premises of all

advertising specialties furnished to retailers for a three-year period. In recognition of modern business practices and needs, ABC proposed to delete the requirement that the records be kept "at the licensed premises."

Subsection (j) currently allows wine suppliers to furnish, to on-sale licensees, tapping accessories, although the equipment must remain the property of the supplier. ABC proposed to repeal this subsection in anticipation of the enactment of SB 1621 (Rosenthal). SB 1621, which was signed by the Governor (see LEGISLATION), regulates and authorizes the provision of tapping/dispensing equipment for all alcoholic beverages and is self-executing; because its enactment makes subsection (j) unnecessary, ABC proposed to repeal it and add a new subsection (j) which affirms that nothing in section 106 shall be construed to authorize

the giving of any premium, gift, or goods of any sort, whether by way of sweepstakes, drawings, prizes, crossmerchandising promotions with a non-alcoholic beverage product or products, or any other method, if the value of the premium, gift, or goods given to an individual exceeds 25 cents with respect to beer, \$1 with respect to wine, or \$5 with respect to distilled spirits.

On November 30, the Office of Administrative Law (OAL) approved all of ABC's proposed amendments of section 106 on an emergency basis, and directed ABC to transmit a certificate of compliance to OAL by March 30, 1999, or the emergency changes will be repealed by operation of law on the following day. On November 25, ABC transmitted a certificate of compliance as to the November 30, 1998 order; at this writing, OAL is expected to approve the rulemaking on a permanent basis in January 1999.

### **Limitations on ABC Licenses for Aliens**

In June 1998, ABC published notice of its intent to adopt section 55.1, Title 4 of the CCR, to implement the provisions of the 1996 federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). The federal law limits the eligibility of certain aliens for "public benefits," including state-issued licenses. Proposed section 55.1 would set forth specific conditions under which aliens are eligible for a new or renewal ABC license under the provisions of PRWORA.

Section 55.1 would require proof of legal presence in the United States from all applicants for a new or renewal sole owner license. Applicants may present a birth certificate, a United States passport (except limited passports which are issued for periods of less than five years), a report of birth abroad of a U.S. citizen (FS-240) (issued by the U.S. State Department to U.S. citizens), or other specified documents indicating lawful residence in the United States. For United States citizens and permanent resident aliens, the documentation need be presented only once; once ABC's records reflect that an individual has permanent status in the United States, it will not require documentation upon license renewal. However, for

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resident aliens who do not have permanent status, the license will be renewed only for the period of the temporary legal status or until the next license renewal, whichever is shorter.

ABC adopted section 55.1 and submitted the rulemaking file to OAL in early December; at this writing, OAL is expected to approve the regulation in mid-January 1999.

## **BSA Audit Challenges ABC to Improve Its Enforcement Program**

As requested by the Joint Legislative Audit Committee, the Bureau of State Audits (BSA) recently reviewed ABC's enforcement program to assess whether it discriminates against establishments serving minority clientele. In a report entitled *Department of Alcoholic Beverage Control: Weaknesses in Its Enforcement Program Leave It Vulnerable to Allegations of Unfair Practices* (May 1998), BSA concluded that, although it did not identify any pattern of discriminatory enforcement or individual instances of unjustified enforcement activity, inconsistencies in ABC's enforcement activities and penalty assessments leave it vulnerable to accusations of discrimination.

In its report, BSA noted that it had to use various sampling techniques in an attempt to address the discrimination issue, because ABC "does not maintain sufficient data for us to conclude whether it discriminated against these establishments.... While we found no pattern of discrimination in our limited sample, we also lacked enough information to be able to say that no discrimination takes place." BSA also stated that its review uncovered other issues of concern, including the following:

- ABC's district offices are not always consistent in their promptness or extent of their complaint investigations, even for high-priority complaints. For example, BSA noted that the Los Angeles District Office received a complaint in February 1994 alleging that one licensee sold narcotics; however, "the district did not visit the licensee until September 1996, two years and seven months later. In contrast, in November 1996 the same complainant reported a similar narcotics complaint to the district for a different licensee. In this instance, the district office made five follow-up visits between February 1997 and May 1997. Based on our review, we believe the district's activity on the second case was justified, but the differences in the investigative follow-up on these two complaints might lead others to conclude that the district office employed selected enforcement."
- BSA also found that ABC's district offices do not have written, consistent guidelines for prioritizing complaint follow-up, and the unwritten prioritization policies each office claims to follow are vague and inconsistent.
- ABC district offices are not consistent in the penalties they assess licensees and in their application of mitigating or aggravating conditions during penalty assessments. Be-

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cause ABC has failed to provide clear guidance to district offices for assessing penalties, it is vulnerable to accusations of discrimination.

- ABC lacks the necessary information to make sound management decisions, because it is forced to rely on inaccurate enforcement data extracted manually from records at the district offices to track its enforcement activity and to report its workload to the legislature.

BSA made several recommendations. First, ABC should establish a formal system for prioritizing each complaint by type and by the number of previous complaints about the licensee; this system should alert district office management to high-priority complaints that need prompt action. Next, BSA stated that ABC should review alternatives to staffing and workload assignments, to determine whether other personnel or contractors could handle some administrative duties which are currently being performed by investigative staff, thus freeing investigators for more complaint follow-up. BSA also stated that ABC should focus on assessing penalties consistently throughout

the state, and provide specific guidance to district offices for applying aggravating and mitigating factors and for dealing with subsequent violations when assessing penalties. In the area of information management, BSA stated that ABC should develop and implement a system that captures and analyzes the districts' enforcement activity; develop and implement a formal policy that requires district management to routinely review patterns of enforcement activities to decide how to distribute its investigative resources; and implement an automated, statewide tracking system for accessing data on enforcement activities.

BSA noted that ABC has concurred in its findings, and plans to update and enhance its automated information system by April 30, 1999.

## **Minor Decoy Program**

ABC's Minor Decoy Program allows local law enforcement agencies to use persons under 20 years of age as decoys to purchase alcoholic beverages from licensed premises. ABC does not use minor decoys; however, it provides guidance to local agencies which choose to use the program.

In *Proviso v. Alcoholic Beverage Control Appeals Board*, 4 Cal. 4th 561 (1994), the California Supreme Court ruled that the use of minor decoys is not entrapment and does not violate due process requirements. [14:2&3 CRLR 118] Immediately after the ruling, the legislature passed AB 3805 (Richter) (Chapter 1205, Statutes of 1994), which required ABC to adopt regulations governing the use of minor decoy programs by local governments. [14:4 CRLR 109] In 1995, ABC adopted section 141, Title 4 of the CCR, which contains the Department's requirements for minor decoy programs. Among other things, the regulation requires the decoy to be less than 20 years of age and to display an appearance

which could generally be expected of a person under 21 years of age. The decoy must either carry his/her own identification showing his/her correct date of birth, or carry no identification. A decoy who carries identification must present it upon request to any seller of alcoholic beverages; and must answer truthfully any questions about his or her age. Further, following any completed sale, the law enforcement officer directing the decoy must, not later than the time a citation (if any) is issued, make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverage. The regulation also provides that failure to comply with these requirements is a defense to any disciplinary action brought by ABC under Business and Professions Code section 25658 (see LITIGATION). [15:4 CRLR 137]

Since the Supreme Court's ruling, more than 100 law enforcement agencies have used the decoy program. When used on a regular basis, the percentage of licensees selling to minors drops dramatically. At the time of the ruling, licensees in some communities were selling alcohol to one out of every two minor decoys who attempted to buy. After continuous use of the program over a period of time, the sale rate dropped to less than one out of five in some cities. In one operation in Fresno, decoy teams visited over 40 outlets with no sales to minors. During the 1997-98 fiscal year, a total of 291 minor decoy operations were conducted by local law enforcement agencies around the state. Of the 6,568 visits made to ABC licensed businesses, 1,355 sold to the decoy, for a 20.63% violation rate (which is down from 29.40% in 1993-94).

ABC strongly encourages law enforcement agencies to notify all licensees by letter of a pending decoy program. The objective of the notification is to minimize the sale of alcoholic beverages to minors. Local agencies are also urged to consider notifying the local media when using the decoy program. This gives licensees a second notification and may elicit editorial and community support for the agency.

**ABC Offers Grant Funds for Teen Anti-DUI Program**

ABC is offering local agencies or community groups grants of up to \$4,000 to implement "Every 15 Minutes," a two-day program focusing on high school juniors and seniors which targets teenage drinking and driving.

The program's name originated from the fact that, in the early 1990s, someone in the United States died of an alcohol-related traffic collision every fifteen minutes. Teen drivers are responsible for a highly disproportionate number of collisions, injuries, and deaths. Although teens currently comprise only 10% of the population, they are involved in 25% of all alcohol-involved fatal collisions. Thirty percent of all teen deaths are caused by motor vehicle collisions. Due to the enactment of new laws and the work of grass-roots organizations like Mothers Against Drunk Driving, the death rate is now one every thirty minutes—"a figure which continues to be unacceptable," according to ABC.

This first-of-its-kind prevention and education program was developed by the Chico Police Department in 1995 through a grant from ABC's Grant Assistance to Law Enforcement program. The Program received the Excellence In Community Policing Award by the National League of Cities. ABC will be awarding about 72 mini-grants of up to \$4,000 each during 1998-99, and plans to award a similar number in 1999-2000.

**ABC Website**

ABC maintains a website which includes the Department's mission, history, and organizational structure. The site also enables any person to inquire about the status of any ABC licensee by license number, business address, business name, or licensee name; a successful search provides information such as license number, office of application, business name, company officers, business address, type, status, issue date, transfers, and disciplinary actions. In addition, the website provides a question and answer section and ABC press releases.

**Legislation**

**SB 1621 (Rosenthal)**, as amended April 15, amends Business and Professions Code section 25510 to permit a manufacturer to furnish to a licensed wholesaler, and a licensed wholesaler or manufacturer to furnish to an on-sale licensee, specified items of alcoholic beverage tapping equipment. The supplier may service, repair, and replace the specified items of alcoholic beverage tapping equipment as necessary. Alcoholic beverage tapping equipment furnished by a supplier remains the property of the supplier.

The essential purpose of SB 1621 is to codify portions of two current ABC regulations, sections 131 and 106, Title 4 of the CCR, which address the subject of tapping equipment, and to update the law to reflect the current standards of practice in the industry (see MAJOR PROJECTS). SB 1621 was signed by the Governor on August 10 (Chapter 277, Statutes of 1998).

**SB 1696 (Alpert)**, as amended on August 24, requires that, after completion of each minor decoy program, the law enforcement agency using the decoy must notify the ABC licensee of the results of the program (to ensure that the licensee knows how his/her employee handled a minor's request to buy alcohol); and permits an ABC licensee, or the licensee's agent or employee, to seize any identification that shows the person to be under the age of 21 years or that is false, so long as a receipt is given to the person from whom the identification is seized and the seized identification is given to the local law enforcement agency that has jurisdiction over the licensed premises within 24 hours. SB 1696 was signed by the Governor on September 17 (Chapter 565, Statutes of 1998).

**SB 452 (Maddy)**, as amended April 17, authorizes the return or exchange of discontinued or seasonal beer. Specifically, this bill provides that a beer wholesaler or manufacturer may, with ABC's approval, accept the return from a retail licensee of beer which has been discontinued in a California market area, or a seasonal brand of beer that is no longer marketable. This bill provides that the beer must be exchanged for a quantity of beer of a brand produced or sold by the same

manufacturer, and that the exchanged product has no greater value than the original sale price to the retail licensee. SB 452 also prohibits a discontinued brand of beer from being reintroduced for a period of twelve months in the same California market area where a return and exchange of beer may take place. For seasonal beers, no reintroduction of the product may occur for a six-month period. The Governor signed SB 452 on August 10 (Chapter 273, Statutes of 1998).

**AB 1204 (Keeley)**, as amended on July 27, increases the misdemeanor penalty for a defendant who purchases an alcoholic beverage for another person under the age of 21 years if the person under age 21 then consumes the alcohol and thereby proximately causes great bodily injury or death to himself, herself, or any other person. The bill provides that punishment of the misdemeanor violation is imprisonment in a county jail for a minimum term of six months, and a maximum term of one year and/or by a fine up to \$1,000. AB 1204 was signed by the Governor on September 3 (Chapter 441, Statutes of 1998).

**AB 2285 (Brown)**, as amended June 25, expands the categories of ABC licensees who are permitted to give away samples of and provide consumer instruction on their products. AB 2285 amends Business and Professions Code sections 23386 and 25503.5 to permit an on-sale retail licensee authorized to sell wine or distilled spirits, a winegrower, or a distilled spirits manufacturer to instruct consumers at the on-sale retail licensed premises regarding wine and distilled spirits. The instruction of consumers may include the furnishing of not more than three tastings to any individual in one day. A single tasting of distilled spirits may not exceed one-fourth of one ounce, and a single tasting of wine may not exceed one ounce. The Governor signed this bill on August 3 (Chapter 248, Statutes of 1998).

**AB 2416 (Committee on Governmental Organization)**, as amended July 7, makes a variety of minor changes to the ABC Act. For example, AB 2416 exempts from the ABC licensing requirement the serving of alcoholic beverages as part of a hot air balloon ride service, provided there is no extra charge or fee for the alcoholic beverages.

Existing law requires an out-of-state beer manufacturer to have an out-of-state beer manufacturer's certificate in order to ship beer manufactured outside the state to licensed importers in the state; ABC is responsible for determining the annual fees for the certificate, which must approximate the cost of the investigation of the applicant and issuance of the certificate. AB 2416 eliminates the requirement that these fees include the cost of investigation of the applicant.

Existing law provides for the issuance of an on-sale general alcoholic beverage license to a person who does not operate a bona fide eating place or other public premises and who meets specified conditions, including, among other things, operating a catering business for not less than five years; catering over 500 events annually; operating or owning, for not less than four years, a bona fide eating place that had an on-sale license, and serving alcoholic beverages at no more than 25% of the events catered. This bill revises one of these conditions by requiring that the licensee own or oper-

ate a bona fide eating place that had an on-sale license for not less than one year (rather than four years). This amendment is the result of a problem a San Diego-based caterer experienced in obtaining a caterer's on-sale general license from ABC. Specifically, the caterer was unable to obtain the caterer's on-sale general license because of the requirement that the caterer must also have operated or owned a restaurant for four years. Supporters of the change stated that there appears to be no policy rationale for such a requirement, and the aggrieved party noted that it is easier for a restaurateur to expand into the catering business than for a caterer to open a restaurant and operate it for four years before the person can obtain a caterer's license.

The ABC Act permits licensees to hold stock in various corporate licensees under specified conditions, among which is that the stock be listed on the New York or American Stock Exchanges. This bill also permits the stock ownership if the stock is listed on NASDAQ.

Existing law provides that the possession, consumption, sale, gift, or delivery of an alcoholic beverage in or on any public schoolhouse or its grounds constitutes a misdemeanor; however, it is not unlawful to acquire, possess, or use an alcoholic beverage if the alcohol is acquired, possessed, or used during events at a stadium with a capacity of more than 18,900 people, located in a county of the 14th class, that is owned or operated by a college. This bill deletes the provisions requiring that the college-owned or college-operated facility be a stadium, have a capacity of more than 18,900 people, and be located in a county of the 14th class in order for the acquisition, possession, or consumption of alcoholic beverages not to be unlawful. AB 2416 also provides that it is not unlawful if the alcoholic beverages are possessed, consumed, or sold, for an event during the weekend or at other times when pupils are not on the grounds of an overnight retreat facility owned and operated by a county office of education in a county of the 18th class.

AB 2416 also makes various changes to provisions affecting the licensure of corporations, limited partnerships, and limited liability companies under the ABC Act. AB 2416 was signed by the Governor on September 20 (Chapter 639, Statutes of 1998).

**SB 1710 (Polanco)**, as amended June 24, authorizes any on-sale licensee authorized to sell wine to also sell soju, an imported Korean alcoholic beverage that contains not more than 24% of alcohol by volume and is derived from agricultural products. This bill was signed by the Governor on July 20 (Chapter 204, Statutes of 1998).

## Litigation

In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board*, 67 Cal. App. 4th 575 (Oct. 28, 1998), the Second District Court of Appeal reversed a decision of the Alcoholic Beverage Control Appeals Board and ordered ABC to withdraw an accusation against a licensee who served alcohol to a minor decoy.

Local law enforcement agencies are permitted to use minor decoys to enforce the constitutional and statutory

prohibitions against the sale of alcoholic beverages to minors, so long as they comply with ABC's minor decoy rules in section 141, Title 4 of the CCR (see MAJOR PROJECTS). Under section 141(b)(5), after the point at which an ABC licensee has served alcohol to a minor decoy and prior to the issuance of a citation, "the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverage." Under section 141(c), "[f]ailure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code section 25658."

In *Acapulco*, a 19-year-old minor decoy working with a Los Angeles Police Department officer ordered a beer in a restaurant. Without first requesting identification, the bartender served the decoy, and the decoy paid for the beer. A police officer seated nearby observed the transaction, and cited the restaurant's owner without having the decoy make the required face-to-face identification of the bartender. After a hearing, an ABC administrative law judge sustained the charge and ordered a 15-day suspension of Acapulco's liquor license. On appeal, the Alcoholic Beverage Control Appeals Board affirmed the suspension, refusing to give section 141(c) a "rigid and literal interpretation" because the police officer had been sitting only a few feet away at the time of the sale. According to the Board, the rule must "take into account reality," and "the reality of this case" is that "there is no need for the requirement of identification when the peace officer is already within the premises and is an eye-

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witness to the transaction." Acapulco appealed.

The Third District reversed. Focusing on the language of ABC's own rule, the court noted that section 141(c) states that failure to comply with the face-to-face identification rule "shall" be a defense to an enforcement action. "We reject the Department's contention that its refusal to apply rules 141(b)(5) and 141(c) is no more than an exercise of its right to 'interpret' a rule governing its enforcement operations. 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...We hold that rule 141(b)(5) means what it says...."

Numerous retailers and their trade associations filed *amicus curiae* briefs in support of Acapulco in the case; their briefs included ABC's own statistics, of which the court took judicial notice, indicating that 18,577 attempts to buy alcohol by underage decoys were made between mid-1994 and September 1998, and that the use of minor decoy programs has increased substantially since 1995. According to *amici* and the court, 48% of all violations over the past three years have been based on decoy sales. "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule."

## Athletic Commission

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The Athletic Commission, part of the state Department of Consumer Affairs (DCA), is empowered to regulate professional and amateur boxing and full contact martial arts and kickboxing under the Boxing Act, Business and Professions Code section 18600 *et seq.* The Commission's regulations are found in Division 2, Title 4 of the California Code of Regulations (CCR). The Commission consists of eight members, each serving four-year terms. All eight members are "public members" as opposed to industry representatives.

The Commission has sweeping powers to approve, manage, and direct all professional and amateur boxing and full contact martial arts shows or exhibitions held in California, and to license professional and amateur boxers and martial arts competitors, promoters/clubs, referees, judges, matchmakers, booking agents, timekeepers, managers, trainers, seconds, and training facilities. The Commission is authorized to develop and administer appropriate examinations to determine the qualifications of individual athletes, including pre-bout physical examinations, HIV/HBV testing, neurological testing, and eye examinations. The Commission is also

responsible for establishing and administering financial protection programs for competitors, such as the Professional Boxers' Pension Plan. The Commission places primary emphasis on boxing, where regulation extends beyond licensing and includes the establishment of equipment, weight, and medical standards. Further, the Commission's power to regulate boxing extends to the separate approval of each contest to preclude mismatches. Commission representatives attend all professional boxing contests.

The Commission's goals are to ensure the health, safety, and welfare of the competitors, and the integrity of the sports of boxing and martial arts in the interest of the general public and the participating athletes.

### Major Projects

#### *Professional Boxers' Pension Plan Issues*

Pursuant to Business and Professions Code section 18880 *et seq.*, the Commission created the Professional Boxers'

