LEAGUE OF CALIFORNIA CITIES

CITY ATTORNEYS DEPARTMENT

REPORT OF THE DEPARTMENT'S AD HOC DUE PROCESS COMMITTEE ON THE COMMINGLING OF FUNCTIONS IN QUASI-JUDICIAL PROCEEDINGS IN THE WAKE OF *NIGHTLIFE PARTNERS* AND *QUINTERO*

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THE APPLICATION OF PROCEDURAL DUE PROCESS TO CITY ADMINISTRATIVE PROCEEDINGS – THE *NIGHTLIFE PARTNERS* AND *QUINTERO* DECISIONS

I. INTRODUCTION

This analysis has been prepared by the City Attorneys Department of the League of California Cities in response to the challenges posed by two recent decisions of the California Court of Appeal – *Nightlife Partners v. City of Beverly Hills*[1] and *Quintero v. City of Santa Ana.*[2] They hold that the commingling of advisory and prosecutorial functions by city attorneys[3] in certain city quasi-judicial administrative hearings renders the procedures in these proceedings a violation of due process.

These cases equate a statutory provision of the State Administrative Procedures Act, which is inapplicable to local governments, with a constitutional due process requirement. Yet they fail to discuss conflicting federal and California appellate cases on the threshold questions of: 1) whether the local administrative proceeding is even subject to procedural due process in the absence of any deprivation of a property or liberty interest; or 2) what process is actually due in any particular circumstance under the due process multi-factor balancing test. As a result, these cases represent an aberration in applicable law concerning procedural due process.

We believe that cities are deeply committed to enforcing their ordinances and polices in a fair and evenhanded manner within the constraints imposed by their underlying regulatory schemes. We seriously disagree, however, that fairness requires administrative procedures to mimic cumbersome courtroom proceedings. Indeed, both California and federal courts have hitherto rejected any such claims. Nonetheless, cities need to pay close attention to these new cases since they may be used to challenge the procedures employed in certain administrative proceedings.[4] This paper is designed to provide the guidance of the City Attorneys Department Due Process Committee, which has been studying these cases and their implications for cities.

II. THE PROBLEM-- THE *NIGHTLIFE* AND *QUINTERO* DECISIONS

A. *Nightlife Partners v. City of Beverly Hills.*[5]

1. The holding.

This paper reflects the comments of the Department membership during and following the May 2005 conference. The Committee appreciates all of those contributions, and further wishes to thank Professors Michael Asimow and Gregory Ogden for their insightful observations. The Committee also wishes to thank Stephen Traylor of the League staff for all of his assistance in this project.

[1] (2003) 108 Cal. App. 4th 81.

[2] (2003) 114 Cal. App. 4th 810.

[3] We use the term "city attorney" interchangeably with deputy and assistant city attorney to mean the municipal lawyer whose role is at issue. This discussion applies equally to other public agency lawyers.

[4] Of course, an issue not raised at an administrative hearing, including a claim of bias, may not be raised in later judicial proceedings. *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549.

[5] *Supra*, 108 Cal. App. 4th 81.

In *Nightlife,* an adult cabaret had to file a permit renewal request every two years under the city's governing ordinance. The city and the applicant disagreed as to whether the governing ordinance required the business to submit exactly the same documents in support of the application as it had done for the initial permit. The deputy city attorney took an active role in advising staff as to the requirements of the city's ordinance, sending several letters to the business directly stating the city's position. The city made the administrative staff decision subject to appeal to an administrative hearing officer. When the same deputy city attorney later advised the hearing officer, the Court found that there had been a commingling of the prosecutorial and advisory functions and a violation of procedural due process. The Court held that the city attorney cannot serve in an advisory capacity after having played an "active and significant" role in a process that is contested, having been a "prosecutor" or "advocate" for staff, or a "partisan advocate for a particular position or point of view."[6] At the hearing the city was separately represented by a different lawyer. Thus, the city had itself created and followed an adversarial administrative model. The significance of this fact becomes more apparent later in this analysis.

2. *Nightlife* failed to discuss the threshold issue of whether federal due process was even triggered.

The *Nightlife* court's discussion of whether due process is applicable while citing to only federal due process cases completely misses the property right - liberty interest threshold for procedural due process protection under federal law. The Court announced instead a sweeping and erroneous blanket premise:

> The protections of procedural due process apply to administrative proceedings (*Richardson* v. *Perales* (1971) 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842); the question is simply what process is due in a given circumstance. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484; see *Logan* v. *Zimmerman Brush Co.* (1982) 455 U.S. 422, 428-429, 102 S. Ct. 1148, 1153-1154, 71 L. Ed. 2d 265.)
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> *Nightlife Partners, Ltd. v. City of Beverly Hills*, *supra*, 108 Cal. App. 4th at p. 90.

However, federal due process is triggered only by the deprivation of a property right or a liberty interest, such as revocation, reduction or termination of previously granted land uses and other entitlements. In *Board of Regents v. Roth* (1972) 408 U.S. 564, a case decided after the *Richardson v. Perales* case cited by the *Nightlife* court, the United States Supreme Court rejected a claim by a probationary university professor that his termination during probation was protected by due process, holding that a property or liberty interest had to be at stake before due process protections were triggered. *Id.* at pp. 569-570. *See also Mathews v. Eldridge* (1976) 424 U.S. 319, 331 ("Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment.")

A mere denial of a permit does not constitute deprivation of a property right. The United States Supreme Court in *American Manufacturers Mutual Insurance v. Sullivan* (1999) 526 U.S. 40, 59-61 rejected a claim that an initial denial of eligibility for workers' compensation benefits created a liberty or property interest protected by due process:

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[6] *Nightlife, supra,* 108 Cal. App. 4th at p. 94. Although the Court did not explicitly rely on this fact in coming to its conclusion, the City was contemporaneously engaged in litigation against this adult business, and the same deputy city attorney was one of the City's litigators.

> In *Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970),* we held that an individual receiving federal welfare assistance has a statutorily created property interest in the continued receipt of those benefits. Likewise, in *Mathews, supra,* we recognized that the same was true for an individual receiving Social Security disability benefits. In both cases, an individual's entitlement to benefits had been established, and the question presented was whether predeprivation notice and a hearing were required before the individual's interest in *continued* payment of benefits could be terminated. See *Goldberg, supra, 397 U.S. at 261-263; Mathews*, *supra*, at 332.
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> *American Manufacturers Mutual Insurance v. Sullivan*, *supra*, 526 U.S. at p. 60 (emphasis in original).[7]

Nightlife also conflicts with other California reported decisions in the land use context, which have held that due process provides no protection in the absence of a protected property interest.[8] Nightlife Partners was applying for a permit and thus had no property interest at stake.[9] *Nightlife* ignores these decisions entirely and instead relies, in part, upon the body of California case law holding that Code of Civil Procedure §1094.5 (which provides for administrative mandamus review of adjudicatory decisions) requires a neutral decision maker for a fair hearing, [10] and a case which assumed that the agency before it had adopted an adversarial model of administrative decision making and, thus, that its procedures should be measured against the norms applicable to such adversary proceedings.[11]

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[7] Interestingly, in *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 615, the California Supreme Court glossed over the property right/liberty interest distinction and went on to reach the due process issue. In assuming that due process applied, the court relied on language from an earlier case, *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 548-549, holding that "land use decisions which 'substantially affect' the property rights of owners of adjacent parcels *may* constitute "deprivations" of property within the context of procedural due process" in combination with allegations of Horn's complaint that the subdivision plan he opposed "will substantially interfere with his use of the only access from his parcel to the street and will increase traffic congestion and air pollution." (Emphasis added.) *Horn v. County of Ventura*, *supra*, 24 Cal. 3d 615. The implied assumption in *Scott v. City of Indian Wells*, *supra*, 6 Cal.3d at pp. 548-549, that discretionary decisions were automatically subject to due process protections, has been expressly disavowed in *Board of Regents v. Roth, supra,* 408 U.S. at pp. 569-570. (Probationary university professor had no property or liberty interest and thus no entitlement to due process protections when he was terminated during probation.) Subsequent cases which cite *Horn* treat it as requiring reasonable notice and an opportunity to be heard to be provided to land owners in land use cases; these cases do not address the threshold question of whether there is a triggering liberty or property interest at stake and thus whether due process even applies. *See e.g. Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555-56; *Van't Rood v. County of Santa Clara* (2003) 113 Cal. App. 4th 549, 570.

[8] *Clark v. City of Hermosa Beach* (1996) 48 Cal. App. 4th 1152, 1168-69; *accord Breakzone Billiards v. City of Torrance* (2000) 81 Cal. App.4th 1205, 1224.

[9] *Nightlife* did, however, involve an existing permit that had to be renewed. Thus, although the court did not expressly state that a property interest was at stake that triggered procedural due process protection, it is possible that under these circumstances a court could have found that a property interest was being deprived.

[10] *Clark v. City of Hermosa Beach, supra,* 48 Cal. App. 4th 1152; *accord Breakzone Billiards v. City of Torrance, supra*, 81 Cal. App. 4th at pp. 1235-36

[11] *Howitt v. Superior Court* (1992) 3 Cal. App. 4th 1575, 1581-1582.

3. California due process-when applicable?

The California Supreme Court has held that under the California Constitution there is a liberty interest in freedom from arbitrary adjudicative procedures in all adjudicatory hearings, even those that do not involve deprivation of property rights or liberty interests.[12] Under either federal or California due process, the fact that procedural due process protection is applicable does not, however, resolve what process is actually due.

As we explain, neither federal nor California due process doctrine requires an adversary hearing that mimics a court proceeding. Both federal and California procedural due process are highly flexible concepts; the type of administrative review required depends on the balancing of various factors.

4. Ascertaining what process is due requires the balancing of various factors under either federal or California due process.

a. Balancing under the United States Constitution to determine what process is due.

Even when a property right or liberty interest is at issue, under federal law, the process provided need not automatically mimic a courtroom proceeding by providing for an adversary hearing before an impartial decision maker. Due process "unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances [citations omitted]." *Mathews v. Eldridge*, *supra*, 424 U.S. at p. 334. It is "flexible and calls for such procedural protections as the situation demands [citations omitted]." *Id.* A court must weigh: 1) the private interest to be affected by the governmental action; 2) the risk that the procedures used will result in an erroneous deprivation of that interest; and 3) the probable value, if any, of using different procedures weighed against the governmental burden entailed by the additional procedures.

b. Balancing under the California Constitution to determine what process is due.

The California Supreme Court likewise has held that the type of procedure required under due process is ascertained only after the complex balancing of factors. More specifically, identification of the dictates of due process generally requires consideration of: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official;

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[12] Under the California Constitution, "due process safeguards required for protection of an individual's statutory interest must be analyzed applying the principle that *freedom from arbitrary adjudicative procedures is a substantive element of one's liberty*." *People v. Ramirez* (1979) 25 Cal.3d 260, 268-69 (emphasis added). Due process guaranteed under Article I § 7 of the California Constitution thus "presumes that when an individual is subject to *deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making* and in being treated with respect and dignity." *Id.* (Emphasis added.) Here, California law appears to depart from federal due process principles as regards the meaning of "deprivation," because the plaintiff in *Ramirez* was *not* challenging termination from a continuing program in which he was already enrolled, but, was challenging the initial decision not to enroll him. The principle that procedural due process protection is applicable to all adjudicatory actions was affirmed in *Saleeby v. State Bar of California* (1985) 39 Cal.3d 547, 563-64. There the court upheld a client's claim that the State Bar's rules governing a Client Security Fund violated due process. Like the *Ramirez* case, *Saleeby* involved an application for benefits, not a termination of existing benefits. This conclusion is difficult to reconcile with cases like *Clark, supra,* which hold that procedural due process is not applicable to the mere denial of a permit.

and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[13]

There have been no California cases applying the California balancing test to conclude that the prohibition against combining prosecutorial and adjudicative functions is required in any given administrative procedure. Instead, *Nightlife* and *Quintero* have relied on federal cases either because the court concluded that the local government had adopted an adversarial model of administrative decision-making[14] or because they were read into Code of Civil Procedure section 1094.5. [15]

5. Code of Civil Procedure section 1094.5.

Prior to *Nightlife*, *Clark v. City of Hermosa Beach, supra,* 48 Cal. App. 4th 1152, held that the fairness of land use procedures were to be measured under Code of Civil Procedure section 1094.5 rather than due process. In that case, the applicant whose land use permit was denied claimed that he did not receive a fair hearing because one of the council members was biased against him as reflected in a pattern of hostile conduct. With respect to the plaintiff's claim that the City had violated his federal civil rights by denying him due process, the court determined that due process did not apply because there was no protected property or liberty interest at stake; the level of discretion granted the City in approving or denying the permit vitiated any claim that the permit was an entitlement rising to the level of a property interest. *Id*. at p. 1170. However, the court stated that the "writ is appropriate where the petitioner has been deprived of a fair hearing (Code of Civ. Proc., § 1094.5, subd. (b).)" *Id.* The *Clark* court then quoted extensively from *Applebaum v. Board of Directors* (1980) 104 Cal. App. 3d 648, 657-658, a case involving the fairness of review procedures at a private hospital. That case rested on reading a common law requirement of fairness in private administrative decision making into Code of Civil Procedure §1094.5 writ review. The court described the requirements of such common law fairness thus:

> [A]n individual has the right to a tribunal 'which meets . . . standards of impartiality.' . . . Biased decision makers are . . . impermissible and even the probability of unfairness is to be avoided. . . The factor most often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members. . .. Personal embroilment in the dispute will also void the administrative decision . . ., although neither prior knowledge of the factual background which bears on a decision nor pre-hearing expressions of opinions on the result disqualifies an administrative body from acting on a matter before it. . .. [¶] . . . Our Supreme Court has declined to fix rigid procedures for the protection of fair procedure rights . . ., but it is inconceivable to us that such rights would not include impartiality of the adjudicators.
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> 48 Cal. App.4th at p. 1170.

By contrast to the *Clark* court's description of the issue of impartiality, the *Appelbaum* decision on which *Clark* relies is actually far more nuanced and cautious:

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13 *People v. Ramirez, supra*, 25 Cal.3d at p. 269.

14 *Howitt v. Superior Court*, *supra*, 3 Cal. App. 4th at pp. 1585-1587.

15 *Breakzone Billiards v. City of Torrance*, *supra*, 81 Cal. App. 4th at p. 1236, n. 24.

> Specific requirements for procedural due process vary depending upon the situation under consideration and the interests involved. (*People* v. *Ramirez, supra*, at p. 264; *Mathews* v. *Eldridge* (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 33, 96 S.Ct. 893].) Where due process requires an administrative hearing, an individual has the right to a tribunal "which meets at least currently prevailing standards of impartiality." (*Wong Yang Sung* v. *McGrath* (1950) 339 U.S. 33, 50 [94 L.Ed. 616, 628, 70 S.Ct. 445].) Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47 [43 L.Ed.2d 712, 723, 95 S.Ct. 1456]; *In re Murchison* (1955) 349 U.S. 133, 136 [99 L.Ed. 942, 946, 75 S.Ct. 623].) The factor most often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members. (See *American Motors Sales Corp.* v. *New Motor Vehicle Bd*. (1977) 69 Cal.App.3d 983 [138 Cal.Rptr. 594], and cases cited therein.) Personal embroilment in the dispute will also void the administrative decision (*Mennig* v. *City Council* (1978) 86 Cal.App.3d 341 [150 Cal.Rptr. 207]), although neither prior knowledge of the factual background which bears on a decision nor prehearing expressions of opinions on the result disqualifies an administrative body from acting on a matter before it. (*City of Fairfield* v. *Superior Court* (1975) 14 Cal.3d 768, 782 [122 Cal.Rptr. 543, 537 P.2d 375].)
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> 104 Cal. App. 3d at p. 658.

On the issue of whether due process or fairness requires a prohibition on the combination of functions the *Appelbaum* court notes:

> The federal position on the issue is that due process is not violated by the combination of investigative and adjudicative functions unless the facts of a case show foreclosure of fairness as a practical or legal matter. (*Withrow* v. *Larkin, supra*, 421 U.S. 35.) Most states, including California, have taken the same approach to combination of functions argument.
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> 104 Cal. App. 3d at p. 659.

The actual language of the leading United States Supreme Court decision *Withrow v. Larkin* cited by the *Appelbaum* court notes that as contrasted with claims of pecuniary bias:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
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> 421 U.S. at p. 47.

6. *Nightlife* ignores all these cases.

The *Nightlife* court's inquiry into what process was due cited no cases whatsoever. It instead baldly stated:

> Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness and the absence of even a *probability* of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor [sic] assuring that such hearings are fair.
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> 108 Cal. App. 4th at p. 90.

As we pointed out earlier, *Withrow v. Larkin*, cited by the *Nightlife* court, actually held that in the absence of pecuniary bias, administrative decision makers are entitled to a presumption of honesty and integrity that can only be overcome by demonstrating facts that suggest a risk of actual bias. By contrast, the case it had cited earlier concerning the application of due process to administrative hearings involving the deprivation of property or liberty interests cautioned to the contrary.[16]

The *Nightlife* court also relied on *Howitt v. Superior Court, supra,* 3 Cal.App.4th at p. 1585 in asserting that "California courts, too, recognize that the combination of prosecutorial and adjudicative functions is the most problematic combination for procedural due process purposes."

In fact, the *Howitt* court said no such thing. It stated instead:

> Both *Withrow* and *Kloepfer* exemplify administrative procedures that depart to some extent from the *pure* adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates. The departure is perhaps more dramatic in *Withrow*, where the functions of investigation and adjudication are effectively merged in the same persons, than in *Kloepfer*, where the commission's staff conducted an initial investigation. Nonetheless, these decisions and numerous others stand for the proposition that the pure adversary model is not entitled to constitutionally enshrined exclusivity as the means for resolving disputes in "[t]he incredible variety of administrative mechanisms [utilized] in this country...." (*Withrow, supra*, 421 U.S. at p. 52 [43 L.Ed.2d at pp. 726- 727].) The mere fact that the decision maker or its staff is a more active participant in the fact-finding process--similar to the judge in European civil law systems--will not render an administrative procedure unconstitutional.
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> 3 Cal. App. 4th at p. 1581.
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> A more difficult question is presented where the administrative agency *chooses to utilize* the adversary model in large part but modifies it in a way that raises questions about the fairness of the resulting procedure. Here, for instance, we assume the county constitutionally could have allowed the sheriff or the board of supervisors to review personnel complaints by employees in the sheriff's department. Instead, it created an independent and disinterested administrative board to adjudicate disputes between the county and its employees.
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> *Id*. at pp.1581-1582 (emphasis added).

[16] *Withrow v. Larkin, supra,* 421 U.S. 35, 47.

Thus, the *Howitt* court judged the constitutional adequacy of the challenged administrative procedure before it, against the quasi-judicial adversary model that the county had itself chosen to establish. The court did not hold that only an adversary administrative proceeding, modeled on judicial proceedings, could pass constitutional muster. Another California court has rejected a challenge to an administrative proceeding where a council member filed an appeal of a lower land use body on the grounds that there had been an improper combination of functions. That court described the law quite differently than the *Nightlife* court:

> Thus, it appears that the highest court of this state construes the state Constitution's due process guaranty of a fair and impartial administrative decision maker in the same manner as the federal courts have interpreted parallel provisions in the federal Constitution. In other words, mere involvement in ongoing disciplinary proceedings does not, per se, violate due process principles. Conversely, [t]hose principles are violated . . . if the official or officials who take part in the proceedings *are demonstrably biased* or if, in the least, circumstances such as *personal or financial interest strongly suggest a lack of impartiality.*
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> *BreakZone Billiards v. City of Torrance, supra,* 81 Cal. App. 4th at p. 1237 (emphasis added).

Despite these decisions, which have been deferential to local government procedures and the need for administrative flexibility, the *Nightlife* court imposed a one size fits all APA/judicial model on local government administrative decionmaking where neither the APA nor the due process clause either apply or dictate this particular model of administrative decision making.

The central fallacy in *Nightlife* and, to a lesser extent, in *Howitt*, is the assumption that local administrative hearings are provided to ensure review by some entirely separate and independent pristine body, which is untarnished or unaffected in any manner by the rest of the agency's actions or history. To the contrary, in most local public agencies, such review is intended to facilitate the agency's own internal scrutiny of the actions of its lower officers and tribunals, to correct errors and ensure that the legislative and policy intent of local regulatory schemes are properly implemented without losing the continuity of advice from its own experts. The need for consistent and reliable legal and expert planning and administrative advice by persons such as the city manager, city attorney or planning director is critical to the citizen decision makers that typically serve as the adjudicators in cities and other local public agencies.

In the absence of any actual standards of what is "fair" combined with a lack of appreciation of the need for administrative flexibility from one type of proceeding to another or one context to another, each court is free to make its own decision about what is fair in the case before it and to choose to import into due process its favorite state statute or procedure, such as provisions of the APA, even where the California legislature itself has recognized that the law is inappropriate for local agencies. *Quintero*, discussed below, is an example of just such administrative procedure du jour, masquerading as fairness.

B. *Quintero v. City of Santa Ana.*[17]

In *Quintero*, a discharged employee appealed his dismissal to the city's personnel board. The assistant city attorney who prosecuted the dismissal at the hearing had at times also acted as attorney for the board, although he was not acting as the decision maker's adviser in this matter. The

[17] *Quintero, supra*, 114 Cal. App. 4th 810.

appellate court ruled that "the appearance of unfairness is sufficient to invalidate the hearing," and found "a clear appearance of bias and unfairness" because of the probability that the board, having relied on his advice in the past, would give that attorney's arguments for termination in this case undue influence. The Court held that while the city attorney's office may act as legal adviser to the board as well as advocate for a party at the same contested hearing, it may do so only if it demonstrates that the advocacy and advisory roles have been properly segregated.

Thus, the *Quintero* court held that due process was violated where a lawyer who regularly advises the personnel board on *other matters* appears as an advocate before the board on an unrelated matter, even though the board was advised by a separate lawyer as to that matter. *Quintero* goes far beyond any of the reported cases invalidating administrative procedures on due process grounds. The court did not even discuss the *Withrow v. Larkin* presumption of honesty and integrity to which decision makers are entitled, in the absence of pecuniary bias. *See Haas v. County of San Bernardino* (2002) 27 Cal. 4th 1017.

C. *Nightlife* and *Quintero* conflict with existing law.

The discussion above demonstrates that *Quintero* and *Nightlife* represent a radical departure from the prior judicial approach to due process. Administrative flexibility and a careful balancing of competing interests were overlooked in favor of a one-size fits all approach, plucking concepts from inapplicable statutes and importing them into local procedures without any appreciation of the resultant administrative chaos.

On a practical level, a broad reading of *Nightlife* wreaks havoc with attorney-client relationships within public agencies. Cities regularly rely on their city attorney for guidance and direction throughout an administrative process. The *Nightlife* decision seems to compel the city attorney at some undefined point in a proceeding to cease offering advice to staff in order to avoid risking disqualification from later advising the city council or other decision making bodies. Staff is then forced to go it alone, or to frequently resort to seeking the advice of outside counsel, who usually is less familiar with city rules and practices and whose judgment is an unknown. The city attorney is loathe to place staff in such a precarious position by seeming to abandon her usual duties due to the possibility that she will be declared biased for doing nothing more than offering sound legal advice. Cities with tight budgets will be reluctant to engage outside counsel every time the specter of a due process violation arises. Most importantly, the risk of inconsistent approaches to the same statutory scheme due to prosecutorial mercenaries being brought into an agency on an ad hoc basis is likely to lead to erratic and inconsistent enforcement of local regulatory schemes, the very unfairness that internal administrative review is designed to avoid. Since the commingling prohibition applies to any official engaged in the administrative proceedings, the next frontier may well be disqualifications of planning directors and city managers who would presumably also be subject to the same prohibition as the lawyers providing the advice, since the APA makes no distinction between lawyers and others involved on the "prosecutorial" or "adjudicatory" side.

III. RECOMMENDATIONS

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

As the above discussion has demonstrated, the *Nightlife* case built upon the holding of the *Howitt* case. *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 an ethical 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* court's conclusion turned on the fact that the county had *chosen* to utilize the adversary model by having a lawyer present the county's termination case to the adjudicatory tribunal. If a lawyer is going to appear to represent one arm of the City whose decision is being appealed, a reviewing court is likely to apply the prohibition on commingling prosecutorial and adjudicatory functions to preclude the tribunal from being represented by another lawyer from the same office unless the two lawyers do not consult with one another on the issue. Hence, a city should be deliberate about choosing when and when not to utilize an adversary model for adjudication.

B. Adopt a resolution expressly disavowing an intention to create an adversarial administrative structure in general or selected proceedings, where the case law does not preclude it.

A city can adopt a resolution, for example, in land use proceedings, which expressly disavows any intention to create an adversary type of administrative hearing structure, and articulates its need for consistent advice from its experts, and other such policy goals to aid in the later review of whether the administrative structure meets the balancing test. A sample resolution from the City of Berkeley is attached. It can also create a type of default resolution disavowing reliance on an adversarial administrative structure in all proceedings unless some provision of law expressly requires it. At bottom, however, the characteristics of the procedure, and not the nomenclature, will be determinative of whether it is adversarial or not.

C. Apply the prohibition on the commingling of functions only to those proceedings where the City can be said to be playing a prosecutorial rather than an evaluative role.

Nightlife and *Quintero* are both grounded in the principle that there is an improper combination of prosecutorial and adjudicative functions if the same lawyer plays both roles, because the advocacy inherent in the prosecutorial role conflicts with the impartiality required of an adjudicator. In each of the two cases, the offending lawyer was described by the court as "advocating" a position. *Nightlife* calls it acting as "a partisan advocate for a particular position or point of view."[18] The court in *Quintero* likewise stated: "Accordingly, to permit an advocate for one party to act as the legal advisor for the decision maker creates a substantial risk that the advice given to the decision maker will be skewed, particularly when the prosecutor serves as the decision maker's adviser in the same or a related proceeding."[19] The challenge is to determine, as a threshold matter, when a proceeding can be said to be of a prosecutorial nature, such that one arm of the City can be said to be functioning as an advocate with a will to win.

We believe that the principles enunciated in these cases pertaining to commingling of functions apply only to prosecutorial proceedings where the local agency lawyer 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 section1094.5's guarantee of an unbiased decision maker, the doctrine that prosecutorial and adjudicatory functions should not be combined in the same lawyer should only be applicable to any administrative proceeding in which one arm of the city is playing a prosecutorial

[18] *Id.* at p. 93 (quoting *Howitt v. Superior Court, supra,* 3 Cal. App. 4th at p. 1585).

[19] *Quintero, supra,* 114 Cal.App. 4th at p. 817 (quoting *Nightlife, supra*, 108 Cal.App. 4th at p. 93).

role and a different administrative tribunal or individual is the quasi-judicial decision maker reviewing the decision of that body.[20]

Accordingly, this paper interprets *Nightlife* and *Quintero* as limited to administrative proceedings in which one lawyer represents the city in a *prosecutorial role.* Where the city presents its "case" before one of its own adjudicatory bodies, the city lawyer arguing for a particular result will be playing a prosecutorial role, and the proceeding itself will likely be subject to the prohibition on combining prosecutorial and adjudicative functions in the same lawyer.[21] In such types of proceedings, the reviewing body should be advised by a different lawyer who should not be collaborating on the merits of the case with the lawyer playing the prosecutorial role (that is, they can be said to have erected an ethical wall between them, as we discuss later).[22]

The prohibition on commingling functions applies to quasi-judicial proceedings 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, which may create the appearance that only hearings involving deprivation of a vested property right are involved. This would be wrong – our focus is on the City's role in the proceeding, *not* the interest that is at stake. 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 plays a prosecutorial role (to which *Nightlife* and *Quintero* apply) and those that are evaluative (to which the commingling doctrine articulated by those cases should be inapplicable).

In general, the prohibition against commingling of 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.[23] By contrast, the City engages in a *purely 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 paper 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

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[20] For purposes of convenience, the term "decision making body" or "decision maker" will be used but it includes a City Council, Civil Service Board, Planning Commission, or any hearing officer or body which presides over quasi-judicial administrative hearings that are prosecutorial in nature.

[21] *Howitt v. Superior Court*, *supra*, 3 Cal. App. 4th at pp. 1585-1587.

[22] *Ibid.* See section III H where we recommend that outside counsel or a deputy city attorney be assigned to the role of prosecutor so that the city attorney can remain the lawyer for the decisionmaker.

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

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.[24] 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. Meaningful involvement in assisting the staff who are committed to a particular result prior to the hearing precludes that lawyer from advising the decisionmaker.

We next apply *Nightlife* and *Quintero* to determine how far the government attorney may go in advising staff before crossing the line and herself becoming a "prosecutor," thereby risking an improper commingling of functions if she later seeks to advise decision makers in the same matter. For purposes of this analysis, we will assume that the city attorney has chosen to serve as advisor to the decision making bodies in prosecutorial matters, and seeks to protect that position by avoiding offering advice to staff that will render her a prosecutor.

Nightlife relied heavily on California and federal administrative procedural regulations. In the case of the California Administrative Procedures Act ("APA")(Government Code Sections 11400 *et seq*.), the investigative, prosecutorial and adjudicative roles must be segregated. Although the APA is explicitly inapplicable to local governments, unless its provisions have been adopted by the local jurisdiction,[25] the prohibition against commingling of functions was borrowed by the *Nightlife* court from Government Code Section 11425.30 of the APA. The Law Revision Comment to that section of the APA explains that "[t]he sort of participation intended to be disqualifying is *meaningful participation* that is *likely to affect an individual with a commitment to a particular result in the case."* Likewise, the prohibition does not apply "to marginal or trivial participation."

In light of the insinuation of APA standards into judicial construction of these procedural due process cases, *Nightlife* can be interpreted *strictly* to prevent virtually *any* substantive interaction between a city attorney who desires to later act as an advisor to the decision making body, and city staff who will be prosecuting the case. Virtually any *specific advice* given by the city attorney to staff in a matter that would later be subject to a prosecutorial hearing would fall within this prohibition, since such advice can be said to "affect" the lawyer who will be later called upon to give the decision maker impartial advice or the staff member prosecuting the matter. Under this strict reading, activities that are likely prosecutorial include advising staff on what enforcement remedies to pursue as to a particular case after reviewing the facts of the case; reviewing and/or revising a particular letter or other document taking enforcement action or disciplinary action; and pointing out

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[24] 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.

[25] *Id.* at pp. 91-93.

strategic approaches to enforcement or discipline in a particular case to maximize the desired outcome.

Alternatively, *Nightlife* can be interpreted *narrowly* to apply only where the attorney is guiding staff towards a particular objective through extensive participation, and not when merely offering occasional legal advice as to what remedies might be available for certain types of violations if the attorney has not become deeply involved in and committed to obtaining the result sought by the staff. Further, preparing general procedures or general advice, in the absence of particular facts, or generally advising as to what remedies are available for violations of city laws, or for terminating or disciplining employees, *without opining as to whether the facts in any particular case are sufficient* to pursue the matter further, should be permissible.

Prior to the institution of formal proceedings, some communication with staff by the city attorney might be considered marginal or trivial. "Formal proceedings" should be deemed to have been initiated from and after final discussions leading to the filing of the initial notice of intended action. This may be a notice to abate in a manner concerning a public nuisance; a notice of permit revocation in a land use matter; or a notice of intended disciplinary action. For example, referring staff to the applicable state and local law; or to a prior concluded enforcement action with similar facts might be considered marginal or trivial. The earlier in the process the city attorney gives advice, the less likely it will be held that the lawyer was acting as a prosecutor with a commitment to a particular result. However, a court is likely to consider the totality of all communications between city attorney and staff in determining if the attorney has crossed the line and become involved in the prosecution. Obviously partisan and tactical advice, intended to assist staff in "winning," will no doubt be deemed prosecutorial *whenever* it occurs in the process.

E. Ethical wall - the lawyer playing a prosecutorial role should not communicate about the merits of the proceeding with a lawyer playing an adjudicative role.

The ethical wall is designed to protect against the commingling of the prosecutorial and adjudicatory function. It does not require any particular type of structure or physical separation. The purpose of the ethical wall is to protect against the lawyer who is playing the prosecutorial role from biasing the lawyer who is advising the decision maker in order to preserve the latter's impartiality. City attorney offices with more than one attorney should be able to avoid due process issues by designating one attorney to advise staff, a second attorney to advise the decision making body, and constructing an "ethical wall" between them.[26]

Originally, the purpose of establishing an "ethical wall" was to prevent confidential information from being given to opposing counsel.[27] The term was originally used to describe a barrier of silence and secrecy.[28] It has been extended to retain confidentiality of information within a single office. An ethical wall may be maintained without having to establish separate units within an office,

[26] For over a decade prior to *Quintero*, the courts recognized that performance by the same law office of the roles of advocate and adviser to a decision-maker was appropriate when there were assurances that the adviser for the decision maker was screened from any inappropriate contact with the advocate. (*See Howitt v. Superior Court*, *supra*, 3 Cal. App.4th at p. 1586.)

[27] *People v. Clark* (1993) 5 Cal.4th 950, 1000.

[28] *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 294.

so long as appropriate safeguards are instituted.[29] However, the party relying on the ethical wall must demonstrate its existence and effectiveness when challenged in court.[30]

Cities may want to consider adopting written procedures designed to meet the burden of proving that a viable wall exists. While not legally required, having them may help defend the actions of the city in a particular case and alleviate the perception or accusation of impropriety. Because each city attorney office will have different constraints based upon size and composition, the policies, procedures and practices will necessarily vary. Particularly in smaller offices, where creating ethical walls may present insurmountable challenges, the policies and procedures should take into account the practical problems of supervision, training and morale when attorneys are isolated from their colleagues.

An ethical wall should prohibit discussion of the merits of the case by the involved attorneys, either directly or through intermediaries, including supervisors, and should also forbid one attorney from having any access to the information or advice provided by the other attorney, including access to documents and files.[31] The ethical wall in any given case should prohibit such attorneys from communicating with one another about the matter except as part of the proceeding itself or where the lawyer in the adjudicator role communicates with lawyers for both parties, including the City's prosecutorial lawyer.

- The lawyer in the prosecutorial role should not be the supervisor of the adjudicator. In light of *Quintero*, it could be argued that the adjudicator will feel like he or she has to defer to the arguments made by his or her supervisor when that supervisor is playing a prosecutorial role. However, there appears to be no problem with the supervising lawyer advising the adjudicator since the adjudicator is already in a position to review the prosecutorial lawyer's arguments in his or her role as adviser to the adjudicator.[32]

- Similarly it is probably best that the head of the office (the city attorney) not be involved in supervising the prosecutorial lawyer because it could again be argued that the deputy advising the adjudicator will tend to defer to the head of the office and thus be biased.

- During office discussions or staff meetings about the case, the two functions should be segregated.[33]

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[29] *Howitt*, *supra,* at pp. 1586-1587; 80 Ops.Cal.Atty.Gen.127 (1997).

[30] *Henricksen v. Great American Savings & Loan* (1992) 11 Cal. App. 4th 109, 116.

[31] "The typical elements of an ethical wall are: physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; . . .." (*Id*. at p.116, n. 6). It is imperative to keep support staff, as well as attorneys, informed of ethical wall rules and procedures.

[32] This was the case in *Howitt v. Superior Court*, *supra,* where the County Counsel advised the board of supervisors and a deputy argued the case before the board. The court remanded the case solely for purposes of determining whether the two lawyers had maintained an effective ethical wall between them.

[33] *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App.4th 17, 27 (issue of disqualification of entire office based upon attorney switching sides).

F. Do not switch lawyers' roles from case to case before the same tribunal.

The prior sections of this paper have explained that the courts have required the lawyer advising the adjudicator to be insulated from the lawyer playing a prosecutorial function in the *same* quasi-judicial proceeding in order to ensure an unbiased decision maker. The Court in *Quintero* expanded this prohibition to include a lawyer's role *on other matters*. The court found that a personnel board advised by a separate lawyer was biased because the city attorney who played the prosecutorial role before the personnel board in that matter had previously advised and represented the board in *unrelated matters:*

> Here, there is no evidence that [the deputy city attorney] acted as both the Board's legal adviser and in a prosecutory function in *this* case. However, [the deputy city attorney's] other interactions with the Board give the appearance of bias and unfairness and suggest the probability of his influence on the Board.
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> *Id.* at p. 814.

In two other adjudicatory proceedings which began before the Quintero disciplinary proceeding and which continued during the time the lawyer was playing the prosecutorial role before the board in the Quintero proceeding, this same lawyer represented the City and thus defended the personnel board action in the two writs arising out of these proceedings. One was before the board on remand during the pendency of the Quintero disciplinary proceeding before the board. The Court also pointed to draft hearing procedures that the same attorney had prepared for the board over several meetings spanning the time period in which the Quintero proceeding was before the board. These various matters spanned a three-year period prior to and during the Quintero proceeding (*Id*. at p. 815.)

Taking all these into account the court noted:

> This is enough to show the probability of actual bias. It would only be natural for the Board members, who have looked to [the deputy city attorney] for advice and guidance, to give more credence to his arguments when deciding plaintiff's case. Whether or not they actually did is irrelevant; the appearance of unfairness is sufficient to invalidate the hearing. (*Nightlife, supra,* 108 Cal.App.4th at p. 94.)
>
> *Quintero*, *supra*, 114 Cal. App.4th at p. 816.

In explaining the limits of its holding, the court stressed:

> That is not to say that once a city attorney has appeared in an advisory role, he or she cannot subsequently act as a prosecutor, or vice versa. But the attorney may occupy only one position at a time and must not switch roles from one meeting to the next.
>
> *Id*. at p. 817.

Under *Quintero*, it is inappropriate for one person to simultaneously perform both functions. Once a city attorney has established an on-going advisory role, he or she should not act as a prosecutor before the same body. If an attorney must change roles, the safest course would be to go from prosecutor to advisor to a board. But the Court provided no guidance regarding how long an

attorney must wait to permanently change roles or the minimum amount of contact the attorney must have had before the conflict arises.[34]

In light of *Quintero* some lessons can be drawn:

1. Practices At-Risk Under *Quintero*

   - Assigning a lawyer to act interchangeably in a prosecutorial or adjudicative capacity before the same adjudicatory body.

   - Assigning the lawyer who prosecuted the case before the adjudicatory body to defend the writ proceeding challenging the adjudicatory body's actions, if that same attorney is to handle the same case on remand or prosecute different matters before the same Board in the future.

   - Assigning a lawyer to prosecute a case before an adjudicatory body to which that lawyer has recently provided advice, especially of a substantial nature.

   - Allowing the city attorney to prosecute a case before the city council with a different lawyer providing advice to the Council in its adjudicatory capacity.

2. Practices Likely to Be Found Acceptable

   - Allowing a lawyer who advised the adjudicatory body to defend the writ challenging the action and to advise the body on remand.

   - Assigning a deputy/assistant to prosecute while assigning the city attorney to advise the adjudicatory body while creating an ethical wall between the two.

   - Allowing different deputies or outside counsel to prosecute the case while the city attorney supervises only the lawyer advising the adjudicator.

   - Assigning a deputy who gave advice many years earlier on a one-time or infrequent basis to an adjudicatory body to prosecute a case before that body many years later.

3. Prohibition on Commingling Applies Only To City Quasi-Judicial Proceedings, Not Later Court Actions

   The prohibition on combining prosecutorial and adjudicative functions in the same lawyer is a constraint only where the enforcement procedure contemplates a later administrative quasi-judicial hearing before the city's own adjudicatory body, such as a civil service commission. If the initial prosecutorial action is to be succeeded by the city filing a civil action, the lawyer that represented the city in the prosecutorial action may represent the city in the civil action because filing the suit is a prosecutorial, not adjudicative function.

[34] The Court did find it "notable" that several of the Board members had served on the Board for several years dating from the deputy city attorney's first service to the Board, thus establishing an "on-going relationship." It is conceivable the court would reach a different result with a high degree of turnover on the Board between an attorney's service as advisor to the Board and a later appearance as prosecutor. *Quintero, supra*, 114 Cal. App. 4th at p. 815.

G. Advising successive adjudicatory tribunals is not a commingling of functions.

The advice provided in this section assumes that the city is playing a prosecutorial role and a prosecutor has been assigned to represent the city in the prosecution. Under these circumstances, may the city attorney advise both the subsidiary body and the city council in their deliberations on the matter?

In an advocacy proceeding, the initial decision making body, and any decision making body hearing the matter on appeal or by right, will generally be advised by an attorney from the city attorney's office. We believe that there is no reason that the same attorney may not advise both the subsidiary body and the city council in their deliberations on the matter since it is the role of the attorney to provide technical and legal advice based upon his or her professional judgment not to advocate for any particular position or party in the dispute. The attorney is an advisor, not an advocate, under these circumstances. The attorney is reacting to the facts and argument presented to the decision maker and evaluating whether those facts support the requested action. The attorney is not advocating a particular result with a will to win. The attorney advising the city council on appeal is not an advocate for the decision of the subsidiary body that has been appealed. The subsidiary body is not adverse to the city council.

The cases that prohibit commingling of functions seek to protect the individual's due process interest in both fair and unprejudiced decision making. Absent actual bias, one court has expressed the test of the ability of the attorney to advise both bodies as whether "in light of the particular facts experience teaches that the probability of actual bias" on the part of the attorney is "too high to be tolerated."[35] In fact, we believe that experience teaches just the opposite: that the probability of actual bias is almost non-existent and the city's need for consistent, coherent and experienced advisers outweighs any claimed bias from the attorney involvement at any earlier stage of the administrative proceeding.

Although the mere fact that the same attorney advises a subsidiary body as well as the city council does not mean that the decision-making will be biased. However, because the courts have been acting in unpredictable and contradictory ways in these cases, establishing rules on an ad hoc basis, it is probably good to be cautious not and not become embroiled in any controversy which may take place at the hearing of the subsidiary body so as not to be perceived as taking as advocating a particular result at the next decision making level where that controversy is again at issue.

H. Outside counsel is best used in a prosecutorial role.

Legal, policy or budgetary reasons may dictate that two attorneys in the same office or firm will not assume the roles of advocate and legal advisor in a prosecutorial proceeding. Rather, special or outside counsel may be retained to assume one of those roles. Two material issues must be dealt with when consideration is given to retention of outside counsel. The first involves the *role* of outside counsel as advocate for staff or advisor to the decision maker. The second involves the *process* to be used to select outside counsel.

We recommend that the city attorney assume the advisory role and outside counsel be assigned the role of prosecutor to preserve the role of advising the highest decionmaking body to the city attorney, who can thus ensure that any errors committed at the lower levels can be corrected, and to avoid *Quintero* claims that would inevitably arise if the city attorney plays a prosecutorial role before the city council. This allocation preserves city attorney's ability to fulfill his/her primary role as chief

[35] *Menning v. City Council* (1978) 86 Cal. App.3d 341, 350.

legal officer of and adviser to the highest level of decision makers of the city. In addition, where the city attorney functions in an adjudicative role, he or she may litigate subsequent judicial challenges to the administrative decision and still be able to advise the council if there is any remand.

Whether outside counsel will serve as prosecutor or legal advisor, the next question is whether the city attorney may participate in selection of the counsel. The best answer is "yes." Not only is the city attorney the official most likely to have expertise in evaluating the qualifications of an attorney to do the job, he or she most always must approve contracts as to form. The mere fact that the city attorney was influential in selecting outside counsel does not establish an inference that the city attorney controls or in any way influences how the outside counsel handles a particular administrative hearing. The retention letter or contract can make this clear. The city attorney should not, however, discuss the substance of the advice or representation in order to maintain the requisite ethical wall between prosecutors and advisers to the decision maker.

Once outside counsel is retained, efforts must be made to preserve the city attorney's independence as adviser to the adjudicator. The city attorney cannot supervise the outside counsel if the attorney is playing a prosecutorial role. Either city staff or perhaps a different attorney in the office who is segregated from the city attorney can do so. Ex parte communications between the city attorney and outside counsel should be prohibited unless the city attorney is communicating with both parties' lawyers in his or her role as adviser to the adjudicator. Thus, for example, the city attorney could properly communicate with both sides in order to set up ground rules for the hearing.

I. Use of outside hearing officers can avoid commingling problems.

One approach to the commingling problem is to utilize legally trained hearing officers as decision makers in lieu of staff or citizen boards. Under this approach, the city attorney could even choose to prosecute a particular matter that may have significant organizational or political implications, without creating a commingling problem. The selection of hearing officers must comply with the dictates of *Haas v. County of San Bernardino, supra,* 27 Cal.4th 1017 or the city could contract with the State office of administrative hearings.

J. The adjudicatory attorney should handle the writ proceeding, so as to preserve the ability to give advice to the adjudicatory body if there were a remand.

Once a final decision has been rendered by a decision making body or hearing officer, the next resort is to the courts. There are two basic types of judicial action that may occur after a quasi-judicial hearing. First, the aggrieved party may file a writ of administrative mandamus under California Code of Civil Procedure section 1094.5. Second, the city may file a judicial action to enforce the decision.

The judicial means to challenge a city's administrative decision from a quasi-judicial hearing is a writ of administrative mandamus. If the court determines that the decision-making body acted in excess of its jurisdiction or abused its discretion, or that the petitioner was not afforded a fair hearing, the matter is remanded for further proceedings in accord with the court's reasoning.[36]

It is important for the city to make a reasoned decision as to which attorney should defend the decision in the writ proceeding. In general, the advisor attorney, the prosecutor, or an independent

[36] CCP § 1094.5(b); *Witkin, California Procedure*, Third Edition, Volume 8, Extraordinary Writs § 253.

attorney may represent the city with no legal consequences in the actual writ proceeding. But the selection will be important if there are any concurrent or subsequent proceedings before the decision making body in that matter. If a choice has to made between the adviser and the prosecuting attorney between the advisor attorney and prosecuting attorney, we conclude that the advisory attorney should be chosen since that attorney is the adviser for the decionmaking body and would undertake no change in role by either defending the writ or advising the body on the remand or in concurrent proceedings.

We conclude that the advisory attorney's representation of the decision making body in the writ proceeding does not disqualify that advisory attorney from advising the decision making body on remand after the writ proceeding results in a reversal of the decision making body's determination because the advisory attorney plays no different role in that proceeding than the decision making body itself. If the decision making body is capable of rendering an impartial decision after reversal it would seem that the lawyer who represented it may continue to play an advisory role on remand. This also makes practical sense because that lawyer will be the one most familiar with the rationale for the court's reversal and thus with how to avoid the flaw which resulted in the initial reversal on remand.

We believe that the prosecuting attorney should not be assigned to defend the writ since, in the event of reversal and remand, that attorney's continued role as prosecutor before the decision making body would likely render the decision making body biased. In addition, the prosecuting attorney who defended the writ would not be able to advise the decionmaking body as to how to comply with the writ without turning into an adviser to that body and thereby improperly commingling prosecutorial and decision making functions.

K. The advisory lawyer can file enforcement actions once the decision is final or where a civil enforcement action is pursued as an alternative to administrative enforcement.

If the period for filing a writ of mandamus has run, the city may proceed to enforce or implement the decision. In some instances, the decision is implemented administratively such as recording the denial of a permit or disciplinary action. There are some final decisions that require judicial action. For example, a demolition order or other nuisance abatement may require a court order.

Generally speaking, if the timeline for filing a writ challenging the decision has run,[37] it is highly unlikely that there will be further proceedings before the decision making body as such an enforcement action cannot be remanded. Because of this, the concerns raised above relating to defending the decision making body and the switching of roles are not present. In such instances, it would make sense to have the prosecuting attorney continue her advocate role, assuming the attorney is also skilled in such litigation. In any event, there are no constraints imposed by the doctrine that prohibits the commingling of prosecutorial and adjudicative functions and the city is free to choose the lawyer who will do the best job enforcing the city's decision.

Similarly, if the City chooses to file a nuisance abatement action as an alternative to administrative abatement of a nuisance, the commingling of functions doctrine would have no application at all and any lawyer for the entity irrespective of his or her role in advising staff pursuing enforcement may file the action.

[37] Although certainly not a rule in all cases, for many decisions by local administrative hearing bodies, the statute of limitations under CCP § 1094.6 is 90 days.

L. It may be safer not to assign a lawyer to defend litigation and advise decision maker when the suit is contemporaneous with the pending adjudicatory proceeding.

In *Walker v. City of Berkeley* (9th Cir. 1991) 951 Fed.2d 182, the deputy city attorney advising the City Manager on a post termination decision as to whether to uphold the termination also represented the City in a suit filed to challenge the validity of the termination while the administrative appeal of the termination was still pending. The deputy city attorney filed a motion in federal court to dismiss the suit as premature, while at the same time, preparing her recommendations for the City Manager as to whether to adopt the Personnel Board's recommendation to overturn the termination decision. *Id*. at p. 184. In a curious turn of events, the jury found that the deputy city attorney, rather than the city manager she was advising, was the actual decision maker. The court found that the role of decision maker was inconsistent with the role of an attorney advocate for the City in the federal litigation and thus found a violation of due process. In our view, the holding turns on this peculiar set of facts.

We are aware of no law that would preclude a lawyer from advising the decisionmaker in an administrative matter while representing the same decisionmaker in a case filed against that decisionmaker by a party to the administrative proceeding. "[A] public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area." *In re Lee G.* (1991) 1 Cal. App. 4th 17. *See also, People v. Superior Court (Hollenbeck)* (1978) 84 Cal. App. 3d 491 and *People v. Municipal Court (Byars)*(1977) 77 Cal. App. 3d 294. If resources and circumstances permit and the city wishes to insulate itself from such claim it may still be advisable to assign a different lawyer to defend litigation than the lawyer who will advise a decision maker in related administrative proceedings when the two are pending at the same time where there has been any significant motion or other practice in which the lawyer is likely to be seen as biased as a result of the attorney's role.

IV. CONCLUSION

Because the case law in this area is so contradictory, it is difficult to offer clear and pragmatic guidance to city attorneys. *Nightlife* and *Quintero* exacerbate the confusion. We believe that the law remains fluid, and that it is not certain how the holdings in these two cases will be applied in future cases involving different fact patterns. The purpose of the analysis and recommendations in this paper is not to establish bright line rules of conduct, but rather to offer a credible interpretation of the two cases, to alert city attorneys to practices that may give rise to allegations of due process violations, and to suggest some possible ways to avoid missteps. It is imperative that city attorneys carefully review the procedures that are utilized in all of the various types of administrative proceedings undertaken in the cities they serve and make particularized determinations in each instance as to what process is due and what roles may properly be played by all of those involved. As always, the discussion and recommendations contained herein are not a substitute for legal research and advice.